

**United Nations
Commission on
International
Trade Law**

YEARBOOK

Volume V: 1974



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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 fifth volume in the series of Yearbooks of the United Nations Commission on International Trade Law (UNCITRAL).¹ The fourth volume covered the period from May 1972 to the end of the Commission's sixth session in April 1973. The present volume covers the period from May 1973 to the end of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods in June 1974.

The present volume consists of three parts. Part one completes the presentation of documents relating to the Commission's report on the work of its sixth session by including material, such as that concerning action by the General Assembly, which was not available when the manuscript of the fourth volume was prepared. Part one also includes the Commission's report on the work of its seventh session, held in New York in May 1974.

Part two reproduces documents considered by the Commission at its seventh session. These documents include reports of the Commission's three working groups dealing respectively with international sale of goods, international negotiable instruments and international legislation on shipping, as well as comments and proposals by Governments and reports of the Secretary-General.

Part three contains as annexes the Final Act of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods which met at United Nations Headquarters in New York, from 20 May to 15 June 1974, and the text of the Convention on the Limitation Period in the International Sale of Goods which was adopted by the Conference. Also included in part three are a compilation of bibliographical materials supplied by members of the Commission, a bibliography of recent writings related to the Commission's work, prepared by the Secretariat, and a check list of UNCITRAL documents.

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); *Volume III: 1972* (United Nations publication, Sales No. E.73.V.6) and *Volume IV: 1973* (United Nations publication, Sales No. E.74.V.3).

I. THE SIXTH SESSION (1973); 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 (26 October 1972-11 September 1973)*

K. *Particular problems in the field of trade and development: Progressive development of the law of international trade—sixth annual report of the United Nations Commission on International Trade Law (Agenda item 10)*

554. The Board considered this item at its 374th meeting on 30 August 1973. The Board had before it the report of the United Nations Commission on International Trade Law (UNCITRAL) on the work of its sixth session.⁸⁹

555. The representative of one developed market economy country noted with satisfaction the report of UNCITRAL on its sixth session and expressed appreciation for the Commission's constructive work in the important field of international trade law.

556. The representative of one developing country said that, since in countries such as his the promotion of economic growth with social justice implied the induction of large numbers of new entrepreneurs into the economic system, the codification, simplification and harmonization of international trade law were particularly important for developing countries because this would facilitate the assimilation of new and relatively inexperienced traders into the international trading system. Regarding the methods of work of the Commission, he supported the Commission's decision to concentrate on four questions of priority interest; commended the Commission's approach of adopting decisions by consensus; and endorsed the establishment of small working groups to deal with specific topics while suggesting that these working groups should submit only progress reports to the Commission. Referring to the four priority questions, he stressed the importance of drafting uniform general conditions of sale and standard contracts applicable to trade in a wide range of commodities; of drafting a uniform law for instruments used in effecting international payments; urged increased ad-

herence to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards;⁹⁰ and supported the work being undertaken on international legislation on shipping.

557. The representative of another developing country, speaking on behalf of the African countries members of the Group of Seventy-seven, pointed out that, although in paragraph 85 of the Commission's report it was stated that the decision on international commercial arbitration had been adopted unanimously, there was a reference in the following paragraph to reservations expressed by some representatives regarding paragraph 2 of that decision. It was the view of the African Group, therefore, that there had not been a consensus in the Commission. The representatives of African countries members of the Commission had expressed reservations regarding paragraph 2 of the decision because they considered that, by inviting the Economic Commission for Europe to draw the attention of States to the European Convention on International Commercial Arbitration of 21 April 1961, UNCITRAL was encouraging the promotion of unification of regional trade law as opposed to international trade law. While the African countries considered that the 1961 European Convention was in itself an excellent arbitration instrument, in their view it reflected the opinion of only part of the international community and its provisions might not be applicable to other regions. They therefore maintained their reservations on that decision and proposed that the Convention should be submitted to the other regional economic commissions for their consideration before it could be adopted as an international legal instrument.

Action by the Board

558. At the same meeting, the Board took note, with appreciation, of the report of UNCITRAL on the work of its sixth session and drew the attention of the General Assembly to the observations made thereon by representatives who took part in the discussion on this item.

⁹⁰ United Nations, *Treaty Series*, vol. 330, No. 4739.

* Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 15 (A/9015/Rev.1).

⁸⁹ Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 17 (A/9017).

B. General Assembly: report of the Sixth Committee (A/9408)*

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* 10 December 1973. Official Records of the General Assembly, Twenty-eighth Session, Annexes, agenda item 92.

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I. INTRODUCTION

1. At its 2123rd plenary meeting, on 21 September 1973, the General Assembly included the item entitled "Report of the United Nations Commission on International Trade Law on the work of its sixth session"¹ as item 92 in the agenda of its twenty-eighth session, and allocated it to the Sixth Committee for consideration and report.

2. The Sixth Committee considered this item at its 1425th to 1430th meetings, from 29 October to 6 November 1973, at its 1438th and 1440th meetings, on 14 and 16 November 1973, and at its 1445th to 1448th meetings, from 23 to 27 November 1973.

3. At the 1425th meeting of the Sixth Committee, on 29 October 1973, Mr. László Réczei (Hungary), Vice-Chairman of the United Nations Commission on International Trade Law at its sixth session, introduced the Commission's report on the work of that session.² The Sixth Committee also had before it a note by the Secretary-General (A/C.6/L.901), setting forth the comments on the Commission's report by the Trade and Development Board of the United Nations Conference on Trade and Development (UNCTAD).

4. At the 1456th meeting, on 6 December, the Rapporteur of the Sixth Committee raised the question whether the Committee wished to include in its report to the General Assembly a summary of the views expressed during the debate on agenda item 92. After referring to paragraph (f) of the annex to General Assembly resolution 2292 (XXII) of 8 December 1967, the Rapporteur informed the Committee of the financial implications of the question. At the same meeting, the Committee decided that, in view of the nature of the subject-matter, the report on agenda item 92 should include a summary of the main trends of opinion expressed during the debate.

¹ Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 17 (A/9017); UNCITRAL Yearbook, Vol. IV: 1973, 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, Vol. I: 1968-1970, part two, I, B, 2).

II. PROPOSAL

5. At the 1438th meeting, on 14 November 1973, the representative of Ghana introduced a draft resolution sponsored by Afghanistan, Cameroon, Czechoslovakia, Germany (Federal Republic of), Ghana, Greece, Guyana, Hungary and Kenya (A/C.6/L.952), which read as follows:

"The General Assembly,

"Having considered the report of the United Nations Commission on International Trade Law on the work of its sixth session,"

"Recalling its resolution 2205 (XXI) of 17 December 1966 establishing the United Nations Commission on International Trade Law and defining the object and terms of reference of the Commission,

"Further recalling its resolutions 2421 (XXIII) of 18 December 1968, 2502 (XXIV) of 12 November 1969, 2635 (XXV) of 12 November 1970, 2766 (XXVI) of 17 November 1971 and 2928 (XXVII) of 28 November 1972 concerning the reports of the United Nations Commission on International Trade Law on the work of its first, second, third, fourth and fifth 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 States on a basis of equality and to the elimination of discrimination in international trade and, thereby, to the well-being of all peoples,

"Being convinced that wider participation of States in the work of the United Nations Commission on International Trade Law would further the progress of the Commission's work,

"Bearing in mind that the Trade and Development Board at its thirteenth session took note with

³ Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 17 (A/9017), UNCITRAL Yearbook, Vol. IV: 1973, part one, II, A.

appreciation of the report of the United Nations Commission on International Trade Law.⁴

"1. *Takes note with appreciation* of the report of the United Nations Commission on International Trade Law on the work of its sixth 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. *Requests* the United Nations Commission on International Trade Law, whenever the Commission considers it appropriate, to incorporate the reports or summaries of the reports of its Working Groups in the reports on the work of its future sessions;

"4. *Notes with satisfaction* the decision of the United Nations Commission on International Trade Law, to organize, in connexion with the eighth session of the Commission, 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;

"5. *Invites* 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;

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

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

"(b) Accelerate its work on training and assistance in the field of international trade law, with special regard to the promotion and teaching of international trade law at universities, taking into account the special interests of the 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 working methods under review with the aim of increasing the effectiveness of its work;

"7. *Invites* the United Nations Commission on International Trade Law to consider the advisability of preparing uniform rules on the civil liability of producers for damage caused by their products intended for or involved in international sale or distribution, taking into account the feasibility and most appropriate time therefor in view of the other items on its programme of work;

"8. *Decides* to increase the membership of the United Nations Commission on International Trade Law from 29 to 35 in accordance with the following rules:

"(a) The six additional members of the Commission shall be elected by the General Assembly for a term of six years, except as provided in subparagraph 8 (c) of this resolution;

"(b) In electing the additional members, the Assembly shall observe the following distribution of seats:

"(i) Two from African States;

"(ii) One from Asian States;

"(iii) One from Eastern European States;

"(iv) One from Latin American States;

"(v) One from Western European and other States;

"(c) Of the additional members elected at the first election, to be held at the twenty-eighth session of the General Assembly, the terms of three members shall expire at the end of three years. The President of the General Assembly shall select these members by selecting one member elected from the African States and two members from other regions, by drawing lots;

"(d) The additional members elected at the first election shall take office on 1 January 1974;

"(e) The provisions of paragraphs 3 to 5 of resolution 2205 (XXI) shall also apply to the additional members;

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

6. At the same meeting, the representative of Argentina proposed an oral amendment to the draft resolution. The amendment read as follows:

"Insert after paragraph 6, subparagraph (a), of the draft resolution the following additional subparagraph:

"(b) Continue to consider the legal problems presented by different kinds of multinational enterprises in accordance with the decision thereon adopted by the Commission at its sixth session', and renumber the subparagraphs of paragraph 6 accordingly."

7. At the 1440th meeting, on 16 November, the representative of Ghana introduced a revised draft resolution sponsored by the same countries (A/C.6/L.952/Rev.1), which included the amendment proposed by the representative of Argentina.

8. At the same meeting, the representative of Kuwait proposed an oral amendment to the draft resolution. The amendment read as follows:

"Modify paragraph 8 of the draft resolution to read as follows:

"*Decides* to increase the membership of the United Nations Commission on International Trade Law from 29 to 36 in accordance with the following rules:

⁴ Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 15 (A/9015/Rev.1), para. 558; see above, section A.

'(a) The seven additional members of the Commission shall be elected by the General Assembly for a term of six years, except as provided in subparagraph (c) below;

'(b) In electing the additional members, the Assembly shall observe the following distribution of seats:

- '(i) Two from African States;
- '(ii) Two from Asian States;
- '(iii) One from Eastern European States;
- '(iv) One from Latin American States;
- '(v) One from Western European and other States;

'(c) Of the additional members elected at the first election, to be held at the twenty-eighth session of the General Assembly, the terms of three members shall expire at the end of three years. The President of the General Assembly shall select these members by selecting one member from those elected from African States, one member from those elected from Asian States, and one member from those elected from other regions, by drawing lots;

'(d) The additional members elected at the first election shall take office on 1 January 1974;

'(e) The provisions of paragraphs 3 to 5 of resolution 2205 (XXI) shall also apply to the additional members.'

III. DEBATE

9. The main trends of opinions expressed in the Sixth Committee are summarized in sections A to J below. Sections A and B deal with general observations on the role and functions of the Commission and its working methods. The succeeding sections, relating to specific topics discussed at the sixth session of the Commission, are set out under the following headings: International sale of goods (section C), international payments (section D), international legislation on shipping (section E), international commercial arbitration (section F), training and assistance in the field of international trade law (section G), multinational enterprises (section H), establishment of a union for *jus commune* in matters of international trade (section I), and future work (section J).

A. General observations

10. Many representatives stressed the importance of the Commission's work in that the establishment of effective uniform rules governing international trade would promote the development of equitable commercial and economic relations between developed and developing countries and between countries with different social and economic systems. In this connexion, it was stated that conditions were now ripe for a sharp upward trend in international trade and a wider application of the international division of labour, and that consequently consideration should be given to the future orientation of the Commission's work. On the other hand, it was also stated that the Commission should continue to focus on the harmonization and unification of the legal issues that arise in international trade and should avoid the broader problems that may arise from international trade relations.

11. Most representatives commended the Commission on the work it had accomplished during its first six years. It was observed that the Commission's work was of great complexity, owing to the fact that unification had to take into account both the different legal and economic systems of the world and current international trade practices.

12. Representatives of developing countries stated that it was essential for the Commission to promote international trade through laws that reflected the need of these countries for a fair and equitable share in the benefits from such trade.

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

13. Most representatives commended the Commission on the working methods it had developed. Special reference was made to the preparatory work carried out by the Commission's secretariat, where appropriate in consultation with interested international organizations and commercial institutions, and to the use of working groups in which the expertise of representatives of the Commission was effectively utilized.

14. Some representatives expressed concern at the rate of progress in the Commission's work and were of the opinion that the Commission should re-examine its programme of work and working methods.

15. With regard to the Commission's programme of work, it was suggested that the Commission should decide on an order of priority for the items at present on its agenda, intensify work on a few subjects and perhaps set target dates for their completion. Several representatives considered that the Commission should not be asked to embark on any new work for the time being. The view was also expressed that, by reason of the importance of establishing uniform rules for international trade, the Commission should be encouraged to deal with more subjects than were currently included in its work programme.

16. With regard to the Commission's working methods, it was stated that it was essential that the Commission seek, whenever possible, the assistance of experts drawn from trade and banking circles so as to ensure that the provisions of uniform laws would reflect international trade practice. Some representatives expressed the view that, in order to reach more rapid results, working groups should be authorized to hold longer sessions or should appoint small preparatory committees, representative of the different legal and economic systems, which would prepare draft texts and commentaries and present these to working groups.

17. One representative raised the question of the relationship between the Commission and its secretariat, and stated that the Commission should avoid its current practice of requesting the secretariat to do work which fell within the framework of the terms of reference of the Commission itself. Other representatives, however, considered that the Commission's secretariat had played an indispensable role in the Commission's work and performed a valuable service in preparing reports and draft texts for the Commission's consideration.

18. Several representatives commented with approval on the Commission's decision and practice to proceed, where possible, by consensus. It was stated that consistent application of that principle would go a long way towards ensuring the successful outcome of the Commission's legislative work. One representative expressed the view that the principle of consensus should be abandoned; it was a not entirely necessary method of work and consensus in the Commission, with its relatively limited membership, did not necessarily imply universal consensus. In this connexion, it was also stated that the Commission could accelerate its work considerably if it were to present alternative texts instead of texts in regard to which consensus had laboriously been reached.

19. Some representatives, noting that the main burden of the Commission's work had shifted to working groups, suggested that an increase in the number of States represented on the Commission would facilitate the establishment and composition of working groups and thus the completion of the Commission's work.

20. There was general agreement that it was for the Commission itself to review its work programme and working methods.

C. *International sale of goods*

21. Many representatives stressed the urgent need for unification of the rules governing the international sale of goods, and expressed the hope that the consideration the Commission was giving to the Hague Conventions of 1964 relating to a Uniform Law on the International Sale of Goods (ULIS) and to a Uniform Law on the Formation of Contracts for the International Sale of Goods would make it possible for a large number of States to accept a revised text. Several representatives noted with satisfaction that the Working Group on the International Sale of Goods had made considerable progress in its work by completing the revision of chapter III of ULIS, providing for the obligations of the seller. In this connexion, it was stated that the Working Group should take into account the interest of all countries and make the new texts sufficiently flexible and simple for practical use.

22. Several representatives stated that the Commission's work on general conditions of sale and standard contracts would contribute to the further legal regulation and simplification of international trade relations. The view was expressed that this work should be co-ordinated with the uniform rules governing prescription (limitation) in the field of international sale of goods so as to avoid legal loop-holes and contradictions.

23. Representatives noted with satisfaction the intended establishment of a group of experts, drawn from regional economic commissions, trade organizations and chambers of commerce, to be consulted on the preparation of a final draft of general conditions of sale. It was stated that the Commission's work on this subject was particularly important since the general conditions of sale prepared under the auspices of the Economic Commission for Europe (ECE) did not seem appropriate for trade between States having different socio-economic systems. The view was expressed that the work should be directed towards general conditions that would be of broader application than

those prepared by the ECE and would embrace the widest possible scope of commodities. However, the view was also expressed that general conditions of the kind which the ECE had drawn up for particular commodities were likely to prove better suited to the needs of specific trades.

D. *International payments*

24. Many representatives reiterated their support for the Commission's decision to prepare uniform rules applicable to a special negotiable instrument for optional use in international transactions. They noted with appreciation the satisfactory co-operative relations established with various international organizations and banking and trade institutions and emphasized the importance of close collaboration by the Working Group on International Negotiable Instruments with these organizations and institutions.

25. Some representatives expressed doubts about the need for establishing new uniform rules applicable to a special negotiable instrument for international payments. It was stated that the banking profession had organized itself quite adequately and that there was thus no pressing need for such rules.

26. Some representatives stressed the importance of the legal terminology and concepts used in the draft Uniform Law on International Bills of Exchange and International Promissory Notes and the need to maintain a just equilibrium between the principal systems of law in the final text.

27. As regards the question whether it would be desirable to prepare uniform rules applicable to international cheques, many representatives noted with approval the decision of the Working Group on International Negotiable Instruments, endorsed by the Commission, to request the Secretary-General to make inquiries regarding the use of cheques for making and receiving international payments and to examine the problems presented, under current commercial practice, by divergencies between the rules of the principal legal systems.

28. Some representatives expressed the view that the role of cheques in international payments was such as to warrant the preparation of a uniform law on international cheques. Other representatives were of the opinion that cheques were of marginal importance in international payments, and therefore should not form the subject of new uniform rules.

29. With respect to bankers' commercial credits, several representatives referred to the importance of the revision of the "Uniform Customs and Practice for Documentary Credits", at present being undertaken by the International Chamber of Commerce (ICC). The hope was expressed that, in its work of revision, ICC would also take account of the views of the governments and banking and trade institutions of countries not represented in ICC. One representative stated that it was regrettable that ICC was not making very rapid progress in its work and was not fully carrying out the Commission's recommendations. Another representative suggested that the Commission should consider the desirability of unifying the legal regulations governing documentary credits which were subject to special laws in only a few countries.

30. One representative suggested that the Commission should in due course examine the degree of the intervention of banks in international trade with a view to drafting a uniform law on various aspects of banking activities.

E. *International legislation on shipping*

31. All representatives who took the floor commended the Commission on its work on the responsibility of ocean carriers under bills of lading. The view was expressed that the results achieved by the Working Group on International Legislation on Shipping represented a well-balanced compromise between the different interests engaged in maritime trade. It was also stated that the establishing of uniform rules governing the carriage of goods under bills of lading was particularly important for countries that had few or no merchant ships. Several representatives urged that the Commission should give priority to its work on this topic.

32. Some representatives considered that, in order to ensure the widest possible adherence to the rules to be established, it would be better to prepare a new convention than to add a further Protocol amending the Brussels Convention for the Unification of Certain Rules relating to Bills of Lading of 1924 and the Brussels Protocol of 1968. One representative expressed the opinion that the Commission itself should not draft a new Convention to replace the 1924 Brussels Convention.

33. One representative expressed the view that it appeared to be desirable to co-ordinate the rules of the conventions on the transport of goods by the various means of transport.

F. *International commercial arbitration*

34. Many representatives welcomed the decision of the Commission to commence work on a draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade. One representative, however, stated that there were now sufficient instruments on the subject. The view was expressed that it was important to secure, by way of legislation, the freedom of the parties and of the arbitration tribunal to decide on matters of procedure. It was suggested that the Commission, in preparing arbitration rules, should take into consideration the Convention on the settlement by arbitration of disputes resulting from economic, scientific and technical co-operation signed by the member States of the Council for Mutual Economic Assistance in 1972.

35. All representatives who spoke on the subject supported the Commission's recommendation that the General Assembly invite States which have not ratified, or acceded to, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 to adhere thereto.

36. Several representatives noted with approval the Commission's invitation to the United Nations Economic Commission for Europe to draw the attention of States eligible to accede to it to the European Convention on International Commercial Arbitration of 1961. One representative expressed the view that the Agreement of 1962 relating to Application of the European

Convention on International Commercial Arbitration should have been included in that invitation. Some representatives reserved their position on the question whether it was proper for the Commission to promote ratification of, or accession to, conventions that were essentially of a regional character. In this connexion, it was stated that it might be more appropriate to invite the Economic Commission for Europe to consult with other regional economic commissions and to solicit their views with respect to the further harmonization and unification of the law relating to commercial arbitration.

37. Some representatives were of the opinion that co-operation among arbitration organizations should be left to these organizations themselves, and that the Commission should neither promote nor sponsor the establishment of an international organization of commercial arbitration.

38. Some representatives supported and others expressed doubts about the proposal, set forth in the final report of the Commission's Special Rapporteur, that the Commission should publish a compilation of arbitral awards relating to international trade.

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

39. Representatives who took the floor on the subject welcomed the Commission's decision to request the Secretary-General to accelerate and intensify the activities relating to the programme of training and assistance in the field of international trade law, with special regard to the needs of developing countries. They particularly welcomed the request for the organization of an international symposium on the role of universities and research centres in that field in connexion with the Commission's eighth session in 1975. It was stated that the training of specialized personnel was of particular importance for developing countries and that the implementation of a comprehensive programme would assist these countries to remove one of the most serious deficiencies in the field of international trade.

40. The view was expressed that the Commission also should give serious consideration to the production of teaching materials in international trade law, the inclusion of international trade law in university curricula, encouraging the establishment of fellowships for nationals of developing countries, and the organization of seminars.

41. Many representatives emphasized that it was important for the Commission to work in close co-operation with other organizations, particularly the United Nations Conference on Trade and Development (UNCTAD), the United Nations Institute for Training and Research (UNITAR) and the Inter-Governmental Maritime Consultative Organization (IMCO).

42. Several representatives expressed their appreciation to those Governments which had made voluntary contributions for the implementation of the Commission's programme of training and assistance. The hope was expressed that other Governments would follow suit. It was suggested, in this connexion, that the problem of subsidizing travel expenses and subsistence allowances of nationals of developing countries attend-

ing international symposia or seminars could be minimized if some of the symposia or seminars were held in developing countries.

H. Multinational enterprises

43. Note was taken of the preparation by the Secretary-General of a questionnaire designed to obtain information on legal problems presented by multinational enterprises. Several representatives stated that the questionnaire was under careful consideration by the competent authorities in their countries. The view was expressed that the information so obtained would not be of much use, until the studies undertaken by UNCTAD, the Economic and Social Council and the International Labour Organisation were sufficiently advanced and until the general problems presented by multinational enterprises were defined.

44. Some representatives stated that the problems arising from the operation of multinational enterprises arose not so much in the legal as in the economic sphere. In this connexion, it was emphasized that the work of the Commission should supplement the work of other United Nations bodies such as the Economic and Social Council and UNCTAD. However, the view was also expressed that the work of the Economic and Social Council and that of the Commission did not conflict with each other and that the studies being undertaken under the auspices of the Economic and Social Council should not be used as an excuse for delaying the Commission's work on the subject. It was also stated that the activities of multinational enterprises could not easily be fitted into the existing legal framework and the problems could not be solved by having recourse to the rules of conflict of laws. Consideration might therefore be given to the development of a set of international regulations governing certain of those activities, with due attention to the safeguarding of national sovereignty, to the desirability of giving statutory guaranties to parties dealing with multinational enterprises who lack their considerable economic power, and to ensuring the efficient use of world resources.

I. Establishment of a union of *jus commune* in matters of international trade

45. Many representatives commented on the proposal by the French delegation to the Commission for the establishment of a union of *jus commune*, which was designed to promote ratification and entry into force of conventions in the field of international trade law. It was recognized that the proposal dealt with a real problem, namely, that of the need to find a way of accelerating the process by which conventions would be applied in practice. The view was expressed that the proposal was perhaps premature, but that it should be borne in mind as an objective to be achieved in the future. Several representatives stated, however, that they could not support a proposal whereby States would be deemed to have consented to international conventions by their silence, particularly when they had not been involved in the framing of such conventions.

46. It was generally considered that the decision of the Commission to request a report examining the causes of delay in ratification of or adherence to international conventions and the means of accelerating such

ratification or adherence could provide a basis for further deliberations on the subject.

47. The view was expressed that a system requiring Governments to report on steps taken by them with regard to ratification could be efficacious in that it would counteract the administrative inertia which was one of the major reasons for non-ratification of conventions.

48. Some representatives were of the opinion that the general question of ratification of conventions fell within the competence of the International Law Commission.

J. Future work

49. The representative of Norway proposed that the Commission should include a new item in its priority work programme, namely, harmonization of the law on producers' civil liability for damage caused by their products intended for or involved in international sale or distribution. In explanation of the proposal, it was stated that the consequences of dangerous qualities of manufactured products had increased greatly and that the problems that arose in this connexion were not necessarily linked to the contract between seller and buyer. With the increase of marketing and distribution of mass-produced goods across national frontiers and between the different continents of the world, damage caused by such products and the protection of consumers was of international concern. In the opinion of the representative of Norway, there was an urgent need for international harmonization in the field in order to facilitate international trade by a unified system of liability standards. In view of the fact that legislative action on the subject was in most countries still in the preparatory or initial stages, such harmonization would avoid the development of diverging laws and a possible distortion of the terms of trade.

50. Several representatives supported the proposal made by the delegate of Norway and expressed the hope that a draft convention on the subject could be prepared. It was pointed out that any international rules on the international sale of goods would be incomplete without rules on the producers' civil liability.

51. Other representatives, while expressing appreciation for the proposal, were of the opinion that the Commission should either not take up new items until it had disposed of the substantive items already on its agenda or given it a low order of priority.

IV. VOTING

52. At the 1445th meeting, on 23 November, the Sixth Committee, at the request of the representative of Uruguay, took a roll-call vote on the amendment proposed by Kuwait (see paragraph 8 above) to operative paragraph 8 of the draft resolution (A/C.6/L.952/Rev.1). In explanation of his request, the representative of Uruguay, on behalf of the Latin American Group, stated that the members of his Group would vote against the amendment on the ground that it was contrary to the principle of geographical distribution of seats in the Commission ensuring the adequate representation of the various regions. The representative of Uruguay also stated that the position taken by the Latin American Group should not be interpreted as

an opposition to the aspirations of the Asian Group and that, if the amendment were approved, it should not constitute a precedent. The amendment was adopted by 79 votes to 14, with 7 abstentions. The voting was as follows:

In favour: Afghanistan, Algeria, Austria, Bahrain, Belgium, Bulgaria, Burma, Burundi, Byelorussian Soviet Socialist Republic, Cameroon, Canada, Chad, Cuba, Cyprus, Czechoslovakia, Democratic Yemen, Denmark, Egypt, Ethiopia, Finland, France, Gabon, German Democratic Republic, Germany (Federal Republic of), Ghana, Greece, Guinea, Hungary, India, Indonesia, Iran, Iraq, Ireland, Italy, Ivory Coast, Japan, Kenya, Khmer Republic, Kuwait, Laos, Lesotho, Libyan Arab Republic, Madagascar, Mali, Mongolia, Nepal, Netherlands, New Zealand, Niger, Nigeria, Norway, Oman, Pakistan, Philippines, Poland, Qatar, Romania, Rwanda, Saudi Arabia, Senegal, Sierra Leone, Singapore, Sudan, Swaziland, Sweden, Syrian Arab Republic, Thailand, Togo, Turkey, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Yemen, Yugoslavia, Zaire, Zambia.

Against: Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Peru, Trinidad and Tobago, Uruguay, Venezuela.

Abstaining: Australia, Bahamas, Dahomey, Guyana, Israel, Portugal, Spain.

Explanations of vote were given by the representatives of Australia, Cuba, Dahomey, Israel, Paraguay, Spain, United Arab Emirates.

53. At the same meeting, the draft resolution as a whole, as amended, was adopted by 95 votes to none, with 6 abstentions (see paragraph 54 below).

RECOMMENDATION OF THE SIXTH COMMITTEE

54. The Sixth Committee recommends to the General Assembly the adoption of the following draft resolution:

Report of the United Nations Commission on International Trade Law

[The draft resolution was adopted unanimously by the General Assembly as resolution 3108 (XXVIII), reproduced below in section C.]

C. General Assembly resolutions 3104 (XXVIII)* and 3108 (XXVIII) of 12 December 1973

3104 (XXVIII). UNITED NATIONS CONFERENCE ON PRESCRIPTION (LIMITATION) IN THE INTERNATIONAL SALE OF GOODS

The General Assembly,

Recalling its resolution 2929 (XXVII) of 28 November 1972 by which it decided that an international conference of plenipotentiaries should be convened in 1974 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,

Recalling further that, in the foregoing resolution, it referred to the conference, as the basis for its consideration, the draft convention on prescription (limitation) in the international sale of goods as contained in chapter II of the report of the United Nations Commission on International Trade Law on the work of its fifth session,¹ together with the commentary thereon and such comments and proposals as may be submitted by Governments and interested international organizations,

Reaffirming the conviction, expressed in the foregoing resolution, that the harmonization and unification of national rules governing prescription (limitation) in the international sale of goods would contribute to the removal of obstacles to the development of world trade,

Requests the Secretary-General:

(a) To convene the United Nations Conference on Prescription (Limitation) in the International Sale of

Goods at United Nations Headquarters in New York, from 20 May to 14 June 1974;²

(b) To provide summary records of the proceedings of the plenary meetings of the Conference and of meetings of committees of the whole which the Conference may wish to establish;

(c) To invite, in full compliance with General Assembly resolution 2758 (XXVI) of 25 October 1971, States Members of the United Nations or members of specialized agencies or the International Atomic Energy Agency and States parties to the Statute of the International Court of Justice, as well as the Democratic Republic of Viet-Nam, to participate in the Conference;

(d) To invite interested specialized agencies and international organizations, as well as the United Nations Council for Namibia, to attend the Conference as observers;

(e) To draw the attention of the States and other participants, referred to in subparagraphs (c) and (d) above, to the desirability of appointing as their representatives persons especially competent in the field to be considered;

(f) To place before the Conference all relevant documentation and recommendations relating to methods of work and procedure, and to arrange for adequate staff and facilities required for the Conference;

(g) To report on the results achieved by the Conference to the General Assembly at its twenty-ninth session.

2197th plenary meeting

3108 (XXVIII). REPORT OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

The General Assembly,

* Resolution 3104 (XXVIII) was adopted by a vote of 108 to none, with 11 abstentions, on the recommendation contained in the report of the Sixth Committee, *Official Records of the General Assembly, Twenty-eighth Session, Annexes, agenda item 93, document A/9409.*

¹ *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 17 (A/8717), paras. 21 and 22; UNCITRAL Yearbook, Vol. III: 1972, part one, II, A.*

² For the texts adopted by the Conference, see below, part three, i.

II. THE SEVENTH SESSION

A. Report of the United Nations Commission on International Trade Law on the work of the Seventh Session (New York, 13-17 May 1974) (A/9617)*

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INTRODUCTION

The present report of the United Nations Commission on International Trade Law covers the Commission's seventh session, held at New York from 13 to 17 May 1974.

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 seventh session on 13 May 1974. The session was opened on behalf of the Secretary-General by Mr. Blaine Sloan, Director of the General Legal Division, Office of Legal Affairs.

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

B. Membership and attendance

2. General Assembly resolution 2205 (XXI) established the Commission with a membership of 29 States, elected by the Assembly. By resolution 3108 (XXVIII), the General Assembly increased the membership of the Commission from 29 to 36 States. The present members of the Commission, elected on 12 November 1970 and 12 December 1973, are the following States:¹ Argentina, Australia,* Austria,* Bar-

¹ Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years, except that, in connexion with the initial election, the terms of 14 members, selected by the President of the Assembly, by drawing lots, expired at the end of three years (31 December 1970); the terms of the 15 other members expired at the end of six years (31 December 1973). Accordingly, the General Assembly, at its twenty-fifth session elected 14 members to serve for a full term of six years, ending on 13 December 1976, and, at its twenty-eighth session, elected 15 members to serve for a full term of six years, ending on 31 December 1979. The General Assembly, at its twenty-eighth session, also elected seven additional members. Of these additional members, the terms of three members selected by the President of the Assembly, by drawing lots, will expire at the end of three years (31 December 1976) and the terms of four members will expire at the end of six years (31 December 1979). The terms of the members marked with an asterisk will expire on 31 December 1976. The terms of the other members will expire on 31 December 1979.

bados, Belgium, Brazil, Bulgaria, Chile,* Cyprus, Czechoslovakia, Egypt,* France,* Gabon, Germany (Federal Republic of), Ghana,* Greece, Guyana,* Hungary, India, Japan,* Kenya, Mexico, Nepal,* Nigeria,* Norway,* Philippines, Poland,* Sierra Leone, Singapore,* Somalia,* Syrian Arab Republic, Union of Soviet Socialist Republics,* United Kingdom,* United Republic of Tanzania,* United States of America, and Zaire.

3. With the exception of Gabon and Somalia all members of the Commission were represented at the session.

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

- (a) *United Nations organs*
United Nations Conference on Trade and Development
- (b) *Specialized agencies*
International Monetary Fund
- (c) *Intergovernmental organizations*
Commission of the European Communities, Council for Mutual Economic Assistance, International Institute for the Unification of Private Law
- (d) *International non-governmental organizations*
International Chamber of Commerce, International Chamber of Shipping, International Law Association, International Union of Marine Insurance, National Association of Credit Management

C. Election of officers

5. The Commission elected the following officers by acclamation:²

Chairman Mr. Jerzy Jakubowski (Poland)
Vice-Chairman . Mr. Khadga Bhakta Singh (Nepal)
Vice-Chairman . Mr. Nehemias Gueiros (Brazil)
Vice-Chairman . Mr. Emmanuel Sam (Ghana)
Rapporteur Mr. Roland Loewe (Austria)

D. Agenda

6. The agenda of the session as adopted by the Commission at its 143rd meeting, on 13 May 1974, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda; tentative schedule of meetings.
4. International sale of goods: uniform rules governing the international sale of goods.

² The elections took place at the 143rd and 144th meetings, on 13 and 14 May 1974, and at the 145th meeting on 15 May 1974. In accordance with a decision taken by the Commission at 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)).

5. International payments:
 - (a) Uniform law on international bills of exchange and international promissory notes;
 - (b) Bankers' commercial credits;
 - (c) Bank guarantees (contract and payment guarantees).
6. International legislation on shipping.
7. Multinational enterprises.
8. Ratification of or adherence to conventions concerning international trade law.
9. Training and assistance in the field of international trade law.
10. Liability for damage caused by products intended for or involved in international trade.
11. Future work.
12. Other business.
13. Date and place of eighth 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 seventh session were all reached by consensus.

F. Adoption of the report

8. The Commission adopted the present report at its 150th meeting, on 17 May 1974.

CHAPTER II

INTERNATIONAL SALE OF GOODS

Uniform rules governing the international sale of goods *Report of the Working Group*

9. The Commission had before it the report of the Working Group on the International Sale of Goods on the work of its fifth session, held at Geneva from 22 January to 1 February 1974 (A/CN.9/87). The reports set forth the further progress made by the Working Group in implementing the Commission's mandate 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 such uniform rules capable of wider acceptance.³

10. The report describes the action taken by the Working Group at its fifth session with respect to articles 58 to 101 of ULIS. By this action the Working Group completed the initial examination of the text of the uniform law. The report also sets forth (annex I) the revised text of the uniform law, which is the result of action taken by the Working Group at its first five sessions.⁴ The report includes the comments and pro-

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, II) *Ibid.*, *Twenty-sixth Session, Supplement No. 17* (A/8417), para. 92, subpara. 1 (c) (UNCITRAL Yearbook, Vol. II: 1971, part one, II). The 1964 Hague Convention Relating to a Uniform Law on the International Sale of Goods, with the annexed Uniform Law (ULIS) appears in the *Register of Texts of Conventions and Other Instruments Concerning International Trade Law*, vol. I (United Nations publication, Sales No.: E.71.V.3) chap. I, 1.

⁴ Certain of the provisions of the revised text were deferred for further consideration by the Working Group. See para. 15 *infra*.

posals by Governments that were considered by the Working Group (annexes II and III) and the report of the Secretary-General on issues presented by chapters IV to VI of ULIS (annex IV).

11. The report indicates that the Working Group, in examining chapter IV (Obligations of the buyer), considered it necessary to revise the provisions of ULIS dealing with the time and place of payment in order to provide a clearer and more unified treatment of the subject.⁵ The Working Group also decided to consolidate the separate sets of remedies afforded the buyer in chapter IV of ULIS, in line with the action taken at its fourth session consolidating the separate sets of remedies afforded the seller in chapter III.⁶ The Working Group noted that such consolidation achieved a substantial simplification of the law, and solved problems which had resulted from overlapping and inconsistent rules in the various remedial provisions.⁷

12. With respect to chapter V of ULIS (Provisions common to the obligations of the seller and the buyer), the Working Group drafted revised legislative texts dealing with suspension of performance by either party, exemptions, avoidance of the contract and the measurement of damages, including the mitigation of loss resulting from breach.⁸

13. With respect to chapter VI (Passing of the risk), the Working Group approved a unified set of rules which brought together provisions that had appeared in various parts of ULIS, and modified the provisions so that the rules on risk would be based on the significant commercial steps in the performance of sales contracts, rather than on abstract concepts.⁹

14. As a result of the various measures taken by the Working Group to consolidate and unify the provisions of ULIS, the revised text set forth in annex I of the report comprises 69 articles, as compared with the 101 articles of ULIS. It has been noted that the length and complexity of ULIS has been a subject of widespread comment, and that meeting these criticisms should be of assistance in facilitating the more widespread adoption of the uniform law.¹⁰

15. The report of the Working Group notes that the Group had not yet reached a final conclusion with respect to certain articles in the revised text of the uniform law as set forth in annex I. Consequently, in planning its future work, the Working Group requested the Secretariat to circulate this revised text, for comments and proposals, among representatives of member States of the Working Group and observers. The Working Group further requested the Secretariat, taking into

consideration such comments and proposals, to prepare a study of the pending questions, including possible solutions thereof, for use by the Working Group at its sixth session.

Consideration of the report by the Commission

16. All representatives who spoke on the subject congratulated the Working Group on the progress it had made in completing the initial examination of the text of ULIS, as reflected in the revised text set forth in annex I to the report. It was agreed that, in line with the usual practice of the Commission, the Commission would not take decisions with respect to the substance of the draft until the Working Group had completed its work.¹¹

17. Some representatives expressed the hope that the Working Group would be able to complete its work on the draft uniform law at its sixth session, to be held in February 1975. One representative expressed the view that the Commission should request the Working Group to complete its work before its eighth session. It was observed that, in accordance with the procedure that had been adopted with respect to the draft Convention on Prescription (Limitation) in the International Sale of Goods, the revised text of the uniform law prepared by the Working Group should be transmitted to members of the Commission for study in advance of the final review and approval of a text by the Commission. It was noted that Governments might need several months for this study; consequently, a draft completed by the Working Group (e.g., in February 1975) probably could not be acted upon by the Commission during the session to be held in the spring or summer of the same year, but would have to be deferred until the 1976 session. To bring the work to fruition as soon as possible, it was suggested that if the Working Group believed that it could not complete its work in the two-week session in February 1975 that it had proposed, that session should be extended to three weeks.

18. Other representatives agreed that the draft uniform law should be finalized as soon as possible, but suggested that the quality of the work should not be jeopardized by establishing an unrealistic deadline for the completion of the work. Some representatives noted that the Working Group had not reached agreement on several important questions and stated that as many of these questions as possible should be resolved by the Working Group before the draft uniform law was referred to the Commission. In this connexion, it was noted that the Commission's final review of a draft uniform law of such length and importance would take a substantial period of time, and that this review could hardly be completed successfully at one session of the Commission unless the review was based on provisions that had reached a wide measure of acceptance within the Working Group. It was also observed that a working group session of three weeks presented practical difficulties for some representatives and Governments.

19. It was suggested that the question of the length and timing of the next session of the Working Group

⁵ A/CN.9/87, paras. 26-36; reproduced in this volume, part two, I, 1.

⁶ Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 17 (A/9017), para. 12; UNCITRAL Yearbook, Vol. IV: 1973, part one, II, A.

⁷ A/CN.9/87, paras. 37-39; reproduced in this volume, part two, I, 1.

⁸ Ibid., paras. 88-156.

⁹ Ibid., paras. 206-244 and annex IV, paras. 64-105 (see below, part two, I, 5); A/CN.9/62, annex II, para. 17 (UNCITRAL Yearbook, Vol. III: 1972, part two, I, A, 5, annex II).

¹⁰ A/CN.9/75, annex II, paras. 101, 158-162 and 177 (UNCITRAL Yearbook, Vol. IV: 1974, part two, I, A, 2); A/CN.9/87, annex IV, para. 22, reproduced in this volume, part two, I, 1.

¹¹ Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17 (A/8417), para. 92, subpara. 1 (c) (UNCITRAL Yearbook, Vol. II: 1971, part one, II, A).

on the International Sale of Goods should be considered in relation to schedules for other working groups. The Commission agreed to consider all such schedules together under agenda item 11: Future work (see chap. IX, *infra*, para. 85).

Decision of the Commission

20. The Commission, at its 150th meeting, on 17 May 1974, 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 fifth session;
2. *Recommends* that the Working Group consider the comments and proposals made at the seventh 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.

CHAPTER III

INTERNATIONAL PAYMENTS

A. Negotiable instruments

Report of the Working Group

21. The Commission had before it the report of the Working Group on International Negotiable Instruments on the work of its second session, held at New York from 7 to 18 January 1974 (A/CN.9/86). The report sets forth the progress made by the Working Group (i) in preparing a final draft uniform law on international bills of exchange and international promissory notes, and (ii) in considering the desirability of preparing uniform rules applicable to international cheques.¹²

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

22. As indicated in the report, the Working Group at its second session considered articles 42 to 62 of the draft uniform law on international bills of exchange and promissory notes prepared by the Secretary-General in response to a decision by the Commission.¹³ The proposed uniform law will establish uniform rules applicable to an international instrument (bill of exchange or promissory note) for optional use in international payments.

23. The report sets forth the deliberations and conclusions of the Working Group with respect to the liability of an endorser, the rights and liabilities of a

guarantor, presentment for acceptance and payment, dishonour and recourse.

24. The Working Group was of the opinion that the uniform law should make provision for liability on an international instrument by way of guarantee, and approved rules in respect of a person guaranteeing on such instrument the obligation of another party.

25. With respect to presentment of an international instrument for acceptance or for payment, the dishonour of the instrument by non-acceptance or by non-payment, any necessary protest in the event of such dishonour and the giving of notice of dishonour, the Working Group reached agreement on detailed provisions setting forth the rights and duties of parties and the legal effects of non-compliance with prescribed rules. The Working Group reported that it had not yet reached final conclusions on certain issues arising in the context of presentment of an instrument, pending further inquiries by the Secretariat on commercial practices in this respect.

(ii) *Uniform rules applicable to international cheques*

26. The Commission, at its fifth session, also requested its Working Group on International Negotiable Instruments to consider the desirability of preparing uniform rules applicable to international cheques, and to consider whether this can best be achieved by extending the application of the draft uniform law on international bills of exchange and international promissory notes to international cheques or by drawing up a separate uniform law on international cheques. The Working Group was requested to report its conclusions on these questions to the Commission at a future session. The report of the Working Group notes that the Working Group requested 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. The Working Group reported that such inquiries were now under way and that, at a future session, it would consider an analysis of the replies received from banking and trade institutions to a questionnaire drawn up by the Secretariat in consultation with the UNCITRAL Study Group on International Payments.

Consideration of the report by the Commission

27. The Commission, in accordance with its general policy of considering the substance of the work carried out by working groups only upon completion of that work, took note of the report of the Working Group on International Negotiable Instruments. Representatives who spoke on the subject expressed satisfaction with the progress being made by the Working Group.

28. The Commission decided to consider the timing of the third session of the Working Group in relation to schedules for other working groups under item 11 of the agenda: Future work (see chapter IX, *infra*, para. 85).

Decision of the Commission

29. The Commission, at its 144th meeting on 13 May 1974, adopted unanimously the following decision:

¹² Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 17 (A/8717), para. 61 (UNCITRAL Yearbook, Vol. III: 1972, part one, II, A).

¹³ 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). The draft uniform law and commentary are set forth in A/CN.9/WG.IV/WP.2. For the text of the draft uniform law, see UNCITRAL Yearbook, Vol. IV: 1973, part two, II, 2.

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 second session;

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

3. Requests the Secretary-General to carry out further work in connexion with the draft uniform law on international bills of exchange and international promissory notes and with the inquiries 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

30. This subject is concerned with the revision by the International Chamber of Commerce (ICC) of "Uniform Customs and Practice for Documentary Credits", drawn up in 1933 and subsequently revised in 1951 and 1962. At its previous session,¹⁴ the Commission stressed the importance of commercial letters of credit in ensuring 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. Accordingly, the Commission, at its third session, requested the Secretary-General to invite Governments and interested banking and trade institutions to communicate to him, for transmission to ICC, their observations on the operation of "Uniform Customs and Practice for Documentary Credits", so that these observations could be taken into account by ICC in its work of revision.¹⁵ The observations so received were transmitted to ICC for consideration.

31. At the present session¹⁶ the Commission had before it a note by the Secretary-General reproducing a note by ICC concerning the progress made by it in respect of the revision of "Uniform Customs and Practice for Documentary Credits" and of its work on bank guarantees. The commission's deliberation and decision in respect of bank guarantees are set forth in Section C of this chapter (paras. 36 and 37 *infra*).

¹⁴ Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/7216), paras. 23 and 28 (UNCITRAL Yearbook, Vol. I: 1968-1970, part two, I, A); *ibid.*, Twenty-fourth Session, Supplement No. 18 (A/7618), paras. 90-95 (UNCITRAL Yearbook, Vol. I: 1968-1970, part two, II, A); *ibid.*, Twenty-fifth Session, Supplement No. 17 (A/8017), paras. 119-126 (UNCITRAL Yearbook, Vol. I: 1968-1970, part two, III, A); *ibid.*, Twenty-sixth Session, Supplement No. 17 (A/8417), paras. 36-43 (UNCITRAL Yearbook, Volume II: 1971, part one, II, A); and *ibid.*, Twenty-seventh Session, Supplement No. 17 (A/8717), paras. 65 and 66 (UNCITRAL Yearbook, Vol. III: 1972, part one, II, A).

¹⁵ Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 17 (A/8017), para. 125 (UNCITRAL Yearbook, Vol. I: 1968-1970, part two III, A).

¹⁶ The Commission considered this subject in the course of its 144th and 150th meetings, held on 13 and 17 May 1974.

32. The Commission took note of the fact that the Commission on Banking Technique and Practice of ICC had adopted, in February 1974, a draft revised text of "Uniform Customs", the text of which was annexed to the note by ICC. The Commission also noted that the text submitted to it was subject to further revision and that a final text would be adopted by the Council of ICC later in the year. In its note, ICC informed the Commission that the draft text had been established after consideration of the comments and suggestions submitted by its national committees and, through the secretariat of the Commission, by countries not represented in ICC. ICC also reported that the draft text had been considered by the *Ad Hoc* Working Group on Banking Technique of the Liaison Committee of ICC with the Chambers of Commerce of socialist countries.

33. Many representatives expressed their appreciation for the work carried out by ICC in respect of the revision of "Uniform Customs". It was generally recognized that the "Uniform Customs" standardized the procedures and practices employed by banks in respect of commercial letters of credit and as such could be characterized as a private convention between bankers and their clients. Some representatives were of the opinion that, in view of the fact that the interests of non-banks, in particular those of the vendor-beneficiary, were involved, the Commission should give careful attention to the revised text of "Uniform Customs". Other representatives took the view that the main object of the Commission's interest in the subject had been to create a channel for communication between ICC and countries not represented in ICC, and that that object had been achieved. In the opinion of these representatives, the final responsibility for the revised text of "Uniform Customs" fell to ICC and it was important that the revised text be adopted and applied without undue delay.

34. There was general agreement among representatives that, while the Commission could not adopt the revised text of "Uniform Customs", it should consider, at its next session, the desirability of commending the use of "Uniform Customs" in transactions involving the establishment of a documentary credit. In this connexion, the Commission requested the Secretariat to prepare an analysis of the observations received by the Secretary-General in respect of the 1962 version of "Uniform Customs", with a view to examining whether the revised text reflected these observations.

Decision of the Commission

35. The Commission, at its 144th meeting on 13 May 1974, adopted unanimously the following decision:

The United Nations Commission on International Trade Law

1. Takes note of the progress report submitted by the International Chamber of Commerce on its work of revision of "Uniform Customs and Practice for Documentary Credits";

2. Commends the International Chamber of Commerce and its Commission on Banking Technique and Practice, on having carried out the work of revision in co-operation with the Commission;

3. *Invites* the International Chamber of Commerce to transmit to it the revised text of "Uniform Customs and Practice for Documentary Credits" upon the adoption thereof by ICC;

4. *Requests* the Secretary-General:

(a) To transmit the revised text of "Uniform Customs and Practice for Documentary Credits" to the States members of the Commission;

(b) To prepare an analysis of the observations received in respect of "Uniform Customs and Practice for Documentary Credits" and to submit this analysis to the Commission at its eighth session.

C. Bank guarantees

36. The Commission took note of the progress made by the International Chamber of Commerce (ICC) in respect of the preparation of uniform rules on contract guarantees and on payment guarantees. The view was expressed that the Commission should follow this work closely in view of the fact that ICC was carrying out the work at the invitation of the Commission. It was emphasized that the proposed rules should establish a just equilibrium between the interests of the parties concerned.

Decision of the Commission

37. The Commission, at its 150th meeting on 17 May 1974, adopted unanimously the following decision:

The United Nations Commission on International Trade Law

1. *Takes note* of the progress made by the International Chamber of Commerce in respect of the preparation of uniform rules on contract guarantees and payment guarantees;

2. *Requests* the Secretary-General:

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

(b) To refer the work of the International Chamber of Commerce in respect of contract and payment guarantees to the Commission's Study Group on International Payments, composed of experts provided by interested international organizations and banking and trade institutions, and to invite to the meetings convened for this purpose interested representatives on the Commission;

3. *Invites* the International Chamber of Commerce to submit to the Commission at future sessions progress reports on its work on contract and payment guarantees.

CHAPTER IV

INTERNATIONAL LEGISLATION ON SHIPPING

Report of the Working Group

38. The Commission, at its fourth session, decided to examine the rules governing the responsibility of ocean carriers for cargo in the context of bills of lading. The Commission established an enlarged Working

Group on International Legislation on Shipping of 21 members of the Commission to carry out this task.¹⁷

39. The Commission had before it the report of the Working Group on International Legislation on Shipping on the work of its sixth session.¹⁸ The report sets forth the progress made by the Working Group at that session to revise the rules of the 1924 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels Convention of 1924) and the 1968 Brussels Protocol thereto.¹⁹ As indicated in the report, the Working Group at its sixth session considered and took action with respect to the following topics: liability of ocean carriers for delay; documentary scope of the convention; geographic scope of the convention; elimination of invalid clauses in bills of lading; carriage of cargo on deck; carriage of live animals; definition of "carrier", "contracting carrier" and "actual carrier"; and definition of "ship". The report includes, in the form of an annex, a compilation of draft provisions that have been approved by the Working Group at its previous five sessions.

40. The Working Group decided that it would be desirable to include a specific provision dealing with the carrier's responsibility for loss or damage caused by delay. Accordingly, the Working Group adopted a definition of "delay", two alternatives for delimiting the maximum amount of liability of carriers for loss or damage caused by delay, and a provision covering the case where the goods are presumed lost due to an extended delay in their delivery.²⁰

41. With respect to the effect on the scope of the Convention of the use of certain documents to evidence the contract of carriage, the Working Group favoured extension of the Convention so that it would be applicable to all contracts for the carriage of goods by sea. The Working Group left open the question whether, in a case where no bill of lading is issued, the parties should have the possibility of excluding their contract

¹⁷ *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17 (A/8417)*, paras. 10-23 (UNCITRAL Yearbook, Vol. II: 1971, part one, II, A). 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, II, A) 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, III, A). 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, II, A), and the report of the Commission on the work of its sixth session, *ibid.*, *Twenty-eighth Session, Supplement No. 17 (A/9017)*, paras. 46-61 (UNCITRAL Yearbook, Vol. IV: 1973, part one, II, A).

¹⁸ A/CN.9/88 and A/CN.9/88/Add.1 (third report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading), reproduced in this volume below, part two, III, 1 and 2.

¹⁹ The texts of the 1924 Brussels Convention and of the 1968 Brussels Protocol appear in the *Register of Texts of Conventions and other Instruments Concerning International Trade Law, Vol. II* (United Nations publication, Sales No. E.73.V.3), chap. II, sect. 1. The report noted that, in defining the task of the Working Group, the Commission decided "that a new international convention may, if appropriate, be prepared for adoption under the auspices of the United Nations" (A/CN.9/88, para. 2).

²⁰ A/CN.9/88, paras. 10-28.

from the coverage of the Convention by an express agreement to this effect.²¹

42. There was agreement within the Working Group that the geographic scope of the Convention should be expanded so that a contract for the carriage of goods by sea would be governed by the Convention if either the port of loading or the port of discharge was in a Contracting State, or if the bill of lading or other document evidencing the contract of carriage was issued in a Contracting State.²²

43. The Working Group adopted draft provisions designed to clarify the effect of the rules of the Convention with respect to contract provisions that are inconsistent with such rules, and to provide compensation for loss or damage, within the limits set by the Convention, for loss or damage suffered as a consequence of the inclusion of such invalid contract provisions.²³

44. The Working Group decided to extend the applicability of the Convention (a) to goods carried on deck, and (b) to the carriage of live animals. However, with respect to the carriage of live animals, the Working Group expressly provided that the carrier would not be liable for loss or damage that resulted from the special risks inherent in carriage of that kind.²⁴

45. The Working Group adopted definitions for the terms "carrier", "contracting carrier" and "actual carrier". In this fashion the Working Group clarified the identity of the carrier against whom shippers or consignees should assert claims for loss or damage, particularly in cases where the goods were transhipped or where the person with whom the shipper contracted for the carriage of the goods did not in fact carry them, but instead arranged for another carrier to transport the goods.²⁵

46. The report of the Working Group noted the substantial progress made with respect to the specific topics referred to it by the Commission.²⁶ The Working Group recommended to the Commission that, in order to expedite the completion of its work, it should hold a further session in the autumn of 1974. The Working Group decided that the next (seventh) session would deal with (1) contents of the contract for carriage of goods by sea; (2) validity and effect of letters of guarantee; (3) protection of good faith purchasers of bills of lading. In addition, the Working Group decided that its seventh session would also consider any other topics necessary to complete the initial consideration of the rules of the 1924 Brussels Convention and the 1968 Protocol.

Consideration of the report by the Commission

47. It was noted during the discussion of the report that, since the drafting of the revised rules on the responsibility of ocean carriers had not at this stage been completed, the Commission would follow its usual practice of considering the progress made by the Working

Group and would take decisions when the draft rules approved by the Working Group could be considered as a whole.

48. All representatives who spoke on the subject expressed their satisfaction with the progress of the Working Group in carrying out its mandate. Many representatives stressed the importance of revising the existing international rules concerning the responsibility of ocean carriers so as to take account more adequately of the interests of the developing countries and of shippers in general. Some representatives emphasized the importance of continued progress in the work, in view of the recommendation by UNCTAD that UNCITRAL should expeditiously prepare revised legal rules in this area.

49. Most representatives were of the opinion that the Working Group would probably need two more sessions to complete its task. At the next (seventh) session of the Working Group, the first reading of the revised rules on the responsibility of ocean carriers could be completed,²⁷ while the eighth session of the Working Group could be concerned with the second reading of these revised rules. Some representatives stated that the Working Group should decide at its next session whether the revised rules should take the form of a revision of the 1924 Brussels Convention and its 1968 Protocol or whether "a new international convention . . . be prepared for adoption under the auspices of the United Nations".²⁸

50. There was general agreement that the Working Group should complete its work as expeditiously as possible. Representatives expressed support for the request by the Working Group that its seventh session be held in Geneva from 30 September–11 October 1974, and its eighth session in New York in January or February 1975. Some representatives expressed the hope that this schedule would enable the Working Group to present a final text of the revised rules to the eighth session of the Commission. It was observed by several representatives that it might not be feasible for the Commission to consider the final draft text at its eighth session, since upon its adoption by the Working Group the final text should be sent to States Members of the United Nations for observations and an analysis of these observations would have to be prepared; in the view of these representatives the Commission would therefore not be in a position to consider the final text of the revised rules prior to its ninth session. Another representative proposed that the final draft of the revised rules be sent only to States members of the Commission, since the draft rules, following their approval by the Commission, would be considered by a diplomatic conference.

51. It was stated that, in view of the short time available between the final session of the Working Group on Shipping in February 1975 and the regularly scheduled eighth session of UNCITRAL in April 1975, it would not be possible for the final document to be prepared and transmitted to Governments so that they might comment on the draft text. It was also considered that, even if the eighth session of UNCITRAL were

²¹ *Ibid.*, paras. 29-49.

²² *Ibid.*, paras. 50-69.

²³ *Ibid.*, paras. 70-95.

²⁴ *Ibid.*, paras. 96-117.

²⁵ *Ibid.*, paras. 118-136.

²⁶ The topics dealt with by the Working Group at earlier sessions are summarized in its report (A/CN.9/88), para. 2.

²⁷ See para. 9 above for the topics to be considered at the seventh session of the Working Group.

²⁸ A/CN.9/88, para. 2.

postponed until the late summer or early autumn of 1975, it would still not be possible for Governments to take account of the views of shipowners, shippers, insurers and financial institutions in preparing comments on the draft text. Finally, it was agreed that the draft text should be given the widest possible distribution to Governments and interested international organizations prior to the discussion of the draft text by the Commission. Accordingly, it was decided that the final draft of the Working Group on Shipping should be discussed at the ninth session of the Commission.

52. Some representatives stated that rules regarding the required contents of the contract of carriage, a topic to be considered by the Working Group at its seventh session, should be such as to offer strong safeguards for shipper and good faith purchasers of the document evidencing the contract of carriage. One representative, commenting on the draft provisions on delay approved by the Working Group, expressed his support for alternative A which incorporated the single method for limitation of the carrier's liability.²⁹ The same representative urged that shippers be afforded protection against possible abuse, should the bracketed language be retained in the draft provision on the documentary scope of the Convention, permitting express agreement that the Convention not be applicable if no document evidencing the contract of carriage was issued.³⁰ That representative also favoured deletion of the bracketed language in the draft provision on carriage of goods on deck, that would permit such carriage if it was in accordance "with the common usage of the particular trade".³¹

Decision of the Commission

53. The Commission, at its 150th meeting, on 17 May 1974, 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 Legislation on Shipping on the work of its sixth session;

2. *Recommends* that the Working Group consider the comments and proposals made at the seventh 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 fourth session and complete the work expeditiously;

4. *Requests* the Secretary-General:

(a) To transmit the draft uniform rules on the subject, when completed by the Working Group, to Governments and interested international organizations for their comments;

(b) To prepare an analysis of such comments for consideration by the Commission at its ninth session.

²⁹ A/CN.9/88, para. 26 (a); Limitation of liability: alternative A.

³⁰ A/CN.9/88, para. 48 (a) (2).

³¹ A/CN.9/88, para. 103, (a) (1).

CHAPTER V

MULTINATIONAL ENTERPRISES

54. The General Assembly, at its twenty-seventh session, adopted resolution 2928 (XXVII) on the report of the United Nations Commission on International Trade Law on the work of its fifth session. 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".

55. In response to a decision taken by the Commission at its sixth session,³² the Secretariat drew up a questionnaire concerning legal problems presented by multinational enterprises and addressed the questionnaire to Governments and international organizations.

56. At the present session,³³ the Commission had before it a note by the Secretary-General (A/CN.9/90), setting forth the text of the questionnaire and information in respect of the number of replies so far received from Governments, United Nations organs and agencies, and international and national organizations. It was noted that most of the replies had been received recently, and that other replies were expected.

57. The Commission was informed by the Secretariat that studies by other bodies referred to in the resolution of the General Assembly were currently in progress, but that it was expected that the report of the Secretary-General requested by it at its sixth session for submission to a future session³⁴ could be prepared in time for its eighth session.

58. Several representatives stressed the importance of the subject to international trade and the need for internationally agreed rules in respect of multinational enterprises. Other representatives were of the view that the Commission could not make a significant contribution to the solution of problems arising in the context of multinational enterprises; however, they were not opposed to any action on the part of the Commission. Reference was made to the fact that a report of the Group of Eminent Persons, appointed by the Secretary-General under Economic and Social Council resolution 1721 (LIII), would be issued in the near future for consideration by the Council at its fifty-seventh session, to be held at Geneva in July 1974. In this regard, the hope was expressed that the recommendations for appropriate international action which the Group would submit would recognize the mandate given by the Gen-

³² *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 17 (A/9017)*, para. 116; *UNCITRAL Yearbook*, Vol. IV: 1973, part one, II, A.

³³ The subject was considered by the Commission at its 146th meeting held on 14 May 1974.

³⁴ *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 17 (A/9017)*, para. 116; *UNCITRAL Yearbook*, Vol. IV: 1973, part one, II, A.

eral Assembly to the Commission in respect of the legal aspects of the subject of multinational enterprises.

Decision of the Commission

59. The Commission, at its 146th meeting, on 14 May 1974, adopted unanimously the following decision:

The United Nations Commission on International Trade Law

Requests the Secretary-General to submit to the Commission, for consideration at its eighth session, a report setting forth:

(a) An analysis of the replies received from Governments and international organizations to the questionnaire drawn up at its request concerning legal problems presented by multinational enterprises;

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

CHAPTER VI

RATIFICATION OF OR ADHERENCE TO CONVENTIONS CONCERNING INTERNATIONAL TRADE LAW

60. The Commission had before it a report by the Secretary-General, prepared in response to a decision taken by it at its sixth session,³⁵ regarding the ratification of or adherence to conventions concerning international trade law.³⁶ The report takes into account information received from other United Nations organs and specialized agencies and the views expressed by representatives to the Commission in reply to inquiries by the Secretariat. The report (a) discusses the possible causes of delay in ratification or adherence that may originate at the preparatory stages of work on a convention and those that are related to the implementation of conventions on the national level; (b) describes procedures and methods that have been designed for the purpose of accelerating the adoption and implementation of international rules, and (c) sets forth conclusions and suggestions as to procedures that may be useful with respect to the ratification of or adherence to conventions concerning international trade law.

61. The Commission noted the procedures developed by the International Civil Aviation Organization and the World Health Organization, under which rules adopted by those agencies become binding upon a member State unless such State has declared, before a speci-

fied date, that it did not wish to become bound. It was observed that these procedures were used only in the context of international rules and standards that were of a technical nature.

62. One representative suggested that the Commission should consider the question of ratification of conventions in consultation with the International Law Commission.

63. The Commission, after deliberation, agreed that the question of ratification could more usefully be taken up by it at a future session after the Convention on Prescription (Limitation) in the International Sale of Goods had been concluded. The view was expressed that it would be more profitable to consider the causes of non-ratification with reference to a specific convention prepared by UNCITRAL. For this reason, the Commission was of the opinion that it was premature to establish a new working group for the subject or to appoint a special rapporteur.

Decision of the Commission

64. The Commission, at its 147th meeting on 15 May 1974, adopted unanimously the following decision:

The United Nations Commission on International Trade Law decides:

(a) To maintain on its agenda the question of the ratification of or adherence to conventions concerning international trade law;

(b) To re-examine this question at its ninth session with special reference to the state of ratification then obtaining in respect of the Convention on the Limitation Period in the International Sale of Goods.

CHAPTER VII

TRAINING AND ASSISTANCE IN THE FIELD OF INTERNATIONAL TRADE LAW

65. The Commission had before it a note by the Secretary-General (A/CN.9/92), setting forth the activities that had been undertaken to implement the Commission's decision on the subject of training and assistance in the field of international trade law.³⁷

66. In introducing the note by the Secretary-General, the Secretary of the Commission informed the Commission that the Governments of Austria and Belgium had each offered two internships for lawyers and government officials from developing countries during 1974, and that the process of selecting the interns was currently under way. The Secretariat has been advised that the Government of Belgium had renewed its offer of internships for 1975.

67. The Secretary of the Commission outlined the plans for holding a symposium on the role of universities and research centres in the teaching, dissemination and wider appreciation of international trade law, in accordance with a decision adopted by the Commission

³⁵ *Ibid.*, para. 132.

³⁶ The Commission considered this item at its 147th meeting on 15 May 1974. As regards previous documentation related to the item, see A/CN.9/60 (UNCITRAL Yearbook, Vol. II: 1971, part two, IV) setting forth the proposal by the French delegation for the establishment of a union for *jus commune*, and A/CN.9/81 setting forth the comments on this proposal by States members of the Commission.

³⁷ The Commission's decision and action in the General Assembly at its twenty-eighth session are described in document A/CN.9/92, paras. 1-3; the implementation of the Commission's decisions is described in paras. 4-19 and the annex of that document.

at its sixth session.⁸⁸ It was reported that the following sums had been committed by Governments in response to a request by the Secretary-General for voluntary contributions to cover the cost of travel and subsistence of participants from developing countries: Norway, \$US 8,000; Sweden, 5,000 Swedish kronor (about \$US 1,150); Austria, 25,000 Austrian schillings (about \$US 1,300); and Kuwait, expenses of participants from that country.

68. There was general agreement with the plans for the symposium as proposed in the note by the Secretary-General.⁸⁹ The discussion of the plans included suggestions with respect to the topics, among those to be considered at the eighth UNCITRAL session, which would be of most interest to the participants, and observations concerning the importance of advance circulation of the preparatory material for the symposium and the significance of the proposed discussion of the scope of courses on international trade law.

69. The representative of the Federal Republic of Germany stated that his Government would make a voluntary contribution of 25,000 DM (about \$US 10,000) to cover the travel and subsistence expenses of participants from developing countries and that his Government would also provide assistance to experts of the Federal Republic of Germany attending the symposium.

70. One representative suggested that consideration should be given to inviting lawyers from developing countries doing postgraduate work in the neighbourhood of the symposium (e.g. in Switzerland), since the travel expenses for such participants at the symposium would be rather small.

71. The observer for the Council for Mutual Economic Assistance (CMEA) announced that his organization has recently established a scholarship fund to aid students from developing countries, and that for 1974, 420 scholarships were available for students from 24 developing countries.

72. The representative of Australia repeated the offer of his Government to award a \$5,000 fellowship for the preparation in Australia, by a fellow from a developing country, of teaching materials for a course on international trade law.

73. Several representatives expressed their appreciation to those Governments that have provided practical internships, fellowships, or voluntary contributions for travel and subsistence expenses of participants at the symposium, and stated that they hoped that other developed countries would decide to provide similar assistance.

74. One representative drew attention to the importance of holding seminars in developing countries on international trade law. He stated that such seminars could be organized in co-operation with international institutions such as UNITAR.

⁸⁸ Report of the United Nations Commission on International Trade Law on the work of its sixth session (1973), *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 17 (A/9017)*, (UNCITRAL Yearbook, Vol. IV: 1973, part one, II, A), para. 107.

⁸⁹ A/CN.9/92, paras. 9-19, and annex.

CHAPTER VIII

LIABILITY FOR DAMAGE CAUSED BY PRODUCTS INTENDED FOR OR INVOLVED IN INTERNATIONAL TRADE

75. The General Assembly, at its twenty-eighth session, adopted resolution 3108 (XXVIII) of 12 December 1973 on the report of the United Nations Commission on International Trade Law on the work of its sixth session. In paragraph 7 of the resolution, the General Assembly invited the Commission:

"To consider the advisability of preparing uniform rules on the civil liability of producers for damage caused by their products intended for or involved in international sale or distribution, taking into account the feasibility and most appropriate time therefor in view of other items on its programme of work."

76. At the present session⁴⁰ the Commission had before it a note by the Secretary-General (A/CN.9/93) setting forth background information pertaining to paragraph 7 of the General Assembly resolution and suggesting possible action by the Commission in response thereto.

77. The representative of Norway, whose Government had proposed to the General Assembly that the subject of products liability be included in the Commission's programme of work stated that it would be in the interest of the proper conduct of international trade if international rules were to be established governing the civil liability of producers for damage caused by their products to persons or their property. The Commission had encountered various kinds of problems that could arise in the context of such liability in the course of its work on uniform rules for the international sale of goods and on the convention on prescription (limitation) in the international sale of goods. However, significant aspects of products liability had been excluded from the scope of the uniform law on the international sale of goods and the convention on prescription (limitation) and it was desirable that the work in the field of international sale be supplemented by uniform rules governing products liability. In the opinion of the representative of Norway, the proposed uniform rules should govern not only the civil liability arising under a contract between buyer and seller but also the civil liability of the producer to a consumer, even though there was no contract between them, and in circumstances in which liability might not be based on rules of contract law. It was not only a question of the liability of the producer himself, but also of other persons that were intermediary between the producer and the consumer. He drew attention to the large number of lawsuits that had been brought in recent years and to the unsatisfactory attempts to distinguish, for the purpose of establishing liability, between contractual and extracontractual relationships. The existence of divergent national laws, imposing different degrees of liability, could affect the terms of trade in that a higher degree of liability gave rise to higher costs, including the cost of insurance. This could lead to distortion of trade.

78. Several representatives expressed themselves in favour of including the subject in the Commission's

⁴⁰ The subject was considered by the Commission at its 145th and 146th meetings, held on 14 May 1974.

programme of work, but took the view that the Commission should take up the subject only upon completion of its work on uniform rules governing the international sale of goods.

79. Some representatives expressed doubts about the desirability of engaging in work on the subject. They pointed out that other international organizations, in particular the Hague Conference on Private International Law, the Council of Europe and the European Communities, had undertaken work in the field of products liability and that it would be advisable to await the results of that work. Doubts were also expressed whether the issue of the civil liability of producers fell within the competence of the Commission with respect to the harmonization and unification of international trade law, as conferred on the Commission by the General Assembly.⁴¹ It was suggested that the proposed topic was not primarily an issue of commercial law, in particular if the liability arose outside a contract for the international sale of goods. It was noted that, even in the context of the international sale of goods, the international instruments that were at present being prepared by the Commission excluded the sale of goods to consumers.

80. On the other hand, other representatives were of the opinion that the scope of the Commission's mandate, and the advisability of preparing uniform rules, should not depend on doctrinal distinctions between matters pertaining to civil and commercial law. In the view of these representatives, the liability of the producer could be considered as a commercial liability. The more relevant question was whether the absence of such rules could have an adverse impact on international trade. There was general agreement that a study on the main problems that arose in connexion with the preparation of uniform rules on the topic and a survey of the pending work of other organizations in the area would be necessary as a basis for a decision on these questions.

Decision of the Commission

81. The Commission, at its 146th meeting on 14 May 1974, adopted unanimously the following decision:

The United Nations Commission on International Trade Law,

Having regard to General Assembly resolution 3108 (XXVIII) of 12 December 1973,

Requests the Secretary-General to prepare a report for consideration by the Commission at its eighth session, setting forth:

(a) A survey of the work of other organizations in respect of civil liability for damage caused by products;

(b) A study of the main problems that may arise in this area and of the solutions that have been adopted therefor in national legislations or are being contemplated by international organizations;

(c) Suggestions as to the Commission's future course of action.

⁴¹ General Assembly resolution 2205 (XXI).

CHAPTER IX

FUTURE WORK

A. *General Assembly resolution 3108 (XXVIII) on the report of the Commission on the work of its sixth session*

82. The Commission took note of this resolution.

B. *Filling of vacancies in Working Groups*

83. As a result of the expiration of the terms of office of some member States of the Commission, vacancies occurred in the Working-Group on the International Sale of Goods and the Working Group on International Legislation on Shipping. The Commission appointed the following member States:

(a) Working Group on the International Sale of Goods: Czechoslovakia and Sierra Leone to replace Iran and Tunisia;

(b) Working Group on International Legislation on Shipping: Federal Republic of Germany to replace Spain.

84. With regard to the filling of the vacancies in the Working Group on the International Sale of Goods, it was understood that the nomination of Czechoslovakia in the place of Iran would in no way prejudice the representation of regional groups in that Working Group or any other Working Group and that a member of the group of Asian States, could, in the future, re-occupy the seat vacated by Iran. It was also understood that Czechoslovakia would be nominated for the duration of the Working Group's work on a uniform law on the international sale of goods and that the composition of the Working Group would be reconsidered when new tasks would be undertaken by it.

C. *Date and place of sessions of the Commission and its Working Groups*

85. After taking note of a statement on the financial implications of convening an extra session of the Working Group on International Legislation on Shipping in Geneva in 1974 (A/CN.9/95), the Commission decided that its eighth session and the sessions of its Working Groups should be scheduled to take place as follows:

(a) Eighth session of the Commission, at Geneva, from 1 to 18 April 1975;

(b) Seventh session of the Working Group on International Legislation on Shipping, at Geneva, from 30 September to 11 October 1974;

(c) Third session of the Working Group on International Negotiable Instruments, at Geneva from 6 to 17 January 1975;

(d) Eighth session of the Working Group on International Legislation on Shipping, at New York, from 27 January to 7 February 1975;

(e) Sixth session of the Working Group on International Sale of Goods, at New York, from 10 to 21 February 1975.

D. *Programme of work*

86. Several representatives noted that the work carried out by the Working Groups of the Commission

was nearing completion and expressed the view that the Commission should endeavour to consider the draft texts submitted by the Working Groups according to the following schedule:

(a) Uniform rules on the liability of ocean carriers for loss or damage with respect to cargo: as soon as possible upon completion of the draft rules by the Working Group (expected in February 1975);

(b) Uniform law on the international sale of goods: at the session of the Commission following the session at which the draft uniform rules on the liability of ocean carriers ((a) above) are approved;

(c) Uniform law on international bills of exchange and international promissory notes: if possible at the session of the Commission following the session at which the draft uniform law on the international sale of goods is approved.

E. Other work in progress

87. The Secretariat reported to the Commission that, in addition to pending matters described in the foregoing chapters of the report, subjects that would be sufficiently advanced for consideration at the Commission's eighth session included the following: draft uniform arbitration rules for optional use in *ad hoc* arbitration relating to international trade;⁴² draft uniform general conditions of sale;⁴³ a study of rules with respect to security interests in goods (e.g., conditional sales and trust receipts) that are relevant to international transactions.⁴⁴

CHAPTER X

OTHER BUSINESS

A. Report of the Secretary-General on current activities of other organizations

88. The Commission took note of this report (A/CN.9/94).

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

89. The Commission, at its sixth session, decided to consider at the present session the request of the President of the International Institute for the Unification of Private Law (UNIDROIT) that the Commission consider the "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.⁴⁵

90. The representatives who spoke on the subject expressed their appreciation to UNIDROIT for having transmitted the draft law to the Commission. Several representatives noted the close connexion between the rules on validity embodied in the UNIDROIT draft and the rules governing the formation of contracts.

91. With respect to the formation of contracts, it was noted that the Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, held at The Hague in April 1974, had, in addition to the Uniform Law on the International Sale of Goods (ULIS), also adopted a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFC). Several representatives expressed the view that the Working Group on the International Sale of Goods, after it had completed its work on the uniform law on the international sale of goods, should be requested to consider the establishment of uniform rules governing the validity of contracts for the international sale of goods on the basis of the UNIDROIT draft in connexion with its mandate to prepare uniform rules on formation. Some representatives were of the opinion that the uniform rules on validity and on formation should be the subject-matter of a single instrument. Other representatives took the view that it should be left to the Working Group to consider whether the rules on validity and formation should be the subject-matter of a single instrument or whether the issues could more appropriately be dealt with in separate instruments. Still other representatives were of the opinion that the Working Group should be free to consider whether it would be desirable and feasible to establish uniform rules on the validity of contracts for the international sale of goods.

92. Some representatives suggested that the Commission should consider the advisability of preparing uniform rules governing the formation and validity of contracts in general to the extent that they were relevant to international trade. However, other representatives were of the view that questions of the validity and formation of contracts presented different aspects dependent on the commercial relationships to which the contract applied. The Working Group should therefore, in first instance, consider questions relating to the formation and validity of contracts for the international sale of goods, but should be empowered to consider whether the principles underlying the formation and validity of such contracts would also be applicable to other types of contract.

Decision of the Commission

93. The Commission, at its 147th meeting on 15 May 1974, adopted unanimously the following decision:

The United Nations Commission on International Trade Law

⁴² The decision of the Commission at its sixth session is set forth in *Official Records of the General Assembly, Twenty-eighth session, Supplement No. 17 (A/9017)*, para. 148; UNCITRAL Yearbook, Vol. IV: 1973, part one, II, A. The text of the draft law is set forth in UNIDROIT publication Etude XVI 1B, Doc. 22; U.D.P. 1972.

⁴² Report of the United Nations Commission on International Trade Law on the work of its sixth session, *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 17 (A/9017)*, para. 85; UNCITRAL Yearbook, Vol. IV: 1971, part one, II, A.

⁴³ *Ibid.*, para. 24.

⁴⁴ 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. 145 (UNCITRAL Yearbook, Vol. I: 1968-1970, part two, III, A); 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)*, paras. 50-53 (UNCITRAL Yearbook, Vol. II: 1971, part one, II, A).

1. *Expresses its appreciation* to the International Institute for the Unification of Private Law (UNIDROIT) for having transmitted 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";

2. *Decides* to request its Working Group on the International Sale of Goods, after having completed its work on the uniform law on the international sale of goods, to consider the establishment of uniform rules governing the validity of contracts for the international sale of goods, on the basis of the above UNIDROIT draft, in connexion with its work on uniform rules governing the formation of contracts for the international sale of goods.

C. Private international law

94. One representative suggested that, at a future session, the Commission might consider undertaking work with respect to the unification of rules in the field of private international law (conflict of laws). Tribute was paid to the expertise in this field of the Hague Conference on Private International Law, and to the useful conventions that had been prepared under its auspices. However, it was observed that, although the Hague Conference was open to States from all parts of the world, many States were not members and the Conference did not have a governing body that was internationally representative. The Commission, in co-operation with the Hague Conference and avoiding duplication of work, might be able to secure wider participation in such work and more general adoption of uniform rules in this field. This suggestion was supported by another representative. Other representatives expressed reservations with respect to this suggestion; in this regard reference was made to the significance

of unification of the substantive rules governing international trade law, and the special competence of the Hague Conference with respect to unification of rules of private international law.

95. It was agreed that no decision with respect to the above question should be taken by the Commission at the present session.

D. Bibliographies on international trade law

96. The Commission took note of the compilation of bibliographies on international trade law (A/CN.9/L.25), based on materials supplied by members of the Commission in response to the invitation extended by the Commission at its fourth session.⁴⁶

97. Appreciation was expressed for the preparation and compilation of this material. It was agreed that if other members should supply such bibliographical material within the field of the Commission's work, this material would be compiled and distributed as a document of the Commission in the form of a supplement to the above initial compilation.⁴⁷

ANNEX

List of documents before the Commission

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

⁴⁶ *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17 (A/8417)*, para. 137; UNCITRAL Yearbook, Vol. II: 1971, part one II, A. Bibliographic material was supplied by Australia, Austria, Belgium, Brazil, Chile, Hungary, India, Italy, Romania, the United Kingdom of Great Britain and Northern Ireland and the Union of Soviet Socialist Republics.

⁴⁷ See also: Survey of bibliographies relating to international trade law: report of the Secretary-General (A/CN.9/L.20 and Add.1), reproduced in UNCITRAL Yearbook, Vol. II: 1971.

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

<i>Title or description</i>	<i>Document reference</i>
Provisional agenda, notes on the provisional agenda, and tentative schedule of meetings: note by the Secretary-General	A/CN.9/85
International payments: Bankers' commercial credits; bankers' guarantees: note by the Secretary-General	A/CN.9/89 and Corr. 1*
Multinational enterprises: Current status of work: note by the Secretary-General	A/CN.9/90
Training and assistance in the field of international trade law: note by the Secretary-General	A/CN.9/92 and Corr. 1**
Liability for damage caused by products intended for or involved in international trade: note by the Secretary-General	A/CN.9/93
Summary records of the seventh session of the Commission	A/CN.9/SR 143 to 150
Draft report of the United Nations Commission on International Trade Law on the work of its seventh session	A/CN.9/VII/CRP. 1 to 10
List of delegations	A/CN.9/INF.6

* In English, Russian and Spanish only.

** In French only.

I. INTERNATIONAL SALE OF GOODS

1. Progress report of the Working Group on the International Sale of Goods on the work of its fifth session (Geneva, 21 January-1 February) (A/CN.9/87)*

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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 is currently composed of the following States members of the Commission: Austria, Brazil, France, Ghana, Hungary,

India, Japan, Kenya, Mexico, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and the United States of America.¹

2. The terms of reference of the Working Group are set out in paragraph 38 of the report of the United

¹ The terms of two of the 14 members of the Working Group elected by the Commission at its second and fourth sessions, namely those of Iran and Tunisia, expired on 31 December 1973.

* 14 March 1974.

Nations Commission on International Trade Law on its second session.²

3. The Working Group held its fifth session at the United Nations Office at Geneva from 21 January to 1 February 1974. All members of the Working Group were represented.

4. The session was also attended by observers for Bulgaria, the Federal Republic of Germany, Norway and the Philippines and by observers for the following international organizations: The Hague Conference on Private International Law, the International Institute for the Unification of Private Law (UNIDROIT) and the International Chamber of Commerce.

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

(a) Provisional agenda and annotations (A/CN.9/WG.2/L.1)

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

(d) Analysis of comments and proposals by representatives of States members of the Working Group relating to articles 71 to 101 of ULIS: note by the Secretary-General (A/CN.9/WG.2/WP.17)

(e) Text of comments and proposals by representatives of States members of the Working Group on articles 71 to 101 of ULIS (A/CN.9/WG.2/WP.17/Add.1)

(f) Comments of the representative of Hungary on article 74 of ULIS (A/CN.9/WG.2/WP.17/Add.2)

(g) Compilation of draft articles 1 to 59 to ULIS as approved by the Working Group at its first four sessions (A/CN.9/WG.2/WP.18)

(h) Issues presented by chapters IV to VI of the Uniform Law on the International Sale of Goods: report of the Secretary-General (A/CN.9/WG.2/WP.19).

6. The session of the Working Group was opened by the representative of the Secretary-General.

7. At its first meeting, held on 21 January 1974, the Working Group, by acclamation, elected the following officers:

Chairman M. Jorge Barrera-Graf (Mexico)

Rapporteur . . . M. Gyula Eörsi (Hungary)

8. The Working Group adopted the following agenda:

1. Election of officers
2. Adoption of the agenda
3. Continuation of consideration of articles 58 to 70 of ULIS
4. Consideration of articles 71 to 101 of ULIS
5. Future work
6. Adoption of the report.

9. In the course of its deliberations, the Working Group set up drafting parties to which various articles were assigned.

10. The text of articles 58-101 as adopted or as deferred for further consideration appears in annex I* to this report. The texts of comments and proposals to representatives of members on articles 56 to 70 and on articles 71 to 101 ((A/CN.9/WG.2/WP.17/Add.1 and 2) appear as annexes II and III, respectively, and the report of the Secretary-General on issues presented by chapters IV to VI of ULIS (A/CN.9/WG.2/WP.19) as annex IV.

I. CONTINUATION OF CONSIDERATION OF ARTICLES 58 TO 70 OF ULIS

11. The Working Group at its fourth session, in addition to considering articles 18-55 of ULIS, commenced the consideration of articles 56-70. With respect to this second group of articles, the Working Group took action with respect to articles 56 and 57, and gave preliminary consideration to articles 58 and 59. Final action on these two articles was deferred until the present session.

CHAPTER IV. OBLIGATIONS OF THE BUYER

SECTION I. PAYMENT OF THE PRICE

A. Fixing the price (continued)⁸

Article 58

12. 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."

13. At the fourth session of the Working Group some representatives proposed that the words "in case of doubt" should be replaced by the words "unless otherwise agreed by the parties".⁴

14. Several representatives opposed the above proposal on the grounds that under article 5 of the revised text the agreement of the parties always prevails over the provisions of the uniform law and, therefore, there was no need to repeat this general rule in specific articles. Some representatives expressed the view that the expression "in case of doubt" should be deleted on the ground that it is but another way to refer to contractual stipulation or usage and is therefore superfluous. Other representatives asserted that doubts might arise in respect of whether there was a contractual stipulation for the case regulated in article 58.

15. At the fourth session it was proposed that a paragraph be added to resolve doubts as to whether the price should be paid in the currency of the seller or of the buyer.⁵

16. The Working Group decided to adopt article 58 of ULIS without any changes.

* Annexes I to IV are separately reproduced below in this chapter of the Yearbook, sections 2 to 5 respectively.

³ The headings of the report referring to specific topics are the same as in ULIS. They have been added to facilitate reference to the various parts of the report.

⁴ A/CN.9/75, para. 166; UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3.

⁵ *Ibid.*, para. 169.

² 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.

B. Place and date of payment

Article 59

17. 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."

18. The Working Group at its fourth session adopted this article without changes, and deferred consideration of a proposed additional paragraph pending submission of a revised draft by the representative concerned.⁶ No such draft has been introduced.

19. With reference to the general rule of article 59 that payment shall be in the seller's country, one representative stated that sellers from developing countries sometimes preferred payment in the currency of third countries and quite frequently buyers in developing countries preferred to make payments for international purchases in their own countries. For this reason, it was suggested that the possibility of deviation from the general rule should be clearly expressed, and proposed the addition of the words "unless otherwise agreed" at the beginning of paragraph 1.

20. One representative suggested that in paragraph 2 of this article, after the expression "subsequent to the conclusion of the contract" the words "the risks or" should be inserted. The proposal was not supported by other representatives.

21. The Working Group decided to adopt article 59 of ULIS without any changes.

Article 60

22. Article 60 of ULIS 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."

23. One representative suggested deletion of the words "without the need for any other formality". Another representative expressed the view that article 60 had been inserted in ULIS to avoid the application of national rules requiring the performance of certain formalities before the price is due, and therefore, without the above-quoted words, the whole article would lose its purpose.

24. Some representatives expressed doubts as to the necessity for this article. Other representatives, however, were of the opinion that retention of the article would be useful.

25. The Working Group decided to adopt article 60 of ULIS without any changes.

New article 59 bis

26. The Secretary-General in his report on issues presented by chapters IV-VI of ULIS (A/CN.9/WG.2/WP.19) came to the conclusion that subsection I B (articles 59 and 60) of ULIS entitled "Place and date of payment" was incomplete. In this report it was noted that while article 59 included certain rules on the place of payment, subsection I B of ULIS made no adequate provision for the time for payment. More particularly, this subsection failed to deal with the relationship between the time and place for payment by the buyer and the seller's handing over of the goods in the normal case where the contract called for despatch of the goods. It was noted that answers to some of the problems could be found in articles 71 and 72 of ULIS, but that it was not easy for a user of ULIS to piece together these scattered provisions on payment, and that articles 71 and 72 presented problems of clarity and completeness.

27. In order to provide for a more unified presentation of rules on the place and date of payment, the above report suggested that subsection I B of ULIS should include an additional article, and suggested the following text which could replace or follow article 60:⁷

"1. The buyer shall pay the price when the seller, in accordance with the contract and the present law, hands over the goods or a document controlling possession of the goods.

"2. Where the contract involves carriage of goods, the seller may either:

"(a) By appropriate notice require that, prior to dispatch of the goods, the buyer at his election shall in the seller's country either pay the price in exchange for documents controlling disposition of the goods, or procure the establishment of an irrevocable letter of credit, in accordance with current commercial practice, assuring such payment; or

"(b) Dispatch the goods on terms whereby the goods, or documents controlling their disposition, will be handed over to the buyer at the place of destination against payment of the price.

"3. The buyer shall not be bound to pay the price until he has had an opportunity to inspect the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with such opportunity."

28. All representatives who spoke on this question agreed in principle with the Secretary-General's proposal that a single subsection of ULIS should deal with all aspects of the place and time of payment. However, several comments were made in respect of the terms and language of the suggested draft.

29. Several representatives expressed the view that the terminology of the proposed draft should be brought into line with that of article 20 by replacing the words "hand over the goods" by "deliver the goods" or "place the goods at the buyer's disposal" and that an appropriate single expression should be used for the description of the documents falling within the scope of this article. It was noted that the expres-

⁶ *Ibid.*, para. 177.

⁷ A/CN.9/WG.2/WP.19, paras. 11 and 21; see annex IV to this report, reproduced below in section 5.

sion "documents controlling possession of the goods" and "documents controlling disposition of the goods" used in the draft may be construed as referring to different types of documents. One representative noted that in common law terminology "entitlement to goods" would seem to be an appropriate expression.

30. As regards paragraph 1 of the draft, one observer noted that the incorporation of the provisions of articles 71 and 72 in the new draft resulted in the loss of the important provision that the seller could make payment a condition for handing over the goods. He therefore suggested that a sentence to this effect should be added to the text.

31. Most comments were directed towards paragraph 2 (a) of the draft. Several representatives considered that this paragraph should be merged with or immediately followed by article 69. One observer expressed the view that the provision in this subparagraph entitling the seller to require the buyer, at the buyer's election, to pay the price or to procure the establishment of an irrevocable letter of credit prior to dispatch of the goods was contrary to commercial usage, and stated that the cost of procuring a letter of credit might in fact prove an excessive burden on the buyer. On the other hand, one representative suggested that the seller should also be entitled to require, where appropriate, the procurement of a performance bond.

32. A few drafting changes were also proposed in respect of subparagraph 2 (a) of the draft. Thus, one representative suggested the replacement of the expression "in accordance with current commercial practice" by "in accordance with usage"; another representative proposed that after the words "of the goods" the following phrase should be inserted: "or procure such documents relating to payment as will satisfy the seller's requirement under the contract, or will conform to current commercial practice in the particular trade". One observer proposed the deletion of the words "in the seller's country".

33. One representative was of the opinion that paragraph 2 (a) should also contain a provision stating the buyer's obligation to open a letter of credit if required by the contract and the consequences should he fail to do so.

34. The Working Group set up a drafting party (Drafting Party II), composed of the representatives of France, Ghana, Japan, United Kingdom and the observers for Norway and the International Chamber of Commerce, and requested the Drafting Party, taking into consideration the comments and proposals made in the plenary, to redraft the suggested new article.

35. Drafting Party II submitted its proposal to the 13th meeting of the Working Group on 29 January 1974. On the basis of that proposal, the Working Group decided:

(a) To delete article 69 of ULIS and replace it by the following new article 56 *bis*:

"The buyer shall take steps which are necessary in accordance with the contract, with the laws and regulations in force or with usage, to enable the price to be paid or to procure the issuance of documents assuring payment, such as a letter of credit or a banker's guarantee".

(b) To include in the law the following new article 59 *bis*:

"1. The buyer shall pay the price when the seller, in accordance with the contract and the present Law, places at the buyer's disposal either the goods or a document controlling their disposition. The seller may make such payment a condition for handing over the goods or the document.

"2. Where the contract involves the carriage of goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will be handed over to the buyer at the place of destination against payment of the price.

"3. The buyer shall not be bound to pay the price until he has had an opportunity to inspect the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with such opportunity."

(c) To delete articles 71 and 72 of ULIS.

C. Remedies for non-payment

Articles 61-64

36. Articles 61 to 64 of ULIS read as follows:

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 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."

37. The Working Group at its fourth session decided to replace the separate sets of remedial provisions on the buyer's remedies for the seller's failure to perform his obligations by a consolidated set of such remedies in chapter III of ULIS. The Secretary-General in his report on issues presented by chapters IV to VI of ULIS (A/CN.9/WG.2/WP.19) came to the conclusion that the reasons for consolidating the remedial provisions in chapter III were also applicable to chapter IV.

38. As stated in the Secretary-General's report, several articles in chapter IV contain remedial provisions. Articles 61 to 64 provide for remedies for non-payment, articles 66-68⁸ for failure of the buyer to take delivery or to make a specification and article 70⁹ for failure of the buyer to fulfil any of his other obligations.

39. The Secretary-General suggested that the consolidated text of remedial provisions should follow the substantive provisions of chapter IV. The last such provision being article 69 of ULIS, and in view of the incorporation of articles 71 and 72 of ULIS in draft article 59 *bis*¹⁰ the Secretary-General proposed that the new remedial articles should provisionally be numbered as articles [70] to [72 *bis*].¹¹

40. The consolidated text as suggested by the Secretary-General in his report¹² reads as follows:

Article [70]

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

"(a) Exercise the rights provided in articles [71] to [72 *bis*]; and

"(b) Claim damages as provided in articles [82] and [83] or articles [84] to [87].

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

Article [71]

"The seller has the right to require the buyer 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 seller has acted inconsistently with that right by avoiding the contract under article [72 *bis*]."

⁸ For text of these articles see paras. 71, 73 and 82 below.

⁹ For text of article 70 see para. 86 below.

¹⁰ See para. 35 (b) above.

¹¹ In order to avoid confusion of these articles with articles 70 to 72 of ULIS, in this report the numbers of articles [70] to [72 *bis*] suggested by the Secretary-General appear in square brackets.

¹² A/CN.9/WG.2/WP.19, para. 36; see annex IV to this report, reproduced below in section 5.

Article [72]

"Where the seller requests the buyer to perform, the seller may fix an additional period of time of reasonable length for such performance. If the buyer does not comply with the request within the additional period, or where the seller has not fixed such a period, within a period of reasonable time, or if the buyer already before the expiration of the relevant period of time declares that he will not comply with the request, the seller may resort to any remedy available to him under the present law."

Article [72 bis]

"1. The seller may by notice to the buyer declare the contract avoided:

"(a) Where the failure by the buyer 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 buyer has not performed the contract within an additional period of time fixed by the seller in accordance with article [72].

"2. The seller shall lose his right to declare the contract avoided if he does not give notice thereof to the buyer within a reasonable time after the seller has discovered the failure by the buyer to perform or ought to have discovered it, or, where the seller has requested the buyer to perform, after the expiration of the period of time referred to in article [72]."

Article [70]

41. The Working Group decided to adopt article [70] as proposed by the Secretary-General.

Article [71]

42. Several representatives expressed the opinion that the parallelism between this article and article 43 as adopted by the Working Group at its fourth session was inappropriate. It was emphasized that the main obligation of the buyer was to pay the price and restrictions in certain national laws on specific performance were not applicable to this obligation of the buyer. A number of representatives suggested that the law should clearly spell out that the above restrictions did not apply to the payment of the price.

43. One representative, supported by an observer, was of the view that the proposed language of article [71], and similarly that of article 43, was misleading because the provision restricting the seller's right to request performance was only set forth in the second phrase, as an exception. He, therefore, suggested that the article should clearly express that the seller has no right to request performance except if it is in conformity with the law of the court.

44. One observer held that the phrase "similar contracts of sale not governed by the Uniform Law" pointed to domestic contracts. He, therefore, suggested that the commentary should contain a clear statement to this effect. One representative supported this suggestion. Another representative suggested that the commentary should also take care of the modalities of payment.

45. Several representatives expressed the view that article 61, paragraph 2 of ULIS seemed to be superfluous on the grounds that it applied mainly to such types of trade which were governed by usage and under article 9 usages always prevail over the provisions of the law.

46. Several representatives and observers expressed views on whether the seller should be entitled to payment or damages in cases where the goods were duly offered or delivered and payment did not follow.

47. One delegate proposed that article [71] should contain a separate rule on payment and another on his obligations other than payment, as well as a provision to the effect that article [71] does not apply where the seller has avoided the contract.

48. The Working Group decided to set up a drafting party (Drafting Party III) composed of the representatives of Austria, Japan and the United States and the observer for ICC and requested the Drafting Party to prepare a revised text of article [71].

49. The Drafting Party submitted its proposal to the 13th meeting of the Working Group on 29 January 1974. The Working Group decided to adopt the proposal with slight modifications.

50. The article as adopted by the Working Group reads:

"1. If the buyer fails to pay the price, the seller may require the buyer to perform his obligation.

"2. If the buyer fails to take delivery or to perform any other obligation in accordance with the contract and the present law, the seller may require the buyer to perform 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 present law.

"3. The seller cannot require performance of the buyer's obligations where he has acted inconsistently with such right by avoiding the contract under article [72 bis]."

Article [72]

51. One observer suggested replacing the words "such performance" at the end of the first sentence by the expression "the performance of the contract".

52. The Working Group decided to adopt article [72] with the modification in paragraph 51 above. The article, as adopted reads:

"Where the seller requests the buyer to perform, the seller may fix an additional period of time of reasonable length for the performance of the contract. If the buyer does not comply with the request within the additional period, or where the seller has not fixed such a period, within a period of reasonable time, or if the buyer already before the expiration of the relevant period of time declares that he will not comply with the request, the seller may resort to any remedy available to him under the present law."

Article [72] bis

53. One observer suggested that a new subparagraph (c) should be added to this article providing for the seller's right now contained in article 66, paragraph 1 of ULIS to avoid the contract "where the

buyer gives the seller good grounds for fearing that the buyer will not pay the price". This proposal was opposed by several representatives on the grounds that anticipatory breach was dealt with in other articles of ULIS.

54. Another observer noted that from the point of view of remedies distinction had to be made between cases where payment or delivery had already taken place and cases where payment or delivery had not yet taken place. In his view if the goods had not been delivered, the seller should be entitled to avoid the contract for non-payment without any further requirements; if, however, the goods had been delivered, the seller should have to give a reasonable time for payment before avoidance of the contract. In this connexion he expressed the view that it seemed to be unsound to copy the seller's obligations and apply them to the buyer.

55. One observer drew attention to his suggestion in annex VI of document A/CN.9/WG.2/WP.17/Add.1* to include a new paragraph 2 in article 66 of ULIS providing that the seller should not have the right to claim the return of the goods for non-payment unless in the contract the seller had retained the "property or a security right in the goods" until the price has been paid.

56. One observer introduced a new version for article [72 bis] and drew attention to the importance of the doctrine of parallelism, in particular to parallelism between articles 44 and [72 bis]. He emphasized that remedies applicable in case of failure of the seller to deliver the goods were not necessarily applicable to failure of the buyer to pay the price. He noted that his proposal was based on a principle adopted by the Working Group at its first session as contained in paragraph 100 of document A/CN.9/35.**

57. Another observer introduced an amendment to paragraph 2 of this article.

58. Several delegates expressed views on the above proposals and the possibility of their reconciliation with article [72 bis] suggested in the report of the Secretary-General.

59. The Working Group decided to defer final action on this article until its next session. At that session it will take into consideration the text suggested in the Secretary-General's report¹³ and the proposals mentioned in paragraph 56 (proposal A) and 57 (proposal B) above. These latter proposals read:

Proposal A

"1. The seller may by notice to the buyer declare the contract avoided:

"(a) Where the buyer has not paid the price or otherwise has not performed the contract within an additional period of time fixed by the seller in accordance with article 72; or

"(b) Where the goods have not yet been handed over, the failure by the buyer to pay the price or to perform any other of his obligations under the

* Annex III to this report; see below, section 4.

** UNCITRAL Yearbook, Vol. 1: 1968-1970, part three, I, A, 2.

¹³ For the text of this proposal see para. 40 above.

contract of sale and the present law amounts to a fundamental breach.

"2. If the buyer requests the seller to make known his decision under paragraph 1 of this article and the seller does not comply promptly the seller shall where the goods have not yet been handed over, be deemed to have avoided the contract.

"3. The seller shall lose his right to declare the contract avoided if he does not give notice to the buyer before the price was paid or, where the goods have been handed over, promptly after the expiration of the period of time fixed by the seller in accordance with article [72]."

Proposal B

"2. The seller shall lose his right to declare the contract avoided if he does not give notice thereof to the buyer within a reasonable time:

"(a) Where the buyer has not performed his obligations on time, after the seller has been informed that the price has been paid late or has been requested by the buyer to make his decision as regards performance or avoidance of the contract;

"(b) Where the seller has requested the buyer to perform, after the expiration of the period of time referred to in article [72];

"(c) In all other cases, after the seller has discovered the failure by the buyer to perform or ought to have discovered it. In any event, the seller shall lose his right to claim the return of delivered goods if he has not given notice thereof to the buyer within a period of 6 months [1 year] from the date on which the goods were handed over, unless the contract reserves the seller the property or a security right in the goods."

SECTION II. TAKING DELIVERY

Article 65

60. Article 65 of ULIS reads as follows:

"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."

61. Several representatives were of the opinion that this article should be retained without any change. Others, however, expressed the view that the present language of the article presented various problems which had to be resolved. Some representatives suggested the deletion of the article.

62. Most comments were directed towards the first phrase of this article providing that the concept of "taking delivery" also included the buyer's doing all such acts as were necessary in order to enable the seller to hand over the goods.

63. Most representatives who spoke on the issue agreed in principle with the above requirement but considered that the language of the article should be improved. Several representatives held that the word "necessary" was too vague and, therefore, it needed

qualification or replacement by a less ambiguous expression. One representative suggested the replacement of the word "necessary" by the phrase "required by the contract". One observer opposed this formulation on the grounds that the buyer's obligations were not limited to those "required by the contract", e.g., he had to give the seller access to his premises in cases where the seller was required to deliver the goods there.

64. It was also suggested that the word "necessary" should be replaced by the expression "can reasonably be expected". This proposal was supported by a number of delegations, subject to eventual drafting improvements.

65. Some representatives suggested that the article should not be drafted as a definition of the concept of "taking delivery" but rather as an express provision to the effect that it was the duty of the buyer to do all such acts as are necessary to enable the seller to effect delivery. One representative noted that article 56 required the buyer to "take delivery".

66. Several representatives expressed the view that the provisions of article 65 should be merged with article 56, while others suggested its merger with article 67. One observer thought that article 20 would be the proper place to provide for the buyer's obligation now contained in article 65.

67. The Working Group at its second meeting on 21 January 1974, established a drafting party (Drafting Party I) composed of the representatives of Austria, Hungary and the United States and the observer for the Federal Republic of Germany and requested the Drafting Party to prepare a revised draft of article 65.

68. The drafting party submitted its proposal for a revised text of article 65 to the fifth meeting of the Working Group on 23 January 1974. In this proposal the drafting party noted that article 20 of ULIS as revised by the Working Group providing for the seller's obligations as regards delivery did not contain obligations of the seller corresponding to those imposed on the buyer by article 65 of ULIS, and suggested that this question should be considered at the second reading of the draft.

69. Several representatives commented on the text submitted by the drafting party. It was observed that the attempt to draft article 65 as a definition of "taking delivery" raised technical difficulties, for example, where the buyer actually took over the goods but had failed to give the seller the required co-operation in connexion with delivery, the approach used in article 65 of ULIS would seem to say that the buyer had not "taken delivery" although he received (or even consumed) the goods. Consequently, it was decided that article 65 should be drafted as a statement of the buyer's obligation to take delivery.

70. The Working Group decided to adopt the following text for article 65:

"The buyers' obligation to take delivery consists in doing all such acts which could reasonably be expected of him in order to enable the seller to effect delivery, and also taking over the goods."

Article 66

71. Article 66 of ULIS reads:

"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."

72. The Working Group decided to delete this article as the provisions thereof had been incorporated in the consolidated set of new remedial articles [70] to [72 *bis*].

Article 67

73. Article 67 of ULIS reads as follows:

"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."

74. The Secretary-General's report on issues presented by chapters IV to VI of ULIS noted that the remedial provision in this article was inconsistent with the remedial provisions in other articles of the Law, in that it provided for avoidance of the contract for any delay or failure to provide specifications without regard to whether this constituted a fundamental breach. The report suggested that in the interest of consistency, the expression "may declare the contract avoided, provided that he does so promptly" should be deleted from the text, so that delay or failure of the buyer to supply specifications would be subject to the general remedial provisions applicable to a breach of contract by the buyer.¹⁴ It was suggested that the above expression should be replaced by the following phrase: "may have recourse to the remedies specified in articles [70] to [72 *bis*]."

75. The above proposal was supported by some representatives, while others doubted whether the general remedial provisions were well suited for the special cases covered by article 67.

¹⁴ A/CN.9/WG.2/WP.19, para. 30; annex IV to this report; see below, section 5.

76. One representative suggested the deletion of the article as it provided for a question of detail only. One observer and some representatives emphasized that the article dealt with problems of high practical importance.

77. Some representatives were of the opinion that avoidance of the contract as allowed by the general remedial provisions was too strong a remedy for the buyer's failure to provide specifications and suggested that the only remedy in such cases should be the transfer to the seller of the power to make specification, coupled, where appropriate, with compensation for damage. One representative, supported by an observer, proposed that, in addition to these remedies, avoidance of the contract should also be allowed. Another representative held the view that the law should not provide for compensation but should leave that question to interpretation.

78. One representative expressed the view that specification was only a right and not an obligation of the seller. Another representative suggested that it should be made clear that the buyer is obliged to make specifications if the contract so provides.

79. One representative suggested that the seller should be obliged to give notice before resorting to remedies.

80. One representative submitted that article 67, after appropriate modifications, should be moved to chapter V of ULIS.

81. The Working Group decided to adopt in principle the proposal mentioned at the end of paragraph 74 above and to defer final action on this proposal and on the whole article until a later session.

Article 68

82. Article 68 of ULIS reads:

"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."

83. The Working Group decided to delete this article as the provisions thereof had been incorporated in the consolidated set of new remedial articles [70] to [72 *bis*].

SECTION III. OTHER OBLIGATIONS OF THE BUYER

Article 69

84. 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".

85. The Working Group decided to delete this article and replace it by a new article 56 *bis*.¹⁵

Article 70

86. Article 70 of ULIS reads as follows:

"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".

87. The Working Group decided to delete this article as the provisions thereof had been incorporated in the consolidated set of new remedial articles [70] to [72 *bis*].

II. CONSIDERATION OF ARTICLES 71 TO 101 OF ULIS

CHAPTER V. PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER

SECTION I. CONCURRENCE BETWEEN DELIVERY OF THE GOODS AND PAYMENT OF THE PRICE

Articles 71-72

88. Articles 71 and 72 of ULIS read as follows:

Article 71

"Except as otherwise provided in article 72, delivery of the goods and payment of the price shall be concurrent conditions. Nevertheless, the buyer shall not be obliged to pay the price until he has had an opportunity to examine the goods."

Article 72

"1. Where the contract involves carriage of the goods and where delivery is, by virtue of paragraph 2 of article 19, effected by handing over the goods to the carrier, the seller may either postpone despatch of the goods until he receives payment or proceed to despatch them on terms that reserve to himself the right of disposal of the goods during transit. In the latter case, he may require that the goods shall not be handed over to the buyer at the place of destination except against payment of the price and the buyer shall not be bound to pay the price until he has had an opportunity to examine the goods.

"2. Nevertheless, when the contract requires payment against documents, the buyer shall not be entitled to refuse payment of the price on the ground that he has not had the opportunity to examine the goods."

89. The Working Group decided to delete these articles as the provisions thereof had been incorporated in article 59 *bis*.

¹⁵ For text of the new article see para. 35, subpara. (a).

Article 73

90. Article 73 of ULIS reads as follows:

"1. Each party may suspend the performance of his obligations whenever, after the conclusion of the contract, the economic situation of the other party appears to have become so difficult that there is good reason to fear that he will not perform a material part of his obligations.

"2. If the seller has already despatched the goods before the economic situation of the buyer described in paragraph 1 of this article becomes evident, he may prevent the handing over of the goods to the buyer even if the latter holds a document which entitles him to obtain them.

"3. Nevertheless, the seller shall not be entitled to prevent the handing over of the goods if they are claimed by a third person who is a lawful holder of a document which entitles him to obtain the goods, unless the document contains a reservation concerning the effects of its transfer or unless the seller can prove that the holder of the document, when he acquired it, knowingly acted to the detriment of the seller."

91. Prior to the present session Governments and representatives on the Working Group submitted several comments on this article. It was noted in these comments that the unilateral decision of the seller as to the economic situation of the buyer might have serious consequences for the buyer;¹⁶ the suggestion was made that the buyer should be allowed to remedy the situation by providing assurances¹⁷ and it was held that the provisions of this article imposing obligations upon the carrier conflicted with those of municipal and international law concerning the carriage of goods.¹⁸

92. The Secretary-General in his report on issues presented by chapters IV-VI of ULIS (A/CN.9/WG.2/WP.19), based on the above comments and the considerations contained in paragraphs 48 to 61 of that report, suggested the following modifications:

(a) A new paragraph 1 *bis* should be inserted in the article to read as follows:

"A party suspending performance shall promptly notify the other party thereof and shall continue with performance if the other party, by guarantee, documentary credit or otherwise, provides adequate assurance of his performance. On failure by the other party, within a reasonable time after notice, to provide such assurance, the party who suspended performance may avoid the contract."

(b) At the end of paragraph 2 the following new sentence should be added:

"The foregoing provision relates only to the rights in the goods as between the buyer and the seller [and does not affect the obligations of carriers and other persons]."

(c) Paragraph 3 of the article should be deleted.

¹⁶ A/CN.9/WG.2/WP.17, para. 11.

¹⁷ *Ibid.*, paras. 12 and 14.

¹⁸ *Ibid.*, para. 13.

93. In respect of paragraph 1 of the article there was general agreement in the Working Group that the expression "the economic situation of the other party appears to have become so difficult" was too subjective and vague and, therefore, it should be replaced by a more objective and precise one. One representative expressed the view that as a matter of policy the right to a unilateral suspension might lead to arbitrary actions to the serious detriment of the buyer. One representative proposed the phrase "reasonable grounds for belief that a material part of performance will not be given when due". Another representative supported this proposal with the modification, however, that the words "for belief" should be replaced by "to conclude". One observer suggested the replacement of the expression "reasonable grounds" in the proposed text by a more unambiguous form.

94. Some representatives expressed the view that article 73 should be made to apply only in cases where credit had been extended and the terms of this credit were not observed. One representative suggested that the article be limited in scope to cases of bankruptcy and insolvency, and added that paragraph 2 would not be operative because the draft could not have any effect on carriers. It was suggested by one delegate that in many countries there was no reliable information on insolvency of companies and by another that the yearly balances were issued too late to provide for up-to-date information on the financial situation of the companies. Another representative held that the grounds for suspension of performance should be derived from the conduct of the defaulting party during performance. One observer noted his disagreement with all these proposals and another representative suggested that the article should only apply in case of a serious deterioration of the financial situation of the buyer.

95. The Working Group agreed in principle that a provision in line with paragraph 1 *bis* suggested by the Secretary-General (see paragraph 92 above) should be inserted in the article. However, several comments were made as to the content and language of such a provision.

96. One representative suggested that a provision should be inserted in paragraph 1 to the effect that the guarantee of performance must be satisfactory to or even accepted by the other party. Another representative was of the opinion that the text should also call for disclosure by the seller of his reasons for suspending performance. Still another representative suggested that the additional costs incurred by the buyer in securing the guarantee should be borne by the seller. This latter proposal was supported by one observer and opposed by another.

97. One observer suggested that the law should also allow the seller to claim a less drastic remedy than avoidance of the contract in addition to his suspension of performance of his obligations under the contract.

98. One representative proposed that the expression "documentary credit" in paragraph 1 *bis* should be replaced by the expression "letter of credit". Another drafting proposal suggested the insertion after "a party suspending performance" at the beginning of the paragraph of the expression "or preventing the handing over of goods".

99. In connexion with paragraph 2 one representative pointed out that the law in most countries allowed a seller to stop goods in transit only in clearly specified cases and suggested that the Uniform Law should also spell out the particular situation in which article 73 would be applicable.

100. One representative and one observer held that the deletion of paragraph 3 of article 73 as suggested in the report of the Secretary-General would leave third parties without any recourse and suggested that this paragraph should therefore be retained.

101. The Working Group requested the drafting party set up for consideration of article 75, paragraph 2 (Drafting Party IV),¹⁹ in view of the interrelation between articles 73 and 75, also to consider article 73 and prepare a revised draft thereof. The drafting party submitted to the Working Group at its 13th meeting a revised text of article 73. Many representatives and observers made comments on this draft and submitted proposals both on the substance and the language of the proposed text. In view of these comments and proposals, the Working Group requested Drafting Party IV to reconsider the draft it had recommended and to submit a revised version thereof.

102. Drafting Party IV submitted its revised draft of article 73 to the 15th meeting of the Working Group on 30 January 1974.

103. One representative expressed the view that there was a discrepancy between the proposed text and article 76 because the protection provided by the former was too narrow while that provided by the latter was too broad. The combined effect of these two articles was to force the parties to avoid the contract rather than to rely on the less drastic remedy of suspension of performance.

104. One observer pointed out that under paragraph 1 of the article the deterioration of the economic situation of a party could only be taken into consideration if this occurred or became known to the other party after the conclusion of the contract. He further noted that paragraph 3 was intended to cover also substantial delay in performance.

105. The representatives of Brazil, Ghana, Hungary and Kenya did not object to the adoption of this article, as suggested by the drafting party, but reserved the right to suggest modification of the text at a later session.

106. The Working Group decided to adopt article 73 as suggested by Drafting Party IV and noted the reservations mentioned in paragraph 105 above. The text of article 73 as adopted by the Working Group reads as follows:

"1. A party may suspend the performance of his obligation when, after the conclusion of the contract, a serious deterioration in the economic situation of the other party or his conduct in preparing to perform or in actually performing the contract, gives reasonable grounds to conclude that the other party will not perform a substantial part of his obligations.

"2. If the seller has already dispatched the goods before the grounds described in paragraph 1 become evident, he may prevent the handing over of the goods to the buyer even if the latter holds a docu-

¹⁹ See para. 121 below.

ment which entitles him to obtain them. The provision of the present paragraph relates only to the rights in the goods as between the buyer and the seller.

"3. A party suspending performance, whether before or after dispatch of the goods, shall promptly notify the other party thereof, and shall continue with performance if the other party provides adequate assurance of his performance. On the failure by the other party, within a reasonable time after notice, to provide such assurance, the party who suspended performance may avoid the contract."

SECTION II. EXEMPTIONS

Article 74

107. Article 74 of ULIS reads as follows:

"1. Where one of the parties has not performed one of his obligations, he shall not be liable for such non-performance if he can prove that it was due to circumstances which, according to the intention of the parties at the time of the conclusion of the contract, he was not bound to take into account or to avoid or to overcome; in the absence of any expression of the intention of the parties, regard shall be had to what reasonable persons in the same situation would have intended.

"2. Where the circumstances which gave rise to the non-performance of the obligation constituted only a temporary impediment to performance, the party in default shall nevertheless be permanently relieved of his obligation if, by reason of the delay, performance would be so radically changed as to amount to the performance of an obligation quite different from that contemplated by the contract.

"3. The relief provided by this article for one of the parties shall not exclude the avoidance of the contract under some other provision of the present law or deprive the other party of any right which he has under the present law to reduce the price, unless the circumstances which entitled the first party to relief were caused by the act of the other party or of some person for whose conduct he was responsible."

108. Studies submitted by members of the Working Group analysed the above article from the point of view of drafting and of substance.²⁰ As to substance, the central objection was that under paragraph 1 a party could be too readily excused from performing his contract. Thus, grounds for such excuse were not limited to physical or legal impossibility, or to circumstances where performance had been radically changed, but might extend to situations in which performance had become unexpectedly onerous; one commentary had envisaged the possibility that a seller might claim exemption under article 74 on the ground of an unforeseen rise in prices. Included in the studies were proposals for the redrafting of article 74 designed to narrow the grounds for excuse, and to clarify the relationship among the three paragraphs of the article. In discussing these proposals, several representatives supported the above objectives: i.e. to narrow the

grounds for exoneration and to make them more objective. In this connexion it was noted that it was important that exoneration should only be available on the occurrence of an objective obstacle or impediment.

109. Some representatives suggested that the central issue was the allocation of risks from unforeseen events, and suggested that the redraft of article 74 should refer to the risk factor. Others stated that while this was a correct analysis of the underlying problem, it would be difficult to draft explicitly in terms of risk allocation.

110. One representative and one observer suggested that the article should be drafted in terms of whether the party claiming exoneration had been at fault in failing to perform; others indicated that in their view the principle of fault should be used in the draft but this principle could come into play only following the occurrence of a serious event creating an impediment or obstacle to performance.

111. One observer suggested that a party who wished to be relieved of his liability for non-performance should have a duty to notify the other party. Another observer noted that in redrafting the provision it should be made clear that the exemption should be limited to liability for damages; the obligation to pay the price should not be excused.

112. One observer emphasized that article 74 could possibly be invoked in cases where damages were due to hidden defect in the goods sold. However, such interpretation would lead to a considerable extension of the causes of exemption which, in this particular field, were dealt with by the majority of the legal systems in a very restricted way. He, therefore, came to the conclusion that it would be appropriate to have a provision indicating clearly that article 74 would not be applicable in the case of damages caused by hidden defect in the goods.

113. The Working Group set up a drafting party (Drafting Party V) composed of the representatives of Ghana, Hungary, the United Kingdom and the USSR and the observer for Norway and requested the drafting party to prepare a revised draft of article 74.

114. Drafting Party V informed the Working Group at its 16th meeting on 30 January 1974 that it had not been able to agree on a final draft. It considered that further study would have to be made of the circumstances in which either party may declare the contract avoided (a matter which was partially covered by article 74, paragraph 3 of ULIS) and of the consequences which should follow from such avoidance. It suggested, however, that the draft provisionally adopted by the drafting party and an alternative proposal submitted by an observer should be included in the report to facilitate later consideration of this article.

115. The Working Group decided to record the text provisionally adopted by Drafting Party V and the alternative proposal submitted by an observer. The texts of these proposals read:

A. Text of article 74 provisionally adopted by Drafting Party V

"1. Where a party has not performed one of his obligations in accordance with the contract and the

²⁰ See sections I and X of annex III to this report, reproduced below in section 4.

present law, he shall not be liable in damages for such non-performance if he proves that, owing to circumstances which have occurred without fault on his part, performance of that obligation has become impossible or has so radically changed as to amount to performance of an obligation quite different from that contemplated by the contract. For this purpose there shall be deemed to be fault unless the non-performing party proves that he could not reasonably have been expected to take into account, or to avoid or to overcome the circumstances.

"2. Where the non-performance of the seller is due to non-performance by a subcontractor, the seller shall be exempt from liability only if he is exempt under the provisions of the preceding paragraph and if the subcontractor would also be exempt if the provisions of that paragraph were applied to him.

"3. Where the impossibility of performance within the provisions of paragraph 1 of this article is only temporary, the exemption provided by this article shall cease to be available to the non-performing party when the impossibility is removed, unless the performance required has then so radically changed as to amount to performance of an obligation quite different from that contemplated by the contract.

"4. The non-performing party shall notify the other party of the existence of the circumstances which affect his performance within the provisions of the preceding paragraphs and the extent to which they affect it. If he fails to do so within a reasonable time after he knows or ought to have known of the existence of the circumstances, he shall be liable for the damage resulting from such failure."

B. *Alternative proposal*

"1. Where a party has not performed one of his obligations [in accordance with the contract and the present law], he shall not be liable [in damages] for such non-performance if he proves that it was due to an impediment [which has occurred without any fault on his side and being] of a kind which could not reasonably be expected to be taken into account at the time of the conclusion of the contract or to be avoided or overcome thereafter.

"2. Where the circumstances which gave rise to the non-performance constitute only a temporary impediment, the exemption shall apply only to the necessary delay in performance. Nevertheless, the party concerned shall be permanently relieved of his obligation if, when the impediment is removed, performance would, by reason of the delay, be so radically changed as to amount to the performance of an obligation quite different from that contemplated by the contract.

"3. The non-performing party shall notify the other party of the existence of the impediment and its effect on his ability to perform. If he fails to do so within a reasonable time after he knows or ought to have known of the existence of the impediment, he shall be liable for the damage resulting from this failure.

"4. The exemption provided by this article for one of the parties shall not deprive the other party of any right which he has under the present law to

declare the contract avoided or to reduce the price, unless the impediment which gave rise to the exemption of the first party was caused by the act of the other party [or of some person for whose conduct he was responsible]."

SECTION III. SUPPLEMENTARY RULES CONCERNING THE AVOIDANCE OF THE CONTRACT

Article 75

116. Article 75 of ULIS reads:

"1. Where, in the case of contracts for delivery of goods by instalments, by reason of any failure by one party to perform any of his obligations under the contract in respect of any instalment, the other party has good reason to fear failure of performance in respect of future instalments, he may declare the contract avoided for the future, provided he does so promptly.

"2. The buyer may also, provided that he does so promptly, declare the contract avoided in respect of future deliveries or in respect of deliveries already made or both, if by reason of their independence such deliveries would be worthless to him."

117. One representative drew attention to his comments in section I of document A/CN.9/WG.2/WP.17/Add.1* suggesting that in order to bring this article into conformity with the provisions on fundamental breach, the expression "failure of performance" should be replaced by the expression "a fundamental breach". Another representative noted that the provision allowing avoidance of the contract only if avoidance is done "promptly" was not in conformity with the general remedial provision on avoidance as suggested by the Secretary-General in article [72 bis] which allowed avoidance "within a reasonable time". The same representative noted that paragraph 1 of article 75 might be irrelevant in view of the provisions contained in article [72 bis].

118. As regards paragraph 2 of article 75 several representatives were of the opinion that an objective test was needed to determine the situation when the contract could be avoided in respect of future instalments. The test of worthlessness of goods to the buyer was considered to be too subjective and also too strict: even highly defective goods might not be worthless. One representative recalled his proposal in section II of document A/CN.9/WG.2/WP.17/Add.1* that the expression at the end of the paragraph "such deliveries would be worthless to him" should be replaced by the phrase "the value of such deliveries to him would be substantially impaired". Some representatives supported this modification; others thought that the original version of ULIS was preferable. In order to make the text more objective, one representative suggested that the words "to him" be replaced by the phrase "to a reasonable person in the buyer's position".

119. One observer drew attention to the difference in the English and French versions of this paragraph. The English version reads "such deliveries would be worthless to him" while the French text talks of "ces livraisons n'ont pas d'intérêt pour lui". The same ob-

* Annex III to this report, reproduced below in section 4.

server suggested that the approach found in the French version should be the basis for the new formulation. One representative suggested that the expression "such deliveries should not serve the purpose for which they were required" should be used. Another proposal favoured the phrase "such deliveries would not serve their normal purpose". This latter proposal, however, was objected to by several representatives.

120. One representative expressed the opinion that the reference in paragraph 2 to future deliveries might cause confusion because such deliveries were dealt with in paragraph 1 of the article. In his view, therefore, paragraph 2 should be confined to past deliveries.

121. The Working Group set up a drafting party (Drafting Party IV) composed of the representatives of France, Ghana, India, Japan and the United States and the observer for the ICC and requested the Drafting Party to prepare a revised draft of article 75. Drafting Party IV submitted its proposal to the Working Group at its 13th meeting on 29 January 1974 (see paragraph 126 below).

122. One representative expressed the view that there was little or no practical difference between the suggested text of article 75 incorporating the concept of fundamental breach and article 76 and, therefore, one of them seemed to be superfluous. Another representative, however, was of the opinion that these articles provided for different situations.

123. One observer suggested that the phrase "of any given delivery or" should be inserted in paragraph 2 before the words "of future deliveries" and that the expression "or serve any other reasonable purpose for the buyer" be added to the end of this paragraph. The former proposal was supported by another representative and both proposals objected to by several other representatives.

124. Some representatives pointed out that other articles of the law as revised by the Working Group provided for the right of the interested party to avoid the contract within a reasonable time and held that there was no reason for providing in this article for the exercise of the right of avoidance "promptly".

125. One observer suggested that paragraphs 1 and 2 should be merged by connecting them with a sentence commencing "He may at that time also declare the contract avoided in respect of ...".

126. The Working Group decided to adopt article 75 as suggested by the Drafting Party with a slight modification relating to the word "promptly". The text as adopted reads:

"1. Where, in the case of contracts for delivery of goods by instalments, by reason of any failure by one party to perform any of his obligations under the contract in respect of any instalment, the other party has good reason to fear a fundamental breach in respect of future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

"2. A buyer, avoiding the contract in respect of future deliveries, may also, provided that he does so at the time, declare the contract avoided in respect of deliveries already made, if by reason of

their interdependence, deliveries already made could not be used for the purpose contemplated by the parties in entering the contract."

127. The Working Group further decided that articles 73, 75 and 76 should comprise a new section I within chapter III of the Law, entitled "Anticipatory breach" and that the provisions providing for exemptions (article 74 of ULIS) should follow that section.

Article 76

128. Article 76 of ULIS reads as follows:

"Where prior to the date fixed for performance of the contract it is clear that one of the parties will commit a fundamental breach of the contract, the other party shall have the right to declare the contract avoided."

129. The Working Group agreed to delete the word "fixed" in the first line of the article in accordance with the suggestion contained in paragraph 29 of document A/CN.9/WG.2/WP.17.

130. The above document also contained a proposal (paragraph 31) to revert to the 1956 wording of this article. That version provided that a party could declare the contract avoided if the other party "so conducts himself as to disclose an intention to commit a fundamental breach of contract". This proposal was supported by one representative who referred to the doctrine of repudiation and held that an anticipatory breach could never be safely assured unless an intention to this effect was disclosed. Having regard to rapidly improving technology and communication systems, there was some merit in restricting the scope of the article as proposed in paragraph 31 of A/CN.9/WG.2/WP.17. This proposal was opposed by several representatives.

131. Some representatives and an observer saw no difference between the case where future breach of contract would be a result of repudiation and where it would be due to another reason, as for instance the burning down of the manufacturer's workshop. One representative pointed out that a great majority of the States attending the 1964 Hague Conference voted for the elimination of the concept of intention from the text. However, he thought that article 76 should be confined to the conduct of the parties and suggested that the expression "from the conduct of the parties" should be inserted after the word "clear". This proposal was objected to by a number of representatives on the grounds that it would narrow the scope of the article. An observer proposed that the insertion should read: "from the conduct or situation of one of the parties, or the conditions on which his performance is dependent".

132. Several representatives expressed their views on the usefulness of merging articles 76 and 48 of ULIS and on the text proposed to this effect by one of the representatives.²¹ While some representatives agreed in principle with such a merger, one observer noted that he preferred to keep these articles separate.

133. One observer suggested that article 76 should contain a provision whereby a guarantee or adequate assurance of performance would prevent a declaration

²¹ A/CN.9/WG.2/WP.17, para. 33.

of avoidance. Some representatives who commented on this proposal expressed their disagreement therewith.

134. The Working Group decided to adopt article 76 of ULIS with the change mentioned in paragraph 129 above. The article as adopted reads:

"Where prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of the contract, the other party shall have the right to declare the contract avoided."

Article 77

135. Article 77 of ULIS reads:

"Where the contract has been avoided under article 75 or article 76, the party declaring the contract avoided may claim damages in accordance with articles 84 to 87."

136. It was observed that this article repeated a rule that had already been established under the basic rules on remedies approved by the Working Group.

137. The Working Group decided to delete this article. It also noted that at its fourth session consideration of article 48 had been deferred pending action on articles 75 to 77. The Working Group decided to delete article 48.

Article 78

138. Article 78 of ULIS reads as follows:

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

"2. If one party has performed the contract either wholly or in part, he may claim the return of whatever he has supplied or paid under the contract. If both parties are required to make restitution, they shall do so concurrently."

139. One observer suggested that the right of the seller to claim the return of the goods should be restricted to cases where he had specifically reserved such right in the contract and even in such cases he should lose that right after the lapse of a certain period. Another observer supported the idea that the seller should only be allowed to claim return of the goods within a certain period but raised the question whether return of the goods could also be claimed where the buyer had gone into bankruptcy or where the goods had been incorporated into his property.

140. Several representatives disagreed with the above proposals. It was held that the party who had fulfilled his obligation should in principle be able to claim the return of whatever he had supplied. This would not apply if the goods had been incorporated in other property or where the buyer went into bankruptcy; in the latter case the national law of the buyer would apply.

141. One representative expressed concern about the solution in this article, according to which in cases where one of the parties avoided the contract that had been partly performed either party could have the right to treat the performance as interdependent and claim restitution without any limitation. He considered that

the solution in the United States Uniform Commercial Code, under which there was a presumption of divisibility, was better.

142. Another representative pointed out that there was some inconsistency between the provisions of the article and those of article 74. Paragraph 1 of this article provided that avoidance released both parties from their obligations "subject to any damage which may be due", while article 74 exempted the party from liability for damages.

143. One representative introduced the following proposal with the request that it should be considered at a later session of the Working Group:

"1. Where the contract is avoided for a fundamental breach which is not excused under article 74, the avoiding party is released from all of his obligations under the contract and may claim damages in accordance with article ...

"2. Where the avoiding party has performed in whole or in part and has not avoided that part of the contract which has been performed, he may require the other party to perform his obligation with regard to that part. If that part of the contract has been avoided, the avoiding party may claim the return of what was supplied or paid. In either case, the avoiding party may claim damages for breach of the unperformed part in accordance with articles ...

"3. If the party in breach has, at the time of avoidance, performed part of his obligation, he may claim as restitution the value of that part of the performance to the extent that such value exceeds any claims for performance, damages or restitution established by the other party."

144. The Working Group decided to defer final action on this article until its next session.

Article 79

145. Article 79 of ULIS reads as follows:

"1. The buyer shall lose his right to declare the contract avoided where it is impossible for him to return the goods in the condition in which he received them.

"2. Nevertheless, the buyer may declare the contract avoided:

"(a) If the goods or part of the goods have perished or deteriorated as a result of the defect which justifies the avoidance;

"(b) If the goods or part of the goods have perished or deteriorated as a result of the examination prescribed in article 38;

"(c) If part of the goods have been consumed or transformed by the buyer in the course of normal use before the lack of conformity with the contract was discovered;

"(d) If the impossibility of returning the goods or of returning them in the condition in which they were received is not due to the act of the buyer or of some other person for whose conduct he is responsible;

"(e) If the deterioration or transformation of the goods is unimportant."

146. The Working Group agreed to adopt the proposals contained in paragraph 41 of document A/CN.9/WG.2/WP.17, that the phrase "or to require the seller to deliver substitute goods" be inserted after the words "avoided" in paragraph 1 of the article, and that the introductory phrase in paragraph 2 should be redrafted to read: "Nevertheless the preceding paragraph shall not apply:". The Working Group also agreed to insert the words "have been sold in the normal course of business or" after the introductory words "if part of the goods" in subparagraph 2 (c) and to add to the end of this subparagraph the phrase "or ought to have been discovered".

147. One representative drew attention to the proposal contained in paragraph 45 of document A/CN.9/WG.2/WP.17. However, the proposal was opposed by some delegates who held that it did not cover cases in which goods had perished or deteriorated because of their own nature. It was proposed that this difficulty could be solved by adding to the end of the subparagraph the words "or is due to the nature of the goods"; however, this proposal was opposed on the ground that the addition would make the exception too broad. It was stated that subparagraph 2 (d) to which the proposal related provided for cases where a defect was present in the goods at the time of their handing over and in such cases the buyer's right of avoidance should be presumed regardless of the fact that the goods might have perished before discovery of the defect.

148. Several representatives suggested that the difference between the proposed language and paragraph 1 of the article might create confusion; because of this and other reasons mentioned above, subparagraph (d) should be retained without any change. The representative of France reserved his country's position on subparagraph 2 (d) until final adoption of chapter VI on passing of the risk.

149. One representative suggested deletion of subparagraph (e) in line with the Working Group's decision to eliminate from article 33 the former paragraph 2. This proposal was supported by another representative and opposed by some observers.

150. The Working Group decided to adopt article 79 as follows:

"1. The buyer shall lose his right to declare the contract avoided or to require the seller to deliver substitute goods where it is impossible for him to return the goods in the condition in which he received them.

"2. Nevertheless the preceding paragraph shall not apply:

"(a) If the goods or part of the goods have perished or deteriorated as a result of the defect which justifies the avoidance;

"(b) If the goods or part of the goods have perished or deteriorated as a result of the examination prescribed in article 38;

"(c) If part of the goods have been sold in the normal course of business or have been consumed or transferred by the buyer in the course of normal use before the lack of conformity with the contract was discovered or ought to have been discovered;

"(d) If the impossibility of returning the goods or of returning them in the condition in which they were received is not due to the act of the buyer or of some other person for whose conduct he is responsible;

"(e) If the deterioration or transformation of the goods is unimportant."

151. One representative suggested that since article 79 deals with a problem unique to the buyer, at the second reading of the Law the Working Group should place this article in chapter III. He further suggested that the Working Group at the same time should consider redrafting article 79 to read as follows:

"1. Where the buyer has taken over all or part of the goods called for under the contract and subsequently discovers a non-conformity that would justify avoidance, the buyer shall lose his right to avoid that part of the contract where it is impossible for him to return the goods in the condition in which he received them."

2. To read as the text of paragraph 70 (2) adopted by the Working Group in paragraph 146 above.

3. To read as Article 80 of ULIS.

Article 80

152. Article 80 of ULIS reads as follows:

"The buyer who has lost the right to declare the contract avoided by virtue of article 79 shall retain all the other rights conferred on him by the present law."

153. Several opinions were expressed as to the need for this article.

154. The Working Group decided to retain this article with the addition mentioned in paragraph 50 of document A/CN.9/WG.2/WP.17. The article as adopted reads:

"The buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods by virtue of article 79 shall retain all the other rights conferred on him by the present law."

Article 81

155. Article 81 of ULIS reads as follows:

"1. Where the seller is under an obligation to refund the price, he shall also be liable for the interest thereon at the rate fixed by article 83, as from the date of payment.

"2. The buyer shall be liable to account to the seller for all benefits which he has derived from the goods or part of them, as the case may be:

"(a) Where he is under an obligation to return the goods or part of them, or

"(b) Where it is impossible for him to return the goods or part of them, but the contract is nevertheless avoided."

156. The Working Group decided to adopt this article with the modification mentioned in paragraph 54 of document A/CN.9/WG.2/WP.17. The article as adopted reads:

"1. Where the seller is under an obligation to refund the price, he shall also be liable for the interest thereon at the rate fixed by article 83, as from the date of payment.

"2. The buyer shall be liable to account to the seller for all benefits which he has derived from the goods or part of them, as the case may be:

"(a) Where he is under an obligation to return the goods or part of them; or

"(b) Where it is impossible for him to return the goods or part of them, but he has nevertheless exercised his right to declare the contract avoided or to require the seller to deliver substitute goods."

SECTION IV. SUPPLEMENTARY RULES CONCERNING DAMAGES

Article 82

157. Article 82 of ULIS reads as follows:

"Where the contract is not avoided, damages for a breach of contract by one party shall consist of a sum equal to the loss, including loss of profit, suffered by the other party. Such damages shall not exceed the loss which the party in breach ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which then were known or ought to have been known to him, as a possible consequence of the breach of the contract."

158. The discussion on this article was focused on the draft text contained in paragraph 57 of document A/CN.9/WG.2/WP.17. Most representatives and observers who spoke on the issue supported the proposal, some with certain modifications.

159. Several representatives held that the restriction, in both ULIS and the proposed text, of the amount of damages which could be claimed for breach of contract was not an equitable solution in all situations. However, most speakers agreed that some restriction on consequential damages was necessary. The views which were expressed differed as to whether the principle of foreseeability contained both in ULIS and the proposed text was sufficiently objective.

160. One representative suggested the deletion of the second paragraph of the draft proposal.

161. One representative recalled the comments contained in paragraph 58 of document A/CN.9/WG.2/WP.17 concerning the French text of this article. One observer noted that the omission of any reference to loss of profit might cause doubts in the English text as well.

162. The Working Group decided to set up a drafting party (Drafting Party VI) composed of the representatives of France, Hungary, India, Japan, Mexico and the USSR and the observer for Norway and requested the Drafting Party to prepare a revised draft of this article.

163. Drafting Party VI submitted its proposal to the Working Group at its 16th meeting on 31 January 1974.

164. The representatives of Brazil and the USSR expressed the opinion that restriction on damages contained in the second sentence of the draft proposal was

not necessary and reserved their rights to return to this question at a later stage.

165. The Working Group took note of the reservations in paragraph 164 above and decided to adopt the text proposed by Drafting Party VI. The text as adopted reads:

"Damages for breach of contract by one party shall consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages shall not exceed the loss which the party in breach had foreseen or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which then were known or ought to have been known to him, as a possible consequence of the breach of contract."

Article 83

166. Article 83 of ULIS reads as follows:

"Where the breach of contract consists of delay in the payment of the price, the seller shall in any event be entitled to interest on such sum as in arrear at a rate equal to the official discount rate in the country where he has his place of business or, if he has no place of business, his habitual residence, plus 1 per cent."

167. The Working Group after consideration of the proposals in paragraph 61 of document A/CN.9/WG.2/WP.17 decided to adopt article 83 without any change.

Article 84

168. Article 84 of ULIS reads as follows:

"1. In case of avoidance of the contract, where there is a current price for the goods, damages shall be equal to the difference between the price fixed by the contract and the current price on the date on which the contract is avoided.

"2. In calculating the amount of damages under paragraph 1 of this article, the current price to be taken into account shall be that prevailing in the market in which the transaction took place or, if there is no such current price or if its application is inappropriate, the price in a market which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods."

169. Most representatives and observers who spoke on this article concentrated their comments on the method of assessment of damages. Several representatives expressed the view that the defaulting party should compensate for the loss actually sustained by the other party and thus put the injured party in the position that he would have been in had the contract been duly performed, irrespective of whether in such a case compensation would be higher than if calculated on the basis provided for in article 89. It was pointed out that under article 86, which referred to loss of profit, the injured party may also claim compensation caused by the breach of the contract.

170. The proposal contained in paragraph 63 of document A/CN.9/WG.2/WP.17, suggesting that the reference in paragraph 1 of article 84 to the date "on which the contract is avoided" should be replaced

by a reference to the date "on which delivery took place or should have taken place", was supported by a number of representatives. It was pointed out that this language eliminated the possibility of speculation while the present language of ULIS opened the door thereto because the injured party was free to avoid the contract on a date when market conditions were most favourable for him.

171. Several representatives supported the present solution in ULIS while others proposed different formulations. Several representatives suggested that article 84 should be worded in such a way as to show clearly that the aggrieved party had the option to rely either on this article or on article 82. One representative, supported by another, suggested that distinction should be made between cases where avoidance occurred before the date agreed for delivery and those where avoidance occurred after that date. Another representative proposed the assessment of damage on the basis of the "current price on the date on which damages were actually paid".

172. One representative noted that the expression "current price" in the text may lead to some problems of interpretation in respect of goods which were not quoted on the market.

173. One representative expressed the view that the purpose of this article was to set forth guidelines for the amount of damage. This view was opposed by an observer who held that the article contained substantive provisions as to the maximum amount of damages.

174. The Working Group decided to set up a drafting party (Drafting Party VII) composed of the representatives of Austria, Brazil, Japan and the United States and requested the Drafting Party to prepare a draft of this article.

175. Drafting Party VII submitted its proposal to the 15th meeting of the Working Group on 30 January 1974.

176. The Working Group decided to adopt the text proposed by the Drafting Party with a minor modification suggested by some representatives. The text as adopted reads:

"1. In case of avoidance of the contract, the party claiming damages may rely upon the provision of article 82 or, where there is a current price for the goods, recover the difference between the price fixed by the contract and the current price on the date on which the contract is avoided.

"2. In calculating the amount of damages under paragraph 1 of this article, the current price to be taken into account shall be that prevailing at the place where delivery of the goods is to be effected or, if there is no such current price, the price at another place which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods."

Article 85

177. Article 85 of ULIS reads as follows:

"If the buyer has bought goods in replacement or the seller has resold goods in a reasonable manner, he may recover the difference between the contract

price and the price paid for the goods bought in replacement or that obtained by the resale."

178. One representative, supported by others, suggested that it was important that this article should provide not only for the manner in which the replacement or resale of the goods should be effected but also for the time within which such act had to take place. He therefore suggested the addition at the end of the article of the expression "if the resale or replacement occurred in a reasonable manner and within a reasonable time after avoidance".

179. Some representatives expressed the view that article 85 was not necessary and should be deleted because application of other articles containing general rules on damages to the special cases dealt with in this article would lead to the same result as provided for in article 85. The deletion of this article, however, was objected to on the basis that the provisions contained therein were of an important practical nature and eliminated the need to go through a difficult construction of interpretation of other articles to arrive at the same solution.

180. Several representatives pointed out the close relationship between articles 82 to 89 and suggested that these articles be considered in conjunction.

181. The Working Group requested the Drafting Party set up for consideration of article 84,²² in view of the comments and proposals of representatives on this article, to prepare a draft on article 85.

182. Drafting Party VII submitted its proposal to the Working Group at its 15th meeting on 30 January 1974. The Working Group decided to adopt the text submitted by the Drafting Party with a minor modification. The text as adopted reads:

"If the contract is avoided and, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, he may, instead of claiming damages under articles 82 or 84, recover the difference between the contract price and the price paid for the goods bought in replacement or that obtained by the resale."

Article 86

183. Article 86 of ULIS reads as follows:

"The damages referred to in articles 84 and 85 may be increased by the amount of any reasonable expenses incurred as a result of the breach or up to the amount of any loss, including loss of profit, which should have been foreseen by the party in breach, at the time of the conclusion of the contract, in the light of the facts and matters which were known or ought to have been known to him, as a possible consequence of the breach of the contract."

184. Several representatives suggested deletion of this article on the grounds that the revised text of article 82 made article 86 unnecessary.

185. The Working Group decided to delete this article.

²² See para. 174 above.

Article 87

186. Article 87 of ULIS reads as follows:

"If there is no current price for the goods, damages shall be calculated on the same basis as that provided in article 82."

187. The Working Group decided to delete this article.

Article 88

188. Article 88 of ULIS reads as follows:

"The party who relies on a breach of the contract shall adopt all reasonable measures to mitigate the loss resulting from the breach. If he fails to adopt such measures, the party in breach may claim a reduction in the damages."

189. One representative suggested the deletion of this article; others, however, were of the opinion that the article served a useful purpose and that it should be retained.

190. Several drafting proposals were submitted. It was suggested that it was the judge who had to decide what measures the injured party could be expected to take in order to mitigate the damages and, therefore, the word "all" before the expression "reasonable measures" should be deleted. Another proposal which received considerable support called for replacement of the expression "all reasonable measures" by the phrase "such measures as may be reasonable in the circumstances". A further proposal suggested that if reference to "loss" was retained then the words "including loss of profit" should be inserted in the text. Finally, it was suggested that the phrase "in the amount of loss which could have been reasonably avoided" should be added to the end of the article.

191. The Working Group requested the Drafting Party originally set up for consideration of article 84 (Drafting Party VII)²³ to consider also article 88 and to prepare a draft text thereof.

192. Drafting Party VII submitted its proposal to the Working Group at its 15th meeting on 30 January 1974 (see paragraph 194 below).

193. One representative commenting on the text submitted by the Drafting Party suggested that the phrase "reduction in the damages in the amount which . . ." in the draft should be replaced by the words "reduction in the amount of damages which . . .".

194. The Working Group decided to adopt the draft as submitted by Drafting Party VII. The text as adopted reads:

"The party who relies on a breach of the contract shall adopt such measures as may be reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to adopt such measures, the party in breach may claim a reduction in the damages in the amount which should have been mitigated."

Article 89

195. Article 89 of ULIS reads as follows:

"In case of fraud, damages shall be determined by the rules applicable in respect of contracts of sale not governed by the present Law."

²³ See para. 174 above.

196. Several comments were made as to the need for this article. Those who preferred its deletion noted that national law would apply even in the absence of this article. The view was also expressed that in case of deletion of this article an express provision would have to be included in the Law that the provisions of the Law were without prejudice to the effect of national law in cases of fraud.

197. Several representatives expressed their agreement with the substance of the proposal contained in paragraph 73 of document A/CN.9/WG.2/WP.17. One representative pointed out that this proposal would in practice raise the question of contract validity which was outside the scope of the Law. He noted further that fraud and contract validity were matters of public policy regulated by mandatory provisions of national law.

198. The Working Group decided to retain article 89 of ULIS without any change.

199. On the basis of a proposal by an observer, the Working Group further decided to delete the subtitles in chapter V, section IV of ULIS.

SECTION V. EXPENSES

Article 90

200. Article 90 of ULIS reads as follows:

"The expenses of delivery shall be borne by the seller; all expenses after delivery shall be borne by the buyer."

201. After a discussion on the need for this article and its relation with usages of international trade the Working Group decided to delete this article.

SECTION VI. PRESERVATION OF THE GOODS

Article 91-95

202. Articles 91 to 95 of ULIS read as follows:

Article 91

"Where the buyer is in delay in taking delivery of the goods or in paying the price, the seller shall take reasonable steps to preserve the goods; he shall have the right to retain them until he has been reimbursed his reasonable expenses by the buyer."

Article 92

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

"2. Where goods despatched to the buyer have been put at his disposal at their place of destination and he exercises the right to reject them, he shall be bound to take possession of them on behalf of the seller, provided that this may be done without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision shall not apply where the seller or a person authorized to take charge of the goods on his behalf is present at such destination."

Article 93

"The party who is under an obligation to take steps to preserve the goods may deposit them in the warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable."

Article 94

"1. The party who, in the cases to which articles 91 and 92 apply, is under an obligation to take steps to preserve the goods may sell them by any appropriate means, provided that there has been unreasonable delay by the other party in accepting them or taking them back or in paying the cost of preservation and provided that due notice has been given to the other party of the intention to sell.

"2. The party selling the goods shall have the right to retain out of the proceeds of sale an amount equal to the reasonable costs of preserving the goods and of selling them and shall transmit the balance to the other party."

Article 95

"Where, in the cases to which articles 91 and 92 apply, the goods are subject to loss or rapid deterioration or their preservation would involve unreasonable expense, the party under the duty to preserve them is bound to sell them in accordance with article 94."

203. In respect of article 91 one representative expressed the view that this article was only useful in cases where property had passed before delivery.

204. Another representative noted that the notion of right to reject in article 92 was not defined and not previously used in the Law.

205. The Working Group decided to adopt articles 91-95 of ULIS without any change.

CHAPTER VI. PASSING OF THE RISK

206. Chapter VI of ULIS: Passing of the risk (articles 96-101) was considered by the Working Group in three steps: (1) the introductory provision contained in article 96; (2) a group of three interconnected substantive articles (articles 97-99); (3) two concluding articles (articles 100-101).

Article 96

207. Article 96 of ULIS reads as follows:

"Where the risk has passed to the buyer, he shall pay the price notwithstanding the loss or deterioration of the goods, unless this is due to the act of the seller or of some other person for whose conduct the seller is responsible."

208. Consideration was given to whether this article should be retained or whether it should be omitted as unnecessary.

209. On the one hand, it was suggested that the provision that when the risk has passed to the buyer he shall pay the price "notwithstanding the loss or deterioration of the goods", stated an obvious consequence of the passing of risk, and was unnecessary. Attention was directed to article 35 as approved by the Working

Group. It was further indicated that the article appeared to state a definition of risk of loss, but was inadequate for that purpose.

210. On the other hand, it was stated that although the rule of article 96 might be obvious to lawyers who had worked with the Uniform Law, a statement of this rule in chapter VI could be helpful to others. Most representatives were of the view that article 96 should be retained. One representative suggested that this article should be placed after articles 97-99.

211. A question was raised concerning the retention of the concluding phrase of the article, dealing with loss or deterioration which was due to an act of the seller "or some other person for whose conduct the seller is responsible". It was noted that this principle was operative, without express provision, throughout the Uniform Law; to state this principle in isolated instances would cast doubt on the general principle. It was concluded that this involved a question to which attention should be given by the Working Group in its final reading of the draft.

212. The Working Group decided to approve article 96, but to defer final action on the phrase "or of some other person for whose conduct the seller is responsible" until a further session.

Articles 97-99

213. The Working Group considered together the provisions of three related articles—articles 97-99. These articles read as follows:

Article 97

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

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

Article 98

"1. Where the handing over of the goods is delayed owing to the breach of an obligation of the buyer, the risk shall pass to the buyer as from the last date when, apart from such breach, the handing over could have been made in accordance with the contract.

"2. Where the contract relates to a sale of unascertained goods, delay on the part of the buyer shall cause the risk to pass only when the seller has set aside goods manifestly appropriated to the contract and has notified the buyer that this has been done.

"3. Where unascertained goods are of such a kind that the seller cannot set aside a part of them until the buyer takes delivery, it shall be sufficient for the seller to do all acts necessary to enable the buyer to take delivery."

Article 99

"1. Where the sale is of goods in transit by sea, the risk shall be borne by the buyer as from the time at which the goods were handed over to the carrier.

"2. Where the seller, at the time of the conclusion of the contract, knew or ought to have known that the goods had been lost or had deteriorated, the risk shall remain with him until the time of the conclusion of the contract."

214. The report of the Secretary-General on issues presented by chapters IV and VI of the Uniform Law discussed the provisions of chapter VI of ULIS with special reference to the decision of the Working Group, at the third session, to delete the definition of "delivery" in article 19 of ULIS.²⁴ This report (paragraph 76) proposed a revision and consolidation of the above articles. One aspect of this proposal was that risk would pass when the goods were "handed over" to the buyer or to a carrier; the report discussed the allocation of risk of roles in relation, *inter alia*, to the question as to which party, under normal commercial practice, would be more likely to have effective insurance coverage for the goods (paragraphs 70-73).

215. The Working Group discussed the question as to whether the central concept for transfer of risk should be "delivery" of the goods or the "handing over" of the goods to the buyer. Some representatives preferred the use of "delivery" as the key concept, and suggested that the rules on risk in chapter VI should refer to the rules on "delivery" in article 20. In their view, article 20 constituted an adequate definition of "delivery"; on the other hand it was suggested that article 20 defined the seller's duty of performance, and that under article 20 the seller's duty could be performed even though the buyer never took over physical possession of the goods.

216. Some delegates questioned the clarity of the concept of "handing over" the goods; it was suggested that placing the goods at the buyer's disposal on the seller's premises might be considered as "handing over" the goods. In reply it was noted that "handing over" had been used in various articles of ULIS and in article 20 as approved by the Working Group, and that the term had been clearly understood as referring to a transfer of possession in which the buyer or carrier took over the goods. Some representatives stated that the Uniform Law should be clear on this point, in order to place the risk of loss with the party who would have possession and control of the goods, and who would be most likely to have effective insurance coverage. Consideration was given to expressions which would be clearer on this point, such as "taking over" the goods.

217. In the light of these discussions, one representative proposed a draft proposal which the Working Group used as the basis for its further deliberations. This proposal was as follows:

Article 97

"1. Where the contract of sale involves carriage of the goods, the risk shall pass to the buyer when

the goods are handed over to the carrier for transmission to the buyer.

"2. The first paragraph shall also apply if at the time of the conclusion of the contract the goods are already in transit. However, if the seller at that time knew or ought to have known that the goods had been lost or had deteriorated, the risk shall remain with him until the time of the conclusion of the contract."

Article 98

"1. In cases not covered by article 97 the risk shall pass to the buyer as from the time when the goods were placed at his disposal and taken over by him.

"2. Paragraph 1 shall also apply in the case of delivery of goods not conforming to the contract when the buyer has neither requested the delivery of new goods nor declared the contract avoided.

"3. When the goods have been placed at the disposal of the buyer but have not been taken over, or have been taken over belatedly by him, and this fact constitutes a breach of the contract, the risk shall pass to the buyer as from the last date when he could have taken the goods over without committing a breach of the contract."

218. The Working Group considered article 97 of the above proposal which dealt with passing of the risk when the contract involved carriage of the goods. It was noted that paragraph 1 constituted a combination of the provisions of articles 19 (2) and 97 (1) of ULIS.

219. It was observed that paragraph 1 was inconsistent with the definition of certain important trade terms; for example, "C.I.F.", as defined in Incoterms, provided for the passage of risk when the goods passed the ship's rail. It was suggested that in view of the importance of such trade terms, paragraph 1 should include a specific reference to usage such as "subject to article 9". On the other hand, several representatives supported the view that the Uniform Law gave effect to the terms of the contract (article 5) and to applicable usage (article 9); to make a specific reference in certain instances would cast doubt on this general principle.

220. The Working Group approved paragraph 1 of article 97 of the above proposal.

221. With respect to paragraph 2 of the same draft article, it was noted that the proposal was a revision of article 99 of ULIS.

222. The Working Group approved the first sentence of the above paragraph 2.

223. Questions arose with respect to the second sentence, which dealt with cases where the seller, at the time of the contract, knew or ought to have known that the goods had been lost or deteriorated. It was suggested that on these facts to permit risk to pass to the buyer at the time of conclusion of the contract was unfair to the buyer in a situation that could amount to fraud. In addition, since the contract was made while the goods were in transit the provision would present difficult problems of proof as to the point in the course of transit when further damage would occur. Attention was directed to the redraft of article 97 (3)

²⁴ A/CN.9/WG.2/WP.19, chapter III, paragraphs 64-105; see below, section 5.

in the report of the Secretary-General (paragraph 76)²⁵ whereby, on these facts, risk would remain with the seller unless he disclosed the loss or damage to the buyer.

224. The Working Group then considered article 98, which deals with contracts which do not involve carriage of the goods. In paragraph 1, attention was given to the provision that risk would pass to the buyer when the goods "were placed at his disposal and taken over by him". Some delegates suggested that "handing over" the goods would be clearer, and that the reference to placing the goods at the buyer's disposal was unnecessary and confusing, since the buyer could hardly "take over" the goods unless the goods had been placed at his disposal. Other delegates preferred the proposed language on the ground that it avoided the problems with respect to "handing over" the goods, as discussed above. The Working Group approved paragraph 1.

225. Paragraph 2 dealt with the effect of non-conformity of the goods on the transfer of risk, and on the ability of a buyer to avoid the contract after the loss or destruction of non-conforming goods. It was noted that placing this paragraph in article 98 made the provision inapplicable to cases where the contract involved carriage of the goods (article 97). It was agreed that this unintended result should be avoided by dealing with the above problem in a new article [98 bis].

226. Paragraph 3 deals with the effect of delay by the buyer in taking over the goods. The word "date" was replaced by "moment". With this modification, the paragraph was approved.

227. The Working Group decided to supplement the above provisions by a further article similar to paragraph 2 of article 98 of ULIS dealing with contracts which related to unidentified (unascertained) goods. The article, as proposed by an observer and adopted by the Working Group, reads:

"Where the contract relates to unidentified goods, the risk shall in no case pass to the buyer until the moment when the goods have been manifestly identified to the performance of the contract and the buyer has been informed of such identification."

228. In connexion with the above new article some representatives suggested that the expression "the contract relates to unidentified goods" might not be sufficiently clear.

229. Some delegates suggested that this chapter should include an article dealing specifically with transfer of risk when goods were held by a third party, such as a bailee or warehouseman. Other delegates were of the view that such a provision was not necessary, and would complicate the text. It was decided not to draft such a provision at this time.

230. The Working Group decided to set up a drafting party (Drafting Party VIII), composed of the representatives of Austria, Hungary, Japan and the United States, and requested it to prepare draft provisions on (a) the situation dealt with in article 97 (2) (second sentence) (i.e., the seller knew or ought to have known that the goods had been lost or deteriorated)

(see paragraph 223 above) and (b) a new article on the question mentioned in paragraph 225 above.

231. Drafting Party VIII submitted its proposals to the Working Group at its 18th meeting on 31 January 1974. The proposals constitute (a) a revision of the second sentence in article 97 (2); (b) an added sentence for article 98 (2); (c) a new article 98 bis. These proposals were incorporated in an integrated text of articles 97, 98 and 98 bis as follows:

Article 97

"1. Where the contract of sale involves carriage of the goods, the risk shall pass to the buyer when the goods are handed over to the carrier for transmission to the buyer.

"2. The first paragraph shall also apply if at the time of the conclusion of the contract the goods are already in transit. However, if the seller at that time knew or ought to have known that the goods had been lost or had deteriorated, the risk of this loss or deterioration shall remain with him, unless he discloses such fact to the buyer."

Article 98

"1. In cases not covered by article 97 the risk shall pass to the buyer as from the time when the goods were placed at his disposal and taken over by him.

"2. When the goods have been placed at the disposal of the buyer but have not been taken over or have been taken over belatedly by him and this fact constitutes a breach of the contract, the risk shall pass to the buyer as from the last moment when he could have taken the goods over without committing a breach of the contract. However, where the contract relates to the sale of goods not then identified, the goods shall not be deemed to be placed at the disposal of the buyer until they have been clearly identified to the contract and the buyer has been informed of such identification."

Article [98 bis]

"1. Where the goods do not conform to the contract and such non-conformity constitutes a fundamental breach, the risk does not pass to the buyer so long as he has the right to avoid the contract.

"2. In the case of a fundamental breach of contract other than for non-conformity of the goods, the risk does not pass to the buyer with respect to loss or deterioration resulting from such breach."

232. The first proposal involved a redrafting of the provisions of article 97 (2) (second sentence) dealing with cases in which the seller knew or ought to have known that the goods had been lost or had deteriorated. The proposed language was approved by the Working Group.

233. The second proposal was for the addition of a sentence to article 98 (2) to deal with cases where goods were not identified at the time of the making of the contract. The Drafting Party proposed this addition as a clarification of the provision earlier adopted by the Working Group as a new article (see paragraph 227 above); under the proposal the new article would not be included in the text of the Law. The Drafting

²⁵ See annex IV to this report, reproduced in section 5 below.

Party proposed that the provision dealing with unidentified goods should be placed in relation to article 98, which dealt with cases not involving carriage of the goods, and where risk of loss in the event of buyer's delay might pass to the buyer while the goods were retained by the seller.

234. One observer proposed that the provision on unidentified goods should be kept in a separate article so that the rule on identification and notice should also apply to cases involving carriage. This was rejected on the ground, among others, that such a provision would interfere with the transfer of risk when the goods are handed over to the carrier; the notice of shipment might in some cases appropriately be given to the buyer somewhat after delivery to the carrier and the commencement of the transit; a rule that risk of loss is only transferred at the time of notice would present practical problems of proof concerning the time of damage during transit. It was also observed that in the normal case the delivery to the carrier constituted an identification of the goods.

235. One representative suggested that the last sentence of article 98, paragraph 2, after deletion of the introductory word, "however", should become a separate paragraph 3. One observer suggested that the phrase "identified to the contract" in the above sentence should be replaced by the phrase "identified for the performance of the contract".

236. One observer suggested that the following text be included in article 98 of the draft as paragraph 4:

"4. When time for delivery has come and delivery is effected (pursuant to article 20) by placing the goods at the buyer's disposal at his place or at the place of a third person, the risk shall thereby pass to the buyer."

237. The observer who submitted this proposal stated that the proposed provision would be subject to the subsequent article making identification a further condition for passing of the risk. The provision covered, for example, such cases where the goods are deposited with, or to be manufactured by, a third person.

238. The above proposal was opposed by some representatives as being too loose. One representative, however, accepted the proposal, provided that the phrase "at the place of a third person" were replaced by the phrase "in the warehouse of a third person in accordance with the buyer". Another representative expressed the view that the concept of "third person" in the proposal was too broad. The Working Group concluded that it could not take action on this proposal at the present session. Some representatives expressed the view that the proposal dealt with an important problem that should be considered at a later stage.

239. The new article [98 *bis*] proposed by the Drafting Party dealt with the effect of breach of contract by the seller on the transfer of risk to the buyer. It was noted that the two paragraphs of the article gave different effect to fundamental breach with respect to (1) non-conformity of the goods and (2) other types of breach (such as delay, improper shipment and the like). Some representatives supported this proposal; others noted that the proposal was novel and interesting, and deserved further consideration, but hesitated to give approval within the time indicated.

240. One observer noted that the question dealt with in the article had already been solved in paragraph 2 (a) of article 79, the correctness of which interpretation was doubted by two representatives. The question was also raised as to whether users of the Law would see the relationship between chapter VI and article 79. The same observer proposed the following language for the article: "Where the seller has failed to perform his obligations under the contract of sale and the present law, the provisions of articles 97 and 98 shall not impair the remedies afforded the buyer because of such failure of performance".

241. The Working Group decided to:

(a) Adopt article 97 as proposed by the Drafting Party (paragraph 231 above);

(b) Adopt article 98 (paragraph 231 above) except for the last sentence in paragraph (2) which would be considered at the next session;

(c) To defer final action on the proposed new article [98 *bis*] until its next session;

(d) Not to include in the Law the previously adopted new article on unidentified goods (paragraph 227 above).

Articles 99-101 of ULIS

242. Articles 99 to 101 of ULIS read as follows:

Article 99

"1. Where the sale is of goods in transit by sea, the risk shall be borne by the buyer as from the time at which the goods were handed over to the carrier.

"2. Where the seller, at the time of the conclusion of the contract, knew or ought to have known that the goods had been lost or had deteriorated, the risk shall remain with him until the time of the conclusion of the contract."

Article 100

"If, in a case to which paragraph 3 of article 19 applies, the seller, at the time of sending the notice or other document referred to in that paragraph, knew or ought to have known that the goods had been lost or had deteriorated after they were handed over to the carrier, the risk shall remain with the seller until the time of sending such notice or document."

Article 101

"The passing of the risk shall not necessarily be determined by the provisions of the contract concerning expenses."

243. It was observed that some of the provisions in these articles had been embraced within articles approved by the Working Group, and that others were unnecessary and unhelpful.

244. The Working Group decided to delete articles 99-101 of ULIS.

III. FUTURE WORK

245. The Working Group, taking into consideration the proposals contained in document A/CN.9/WG.2/L.1, concerning methods of work and after a debate on the item, decided:

(a) To request the Secretariat to circulate among representatives of member States of the Working Group and the observers who attended the session the text of the uniform law as adopted or deferred for further consideration before 15 March 1974;

(b) To request the representatives of Member States and the observers who attended the session to submit to the Secretariat their comments and proposals on the text preferably by 31 August 1974;

(c) To request the Secretariat, taking into consideration the comments and proposals of representatives submitted before the above date, to prepare a study of the pending questions, including possible solutions thereon, and to circulate the study to members of the Working Group before 30 November 1974;

(d) To hold the sixth session of the Working Group, from 10 to 21 February 1975, subject to approval by the Commission.

2. Revised text of the Uniform Law on the International Sale of Goods as approved or deferred for further consideration by the Working Group, on the International Sale of Goods at its first five sessions (A/CN.9/87, Annex I)

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UNIFORM LAW ON THE INTERNATIONAL SALE OF GOODS*

CHAPTER I

SPHERE OF APPLICATION OF THE LAW

Article 1

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

* Square brackets in the text of the law indicate that no final decision was taken by the Working Group on the provisions enclosed. The headings in ULIS have been retained, where appropriate; for ease in reference, some new headings, not contained in ULIS, have been inserted by the Secretariat; all such new headings are enclosed in square brackets.

(a) When the States are both Contracting States; or
(b) When the rules of private international law lead to the application of the law of a Contracting State.

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

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

Article 2

The present Law shall not apply to sales:

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

(b) By auction;

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

2. Neither shall the present Law apply to sales:

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

(b) Of any ship, vessel or aircraft [which is registered or is required to be registered];

(c) Of electricity.

Article 3

1. [The present Law shall not apply to contracts where the obligations of the parties are substantially other than the delivery of and payment for goods.]

2. Contracts for the supply of goods to be manufactured or produced shall be considered to be sales within the meaning of the present Law, unless the party who orders the goods undertakes to supply an essential and substantial part of the materials necessary for such manufacture or production.

Article 4

For the purpose of the present Law:

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

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

(c) Neither the nationality of the parties nor the civil or commercial character of the parties or the contract shall be taken into consideration;

(d) A "Contracting State" means a State which is Party to the Convention dated . . . relating to . . . and has adopted the present Law without any reservation [declaration] that would preclude its application to the contract;

(e) Any two or more States shall not be considered to be different States if a declaration to that effect made under article [II] of the Convention dated . . . relating to . . . is in force in respect of them.

Article 5

The parties may exclude the application of the present Law or derogate from or vary the effect of any of its provisions.

Article 6

(Transferred to article 3, paragraph 2)

Article 7

(Transferred to article 4 (c))

Article 8

The present Law shall govern only the obligations of the seller and the buyer arising from a contract of sale. In particular, the present Law shall not, except as otherwise expressly provided therein, be concerned with the formation of the contract, nor with the effect which the contract may have on the property in the goods sold, nor with the validity of the contract or of any of its provisions or of any usage.

CHAPTER II

GENERAL PROVISIONS

Article 9

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

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

3. [In the event of conflict with the present Law, such usages shall prevail unless otherwise agreed by the parties.]

4. [Where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning widely accepted and regularly given to them in the trade concerned unless otherwise agreed by the parties.]

Article 10

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

Article 11

Where under the present Law an act is required to be performed "promptly", it shall be performed within as short a period as is practicable in the circumstances.

Article 12

(Deleted)

Article 13

(Deleted)

Article 14

Communications provided for by the present Law shall be made by the means usual in the circumstances.

Article 15

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

Article 16

Where under the provisions of the present Law one party to a contract of sale is entitled to require performance of any obligation by the other party, a court shall not be bound to enter or enforce a judgement providing for specific performance except in accordance with the provisions of article VII of the Convention dated the 1st day of July 1964 relating to a Uniform Law on the International Sale of Goods.

Article 17

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

CHAPTER III

OBLIGATIONS OF THE SELLER

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.

SECTION I. DELIVERY OF THE GOODS
[AND DOCUMENTS]*Article 19*

(Deleted)

SUBSECTION 1. OBLIGATIONS OF THE SELLER AS
REGARDS THE DATE AND PLACE OF DELIVERY*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.

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.

Articles 24-32

(Incorporated into articles 41-47)

SUBSECTION 2. OBLIGATIONS OF THE SELLER AS
REGARDS THE CONFORMITY OF THE GOODS*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

(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 for 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.

SECTION II. [REMEDIES FOR BREACH OF CONTRACT BY THE SELLER]

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 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.

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

(Deleted)

Article 49

(Deleted)

Article 50

(Transferred to article 23)

Article 51

(Deleted)

SECTION III. TRANSFER OF PROPERTY

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 to 47)

CHAPTER IV

OBLIGATIONS OF THE BUYER

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.

SECTION I. PAYMENT OF THE PRICE

Article 56 bis

The buyer shall take steps which are necessary in accordance with the contract, with the laws and regulations in force or with usage, to enable the price to be paid or to procure the issuance of documents assuring payment, such as a letter of credit or a banker's guarantee.

A. FIXING THE PRICE

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.

B. PLACE AND DATE OF PAYMENT

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 59 bis

1. The buyer shall pay the price when the seller, in accordance with the contract and the present Law, places at the buyer's disposal either the goods or a document controlling their disposition. The seller may make such payment a condition for handing over the goods or the document.

2. Where the contract involves the carriage of goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will be handed over to the buyer at the place of destination against payment of the price.

3. The buyer shall not be bound to pay the price until he has had an opportunity to inspect the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with such opportunity.

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.

Articles 61-64

(Incorporated into articles 70 to 72 bis)

SECTION II. TAKING DELIVERY

Article 65

The buyer's obligation to take delivery consists in doing all such acts which could reasonably be expected of him in order to enable the seller to effect delivery, and also taking over the goods.

Article 66

(Incorporated into articles 70 to 72 bis)

[SECTION III. REMEDIES FOR BREACH OF CONTRACT BY THE BUYER]

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 have recourse to the remedies specified in articles 70 to 72 bis], 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

(Incorporated into articles 70 to 72 bis)

Article 69

(Deleted)

Article 70

1. Where the buyer fails to perform any of his obligations under the contract of sale and the present Law, the seller may:

(a) Exercise the rights provided in articles 71 to 72 bis; and

(b) Claim damages as provided in articles 82 and 83 or articles 84 to 87.

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

Article 71

1. If the buyer fails to pay the price, the seller may require the buyer to perform his obligation.

2. If the buyer fails to take delivery or to perform any other obligation in accordance with the contract and the present law, the seller may require the buyer to perform 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 present law.

3. The seller cannot require performance of the buyer's obligations where he has acted inconsistently with such right by avoiding the contract under article 72 bis.

Article 72

Where the seller requests the buyer to perform, the seller may fix an additional period of time of reasonable length for such performance. If the buyer does not comply with the request within the additional period, or where the seller has not fixed such a period, within a period of reasonable time, or if the buyer already before the expiration of the relevant period of time declares that he will not comply with the request, the seller may resort to any remedy available to him under the present law.

Article 72 bis

Alternative A (text suggested in document A/CN.9/WG.2/WP.19):¹

[1. The seller may by notice to the buyer declare the contract avoided:

(a) Where the failure by the buyer 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 buyer has not performed the contract within an additional period of time fixed by the seller in accordance with article 72.

2. The seller shall lose his right to declare the contract avoided if he does not give notice thereof to the buyer within a reasonable time after the seller has discovered the failure by the buyer to perform or ought to have discovered it, or, where the seller has requested the buyer to perform, after the expiration of the period of time referred to in article 72.]

Alternative B (text of proposal A in paragraph 59 of the report of the Working Group on its fifth session):²

[1. The seller may by notice to the buyer declare the contract avoided:

(a) Where the buyer has not paid the price or otherwise has not performed the contract within an additional period of time fixed by the seller in accordance with article 72; or

(b) Where the goods have not yet been handed over, the failure by the buyer to pay the price or to perform any other of his obligations under the contract of sale and the present law amounts to a fundamental breach.

2. If the buyer requests the seller to make known his decision under paragraph 1 of this article and the seller does not comply promptly the seller shall where the goods have not yet been handed over, be deemed to have avoided the contract.

3. The seller shall lose his right to declare the contract avoided if he does not give notice to the buyer before the price was paid or, where the goods have been handed over, promptly after the expiration of the period of time fixed by the seller in accordance with article 72.]

Alternative C (text of proposal B in paragraph 59 of the Working Group on its fifth session):³

[2. The seller shall lose his right to declare the contract avoided if he does not give notice thereof to the buyer within a reasonable time:

(a) Where the buyer has not performed his obligations on time, after the seller has been informed that the price has been paid late or has been requested by the buyer to make his decision as regards performance or avoidance of the contract;

(b) Where the seller has requested the buyer to perform, after the expiration of the period of time referred to in article 72;

(c) In all other cases, after the seller has discovered the failure by the buyer to perform or ought to have discovered it. In any event, the seller shall lose his right to claim the return of delivered goods if he has not given notice thereof to the buyer within a period of 6 months [1 year] from the date on which the goods were handed over, unless the contract reserves the seller the property or a security right in the goods.]

CHAPTER V

PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER

SECTION I. ANTICIPATORY BREACH

Article 73⁴

1. A party may suspend the performance of his obligation when, after the conclusion of the contract, a serious deterioration in the economic situation of the other party or his conduct in preparing to perform or in actually performing the contract, gives reasonable grounds to conclude that the other party will not perform a substantial part of his obligations.

2. If the seller has already dispatched the goods before the grounds described in paragraph 1 become evident, he may prevent the handing over of the goods to the buyer even if the latter holds a document which entitles him to obtain them. The provision of the present paragraph relates only to the rights in the goods as between the buyer and the seller.

3. A party suspending performance, whether before or after dispatch of the goods, shall promptly notify the other party thereof, and shall continue with performance if the other party provides adequate assurance of his performance. On the failure by the other party, within a reasonable time after notice, to provide such assurance, the party who suspended performance may avoid the contract.

Article [74] (previously article 75)

1. Where, in the case of contracts for delivery of goods by instalments, by reason of any failure by one party to perform any of his obligations under the contract in respect of any instalment, the other party has good reason to fear a fundamental breach in respect of future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

2. A buyer, avoiding the contract in respect of future deliveries, may also, provided that he does so at the same time, declare the contract avoided in respect of deliveries already made, if by reason of their interdependence, deliveries already made could not be used for the purpose contemplated by the parties in entering the contract.

Article [75] (previously article 76)

Where prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of the contract, the other party shall have the right to declare the contract avoided.

¹ See in this volume, section 5 below.

² See in this volume, section 1 above.

³ *Ibid.*

⁴ Four member States reserved the right to suggest modification of the text at a later session (report of fifth session, paragraph 104; see in this volume section 1 above).

SECTION II. EXEMPTIONS

*Article [76] (previously article 74)**Alternative A* (text provisionally adopted by Drafting Party V):

[1. Where a party has not performed one of his obligations in accordance with the contract and the present law, he shall not be liable in damages for such non-performance if he proves that, owing to circumstances which have occurred without fault on his part, performance of that obligation has become impossible or has so radically changed as to amount to performance of an obligation quite different from that contemplated by the contract. For this purpose there shall be deemed to be fault unless the non-performing party proves that he could not reasonably have been expected to take into account, or to avoid or to overcome the circumstances.

2. Where the non-performance of the seller is due to non-performance by a subcontractor, the seller shall be exempt from liability only if he is exempt under the provisions of the preceding paragraph and if the subcontractor would also be exempt if the provisions of that paragraph were applied to him.

3. Where the impossibility of performance within the provisions of paragraph 1 of this article is only temporary, the exemption provided by this article shall cease to be available to the non-performing party when the impossibility is removed, unless the performance required has then so radically changed as to amount to performance of an obligation quite different from that contemplated by the contract.

4. The non-performing party shall notify the other party of the existence of the circumstances which affect his performance within the provisions of the preceding paragraphs and the extent to which they affect it. If he fails to do so within a reasonable time after he knows or ought to have known of the existence of the circumstances, he shall be liable for the damage resulting from such failure.]

Alternative B (text of alternative proposal in paragraph 114 of the report of the Working Group on its fifth session):⁶

[1. Where a party has not performed one of his obligations [in accordance with the contract and the present Law], he shall not be liable [in damages] for such non-performance if he proves that it was due to an impediment [which has occurred without any fault on his side and being] of a kind which could not reasonably be expected to be taken into account at the time of the conclusion of the contract or to be avoided or overcome thereafter.

2. Where the circumstances which gave rise to the non-performance constitute only a temporary impediment, the exemption shall apply only to the necessary delay in performance. Nevertheless, the party concerned shall be permanently relieved of his obligation if, when the impediment is removed, performance would, by reason of the delay, be so radically changed as to amount to the performance of an obligation quite different from that contemplated by the contract.

⁶ See in this volume section I above.

3. The non-performing party shall notify the other party of the existence of the impediment and its effect on his ability to perform. If he fails to do so within a reasonable time after he knows or ought to have known of the existence of the impediment, he shall be liable for the damage resulting from this failure.

4. The exemption provided by this article for one of the parties shall not deprive the other party of any right which he has under the present Law to declare the contract avoided or to reduce the price, unless the impediment which gave rise to the exemption of the first party was caused by the act of the other party [or of some person for whose conduct he was responsible].]

Article 77

(Deleted)

SECTION III. EFFECTS OF AVOIDANCE

Article 78

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

2. If one party has performed the contract either wholly or in part, he may claim the return of whatever he has supplied or paid under the contract. If both parties are required to make restitution, they shall do so concurrently.]

Article 79^a

1. The buyer shall lose his right to declare the contract avoided or to require the seller to deliver substitute goods where it is impossible for him to return the goods in the condition in which he received them.

2. Nevertheless the preceding paragraph shall not apply:

(a) If the goods or part of the goods have perished or deteriorated as a result of the defect which justifies the avoidance;

(b) If the goods or part of the goods have perished or deteriorated as a result of the examination prescribed in article 38;

(c) If part of the goods have been sold in the normal course of business or have been consumed or transferred by the buyer in the course of normal use before the lack of conformity with the contract was discovered or ought to have been discovered;

(d) If the impossibility of returning the goods or of returning them in the condition in which they were received is not due to the act of the buyer or of some other person for whose conduct he is responsible;

(e) If the deterioration or transformation of the goods is unimportant.

^a One member State has reserved its position in respect of paragraph 2 (d) of this article until final acceptance of the provisions on transfer of risk. (Report on fifth session, paragraph 148; see in this volume section I above.) Another representative suggested that at the second reading of the text, the Working Group should transfer this article into chapter III and revise its language in accordance with the proposal contained in paragraph 151 of the report.

Article 80

The buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods by virtue of article 79 shall retain all the other rights conferred on him by the present law.

Article 81

1. Where the seller is under an obligation to refund the price, he shall also be liable for the interest thereon at the rate fixed by article 83, as from the date of payment.

2. The buyer shall be liable to account to the seller for all benefits which he has derived from the goods or part of them, as the case may be:

(a) Where he is under an obligation to return the goods or part of them, or

(b) Where it is impossible for him to return the goods or part of them, but he has nevertheless exercised his right to declare the contract avoided or to require the seller to deliver substitute goods.

SECTION IV. SUPPLEMENTARY RULES CONCERNING DAMAGES

Article 82⁷

Damages for breach of contract by one party shall consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages shall not exceed the loss which the conclusion of the contract, in the light of the facts and matters which then were known or ought to have been known to him, as a possible consequence of the breach of contract.

Article 83

Where the breach of contract consists of delay in the payment of the price, the seller shall in any event be entitled to interest on such sum as in arrear at a rate equal to the official discount rate in the country where he has his place of business or, if he has no place of business, his habitual residence, plus 1 per cent.

Article 84

1. In case of avoidance of the contract, the party claiming damages may rely upon the provision of article 82 or, where there is a current price for the goods, recover the difference between the price fixed by the contract and the current price on which the contract is avoided.

2. In calculating the amount of damages under paragraph 1 of this article, the current price to be taken into account shall be that prevailing at the place where delivery of the goods is to be effected or, if there is no such current price, the price at another place which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

⁷ Two members of the Working Group reserved the right to return to this article at a later stage (report on fifth session, paragraph 164; see in this volume section 1 above).

Article 85

If the contract is avoided and, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, he may, instead of claiming damages under articles 82 or 84, recover the difference between the contract price and the price paid for the goods bought in replacement or that obtained by the resale.

Article 86

(Deleted)

Article 87

(Deleted)

Article 88

The party who relies on a breach of the contract shall adopt such measures as may be reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to adopt such measures, the party in breach may claim a reduction in the damages in the amount which should have been mitigated.

Article 89

In case of fraud, damages shall be determined by the rules applicable in respect of contracts of sale not governed by the present law.

Article 90

(Deleted)

SECTION V. PRESERVATION OF THE GOODS

Article 91

Where the buyer is in delay in taking delivery of the goods or in paying the price, the seller shall take reasonable steps to preserve the goods; he shall have the right to retain them until he has been reimbursed his reasonable expenses by the buyer.

Article 92

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

2. Where goods dispatched to the buyer have been put at his disposal at their place of destination and he exercises the right to reject them, he shall be bound to take possession of them on behalf of the seller, provided that this may be done without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision shall not apply where the seller or a person authorized to take charge of the goods on his behalf is present at such destination.

Article 93

The party who is under an obligation to take steps to preserve the goods may deposit them in the warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

Article 94

1. The party who, in the cases to which article 91 and 92 apply, is under an obligation to take steps to preserve the goods may sell them by any appropriate means, provided that there has been unreasonable delay by the other party in accepting them or taking them back or in paying the cost of preservation and provided that due notice has been given to the other party of the intention to sell.

2. The party selling the goods shall have the right to retain out of the proceeds of sale an amount equal to the reasonable costs of preserving the goods and of selling them and shall transmit the balance to the other party.

Article 95

Where, in the cases to which articles 91 and 92 apply, the goods are subject to loss or rapid deterioration or their preservation would involve unreasonable expense, the party under the duty to preserve them is bound to sell them in accordance with article 94.

CHAPTER VI

PASSING OF THE RISK

Article 96

Where the risk has passed to the buyer, he shall pay the price notwithstanding the loss or deterioration of the goods, unless this is due to the act of the seller [or of some other person for whose conduct the seller is responsible].

Article 97

1. Where the contract of sale involves carriage of the goods, the risk shall pass to the buyer when the goods are handed over to the carrier for transmission to the buyer.

2. The first paragraph shall also apply if at the time of the conclusion of the contract the goods are already in transit. However, if the seller at that time knew or ought to have known that the goods had

been lost or had deteriorated, the risk of this loss or deterioration shall remain with him, unless he discloses such fact to the buyer.

Article 98

1. In cases not covered by article 97 the risk shall pass to the buyer as from the time when the goods were placed at his disposal and taken over by him.

2. When the goods have been placed at the disposal of the buyer but have not been taken over or have been taken over belatedly by him and this fact constitutes a breach of the contract, the risk shall pass to the buyer as from the last moment when he could have taken the goods over without committing a breach of the contract. [However, where the contract relates to the sale of goods not then identified, the goods shall not be deemed to be placed at the disposal of the buyer until they have been clearly identified to the contract and the buyer has been informed of such identification.]

[Article 98 bis]

1. Where the goods do not conform to the contract and such non-conformity constitutes a fundamental breach, the risk does not pass to the buyer so long as he has the right to avoid the contract.

2. In the case of a fundamental breach of contract other than for non-conformity of the goods, the risk does not pass to the buyer with respect to loss or deterioration resulting from such breach.]

Article 99

(Deleted)

Article 100

(Deleted)

Article 101

(Deleted)

3. Texts of comments and proposals by representatives on articles 56 to 70 (A/CN.9/87, Annex II)*

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* Previously issued as document A/CN.9/WG.2/WP.15/Add.1 of 16 November 1972.

I

COMMENTS AND PROPOSALS OF THE REPRESENTATIVE
OF THE USSR*Articles 56-60 of ULIS**Article 56*

This article does not give rise to any objection.

Article 57

It seems appropriate to exclude this article from the Uniform Law. In our view, the Law should not provide, even indirectly and restrictedly, for a possibility of concluding sale contracts without stating a price or making provision for the determination of the price.

According to the legislation and practice of many countries, the price is an indispensable or essential element of such contracts, failing which there shall be no contract made at all. It should be mentioned that under article 8 the Uniform Law shall not be concerned with the formation and validity of the contract.

Apart from the inappropriateness of the provision itself, i.e. imposing the obligation on the buyer to pay the price "generally charged" by the seller ("habitulement pratiqué par le vendeur") where no price or a manner of determining thereof has been agreed by the parties, such a provision seems also unacceptable for obvious practical considerations, namely: how may one definitely decide which price is being "charged" by the seller, what kind of evidence might be sufficient or conclusive. Other contracts may well contain a good deal of conditions different from those of the contract made with the buyer concerned and affecting the matter of price at varying degrees. Evidently it is not always possible to find completely identical contracts, particularly for the supply of machines and equipment. In trade practice, prices often depend upon a variety of factors including the volume of other transactions, the business relations and settlements between the parties with regard to other transactions, covering long periods of their commercial dealings. Not infrequently sellers provide various allowances and rebates to buyers either at the time of concluding a contract or thereafter, which fact may not be reflected in any way in the contract itself.

It should be noted also that the provision in question is generally concerned not with the obligations of the buyer but, rather, with the matter of determining the price.

Article 58

It would be recommendable to replace the words "in case of doubt" with the words "unless otherwise agreed by the parties".

Article 59

This article does not give rise to any objection.

Article 60

Generally it would seem advisable to discuss at the next meeting of the Working Group a possibility of formulating provisions on the date of payment along the lines recommended with regard to the date

of delivery at the third session of the Working Group, Geneva, 17-28 January 1972 (A/CN.9/62, para. 22).¹

In any case it would seem useful, for the purpose of simplifying the present text of article 60 of ULIS, to omit the words "without the need for any other formality" (as has been done by the Working Group at its last session in reconsidering article 20 of ULIS—paragraph 22 of the above-mentioned document A/CN.9/62). The above words, as they stand at present, are not sufficiently clear; a question may first be raised as to what kind of "formalities" are meant: do they refer to a demand of payment or the effecting of payment, do they mean formalities to be complied with by the seller or buyer, etc.

II

COMMENTS AND PROPOSALS OF THE REPRESENTATIVE
OF GHANA*Articles 56-60 of ULIS**Article 56*

This article does not seem to need any comment.

Article 57

The text of this article, in its first part, seems by implication to make provision for cases in which the price is not expressly stated; the contract may make provision for its ascertainment.

The second part of the text does address itself to the question: "What if the contract does not provide a mode for ascertaining the price?" (A subsidiary question, which the text does not pause to answer in its first part, is whether the provision for determination of the price may be deduced by way of implication, where no such provision is expressly made. This will be considered later.)

The delegation of Ghana has been very impressed by the very closely reasoned argument of the representative of the USSR against leaving the price to be fixed in the uncertain manner at present made possible by this article. In municipal law, the concept of the "market price" or the "reasonable price"—not always regarded as the same—may render the uncertainty inherent here manageable; in the field of international sale such a concept is likely to be impracticable except in the comparatively few cases of particular commodities whose prices are fixed by the operations of recognized commodity exchanges.

The delegation of Ghana believes that "the price generally charged by the seller at the time of the conclusion of the contract" is not certain enough, as a test, to be an adequate substitute for the "market price"/"reasonable price" concept in municipal sale law. The reasons stated by the representative of the USSR in the third paragraph of his comment are sufficient to show the unsatisfactory nature of this criterion.

On purely theoretical grounds, also, the text may well create difficulties among jurists and legal advisers

¹ UNCITRAL Yearbook, Vol. III: 1972, part two, I, A, 5.

who, on doctrinal grounds, cannot regard a sale contract as "concluded" when no price is fixed or fixable by reference to some part of the contract.

For these reasons, the delegation of Ghana finds the present text of article 57 unsatisfactory. That raises a further question. Must it be deleted altogether, or must ULIS make specific provision for this case?

The delegation of Ghana believes that deletion would create an unsatisfactory situation; businessmen will be left in doubt as to the status of a sale contract that was concluded in all important respects except for the fixing of the price. As this situation may be expected not to occur only during negotiations, when nothing is regarded by either party as binding, it seems necessary to legislate specifically for it. For this reason, the delegation of Ghana does not share the view that article 57 should be excluded altogether. It should be modified to meet the difficulty outlined by the representative of the USSR.

The delegation of Ghana believes that one way of doing this would be to retain the first part of article 57 (subject to a small modification to be discussed shortly) and to insist that the agreement shall not generate any obligations for either party until a price agreeable to both has been settled.

If such a rule has the appearance of unnecessary finality, it at least has the merit of certainty in an area where certainty is of paramount importance. It seems that its apparent harshness can be reduced by making it possible to ascertain the price by reasonable implication from other terms of the contract where these bear on the question. To leave no room for doubt, the possibility of drawing such an implication from other terms of the contract ought, it is thought, to be expressly provided for. A possible amendment to article 57, giving effect to these observations, would read as follows:

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.

The concluding clause in this proposed amendment leaves the door open in the cases where the parties deal with each other in circumstances where it is reasonable to assume that, either because they contracted with reference to a recognized commodity market, or because they have agreed to suspend negotiations on the single issue of price, it is in their mutual interest for the other agreed provisions of the contract to be enforceable.

Article 58

The delegation of Ghana prefers the clause "unless otherwise agreed" to the phrase "in case of doubt" in this article. It seems better to create a definite *prima facie* link between the price and the actual commodity sold (as distinguished from the commodity and its packaging, etc.), and to leave the parties free to modify this if they wish, than to leave this role to cases of "doubt" whose nature is not specified in the law and which, in any case, could be difficult to identify.

Article 59

Paragraph 1. For economic reasons, Ghana and, it is believed, many other developing nations, will find it difficult to commit themselves unreservedly to the rule set out in this paragraph.

The impact of unavoidable exchange control legislation in several of these countries will normally make it difficult, if not altogether impossible, for a buyer in these countries to give such an unreserved undertaking as is entailed in a promise to pay at the seller's place of business, as literally understood. Conversely, where municipal exchange control legislation allows this, a seller in a country with inconvertible currency may well prefer to be paid by a buyer in a country with convertible currency in the latter's country or usual place of business, and wish to stipulate for this in his contract. It would not be satisfactory for such a stipulation to oblige the seller by implication to hand over the goods in the country of the buyer.

For these reasons the delegation of Ghana would prefer this rule to be made facultative by prefacing it with the words: "unless otherwise agreed".

Paragraph 2. This paragraph does not create any problems for the delegation of Ghana.

Article 60

The delegation of Ghana shares the view of the representative of the USSR on the desirability of deleting the words "without any other formality" from the text of this article.

It seems desirable, as noted by the representative of the USSR, also to try to approximate as far as possible the rules relating to date of payment to the principles underlying the newly recommended rules relating to the time of delivery.

III

COMMENTS AND PROPOSALS OF THE REPRESENTATIVE OF MEXICO

Articles 56-60 of ULIS

CHAPTER IV

OBLIGATIONS OF THE BUYER

Article 56

(No change)

SECTION I. PAYMENT OF THE PRICE

A. Fixing the price

Article 57

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. 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 or, in the

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

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.

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 seller shall be deemed as applicable.

2. 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

...

Addition of the following new paragraph (3):

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.

Comments

1. The obligations of the buyer are established in those articles, specifically the price and the place and the date at which the same should be paid.

2. With respect to the first of these articles, namely, article 56, we do not propose any change, since it limits itself to establish the two basic obligations of the buyer; and corresponds to article 18 in the structure of ULIS, which establishes the respective obligations of the seller.

3. In so far as concerns article 57, that is the one which establishes the rules for the fixing of the price, it is our opinion that it should cover an additional situation, namely in what does the payment of the price consist as well as the rules which are applied when no price is fixed in the contract.

4. As to the payment of the price, we believe it should be indicated that the same consists in the delivery of the monies or documents provided for in the contract. We consider that these principles be fixed in order to expressly regulate both the cases of direct payment to the seller—exceptional in international sale transactions—as well as payment through a bank and/or through documents.

5. In connexion with the rules which should be applied when a fixed price is not stated in the contract, they should provide not only the price generally charged by the seller at the time of the conclusion of the contract, but also the case in which said reference is not possible, or when the seller does not normally state the price, in which hypothesis we believe that the price prevailing in the market should be applied also at the time of the conclusion of the contract.

6. With reference to article 58, it is our opinion that two hypotheses be foreseen. The first hypothesis concerns the currency in which payment should be made, when the one indicated in the contract might refer indistinctly to the countries involved in the contract; that is, when the name of the money is the

same in various countries (dollars, francs, pesos, etc.). In such event, we believe that the money of the country of the seller should govern. The second hypothesis is the one currently provided for in ULIS, namely the one relative to the fixing of the price in accordance with the weight of the goods.

7. In connexion with the problems of the place and date of payment, it is our belief that a provision should be added to article 59 to resolve the problems arising when exchange controls exist in the country of the buyer. In such a case, we believe it advisable that ULIS establish a simple rule, namely that the fulfilment of all the requisites fixed by the internal legislation of the buyer shall be his obligation in order that the seller receive the price agreed upon in the terms of the contract.

This rule is important, since if the exit of money from the country of the buyer were to be prevented, it would grant rights to the seller, either to consider the contract *ipso jure* avoided to detain or vary the shipment of the goods or even to claim damages.

8. Finally, as to article 60, we do not propose any amendment, but we would like to note that this provision could be actually omitted, inasmuch as it does not establish any special rule which was not provided in other articles of ULIS. The contractual agreement, or the usages in the absence of the agreement to which this article 60 refers, are provided for in article 1 and 9 of ULIS.

Furthermore, the special references to the application of the usages in this article and others of ULIS, notwithstanding the general regulation of article 9, are not convenient, since they can be interpreted as limitations to the scope of said article 9, or because in other situations, in which ULIS does not contain express reference to usages, it might be considered that the same would not be applicable.

IV

COMMENTS AND PROPOSALS OF THE REPRESENTATIVE OF THE UNITED KINGDOM

Articles 56-60 of ULIS

1. Articles 56-60 deal with certain obligations of the buyer, in particular the payment of the price.

2. Article 56: no comment.

3. Article 57: this provides for the fixing of the price if it has not been stated. It has been objected that a contract would not exist if the price were not fixed. But the article is expressly confined to cases where a contract has been concluded. The chances of an international sales contract being concluded without the price being fixed are very small indeed, but it could happen in exceptional cases, and the article should stay. (The example has been given of publishers who distribute catalogues and whose order forms do not repeat the prices.)

4. The "price generally charged by the seller at the time of the conclusion of the contract" would presumably (as a result of article 9) be established first of all by the course of dealing between the parties, and if that did not show a price, the price generally charged by the seller to third parties would be appli-

cable. Whilst there might be a conflict between the two prices—i.e. the previous price paid by the buyer and the price charged by the seller to third parties at the time of the contract—in my view the previous price between the parties would be the valid price. It does not seem to be worth complicating the article by mentioning this expressly.

5. *Article 58*: no comment.

6. *Article 59*: this article adopts the rule that the debtor shall seek out the creditor. This is in accordance with English Law and is supported by the United Kingdom.

7. *Article 60*: it might be argued that this article is unnecessary since there is an obligation to pay the price. However, some legal systems require notice to establish delay in payment except where the parties have agreed on a date for a payment. This article places a date fixed by usage on the same level as a date determined by agreement. The words "without the need for any other formality" could be omitted.

V

COMMENTS AND PROPOSALS OF THE REPRESENTATIVES OF AUSTRIA AND THE UNITED KINGDOM

Articles 61 to 64 of ULIS

GENERAL OBSERVATIONS

1. Both representatives consider that this group of articles does not give rise to any fundamental objections. Articles 61 to 64 ought, however, to be harmonized with articles 24 *et seq.*, which have not yet been finalized by the Working Group.

Article 61

2. The two representatives have no comments on paragraph 1 of this article.

3. Mr. Loewe (Austria) points out that this process of harmonization might require the deletion of paragraph 2 of article 61 and the replacement of *ipso facto* avoidance ("résolution de plein droit") in paragraph 1 of article 62 by another system. Personally, he regrets the disappearance of the system of *ipso facto* avoidance and finds the text for replacement proposed by the Drafting Group at the session held in Geneva in January 1972 to be extremely unattractive and complicated.

4. Mr. Guest (United Kingdom) points out that it may be very doubtful in practice whether or not "it is in conformity with usage and reasonably possible for the seller to sell the goods", so that it will be difficult to decide whether the seller is entitled to sue for the price or only to claim damages. As a general rule, under the Sale of Goods Act, 1893 (United Kingdom), the seller may only maintain an action for the price (i) when the property (ownership) in the goods has passed to the buyer, or (ii) when the price is payable on a day certain irrespective of delivery. The relevant provisions of the 1893 Act are attached as appendix A to this report. It may also be helpful for the Working Group to consider article 2, section 2-709, of the Uniform Commercial Code (United States of America), which is attached as appendix B.

Article 62

5. The observations of Mr. Loewe on article 62, paragraph 1, are contained in paragraph 3 above. Mr. Guest agrees that it will be necessary to replace *ipso facto* avoidance with different provisions.

6. Neither representative has any comments on paragraph 2 of this article.

Article 63

7. Both representatives consider that this article is probably useful.

Article 64

8. Both representatives consider that article 64 should be retained—it corresponds with paragraph 3 of article 24 of the Working Group's draft.

Appendix A

SALE OF GOODS ACT, 1893

s.27 It is the duty ... of the buyer to accept and pay for [the goods] in accordance with the terms of the contract of sale.

s.49 (1) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

(2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. ...

Note

In English Law, the seller may also claim payment of the price if the goods perish after the risk of their loss has passed to the buyer.

If the contract merely provides for payment against shipping documents, and the buyer refuses to accept the tender of the documents, the seller cannot claim the price, for the property in the goods will not pass until the documents are transferred and the price is not payable on a day certain irrespective of delivery (*Stein, Forbes and Co., v. County Tailoring Co.* (1917) 86 L.J.Q.B.448 (c.i.f.); see also *Colley v. Overseas Exporters* [1921] 3 K.B.302 (f.o.b.—buyer fails to nominate effective ship—no action for price)).

Where the seller cannot maintain an action for the price, he may still claim damages for non-acceptance under section 50 of the 1893 Act.

Appendix B

UNIFORM COMMERCIAL CODE, ART. 2

Section 2-709. Action for the price

(1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price

(a) Of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and

(b) Of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

(2) Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale becomes impossible he may resell them at any time prior to the collection of the judgement. The net proceeds of any such resale must be credited to the buyer and payment of the judgement entitles him to any goods not resold.

(3) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated (section 2-610), a seller who is not entitled to the price under this section shall nevertheless be awarded damages for non-acceptance under the preceding section.

VI

PROPOSAL OF THE REPRESENTATIVE OF JAPAN ON ARTICLE 68 OF ULIS

In the process of examination of articles 65-68 of ULIS, although we are still to continue our examination, our experts and I would like to make the suggestions intermediately that the word "accept" in paragraph 1 of article 68 should be replaced by "take".

VII

COMMENTS BY THE REPRESENTATIVE OF HUNGARY OF OF THE PROPOSAL OF THE REPRESENTATIVE OF JAPAN ON ARTICLE 68 OF ULIS

We appreciate highly your proposal and agree with your suggestion that the word "accept" in paragraph 1 of article 68 should be replaced by "take".

VIII

COMMENTS AND PROPOSALS OF THE REPRESENTATIVE OF FRANCE

Articles 69 and 70 of ULIS

Articles 69 and 70, which constitute chapter IV, section III, of ULIS, entitled "Other obligations of the buyer", have given rise to only very few comments (see

primarily documents A/CN.9/31, paragraphs 130 and 131).²

Article 69

1. Japan submitted that the provisions of this article made no provision for the many disputes that could arise between buyers and sellers regarding documentary credits, e.g. disputes over contracts providing for a letter of credit without specifying its precise contents, the time of opening the credit or the amount involved.

This point is well taken, but it might be asked whether such provisions, which are more than implicit in the existing text, would not overburden the text, without any great advantage, in comparison with the other ways of making provision for or guaranteeing payment of the price, namely, the acceptance of a bill of exchange and the giving of a banker's guarantee.

Article 70

2. Austria expressed the view that it was difficult to understand why the seller could only declare the contract avoided if he did so promptly, and that an additional period of time for the buyer to perform would be in the latter's interest.

It appears that the structure of this article is exactly the same as that of article 55, which contains identical provisions concerning other obligations of the seller. Logically, therefore, article 70 should be given the same wording as article 55. However, the Working Group was unable to consider any revision of the latter article at its last session (see document A/CN.9/62,³ para. 15, and annex I, para. 36), and it requested the representative of Japan to submit, together with the representatives of other countries including Austria, a study on that article in combination with the study on articles 50 and 51.

² UNCITRAL Yearbook, Vol. I: 1968-1970, part three, I, A, 1.

³ UNCITRAL Yearbook, Vol. III: 1972, part two, I, A, 5.

4. Texts of comments and proposals by representatives on articles 71 to 101 (A/CN.9/87, Annex III)*

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* Sections I to IX originally appeared in document A/CN.9/WG.2/WP.17 Add.1, of 27 November 1973; section X was first issued in document A/CN.9/WG.2/WP.17/Add.2, of 31 December 1973.

I

COMMENTS AND PROPOSALS BY THE REPRESENTATIVE
OF THE UNITED KINGDOM, INCORPORATING OBSER-
VATIONS BY THE REPRESENTATIVE OF GHANA*Article 74 of ULIS*

1. This article presents difficulties at two levels, at the level of form and at that of substance. At the level of form, the language used does not always clearly express what was presumably the legislative intention, and at the level of substance the legislative intention may, it is suggested, produce unsatisfactory results in some circumstances. Since the question of substance may be controversial the question of form is discussed first, though the two questions cannot be kept entirely separate.

FORM

Paragraph 1

2. (a) "He shall not be liable...." It appears from paragraph 3 that this is intended to refer only to liability in damages (or possible in some cases liability to specific performance, since the article includes situations in which performance is not impossible but is nevertheless excused; see below). But in the terminology of ULIS (e.g. art. 35(2), 36), and still more clearly in that of the new draft (e.g. art. 33(2), 35), the word "liable" embraces subjection to any remedy, including avoidance. The text should therefore be:

"He shall neither be required to perform nor be liable for his non-performance...."

(b) "If he can prove that it was due to...." The phrase "due to" is not very felicitous. The non-performing party is, in effect, being afforded an opportunity to excuse his non-performance, and in the absence of a clear understanding as to what is meant by "due to" (the French text is equally open), two difficulties arise. (i) Even before the matter comes before a tribunal, it will be possible for the non-performing party, by relying on a generally long chain of causation, to argue that his non-performance was "due to" a wide range of factors. Thus, Professor Tunc's commentary envisages the possibility that a seller might claim exemption on the ground of an unforeseen rise in prices. In such a case the non-performance would presumably be "due to" the rise in prices in the sense that the rise in prices is the reason why the seller has not performed (i.e. the seller has found it uneconomic to do so). Admittedly, in such case the seller would have to prove that "according to the intention of the parties or of reasonable persons in the same situation", he was not bound to take into account or overcome the rise, but nevertheless the scope for dispute seems dangerously wide. (ii) If the dispute is brought before a tribunal, the acceptable limits of cause and effect cannot be settled on any easily identifiable principles. The resulting doubt and divergence between national jurisdictions ought to be avoided if possible. But since the wide scope of the phrase was apparently the legislative intention, the question of revision is considered under the heading of "Substance", below.

(c) "Regard shall be had to what reasonable persons in the same situation would have intended". This

formulation appears to have been a compromise, and it may be the best that can be achieved, but if it is taken to mean what it says it will create difficulty, since a reasonable seller and a reasonable buyer might well have intended quite different things. It will presumably in fact be construed as requiring the court to decide whether the party could reasonably have been expected to "take into account" etc. the circumstances. It would be better to say this, e.g.:

"Regard shall be had to what the party in question could reasonably have been expected to take into account or to avoid or to overcome".

Paragraph 2

3. This presents three difficulties: (i) it does not state the primary rule, i.e. that if the delay is not inordinate, the obligation is only suspended; (ii) it expresses the exemption in terms of suspension of the obligation, whereas paragraph 1 has expressed it in terms of exemption from liability; this duplication of concepts, seems to serve no practical purpose, and might possibly give rise to doubt as to what was intended; (iii) from the Common Law point of view at least, the phrase "the party in default" is confusing, since it suggests that the party is in some way at fault, whereas paragraph 1 assumes that he has proved that he is not. These difficulties could be met by the following text:

"Where the circumstances which gave rise to the non-performance constitute only a temporary impediment to performance, the exemption provided by this article shall cease to be available to the non-performing party when the impediment is removed, save that if performance would then, by reason of the delay, be so radically changed as to amount to the performance of an obligation quite different from that contemplated by the contract, the exemption shall be permanent."

Paragraph 3

4. This appears to envisage two possibilities: (i) that the party who has not performed may nevertheless want to avoid the contract on some other ground; (ii) that the other party, though he cannot claim damages (because of the exemption provided by paragraph 1), may wish to avoid or (if he is the buyer) reduce the price. Subject to the question of substance (below), it is not unreasonable to provide for (ii) expressly, since the pattern of remedies adopted in this article is foreign to, for example, Common Law systems; but it is less clear why (i) is included. It seems to be illogical and superfluous. There can of course be circumstances in which the party who is exempted from liability in damages by paragraph 1 may nevertheless reasonably wish to avoid the contract on some other ground (for example, a seller who is exempted from liability for late delivery, may wish to avoid the contract because of the seller's subsequent refusal to pay the price) but there is in any event nothing in paragraph 1 to suggest that he may not do so. To exempt a party from liability to damages does not logically exclude him from avoiding the contract on some other ground. Since therefore the inclusion of (i) seems to serve no useful purpose and may give rise to doubts

as to what was intended, it seems best to redraft the clause to deal only with (ii), as follows:

"The exemption provided by this article for one of the parties shall not deprive the other party of any right which he has under the present law to declare the contract avoided or to reduce the price, unless the circumstances which gave rise to the exemption of the first party were caused by the act of the other party or of some person for whose conduct he was responsible."

(The present paragraph 3 speaks of "relief" and not of "exemption", but this seems, once again, to multiply concepts unnecessarily.)

SUBSTANCE

5. At the level of substance the article is open to several criticisms.

- (i) It deals both with the situation where the contract has, in Common Law terms, been frustrated (i.e. performance has become impossible or illegal, or in the words of paragraph 2, has so radically changed as to be performance of an obligation quite different from that contemplated by the contract), and also with the situation where non-performance is excused for some less fundamental reason. (See the remarks above on paragraph 1: "If he can prove it was due to...") To allow a party to claim exemption because some unforeseen turn of events has made performance unexpectedly onerous, is out of place in the context of sale of goods for the reasons which are set out at greater length by the representative of Ghana below. Excuses for non-performance falling short of frustration should be either expressly provided for in the contract or ignored. This approach could be expressed by redrafting paragraph 1 as follows:

"Where one of the parties has not performed one of his obligations, he shall neither be required to perform nor be liable for his non-performance if he can prove either that performance has become impossible owing to circumstances which, according to the intention of the parties at the time of the conclusion of the contract, he was not bound to take into account or to avoid or to overcome, or that, owing to such circumstances, performance would be so radically changed as to amount to the performance of an obligation quite different from that contemplated by the contract; if the intention of the parties in these respects at the time of the conclusion of the contract was not expressed regard shall be had to what the party who has not performed could reasonably have been expected to take into account or to avoid or to overcome."

- (ii) The article allows the contract to be avoided (subject to the usual conditions) where performance is excused. Where avoidance takes place, the position of the parties is governed by ULIS article 78. This is primarily concerned with avoidance on breach, and it may not be well suited to the dealing with the consequences of frustration. In particular the party from whom restitution is claimed may have incurred expense

in performance of the contract; if this expense has resulted in a benefit to the other party, this benefit may presumably be set off against the restitution claimed; but if the expense has not resulted in any benefit, no set-off seems to be allowed.

6. Revision of article 78 is not of course within the scope of this study, but the problem is mentioned because it is an aspect of the larger question whether avoidance on frustration should be covered by the same rules as avoidance on breach. Avoidance, if coupled with the effects laid down in article 78, may be too drastic a remedy where the non-performance is not due to any fault. For example, if an f.o.b. buyer were unable, owing to circumstances within article 74 (1), to give effective shipping instructions, the buyer would be exempted from damages for this non-performance, and it is obviously right that the seller should be relieved of his obligation to deliver; but it is not so obvious that he should be allowed to avoid the contract. For this would entitle him to obtain restitution of any part-performance he might have rendered, on condition of restoring the price (art. 78 (2)). This could cause injustice to the blameless buyer where the market is rising. Similar cases of injustice to the seller could arise on a falling market. If problems such as this are to be dealt with, a special scheme of remedies for the situation envisaged in art. 74 will be necessary.

Addendum to (i) above by the representative of Ghana

7. Whether, apart from frustrating events, a sale law should recognize and give legal effect to other circumstances to which the parties did not advert their attention at the time of making their contract, and if so, what such effect should be, seems primarily to be a question of legislative policy. The considerations against giving legal recognition to such circumstances are many, and among them the following seem to be important:

(a) Such circumstances are very difficult to define with sufficient precision to make for certainty and uniformity of application. This is particularly important in a law intended for application in legal systems of several nations with differing traditions of jurisprudence;

(b) In the nature of things, they are very difficult to bring together into a single class by means of a definition, because of their possible diversity. It is, therefore, impossible in principle to make a single rule, applicable to all of them, without introducing a rather questionable element of arbitrariness. The alternative to a single definition, would be to envisage and to set out expressly a series of non-frustrating situations which may for some reason or another be thought to be of sufficiently important effect to warrant their being regarded as factors affording some sort of relief (not necessarily of the same kind) to one of the contracting parties. This alternative promises to result in inelegance without any guarantees of comprehensiveness. It is doubtful if the possible practical results of such a legislative effort would justify the effort involved;

(c) Such cases have traditionally been best left to the contracting parties themselves to stipulate for;

(d) The very wording of the present paragraph 1 shows how difficult it is to provide for such situations

in a general legislative text. The paragraph speaks of "...circumstances which, according to the intention of the parties *at the time of the conclusion of the contract*, [one of the parties] was not bound to take into account or overcome". The italicized words do not necessarily confine an inquiry about the intention of the parties to the terms of the contract as they are written or proved by oral evidence, and "what reasonable persons in the same situation *would have intended*" is not an easy standard to apply after the event;

(e) The traditional jurisprudence of sale law, both in Civil Law and Common Law, has generally ignored this matter, probably because of problems such as those set out above, and neither system appears to be any the worse for this omission.

II

COMMENTS AND PROPOSALS BY THE REPRESENTATIVE OF THE UNITED STATES AND OBSERVATIONS OF THE REPRESENTATIVES OF FRANCE AND HUNGARY

Articles 75-77 of ULIS

1. A draft report on articles 75 to 77 of ULIS was prepared by the representative of the United States and circulated to the representatives of France, Hungary, Iran and Japan for their comments. Such exceptions as they took have been set out in the appendix to this final report; otherwise it is assumed that they are in agreement.

Scope

2. Articles 75 to 77 purport to contain "Supplementary grounds for avoidance" of the contract. Article 75 is limited to contracts for delivery in instalments while article 76 applies to contracts for sale generally. Article 77 states one effect of avoidance under the preceding two articles.

Article 75

3. Article 75 (1) provides that when either party's failure to perform as to one instalment, under a contract for delivery in instalments, gives the other "good reason to fear failure of performance in respect to future instalments", he may avoid the contract for the future. In order to bring this article into conformity with the provisions on fundamental breach, it would be desirable to change the quoted language to read: "good reason to fear a *fundamental breach* in respect to future instalments".

4. Article 75 (2) goes on to allow avoidance by the buyer as to deliveries already made as well, "if by reason of their interdependence such deliveries would be worthless to him". (No need was seen to give the seller such a right.) The requirement that past deliveries be made "worthless" seems too strong. It would be desirable to substitute for the quoted language: "if by reason of their interdependence *the value of such deliveries to him would be substantially impaired*".

Article 76

5. Article 76 allows a party to avoid when prior to the "date fixed" for performance "it is clear that one of the parties will commit a fundamental breach

of contract". A minor improvement would be to delete the word "fixed" which might be read as limiting the application of the article to contracts in which a date is expressly stated. There is, however, a more basic difficulty with this section which attempts to incorporate into ULIS common law notions of "anticipatory breach".

6. The original language of article 76 (then article 87 of the 1956 draft) was: "when... either party so conducts himself as to disclose an intention to commit a fundamental breach of contract". Although this language was broadened at the Hague, to go beyond the conduct of a party, Professor Tunc's commentary on article 76 justified it in terms of the original narrower language:

It is not right that one party should remain bound by the contract when the other has, for instance, *deliberately declared* that he will not carry out one of his fundamental obligations or when he *conducts himself* in such a way that it is clear that he will commit a fundamental breach of the contract [emphasis supplied].

It would be desirable to revert to the original narrower language. The common law doctrine of "anticipatory breach", on which article 76 is presumably based, is limited to the conduct of the party. Furthermore, the broader language of article 76 may lead to an unjust result.

7. Suppose that as a result of events other than the conduct of, say, the seller, it becomes clear to the buyer that the seller will not be able to perform (and has no legal excuse). Notwithstanding the seller's insistence that he will be able to perform in spite of these events, the buyer avoids under article 76. To everyone's surprise, when the time for performance comes, the seller is able to perform and is willing to do so. But under article 76, not only is the contract avoided, but, under article 77, the seller is liable for damages—even though no *conduct* on his part justified the buyer in thinking that there would be a breach. It would therefore be preferable to revert to the language of the earlier draft (quoted above), and to leave the hypothetical case just stated to be dealt with under article 73 (allowing suspension of performance when "the economic situation of the other party appears to have become so difficult that there is good reason to fear that he will not perform a material part of his obligations"). It may be desirable to broaden article 73 for this purpose and to allow the "other party" to remedy the situation by providing assurances, but this question goes beyond the scope of this draft study. It should be noted that article 48, which is also beyond the scope of this draft study, would have to be brought into line with article 76 if the change suggested here is made.

Article 77

8. Article 77 states one effect of avoidance under article 75 or 76—the party avoiding may claim damages. Since article 78 (1) says that avoidance on any ground leaves the parties "subject to any damages which may be due", article 77 seems unnecessary. Furthermore, it is misleading to include it under the heading "Supplementary grounds for avoidance" rather than "Effects of avoidance". It should be omitted.

COMMENTS OF THE REPRESENTATIVE OF FRANCE

Articles 75-77

9. (a) Your drafting proposal designed to bring this provision into conformity with the provisions on fundamental breach merits approval.

(b) While the aforementioned amendment tends to limit more precisely the circumstances in which the parties may request avoidance of the contract, the amendment that you are proposing to paragraph 2 has the opposite effect.

10. It is difficult to determine whether the deliveries would be worthless to the buyer because this would require a subjective judgement.

11. Your proposal would have the effect of replacing the words "pas d'intérêt" by the words "peu d'intérêt", which would considerably heighten the uncertainty and would increase the risk of litigation. I would therefore prefer not to change the paragraph which already favours the buyer to the detriment of the seller, since it applies only to the former.

Article 76

12. The replacement of the word "fixed" by a more general, less exact term appears to me to be a desirable improvement.

13. On the other hand, the advantage of reverting to the language of article 87 of the 1956 draft is questionable.

14. I agree that the evidence of a future or contingent situation is very often unsatisfactory.

15. That is why the claimant or court is reassured when the defendant himself has revealed his intention not to perform the contract without actually committing a fundamental breach.

16. You would like to rule out avoidance in cases where the defendant did not state his intentions.

17. However, a rule of this kind might involve the contracting party in excessive risk. Let us take the case of a shipowner who orders a very special type of vessel from a shipyard. Later it becomes "clear" that the economic position of the buyer has substantially deteriorated and that bankruptcy proceedings are deemed inevitable. In such a case it would seem preferable to allow the seller to avoid the contract even if the shipowner, attempting to regain the confidence of his creditors, were to confirm his wish to purchase the vessel in question.

18. Admittedly, after the manner of French criminal law where confession is considered to be the most conclusive of evidence, it would be preferable in such a case for the two parties to agree to avoid their contract when one of the parties has acknowledged that he is either unable or unwilling to perform his obligations.

19. However, the present wording leaves wider discretion to the court, although the adjective "manifeste"—which, to my mind, is closer in meaning to "obvious" than to "clear"—leaves very little room for uncertainty. Besides, subsequent events would resolve any uncertainty.

COMMENTS OF THE REPRESENTATIVE OF HUNGARY

20. (a) Article 76 and article 48 are overlapping. Article 76 is broader than article 48 because it deals with all cases of fundamental breach and not only with non-conformity on the one hand and is narrower than article 48 on the other because it deals only with fundamental breach whereas article 48 covers both fundamental and non-fundamental breach in the restricted domain of non-conformity. The first question is whether two separate and overlapping articles are needed for the purposes of anticipatory breach. One article might suffice. The next question is what its substance should be.

(b) Many good reasons speak for the proposal made by Professor Farnsworth which would restrict the field of anticipatory breach and create greater certainty of law than the present text. On the other hand there might be some arguments in favour of the present solution. It might be justified to ask: why does the buyer have to wait till the date fixed for performance has elapsed when it is already clear that the seller will commit a fundamental breach? More precisely, why does he not have to wait if the breach is due to a conduct of the seller and why does he have to wait if the breach is a result of some other cause?

21. The answers given by Professor Farnsworth to these questions are twofold:

(a) "Suppose that as a result of events other than the conduct of, say, the seller, it becomes clear to the buyer that the seller will not be able to perform (and has no legal excuse). In spite of the seller's insistence that he will be able to perform in spite of these events, the buyer avoids under article 76. To everyone's surprise, when the time for performance comes, the seller is able to perform and willing to do so." In this case, in my opinion, the avoidance is void as it has become clear from the results that at the time of the avoidance it could not have been clear that the seller would commit a fundamental breach. The buyer avoids the contract at his own risk in cases of anticipatory breach except express repudiation by the seller. A conduct short of repudiation might also re-create uncertainties.

(b) "Under article 76, not only is the contract avoided, but, under article 77, the seller is liable for damages—even though no conduct on his part justified the buyer in thinking that there would be a breach." It is suggested that in this case the seller will have a good defence under article 74.

22. Thus it is submitted that we delete both article 48 and article 76 and draft an article on the following lines:

Where prior to the date fixed for performance of the contract it is clear that one of the parties will commit a breach, the other party shall be entitled from this time on to exercise the rights provided in this Law for that particular breach.

It is not easy to find a place for this (or a similar) text in the Uniform Law, because it goes beyond "supplementary grounds for avoidance". Perhaps it could constitute a separate section entitled "anticipatory breach" in chapter V.

III

OBSERVATIONS AND PROPOSALS BY THE
REPRESENTATIVE OF FRANCE*Articles 78-81 of ULIS*

1. In accordance with the decision taken by the UNCITRAL Working Group, the French rapporteur, in collaboration with the Hungarian, Tunisian and United States rapporteurs, considered articles 78-81 of ULIS. This gave rise to the following observations:

(a) Article 79, paragraph 2 (d)

2. It seems to the French rapporteur that the effect of article 79, paragraph 2 (d), which provides that the seller must bear the risk attaching to the goods if the impossibility of returning them is not due to the act of the buyer or of some other person for whose conduct he is responsible, is not in conformity with the intention of the drafters (cf. Professor Tunc's commentary, which indicates that the idea was to relieve the buyer from his obligation to return the goods where the impossibility of his doing so was due to the act of the seller or to some chance happening).

3. Moreover, such a wording would hardly be compatible with article 97, paragraph 1, which provides that normally the risk shall pass to the buyer when delivery of the goods is effected.

4. Again, this provision allows for the return of the goods in a condition other than that in which they were received by the buyer.

5. It would therefore be preferable to specify that the possibility of returning the goods shall be subject to their having retained their substantial qualities.

6. The French rapporteur accordingly proposes the following wording for article 79, paragraph 2 (d):

"If the impossibility of returning the goods with their substantial qualities intact or in the condition in which they were received is due to the fact of the seller."

7. The Hungarian rapporteur agrees in principle with the French proposal.

8. He suggests the addition of the following words: "or of some other person for whose conduct he is responsible".

9. The Hungarian rapporteur also believes that subparagraph (a), which is simply one case to which subparagraph (d) applies, should be deleted.

10. The numbering would then have to be changed, with subparagraph (d) becoming subparagraph (a).

11. The Hungarian rapporteur also favours an addition to article 79, paragraph 2 (c), so it would read: "if part of the goods have been sold, consumed or transformed by the buyer ...".

12. The United States rapporteur also agrees in principle to the French proposal, provided that return of the goods is still possible where the deterioration is due to the defect in the goods.

13. However, the Tunisian rapporteur considers that it would be better to retain the ULIS wording.

14. He maintains that article 79, paragraph 2 (d), as it stands is compatible with article 96. The passing of the risk is always subject to prior performance of the obligations of the seller. If the seller has failed

to perform his obligations, the buyer must be able to declare the contract avoided in the manner provided for in ULIS.

(b) Article 79, paragraph 2 (e)

15. The French rapporteur questions the desirability of this subparagraph, the inevitably vague wording of which may cause many disputes.

16. Does the deterioration have to be unimportant in the eyes of the seller or the buyer, or of both parties?

17. The United States rapporteur endorses this comment. In the view of the Hungarian Government, however, the answer to this question depends on the wording eventually adopted for article 33, paragraph 2. The Tunisian Government would like the subparagraph to be reformulated in order to obviate the difficulties that have been noted but believes that the idea, which by and large does protect the interests of the buyer, should be retained.

(c) Article 80

18. The French rapporteur considers that this article is superfluous and indeed may lead to some errors of interpretation, since it was decided that the Law would have only supplementary effect and, where that point is concerned, this provision may appear ambiguous.

19. The Tunisian rapporteur agrees with that view, but would like the deletion of the article to be negotiated in exchange for provisions which would become mandatory or would be matters of public policy.

20. The Hungarian and United States rapporteurs prefer the retention of this provision.

(d) Article 81

21. The French rapporteur noted that implementation of this provision might prove very difficult and somewhat inequitable.

22. The appraisal of any benefits derived from the goods by the buyer would appear to be a subjective and arduous operation. Since it is generally the buyer who has the contract avoided, he will surely grudge having to compute the amount of this claim against him by the seller. One might add that the problem will be even worse where he purchased the goods in dispute for his personal use.

23. This means that the seller will have great difficulty in producing proof. On the other hand, he is required to refund to the buyer the sums of money which have been paid to him, an amount of interest being automatically added.

24. It is therefore suggested that the buyer should also be allowed to use this apparently simple method of computation, so that one may envisage two cash claims being easily set off against each other.

25. This will not mean, of course, that the seller cannot claim the payment of interest for his exclusive benefit on the ground that the goods were unusable or practically worthless for his purposes. However, unless he proves his claims, the buyer will be considered to have derived the same benefits from the goods as the seller himself has derived from the price of the goods.

26. The United States rapporteur does not consider this discussion to be of great importance, since

it seems likely to him that the burden of proof will rest on the plaintiff.

27. The Tunisian rapporteur agrees that computation of the indemnity payable by the buyer will be complicated, and he proposes that consideration should be given to finding an improved wording for this provision.

IV

COMMENTS AND PROPOSALS BY THE REPRESENTATIVE OF MEXICO INCORPORATING OBSERVATIONS BY THE REPRESENTATIVE OF AUSTRIA

Articles 82-90 of ULIS

1. The title of section IV: Supplementary rules concerning damages (*Règles complémentaires en matière de dommages-intérêts*) must be simplified, in order that it only refer to damages, whereby, this title would correspond with the wording of other titles of the same ULIS (for example: sections V and VI under the same chapter V, as well as chapter VI). Furthermore, this section contains the fundamental rules on damages, not the supplementary or complementary rules thereto.

2. I believe that subsections A and B should be reduced to one article, given the fact that the general rule contained under article 82 does not only apply to damage when the contract is not avoided, but also when same is avoided, pursuant to the stipulations in article 87. Moreover, the rules under articles 83 through 87 should be considered as special cases for the determination of damages. Consequently, this first subsection A must refer to the determination of damages, inasmuch as all the articles thereunder (articles 82 through 87) make reference to the same problem.

3. *Article 82*: This article is substantially maintained in its present form; the modifications I propose are:

(a) In the first paragraph add the adverb "actually" so as to require that payment for damages correspond to those really suffered. This change is in accord with the comment made by Professor Tunc (Commentary on the Hague Convention of 1 July 1964).

(b) *Article 89* expressly excluded from the rule established in article 82 since its application within the different internal legislations, may result in a higher indemnity for damages.

(c) Instead of the phrase "ought to have foreseen" in the first part of the second sentence, I propose that similar verbal expressions be used and perhaps clearer than those contained in ULIS such as "had foreseen, or ought to have foreseen"; and, in lieu of the phrases "then were known or ought to have been known", in the second part of the same sentence, "then knew or ought to have known" be used.

Note: The representative of Austria has indicated that the French version of this article should maintain the reference as to *perte subie* and *gain manqué*, I am not certain whether the French text does require such provision, as I believe that reference to *dommages-intérêts* at the beginning of the article is sufficient to understand both concepts, *perte subie* and *gain manqué*. It seems to me that

such is the scope of article 1149 of the French Code. There is no doubt whatsoever that the Civil Code of Mexico, upon referring to the concept which is equivalent to *dommages-intérêts* (*daños y perjuicios*) includes both the losses suffered as well as the profits which were not earned. The text of article 2108 and 2109 of the Code is the following:

Artículo 2108. Se entiende por daño la pérdida o menoscabo sufrido en el patrimonio por la falta de cumplimiento de una obligación.

Artículo 2109. Se reputa perjuicio la privación de cualquiera ganancia lícita, que debiera haberse obtenido con el cumplimiento de la obligación.

Article 2180. By damage shall be understood the loss of or deterioration caused to property by failure to fulfil an obligation.

Article 2109. By impairment shall be understood the loss of any licit profit which should have been derived from the fulfilment of the obligation.

However, if experts of law and French language, should judge that it is not sufficient to talk about *dommages-intérêts*, the expression *perte subie* and *gain manqué* should, of course, remain within the text.

4. *Article 83.* The text is maintained, our proposal merely omitting the additional 1 per cent assessment with respect to interests on such sum as is in arrear—which I do not believe is justified. The expression (in any event) remains in parenthesis, inasmuch as I believe same is superfluous.

5. *Article 84.* The representative of Austria has proposed that the reference under this article to the *jour où le contrat est résolu* be replaced by the expression *jour où la délivrance a eu lieu ou aurait dû avoir lieu*, which would avoid doubts and problems to the party exercising the right to avoid the contract. I believe that this suggestion is wise and advisable and consequently, the text should be changed accordingly.

6. *Article 85.* No changes.

7. *Article 86.* No changes.

8. *Article 87.* This article is omitted since it seems unnecessary given the new text proposed for article 82.

9. Subsection C (General provisions concerning damages). I propose that it be changed to:

B. General provisions

10. *Article 88.* No changes.

11. *Article 89.* The addition of a second paragraph is proposed, which would reflect, in a very express form, what Professor Tunc, upon commenting ULIS indicates as being implicit in the rule, namely that the damages as referred to therein shall never be less than those which may result from applying the rules of articles 82 through 88.

12. Section V. Expenses. No changes.

13. *Article 90.* We suggest that this article commence by using the phrase "except as otherwise agreed" since the parties may reach an agreement as to different rules other than those established under this article.

14. The text of articles 82-90 as suggested appears in the appendix hereto.

Appendix

DAMAGES

A. *Determination of their amount*

Article 82

Damages for a breach of contract by one party shall consist (whether the contract is avoided or not) of a sum equal to the loss actually suffered by the other party.

Except as provided for by article 89, such damages shall not exceed the loss which the party in breach had foreseen or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which he knew then or ought to have been known to him as a possible consequence of the breach of the contract.

Article 83

Where the breach of contract consists of a delay in the payment of the price which does not cause the avoidance of the contract, the seller shall (in any event) be entitled to interest on such sum as is in arrear at a rate equal to the official discount rate in the country where he has his place of business, or, if he has no place of business, his habitual residence.

Article 84

1. In case of avoidance of the contract, where there is a current price for the goods, damages shall be equal to the difference between the price fixed by the contract and the current price on the date on which the delivery took place or ought to have taken place.

2. (No changes.)

Article 85

(No changes.)

Article 86

(No changes.)

Article 87

(Omitted.)

B. *General provisions*

Article 88

(No changes.)

Article 89

In case of fraud, damages shall be determined by the rules applicable in respect of contracts of sale not governed by the present law. However, such damages shall never be less than those which may result from applying the rules of articles 82 through 88.

SECTION V. EXPENSES

Article 90

(No changes.)

V

OBSERVATIONS AND PROPOSALS BY THE REPRESENTATIVE OF AUSTRIA PREPARED IN CO-OPERATION WITH THE REPRESENTATIVE OF MEXICO

Articles 91-101 of ULIS

1. Articles 91-95, relating to preservation of the goods, call for little comment. At the very most, it might be helpful to the interpretation of the end of paragraph 1 of article 94 if the words *en temps utile* were inserted between the words *pourvu qu'elle lui ait donné* and *un avis* in the French text.

2. On the other hand, articles 96-101, concerning passing of the risk, should be fairly substantially re-drafted and simplified.

3. First of all, one may wonder whether article 96, which, in a roundabout way, contains nothing other than a perhaps questionable definition of the term "risk", serves any purpose. Although I have no strong feelings on the matter, I should be inclined to delete that article.

4. In article 97, paragraph 2, the words "handing over" which occur twice should be replaced by the word "delivery".

5. Paragraphs 2 and 3 of article 98 no longer conform to article 20 (b) and (c). Those provisions state clearly when delivery occurs. Paragraphs 2 and 3 of article 98 do not add very much but tend rather to confuse matters. It will be better to delete them.

6. *Comments by the representative of Mexico.* I agree with all your points of view. The only small change I would suggest is that in the first paragraph of article 98 the expression "handing over" in the English version and *remise* in the French version be replaced by "delivery" and *délivrance*, respectively. Obviously, the foregoing is a consequence of your proposal to modify the second paragraph of article 97 to this effect.

7. Article 99 apparently follows an old rule of maritime law. However, I am not convinced that the mode of transport should affect the relations between seller and buyer (even though the sale of a bill of lading seems to fall outside the scope of ULIS) and that the buyer can be obliged to pay the price for goods which no longer existed at the time of the conclusion of the contract, whether or not that fact was known by the seller. It therefore seems to me that we must avoid any possibility of a passing of the risk prior to the conclusion of the contract of sale. A provision to that effect would be better inserted in article 97.

8. *Comments by the representative of Mexico.* I also share your criticism with respect to article 99; however, inasmuch as said rule reproduces "an old rule of maritime law", I believe your suggestion to add another paragraph to article 97 (which may be the second paragraph in order that the one which currently appears as the second becomes the third paragraph), which would say what you indicate, namely, that the risks shall never be transferred prior to the conclusion of the sales contract, is wise and advisable. Strictly speaking, and in consideration of the rule provided for in article 97, such principle would be unnecessary. However, I insist that inasmuch as a tradi-

tional rule of maritime law is involved—which perhaps has already been included in some international convention—problems of interpretation would be prevented if the Law established the opposite principle in an express manner.

9. There is no longer any reason for article 100, since the former paragraph 3 of article 19 has been deleted and those parts of it to which article 100 refers have not been incorporated in article 20. The points raised concerning article 99 also apply to article 100, which could therefore be deleted.

10. With respect to article 101, Professor Tunc's commentary states that it is intended to avoid misunderstandings. I feel that on the contrary it creates misunderstandings, and I would favour its deletion also.

11. The text that I would propose, with the agreement of the representative of Mexico, would therefore read as follows:

Article 96

(Deleted.)

Article 97

(1) (Unchanged.)

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

(3) Where the sale is of goods in transit by sea, the risk shall be borne by the buyer as from the time of the handing over of the goods to the carrier. However, where the seller knew or ought to have known, at the time of the conclusion of the contract, that the goods had been lost or had deteriorated, the risk shall remain with him until the time of the conclusion of the contract.

Article 98

[(1)] Where delivery of the goods is delayed owing to the breach of an obligation of the buyer, the risk shall pass to the buyer as from the last date when, apart from such breach, delivery could have been made in accordance with the contract.

(2) (Deleted.)

(3) (Deleted.)

Article 99

(Deleted.)

Article 100

(Deleted.)

Article 101

(Deleted.)

VI

PROPOSALS BY THE REPRESENTATIVE OF NORWAY FOR
THE REVISION OF ARTICLES 71 TO 101 OF ULIS

Article 48

The buyer may exercise the rights [as] provided in articles 43 to 46 [and claim

damages as provided in Article 82 or articles 84 to 87], even before the time fixed for delivery, if it is clear that *the seller will fail to perform [any of] his obligations.*

CHAPTER IV. OBLIGATIONS OF THE BUYER

Article 56

SECTION I. PAYMENT OF THE PRICE

Articles 57 to 60

SECTION II. OTHER OBLIGATIONS

Article 61

Same as ULIS article 69.

Article 62

Same as ULIS article 65.

SECTION III. REMEDIES FOR THE BUYER'S
FAILURE TO PERFORM

Article 63

Cf. ULIS
art. 70 and
rev. art. 41

1. Where the buyer fails to perform any of his obligations [his obligations relating to payment of the price, taking delivery of the goods or any other obligation] under the contract of sale or the present Law, the seller may

(a) Exercise the rights [as] provided in articles 64 to 67;

(b) Claim damages as provided in articles [82 and 83] or in articles [84 to 87].

ULIS arts.
63, 68 and
70
ULIS art.
64

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

Article 64

ULIS art.
61. Cf. rev.
art. 42

The seller has the right to require the buyer to perform the contract [his obligations] 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 [according to article 17], unless the seller has acted inconsistently with that right by avoiding the contract under article 66.

Article 65

ULIS art.
62, para. 2,
art. 66,
para. 2, Cf.
rev. art. 43

Where the seller requests the buyer to perform, the seller may fix an additional period of time of reasonable length for performance of the contract [obligations]. If the buyer does not comply with the request within the additional period, or where the seller has not fixed such a period, within a period of reasonable time, or if the buyer already before

the expiration of the relevant period of time declares that he will not comply with the request, the seller may resort to any remedy available to him under the present Law.

Article 66

ULIS arts. 62, 66 and 70. Cf. rev. art. 44

1. The seller may by notice to the buyer declare the contract avoided:

(a) Where the failure by the buyer to perform his obligations under the contract and the present Law amount to a fundamental breach of contract, or

(b) Where the buyer has not performed within an additional period of time fixed by the seller in accordance with article 65, or

ULIS art. 66, para. 1

(c) Where the buyer's failure to perform his obligation to take delivery of the goods gives the seller good grounds for fearing that the buyer will not pay the price.

New

2. Where the goods have been taken over by the buyer, the seller cannot declare the contract avoided according to the preceding paragraph and *claim the return* of the goods unless the contract provides that the seller shall retain the property or a security right in the goods until the price has been paid, and such provision is not invalid as against the buyer's creditors according to the law of the State where the buyer has his place of business. [The provisions of article 4 subparagraphs (a) and (b) shall apply correspondingly.]

Cf. rev. art. 44, para. 2

3. The seller shall lose his right to declare the contract avoided if he does not give notice thereof to the buyer within a reasonable time:

(a) Where the buyer has not performed his obligations on time, after the seller has been informed that the price has been paid late or has been requested by the buyer to make his decisions as regards performance or avoidance of the contract;

(b) In all other cases, after the seller has discovered the failure by the buyer to perform or ought to have discovered it, or where the seller has requested the buyer to perform, after the expiration of the period of time referred to in article 65.

Article 67

Same as ULIS article 67.

Article 68

Cf. ULIS arts. 76-77 and art. 48

The seller may exercise the rights [as] provided in articles 65 and 66 [and claim damages as provided in article 82 or articles 84 to 87], even before the time

fixed for performance, if it is clear that the buyer will fail to perform [any of] his obligations.

Comments

1. The draft arts. 61 to 67 shall replace ULIS arts. 61 to 70. The drafting is based on the revised arts. 41 to 44 as adopted during the last meeting of the Working Group.

2. Art. 61 is the same as ULIS art. 69, and art. 62 the same as ULIS art. 65.

3. Art. 63 replaces ULIS arts. 63, 64, 68 and 70 (cf. rev. art. 41).

4. The matters dealt with in ULIS Arts. 61, 62 and 66 are dealt with in the draft arts. 64 to 66, which have been drafted in accordance with the text of arts. 42 to 44 as adopted at the last meeting of the Working Group.

5. As regards ULIS art. 61 para. 2, see proposed new art. 82 *infra*.

6. The draft art. 65 para. 2, which is new, is based on the Uniform Scandinavian Sales Act, section 28 para. 2.

7. Art. 68 deals with anticipatory mora and corresponds to ULIS arts. 76-77 and 48. ULIS arts. 76-77 are proposed to be deleted (and art. 48 to be correspondingly extended to cover also damages).

CHAPTER V. PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER

Article 69

Same as ULIS article 90.

Article 70

1. Same as ULIS article 75 para. 1.

Cf. ULIS art. 77

2. Same as ULIS article 75 para. 2.

3. The party exercising the right to declare the contract avoided, in whole or in part, as provided in the preceding paragraphs of this article, may claim damages in accordance with articles [84 to 87].

SECTION I. CONCURRENCE BETWEEN DELIVERY OF THE GOODS AND PAYMENT OF THE PRICE

Article 71

Same as ULIS article 71.

Article 72

ULIS art. 72

1. Where delivery is effected by handing over the goods to the carrier in accordance with subparagraph 1 (a) of article 20, the seller may despatch the goods on terms that reserve to himself the right of disposal of the goods during the transit. The seller may require that the goods shall not be handed over to the buyer at the place of destination except

against payment of the price and the buyer shall not be bound to pay the price until he has had an opportunity to examine the goods.

2. Same as ULIS article 72 para. 2.

Comments

In the third and fourth line of the present paragraph 1 the words "either postpone despatch of the goods until he receives payment or" are a bit misleading since in most cases there will be an agreement or a usage to the contrary. It seems better to delete this passage, so that any right to postpone despatch would depend on agreement or usage.

Article 73

1. Same as ULIS article 73 para. 1.

2. Same as ULIS article 73 para. 2.

3. Same as ULIS article 73 para. 3.

New 4. A party may not exercise the rights provided in paragraphs 1 and 2 of this article if the other party provides a guarantee for or other adequate assurance of his performance of the contract.

[Transfer present art. 74 to new art. 87.]

SECTION II. SUPPLEMENTARY RULES CONCERNING EFFECTS OF AVOIDANCE AND DELIVERY OF SUBSTITUTE GOODS

[Transfer present article 75 to new article 70 and delete present articles 76-77 (cf. Article 48, new article 68 and new para. 3 of new article 70).]

Article 74

Same as ULIS article 78.

Article 75

ULIS art. 79. Cf. ULIS art. 97, para. 2 (which is proposed to be deleted) 1. The buyer shall lose his right to declare the contract avoided or to require the seller to deliver substitute goods where it is impossible for him to return the goods delivered in the condition in which he received them.

2. Nevertheless, the preceding paragraph shall not apply:

(a)

(b) As in ULIS art. 79 para. 2.

(c) If part of the goods have been consumed or transformed by the buyer in the course of normal use before the lack of conformity with the contract was discovered or ought to have been discovered;

(d)

(e) As in ULIS art. 79 para. 2.

Article 76

ULIS art. 80 The buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods by

virtue of article 75, shall retain all other rights conferred on him by the present Law.

Article 77

ULIS art. 81

1. Same as ULIS article 81 para. 1.

2. Same as ULIS article 81 para. 2, except. *subpara. (b)* which shall read:

(b) Where it is impossible for him to return the goods or part of them, but he has nevertheless exercised his right to declare the contract avoided or to require the seller to deliver substitute goods.

SECTION III. SUPPLEMENTARY RULES CONCERNING DAMAGES

Article 78

Same as ULIS article 82.

Article 79

ULIS art. 83

Where the breach of contract consists of delay in the payment of the price, the seller shall in any event be entitled to interest on such sum as is in arrear at a rate of 6 per cent, but at least at a rate of 1 per cent more than the official discount rate in the country where he has his place of business or, if he has no place of business, his habitual residence [article 4 (a) and (b) apply].

Comments

The official discount rates are in many countries fixed rather arbitrarily, based on monetary and other financial considerations, and are often much lower than the rates to be paid in private business. It is therefore proposed to fix a minimum rate of 6 per cent corresponding to the rate established in the Geneva Convention of 1930 providing a Uniform Law for Bills of Exchange and Promissory Notes (article 49).

Article 80

Same as ULIS article 84.

Article 81

Same as ULIS article 85.

Article 82

New

The damages referred to in articles 80 and 81 shall not, however, exceed the difference between the price fixed by the contract and the current price at the time when it would be in conformity with usage and reasonably possible for the buyer to purchase goods to replace, or for the seller to resell, the goods to which the contract relates.

Comments

The provisions contained in ULIS art. 25, art. 42 paragraph 1 (c) and art. 61 paragraph 2 exclude the right to performance of the contract in cases where it is in conformity with usage and reasonably possible

to purchase goods to replace, or to resell, the goods to which the contract relates. These provisions have important consequences for the calculation of damages according to art. 84 paragraph 1 and art. 85 [new arts. 80-81], because they mean that in the cases in question the damages will be calculated on the basis of the current price at the time when it is in conformity with usage and reasonably possible for the buyer to purchase goods in replacement, or for the seller to resell the goods. The majority of the Working Group has been in favour of deleting the provisions contained in *ULIS arts. 25, 42 paragraph 1 (c) and 61 paragraph 2*. In view of this it seems to be desirable to add a provision to ensure that the deletion of the said provisions in *ULIS* does not affect the substance of the provisions in arts. 84 and 85 [new 80-81] as they now appear in the *ULIS* context. It should also be kept in mind that the abolishment of the concept of *ipso facto* avoidance will influence the content of the rule in present article 84 paragraph 1, since the time of avoidance may be shifted and delayed, especially in the case of non-delivery. This will be mitigated by the proposed provision in new article 82.

Articles 83 to 86

Same as *ULIS* articles 86 to 89. [In the renumbered article 83 the references should be corrected to articles 80 to 82.]

SECTION IV. EXEMPTIONS

Article 87

Same as *ULIS* article 74.

SECTION V. PRESERVATION OF THE GOODS

Articles 88 to 92

Same as *ULIS* articles 91 to 95.

CHAPTER VI. PASSING OF THE RISK

Article 93

Same as *ULIS* article 96.

Article 94

- ULIS* art. 97
1. The risk shall pass to the buyer when delivery of the goods is effected.
 2. Same as *ULIS* article 101.

Comments

Paragraph 1 should be formulated so as not to make the passing of the risk dependent on a (faultless) delivery on time.

The present *paragraph 2* is deleted as superfluous on the background of the revised article 20; cf. present article 79 paragraph 2 (new art. 75 para. 2).

Articles 95 to 97

Same as *ULIS* articles 98-100. [In the new art. 97 the reference in the first line should be corrected to the second period of revised article 21, paragraph 1.]

VII

OBSERVATIONS BY THE REPRESENTATIVE OF AUSTRIA

Articles 74-101 of *ULIS*

1. Since I have a very limited time at my disposal to consider the various proposals, I can give below only a brief expression of opinion without elaborating on the reasons for adopting the various attitudes. I must also reserve the right to modify, if necessary, one or other of the views expressed below if in the course of the discussion at the next meeting of the Working Group convincing arguments are put forward.

Article 74

2. The suggestions of the United Kingdom representative appear to be generally acceptable.

Articles 75 to 77

3. With regard to paragraph 1 of article 75, I can accept the amendments proposed by the United States representative. I should however prefer to retain in paragraph 2 the phrase "would be worthless to him".

4. With regard to article 76, I would prefer, like the French representative, to retain the text (with the exception of the word "fixed"), although I have doubts regarding the Hungarian representative's interpretation according to which the avoidance of the contract would appear to be conditional.

5. I support the proposed deletion of article 77.

Articles 78 to 81

6. I am in favour of deleting subparagraph (a) of article 79, paragraph 2, but I do not agree with the Hungarian representative's wish to add in subparagraph (c) (which would become subparagraph (b)), the word "sold". That appears to me to be going too far. Similarly, I cannot support the French representative's proposal to amend subparagraph (d) (which would become subparagraph (c)), which may perhaps arise from a misunderstanding. The first part of the wording proposed is unnecessary. It would suffice to use the same language as in paragraph 1 and state: "if the impossibility of returning the goods in the condition in which they were received is not due to the act of the buyer or of some other person for whose conduct he is responsible".

7. I agree with the Hungarian representative that the action to be taken on subparagraph (e) (which would become subparagraph (d)) should depend on the decision concerning article 33, paragraph 2.

8. In view of the wish to delete article 77, the retention at least of article 80 is in my view desirable.

9. I am not entirely convinced by the criticism of article 81 (particularly paragraph 2). In particular, the example of purchase for personal use does not appear to me relevant, since it has been decided to exclude retail sales from the scope of application of the Uniform Law. It is clear that the calculation called for by paragraph 2 will often be more difficult than that which is required for the application of paragraph 1. That does not seem to me to be an adequate reason for making the buyer liable to pay an almost fixed sum which will hardly ever correspond to the real benefits (or lack of benefits).

Articles 82 to 90

10. The Mexican representative took account of my views in drafting his comments; I have therefore nothing further to add.

Articles 91 to 101

11. I have nothing to add to the proposals which the Mexican representative and I have already submitted with regard to this group of articles.

12. The amendments to all the articles from 61 to 101 submitted by the observer for Norway, depart to such an extent from the text of the 1964 Uniform Law on the International Sale of Goods, particularly with regard to presentation, that it would require considerably more time to examine them than the period allocated to members of the Working Group. I cannot therefore for the time being make any comments about the document which will no doubt be carefully examined in the course of the next session.

VIII

OBSERVATIONS BY THE REPRESENTATIVE OF HUNGARY
FOR THE REVISION OF ARTICLES 82-90

Article 82 (1)

1. "Loss actually suffered" might create the impression that only *damnum emergens* is due, particularly if the reader asks the question why did the UNCITRAL modify the ULIS text. This impression seems to be strengthened by using the word "actually".

Article 82 (2)

2. I wonder whether "had foreseen" should appear in the text. If the party actually foresees losses on the part of his partner in case of his breach, does he not act in bad faith?

Article 84

3. In substance I agree with the idea expressed in this article. A problem, however, might arise in connexion thereof in cases where the goods were delivered with a delay.

	(a)	(b)	(c)
(i) the price fixed by the contract:	100	100	100
(ii) price at the date of delivery:	150	100	80
(iii) at the actual date of delivery:	130	80	100

(a): The buyer has no damage if the prices under (ii) and (iii) are contrasted with the price fixed by the contract. If, however, the seller had delivered in time the buyer could have sold the goods for 150 and at the time of actual delivery he can sell them only for 130. If he receives only 30—which seems to be the proposed solution—he will have a loss of 20.

(b): The buyer would have had no damage if the seller had delivered at the time fixed by the contract. At the time of actual delivery he has a loss of 20 and it is fair that he obtains 20 in damages.

(c): The buyer would have had a loss of 20 if the seller had delivered in time. At the date of actual de-

livery he has no damage, the rule is correct, subject to 2.

4. It is not quite clear from the proposed text whether the victim of the breach or the judge is given a right of option between the price on which the delivery took place and on which it was due, or whether in cases where delivery actually took place later than the time of performance, the price on that later date is binding for the purposes of assessing the damages. If the buyer has an option in this field, case under (c) might lead to an unwarranted result: the buyer would be entitled to claim 20, and if the buyer had no option, he would lose 20 in the case under (a).

Article 90

5. The term "delivery" in the ULIS means only delivery of goods which conform to the contract, and in the UNCITRAL draft it covers also delivery of non-conform goods (see e.g. art. 97 and the comments of the representative of Austria thereto). Having regard to this fact ought art. 90 not be amended or supplemented? Are these rules applicable also in cases of delivery of goods which are not in conformity with the contract? In such cases the seller will most probably have further expenses.

Articles 96-101 of ULIS

6. The simplifications proposed by the representative of Austria and the representative of Mexico are very well-founded. The only remark I should like to make is that perhaps article 96 could be retained, although it seems to be sufficiently clear that most if not all legal systems are rather unanimous in leading to the same result and thus the article might be quite unnecessary. My concern is rather related to drafting techniques and the niceties thereof. I do not see in article 96 an endeavour to define risk, but rather a disposition in case the risk passes and I feel somewhat uneasy to describe facts without providing for the legal consequences.

7. If this is correct then the legal consequences should follow the statement of facts to which they are related. Therefore, if the Working Party would decide to retain article 96 of the ULIS, then it should appear as article 99.

IX

OBSERVATIONS BY THE REPRESENTATIVE OF NORWAY
ON THE REPORTS ON THE REVISION OF ARTICLES 74-101

Article 74 of ULIS

1. I have no objections to the proposals made by the United Kingdom, but would prefer the following language in paragraphs 1 and 2:

"1. Where one of the parties has not performed one of his obligations, he shall neither be required to perform nor be liable for his non-performance if he can prove either (a) that performance has become impossible owing to circumstances of such nature which it was not contemplated by the contract that he should be bound to take into account or to avoid or to overcome, or (b) that, owing to such circumstances, performance would be so radically changed as to amount to the performance of a

quite other obligation than that contemplated by the contract; if the intention of the parties in these respects at the time of the conclusion of the contract was not expressed, regard shall be had to what the party who has not performed could reasonably have been expected to take into account or to avoid or to overcome.

"2. Where the circumstances which gave rise to the non-performance, constitute only a temporary impediment to performance, the relief provided by this article shall cease to be available to the non-performing party when the impediment is removed, provided that performance would then, by reason of the delay, not be so radically changed as to amount to the performance of a quite other obligation than that contemplated by the contract."

2. In the revised ULIS Norway has proposed to transfer this article to a new article 87.

Articles 75-77 of ULIS

3. I support the United States proposal regarding article 75 (1) and have no objection to their proposals concerning article 75 (2) and article 77. Norway has proposed to transfer these provisions to a new article 70 in the revised ULIS.

4. As regards the United States proposal to narrow the language of article 76 I share the doubts expressed by the French and Hungarian representatives. Like the representative of Hungary I think that article 76 should be harmonized with article 48, but I would not amalgamate them into one single article. I refer to the Norwegian proposal to transfer article 76 to a new article 68, cf. also the proposed revised article 48.

Articles 78-81 of ULIS

5. Norway has proposed to transfer article 79 to a new article 75 and to extend the scope to cover also the buyer's right to require the seller to deliver substitute goods (cf. ULIS article 97 (2)). Further, in paragraph 2 c, it is proposed to add as an alternative after the word "discovered" the following: "or ought to have been discovered".

6. As regards article 79 paragraph 2 d I am not in favour of the French proposal, even with the amendment proposed by Hungary. In my opinion it is important that the exceptions in paragraph 2 cover, among others, perishment, deterioration or transformation as a result of the very nature of the goods (e.g. perishable goods), regardless of whether the perishment etc. is caused by their non-conformity. Such cases are not covered by other subparagraphs than subparagraph 2 d. Subparagraph 2 d should therefore include these cases as well as fortuitous (accidental) events and the conduct of the seller or a person for whose conduct he is responsible. I have no objection to amalgamating subparagraphs 2 a and 2 d, provided that perishment as a result of the defect is still mentioned.

7. I have no objection to the present subparagraph 2 e of article 79.

8. Article 80 should be kept and extended to cover the buyer's right to require the seller to deliver substitute goods (cf. the new article 76 proposed by Norway).

9. As regards article 81 I refer to the new article 77 proposed by Norway, in particular the proposed extension of subparagraph 2 b. I have no comment on the French suggestion.

Articles 82-90 of ULIS

10. I refer to the new (renumbered) articles 78-86, cf. 69, proposed by Norway.

11. I have no objection to the title etc. of sections proposed by Mexico. As regards the draft text of article 82 proposed by Mexico, I miss an express reference to loss of profit (cf. article 86).

12. Concerning article 83 Norway has proposed (in a new article 79) to fix an interest rate of a minimum 6 per cent, so as not to depend entirely on official discount rates, which in many countries may be fixed rather arbitrarily.

13. Regarding article 84 it should be kept in mind that the abolishment of the concept of *ipso facto* avoidance will influence the content of the rule in present paragraph 1, since the time of avoidance may be shifted and delayed, especially in the case of non-delivery (resp. non-payment of the price). I therefore agree with the representative of Austria that one should reconsider whether the best rule is to rely on the current price on the date of actual avoidance. The date of actual delivery (resp. time for delivery) is proposed by Austria and Mexico. This date seems, however, to be less satisfactory in cases of transport and delivery to a carrier (in which case the buyer may not yet have knowledge of the breach) as well as in cases of non-delivery (in which case the buyer may not yet have had sufficient reason or even the right to avoid the contract until some further time has passed). It should therefore be considered to rely on the date on which the goods are handed over to the buyer or placed at his disposal at the place of destination, unless the buyer has declared the contract avoided on an earlier date, in which case that date should be the basis. In the case of non-delivery (or non-payment) one should rely either on the date of actual avoidance or on the earliest date on which the contract could have been avoided. Further it should be considered to make it clear in the text whether damages always may be increased if any additional damage is proved (cf. article 86).

14. Norway has proposed to insert a new article after present article 85 (a new article 82) for cases where it is in conformity with usage and reasonably possible for the buyer to purchase goods to replace, or for the seller to resell, the goods to which the contract relates. Cf. present ULIS articles 25, 42 (1) c and 61 (2).

15. Norway has proposed to transfer present article 90 on expenses to the beginning of chapter V, as an initial article 69 (without separate section and title).

Articles 91-101 of ULIS

16. I would prefer to keep article 96.

17. As regards article 97 I refer to the new article 94 proposed by Norway. The present paragraph 2

is proposed to be deleted as superfluous on the background of the rev. article 20, cf. present article 79, paragraph 2.

18. I have no serious objections to the present articles 98-100. In article 100 the reference in the first line should be corrected to the second period of rev. article 21, paragraph 1. I think there may still be room for article 100.

19. Norway has proposed to transfer article 101 to article 97 (new article 94) as a new paragraph 2.

X

COMMENTS OF THE REPRESENTATIVE OF HUNGARY ON ARTICLE 74 OF ULIS

1. *On the comments and proposals of the United Kingdom, "Form", paragraph 1 (a):** It is indeed clear from article 35.2 and 36 ULIS that the word "liable" embraces subjection to any remedy. In this case, however, it might be superfluous or even misleading to use other words in article 74. This might create the impression that articles 35.2 and 36 do not cover the same field covered by the proposed text of paragraph 1 in comment (a). It might be asked why do articles 35.2 and 36 not use the same words. The extensive meaning of the word "liable" can also be deduced from paragraph 3, article 74.

2. *Ibid., paragraph 1 (b):* I wonder whether the proposed text under the heading "Substance" eliminates the evils which the proposal strives to eliminate.

(a) An "absence of clear understanding" is also present in respect of "radically changed" or "an obligation quite different", not to speak of the fact that the proposed text also contains the incriminated expressions (*in fine*).

(b) "Impossibility" is also subject to "doubt and divergence between national jurisdictions".

(c) The difficult problem of cause and effect is not eliminated by the proposed text, only transferred to another level ("impossibility owing to such circumstances").

(d) The proposed text is much more complicated than the original. As it is one of the aims of the Working Group to simplify the ULIS. I wonder whether it brings such improvements as to warrant such a result.

3. *Ibid., paragraph 2:*

(a) The original rule in ULIS applies also while the temporary impediment has not yet come to an end, the proposed rule does not. Under this latter rule a radical change becomes relevant only when the temporary impediment has ceased to exist. I believe that a "radical change" should be relevant also before the temporary impediment has been removed.

(b) This indicates a shortcoming of ULIS. Why should the "radical change" be relevant only where there is a temporary impediment? Moreover: what is the reason for concentrating in paragraph 1 on the causes of breach and in paragraph 2 on the results thereof? From this point of view the text of paragraph 1 as suggested by the representative of the United Kingdom is far better than that of the ULIS, provided that it would apply to paragraph 2 as well because it combines the cause and the result of the breach and provided that the word "impossibility" is omitted (see under 5 below). But if such a distinction should nevertheless be maintained for different sets of breach, the division line should not run between temporary impediment and other cases of breach but perhaps between delay and other cases of breach. This needs further consideration. Consequently we should either have the "either . . . or" construction of the text suggested by the representative of the United Kingdom or use "due to" (or any other expression) in paragraph 1 and "radical change" in paragraph 2 for all cases of delay.

4. *Ibid., paragraph 3:* I wonder whether "the contract avoided" should be inserted. This would, to a great extent, reduce the meaning of "liability" in paragraph 1 to damages. Exemption would then mean only exemption from paying damages and from requiring specific performance which is anyway heavily restricted (see article 41, ULIS).

5. *"Restriction" to frustration:* Both the representative of the United Kingdom and the representative of Ghana advocate the "restriction" of the field of application of article 74 to frustration. I have the impression that the provisions of ULIS do not provide for a broader scope for exemptions than it would provide for if based on frustration. Frustration is after all a common law term and concept and ULIS tries to find words equally workable under many civil law systems as well.

As it seems, the two distinguished delegates feel uneasy in respect of the very Continental brevity of the expression "was due to". Perhaps their doubts and misgivings might be reduced by supplementing the expressions in paragraph 1: "he was not bound to take into account or avoid or overcome" by the following words (subject to linguistic improvement): "or did not fall within his sphere of risk". This might be about as vague as any wording we can find in this field but would at least cover the case of an unforeseen rise in prices mentioned under the heading: Form, paragraph 1 (b) by the representative of the United Kingdom. In that case the word "impossibility" might not appear in the text. This concept is namely much narrower in many civil law systems than the "impossibility" of frustration. It usually covers only physical and legal impossibility, although the Germans frequently used the term "economic impossibility" also (particularly before the doctrine of "*Wegfall der Geschäftsgrundlage*" was generally accepted) in which case impossibility would by and large cover the "impossibility" of frustration.

* See above in this annex, section I.

5. Report of the Secretary-General: issues presented by chapters IV to VI of the Uniform Law on the International Sale of Goods (A/CN.9/87, Annex IV)

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INTRODUCTION

1. This is a sequel to the report presented to the Working Group at its fourth session.¹ That report examined unresolved problems presented by the Uniform Law on the International Sales of Goods (ULIS)² in chapter III, "Obligations of the seller"; in response to a request by the Working Group, the report set

¹ "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; UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 2), herein cited as "Report of the Secretary-General on obligations of the seller". This report was reproduced as annex II to the progress report of the Working Group on the International Sales of Goods on the work of its fourth session (A/CN.9/75), herein cited as "Report on fourth session" (UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3).

² 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. The Convention and Uniform Law appear in the *Register of Texts of Conventions and Other Instruments Concerning International Trade Law*, vol. I, at chap. I, 1 (United Nations publication, Sales No. E.71.V.3), herein cited as "Register of Texts".

forth proposed legislative texts dealing with these problems.

2. The proposals included the consolidation and unification of the separate sets of remedial systems contained in chapter III of ULIS. Part I of the present report includes a comparable proposal with respect to the separate sets of remedial provisions in chapter IV, "Obligations of the buyer". Subsequent parts of the present report consider possible solutions to problems presented by chapters V and VI of ULIS, as revealed by the comments and proposals by Governments,³ and adjustments that may be advisable for conformity with decisions taken at prior sessions of the Working Group.⁴

³ See "Analysis of comments and proposals by Governments relating to articles 71 to 101 of ULIS" (A/CN.9/WG.2/WP.17), herein cited as "Analysis".

⁴ Earlier reports of the Working Group: report on first session (January 1970) (A/CN.9/35), UNCITRAL Yearbook, Vol. I: 1968-1970 part three, I, A, 2; report on second session (December 1970) (A/CN.9/52), UNCITRAL Yearbook, Vol. II: 1971, part two, I, A, 2; report on third session (January 1972) (A/CN.9/62), UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5.

I. CHAPTER IV. OBLIGATIONS OF THE BUYER

A. SUBSTANTIVE OBLIGATIONS OF THE BUYER WITH RESPECT TO PERFORMANCE OF THE CONTRACT

1. Action taken at fourth session

3. The Working Group at its fourth session considered four articles (56-59) in chapter IV of ULIS dealing with the substantive obligations of the buyer. Article 56 of ULIS (a general introductory provision) was approved without modification. The Working Group approved a revised version of article 57 (fixing the price), and deferred action on article 58 (net weight) until the current (fifth) session. With respect to article 59 (place of payment), the Working Group approved paragraphs 1 and 2; consideration of a proposed third paragraph (compliance with national law to permit the seller to receive the price) was deferred until the current session.⁶

2. Place and date of payment: articles 59 and 60

4. Articles 59 and 60 of ULIS comprise a subsection entitled: "B. Place and date of payment". Analysis of these two sections discloses that they are incomplete with respect to the *date* for payment of the price, and most particularly with respect to the important practical question of the relationship between the time for payment and for the handing over or dispatch of the goods. The omission seriously impairs the clarity and workability of the law. Merchants need a clear, unified picture as to both *where* and *when* payment is to occur; and the vital aspect of payment needs to be placed in relationship to step-by-step performance of the sales contract by both parties.

5. To analyse the rules of ULIS that bear on the subject of section 1B, "Place and date of payment", it will be necessary to examine the interrelationship among several articles of ULIS. Following this analysis, an attempt will be made to unify and simplify the rules in question.

6. At first glance it would be assumed that article 59 (1) of ULIS attempts to deal with the relationship between payment by buyer and seller's performance. Article 59 (1) states that "where the payment is to be made against handing over of the goods or documents, [the buyer shall pay] at the place where the handing over of documents takes place." However, examination of this provision shows that it is a tautology. The "rule" only applies "where the payment is to be against the handing over of the goods or of documents". This premise for the rule on the place of payment necessarily assumes that the place for handing over the goods (or documents) and the place for payment of the price must be the same; articulating the conclusion that the payment shall be made at the place of the handing over of the goods merely restates the premise in different words and adds nothing to the

general rule of ULIS that the parties shall perform the agreements they undertake. Such a circular statement is presumably harmless. But it must be borne in mind that article 59 fails to set forth a norm which (in the absence of contractual provision) deals with the question as to *when* the buyer is obliged to pay for the goods in relation to the time for the handing over of the goods or documents.

7. To find an answer to this basic question it is necessary to piece together other widely separated and complex provisions of ULIS. Over 10 articles later, it is possible to find in article 71 the following sentence: "Except as otherwise provided in article 72, delivery of the goods and payment of the price are *concurrent conditions*". "Concurrent conditions" is a legalistic concept not readily understandable by merchants, or even by lawyers from different legal systems; this provision is, however, presumably intended to express two important norms: (1) the buyer is not obliged to pay before he receives the goods; (2) the seller is not obliged to surrender the goods before he is paid. Both of these norms implement a common principle: reliance on the credit of another party, in spite of its frequency, calls for an assessment of the facts at hand and consequently is not required unless the parties have specifically so agreed.

8. One difficulty is that under the above provision in article 71 of ULIS, the price is to be paid concurrently with "delivery" (in the French text, *délivrance*). In ULIS, "delivery" (*délivrance*)—unlike "handing over" (*remise*)—does not refer to the surrender of possession or control of the goods. Instead, "delivery" is a complex and artificial concept the implications of which must be gathered from widely separate and complex provisions. To implement article 71 it is necessary in ULIS to look first at article 19, which sets forth rules on "delivery"; the Working Group at its third session found that article 19 was unsatisfactory, and at the fourth session decided that this article should be deleted.⁶ In place of the attempt to define the concept of "delivery" the Working Group at the fourth session approved rules in article 20 on the steps to be taken by the seller to carry out his obligation to effect delivery.⁷

9. Under article 71 the rule that delivery and payment are "concurrent conditions" is applicable "except as otherwise provided in article 72". Article 72 applies only "where the contract involves carriage of the goods and where delivery is, by virtue of paragraph 2 of article 19, effected by handing over the goods to the carrier". In this setting, article 72 provides rules designed to reinforce the general proposition of article 71 to the effect that the seller is not required to either dispatch the goods or surrender control over the goods to the buyer until the buyer has

⁶ Report on fourth session (A/CN.9/75; UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3), paras. 150-177. The Working Group also deferred consideration of articles 60-70 of chapter IV (*ibid.*, para. 178). See also: "Compilation of legislative texts approved by the Working Group at its first four sessions" (A/CN.9/WG.2/WP.18) herein cited as "Compilation", reproduced in this volume, part two, I, 2, above.

⁶ Report on third session (January 1972) (A/CN.9/62/Add.1) (UNCITRAL Yearbook, Vol. III: 1972, part two: I, A, 5), paras. 15-21; Report on fourth session (1973) (A/CN.9/75), paras. 16-21 (UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3). See also report of the Secretary-General on "delivery" in ULIS (A/CN.9/WG.2/WP.8) (UNCITRAL Yearbook, Vol. III: 1972, part two: I, A, 1), paras. 37-40 and annex III.

⁷ Report on fourth session, paras. 22-29; UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3.

paid for the goods. However, the intended result is obscured by the reference to "delivery" of the goods.⁸

10. To sum up, section IB, "Place and date of payment" (articles 59 and 60), fails to deal with the most important problems under this heading; widely scattered provisions in articles 19, 71 and 72 touch on these basic questions but the answers are unclear and, on occasion, unfortunate. It would seem advisable to set forth a more complete presentation under the above heading in section IB, "Place and date of payment".

11. Such a presentation, which draws on the rules of articles 71 and 72, is set forth below as a redraft of article 60. It will be noted that paragraph 2 of the redraft takes account of the role played by documentary letters of credit in facilitating the exchange of goods for the price. The operative provisions on payment in ULIS virtually ignore this basic commercial arrangement.⁹ The detailed operations of the documentary letter of credit must, in the interest of flexibility, be left to commercial usage; however, a direct reference to the documentary credit seems essential in a modern commercial law. Further questions can best be considered after examination of the draft provision, which follows:

(a) *Proposed redraft of article 60 [bis]*

1. The buyer shall pay the price when the seller, in accordance with the contract and the present law, hands over the goods or a document controlling possession of the goods.

2. Where the contract involves carriage of the goods, the seller may either:

(a) By appropriate notice require that, prior to dispatch of the goods, the buyer at his election shall in the seller's country either pay the price in exchange for documents controlling disposition of the goods, or procure the establishment of an irrevocable letter of credit, in accordance with current commercial practice, assuring such payment; or

(b) Dispatch the goods on terms whereby the goods, or documents controlling their disposition, will be handed over to the buyer at the place of destination against payment of the price.

⁸ It will be noted that the quoted rule of article 72 permitting the seller to require payment at destination against surrender of documents applies when two conditions are met: (1) the contract involves carriage of the goods and (2) "delivery" under article 19 (2) is effected by handing over goods to the carrier. In view of the role which "delivery" in ULIS plays in connexion with risk of loss (see article 97 of ULIS) the above rule of article 72 would seem to be inapplicable when the contract provided that risk in transit would remain with the seller. In such shipments the seller would have as much or more justification for surrendering the goods at destination only when the buyer pays, but the use of the "delivery" concept in ULIS makes it difficult to reach this necessary result.

⁹ Article 69 of ULIS refers to various payment devices, including the documentary credit, but the provision is without independent effect for it is expressly dependent on provisions in the contract or the applicability of usages or laws or regulations in force. This article consequently adds little or nothing to other provisions of ULIS. See articles 3 and 9, as approved by the Working Group; these articles are reproduced in the Compilation (A/CN.9/WG.2/WP.18; reproduced in this volume, part two, I, 2).

3. The buyer shall not be bound to pay the price until he has had an opportunity to inspect the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with such opportunity.

(b) *Discussion of draft provision*

12. Paragraph 1 serves two basic functions. The first is to define the time when payment of the price is due. The time is specified in terms of the seller's performance in handing over the goods (or documents controlling them). This approach is appropriate in terms of the nature of performance of a sales contract. The seller's performance, in procuring or manufacturing the goods and, in the normal case, readying them for shipment involves more complex processes than the payment of the price. Often, under the contract or applicable usage, there is some leeway in time for the seller to complete these processes and to tender the goods to buyer or dispatch them by carrier. (See ULIS, article 21.) Before the seller is ready to perform the contract the price is not due; when the point is reached, the price is due—unless, of course, the parties have agreed on delivery on credit. The draft in paragraph 1 thus establishes a norm for the time of payment—an essential feature that is lacking from the section of ULIS entitled "Place and date of payment".

13. The second function of the draft is to articulate the accepted commercial premise that, in the absence of specific agreement, neither party is obliged to extend credit to the other; i.e., the buyer is not obliged to pay the seller until he has control over the goods, and the seller is not required to relinquish control until he receives the price.

14. The draft in paragraph 1 takes account of the fact that control over the goods may be effected by possession of a document that controls possession of the goods. The phrase "document controlling possession of the goods" would be understood to refer to documents such as negotiable bills of lading or similar documents of title under which the carrier requires surrender of the document in exchange for delivery of the goods.¹⁰

15. Paragraph 2 applies the basic principles of paragraph 1 to the circumstances that arise when the contract calls for carriage of the goods.

16. Paragraph 2 (a) affords the seller the opportunity to require that the price be paid before he dispatches the goods. In the sales governed by this law, the goods normally will be shipped to another country; the carriage will often be to a distant point and subject to substantial freight expense. Paragraph 2 (a) affords the seller the opportunity to avoid two hazards: (a) if the price is paid at destination, exchange control restrictions may make it impossible for the seller to receive the benefit of the sale; (b) if the buyer rejects the goods at a distant point the seller may incur serious expenses in reshipping or redisposal of the goods—expenses

¹⁰ Whether a document controls possession of the goods depends on the provisions of the document in question and on applicable law. The reference in paragraph 1 to the effect of the document seems preferable to referring to the designations of such documents, such as "negotiable bill of lading" or "document of title", since such designations lack a uniform meaning.

which, in view of the uncertainties inherent in litigation and the buyer's credit, the seller may never be able to recover. Such considerations seem to underlie provisions in articles 59 and 72 of ULIS, but it is hoped that the statement of such rules as part of a unified presentation on the date and place of payment will be clearer and less subject to gaps and technicalities.

17. Under paragraph 2 (a), it will be noted that if the seller requires payment before dispatch of the goods, the buyer may elect to follow the customary and efficient procedures for handling such payment by establishing an irrevocable letter of credit in the seller's country.¹¹ Pursuant to the general rule in paragraph 1 and "current commercial practice" (paragraph 2), payment under the letter of credit would be due only on the presentation of documents that control possession of the goods.¹²

18. Paragraph 3 brings together, in the setting of the exchange of goods for the price, rules on the right to inspect before payment which appear in articles 71, 72 (1) and 72 (2) of ULIS. These three provisions of ULIS seek to express the general rule that the buyer may inspect the goods before he pays for them unless the arrangements for payment on which the parties have agreed are inconsistent with such inspection. Paragraph 3 of the draft states this as a single, uniform rule which is designed to avoid problems of interpretation that could arise under ULIS from the necessity to reconcile paragraph 1 and paragraph 2 of article 72. Under 72 (1) of ULIS (last sentence) the handing over of goods at destination would normally be arranged by sending the documents (including a negotiable bill of lading) to a collecting bank in the buyer's city, which would surrender the documents in exchange for payment of the price.¹³ In such a payment article 72 (1) states that "the buyer shall not be bound to pay the price until he has had an opportunity to examine the goods". On the other hand, paragraph (2) states:

"Nevertheless, when the contract requires payment against documents, the buyer shall not be entitled to refuse payment of the price on the ground that he has not had an opportunity to examine the goods."

19. The difficulty of reconciling these provisions of paragraphs 1 and 2 of article 72 of ULIS can be illustrated by the following cases:

(a) *Case No. 1.* The contract calls for payment of the price on presentation of a negotiable bill of lading at the point of arrival of the goods and only after arrival of the goods.

(b) *Case No. 2.* The contract calls for such payment against documents prior to the time when arrival

of the goods could be expected, or at a place remote from the place of arrival.

20. In case No. 1, inspection would be feasible, and the seller may be expected to provide therefor by an appropriate instruction on the bill of lading or by appropriate instruction to the carrier. In case No. 2, the terms of the contract show that inspection before payment was inconsistent with the procedures for delivery and payment to which the parties have agreed. Under the proposed draft, an effective tender of delivery by the seller would require that an opportunity for inspection be provided in case No. 1, but not in case No. 2. It seems difficult to work out satisfactory solutions for these standard situations under paragraphs 1 and 2 of article 72 of ULIS.

21. It will be noted that the above draft provision is designated as "Article 60 [bis]". This designation reflects the fact that questions have been raised as to the need for article 60 of ULIS.¹⁴ If the Working Group decides to delete this article, the above draft provision could take its place. If the Working Group retains article 60 of ULIS, the above draft provision could appropriately follow this article.

B. REMEDIES FOR BREACH OF CONTRACT

1. Consolidation of separate sets of remedial provisions applicable to breach of the sales contract by the buyer

22. Chapter IV of ULIS, entitled "Obligations of the buyer", sets forth only a few substantive rules as to the buyer's obligations but intersperses among these provisions three separate sets of remedial provisions that apply when the buyer fails to perform one or another of his substantive obligations. Thus, in chapter IV, separate remedial provisions appear in: (a) articles 61-64 (remedies for non-payment), (b) articles 66-68 (remedies for failure to take delivery), and (c) article 70 (remedies for failure to perform "any other" obligation). This fragmentation of remedial provisions parallels the approach of chapter III of ULIS, "Obligations of the seller". The Working Group at its fourth session decided that the separate sets of remedial provisions in chapter III should be consolidated.¹⁵ The reasons for consolidating the remedial provisions in chapter III appear also applicable to chapter IV. The report of the Secretary-General presented to the Working Group at its fourth session analysed in detail the problems resulting from the creation of separate sets of remedial provisions for various aspects of the performance of a sales contract. As the report noted, unifying such provisions has the following advantages:¹⁶

¹¹ It seems adequately clear that the letter of credit has been "established" if it has either been issued or confirmed in the seller's country.

¹² Under "current commercial practice" the letter of credit may also require the presentation of other documents related to the shipment. See ICC, *Uniform Customs and Practice for Documentary Credits, Register of Texts*, Vol. I, chap. II, B. However, specifying such details in an international convention would probably result in excessive rigidity.

¹³ The collecting bank, acting for the seller, would normally hold both the bill of lading and a sight draft, drawn by the seller, calling for payment of the price. On payment of the draft, the collecting bank would surrender the bill of lading.

¹⁴ See the analysis of comments and proposals presented to the Working Group at its fourth session (A/CN.9/WG.2/WP.15, UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 1), paras. 25-26. The need for article 60 of ULIS may be further diminished by adoption of the provisions on time for payment set forth in the above draft proposal.

¹⁵ Report on fourth session (A/CN.9/75; UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3), paras. 79-137.

¹⁶ The report of the Secretary-General (A/CN.9/WG.2/WP.6) is reproduced as annex II to the report on fourth session (A/CN.9/75; reproduced in UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 2). Consolidating the remedial provisions is discussed at paras. 27-57, 111-155, and 158-162. The reasons for such consolidating are summarized at para. 177.

(a) A unified structure avoids gaps, complex cross-references and inconsistencies which result from such separate sets of remedial provisions. As a result, unified provisions can be drafted with greater simplicity and clarity;

(b) All of the substantive provisions on what the party *shall do* can be placed together and need not be interrupted by complex and technical rules on remedies for non-performance. Such a unified presentation of substantive duties makes it easier for merchants to understand, and perform, their obligations;

(c) Repetitive and overlapping provisions can be omitted, thereby simplifying and shortening the law. As the Secretary-General's report pointed out, the length and complexity of ULIS has been the subject of widespread comment; meeting these criticisms should be of assistance in facilitating the more widespread adoption of the Uniform Law.

23. In view of the action by the Working Group consolidating the separate sets of remedial provisions in chapter III, "Obligations of the seller", it seems likely that the Working Group would wish to consider a comparable consolidation in chapter IV, "Obligations of the buyer". Consequently, this report will consider first the provisions on the substantive obligations of the buyer. Examination of chapter IV discloses that it contains very few substantive provisions on performance by the buyer. This fact, reflecting the relatively narrow scope of the buyer's performance (payment of the agreed price), enhances the desirability and feasibility of consolidating (a) the substantive provisions and (b) the remedial provisions of chapter IV.

24. The first four of the substantive provisions in chapter IV, articles 56 to 59, were considered by the Working Group at its fourth session.¹⁷ Article 60, and a proposed article 60 *bis*, were considered above (paragraph 11).

25. Articles 61-64 of ULIS comprise a subsection entitled "C. Remedies for non-payment". For reasons mentioned above (paragraphs 22-23), these remedial provisions will be considered later in connexion with a consolidation of the remedies of the seller.

26. Section II of ULIS, entitled "Taking delivery" (articles 65-68) is primarily composed of remedial provisions that duplicate those of subsection C of section I of ULIS. One of the relatively few substantive provisions in this section is article 65. This article constitutes merely a definition of "taking delivery". (The buyer is required to "take delivery" by article 56.) Retention of article 65 in its present form seems to present no problems.¹⁸

¹⁷ Report on fourth session (A/CN.9/75; UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3), paras. 150-177. It will be noted that article 58 (computation by net weight) was placed in square brackets with final action deferred until the present session (*ibid.*, para. 171). Action on a proposed third paragraph for article 59 was similarly deferred (*ibid.*, paras. 173-177).

¹⁸ The analysis of comments and proposals presented to the Working Group at its fourth session stated that no comments had been made on this article (A/CN.9/WG.2/WP.15; UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 1, paras. 33-34).

27. Article 66 sets forth remedial provisions for failure of the buyer to take delivery. (This article parallels article 62, which sets forth remedial provision for failure of the buyer to pay the price.) For reasons stated above (paragraphs 22-23), a consolidated set of remedial provisions will be set forth later (paragraph 36 below) following a unified presentation of the buyer's substantive duties.

28. Article 67 of ULIS is primarily concerned with the substantive rights and duties of the seller and the buyer when the contract gives the buyer the right to make certain specifications with respect to the "form, measurement or other features of the goods". In addition, this article includes in paragraph 1 a brief clause providing a remedy for failure of the buyer to make such a specification. The text of article 67 (with remedial provision in *italics*) is as follows:

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.

29. It will be noted that the italicized remedial provision is so brief that it could be retained in this article without significantly impairing the advantages (discussed at paragraphs 22-23 above) of establishing a single, consolidated set of remedies applicable to breach of contract by the buyer. However, this remedial provision presents certain issues of policy that the Working Group may wish to consider.

30. Under article 67 (1) of ULIS, if the buyer fails to make a specification "on the date expressly or impliedly agreed upon", the seller may "*declare the contract avoided, provided that he does so promptly*". Under this provision, the seller may promptly declare the contract avoided without regard to the extent of the delay in making the specification and without regard to whether the delay constitutes a fundamental breach of contract. In this respect, the above provision is inconsistent with articles 26 (1), 30 (1), 32 (1), 43, 45 (2), 52 (3), 55 (1) (a), 62 (1), 66 (1) and 70 (1) (a) of ULIS and with the remedial provisions applicable to breach by the seller established by the Working Group at its fourth session.¹⁹ Under all of these provisions, the severe remedy of avoidance of the contract is avail-

¹⁹ Report on fourth session (A/CN.9/75; UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3, para. 108 (article 44 (1) (a)); see also Compilation (A/CN.9/WG.2/WP.18, reproduced in this volume, part two, I, 2 above).

able only for a fundamental breach of contract.²⁰ It is not evident that a brief delay by the buyer in supplying specifications to the seller would always be more serious than a delay by the seller in supplying the goods or a delay by the buyer in paying for them. Hence, in the interest of consistency and of sound policy, it would seem desirable to delete the italicized remedial provisions from article 67, so that delay or failure of the buyer to supply specifications would be subject to the general remedial provisions applicable to a breach of contract by the buyer.²¹

31. Article 68 sets forth remedies for failure of the buyer "to accept delivery of the goods or to make a specification". For reasons indicated above (paragraphs 22-23) the substance of this provision will be included in a consolidated remedial provision for chapter IV. (See paragraph 36 below.)

32. Article 69 sets forth, in one brief sentence, the only substantive provision in subsection III, "Other obligations of the buyer". Even this article is without independent effect, for the buyer's obligation is confined to taking those steps with respect to guaranteeing payment of the price that are "provided for in the contract, by usage or by laws and regulations in force". It seems unnecessary to repeat that the buyer shall perform his contract; ULIS in article 9 gives effect to usages; and it seems that "applicable" laws and regulations would continue to be "applicable" without such a vague (and circular) provision. Setting up this separate section on "Other obligations of the buyer" probably resulted from the creation of separate categories for the buyers' duties ("Section I. Payment of the price"; "Section II. Taking delivery"), each with its own remedial system. This attempt to categorize the buyer's duties created the need for a residuary "catch-all" section for any obligation of the buyer that might fall outside the first two sections. This problem is avoided by a unified presentation of (a) the buyer's substantive duties and (b) the remedies applicable to the breach of any of his substantive duties.

33. Since article 69 has no independent effect it could be omitted; by the same token its retention probably would not be harmful. However, provisions on payment (including assuring payment by establishing a documentary credit) were included in the proposed redraft of article 60 [*bis*] (paragraph 11 above). If an article along the lines of that proposal is adopted by the Working Group, there would be some gain in clarity and simplicity from omitting article 69 of ULIS.

34. Article 70, the last article in chapter IV, "Obligations of the buyer", provides a set of remedies for section III, "Other obligations of the buyer". Such separate sets of remedies would, of course, be unnecessary

if the Working Group established a consolidated set of remedies for chapter IV.

(a) *Approach to drafting consolidated remedial provisions*

35. For reasons noted above (paragraphs 22-23), it seems probable that the Working Group would wish to establish consolidated remedies for chapter IV, based on the consolidated remedies which it approved for chapter III.²² As we shall see, the consolidated remedies for chapter III, "Obligations of the seller", can readily be adapted for chapter IV, "Obligations of the buyer". The principal adaptations result from the fact that performance by a buyer is less complex than performance by the seller; as a result, some of the remedial provisions in chapter III need not be retained for chapter IV.

(b) *Draft provisions for Section II: remedies for breach of contract by the buyer*

36. Following is a draft set of remedial provisions for chapter IV based on the provisions (articles 41 *et seq.*) approved for chapter III. This system presupposes that the first part of chapter IV will set forth the substantive obligations of the buyer; these provisions could be grouped under a heading such as: "Section 1. Performance of the contract by the buyer".²³ The consolidated remedial provisions could then be grouped under a heading such as "Section II. Remedies for breach of contract by the buyer".²⁴

Proposed provisions

SECTION II: REMEDIES FOR BREACH OF CONTRACT BY THE BUYER

Article 70

1. Where the buyer fails to perform any of his obligations under the contract of sale and the present Law, the seller may:

(a) Exercise the rights provided in articles 71 to 72 *bis*; and

(b) Claim damages as provided in articles 82 to 83 or articles 84 to 87.

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

Article 71

The seller has the right to require the buyer to perform the contract to the extent that specific per-

²² Report on fourth session (A/CN.9/75; UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3); paras. 83-130 (articles 41-47) and annex I. See report of the Secretary-General, *ibid.*, annex II (UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 2), paras. 111-177, especially paras. 158-176.

²³ This section would include the original or redrafted versions of articles 56, 57, 58, 59, 60, 65 and 67. See paras. 3, 11 and 28 above. The proposed structure for chapter IV is set out in para. 45 below.

²⁴ This section would take the place of articles 61, 62, 63, 64, 66, part of 67 (1), 68, and 70 of ULIS. To avoid confusion with the numbering in ULIS, the draft remedial provisions start with article 70, which in ULIS provides remedies for breach by the buyer of any "Other obligations". Articles 71 and 72 of ULIS have been incorporated in the draft article 60 [*bis*] which appears at para. 11 above.

²⁰ In many provisions of ULIS, and in the remedial system approved by the Working Group at the fourth session (arts. 43 and 44 (1) (b)) the innocent party may establish a basis for avoidance of the contract by a notice to perform within a fixed time of reasonable length (*Nachfrist*). Article 67 (1) of ULIS provides for a notice by the seller to the buyer, but the seller may avoid the contract for any delay in providing specifications without regard to whether such a notice has been given.

²¹ The proposed structure for chapter IV is set out in paragraph 45 below. That presentation shows the proposed location of article 67 in the chapter.

formance 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 seller has acted inconsistently with that right by avoiding the contract under article 72 *bis*.

Article 72

Where the seller requests the buyer to perform, the seller may fix an additional period of time of reasonable length for such performance. If the buyer does not comply with the request within the additional period, or where the seller has not fixed such a period, within a period of reasonable time, or if the buyer already before the expiration of the relevant period of time declares that he will not comply with the request, the seller may resort to any remedy available to him under the present law.

Article 72 *bis*

1. The seller may by notice to the buyer declare the contract avoided:

(a) Where the failure by the buyer 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 buyer has not performed the contract within an additional period of time fixed by the seller in accordance with article 72.

2. The seller shall lose his right to declare the contract avoided if he does not give notice thereof to the buyer within a reasonable time after the seller has discovered the failure by the buyer to perform or ought to have discovered it, or, where the seller has requested the buyer to perform, after the expiration of the period of time referred to in article 72.

(c) Discussion of draft provisions for section II: remedies for breach of contract by the buyer

37. Article 70 is modelled closely on the initial article (article 41) in the consolidated remedial provisions for chapter III, as approved by the Working Group at its fourth session. In paragraph 1 (b) of article 70, it was necessary to add a reference to article 83, which is applicable to "delay in the payment of the price". Compare ULIS 63 (2).

38. Paragraph 1 of article 70 is an introductory index section. The word "and" has been inserted at the end of paragraph 1 (a) to preserve the principle of articles 41 (2), 55 (1), 63 (1) and 68 (1) of ULIS that a party may both avoid the contract and claim damages for breach.²⁶

39. Paragraph 2, providing that the buyer may not apply to a court or arbitral tribunal to grant him a period of grace, incorporates the rule of article 64 of ULIS, which appears in section I, "Payment of the price" of chapter IV. Section II, "Taking delivery", and section III, "Other obligations of the buyer", do not contain this provision. Because of this omission, it might be argued that ULIS does not prohibit applications for periods of grace with respect to the obligations em-

braced within sections II and III. Such contention, presumably inconsistent with the intent of the draftsmen, illustrates the inconsistencies and gaps that result from the fragmentation of the remedial provisions applicable to various aspects of performance of the contract of sale.²⁶

40. Article 71 is based on article 42 as approved by the Working Group at the fourth session. The only material modifications are: (a) the omission, at the end of paragraph 1 of article 42, of references to reduction of the price and cure of a lack of conformity of the goods, and (b) the omission of paragraph 2, which deals with the seller's delivery of substitute goods. These provisions are inappropriate to performance by the buyer and no corollary provisions applicable to performance by the buyer appear in chapter IV of ULIS.²⁷

41. Article 72 is modelled closely on article 43 as approved by the Working Group. (Article 43 *bis*, approved by the Working Group for chapter III, deals with cure by the seller of any failure to perform his obligations. For reasons mentioned in the preceding paragraph, it is not included in the draft remedial provisions for chapter IV.)²⁸

42. Article 72 *bis* is based on article 44 as prepared by the Working Group. The only significant modification is the omission of subparagraph 2 (a) of article 44, which relates to the provisions on seller's "cure" of defective performance.

43. Other remedial provisions applicable to performance by the seller (chapter III) do not appear appropriate to the relatively simpler performance by the buyer (chapter IV) and have not been included in the above draft. (Chapter IV of ULIS did not contain such provisions.) These remaining provisions of chapter III which have not been employed in the above draft proposed for chapter IV (paragraph 36) are as follows: article 45 (reduction of the price); article 46 (delivery of only part of the goods); article 47 (early tender of delivery; tender of a greater quantity of goods); article 48 (early recourse to remedies when it is clear the goods will not conform).

44. The above consolidated set of remedies, applicable whenever "the buyer fails to perform any of his obligations under the contract of sale and the pres-

²⁶ Similar gaps and inconsistencies that appeared in the separate sets of remedial systems in chapter III are discussed in the report of the Secretary-General presented to the Working Group at its fourth session (A/CN.9/75, annex II; UNCITRAL Yearbook, Vol. IV: part two, I, A, 2) at paragraphs 164, 170, 171, 172, 174 and 176.

²⁷ Draft article 71 deals with the right to require the buyer to perform the contract. In chapter IV of ULIS, such a provision appears in section I (article 61) and in section III (article 70 (2)), but not in section II. This latter omission appears to be another accidental gap that resulted from fragmentation of the remedial provisions of ULIS. See para. 39, above.

²⁸ It would be possible to devise a provision on "cure" by a buyer of defective initial performance with respect to payment (i.e. correcting the terms of a letter of credit). However, the provisions on cure in article 44 of ULIS and in article 43 *bis* of the Working Group redraft seem to be occasioned by the special complications involved in the repair or replacement of defective goods. As has been noted, ULIS does not set forth a provision in chapter IV comparable to the cure provisions of article 44 included in chapter III. There seems no necessity for such provisions since such issues can be handled in terms of whether the initial failure of performance, or the delay in correcting such a failure, constituted a fundamental breach.

²⁵ Articles 84-87 make clear that damages may be recovered on avoidance of the contract, but it may be advisable not to leave a reader in doubt on this point while examining the earlier portions of the law.

ent Law", deals with the substance of the issues dealt with in the three sets of remedial provisions in chapter IV of ULIS (subsec. I, C: articles 61, 62, 63 and 64; sec. II: articles 66, 67 (1) and 68; sec. III: art. 70).²⁹ It is believed that such a unification of the remedies available to the seller implements the policies that led the Working Group to take similar action with respect to chapter III. (See paragraph 22 above.)

C. PROPOSED STRUCTURE FOR CHAPTER IV

45. The following indicates in skeletal form the structure for chapter IV that would result from decisions by the Working Group and the draft provisions set forth herein:

CHAPTER IV. OBLIGATIONS OF THE BUYER

SECTION I: PERFORMANCE OF THE CONTRACT BY THE BUYER

Articles 56-59

(See annex I to A/CN.9/75* and the compilation (A/CN.9/WG.2/WP.18**))

Article 60 [bis]

(See draft provision at paragraph 11 above)

Article 65

(Same as ULIS; see paragraph 26 above)

Article 67

(See provision at paragraph 28 above, based on ULIS 67 except that the italicized remedial provision would be deleted.)

SECTION II: REMEDIES FOR BREACH OF CONTRACT BY THE BUYER

Articles 70-72 bis

(See draft provisions at paragraph 36 above)

II. CHAPTER V. PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER

A. REVISION AND RELOCATION OF PROVISIONS ON PAYMENT BY BUYER IN ARTICLES 71 AND 72

46. It was proposed above (paragraphs 7-11) that the substance of articles 71 and 72 be incorporated in chapter IV in order to achieve a more complete and intelligible presentation of the buyer's obligations with respect to payment (e.g., time and place for payment

and right to inspection prior to payment). Such a consolidation was proposed in the draft article 60 [bis] that was set forth above at paragraph 11; this provision also dealt with drafting problems that are presented by articles 71 and 72. If the Working Group approves a provision along the lines of the above draft, articles 71 and 72 should be deleted from chapter V.

47. As has been noted, the matters dealt with in articles 71 and 72 are an integral part of the basic obligations of the buyer with respect to payment, which is dealt with in chapter IV, in subsection I, B, "Place and date of payment". Article 73 deals with a distinct problem: a privilege to suspend performance because of a supervening circumstance—i.e., "whenever, after the conclusion of the contract, the economic situation of the other party appears to have become so difficult that there is good reason to fear that he will not perform a material part of his obligations". Problems presented by such supervening circumstances are closely related to the problems dealt with in chapter V, section II, "Exemptions" (article 74). Consequently, article 73 should remain in chapter V.³⁰ On the other hand, moving the provisions on the basic obligation of the buyer to pay the price in articles 71 and 72 to chapter IV would clarify the structure of the uniform law.

B. SUSPENSION OF PERFORMANCE: ARTICLE 73

48. The provisions of article 73 deal with two subjects: (1) paragraph 1 establishes a general rule on suspension of performance; (2) paragraphs 2 and 3 apply the general rule to a specific situation: preventing of the delivery of goods in transit to the buyer.

1. *The general rule on suspension of performance*

49. Paragraph 1 of article 73 provides:

"Each party may suspend the performance of his obligations whenever, after the conclusion of the contract, the economic situation of the other party appears to have become so difficult that there is good reason to fear that he will not perform a material part of his obligations."

50. One question, presented in 1969 in the reply by Egypt to an inquiry by the Secretary-General, emphasized that the above provision "leaves it to the party concerned to evaluate both the economic situation of the other party and the extent of the obligations which will not be performed".³¹ The same issue was discussed at the Commission's second session (1969); other representatives expressed the view that under this provision a party is not given the right unilaterally to suspend performance, and that if a party acts inconsistently with the standard set forth in paragraph 1 he would be liable for damages for breach of contract.³² Thus, one question that the Working Group may wish to consider is whether the statement in article 73 of the circum-

³⁰ It would seem appropriate for article 73 to appear in section I of chapter V under a heading such as "Suspension of performance".

³¹ A/CN.9/11/Add.3, p. 24.

³² UNCITRAL, Report on second session (1969); *Official Records of the General Assembly, twenty-fourth session, Supplement No. 18 (A/7618)*, annex I, paras. 95-96.

* UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3.

** Reproduced in this volume, part two, I, 2, above.

²⁹ Article 66 (1) provides that where the buyer's failure to take delivery "gives the seller good grounds for fearing that the buyer will not pay the price", the seller may declare the contract avoided, even if such failure does not constitute a fundamental breach. No such provision appears in section I, "Payment of the price", or section III, "Other obligations", of chapter IV, and it is difficult to see why a failure (or delay) in taking delivery calls for more extreme remedies than a failure (or delay) with respect to payment of this price. Compare the discussion of article 67 on failure to supply specifications (para. 30, above). See also ULIS 73 (suspension of performance based on fear of non-performance).

stances authorizing suspension of performance is sufficiently definite and objective.³³

51. A second question is the consequence of the suspension of performance. This problem can usefully be considered in the setting of the following concrete case, which is probably the most typical situation for which article 73 was intended.

52. *Case No. 1.* A sales contract made in January calls for delivery in June. In January an investigation by the seller's credit department indicates that the buyer's financial position is strong, so the seller agrees that the buyer may defer payment until 60 days after the June delivery.³⁴ However, in May the seller receives information that the buyer's financial position has been impaired so that it would be hazardous to deliver the goods prior to payment: in the language of article 73 (1), "there is good reason to fear" that the buyer will not perform a material part of his obligation.

53. In the above situation, article 73 (1) simply provides that the seller "may suspend the performance of his obligations". This brief statement raises several questions: Is the seller obliged to notify the buyer that he is "suspending performance", or may the buyer receive his first intimation of difficulty when the goods fail to arrive in June? If the buyer's financial position remains doubtful, is the seller entitled to do *nothing* further in performance of the contract? (Note that the only feature that should cause concern to the seller was the initial provision for delivery on credit.) What is the effect of the seller's "suspension of performance" on the buyer's duty to perform? (i.e., if the buyer does nothing to remedy the situation, is he liable to the seller for breach of contract, or does the deterioration of the buyer's financial position relieve him of responsibility under the contract?) Thus, under the present text of article 73 the situation seems suspended in mid-air.

54. In practice, the situation would be handled as follows: the seller would notify the buyer that, because of concern over a current financial report, the arrangement for delivery on credit will be suspended, and the goods will be shipped only if the buyer first assures that the price will be paid—typically by establishing an irrevocable letter of credit. The article would be more helpful if it gave somewhat clearer guidance to the parties based on normal commercial practice.

55. The operation of article 73 may also be examined in the setting of the following situation:

56. *Case No. 2.* A contract made in January calls for the seller to manufacture goods to buyer's specifications and deliver them in June in exchange for cash payment. In February the seller receives a discouraging report on the buyer's financial status so that there is "good reason to fear" that the goods manufactured to buyer's specifications would be left on seller's hands. (In this setting the seller cannot, of course, rely on a theoretical legal obligation by the buyer to compensate the seller for his loss.)

³³ This question is related to that presented by the provision in article 76 that a party may declare the contract avoided where "it is clear that one of the parties will commit a fundamental breach of contract".

³⁴ In practice, the sales contract would normally permit the seller to modify or withdraw such arrangements for credit until the time for delivery.

57. In this situation, as in Case No. 1, there is need for a careful reconciliation of the interests of both parties: (a) the seller needs protection against a practical hazard; (b) the buyer needs to know of the seller's concern; (c) the seller's performance should be subject to suspension only until the buyer provides assurance of payment on delivery—typically by procuring the issuance of a documentary letter of credit.

58. It seems advisable to supplement paragraph 1 of article 73 so as to deal with the foregoing problems. Consideration might be given to the following:

Draft paragraph 1 bis for article 73

A party suspending performance shall promptly notify the other party thereof and shall continue with performance if the other party, by guarantee, documentary credit or otherwise, provides adequate assurance of his performance. On failure by the other party, within a reasonable time after notice, to provide such assurance, the party who suspended performance may avoid the contract.

2. Preventing delivery of goods in transit to the buyer

59. The provisions on stoppage in transit in paragraphs 2 and 3 of article 73, in actual practice, become applicable only under a rather rare combination of circumstances: (1) the seller dispatches the goods to the buyer without receiving payment or assurance of payment (as by documentary letter of credit) and without retaining control over the goods;³⁵ and (2) the seller receives new information as to the buyer's financial position while the goods are still in transit, and in adequate time to take the steps required to prevent the carrier from handing over the goods to the buyer. Provisions on stoppage in transit appear, in various forms, in national legislation and have led to intriguing theoretical speculation, but it is doubtful whether they have a significance in practice that is commensurate with their difficulty.

60. A basic question of interpretation arises under the ULIS provisions on stoppage in transit: Do these provisions impose legal obligations on carriers or third persons, or is article 73 confined to rights in the goods as between the seller and buyer? Article 8 of ULIS, as approved unchanged by the Working Group, provides: "The present Law shall govern *only the obligations of the seller and the buyer* arising from a contract of sale." On the other hand, a wider scope for article 73 seems to be implied from the provision in paragraph 2 that the seller "may prevent the handing over of the goods" by the carrier and, more particularly from the provision in paragraph 3 protecting a third person claiming the goods "who is a lawful holder of a document which entitles him to obtain the goods" unless the seller proves that the third person, when he obtained the document, "knowingly acted to the detriment of the seller". The 1969 reply of Austria to the Secretary-General's inquiry expressed concern over the liability which these provisions may inflict on carriers,

³⁵ Such control could be handled by consigning the goods to the order of the seller, and by transmitting this negotiable bill of lading, with a sight draft, through banking channels.

in conflict with provisions of municipal and international law concerning the carriage of goods.⁸⁶

61. It would be difficult, within the scope of a uniform law on sales, to deal adequately with the rights of carriers and third persons. Therefore, it seems advisable to make it clear that any provisions on stoppage in transit in article 73 are limited to rights as between the seller and buyer, and thus are compatible with the scope of the law as defined in article 3. This could be accomplished by an addition to paragraph 2 of article 73. (In the following draft, it is doubtful whether the bracketed language (a) is surplusage, or (b) is helpful in the interest of clarity.)

Proposed addition to article 73 (2)

The foregoing provision relates only to the rights in the goods as between the buyer and the seller [and does not affect the obligations of carriers or other persons].

62. If the Working Group decides that article 73 (2) is limited to rights as between the seller and buyer, paragraph 3 becomes unnecessary and could be deleted.

C. PROPOSED STRUCTURE FOR CHAPTER V, SECTION 1

63. The foregoing proposals would lead to the following structure for chapter V, section 1 (the first two articles of this section in ULIS—articles 71 and 72—would be incorporated into chapter IV; see paragraphs 7-10, and proposed article 60 *bis* at paragraph 11 above:

CHAPTER V. PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER

SECTION I: SUSPENSION OF PERFORMANCE

Article 73

1. Each party may suspend the performance of his obligations whenever, after the conclusion of the contract, the economic situation of the other party appears to have become so difficult that there is good reason to fear that he will not perform a material part of his obligations. (Same as ULIS 73 (1).)

1 *bis*. A party suspending performance shall promptly notify the other party thereof, and shall continue with performance if the other party, by guarantee, documentary credit or otherwise, provides adequate assurance of his performance. On failure by the other party, within a reasonable time after notice, to provide such assurance, the party who suspended performance may avoid the contract. (See paragraph 58 above.)

2. If the seller has already dispatched the goods before the economic situation of the buyer described in paragraph 1 of this article becomes evident, he may prevent the handing over of the goods to the buyer even if the latter holds a document which entitles him to obtain them. The foregoing provision relates only to the rights in the goods as between the buyer and the seller [and does not affect the obligations of carriers or other persons]. (ULIS 73 (2), with addition proposed at paragraph 61, above.)

⁸⁶ Analysis (A/CN.9/WG.2/WP.17), para. 13; A/CN.9/11, p. 9.

(Paragraph 3 of ULIS 73 is omitted. See paragraph 62 above.)

III. CHAPTER VI. PASSING OF THE RISK

A. INTRODUCTION; RELATED DECISIONS BY WORKING GROUP

64. An important problem, for which a uniform law on sales should supply clear and practical answers, is whether the seller or the buyer bears the risk of loss to the goods. This problem usually is presented by damage or loss occurring after the goods have been handed over by the seller to a carrier or other intermediary and before they are received by the buyer. In normal practice, all or most of this loss will be covered by insurance.⁸⁷ But even in such cases rules on risk of loss are relevant to allocate the burden of pressing a claim against the insurer and of salvaging damaged goods; where insurance coverage is inadequate or lacking, rules on risk of loss have even greater impact.⁸⁸

65. Significant decisions with respect to the approach to risk of loss were taken by the Working Group at its third session (January 1972). At that session the Working Group considered article 19 of ULIS, which sets forth a complex definition of "delivery" (*délivrance*).⁸⁹ The question of rules on risk of loss arose at that time, since the basic rule on risk of loss, contained in article 97 (1) of ULIS, states:

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

Consequently, it was necessary to consider whether the definition of "delivery" in article 19 served well to determine where risk of loss would fall, as well as to determine the other issues which, under ULIS, turned on whether there had been delivery of the goods.

66. In response to an earlier request by the Working Group, the Secretary-General prepared a study addressed to the above question, which the Working Group considered at its third session.⁹⁰ At that session the Working Group took two important decisions that are relevant to the approach to chapter VI on passing of the risk.

67. First, the Working Group concluded that the concept of "delivery" was an unsatisfactory way to approach the practical problem of the risk of loss, and "that in approaching the problem of the definition of

⁸⁷ In some settings the responsibility of the carrier for goods lost or damaged while in his charge is analogous to the protection provided by a policy of insurance.

⁸⁸ See also article 35 (1) (conformity of goods determined by condition when risk passes) and the discussion of this provision in the report of the Secretary-General on obligations of the seller (A/CN.9/75, annex II, paras. 65-67). Well drafted contracts, and general conditions of sale, make specific provision as to risk of loss, either by an explicit statement as to risk or by the use of a defined trade term such as "FOB" or "CIF". Cf. INCOTERMS (ICC Brochure 166), *Register of Texts*, vol. I, chap. I, 2.

⁸⁹ Report on third session (A/CN.9/62, annex II, UNCITRAL Yearbook, Vol. III: 1972, part two, I, A, 5), paras. 17-19.

⁹⁰ Report of the Secretary-General on "delivery" in ULIS (A/CN.9/WG.2/WP.8), UNCITRAL Yearbook, Vol. III: 1972, part two, I, A, 1.

'delivery' it would be assumed that problems of risk of loss (chapter VI of ULIS) would not be controlled by the concept of 'delivery'.⁴¹

68. Secondly, the Working Group concluded that it was necessary to adopt a different approach to "delivery" from that employed in ULIS. This culminated in decisions at the fourth session to delete the definition of delivery in article 19 of ULIS and to state the seller's duties as to delivery in article 20. As had been noted in the report of the Secretary-General, ULIS had vacillated between two approaches to delivery: one is to define the physical act of delivery; the second is to specify the seller's legal duty to deliver: i.e., the contractual duty to perform the contract.⁴² Article 19 of ULIS, which the Working Group deleted, follows the first approach. Article 20, as drafted and approved by the Working Group at its fourth session, follows the second. Thus, article 20 is not a definition of the concept of "delivery" but states what the seller shall do to perform his obligation under the contract. Thus, under article 20 (a) delivery "shall be" effected in certain cases by "handing the goods over to the carrier" and under article 20 (b) and (c) (where the buyer is to come for the goods) "by placing the goods at the buyer's disposal"—usually at the seller's place of business.

69. For example, in the above situations covered by articles 20 (b) and (c) (i.e., where the buyer is to come for the goods), when the seller holds the goods at the buyer's disposal at the seller's place of business, the seller has performed his contractual duty with respect to delivery. But such performance by the seller does not constitute the act of "delivery", which, as the Working Group has observed, requires the co-operation of both parties in effecting a transfer of possession and control from one party to the other. Indeed, the buyer usually is unable, and is not required, to come and take possession of the goods as soon as they are placed at his disposition, and in some situations he may never come and take over the goods. In most such cases, on expiration of the period allowed for taking possession the buyer will be in breach of contract and will be responsible to the seller for loss resulting therefrom; however, in some cases the buyer's delay or total failure to come and get the goods may be subject to an "exemption" or excuse (article 74). Consequently, to conclude that a unilateral act by the seller under article 20 (b) or (c) constitutes an act of "delivery" which transfers risk of loss to the buyer could raise significant practical problems which call for further attention. See paragraphs 73-74 below.

B. ISSUES PRESENTED BY THE RISK PROVISIONS OF ULIS, AND SUGGESTED SOLUTIONS

70. The approach chosen by the Working Group at the fourth session, in drafting article 20 as a statement

of the seller's duty with respect to performance of the contract rather than as a definition of the act or concept of delivery, reinforces the decision taken at the third session—that rules on risk of loss would not be controlled by the concept of "delivery".⁴³ The underlying issues may be illustrated by reference to the following situation.

71. *Case No. 1.* The parties agree on the sale to the buyer of goods, which are to be made available to the buyer at the seller's place of business during the month of May, and which the buyer will come and take away by his own transport at any time during that month. (Compare a sale *ex works*.) On 1 May the goods are ready and available for delivery, but on 2 May the goods are destroyed by fire while they remain on the premises of the seller.

72. On the above facts, the seller has performed his contractual duty as defined in article 20 (b) and (c), as approved by the Working Group at its fourth session.⁴⁴ However, under the rules on risk of loss in ULIS, risk would remain on the seller. Under article 97 (1) risk passes to the buyer on "delivery"; under article 19 (1), (which is applicable in cases that do not involve carriage of the goods), "delivery" consists in "handing over" the goods—an event which, in the above case, has not occurred. Only when the buyer fails to perform his obligation with respect to removal of the goods (i.e., if he fails to come for them during May), would risk pass to the buyer by virtue of article 98 of ULIS.

73. The approach taken by ULIS with respect to risk of loss while the goods are in the seller's possession seems to be supported by practical considerations. In the absence of breach of contract by one party which prolongs possession (and risk) by the other party, there are practical reasons to allocate risk of loss to the party (a) who is in possession and control of the goods and (b) who, under normal commercial practice, is most likely to have effective insurance coverage for the goods. Each of these two considerations calls for brief comment.

(a) A buyer who is asked to pay for goods which he never received because they were destroyed while in the seller's possession will naturally consider the possibility that negligence of the seller or his agents caused or contributed to the loss. The relevant facts (e.g., the circumstances that led to a fire on seller's premises) present difficult problems as to proof (and disproof) and can lead to expensive litigation—as well as to disappointment of the buyer's expectation that he will receive from the seller the goods which the seller promised to hand over to him.

(b) Goods in the seller's possession awaiting delivery to the buyer are more likely to be covered by the seller's insurance than by the buyer's. One of the most efficient and common forms of insurance is the policy covering "Building and contents", which is carried by the businessman in possession and control of the

⁴¹ Report on third session (A/CN.9/62; UNCITRAL Yearbook, Vol. III: 1972, part two, I, A, 5) annex II, para. 17. The reasons supporting this conclusion had been developed, in the setting of concrete situations, in the above-mentioned report of the Secretary-General on "delivery" in ULIS (UNCITRAL Yearbook, Vol. III, 1972, part two, I, A, 1).

⁴² Report of the Secretary-General on "delivery" in ULIS (A/CN.9/WG.2/WP.8, UNCITRAL Yearbook, Vol. III: 1972, part two, I, A, 1), paras. 5, 41, 56-61.

⁴³ Report on third session (A/CN.9/62; UNCITRAL Yearbook, Vol. III: 1972, part two, I, A, 5), annex II, para. 17 discussed above at para. 67.

⁴⁴ Report on fourth session (A/CN.9/75; UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3), para. 29. See also the Compilation (A/CN.9/WG.2/WP.18), reproduced in this volume, part two, I, 2 above.

building. Such a policy is efficient and common because the insurer can calculate the conditions, and risk experience, with respect to losses in such a building (e.g., fire resistance of construction, storage of flammable materials, security measures against theft, and the like). The buyer who has just signed a contract for the purchase of goods is not likely to take out a special policy of insurance covering such goods, and such special coverage is relatively expensive because of administrative costs and the difficulty of rating risks under unknown conditions.

74. In addition, allocating to the seller the risk of loss of goods held by the seller on his own premises (as in the facts stated in case No. 1 at paragraph 71 above) minimizes complex problems of "appropriation" (identification) of goods and of notice to the buyer with respect to "appropriation" to which members of the Working Group have referred in connexion with ULIS 98 (2) and (3).⁴⁵

75. For these reasons, suggested draft provisions, which appear below, follow the approach of ULIS as to allocation of risk of loss in the situation described above, rather than an allocation of risk based on the seller's performance of his contractual duty based on revised article 20. On the other hand, the proposed draft provisions integrate provisions which under ULIS are divided between article 19 and articles 96-101 (chapter VI), and also avoid the problems which the Working Group concluded were the result of the use in ULIS of the definition of "delivery" (*délivrance*).⁴⁶ Other aspects of the draft provisions will be explained below (paragraphs 77 to 86).

1. Draft provisions for chapter VI: passing of the risk

76. Consideration may be given to the following provisions for chapter VI:

CHAPTER VI. PASSING OF THE RISK

[Article 96: omitted]

Article 97 (See ULIS 97 (1), 19 (2), 99)

(1) The risk shall pass to the buyer when the goods are handed over to him. (See ULIS 97 (1).)

(2) Where the contract of sale involves carriage of the goods, the risk shall pass to the buyer when the goods are handed over to the carrier for transmission to the buyer. (See ULIS 19 (2).)

(3) Where the [sale is of] *contract relates to goods then in transit [by sea]* the risk shall be borne by the buyer as from the time of the handing over of the goods to the carrier. However, where the seller knew or ought to have known, at the time of the conclusion of the contract, that the goods had been

lost or had deteriorated, the risk shall remain with him [until the time of the conclusion of the contract] *unless he disclosed such fact to the buyer [and the buyer agreed to assume such risk]*. (See ULIS 99.)

Article 98 (See ULIS 98 (1) and (2))

(2) Where the contract relates to *unidentified* [a sale of unascertained] goods, delay on the part of the buyer shall cause the risk to pass only where the seller has [set aside goods] manifestly *identified goods* [appropriated] to the contract and has notified the buyer that this has been done. (ULIS 98 (2), with indicated drafting changes.)

[Paragraph (3) of ULIS 98 is omitted.]

[Article 99: Omitted: see article 97 (3) of above draft]

[Article 100: omitted]

[Article 101: omitted]

2. Discussion of draft provisions for chapter VI: risk of loss

77. Article 96 of ULIS, under the above draft provisions, would be omitted.⁴⁷ The provision that where the risk has passed to the buyer "he shall pay the price notwithstanding the loss or deterioration of the goods" from one point of view merely articulates an obvious implication of passage of the risk and duplicates the substance of article 35 (1) (first sentence), which has been approved by the Working Group.⁴⁸ Under this reading, the provision would probably be unnecessary but harmless. On the other hand, the provision that the buyer "shall pay the price" might be read (incorrectly) as a remedial provision which would give the seller the right to recover the full price (as contrasted with damages) whenever the risk of loss has passed to the buyer—an approach that would be inconsistent with the system of remedies approved by the Working Group at its fourth session.⁴⁹ The choice does not appear to be of major importance, and article 96 probably would not cause serious inconvenience in practice. However, in the interest of simplicity and clarity, the article is omitted from the above draft provisions.

⁴⁷ See the divergent views on this question summarized in the Analysis (A/CN.9/WG.2/WP.17), para. 84. See *ibid.*, annex V, paras. 3, 6 and 11; annex VIII, paras. 6-7; annex IX, para. 16; reproduced in this volume, part two, I, 4 above.

⁴⁸ See Compilation (A/CN.9/WG.2/WP.18; reproduced in this volume, part two, I, 2), and discussion of article 35 in the report of the Secretary-General on obligations of the seller (A/CN.9/75; UNCITRAL Yearbook, Vol. IV: part two, I, A, 2), annex II, paras. 65-66.

⁴⁹ See article 42 (1) (right to require seller to perform the contract), Report on fourth session (A/CN.9/75); UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3) para. 97. Compare the proposed draft article 71 (based on article 42) set forth above at paragraph 36. Recovery by the seller of the full price (as contrasted with damages) as a practical matter requires the buyer to take over the goods; where the seller is still in possession of the goods, this is equivalent to requiring specific performance of the contract, a remedy which, under ULIS and under the text approved by the Working Group, is not automatically available. However, this inconsistency would probably be insignificant if the Working Group approved the approach, recommended herein, whereby the risk of loss would not normally be transferred to the buyer until the goods are "handed over" to him.

⁴⁵ See analysis (A/CN.9/WG.2/WP.17), para. 90 and annex V, paras. 5 and 11.

⁴⁶ Report on third session (A/CN.9/62; UNCITRAL Yearbook, Vol. III: 1972, part two, I, A, 5), annex II, paras. 17-19; report on fourth session (A/CN.9/75; UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3), paras. 16-21. One of the difficulties resulting from the definition of "delivery" in article 19 of ULIS was that, under some circumstances, goods which were not in conformity with the contract would never be "delivered" to the buyer even if they were used or consumed by him. This led to both practical difficulties and difficulties of translation.

78. Article 97 of the draft states in paragraph 1 a general rule on passage of risk which is applicable to the minority of cases where the contract does not involve carriage of the goods—i.e., where the buyer is obliged to come or send for the goods, as in a contract *ex works*. Cases where the contract involves carriage of the goods would be governed by paragraphs 2 and 3.

79. Paragraph 1 preserves the substance of the rule on risk of loss of ULIS which results from combining articles 19 (1) and 97 (1), but in a simpler and unified form. The reasons of policy that support the approach of ULIS on this point have been discussed in paragraphs 73 to 74 above.

80. Paragraph 2 preserves the substance of the rule that would result under ULIS under articles 19 (2) and 97 (1)—but again in a simplified and unified form. This draft does not retain the exception in article 19 (2) where another “place for delivery has been agreed upon”. The purpose of that exception is to give effect to a contractual provision specifying the point at which risk shall pass to the buyer.⁶⁰ However, under article 8, the provisions of the uniform law yield to the agreement of the parties; repeating this rule in certain parts of the law seems unnecessary.

81. Paragraph 3 is based on article 99 of ULIS, which provides in limited circumstances for transfer to the buyer of loss that had occurred prior to the making of the contract. The provision is placed in conjunction with the rule of paragraph 2 (risk where the contract involves carriage) in conformity with suggestions made in studies prepared for the present session.⁶¹ Certain possible drafting changes are indicated by brackets and italics. The most significant of these relates to the language of ULIS 99 (2), which states that even if the seller knew that “the goods had been lost or had deteriorated” and fails to inform the buyer of this fact, risk shall remain on the seller “until the time of the conclusion of the contract”. It will be noted that under this article, the goods are in transit at the time of the making of the contract; if, after the contract is made, the goods suffer further transit damage this provision would make it necessary to ascertain the points during the transit at which various types of damage occurred—an inquiry that is subject to practical difficulties, particularly in the setting of modern containerized transport. In the interest of simplicity and fairness, the modification indicated at the end of article 97 (3) of the above draft (paragraph 76) would slightly restrict the benefits which this difficult and controversial provision confers on the seller.

82. Article 98 deals with the significant problem of the effect of breach by the buyer on risk of loss. This article could be applicable either at the end of transit under a contract calling for delivery *ex ship* (or the like), or at the seller's factory under a contract calling for the buyer to come for the goods. The above draft retains the substance of paragraphs 1 and 2 of ULIS 98, but omits paragraph 3. A study submitted for this session suggests that paragraph 1 of article 98 be retained

(in substance) but that both paragraphs 2 and 3 of ULIS 98 be omitted.⁶²

83. Paragraph 2 of article 98 responds to the fact that specific goods are usually not identified (“ascertained”) when the contract is made, and that such identification normally occurs only when the goods are packed and labelled for shipment or for handing over to the buyer. It is a basic principle of sales law that risk of loss cannot pass until the goods in question are identified (“ascertained”).⁶³ Indeed, it is difficult to think of passage of risk in goods unless one can identify the goods in question. This principle may be so fundamental that it need not be stated. On the other hand, the deletion of a statement of this principle, now embodied in ULIS 98 (2), may lead to misunderstanding. In addition, ULIS 98 (2) requires not only that the goods have been “manifestly appropriated to the contract” but also that the seller “has notified the buyer that this has been done”. Where the seller seeks to hold the buyer for the loss of goods destroyed on the seller's premises, this notice requirement may be useful to prevent a false claim, following a fire or theft from the seller's place of business, that the goods lost had been “set aside” and “appropriated to the buyer”.

84. Paragraph 2 of ULIS 98 employs the concepts “unascertained” and “appropriated”. These concepts have complex connotations in national law which present problems of translation and could lead to misunderstanding in an international statute. “Identification” of goods seems to be a clearer concept, and has been suggested in italicized portions of the draft proposal.

85. Paragraph 3 of ULIS 98 is much less helpful. Indeed, this provision is difficult to apply in practice since it seems to contemplate that risk passes in unidentified (“unascertained”) goods—an approach which, for reasons just mentioned, would present problems of application and dangers of abuse. For these reasons, paragraph 3 is omitted from the draft proposal.

86. Article 99 of ULIS, for reasons indicated above (paragraph 81) has been included in a slightly modified form, as paragraph 3 of draft article 97.

87. Article 100 of ULIS states a modification of article 19 (3) of ULIS, which the Working Group decided to delete.⁶⁴ ULIS 19 (3) deals with the possibility that goods might be handed over to the carrier without being clearly “appropriated” to the contract; ULIS 100 deals with the possibility that when the seller, after dispatching “unappropriated” goods, might send a notice to the buyer at a time when he knew (or ought to have known) that the goods had been lost or damaged in transit. Under article 97 (2) of the above draft proposal, risk passes to the buyer when the goods have been “handed over to the carrier for transmission

⁶² See the analysis, para. 90 and annex V (reproduced in this volume, part two, I, 4, above), paras. 5, 6 and 11. On the other hand, the outline of provisions in annex VI (*ibid.*) calls for the retention of article 98. See also annex IX (*ibid.*), para. 18.

⁶³ It may be suggested that risks can pass when the buyer purchases a part or fraction of an identified larger mass or “bulk”. However, this is not an exception to the general rule, for in such cases the larger mass must be identified; risk then passes with respect to a share in the larger mass or “bulk”.

⁶⁴ Report on fourth session (A/CN.9/75; UNCITRAL Yearbook, Vol. IV : 1973, part two, I, A, 3), para. 21.

⁶⁰ This agreement may be expressed by a trade term (such as *ex ship*) which is understood to fix the point for passage of risk.

⁶¹ Analysis, para. 92.

to the buyer". In such a case, it seems that problems of lack of "appropriation" could scarcely arise. The combination of articles 19 (3) and 100 of ULIS produce a complex set of rules which seem unnecessary and difficult of practical application. Consequently, ULIS 100 is omitted from the draft provision—a result that is consistent with the study on this topic submitted for the present session.⁵⁵

88. Article 101 of ULIS provides that the passing of risk "shall not necessarily be determined by the provisions of the contract concerning expenses". This cryptic statement was unhelpful in the setting of ULIS and would be quite unnecessary under the above draft provisions which avoid the complex concept of "delivery". The above draft omits article 101—a recommendation which conforms to that in the above-mentioned study.⁵⁶

3. Non-conformity of the goods: effect on risk and the right to avoid the contract

89. Article 97 (2) of ULIS provides:

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

90. This provision is addressed to the following situation: The goods which the seller hands over to the buyer (or to a carrier) do not fully conform to the contract. However, as often is the case when the non-conformity can readily be dealt with by an allowance or deduction from the price, the buyer does not "avoid the contract" or require the seller to replace the goods. In these circumstances, when does the risk of loss pass to the buyer?

91. The complex rules embodied in ULIS 97 (2) were designed to cope with consequences produced by the interaction of two other provisions of ULIS: (1) article 19 (1) of ULIS defines "delivery" as the "handing over of goods which conform with the contract"; (2) under article 97 (1), risk passes "when delivery is effected in accordance with the provisions of the contract and the present Law". These two provisions would produce the following surprising result: If the seller hands over goods which do not conform with the contract, "delivery" will never occur and risk will never pass to the buyer—even though the buyer chooses to retain the goods, and uses (or even consumes) them.

92. To avoid the above result produced by ULIS 19 (1) and 97 (1), it was necessary to add article 97 (2), which was quoted at paragraph 89. This provision is not easy to read, but it seems designed to say that if the buyer retains the goods (i.e., if he does not avoid the contract or require goods in replacement), the risk of loss shall be deemed to have passed retroactively to the buyer when the goods were handed over to him or to a carrier.

93. In short, the source of the difficulty that led to this provision was the rule of ULIS 19 (1) that "delivery" does not occur when goods are handed over which do not "conform with the contract". This difficulty has been removed by the Working Group's decision to delete article 19.⁵⁷ It would seem to follow that article 97 (2), at least in its present form, would be inappropriate. The question that remains is whether there is need for some other provision in chapter VI dealing with the effect of seller's breach of contract on the transfer of risk to the buyer.

94. This question can be analysed in the setting of the two following cases.

95. *Case No. 1.* The seller hands over to the buyer (or to a carrier) goods which fail to conform to the contract in a manner which, although requiring a reduction of the price, would not justify avoidance of the contract. These goods then suffer damage while in the possession of the buyer (or of the carrier).

96. *Case No. 2.* The facts are the same as in case No. 1, except that the non-conformity of the goods constitutes a "fundamental breach" which would justify avoidance of the contract. As in case No. 1, the goods suffer damage after they have been handed over to the buyer or to a carrier.

97. *Case No. 1* presents the following issue: Should the minor non-conformity of the goods prevent the transfer of risk, which normally would have occurred when the goods were handed over? If so, minor breaches of contract could have serious consequences: (a) transit risks would often fall on the seller, even though the damage would normally be disclosed at destination, under circumstances in which the buyer (in accordance with the contract) could more efficiently assess the minor damage and file a claim against the insurer or carrier; (b) if the seller is made responsible for the damage to the goods, the breach would often be sufficiently serious to justify avoidance of the contract.⁵⁸ Both of the above consequences seem unfortunate: a minor non-conformity of the goods probably should not reverse the basic rules on risk of loss. If this conclusion is correct, no provision to deal with the situation described in case No. 1 need be added to chapter VI (risk of loss).

98. *Case No. 2* involved a shipment in which the seller's breach was sufficiently material to entitle the buyer to avoid the contract. Should the fact that the goods were damaged in transit (after the risk passed to the buyer) bar the buyer from avoiding the contract on the ground that he could not "return the goods in the condition in which he received them", as required by article 79 (1).

99. If, as seems probable, the buyer should retain his right to avoid the contract in spite of the damage to the goods, it would be necessary to examine the five exceptions to the rule of article 79 (1) that appear in article 79 (2) to ascertain whether they adequately deal with this question. It seems that the problem may be

⁵⁵ Analysis, para. 94 and annex V (reproduced in this volume, part two, I, 4, above) paras. 9 and 11. But compare annex IX (*ibid.*) in which article 100 is retained.

⁵⁶ *Ibid.*

⁵⁷ Report on fourth session (A/CN.9/75; UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3) para. 21.

⁵⁸ Article 35 (1) provides that conformity of the goods with the contract shall be determined by their condition at the time when risk passes.

met by the fourth exception (article 79 (2) (d)). Under this provision:

"2. Nevertheless, the buyer may declare the contract avoided:

"...

"(d) If the impossibility of returning the goods or of returning them in the condition in which they were received is not due to the act of the buyer or of some other person for whose conduct he is responsible;"

However, it seems advisable to give final consideration to any problems of draftsmanship or clarity that may be presented by this provision in connexion with the Working Group's examination of the rules on avoidance in article 79 of ULIS.

100. The situation described in case No. 2 presents one further issue—the effect of a fundamental breach of contract by the seller on the passage of risk to the buyer. (It will be recalled that this problem arises only when the goods are seriously defective and also have been damaged—usually in transit.) If the buyer exercises his right to avoid the contract, or requires other goods in replacement, the answer is clear: the seller must take over and suffer any loss with respect to the goods that are both defective and damaged.

101. It might be suggested that where there has been a fundamental breach of contract, the buyer will normally exercise his right to avoid the contract (or require goods in replacement), so that no further problem need be considered. However, it is conceivable that the buyer's need for the goods might, in some cases, lead him to retain the goods. On this hypothesis, should the buyer be entitled to claim against the seller for (1) the defect, and (2) the damage to the goods that occurred after the seller handed them over?

102. Examination of ULIS 97 (2) (quoted at paragraph 89 above) shows that, under ULIS, if the buyer does not declare the contract avoided or require goods in replacement, the risk of loss remains with the buyer. Consequently, under ULIS: (1) the buyer may recover for the defect resulting from the seller's breach of contract; but (2) he may not recover for the damage to the goods that occurred after they were handed over. Under the simplified approach to delivery that has been adopted by the Working Group, and under the above draft provisions for chapter VI (paragraph 76), this same result is achieved without the addition of a provision like that of ULIS 97 (2). (As has been noted at paragraphs 90-93, above, the complex rule of ULIS

97 (2) was made necessary only by the provision in ULIS 19 (1) that goods are not "delivered" unless they "conform with the contract"; this problem has been removed by the Working Group by the deletion of article 19.)

103. The above approach has the merit of simplicity and probably would not encounter serious difficulty in practice. On the other hand, it might be suggested that the above approach is subject to the following criticism: The buyer may transfer the risk of loss to the seller if he avoids the contract but not if he retains the goods. As a consequence, this rule may encourage avoidance of the contract. However, the problem can arise only under a relatively rare combination of circumstances: the conjunction of (1) fundamental breach and (2) damage and (3) the lack of adequate insurance coverage and (4) a situation in which the buyer might be willing to retain the goods in spite of a fundamental breach.

104. If it is thought desirable to reverse the result achieved under ULIS and the above draft provisions for chapter IV, consideration might be given to adding the following as article 99. (It will be noted that article 98 deals with the effect of breach by the buyer; this would be followed by the following draft provision dealing with the effect of breach by the seller.)

Draft article 99

Where the failure of the seller to perform any of his obligations under the contract of sale and the present law constitutes a fundamental breach of contract, the risk with respect to goods affected by such failure of performance shall remain on the seller so long as the buyer may declare the contract avoided.

105. The attempt to devise a statutory text to deal with the above problem unfortunately requires recourse to the concept of "fundamental breach of contract"—a test that is inherently subject to doubt and dispute.⁶⁹ It may be doubted whether the situation is of sufficient practical importance (see paragraph 103 above) to justify complicating the rules on risk of loss. For these reasons, the above draft article 99 is not included in the draft provisions proposed for chapter VI.

⁶⁹ It may be assumed that minor contractual deviations would not justify reversal of the rules on risk of loss resulting from the provisions of the uniform law or from the contract. See annex VI (reproduced in this volume, part two, I, 4) to the Analysis (comment to proposed article 94), and paragraph 97 above.

6. 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, fifth session</i>	
Analysis of comments and proposals by representatives of States members of the Working Group relating to articles 56 to 70 of ULIS: note by the Secretary-General	A/CN.9/WG.2/WP.15*

* Reproduced in UNCITRAL Yearbook, Vol. IV: 1973, part two, I, 1.

<i>Title or description</i>	<i>Document reference</i>
Analysis of comments and proposals by representatives of States members of the Working Group relating to articles 71 to 101 of ULIS: note by the Secretary-General	A/CN.9/WG.2/WP.17
Provisional agenda and annotations	A/CN.9/WG.2/L.1
Proposal by the representative of Austria: new paragraph 3 of article 59	A/CN.9/WG.2/V/CRP.1
Proposal of Drafting Group I: article 65 of ULIS	A/CN.9/WG.2/V/CRP.2
Proposal by Norway: article 72 <i>bis</i> , paragraph 2 of ULIS	A/CN.9/WG.2/V/CRP.3
Proposal by the United States: article 73, paragraph 1 of ULIS	A/CN.9/WG.2/V/CRP.4
Proposal by the observer of the International Chamber of Commerce (ICC): article 72 <i>bis</i>	A/CN.9/WG.2/V/CRP.5/ Rev. 1
Proposal of Drafting Party II: articles 60 [<i>bis</i>], 69 and 71 of ULIS	A/CN.9/WG.2/V/CRP.6
Proposal of Drafting Party III: article 71 of ULIS	A/CN.9/WG.2/V/CRP.7
Draft progress report of the Working Group on the International Sale of Goods on the work of its fifth session	A/CN.9/WG.2/V/CRP.8 and Add. 1 to 8

II. INTERNATIONAL PAYMENTS

1. Report of the Working Group on International Negotiable Instruments on the work of the second session (New York, 7-18 January 1974) (A/CN.9/86)*

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INTRODUCTION

1. In response to decisions by the United Nations Commission on International Trade Law (UNCITRAL), the Secretary-General prepared a "Draft uniform law on international bills of exchange and international promissory notes, with commentary" (A/CN.9/WG.IV/WP.2).¹ At its fifth session (1972) the Commission established a Working Group on International Negotiable Instruments. The Commission requested that the above draft uniform law be submitted to the Working Group and entrusted the Working Group with the preparation of a final draft.²

2. The Working Group held its first session in Geneva in January 1973. At that session the Working Group considered articles of the draft uniform law relating to transfer and negotiation (articles 12 to 22), the rights and liabilities of signatories (articles 27 to 40), and the definition and rights of a "holder" and a "protected holder" (articles 5, 6 and 23 and 26).³

3. The Commission at its sixth session (1973) took note with appreciation of the report of the Working Group on its first session, and requested it to continue its work.⁴

4. The Working Group held its second session at United Nations Headquarters in New York from 7 to 18 January 1974. The Working Group 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. With the exception of Egypt, all the members of the Working Group were represented. The session was also attended by observers from the following members of the Commission: Austria, Brazil, Czechoslovakia, Greece, Guyana, Japan, Nepal, Philippines and Sierra Leone, and by observers from the International Monetary Fund, Bank for International Settlements, Commission of the European Communities, Hague Conference on Private International Law and the European Banking Federation.

5. The Working Group elected the following officers:

Chairman Mr. René Roblot (France)
Rapporteur Mr. Roberto L. Mantilla-Molina (Mexico)

6. The Working Group had before it the following documents: a provisional agenda (A/CN.9/WG.IV/WP.3), the draft uniform law on international bills of exchange and international promissory notes, and com-

* 4 February 1974

¹ UNCITRAL report on the fourth session (1971), *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; 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. 61 (2) (c); UNCITRAL Yearbook, Vol. III: 1972, part one, II, A.

² *Ibid.*, para. 61 (1) (a).

³ 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; UNCITRAL Yearbook, Vol. IV: 1973, part two, II, 1.

⁴ UNCITRAL report on the sixth session (1973) *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 17* (A/9017), paras. 25-36; UNCITRAL Yearbook, Vol. IV: 1973, part one, II, A.

mentary (A/CN.9/WG.IV/WP.2),⁵ and the 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).⁶

DELIBERATIONS AND CONCLUSIONS

7. As at its first session, the Working Group decided to concentrate its work on the substance of the draft uniform law and to request the Secretariat to prepare a revised draft of those articles in respect of which its deliberations would indicate modifications of substance or of style.

8. In the course of its session, the Working Group considered articles 42 to 62 of the draft uniform law. A summary of the Group's deliberations in respect of those articles and its conclusions are set forth in paragraphs 10 to 140 of this report.

9. At the close of its session, the Working Group expressed its appreciation to the representatives of international banking and trading organizations that are members of the UNCITRAL Study Group on International Payments for the assistance they had given to the Group and the Secretariat. The Group expressed the hope that the members of the Study Group would continue to make their experience and services available during the remaining phases of the current project.

A. Liability of an endorser on the instrument

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."

10. Article 41 lays down what is the liability of the endorser on his endorsement of an international instrument. Under the article, the liability of an endorser is a secondary liability: it materializes upon dishonour of the instrument by non-acceptance or by non-payment and is subject to any necessary presentment for acceptance or for payment and the making of a protest. An endorser may limit or exclude his liability on the instrument by an express stipulation to that effect on the instrument. At its first session, the Working Group decided 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 the parties to an instrument (see report of the Working Group on International Negotiable Instruments on the work of its first session, A/CN.9/77, paragraph 99, *in fine*).⁷ The Group also agreed that an exclusion or limitation of liability by a party would be effective only

with respect to that party (*ibid.*, paragraph 102). Consequently, article 41 of the revised text (A/CN.9/WG.IV/CRP.3) provides that:

"(a) The endorser may exclude or limit his liability by an express stipulation on the instrument.

"(b) Such stipulation shall be effective only with respect to the endorser."

11. In connexion with the endorser's liability being subject to the making of a protest, where protest is necessary, it was noted that article 58 allowed for the making of an authenticated protest and the making of a protest in simplified form. The question was raised as to what would be the legal effect of a protest, in simplified form, for dishonour of an instrument on which it was stipulated that an authentic protest was required. In this connexion, it was suggested that in such a case the holder should not lose his rights of recourse against prior parties, but should be liable for any damages that were due to his failure to make an authenticated protest. The Working Group decided to take up this question in the context of article 58.

12. It was suggested that the commentary to article 41 should emphasize the importance of the giving of notice in view of the fact that failure to do so would make the holder liable for damages (see article 66).

13. The Working Group expressed provisional agreement with article 41. In accordance with the opinion expressed by it at its first session (A/CN.9/77, para. 120),⁸ the Group decided that the part of the article dealing with the endorser's liability to parties subsequent to himself who are in possession of the instrument and are discharged of liability thereon, should be examined in connexion with the provisions of the draft uniform law concerning discharge (part six).

B. Liability of an endorser outside the instrument

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."

14. Article 42 concerns the liability of an endorser outside the instrument. An endorser is liable for any damages that a subsequent holder may suffer because of defects in previous signatures, material alterations or other infirmities in the rights of the endorser to and upon the instrument. The fact that the endorser did not know of such defects, alterations or infirmities, whether negligently or not, does not affect his liability under the article. Such liability runs with the instru-

⁵ The text of the draft uniform law on international bills of exchange and international promissory notes was reproduced in UNCITRAL Yearbook, Vol. IV: 1973, part two, II, 2.

⁶ UNCITRAL Yearbook, Vol. IV: 1973, part two, II, 1.

⁷ UNCITRAL Yearbook, Vol. IV: 1973, part two, II, 1.

⁸ UNCITRAL Yearbook, Vol. IV: 1973, part two, II, 1.

ment in favour of any subsequent holder who, when taking the instrument, had no knowledge of the defects, alterations or infirmities.

Since the liability incurred under article 42 is a liability outside the instrument, it is incurred also by a person who is not himself liable on the instrument, as where an endorser has endorsed the instrument "without recourse" or where a person has transferred an instrument, on which the last endorsement is in blank, by mere delivery. Furthermore, such liability materializes the moment the instrument is delivered, regardless of its date of maturity. Since the liability is outside the instrument, presentment and the making of protest is not a condition precedent to such liability.

15. The Working Group expressed provisional agreement with the inclusion in the draft of a provision on the lines of article 42, subject to reviewing the article in the context of forged or unauthorized signatures. The following observations were made:

- (i) The article should provide for an upper limit of the amount for damages beyond which the endorser would not be liable. It was agreed that such liability should not exceed the amount which a holder may receive by application of article 67 or 68.
- (ii) The expression "any person" in paragraph 1 of article 42 should not comprise agents for collection. In this connexion it was noted that such agents could be contractually liable to the holder, i.e. outside the instrument.
- (iii) The Working Group was of the opinion that a person liable under article 42 should be permitted to exclude his liability, for instance by writing on the instrument the words "without recourse". However, it was noted that the insertion of such a clause in the instrument could be construed as excluding the liability of the endorser under both article 41 and article 42, thus making it impossible for him to exclude his liability under one of these articles only. The Group instructed the Secretariat to examine the possibility of a special clause which would exclude liability under article 42 only, and to make appropriate inquiries to that effect among banking and trade institutions.
- (iv) The Working Group was agreed that a person liable under article 42 should not be able to exclude his liability if he himself had committed a fraud, if he knew that prior to the transfer of the instrument to him a signature on the instrument was forged or unauthorized, where the instrument was materially altered, where a party had a valid claim or defence, or where the instrument was dishonoured by non-acceptance or non-payment.

16. The Working Group concluded that the provision in article 42 (1) (c) should be complemented by adding the words "against him", on the ground that defences between previous parties that could not be opposed to the transferor should not give rise to an action against the transferor.

17. The question was raised whether the liability under article 42 should also extend to liability for insolvency of a prior party. It was agreed that article 42

should not deal with this issue. However, it was pointed out that, under the draft uniform law, the fact that the drawee was in the course of insolvency proceedings constituted dishonour by non-acceptance; the transferor would thus become liable under article 42. The Working Group requested the Secretariat to ensure that this consequence be specifically stated in the commentary on the final text of the draft uniform law to be submitted to the Commission.

18. As regards the use of the term "negotiates" in paragraph (1) of article 42, the Working Group requested the Secretariat to employ, in the revised text of the article, the concepts of endorsement and delivery, in accordance with its conclusions in respect of article 13 (see report of the Working Group on the work of its first session, A/CN.9/77, para. 17).⁹

19. One representative and the observer of an international organization expressed their reservations in respect of article 42.

C. Rights and liabilities of a guarantor (articles 43-45)

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."

20. Articles 43, 44 and 45 set forth rules in respect of a person guaranteeing on the instrument the obligation of another party. Under the Geneva Uniform Law on Bills of Exchange and Promissory Notes such guarantee is known as "aval". The special obligation of a guarantor is to be distinguished from the obligation of an endorser, which is regulated under articles 41 and 42. Under article 43, paragraph (3), a guarantor may specify on the instrument the party whose liability he guarantees. Under paragraph (4), in the absence of such indication, he will be deemed to have guaranteed the liability of the drawer, in the case of a bill, or of the maker, in the case of a note. Evidence brought from outside the bill which would prove that the guarantor intended to guarantee the liability of another party will not invalidate such presumption.

21. The Working Group at its first session considered the scope of the provisions on guarantee and that of the provision on endorsement. Under paragraph (2) of article 43, a guarantee is effected by the signature of the guarantor on the instrument, or on a slip affixed thereto, accompanied by the words "guaranteed", "aval", "good as aval" or by words of similar import. A mere signature, not being the signature of the drawer, the drawee or an endorser, would therefore not have been a guarantee under article 43

⁹ UNCITRAL Yearbook, Vol. IV: 1973, part two, II, 1.

but would have constituted an undertaking under article 32, namely that of an endorser. At its first session, the Working Group considered that the liability following from such a mere signature should be dealt with in connexion with articles 43 to 45 and that the text of article 32 should be deleted. The Group, at its first session, concluded that the scope of article 43 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 (A/CN.9/77, para. 114).¹⁰ The Group also concluded that additional questions arising in the context of a mere signature should be dealt with in the present article (*ibid.*). However, the Group was agreed that the signature alone of the drawee on the front of the instrument constituted an acceptance (*ibid.*, para. 128).

22. The Working Group, at the present session, was of the opinion that the uniform law should make provision for liability on the instrument by way of guarantee.

23. The Working Group, taking into account the consequences of the deletion of article 32, considered the liability under a mere signature on the basis of the following example: the drawer issues a bill to the payee P and the bill shows the following series of signatures on its back: (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. The Group concluded that X, B and Y should be liable as endorsers because their signatures could be construed, on the face of it, as fitting within a chain of endorsements.

24. The Working Group expressed agreement with the provisions of paragraphs (3) and (4) of article 43. However, the Group requested the Secretariat to clarify in paragraph (3) that the specification by the guarantor should appear "on the instrument or on a slip affixed thereto".

25. It was observed that the present wording of article 43, paragraph (1), made the guarantor guarantee "payment" of the instrument. The Working Group requested the Secretariat to modify article 43 in such a way as to make it clear that the guarantor guaranteed a party's undertaking on the instrument.

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 the party's lack of liability is apparent from the face of the instrument."

26. Article 44 provides in paragraph (1) that the liability of a guarantor is of an accessory nature. It follows that if the liability of a party is secondary, the liability of his guarantor is also secondary. Further, the guarantor may base defences against his liability on the instrument on the defences which the party

whose obligation he guaranteed may invoke. However, paragraph (2) specifies an area in which the liability of the guarantor is primary in that he will incur liability when the liability of the person for whom he has become a guarantor was null and void *ab initio*, as where such person's signature on an instrument was forged or such person signed the instrument without capacity.

27. The Working Group considered three possibilities with respect to the nature of the guarantor's liability:

- (1) His liability should be a primary liability in all cases;
- (2) His liability should be an accessory liability in all cases; and
- (3) His liability should be primary in some cases and accessory in others.

The Group, after deliberation, concluded that the most appropriate solution would be to lay down a rule under which the liability of the guarantor would be accessory in all cases, except where the guarantor had stipulated otherwise on the instrument. Consequently, the Group agreed to delete paragraph (2) of article 44.

28. It was suggested that the commentary on article 44 should specify that a guarantor could not only invoke the defences of the party for whom he became liable, but also any defences which were personal to himself.

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."

29. Pursuant to article 45, the guarantor, upon payment of the instrument by him, acquires rights on the instrument against the party for whom he became guarantor and against those parties who were liable on the instrument to that party.

30. The Working Group considered the question whether the guarantor, upon payment of the instrument by him, should have rights not only on the instrument but also to the instrument over and above the rights which a payor has under article 70 (2). Referring to the deliberations held at its first session (see A/CN.9/77, para. 62), the Group was agreed that the guarantor should not be considered to be a holder and that, upon payment of the instrument by him, his only rights should be the rights under articles 45 and 70 (2).

D. Presentment, dishonour and recourse

I. 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

¹⁰ UNCITRAL Yearbook, Vol. IV: 1973, part two, II, 1.

"[(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."

31. Presentment for acceptance is optional, except in the cases specified in article 46. Failure to present a bill for acceptance in these cases affects the liability of prior parties as provided in article 50.

Paragraph (1) (a)

32. The Working Group was agreed that the drawer, an endorser or a guarantor could stipulate on the bill that it must be presented for acceptance.

33. The Working Group considered the effect of a stipulation, made on an instrument, on the liability of parties subsequent to the party making the stipulation. The Group was agreed that under the uniform law:

- (i) A stipulation made on the instrument by the drawer or the maker would be operative in respect of subsequent parties, unless a subsequent party had stipulated otherwise on the instrument;
- (ii) A stipulation made on the instrument by an endorser or a guarantor would be personal to that endorser or that guarantor and, therefore, not be operative in respect of subsequent parties.

The Group also examined the following questions:

- (i) Would a stipulation made on an instrument be effective only if it was especially signed by the party making the stipulation?
- (ii) What should be the effect of a stipulation when it could not be determined from the face of the instrument which party had made it?

The Group, after deliberation, was of the opinion that the uniform law should not set forth any special rule on these questions.

Paragraph (1) (b)

34. The Working Group expressed agreement with the provision of this paragraph.

Paragraph (1) (c)

35. The Working Group considered three alternative solutions in respect of a bill drawn payable elsewhere than at the residence or place of business of the drawee:

- (i) The holder would have an option to present or not present a domiciled bill for acceptance;
- (ii) The holder must present a domiciled bill for acceptance and failure to do so would result in non-liability of prior parties; or
- (iii) The holder must present a domiciled bill for acceptance and failure to do so would render him liable to a prior party for any damages that such party might suffer from a dishonour of the bill by non-payment if the dishonour was due to non-presentment for acceptance.

The Working Group, after deliberation, was agreed that presentment for acceptance of a domiciled bill

should be mandatory and that failure to present should result in the non-liability on the bill of prior parties. The Group was of the opinion that such a rule was justified in view of the fact that where the drawer indicated the place of payment on the bill and such place was not the residence or place of business of the drawee, the drawee would need to be advised so as to be able to provide for the necessary funds at the place of payment.

36. The Working Group requested the Secretariat to redraft paragraph (1) (c) in such a way that the requirement of presentment for acceptance would not apply in the case of a domiciled bill drawn payable on demand.

Paragraph (2)

37. The Working Group suggested that this paragraph should become paragraph (1) since it sets forth a general rule to which the present paragraph (1) states the exceptions.

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."

38. Article 47 permits a party, by a stipulation on the bill, to exclude his liability to pay the bill in the event of dishonour by non-acceptance. The holder will thus not be able to exercise an immediate right of recourse against such party. Similarly, a party may stipulate on the bill that it not be presented for acceptance before a specified date or before the occurrence of a specified event, e.g. the arrival of the goods. However, an acceptance given, notwithstanding such stipulations, is effective.

39. The Working Group expressed agreement with the provisions set forth in paragraph (1) of article 47, in so far as it concerned a stipulation made by the drawer. Consistent with its deliberations in respect of article 46 (see paragraph 33 above), the Group was agreed that the stipulations referred to in paragraph (1) of article 47 if made by the drawer, would benefit subsequent parties.

40. The Working Group considered the following questions:

- (i) Should a party other than the drawer be permitted to make a stipulation prohibiting presentment for acceptance?
- (ii) Where the drawer has stipulated that the bill must be presented for acceptance, and an endorser stipulates that it must not be so presented, what is the legal effect of such stipulation on the liability of parties subsequent to the endorser?

The Group was of the view that preference should be given to a rule under which only the drawer could make a stipulation prohibiting presentment which would be effective as to other parties. At the same time, it was of the opinion that the relationship between various stipulations excluding or limiting liability should be examined more closely. The Group requested the Secretariat to redraft article 47 with these considerations in mind.

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."

41. In order to establish the liability of parties because of dishonour for non-acceptance (article 51 (2)), presentment for acceptance, whether optional or mandatory, must be "due presentment". Article 48 specifies what constitutes due presentment.

Paragraph (a)

42. The Working Group expressed agreement with the principle underlying paragraph (a) that presentment for acceptance should be "personal", i.e., "to the drawee". However, the Group was of the opinion that

- (i) The bill must be presented at a reasonable hour on a business day, and
- (ii) If the bill indicates a place of acceptance, presentment must be made at that place.

Paragraph (b)

43. The Working Group expressed agreement with this provision.

Paragraphs (c) and (d)

44. The Working Group expressed agreement with these provisions. The question whether the death or insolvency of the drawee dispenses with presentment for acceptance is discussed under article 49 (1) (see paragraphs 53 to 56 below).

45. One representative expressed his reservation in respect of paragraph (d).

Paragraph (e)

46. The Working Group expressed agreement with this provision.

Paragraph (f)

47. The question was raised whether the period of one year running from the date of issue of the bill within which a bill drawn payable after sight must be presented for acceptance was justified. The Working Group requested the Secretariat to inquire among banking and trade institutions what would be an acceptable period of time within which such bills should be presented for acceptance.

48. The question was also raised how the period of one year could be calculated if the bill did not state a date of issue. The Working Group was agreed that, in such a case, the holder should be able to insert the true date of issue. In this connexion, it was agreed that if the holder should insert a wrong date of issue, the effects would be similar to those set out in article 11.

Paragraph (g)

49. The Working Group expressed agreement with the provision of this paragraph.

Paragraph (h)

50. The Working Group was of the view that this paragraph was already covered by paragraphs (e) and (f) and therefore superfluous.

Presentment by mail

51. The Working Group provisionally agreed that the uniform law should not set forth a specific provision in respect of presentment for acceptance or for payment through the post. In the view of the Group, the absence of such a provision would not prevent a holder from using the post for presentment. The Group requested the Secretariat to inquire on the practice of presentment by mail and the existence of any special rules for presentment and the making of protest through or by the post.

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;

"(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."

52. Article 49 states the cases in which presentment for acceptance is dispensed with. Under article 51 (1) (b), such cases constitute constructive dishonour and, under article 51 (2), the holder may then exercise an immediate right of recourse, subject to any necessary protest.

Paragraph (1)

53. The Working Group considered the question whether the death of the drawee or the fact that the drawee is in the course of insolvency proceedings should entitle the holder to an immediate right of recourse against prior parties. Under one view, there should not be constructive dishonour because in the event of the drawee's death, the holder could present the bill to the drawee's heirs and, in the event of insolvency proceedings, to the person who under the applicable law was authorized to act in his place. Moreover, in the case of insolvency proceedings, non-presentment would be to the detriment of the drawer in that the assets of the insolvent drawee would possibly have been distributed among his creditors before the drawer exercised a right of action against the person authorized to administer the drawee's assets. Under another view, the holder when taking the bill had a legitimate expectancy to be paid fully by the drawee according to the terms of the instrument. Such expectancy fell short in the case of the drawee's death or his insolvency. The Working Group concluded that the latter view should prevail and expressed agreement with the provision of paragraph (1). One representative expressed his reservation.

54. The question was raised whether the provision should also apply to legal entities which were not physical persons ("*personnes morales*"). The Working Group was of the view that the rule under paragraph (1) of article 49 should apply also to such entities. It instructed the Secretariat to redraft paragraph (1) in such a way as to make it clear that the rule would apply only to entities which under the applicable national law were defunct or had ceased to exist.

55. The Working Group considered the special problem of the merger of a drawee-company with another company. The Group was agreed that if in such a case the drawee ceased to exist, this case should be governed by paragraph (1).

56. It was suggested that the Secretariat should consider the case of a fictitious drawee with a view to possibly extending the provision of paragraph (1) to this case also.

Paragraph (2)

57. The Working Group expressed agreement with the provision of this paragraph.

Paragraph (3)

58. The Working Group considered the question whether the uniform law should provide for the waiver of presentment for acceptance. It was noted that, in accordance with the general policy underlying the Draft Uniform Law, a party had the faculty to limit, exclude or increase his liability on an instrument. On the other hand, it was also noted that the effect of a waiver of presentment for acceptance was that the party in respect of whom the waiver was operative would not be freed from liability because of failure by the holder to present for acceptance a bill which must be so presented. Failure to present should not give the holder a right of immediate recourse against parties on whom the waiver was binding on the ground that there was constructive dishonour. It was further noted that non-presentment for acceptance of an instrument drawn payable after sight would result in the absence of a maturity date and that, in accordance with article 1 (2), there would not be a bill. The Group was therefore of the opinion that paragraph 3 should be deleted. The Group also requested the Secretariat to study the question whether and in what circumstances the uniform law should make provision for waiver of presentment for acceptance. (On waiver of presentment for payment, see paragraph 83 below; on waiver of protest, see paragraphs 128 and 129 below.)

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."

59. In the case of bills that must be presented for acceptance under article 46, the failure of the holder to present results in the absence of liability of prior parties on the bill.

60. The Working Group expressed agreement with the provision of article 50, but requested the Secretariat to introduce into paragraph (1) the amendments agreed upon in respect of article 46 (1) (a) regarding the effect of the stipulation on the liability of subsequent parties.

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."

61. Article 51 (1) lays down what constitutes dishonour by non-acceptance. Article 51 (2) states the consequences of such dishonour as regards the liability of prior parties.

62. The Working Group expressed agreement with the provisions of article 51, subject to the opinion expressed by it under article 49 (3) (see paragraph 58 above) that waiver of presentment for acceptance should not constitute constructive dishonour.

63. The question was raised whether paragraph (2) was necessary since the same rule was set forth in article 57. On the other hand, it was observed that stating the consequence of dishonour made it easier for a reader to grasp the significance of this article.

II. 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."

64. Under article 52, presentment of an instrument for payment is not necessary to make the acceptor or the maker liable. However, such presentment is necessary to establish the liability of the drawer, endorser and guarantor.

65. The Working Group expressed agreement with the substance of article 52. However, it was pointed out that the rules under article 52 also followed from other provisions of the draft uniform law (article 34 as regards the drawer, article 34 (*bis*) as regards the maker, article 36 as regards the acceptor, article 41 as regards the endorser, article 44 as regards the guarantor, and article 55). The Secretariat was requested to take this into account when redrafting the section on presentment.

66. The Working Group was agreed that paragraph (3) should be completed by inserting the words "or the maker" after the word "acceptor".

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."

67. In order to establish the liability of the drawer, the endorser and their guarantors on the ground that there was actual dishonour by non-payment (article 56 (1) (a)), presentment for payment must be "due" presentment. Article 53 specifies what constitutes due presentment.

Paragraph (a)

68. The Working Group expressed agreement with the provision of paragraph (a), subject to specifying in the provision that presentment for payment must be made at a reasonable hour on a business day.

Paragraph (b)

69. The Working Group expressed agreement with the substance of paragraph (b), but requested the Secretariat to redraft the provision on the lines of paragraph (b) of article 48, specifying that if a bill is drawn upon or accepted by two or more drawees, or if a note is made by two or more makers, it shall be sufficient to present the instrument to any one of them, unless the instrument clearly indicates otherwise.

70. The Working Group was agreed that the words "if a place of payment is specified, presentment shall be made at that place" should be deleted.

Paragraph (c)

71. The Working Group expressed agreement with the substance of this paragraph. It was noted that, under articles 49 and 51, the death of the drawee dispensed with presentment for acceptance and entitled the holder to an immediate right of recourse against prior parties. The Working Group was agreed that in this case, presentment for payment should be also dispensed with. The question arose under what circumstances presentment for payment would nevertheless be required. The Group was of the view that two cases could be envisaged: (i) that of a demand bill and (ii) that of a bill on which the drawer had stipulated that it should not be presented for acceptance. The Group requested the Secretariat to examine the im-

plications of articles 49 and 51 in the context of paragraph (c), in so far as the drawee was concerned. One representative expressed his reservation in respect of paragraph (c).

72. In view of the deletion of article 54 (2) (d) (see paragraph 86 below), the Working Group requested the Secretariat to add to article 53 a new paragraph which would provide that where the drawee, the acceptor or the maker was in the course of insolvency proceedings, presentment for payment must be made to a person who under the applicable law is authorized to act in his place.

Paragraph (d)

73. The Working Group considered whether it was justified to allow the holder of an instrument to present the bill for payment also on one of the two business days which follow the day of maturity. The view was expressed that the two extra days should be granted for the sole benefit of the drawee, the acceptor or the maker. However, the Group was informed that paragraph (d) was necessary in order to facilitate the presentment for payment within the time-limits laid down in the uniform law, and to accommodate present commercial practices. The Group therefore concluded that it was appropriate to grant the holder, usually a collecting bank, two additional days for due presentment. (See also paragraphs 115-117 below.)

Paragraph (e)

74. The question was raised whether the period of one year, running from the date of issue of the instrument, within which an instrument payable on demand must be presented for payment, was justified. The Working Group requested the Secretariat to inquire amongst banking and trade institutions what would be an acceptable period of time within which such an instrument should be presented for payment. It was suggested that the period laid down in respect of presentment for acceptance need not necessarily be the same as the period laid down in respect of presentment for payment, and that there might be grounds for laying down a shorter period for presentment for acceptance than for presentment for payment.

Paragraph (f)

75. The Working Group considered a proposal made at the preparatory stage of work on the draft uniform law under which an instrument should be domiciled for payment with a bank. In this context, reference was made to a more general proposal made by the Banca d'Italia according to which the uniform law would permit only one non-bank endorsement, namely that of the payee. The Working Group agreed to consider these proposals in the context of the scope of application of the uniform law (articles 1 to 3).

76. The Working Group was of the opinion that paragraph (f) should be complemented by an additional provision in subparagraph (iii) according to which an instrument may be presented wherever the drawee, the acceptor or the maker can be found or at the drawee's last known residence or place of business.

77. The question was raised as to the meaning of the terms "principal place of business" and "residence". The Working Group was agreed that these terms should not be defined in the uniform law, but should be left to local law. In this connexion, the Group referred to its deliberations and conclusions in respect of article 40 (A/CN.9/77, para. 134),¹¹ requesting the Secretariat to give further consideration to the interpretation of the "place" of payment.

78. As to the term "residence", the Working Group was agreed that it should relate only to the private residence of an individual person and not to the residence of the officers of a legal entity which was not a private person ("personne morale").

Use of copies of a bill or a note

79. The Working Group requested the Secretariat to make inquiries regarding the use of a copy of a bill or a note in making presentment for payment.

Article 54

"(1) Delay in making presentment for payment shall be excused when the delay is caused by circumstances beyond the control of the holder. When the cause of delay ceases to operate, presentment must be made promptly [within ... days].

"(2) Presentment for payment shall be dispensed with

"(a) Where the drawer, 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."

80. Article 54 provides for the excuse of delay in making presentment for payment. When delay is excused, the liability of prior parties is not affected on the ground that there was no presentment for payment. Under the article, delay is excused when the holder is prevented from presenting the instrument for payment by circumstances beyond his control. Under paragraph (2) (b) and (c), present-

¹¹ UNCITRAL Yearbook, Vol. IV: 1973, part two, II, 1.

ment for payment is dispensed with altogether if the cause of delay continues to operate beyond 30 days after the date of maturity, in the case of a fixed-term instrument, or beyond 30 days after the expiration of the time-limit for presentment for payment, in the case of an instrument payable on demand. Under paragraph 2, presentment for payment is also dispensed with where it was waived, where the drawee, acceptor or maker is in the course of insolvency proceedings, where the bill was protested for dishonour by non-acceptance and where, as regards the drawer, the holder has no reason to believe that the bill would be paid.

Paragraph (1)

81. In connexion with the expression "circumstances beyond the control of the holder", the Working Group considered whether delay in making presentment for payment should be excused if the delay was due to circumstances which were personal to the holder, such as illness or death. It was noted that the Working Group on Time-Limits and Limitations (Prescription) had considered a similar rule and had suggested to the Commission a provision under which delay (typically, in commencing legal proceedings) would be excused if it was due to circumstances which were "not personal to the creditor and which he could neither avoid nor overcome" (A/CN.9/70, annex I, article 19).¹² This wording was modified by the Commission as follows: "Where, as a result of a circumstance which is beyond the control of the creditor and which he could neither avoid nor overcome . . ." (see article 20 of the Draft Convention on Prescription (Limitation) in the International Sale of Goods, Yearbook of the United Nations Commission on International Trade Law, Vol. III: 1972, part one, I, B, para. 21). It was noted that this language approved by the Commission did not exclude circumstances personal to the creditor. The Working Group was agreed that article 54 (1) should use the same wording as article 20 of the Draft Convention on Prescription (Limitation). The suggestion was made that the provision in article 54 (1) of the present draft should more clearly exclude excuse based on circumstances imputable to the fault of the holder. It was indicated that the language of article 20 of the Prescription Convention, by addition of the phrase "and which he could neither avoid nor overcome" was helpful in this regard. The Group noted that in translating the above provision of the Draft Convention on Prescription (Limitation), the verbal equivalent was used in other language versions, rather than legal idioms such as *force majeure* or act of God. It was agreed that this approach should also be used in the language versions of the present draft, since such legal idioms had different meanings in different systems of law.

82. The Working Group was of the view that the term "promptly" should be replaced by the term "with reasonable diligence" as used in article 49 (2), and that the words "within . . . days" placed between brackets should be deleted.

Paragraph (2)

Subparagraph (a)

83. The question of an express or an implied waiver was considered by the Working Group in connexion with the waiver of the making of a protest (see article 61, paragraphs 128 and 129 below).

Subparagraph (b)

84. The Working Group expressed agreement with this provision.

Subparagraph (c)

85. It was noted that under the present wording of subparagraph (c), the holder, in the case of a demand bill, could not exercise a right of recourse on the ground of constructive dishonour by non-payment until 30 days after the expiration of the time-limit for presentment for payment. In the view of the Working Group, this rule would result in an unreasonable period of inaction imposed on the holder. The Group therefore requested the Secretariat to reconsider subparagraph (c) with a view to enabling the holder to exercise his right of recourse within a shorter period of time than that provided in the present text.

Subparagraph (d)

86. The Working Group was of the opinion that the fact that the drawee, the acceptor or the maker was in the course of insolvency proceedings should not entitle the holder to an immediate right of recourse. The holder should present the instrument for payment to the person who under the applicable law was authorized to act in the place of the drawee, the acceptor or the maker and, in the case of dishonour by non-payment, should protest the instrument for non-payment. The Group therefore was agreed that subparagraph (d) should be deleted.

87. It was pointed out that under the legal system of some countries the bankruptcy of the acceptor or the maker accelerated the date of maturity. The Working Group requested the Secretariat to study the effect of such acceleration on the relevant provisions of the draft uniform law.

88. It was observed that the negotiable instruments law of some common law countries made provision for a so-called "protest for better security" in the case of bankruptcy or insolvency of the acceptor, or of suspension of payment by him, before the bill became due. The Working Group requested the Secretariat to study the question whether similar provisions should be introduced in the Uniform Law.

Subparagraph (e)

89. The Working Group expressed agreement with the provision of subparagraph (e).

Death or insolvency proceedings of the drawee

90. The Working Group considered the case of a bill drawn payable at a fixed date which did not include a stipulation that it be presented for acceptance. In such a case, article 49 (1) provides that the death of the drawee or the fact that he was in the course of insolvency proceedings dispenses with presentment for ac-

¹² UNCITRAL Yearbook, Vol. III: 1972, part two, I, B, 2.

ceptance. The Group was of the opinion that in respect of such a fixed term bill, article 54 (2) should make provision for dispensation from presentment for payment.

Subparagraph (f)

91. The Working Group was agreed that subparagraph (f) should be deleted provisionally and that the issues presented by this provision should be taken up in connexion with a redraft by the Secretariat of article 62 (2) (c).

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."

92. Under article 55, failure to make presentment for payment will result in the absence of liability on the instrument of the drawer, the endorsers and their guarantors. Therefore the holder will not be entitled to exercise a right of recourse in the event of dishonour of the instrument by non-payment.

93. The Working Group expressed agreement with the provision of article 55.

94. The question was raised what would be the effect of the absence of liability on the instrument of secondary parties, because of non-presentment for payment, on their liability on the transaction underlying the drawing or endorsing of an instrument. Reference was made in this respect to section 3-802 of the Uniform Commercial Code. The Working Group requested the Secretariat to examine this question and the possible need for a special provision governing this situation.

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."

95. Article 56 states when an instrument is dishonoured by non-payment. Provision is made in paragraph (1) (a) for actual dishonour (when payment is refused or the holder cannot obtain the payment to which he is entitled) and in paragraph 1 (b) for constructive dishonour (when presentment for payment is dispensed with). Under paragraphs (2) and (3), in the event of such dishonour, the holder is then, subject to

any necessary protest, entitled to exercise an immediate right of recourse against the drawer, the endorsers and their guarantors.

96. The Working Group expressed agreement with the provision of article 56, subject to modifying paragraph (2) as follows: instead of "the guarantors" read "their guarantors".

97. One representative expressed the view that the provision of article 56 should be included in part six, section 2 (payment).

III. PROTEST

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."

98. Under article 57, the making of a protest is necessary in order to entitle the holder to exercise, upon dishonour of the instrument by non-acceptance or by non-payment, a right of immediate recourse.

99. The Working Group considered whether the uniform law should provide for the making of a protest in the event of dishonour of an instrument and, if so, what should be the consequences of a failure on the part of the holder to effect such protest.

100. Under one view, protest should not be required unless there was an express stipulation to that effect on the instrument. This solution was adopted in the Draft Uniform Law for Latin America on Commercial Documents. In support of this view it was stated that protest was a mere formality and that it would not always produce reliable evidence by an independent person of the fact of dishonour.

101. Under another view, the making of a protest should be required under the uniform law, but failure to do so should make the holder liable for damages only. In support of this view, it was stated that this would give just results, in that failure by the holder to perform the formality of protest should not benefit parties who were liable on the instrument. However, if through the absence of protest such parties had suffered, the holder should be liable for damages. It was noted that this solution would be in harmony with the legal effect given by the draft uniform law to failure to give due notice of dishonour (article 66).

102. Under yet another view, protest was required in order to establish the liability of secondary parties on the instrument. In support of this view it was stated that such parties, when signing the instrument, had undertaken to pay the amount of the instrument upon due presentment for acceptance, where required upon due presentment for payment and in the event of dishonour. Evidence thereof, obtained from a person independent from the holder, was therefore required. It was further noted that in some countries a protest for dishonour was necessary to bring summary proceedings on the instrument. Finally, the concept of protest was universally known and the uniform law would therefore, in this respect, be in conformity with current practice.

103. The Working Group, after deliberation, was agreed that the last view, which was also underlying the draft uniform law, should prevail. Consequently, article 57 should be retained.

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."

104. Article 58 makes provision for two kinds of protest: a protest in simplified form effected by means of a declaration, written on the instrument and signed and dated by the drawee, the acceptor or the maker, to the effect that acceptance or payment is refused (paragraph 1), and an authenticated protest (paragraph 3). Under the article, an authenticated protest is required in the following cases:

- (i) When the declaration of the drawee, the acceptor or the maker is refused or cannot be obtained; or
- (ii) When the instrument specifies an authenticated protest; or
- (iii) When the holder calls for an authenticated protest.

Paragraph (1)

105. The view was expressed that a declaration written on the instrument by the person dishonouring the instrument should not be considered as constituting

a protest; such a declaration should be considered as an act replacing protest. Hence article 58 should state that, for the purposes of effecting a protest, an authenticated protest was required and should specify in a separate paragraph that a protest could be replaced, in certain specified circumstances, by a dated declaration written on the instrument and signed by the person dishonouring it.

106. It was noted that the purpose of dealing with the declaration of dishonour in paragraph (1) of article 58 was to emphasize that this form of protest should be the rule and not the exception. However, the view was expressed that article 58 could set forth an additional provision on the following lines:

"Where an authenticated protest is replaced by the declaration of dishonour referred to in paragraph , such declaration shall have the effect of an authenticated protest in every respect."

Paragraph (2)

107. The Working Group was agreed that paragraph (a) should be deleted in view of the fact that the case envisaged in that paragraph was covered by paragraph (c).

Paragraph (3)

108. The Working Group expressed agreement with this provision subject to the following amendments:

- (i) In subparagraph (b) the words "and date" should be deleted in view of the fact that the person drawing up the statement of dishonour was already, under paragraph 3, obliged to date the statement;
- (ii) In subparagraph (c) the words "the cause or reason for protesting the instrument" should be deleted since this would follow from the demand made by the person drawing up the protest and the answer given by the drawee, the acceptor or the maker.

109. The question was raised whether, under the uniform law, a protest made in a country other than the country where the instrument was dishonoured, was a valid protest for the purposes of the uniform law. It was observed that, under the uniform law, a protest must be effected in the country where the instrument was dishonoured because it was only in that country that proof of due presentment and of dishonour could be obtained. Furthermore, a person authorized to certify dishonour under the law of one country would not always be authorized to certify dishonour under the law of another country.

Paragraph (4)

110. The Working Group expressed agreement with the substance of paragraph (4). The Group was agreed that subparagraph (a) should specify that the authenticated protest could be made also on a slip affixed to the instrument.

111. The suggestion was made that if a separate document was drawn up, the dishonour should be noted on the instrument. Any subsequent holder would thus know that the instrument had been dishonoured and that the dishonour had been protested. It was observed that it was ordinary notarial practice in some countries

to note an instrument upon dishonour. The Working Group was of the view that the uniform law should not set forth a specific provision on this point, but requested the Secretariat to mention the advisability of such a noting in the commentary on the whole.

Stipulation for additional elements of protest

112. The question was raised whether a party could stipulate on the instrument that requirements additional to those set forth in paragraph 3 should be met by the holder in effecting due protest. It was observed that, under the uniform law, a party could limit his liability and that therefore such a stipulation was permitted.

Presentment effected through the post

113. The question was raised whether the uniform law should set forth a specific rule regarding the place where protest may be effected when presentment was effected through the post and the instrument was returned by the post dishonoured (see section 51 (6) (a) of the United Kingdom Bills of Exchange Act, 1882). The Working Group requested the Secretariat to study this question in connexion with its inquiry on the practice of presentment of mail and the existence of any special rules for presentment by mail (see paragraph 51 above).

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.]"

114. Article 59 lays down the time-limits within which an instrument must be protested for dishonour. Failure to observe these time-limits will deprive the holder of his rights of recourse against parties secondarily liable. Under paragraph (3) an authenticated protest must be effected at the place where the instrument was dishonoured.

Paragraphs (1) and (2)

115. It was observed that, by virtue of the provisions of article 53 (d) and (e) and article 59 (1) and (2), it would be possible for a holder to protest a bill or a note on the fourth day after maturity. Thus if a bill matured on a Monday, the holder, under article 53 (d), could present the bill for payment on Wednesday and upon dishonour protest the bill on Friday. Under article 64, notice of dishonour must be given within the two business days which follow the day of protest. It could thus occur that the party against whom the holder wishes to exercise his rights of recourse would be notified on Tuesday of the following week.

116. The Working Group was of the view that this long lapse of time was not desirable. The Group concluded therefore that protest for dishonour by non-payment must be made on the day on which the instru-

ment is payable or on one of the two business days which follow. With respect to protest for dishonour by non-acceptance, the Group was agreed that such protest must be made on the day on which the bill was dishonoured or on one of the two business days which follow. The Group was of the opinion that protest for non-acceptance must be made upon the first dishonour of the bill and that a second presentment for acceptance could not constitute a due presentment.

117. One representative, however, expressed the view that the present text of paragraphs (1) and (2) provided the more satisfactory rule in respect of protest for dishonour by non-payment. He noted that the rule suggested by the Group posed a problem in the case of a demand bill or note and that, for that type of instrument, a different rule would be required.

Paragraph 3

118. It was observed that according to article 59 (3) an authenticated protest must be effected at the place where the instrument was dishonoured. Therefore, if a place of payment was specified on the instrument, the instrument could only be duly presented and be dishonoured at that place (see article 53 (f) (i)). Consequently, protest must be effected at that place.

119. One representative was of the view that paragraph (3) should be complemented by a provision setting forth the place where protest must be effected in all cases referred to in article 53 (f).

120. The Working Group agreed that the substance of paragraph (3) should be dealt with under article 58.

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."

121. According to article 60, failure on the part of the holder to protest an instrument for dishonour by non-acceptance or by non-payment results in the absence of liability of parties secondarily liable on an instrument.

122. The Working Group expressed agreement with the provision of article 60.

123. The suggestion was made that, in the case of an instrument stipulating an authenticated protest, failure to make such a protest should not free secondary parties from liability if the holder had made a protest in simplified form under article 58 (1). The Working Group was of the view that if a party had stipulated that an authenticated protest be made, a protest in simplified form would not be in accordance with the stipulation limiting the liability of the party who made the stipulation.

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, 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 the expiration of the time-limit for presentment for payment;

"(c) As regards the drawer of a bill, where (i) the drawer and the drawee are the same person; or (ii) the drawer is the person to whom the bill is presented for payment; or (iii) the drawer has countermanded payment; or (iv) the drawee or the acceptor is under no obligation to accept or pay the bill;

"(d) As regards the endorser, where the endorser is the person to whom the instrument is presented for payment;

"(e) Where presentment for acceptance or for payment is dispensed with in accordance with articles 49 or 54 (2)."

124. Under article 61 delay in protesting an instrument for dishonour is excused when the delay is caused by circumstances beyond the control of the holder. When delay is excused, the liability of parties secondarily liable is not affected on the ground that there was no due protest. Paragraph (2) states the cases in which protest is dispensed with. In such cases, the holder can exercise a right of immediate recourse against the parties secondarily liable.

Paragraph (1)

125. The Working Group requested the Secretariat to redraft paragraph (1) in the light of the observations made in respect of article 54 (1) concerning delay in making presentment for payment (see paragraph 81 above).

126. The Working Group was agreed that the excuse of delay in protesting an instrument for dishonour should benefit both the holder of the instrument and the person authorized to certify dishonour. It was specified that where the protest was made by a public functionary, such as a notary, and the delay in the effecting of protest by such functionary was excused under article 61, the excuse would operate to the benefit of the holder.

127. The question was raised whether paragraph (1) should also apply to a holder making a protest in simplified form. It was noted that if delay would also be excused in respect of such a protest, the provision could give rise to abuse. The Working Group, after deliberation, was agreed that the excuse of delay in protesting should benefit only the holder who made an authenticated protest.

Paragraph (2)

Subparagraph (a)

128. The Working Group considered the question whether a waiver of protest by the drawer, an endorser or their guarantor made outside the instrument would

dispense the holder from protesting the instrument for dishonour. Various views were expressed, but the Group was unable to reach agreement on this point. The Group requested the Secretariat to prepare alternative texts based on the following:

- (i) Waiver of protest may be stipulated expressly on the instrument, or expressly or impliedly outside the instrument (present text);
- (ii) Waiver of protest may be stipulated only expressly whether on or outside the instrument;
- (iii) Waiver of protest may be stipulated only on the instrument.

129. The Working Group considered the question in respect of which party a stipulation "without protest" would be operative. Consistent with the conclusions it had reached earlier in respect of article 46 (see paragraph 33 above), the Group was agreed that:

- (i) If the drawer made such a stipulation on the instrument, the stipulation would be operative in respect of all subsequent parties;
- (ii) If an endorser or a guarantor (except the guarantor of the acceptor or the maker) made such a stipulation on the instrument, the stipulation would be operative only in respect of such endorser or guarantor;
- (iii) Any stipulation outside the instrument would be operative only in respect of the party making the stipulation.

Subparagraph (b)

130. The Working Group expressed agreement with the provision of subparagraph (b). It was specified that the word "delay" in this subparagraph referred to the delay excused under paragraph (1).

Subparagraphs (c) and (d)

131. The Working Group expressed agreement with the principle underlying subparagraphs (c) and (d). The Group requested the Secretariat to draft a general rule covering these subparagraphs.

Subparagraph (e)

132. The Working Group expressed agreement with the provision of subparagraph (e).

133. The question was raised on whom should fall the burden of proving that the instrument was dishonoured by non-acceptance or by non-payment when protest was dispensed with: the holder or the person who raises as a defence against his liability that the instrument was not duly presented for acceptance or for payment? The Group concluded that the burden of proof should be borne by the holder and that no special rule was needed to achieve this result.

134. The Working Group requested the Secretariat to conduct an inquiry amongst banking and trade institutions for the purpose of ascertaining if its conclusion would or would not impair the international circulation of the proposed international instrument.

IV. NOTICE OF DISHONOUR

Article 62

"(1) Where a bill has been dishonoured by non-acceptance or by non-payment, due notice of dis-

honour must be given to the drawer, the endorser and their guarantors.

"(2) Where a note has been dishonoured by non-payment, due notice of dishonour must be given to the endorser 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."

135. Article 62 sets forth rules in respect of notice of dishonour. The article should be read in conjunction with article 66 under which failure of the holder to give due notice of dishonour makes him liable for damages which a party may suffer as a consequence of such failure. Under the draft uniform law, the liability of secondary parties is not affected because they have not received notice. According to article 62, notice of dishonour must be given to any prior party by the holder or by any party who has himself received notice, and the notice operates for the benefit of all parties who have a right of recourse against the party notified. For example: a bill is drawn in favour of the payee, who endorses it to A. A endorses to B, B to C, and C to D. D presents the bill for payment to the drawee and payment is refused. Under article 62, D must give notice of dishonour to all prior parties, on pain of being liable for damages to the party paying the bill. When C receives notice of dishonour from D, C must, in turn, give notice of dishonour to parties prior to him. Notice sent by D or C to the drawer enures for the benefit of the payee, A and B.

136. The Working Group was agreed that the principle underlying the draft uniform law, namely that failure on the part of the holder to give due notice of dishonour would not free secondary parties from liability but would make the holder liable for damages, was acceptable.

137. The Working Group considered the question who should give notice of dishonour and to whom it should be given. The Group recognized the importance of notice of dishonour to parties who were secondarily liable on an instrument and concluded as follows:

- (i) The holder, upon dishonour by non-acceptance or by non-payment, must give due notice of dishonour to all previous parties who were secondarily liable;
- (ii) An endorser or a guarantor who received notice must give notice to the party immediately preceding him and liable on the instrument;
- (iii) The holder and the party who received notice are dispensed from giving notice to parties whose address does not appear on the instrument or whose signature or address is illegible. The Working Group considered that the question of the requirement of notice to a party whose identity or address was known, but could not be read or did not appear on the instrument, required further study.
- (iv) The holder and the party who received notice must give notice to the party immediately preceding them and liable on the instrument, even

if the address of such party does not appear on the instrument or if his signature or address is illegible.

- (v) Notice of dishonour operates for the benefit of all parties who have a right of recourse on the instrument against the party notified.

One representative expressed disagreement with the proposed rule under (ii) and (iv) above.

138. The effect of the proposed rules is that, in the example given in paragraph 135 above, D must give notice of dishonour to all prior parties on pain of being liable for damages to the party paying the bill. When C receives notice of dishonour from D, C must, in turn, give notice of dishonour to B. The fact that the address of C does not appear on the instrument does not dispense D from giving notice of dishonour. Similarly, the fact that the address of B does not appear on the instrument does not dispense C from giving notice of dishonour. Furthermore, under the rule proposed under (v) above, notice sent by D to the drawer enures for the benefit of the payee.

139. With respect to the proposed rule under (iv) above, it was observed that that rule was based on the presumption that an endorsee should know his own endorser. However, the rule specified that notice be given to an immediately preceding party *who is liable on the instrument*. Thus, in the example given in paragraph 135 above, if B had endorsed the bill without recourse, C, having received notice from D, must give notice to A. If A's address did not appear on the bill, or if his signature or address was illegible, the requirement that C must in such case nevertheless give notice was unreasonable, since C could not be presumed to know A who was not his endorser. The Working Group agreed to revert to this question when examining the redraft of article 62.

140. The Working Group considered the question whether a holder was obliged to send notice of dishonour to a person who transferred an instrument without endorsing it. The Group was of the view that such party should not be entitled to notice of dishonour although he might be liable under article 42.

CONSIDERATION OF THE DESIRABILITY OF PREPARING UNIFORM RULES APPLICABLE TO INTERNATIONAL CHEQUES

141. The Working Group was informed that, in response to its request that an inquiry be conducted regarding the use of cheques in international payment transactions (see report on the first session,¹³ paragraphs 136-138), the Secretariat, in consultation with the UNCITRAL Study Group on International Payments, had drawn up a questionnaire which had been addressed to banking and trade institutions and that an analysis of the replies received thereto would be submitted to it at a future session.

FUTURE WORK

142. The Working Group gave consideration to the timing of its third session. The Group was of the unani-

¹³ UNCITRAL Yearbook, Vol. IV: 1973, part two, II, 1.

mous opinion that, in view of the progress achieved at the present session, its third session should be held as soon as possible. Some representatives expressed the view that the third session should be held in the course

of 1974. Others were of the opinion that consideration of the time and place for the third session should be left for decision by the Commission at its forthcoming session, which will convene on 13 May 1974.

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

<i>Title or description</i>	<i>Document reference</i>
<i>Second session of the Working Group on International Negotiable Instruments</i>	
Report of the Working Group on International Negotiable Instruments on the work of its first session	A/CN.9/77*
Report of the Secretary-General: draft uniform law on international bills of exchange and international promissory notes, with commentary	A/CN.9/WG.IV/WP.2**
Provisional agenda	A/CN.9/WG.IV/WP.3
Draft uniform law on international bills of exchange and international promissory notes; revised text of articles 5(9), 6 and 12 to 41	A/CN.9/WG.IV/CRP.3
Draft uniform law on international bills of exchange and international promissory notes	A/CN.9/WG.IV/CRP.4 and Add. 1 to 13

* Reproduced in UNCITRAL Yearbook, Vol. IV: part two, II, 1.

** The text of the draft uniform law on international bills of exchange and international promissory notes was reproduced in UNCITRAL Yearbook, Vol. IV: 1973, part two, II, 2.

III. INTERNATIONAL LEGISLATION ON SHIPPING

1. Report of the Working Group on International Legislation on Shipping on the work of its sixth session (Geneva, 4-20 February 1974) (A/CN.9/88)*

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* 29 March 1974.

GENERAL 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 (1969), and was enlarged by the Commission at its fourth session. The Working Group consists of the following 20 members of the Commission: Argentina, Australia, Belgium, Brazil, Chile, Egypt, France, Ghana, Hungary, India, Japan, Nigeria, Norway, Poland, Singapore, Union of Soviet Socialist Republics, United Kingdom of Great Britain and

Northern Ireland, United Republic of Tanzania, United States of America and Zaire.¹

2. In defining the task of the Working Group, the Commission resolved that:

¹ As enlarged by the Commission at its fourth session, the Working Group consisted of 21 members of the Commission. 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, para. 19. The term of one of these members of the Commission (Spain) expired on 31 December 1973.

"The rules and practices concerning bills of lading, including those rules contained in the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (the Brussels Convention 1924) and in the Protocol to amend that Convention (the Brussels Protocol 1968), should be examined with a view to revising and amplifying the rules as appropriate, and that a new international convention may, if appropriate, be prepared for adoption under the auspices of the United Nations."²

In addition, the Commission specified a number of topics that, among others, should be considered.³ The Working Group at earlier sessions has taken action with respect to the following of these topics: (a) the period of carrier responsibility; (b) responsibility for deck cargoes and live animals; (c) choice of forum clauses in bills of lading;⁴ (d) the basic rules governing the responsibility of carriers; (e) arbitration clauses in bills of lading;⁵ (f) unit limitation of liability; (g) trans-shipment; (h) deviation; and (i) the period of limitation.⁶

3. At its fifth session⁷ the Working Group decided to devote the sixth session to the following topics: (a) definitions under article I;⁸ (b) elimination of invalid clauses;⁹ (c) deck cargo and live animals; (d) liability of the carrier for delay; and (e) scope of application of the Convention.

4. The Working Group held its sixth session in Geneva from 4-20 February 1974.

² *Ibid.* The Commission decided at its sixth session that the Working Group should "continue its work under the terms of reference set forth by the Commission in the resolution adopted at its [the Commission's] fourth session". Report of the United Nations Commission on International Trade Law on the work of its sixth session (2-13 April 1973), *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 17* (A/9017), para. 61; UNCITRAL Yearbook, Vol. IV: 1973, part one, II, A.

³ *Ibid.*

⁴ Report of the Working Group on the work of its third session, Geneva, 31 January-11 February 1972 (A/CN.9/63; UNCITRAL Yearbook, Vol. III: 1972, part two, IV). The first report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading (A/CN.9/63/Add.1; UNCITRAL Yearbook, Vol. III: 1972, part two, IV, annex) was used by the Working Group as its working paper.

⁵ Report of the Working Group on the work of its fourth (special) session, Geneva, 25 September-6 October 1972 (A/CN.9/74; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 1). The Working Group used as its working documents the first report of the Secretary-General (see preceding note) and two other working papers prepared by the Secretariat: "Approaches to basic policy decisions concerning allocations of risks between the cargo owner and carrier" (A/CN.9/74, annex 1; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 2) and "Arbitration clauses" (A/CN.9/74, annex II; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 3).

⁶ Report of the Working Group on the work of its fifth session, New York, 5-16 February 1973 (A/CN.9/76; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 5). The Working Group used as its working document the second report of the Secretary-General on responsibility of carriers for cargo: bills of lading (A/CN.9/76/Add.1; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 4).

⁷ Report of the Working Group on the work of its fifth session (*ibid.*, part two, IV, 5), paras. 73-75.

⁸ The items mentioned in (a) and (b) were the remaining topics of those listed in the resolution adopted by UNCITRAL at its fourth session (see note 2) above).

5. All 20 members of the Working Group were represented at the session. The session was attended by the following members of the Commission as observers: Bulgaria and Federal Republic of Germany; and also by observers from the following international, inter-governmental and non-governmental organizations: United Nations Conference on Trade and Development (UNCTAD), International Maritime Committee (IMC), International Chamber of Commerce (ICC), International Chamber of Shipping (ICS), International Union of Marine Insurance (IUMI), Office Central des Transports Internationaux par Chemins de Fer (OCTI), the International Institute for the Unification of Private Law (UNIDROIT), the Inter-Governmental Maritime Consultative Organization (IMCO), the International Shipowners' Association (INSA) and the Baltic and International Maritime Conference (BIMCO).

6. The Working Group, by acclamation, elected the following officers:

Chairman	Mr. Mohsen Chafik (Egypt)
Vice-Chairmen	Mr. Nehemias Gueiros (Brazil)
	Mr. Stanislaw Suchorzewski (Poland)
Rapporteur	Mr. R. K. Dixit (India)

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

1. Provisional agenda and annotations (A/CN.9/WG.III/L.1)
2. Second report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading (A/CN.9/76/Add.1)
3. UNIDROIT study on carriage of live animals (A/CN.9/WG.III/WP.11)
4. Third report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading (A/CN.9/WG.III/WP.12), Vols. I to III
5. Deck cargo: working paper by the Secretariat (A/CN.9/WG.III/WP.14)
6. Comments and suggestions on the topics to be considered at the sixth session of the Working Group (A/CN.9/WG.III/WP.12/Add.1)
7. Compilation of draft provisions approved by the Working Group: note by the Secretariat (A/CN.9/WG.III/WP.13)

8. 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 at the fifth session of the Working Group to be dealt with at the sixth session
5. Future work
6. Adoption of the report.

9. The Working Group used the report of the Secretary-General entitled "third report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading" (hereinafter referred to as the third report of the Secretary-General) (A/CN.9/WG.III/WP.12) as its working document for the topics examined therein. In that report the Secretary-General examined the following topics: liability of ocean car-

riers for delay (part one); geographical scope of application of the Convention (part two); documentary scope of application of the Convention (part three); invalid clauses in bills of lading (part four).⁹ With respect to the consideration of definitions under article I the Working Group used as its working document part five of 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.9/76/Add.1*). In addition to the aforementioned reports the Working Group used a study prepared by the International Institute for the Unification of Private Law (UNIDROIT) entitled "Study on carriage of live animals" (A/CN.9/WG.III/WP.II)** and a working paper by the Secretariat on the topic of deck cargo (A/CN.9/WG.III/WP.14).

I. LIABILITY OF OCEAN CARRIERS FOR DELAY

A. Introduction

10. Part one of the third report of the Secretary-General dealt with the liability of ocean carriers for delay in the delivery of cargo.¹⁰ The report noted that the Brussels Convention of 1924 contains no provision addressed to this question; that case-law on the subject was conflicting; and that in most jurisdictions the problems had not been resolved either by court decisions or by legislation.

11. The report noted (paragraph 5) that under the present Convention when cargo had been physically damaged during transit as a result of delay in delivery, the legal issue involved was not analytically different from the issue presented generally by physical damage to goods on the failure of the carrier to perform his obligation under article 3 (2)—"properly and carefully" to "load . . . carry . . . and discharge the goods carried". On the other hand, it was also noted that when the consequence of delay was not physical damage to the goods, but rather economic loss to the consignee (e.g. because of the consignee's inability to use or resell the goods or as a result of a drop in the value of the goods during the period of delay), the existing law was especially unclear.¹¹

* UNCTRAL Yearbook, Vol. IV: 1973, part two, IV, 4.

** Reproduced in this volume, part two, III, 3, *infra*.

⁹ Parts one and two of the above document (A/CN.9/WG.III/WP.12, Vols. I-III) appeared in volume one; part three in volume two, and part four in volume three. The third report of the Secretary-General which was also circulated as an addendum to the present report (A/CN.9/88/Add.1) is reproduced in this Yearbook, part two; III, 2, *infra*.

¹⁰ A/CN.9/88/Add.1, reproduced in this volume, part two, III, 2, *infra*.

¹¹ The report (note 12 at paragraph 5) noted that one of the problems was whether certain types of economic loss were sufficiently direct or foreseeable to provide a basis for the recovery of damages. It was further noted that such problems of economic loss to the buyer may arise when the goods are lost or are rendered unusable as a result of physical damage, and hence are not peculiar to unavailability of the goods because of delay in delivery. The report also drew attention to the connexion between this general problem and the rules setting limits on the liability of the carrier. See Compilation of draft provisions approved by the Working Group (A/CN.9/WG.III/WP.13) (herein referred to as "Compilation"), part J, on carrier responsibility. The Compilation is reproduced as an annex to this report.

12. The report examined provisions dealing with delay in other transport conventions (paragraphs 8-12). The report then set forth five draft provisions for consideration by the Working Group: (1) Draft provision A (paragraph 13) would establish the basic principle that the Convention's rules on responsibility of the carrier were applicable not only to physical loss of or damage to cargo but also to delay in delivery. (2) Draft provision B (paragraph 17) set forth a definition of delay. (3) The report presented two alternative texts with respect to the limitation of a carrier's liability for delay. One alternative (draft provision C, at paragraph 26) would provide the same limitation on liability as that approved by the Working Group with respect to loss or damage to goods.¹² A second alternative (draft provision D, at paragraph 28) would provide a special limitation on a carrier's liability to the shipper for loss other than physical loss of or damage to the goods (e.g. for economic loss); this special limitation was to be based on the freight charges for the goods in question.¹³ (4) The problem presented by an extended delay in arrival of the goods, when it was unclear whether the goods were lost, was dealt with in a proposal (draft provision E, paragraph 37) based on provisions of the Road (CMR) and Rail (CIM) Conventions.

B. Discussion by the Working Group

(1) The basic rule on responsibility of the carrier for delay

13. There was general agreement within the Working Group that a specific provision establishing the carrier's responsibility for loss or damage from delay was desirable and most representatives spoke in favour of the approach taken in draft provision A of the third report of the Secretary-General.¹⁴ One observer opposed inclusion of such a provision in the Convention on the grounds that shipowners would thus be subjected to heavy potential liability for consequential damages from delay. Another observer stated that carrier liability for delay would be considered as a new risk for insurance purposes, but that insurance would be available to cover such risk.

14. Several representatives suggested that draft provision A be amended along the lines of article 19 of the CMR Convention.¹⁵ Other representatives proposed that any modification of draft provision A in the third report of the Secretary-General should take into account the draft TCM Convention,¹⁶ and the ICC Uniform Rules for a Combined Transport Document.¹⁷ Some

¹² Compilation, part J. In this provision the monetary amounts were left blank.

¹³ The report noted (foot-note 35) that the 1970 revision of the CIM Convention provided a limitation of "twice the amount of the carriage charges". For separate consideration by the Working Group the bracketed language in the draft provision included this approach.

¹⁴ A/CN.9/88/Add.1, part one; reproduced in this volume, part two, III, 2, *infra*.

¹⁵ Convention on the Contract for International Carriage of Goods by Road (1956), United Nations, *Treaty Series*, vol. 399, 189.

¹⁶ IMCO/ECE Draft Convention on the International Combined Transport of Goods (November 1971), CTC IV/18/Rev.1, TRANS/374/Rev.1, article 11.

¹⁷ International Chamber of Commerce, Brochure 273, November 1973, Rules 14-15.

representatives and observers, however, cautioned against the use of conventions on land transportation as models for a convention concerned with the carriage of goods by sea.

15. Several representatives stressed that the Convention should apply only after the carrier has taken charge of the goods, as the transportation does not commence until the carrier has in fact taken charge of the goods. One representative suggested that the Convention should provide specifically that the carrier was liable for extra expenses incurred by the shipper as a consequence of the carrier's delay in taking charge of the goods.

16. Some representatives favoured, in principle, the suggestion of one representative that the carrier be held liable for "economic losses resulting from delay". However, a number of representatives and observers who expressed support for use of the term "economic loss" considered that the types of economic losses from delay for which a carrier would be held responsible should be enumerated and that the measure of such damages be limited to some standard of foreseeability. Other representatives suggested that the measure of damages as a result of delay due to the fault of the carrier should be left to national legislation; for this reason they opposed any listing of the types of recoverable economic losses or the inclusion of a limitation of recoverable damages based on a test of foreseeability for damages other than physical damage to the goods. Some representatives were opposed to any use of the term "economic loss", as all loss was in a sense economic and the term had no accepted meaning in most legal systems.

(2) Definition of delay

17. There was general agreement within the Working Group that there should be a definition of delay. Some representatives supported draft provision B¹⁸ in the third report of the Secretary-General, focusing on the agreed upon or normal date for delivery. Other representatives favoured a definition centred on the concept of "actual duration of the carriage" as found in article 19 of the CMR Convention.

18. One representative proposed the deletion of the phrase "date for delivery expressly agreed upon by the parties" from draft provision B, thus eliminating the option of the parties to agree on a specific date for delivery. Two representatives expressed reservations concerning the possibility that, should the above phrase be retained, the specific date for delivery agreed upon by the parties would not be reflected in the bill of lading or that the date could be based on an oral agreement between the parties.

19. Some representatives proposed that the definition of delay should include a specific provision to cover cases of partial loads but several other representatives expressed their opposition to this proposal.

(3) Application of limitation of liability rules in case of delay

20. About half of the representatives in the Working Group expressed their support in principle for the

establishment of a single limitation on carrier liability, regardless of whether the damages were in the form of physical loss of or damage to the goods or some other type of loss or damage (e.g. due to delay suffered by the owner of the goods), and regardless of whether the carrier's fault giving rise to the damages had taken the form of delay or of some other violation by the carrier of his obligations under the Convention. While suggesting some drafting modifications, these representatives favoured therefore the approach contained in draft provision C.¹⁹

21. A majority—although narrow—of the representatives and some observers expressed their preference for a dual system of liability, establishing a per package or per weight limitation of carrier liability for physical loss of or damage to the goods and a separate limitation of carrier's liability based on freight charges for delay, along the lines suggested in draft proposal D.²⁰ A majority of the representatives who favoured a special limitation for delay based on freight indicated that they proposed to have the per package or per weight limitation apply in cases of physical loss of or damage to the goods due to delay, and that the freight limitation would apply only to cases of damages from delay in delivery other than physical loss or damage to the goods.

22. One representative, supported by some others, proposed the following wording for the special limitation applicable to cases of delay: "In the case of delay, if the claimant to the goods proves that damage (*prejudice*) has resulted therefrom, the carrier shall pay compensation for such damage not exceeding [double] the freight charges." The representative stated that his proposal used as its model article 23 of the CMR Convention.

23. Some representatives expressed the view that the Working Group should adopt alternative texts, one based on the single limitation approach and the other on the dual system of limitation providing for a special limitation for cases of delay. In this connexion it was argued that governments were not yet in a position to choose between these two approaches, since their final preference may well depend on the level of actual liability established by an agreement as to the sum of the per package or per weight limitation. One representative suggested that the special limitation of liability for delay should also have alternative texts: one alternative incorporating the freight limitation and the other one based on a per package or per weight limitation.

(4) Delay in delivery: loss of goods

24. All representatives who spoke on the subject endorsed the principle contained in paragraph 1 of draft proposal E²¹ of the third report of the Secretary-General, to the effect that after a specified period of delay in delivery the person entitled to the goods may treat them as lost and make a claim against the carrier on that basis. However, differing views were expressed as to whether the carrier should have the right to prove that the goods were not in fact lost.

¹⁸ A/CN.9/88/Add.1, part one, para. 17, reproduced in this volume, part two, III, 2, *infra*.

¹⁹ *Ibid.*, para. 28.

²¹ A/CN.9/88/Add.1, part one, para. 37; reproduced in this volume, part two, III, 2, *infra*.

¹⁸ A/CN.9/88/Add.1, part one, para. 17, reproduced in this volume, part two, III, 2, *infra*.

25. A majority of the representatives stated that the rules in paragraphs 2-4 of draft proposal E, regulating in detail the rights of the claimant and the carrier should the goods be recovered subsequently, were unnecessary as the matter could be left to commercial practice. However some representatives held the view that the above provisions were useful and should be retained because there could be cases when the consignee wanted to have the goods in spite of delay, due to their particular usefulness to him. It was also necessary to protect the consignee's interest in cases when the value of recovered goods was far in excess of the maximum carrier liability. Otherwise the carrier in this latter case would have a quick windfall profit.

C. REPORT OF THE DRAFTING PARTY

26. The Working Group, after a discussion of alternative approaches to deal with the subject, decided to constitute a Drafting Party to prepare texts on the subject as well as on the other topics that were to be considered during the sixth session.²² The report of the Drafting Party on the inclusion of provisions on carrier liability for delay in delivery, with some amendments to the text of the proposed draft provisions made by the Working Group,²³ is as follows:

PART I OF THE REPORT OF THE DRAFTING PARTY: INCLUSION OF PROVISIONS ON CARRIER LIABILITY FOR DELAY IN DELIVERY

(a) The Drafting Party formulated draft texts to reflect the views expressed in the discussion of the Working Group on the inclusion of provisions imposing carrier liability for delay in delivery. It was agreed by the Drafting Party that these draft texts would necessarily replace certain provisions previously agreed upon by the Working Group as indicated below. The Drafting Party recommended the following provisions:

²² The Drafting Party was composed of the representatives of Argentina, France, Ghana, India, Japan, Nigeria, Norway, United Kingdom of Great Britain and Northern Ireland, Union of Soviet Socialist Republics and the United States of America. The Drafting Party elected Mr. E. Chr. Selvig (Norway) as Chairman.

²³ The amendments made by the Working Group are the following: (a) the definition of delay in delivery will be subparagraph 1 (b) rather than a separate paragraph 4 of the basic rules on the responsibility of the carrier (part D of the compilation); (b) subparagraph 1 (a) of alternative B shall commence with the words "the liability of the carrier for loss, damage or expense resulting from . . ." ("loss, damage or expense" to be translated into French as "*préjudice*" and into Spanish as "*los perjuicios*"), instead of the words "the liability of the carrier according to the provisions of article [] for . . ."; (c) in subparagraph 1 (c) of alternative B the word "paragraph" will replace the word "article" preceding the expression "for total loss of the goods"; (d) in the revised formulation of article B, paragraph 1 of part J of the compilation, the phrase "covered by the contract of carriage" should replace the phrase "covered by a contract of carriage"; (e) and in the draft provision on delay in delivery—loss of goods, the bracketed language "unless the carrier proves the contrary" following the expression "may treat the goods as lost", shall be deleted.

During the consideration by the Working Group of this report of the Drafting Party, notes (f) and (g) were added, at the request of the Chairman of the Drafting Party, to the notes on the proposed draft provisions.

BASIC RULES GOVERNING THE RESPONSIBILITY OF THE CARRIER

To replace paragraph 1, part D of the compilation of draft provisions approved by the Working Group reading as follows:

"1 (a) The carrier shall be liable for loss, damage or expense resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article (),²⁴ 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.

"1 (b) Delay in delivery occurs when the goods have not been delivered within the time expressly agreed upon in writing or, in the absence of such agreement, within the time which, having regard to the circumstances of the case, would be reasonable to require of a diligent carrier."

LIMITATION OF LIABILITY

To replace article A, paragraph 1, in part J of the compilation reading:

Alternative A: Single method for limitation of liability:

1. The liability of the carrier according to the provisions of article []²⁵ 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, damaged or delayed, whichever is the higher.

Alternative B: dual method for the limitation of liability:

1 (a) The liability of the carrier for loss, damage or expense resulting from 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.

1 (b) In case of delay in delivery, if the claimant proves loss, damage or expense other than as referred to in subparagraph (a) above, the liability of the carrier shall not exceed

variation x: [double] the freight.

*variation y:*²⁶ an amount equivalent to (X-Y) francs per package or other shipping unit or (X-Y) francs per kilo of gross weight of the goods delayed, whichever is the higher.

1 (c) In no case shall the aggregate liability of the carrier, under both subparagraphs (a) and (b) of this paragraph, exceed the limitation which would be established under subparagraph (a) of this paragraph for total loss of the goods with respect to which such liability was incurred.

²⁴ The reference is to the provision on the period of carrier responsibility found in subparagraph (ii), art B of the compilation.

²⁵ The reference is to the revised basic rules governing the responsibility of the carrier, above, which includes liability for delay.

²⁶ It is assumed that (X-Y) will represent lower limitations on liability than those established under subparagraph 1 (a).

To replace article B, paragraph 1 of part J of the compilation reading:

"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 or damage to the goods covered by the contract of carriage, as well as of delay in delivery, whether the action be founded in contract or in tort."

DELAY IN DELIVERY: LOSS OF GOODS

The person entitled to make a claim for the loss of goods may treat the goods as lost when they have not been delivered as required by article ()²⁷ within [sixty] days following the expiry of the time for delivery according to paragraph () of article ().²⁸

Notes on the proposed draft provisions

The attention of the Working Group is drawn to the following matters:

(b) Among the representatives favouring the dual method of limiting liability a majority supported alternative B, variation x, while some support was expressed for variation y as a possible alternative.

(c) With respect to the provision on limitation of liability, the views of the members of the Drafting Party were divided regarding paragraph 1 (c) establishing the non-cumulative effect of the separate limitations incorporated in the dual method.

(d) Some representatives favoured the inclusion of a special rule on foreseeability applicable to cases of delay in delivery. The language proposed is as follows:

"The carrier shall, however, not be liable to pay compensations for loss, damage or expense, other than loss of or damage to the goods, resulting from delay in delivery when such loss, damage or expense could not have been reasonably foreseen by the carrier at the time of entering into the contract of carriage as a probable consequence of the delay."

(e) One representative expressed reservations about identifying delay only as "delay in delivery".

(f) The phrase "loss, damage or expense" should be translated into French as "*préjudice*" and into Spanish as "*los perjuicios*".²⁹

(g) Adoption of the above draft texts may require the Working Group, at some future date, to review the texts of some provisions it had approved previously in order to ensure uniformity of terminology in the revised Convention.

²⁷ The reference is to the provision on the period of carrier responsibility, in subparagraph (ii), part B of the compilation.

²⁸ The reference is to the definition of delay adopted by the Drafting Party as subparagraph 1 (b) of the basic rules governing the responsibility of the carrier.

²⁹ Some representatives stated that by adopting, in the context of article D, para. 1 (a) of the compilation, the terms "loss, damage or expense resulting from loss or damage to the goods", the Working Group explicitly enlarged the scope of application of the Convention to damages other than the loss of the commercial value of the goods. The extent of liability for such other damages will be determined in accordance with the principles concerning causality which are in effect in each Contracting State.

D. Consideration of Part I of the Report of the Drafting Party

27. The Working Group considered the above part of the report of the Drafting Party.³⁰ The report of the Drafting Party, including the proposed draft provisions, was approved by the Working Group.

28. The following comments and reservations were made with respect to the draft provision on delay in delivery—loss of goods:

(a) Some representatives favoured retention of the bracketed language "unless the carrier proves the contrary" following the expression "may treat the goods as lost", in order to permit a carrier to establish that goods were not in fact lost but only delayed, and thereby overcome the presumption of their loss.

(b) Some representatives expressed support for the adoption of specific provisions dealing with the subsequent recovery of goods that had been treated as lost by the person entitled to make a claim for the loss of the goods pursuant to the basic operative provision on delay in delivery—loss of goods. These representatives proposed that the basic provision proposed by the Drafting Party be supplemented by three further paragraphs, modelled after the CIM Convention,³¹ CMR Convention,³² or draft proposal E in part one of the third report of the Secretary-General.³³ One representative reserved his position concerning the addition of such supplementary provisions.

II. DOCUMENTARY SCOPE OF APPLICATION OF THE CONVENTION

A. Introduction

29. The Working Group discussed separately two aspects of the scope of application of the Convention: (1) "documentary" scope of the Convention—the effect of the use (or non-use) of certain documents evidencing the contract of carriage; and (2) "geographic" scope—the effect of the place of origin and of destination of the carriage of goods by sea.

30. The question of "documentary" scope was considered in part three of the third report of the Secretary-General.³⁴ The responsibilities and liabilities established under the 1924 Brussels Convention are applicable when there is a "contract of carriage" as defined in article 1 (b). Article 1 (b) provides:

"(b) 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; it also applies to any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such instrument regulates the relations between a carrier and a holder of the same."

³⁰ See foot-note 23 above.

³¹ A/CN.9/88/Add.1, part one, para. 36, reproduced in this volume, part two, III, 2, *infra*.

³² *Ibid.*, para. 35.

³³ *Ibid.*, para. 37.

³⁴ The question of "geographic" scope is considered in part III of the present report, and in A/CN.9/88/Add.1 part two, reproduced in this volume, part two, III, 2, *infra*.

31. The report drew attention to problems that had arisen, particularly under modern shipping practices, with respect to the words contained in article 1 (b): "covered by a bill of lading or similar document of title".

32. It was noted that at the time of the drafting of the Convention in the early 1920s, the terms "bill of lading" and "document of title" clearly identified the standard contracts of carriage of that period. When goods were loaded the carrier would issue a document entitled "bill of lading". This "bill of lading" clearly was a "document of title" in that, *inter alia*, the carrier was only obliged to surrender the goods in exchange for the document—a feature that gave the possessor of the document control over the goods.³⁵

33. The report noted that in many regions documents labelled "bills of lading" clearly met the above criteria, but in other regions two distinct types of "bills of lading" were used. One type called for the delivery of the goods to "the order of" the consignee; this "order" or "negotiable" bill of lading was clearly a "document of title" and fell within the above definition in article 1 (b). A second type, a "non-negotiable" (or "straight") "bill of lading", permitted delivery to a named consignee without surrender of the document. It was reported that in some jurisdictions this document, when labelled a "bill of lading" and under local law having some (but not all) of the indicia of a "document of title", would bring the carriage within the scope of the Convention; however, in many other jurisdictions the applicability of the Convention to carriage of goods under such documents was subject to question.³⁶

34. It was also reported that mercantile and shipping practices which had developed since the preparation of the Convention had led to the use of documents permitting greater flexibility and efficiency. Shipping arrangements might be made under documents bearing various names, such as "consignment note" or "shipping receipt", and, sometimes, these arrangements might be recorded and reproduced by computer and by other electronic devices. There was serious doubt as to whether such carriage fell within the definition set forth in article 1 (b) of the Convention.³⁷

35. The report raised the question whether the areas of protection given to the shipper under the Convention should shrink with the increased use of such new types of documentation,³⁸ or whether it should be

enlarged. Attention was drawn to the provisions dealing with this question in other transport conventions.³⁹ In the light of these considerations, the report set forth a draft proposal whereby "contract of carriage" would be defined to apply to "all contracts for the carriage of goods by sea". It was noted that, under such an approach, the label of the document evidencing the contract of carriage, or the non-existence of such a document, would not affect the applicability of the Convention.⁴⁰

36. The report pointed out that if such a broad basic rule concerning the applicability of the Convention were adopted, certain exceptions should also be considered. Draft provisions were set forth preserving the present exception for charter parties. Attention was also directed to the possibility of further exceptions for specific types of carriage where the applicability of the Convention would be inappropriate.⁴¹

B. Discussion by the Working Group

(1) General rule on scope of application

37. It was generally agreed by the Working Group that the scope of application of the Convention should be broadened so that its mandatory rules would be made more widely applicable. Most representatives were of the view that the Convention should state as the general rule that it was applicable to all contracts of carriage of goods by sea subject to the rules on geographic scope.⁴²

38. Some representatives favoured extending the coverage of the Convention beyond the contract of carriage so that the Convention would cover all types of maritime transport, all forms of obligation (contract, tort, bailment), all documents, and situations where shipments are processed by computers. On the other hand, some other representatives were of the opinion that the Convention should apply only to contracts of carriage evidenced by a document and that the basic document should be the "bill of lading" since parties to contracts of maritime carriage were familiar with this document.

39. Some representatives, who favoured the application of the Convention to all contracts of carriage, indicated that every shipper should continue to have the right to demand a bill of lading and that the Convention should contain uniform rules governing the contents of bills of lading. In addition, it was suggested that it would be desirable to have rules specifying the type of information to be contained in other documents evidencing carriage such as consignment notes and delivery orders.

³⁵ Such control over the goods facilitates arrangements for the exchange of goods for the price—often through banking intermediaries whereby documents are presented in response to the terms of a letter of credit. In addition national law usually gave the purchaser of such a "bill of lading" strong legal protection against claims by earlier possessors of the document and (in many jurisdictions) of the goods. This protection was commonly associated with the concept that the document was "negotiable" and "represented" the goods.

³⁶ A/CN.9/88/Add.1, part three, paras. 8-9; reproduced in this volume, part two, III, 2, *infra*.

³⁷ The report also considered the effect of the failure of the carrier to issue a document in circumstances where such issuance would be expected or usual. (*Ibid.*, paras. 14-18.)

³⁸ It was noted that the protection given the shipper in the event of loss of or damage to the goods, or delay in delivery, was a distinct issue from the rules defining the rights as between successive holders of bills of lading and other documents evidencing the carriage.

³⁹ A/CN.9/88/Add.1, paras. 25-27; reproduced in this volume, part two, III, 2, *infra*, referring to provisions in the Rail (CIM), Road (CMR), and Air (Warsaw) Conventions.

⁴⁰ The report noted that other provisions of the Convention, with respect to the obligation of the carrier to issue documents containing specified provisions, and the rights of third persons under documents, presented issues that were distinct from the basic rule as to the applicability of the Convention. (*Ibid.*, para. 38.)

⁴¹ *Ibid.*, paras. 23-24, 31, 36-37.

⁴² See para. 65, below, for the draft articles adopted by the Working Group as to the geographic scope of the Convention.

(2) *Exceptions to application of the Convention*

40. It was suggested that the article on the scope of application of the Convention should contain a provision to the effect that, in cases where a bill of lading or similar document of title was not issued, the parties to a contract of carriage might agree, by means of a note endorsed on the document evidencing the contract of carriage and signed by the shipper, that the contract would not be subject to the rules of the Convention. These representatives observed that, under the circumstances set forth above, the contract between the parties would not be a contract of adhesion since the shipper would have specifically agreed to the non-application of the Convention.

41. A majority of the representatives were opposed to including such a provision permitting the shipper to sign away the protection of the Convention, even in cases where the document evidencing the contract of carriage was not a bill of lading. It was indicated that standard form documents might well be developed by carriers, excluding application of the Convention, which shippers would be expected to sign as a matter of routine. These would then be new types of adhesion contracts.

42. Some representatives, while agreeing with the majority, nevertheless were of the view that under special circumstances the parties to a contract of carriage should be permitted to agree specifically to the non-applicability of the Convention.

43. The Working Group generally favoured the exclusion of charter-parties from the scope of application of the Convention. In this connexion it was pointed out by one representative that, according to the legislation of his country, charter-parties were not considered to be contracts of carriage, and hence there was no need to exclude specifically charter-parties. This view was not shared by other representatives.

44. It was agreed that the Convention would not be applicable to a charter-party between the charterer and the shipowner, but that it would be applicable to the contractual relationship between the carrier and a cargo owner who was not the charterer.

45. Many representatives opposed the incorporation of a definition of "charter-party" into the Convention. It was observed that it would be difficult to find a definition of "charter-party" that would avoid substantial difficulties of interpretation. In this connexion, it was pointed out by one representative that there had been very little litigation over the distinction between charter-parties and contracts of carriage. Some representatives who favoured the inclusion of a definition of "charter-party" supported such inclusion on the ground that it would be desirable to distinguish clearly between charter-parties and contracts for the carriage of goods governed by the Convention.

46. The exclusion of quantum contracts from the application of the rules of the Convention was also discussed. Such exclusion was supported by some representatives.

47. The Working Group decided to delete article 6 of the Brussels Convention of 1924. It was generally considered that article 6 was vague and that practice had shown that parties to contracts of carriage had not made use of the provisions of this article.

C. *Report of the Drafting Party*

48. Following the discussion by the Working Group, this subject was referred to the Drafting Party. The Drafting Party agreed on a draft provision on the documentary scope of application of the Convention to replace article 1 (b) and article 5, paragraph 2, (first sentence) of the Brussels Convention of 1924 and made a number of other recommendations and observations which were included in its report to the Working Group. This report, including the draft provision to which minor amendments were made by the Working Group,⁴³ reads as follows:

PART II OF THE REPORT OF THE DRAFTING PARTY:
DOCUMENTARY SCOPE OF APPLICATION OF
THE CONVENTION

The Drafting Party was requested by the Working Group to draft provisions on the scope of application of the Convention, taking into account the views on the various aspects of the subject expressed by representatives.

(a) The Drafting Party recommends the following draft provisions:

1. The provisions of this Convention shall be applicable to all contracts for the carriage of goods by sea.

[2. Where a bill of lading or similar document of title is not issued, the parties may expressly agree that the Convention shall not apply, provided that a document evidencing the contract is issued and a statement of the stipulation is endorsed on such document and signed by the shipper.]

3. The provisions of this Convention shall not be applicable to charter parties. However, where a bill of lading is issued under or pursuant to a charter-party, the provisions of the Convention shall apply to such a bill of lading where it governs the relation between the carrier and the holder of the bill of lading.

[4. For the purpose of this article, contracts for the carriage of a certain quantity of goods over a certain period of time shall be deemed to be charter parties.]

⁴³ The amendments to the draft provision made by the Working Group are the following: (a) in paragraph 2, "agree" was replaced by "stipulate" and "agreement" was replaced by "stipulation"; (b) in paragraph 3 "contained herein" was replaced by the words "of the Convention"; (c) in paragraph 4 the expression "carriage of a quantity of goods" was replaced by "carriage of a certain quantity of goods".

The Working Group deleted the recommendation of the Drafting Party (which had been part (b) (ii) of the report of the Drafting Party) that "the term 'charter party' should be translated into French as '*contrat d'affrètement constaté par une charte-partie*'"; however, the Working Group added the following item to the notes on the proposed draft provisions: "Paragraph 3 of the draft provisions—It was noted by the representative of France that 'charter party' was translated into French as '*contrat d'affrètement*'. It was also noted by the representatives of Argentina and Chile that 'charter party' was translated into Spanish as '*contrato de fletamento*'. The Working Group decided to follow these suggestions.

At the request of the Chairman of the Drafting Party the following recommendation was added as part (b) (iii) of the report of the Drafting Party: "The Drafting Party recommended that article 6 of the Brussels Convention of 1924 be deleted."

(b) The Drafting Party also recommends that:

- (i) The Convention should not contain any definition of the terms "charter party" and "*contrat d'affrètement*".
- (ii) A provisional definition of bill of lading be adopted for the purpose of the deliberations of the Working Group. The definition reads as follows:
"Bill of lading means a bill of lading or any similar document of title".
- (iii) The Drafting Party recommended that article 6 of the Brussels Convention of 1924 should be deleted.

Notes on the proposed draft provisions

(c) The attention of the Working Group is drawn to the following: *Paragraph 1 of the draft provisions*

1. One representative was of the opinion that the scope of application should be related to "the carriage of goods" rather than to "contracts of carriage". This representative suggested that subparagraph 1 should read as follows:

"The provisions of this Convention shall apply to the carriage of goods between ports in two different States."

2. It was suggested by one member of the Drafting Party that the following phrase should be added to paragraph 1: "*whether evidenced by a bill of lading or any other document covering such carriage*" in order to cope with modern or future practices involving new and various forms of contract of carriage documentation and at the same time to indicate clearly that some document is still required to evidence such contracts. This view was supported by another representative.

Paragraph 2 of the draft provision

1. Opinion as to whether this paragraph should be included was divided in the Drafting Party and it was agreed that the paragraph should appear in square brackets in the report of the Drafting Party.

2. Two representatives, although in favour of the principle laid down in this paragraph, held the view that such an exception from applicability of the Convention should be made available only in special circumstances.

Paragraph 3 of the draft provision

It was noted by the representative of France that "charter-party" was translated into French as "*contrat d'affrètement*". It was also noted by the representatives of Argentina and Chile that "charter-party" was translated into Spanish as "*contrato de fletamento*".⁴⁴

Paragraph 4 of the draft provision

At the request of four representatives who were opposed to this provision it was agreed to place this subparagraph in square brackets.

⁴⁴ The Working Group decided to follow these suggestions.

D. Consideration of Part II of the report of the Drafting Party

49. With minor amendments,⁴⁵ the Working Group approved the above part of the report of the Drafting Party, including the draft provisions.

III. GEOGRAPHIC SCOPE OF APPLICATION OF THE CONVENTION

A. Introduction

50. Article 10 of the Brussels Convention of 1924 provides:

"This Convention shall apply to all bills of lading issued in any of the contracting States."

51. Part two of the third report of the Secretary-General noted (at paragraphs 4-5) that this provision had given rise to criticism, *inter alia*, on the following grounds: (1) Under a literal reading, the Convention could be applicable when the carriage had no international element; i.e., coast-wise carriage within the same State involving a ship and nationals of that State; (2) The place of issuance of the bill of lading, as the sole criterion for applicability did not bear an adequate relationship to the performance of the contract of carriage.

52. The difficulties presented by article 10 of the 1924 Brussels Convention led to the revision of that article by article 5 of the Brussels Protocol of 1968. Article 5 of the 1968 Protocol reads as follows:

"The provisions of this Convention shall apply to every bill of lading relating to the carriage of goods between ports in two different States if:

"(a) The bill of lading is issued in a contracting State, or

"(b) The carriage is from a port in a contracting State, or

"(c) The Contract contained in or evidenced by the bill of lading provides that the rules of this Convention or legislation of any State giving effect to them are to govern the contract whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

"Each Contracting State shall apply the provisions of this Convention to the Bills of Lading mentioned above.

"This article shall not prevent a Contracting State from applying the rules of this Convention to bills of lading not included in the preceding paragraphs."

53. The report noted that the above provision had been based on draft provisions developed at two conferences of the International Maritime Committee (CMI)—the XXIVth Conference held at Rijeka and the XXVth Conference held at Stockholm. The Rijeka/Stockholm draft differed from that embodied in the above provisions of the Brussels Protocol in one important respect: namely, under the Rijeka/Stockholm draft, the Convention would also be applicable when "the port of discharge ... is situated in a contracting State".⁴⁶

⁴⁵ See foot-note 43 above.

⁴⁶ The report noted (A/CN.9/88/Add.1, para. 24, reproduced in this volume, part two, III, 2, below) that the final paragraph of revised article 5 in the 1968 Protocol reflected a compromise in response to the proposals to include the port of discharge as a basis for applicability.

54. The above proposal contained in the Rijeka/Stockholm draft was discussed at the Diplomatic Conference that drafted the Brussels Protocol of 1968. The report summarized the main points developed in the course of the discussion,⁴⁷ and drew attention to certain practical considerations bearing on the interest of the consignee in the applicability of the Convention. These included the fact that the existence of damage to the goods, and the scope of any such damage can usually be determined only when the goods are unloaded at the port of discharge; as a consequence, claims and litigation over the contract of carriage are usually more closely related to the port of discharge than to the port of loading.⁴⁸

55. In the light of these considerations the report set forth alternative draft proposals for consideration by the Working Group. Draft proposal A was patterned on Brussels Protocol of 1968.⁴⁹ Draft proposal B was also based on the Brussels Protocol, but included a provision whereby the Convention would also be applicable when the port of discharge was located in a Contracting State.

B. Discussion by the Working Group

56. It was generally agreed that article 10 of the 1924 Brussels Convention was not satisfactory in that it was ambiguous and did not provide a sufficiently broad scope of geographic application.

57. Further, it was generally agreed that article 5 of the 1968 Brussels Protocol (on which draft proposal A was based) was an improvement on article 10 of the 1924 Convention. However, most representatives considered neither article 5 of the Protocol, nor draft proposal A to be fully satisfactory. These representatives favoured draft proposal B which, in addition to what was set forth in draft proposal A, provided for the application of the Convention when the port of discharge was situated in a Contracting State.

58. Representatives favouring draft proposal B emphasized the need for protection of the consignee, who was often the claimant in case of loss of or damage to the goods; consequently, the State in which the port of discharge was situated had a distinct interest in the matter, and the Convention should apply if the State in question was a party to the Convention even if the port of loading was situated in a non-contracting State. It was also noted that the Working Group had already adopted provisions on choice of forum and arbitration clauses, which gave the option to the plaintiff to bring an action in the contracting State where the port of discharge was situated; to assure implementation of these provisions, the Convention must be in force at the port of discharge. It was also observed in support of draft proposal B that one of the main objectives of the Convention was to achieve harmonization and unification of maritime law, and that this objective was best served by as wide a scope of application as possible.

59. One representative stated that several Parties to the 1924 Convention, in their national legislation to

implement the Convention, had narrowed the scope of the Convention; the legislation of one such State provided for application of the provisions set forth in the Convention only when a bill of lading was issued in that State and not when issued in *any* contracting State as provided for in article 10 of the Convention. Attention was drawn to paragraph 3 of draft proposal A, which provided: "3. Each contracting State shall apply the provisions of the Convention to the contract of carriage". This representative, supported by others, favoured the inclusion of paragraph 3 in draft proposal B. In support of this view attention was also drawn to the fact that under the constitutions of some States the ratification of a convention does not give the provisions of the convention the force of private law, and that such effect results only from the enactment of national legislation.

60. Some representatives, while favouring the approach of draft proposal B, suggested that the place of issuance of the bill of lading or of other documents evidencing the contract of carriage should not be an independent criterion for the application of the Convention as that would lead to an unnecessarily wide scope of application. However, some other representatives were in favour of such a provision while suggesting that reference should be made not to the bill of lading but to the document evidencing the contract of carriage since, pursuant to draft provisions already adopted by the Working Group, application of the Convention was no longer dependent on the existence of a bill of lading or similar document of title.

61. Some representatives indicated that the term "port of discharge" was ambiguous in that it was not clear whether it referred to an *agreed* port of discharge, or to an *actual* port of discharge other than one agreed upon, or possibly to both. In this context, one representative thought it would be desirable to provide that an optional port of discharge should be regarded as a factor for determining the applicability of the Convention. The same representative suggested that, consistent with the intention of draft proposal B to broaden the scope of application, consideration could be given to making the Convention applicable regardless of the location of the port of loading or the port of discharge.

62. Two representatives who favoured draft proposal A emphasized that draft proposal B was unacceptable to them and stated that they would have to reserve their position should the Working Group adopt a provision including a port of discharge situated in a Contracting State as a criterion for the application of the Convention. These representatives drew attention to the reasons mentioned in paragraph 31 of the Secretary-General's report in support of their position. They also stressed certain additional considerations. Thus, it was observed that under article 5 of draft proposal A, States could apply the rules of the Convention to cases not expressly covered by that article. It was noted that the approach of draft proposal A had been the outcome of a difficult compromise achieved in 1967-1968. It was also observed that draft proposal B would increase the difficulties of resolving conflicts of laws, especially with respect to countries which were parties to the 1924 Convention but which would not be parties to the new Convention during a transitional period.

⁴⁷ *Ibid.*, paras. 31-32.

⁴⁸ *Ibid.*, paras. 33-34.

⁴⁹ *Ibid.*, para. 21. Article 5 of the Brussels Protocol was quoted at paragraph 52 above. Draft proposal A suggested certain drafting changes to take account of language and approach reflected in earlier decisions of the Working Group.

63. In addition, one of the representatives favouring draft proposal A stated that if the Working Group adopted a formula along the lines of draft proposal B, it would be essential to add a provision, similar to one contained in the 1955 Hague Protocol to the Warsaw Convention, to the effect that the Convention was applicable to carriage of goods between ports in two different States provided that both the port of loading and the port of discharge were situated in Contracting States.

64. One representative, although recognizing merits in draft proposal B, observed that the practical result of that proposal would not be very much different from that of draft proposal A. The Working Group should consider whether it was desirable to have a provision on scope of application that might prevent a number of States from acceding to the Convention. In that event the attempt to establish a wide scope of application would fail to achieve its objectives; conversely, a narrower provision on geographic scope of application would not be significant if the Convention obtained general adherence.

C. Report of the Drafting Party

65. Following discussion by the Working Group this subject was referred to the Drafting Party. The report of the Drafting Party, with some amendments made by the Working Group is as follows:⁵⁰

PART III OF THE REPORT OF THE DRAFTING PARTY: GEOGRAPHIC SCOPE OF APPLICATION

(a) The Drafting Party considered the revision of the provision regarding the geographic scope of application of the Convention, based on the views expressed by the members of the Working Group. The Drafting Party recommends the following provision:

1. The provisions of this Convention shall, subject to article [],⁵¹ be applicable to every contract for carriage of goods by sea between ports in two different States, if:

(a) The port of loading as provided for in the contract of carriage is located in a Contracting State, or

(b) The port of discharge as provided for in the contract of carriage is located in a Contracting State, or

⁵⁰ The amendments made by the Working Group are the following: (1) the foot-note below (numbered 51) is added to paragraph 1; (2) subparagraphs 1 (d) and (e) commence with the words "the bill of lading or other document evidencing . . .", instead of with the words "the document evidencing . . ."; (3) paragraph 3 is put between square brackets; (4) paragraph 4 is added; (5) the words "... as one of these ports may well not have been mentioned in the contract of carriage", were added under (d) to the notes on the proposed draft provisions; (6) note (h) commences with the words "Some representatives . . .", instead of the words "One representative . . ."; (7) note (i) is added to the notes on the proposed draft provisions.

It was also noted that the draft provisions set forth in this part of the report of the Drafting Party were intended to replace article 10 of the 1924 Brussels Convention and article 5 of the 1968 Protocol.

⁵¹ The reference is to the draft provision on the documentary scope of application of the Convention, found in part II of the report of the Drafting Party, at paragraph 48 above.

(c) One of the optional ports of discharge provided for in the contract of carriage is the actual port of discharge and such port is located in a Contracting State, or

(d) The bill of lading or other document evidencing the contract of carriage is issued in a Contracting State, or

(e) The bill of lading or other document evidencing the contract of carriage provides that the provisions of this Convention or the legislation of any State giving effect to them are to govern the contract.

2. The provisions of paragraph 1 are applicable without regard to the nationality of the ship, the carrier, the shipper, the consignee or any other interested person.

[3. Each Contracting State shall apply the provisions of this Convention to the contracts of carriage mentioned above.]

4. This article shall not prevent a contracting State from applying the rules of this Convention to domestic carriage.

Notes on the proposed draft provisions

(b) Some representatives suggested that the terms "port of departure" and "port of destination" should be used instead of the terms "port of loading" and "port of discharge" respectively, in paragraph 1, subparagraph (a), (b) and (c). The Drafting Party noted that the terms "port of loading" and "port of discharge" had been used in other draft texts adopted by the Working Group, and recommended that these terms should be retained, subject to a subsequent decision on the terminology to be used in the Convention.

(c) In opposing paragraph 1, subparagraphs (b) and (c), two representatives favoured a provision based on article 5 of the Brussels Protocol. They felt that as a matter of policy it was incorrect for parties to a Convention to purport to control the terms on which goods were shipped to their countries, regardless of the applicable law in the port of loading. It was also feared that the adoption of the draft proposal would lead to a conflict with the existing Hague Rules during any transitional period.

(d) One representative, commenting on paragraph 1, subparagraph (b), observed that it made it unnecessary to include an express provision (paragraph 1, subparagraph (c)) dealing with optional ports of discharge.

(e) With respect to paragraph 1, subparagraphs (a) to (c), one representative was of the opinion that as additional criteria for the application of the Convention the actual port of loading and the actual port of discharge should be added, since one of these ports may well not have been mentioned in the contract of carriage.

(f) Some representatives referring to the concept of "contracts for carriage of goods" used in paragraph 1 of the draft article on the documentary scope of the Convention, expressed the opinion that paragraph 1, subparagraph (d) was not necessary in view of the adoption of subparagraphs (a) to (c) and (e), but they were nevertheless prepared to

accept it in order to meet the wishes of other representatives. One representative held the view that the text of paragraph 1, subparagraph (d) should read: "the contract of carriage is concluded in a contracting State." According to that representative it was necessary to adopt such a formulation to take account of paragraph 1 of the draft article previously adopted with respect to the documentary scope of application of the Convention, and of the fact that paragraph 2 of that draft article had been placed in square brackets: a certain number of representatives had thus accepted that the Convention should apply to all contracts of carriage irrespective of whether a document had been issued. Therefore, that representative suggested that a draft of this article should be adopted, which would be in harmony with the text of paragraph 1 of the draft article on the documentary scope of application of the Convention.

(g) With respect to paragraph 1, subparagraph (e), two representatives held the view that the words "or the legislation of any State giving effect to them" should be deleted.

(h) Some representatives suggested that the provisions of paragraph 3 might need further consideration at a later stage, from the point of view of its stating the truism that international treaties must be complied with, and from the point of view of its incidental effect on the law of international treaties; in the latter respect it should not be taken as a precedent implying that in the absence of such a specific provision in the text of a Convention the parties thereto may avoid applying the Convention in cases where it shall be applicable.

(i) One representative suggested that the provisions on geographic scope should read as follows:

- "1. The provisions of this Convention shall apply to the carriage of goods between ports in two different States.
2. Contracting States may decline to apply the rules of this Convention where the transit is domestic or does not involve traversing oceans or seas.
3. Contracting States may decline to apply the rules of this Convention if both the port of loading and the port of discharge are in non-contracting States."

D. *Consideration of Part III of the report of the Drafting Party*

66. The Working Group considered the above part of the report of the Drafting Party and approved paragraphs 1, 2 and 4 of the proposed draft provisions.

67. With respect to subparagraphs 1 (d) and 1 (e) one representative suggested that specific reference should be made to bills of lading, as well as to documents evidencing the contract of carriage, since the bill of lading could well be a document different from the contract of carriage and could be issued in a State other than the one where the contract of carriage was concluded. In reply another representative stated that such reference to bills of lading was unnecessary as the words "document evidencing the contract of carriage" would include bills of lading. On the other hand, this representative was prepared to accept express reference

to the bill of lading, if that was the wish of the Working Group, as such reference would not alter the substance of subparagraphs 1 (d) and 1 (e). Consequently, the Working Group decided to include express reference to bills of lading in the above-mentioned subparagraphs.

68. With respect to paragraph 3, some representatives, for reasons set forth in paragraph 59 above, expressed a strong preference for retaining this paragraph without square brackets. However, the majority of the representatives, some of whom considered this paragraph to be superfluous, preferred placing paragraph 3 in square brackets for further consideration at a later stage.

69. A representative of a State with a federal constitutional system suggested an additional paragraph on the lines of paragraph 4 (comparable to article 5, paragraph 3 of the 1968 Protocol), aimed at solving problems of application of the provisions of the Convention in States with such a constitutional system. Most representatives who spoke on the subject considered such a paragraph unnecessary from the point of view of their own governmental systems, but were willing to accept it in order to meet the above-mentioned problem. Accordingly, the Working Group adopted paragraph 4 of the proposed draft provisions.

IV. ELIMINATION OF INVALID CLAUSES IN BILLS OF LADING

A. *Introduction*

70. The problems involved in the use of invalid clauses were analysed in part six of the second report of the Secretary-General (A/CN.9/76/Add.1).^{*} In part four of the third report of the Secretary-General this analysis was carried further by the development of alternative (though not mutually exclusive) draft texts directed to the use of clauses which derogate from the provisions of the Convention.

71. Both reports noted that the inclusion of invalid clauses in bills of lading caused uncertainty in the minds of cargo owners as to their rights and liabilities. It was considered that 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".⁵²

72. The reports noted four possible approaches in dealing with invalid clauses; these approaches are considered below.

73. The first approach was aimed at making the mandatory requirements of the Convention as clear and explicit as possible. In this regard attention was drawn to article 3 (8) of the Brussels Convention of 1924 which attempted to regulate the use of invalid clauses. The text of this article is as follows:

"Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from

^{*} UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 4.

⁵² "Bills of lading", report by the secretariat of UNCTAD TD/B/C.4/ISL/6/Rev.1, para. 295 (United Nations publication, Sales No. E.72.II.D.2).

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."

The reports noted that the present wording of article 3 (8) is inadequate in that it (a) refers only to the Convention's provisions on "liability", (b) leaves unclarified its effect on clauses which are valid only under certain circumstances and not in others, and (c) leaves uncertain the effect of invalidity of one clause on the rest of the contract of carriage.

74. To remedy the aforementioned inadequacies of article 3 (8), the third report of the Secretary-General proposed a draft provision (draft proposal A, at paragraph (5) which (1) required that the contract of carriage or bill of lading conform to all the provisions of the Convention, (2) provided for the nullity of a clause only to the extent that it derogated from the Convention and (3) expressly limited the nullity of an invalid clause to the clause itself. Paragraph 2 of the draft provision incorporated the substance of article 5, paragraph 1 of the Brussels Convention of 1924 permitting a carrier by contract to increase his responsibilities set forth in the Convention.

75. The above-mentioned reports of the Secretary-General also considered the suggestion that the text of the Convention itself should specify certain types of clauses which are invalid. In this regard attention was directed to the last sentence of article 3 (8) of the Brussels Convention of 1924 which specifically prohibits "benefit of insurance" clauses. However, it was noted that this approach presented difficulties in that (1) certain clauses are invalid only in some circumstances and not in others and (2) the identification of certain clauses as invalid might lead draftsmen to prepare new wording to achieve the same ends.

76. The third approach proposed the introduction of sanctions to penalize the use of invalid clauses. The third report of the Secretary-General set forth two alternative draft provisions.* The first alternative (draft proposal B (1), paragraph 14) would remove the carrier's limitation of liability under the Convention when the carrier relies on a clearly invalid clause in a judicial or arbitral proceeding. The second alternative (draft proposal B (2), paragraph 17) established the carrier's liability for all expenses, loss or damage (such as litigation costs) caused by the presence of the invalid clause.

77. The fourth approach suggested that the Convention require the inclusion, in the contract of carriage, of a notice clause regarding invalid clauses. The third report of the Secretary-General set forth a draft provision (draft proposal C, paragraph 21) which required all contracts of carriage or bills of lading to contain a statement that (a) the carriage is subject to the provisions of the Convention and (b) any clause derogating from the Convention is null and void. By way of sanction, paragraph 2 of the draft provision removed the carrier's entitlement to the Convention's

rules on limitation of liability whenever the contract of carriage or bill of lading did not contain the required statement. The report noted that a similar approach had been taken in the Warsaw (Air) Convention and the Convention of Carriage by Road (CMR).

B. Discussion by the Working Group

78. The Working Group discussed the problems involved in the inclusion of invalid clauses in bills of lading and considered solutions based on the foregoing draft proposals. It was emphasized by a number of representatives that these proposals complemented each other and were not mutually exclusive.

79. A majority of the representatives were in agreement on the need for a general provision along the lines of draft proposal A (see paragraph 74 above), which specified the legal status of clauses that were inconsistent with the Convention. On the other hand, one representative considered such a provision to be unnecessary, since the provisions of the Convention were obligatory anyway.

80. Suggestions were made for improving the clarity of the provisions in paragraph 1 of draft proposal A. In addition, one representative suggested the deletion of any reference to separation or severance of the invalid clause from the rest of the contract on the ground that such a rule would be a source of litigation.

81. A number of representatives expressed the view that the general provision in draft proposal A should indicate clearly that it applied to all clauses in the contract of carriage, whether or not contained in the bill of lading or other document evidencing the contract of carriage. One representative expressed concern that, even with this broad terminology, the possibility still existed that under common law systems there could be collateral agreements inconsistent with the provisions of the Convention and yet not covered by the provision.

82. The view was expressed that draft proposal A was too broad in that it applied to all provisions of the Convention instead of permitting some degree of freedom of contract, within the scope of the Convention, in those areas not considered mandatory. Another representative stated that there should be flexibility in the scope of application of the Convention, thereby permitting the parties to alter the burden of responsibilities in certain circumstances.

83. Most representatives supported paragraph 2 of draft provision A, validating clauses which increased the carriers' responsibilities or obligations. Two representatives expressed doubt whether it was necessary to require that clauses increasing the carriers' liabilities be evidenced in a document.

84. Some representatives, who supported the general provision in draft proposal A, also advocated the inclusion of an illustrative list of invalid clauses as a supplement to the basic provision.

85. In regard to the inclusion of a sanction to deter carriers from utilizing invalid clauses (draft proposals B (1), B (2) and C), a majority of the representatives were in favour of including a sanction, but no clear consensus was reached as to the form of this sanction.

86. Some support was expressed for a sanction which would remove the limitation of liability under

* See the next section of this volume.

the Convention (draft proposal B (1)). However, most representatives were of the opinion that such a sanction was excessive. It was noted that this sanction was limited to invoking clauses which were "clearly" inconsistent with the Convention; however, most representatives expressed concern over the difficulties inherent in determining which clauses would be "clearly" invalid.

87. A majority of the representatives supporting the concept of a sanction for invalid clauses were in favour of the approach embodied in draft proposal B (2), which made the carrier liable for all expenses, loss or damage caused by an invalid clause. However, one representative opposed this alternative to the extent that it would permit the assignment of legal fees to the losing party in a legal action, an approach which was inconsistent with the law of his country. Another representative, opposed to the concept of sanctions, expressed a similar reservation to this particular alternative on the grounds that the costs of litigation should be determined by national rules.

88. Several representatives were opposed to the approach of both draft proposal B (1) and draft proposal B (2) on the ground that these provisions were unnecessary and might produce arbitrary results.

89. A majority of the representatives in the Working Group favoured the inclusion of a notice provision in the contract of carriage along the lines suggested in draft proposal C (see paragraph 77 above). On the other hand, there was little support for the sanction which provided for withdrawal of the limits on the carriers' liability when the required notice was omitted in the contract of carriage.

90. A majority of the representatives agreed that some sanction was necessary. Several representatives indicated that a sanction along the lines of draft proposal B (2) (see paragraphs 76 and 87, above) might be amalgamated with draft proposal C. One representative noted that if this latter approach were not adopted, the problem of a sanction for omission of the required notice should be left to the national legislatures. Speaking in favour of a sanction similar to draft proposal B (2) rather than the one originally contained in draft proposal C, several representatives noted that a sanction removing the carrier's limitation of liability whenever there was an omission of the required notice had caused complications in the Warsaw (Air) Convention and had been deleted in that Convention's most recent revision of the rules on the carriage of passengers. Some of these representatives observed that draft proposal B (2) was similar to the sanction adopted by the Convention of Carriage by Road (CMR).

91. Some representatives opposed any provision mandating that a specified notice be given in the bill of lading or other documents. In this connexion it was noted that such a requirement would be inconsistent with the trend to reduce costs by using fewer documents in international transport.

92. One representative expressed the view that this provision should be made dependent upon issuance of a document which could contain the required statement. However, two representatives were of the opinion that such a qualification was unnecessary since, if no

document were issued, there would be no opportunity for the inclusion of an invalid clause. These representatives responded to a query as to the language to be employed in giving the required notice by observing that the notice would be in the same language as the rest of the document.

93. It was the general consensus of the Working Group that the Drafting Party should develop provisions on invalid clauses along the lines of the principles approved by the Working Group.

C. Report of the Drafting Party

94. Following the discussion by the Working Group, this subject was referred to the Drafting Party. The report of the Drafting Party, with amendments to the text of the proposed draft provisions made by the Working Group,⁵³ is as follows:

PART IV OF THE REPORT OF THE DRAFTING PARTY: INVALID CLAUSES

(a) On the basis of the opinions expressed by members of the Working Group, the Drafting Party considered the revision of the present Convention to deal more effectively with the problem of invalid clauses in contracts of carriage. On the basis of these opinions the Drafting Party recommends the following text:

1. Any stipulation of the contract of carriage or contained in a bill of lading or any other document evidencing the contract of carriage shall be null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation shall not affect the validity of the other provisions of the contract or document of which it forms a part. A clause assigning benefit of insurance of the goods in favour of the carrier, or any similar clause, shall be null and void.

2. Notwithstanding the provisions of paragraph 1 of this article, a carrier may increase his responsibilities and obligations under this Convention.

3. When a bill of lading or any other document evidencing the contract of carriage is issued, it shall contain a statement that the carriage is subject to the provisions of this Convention which nullify any stipulation derogating therefrom to the detriment of the shipper or the consignee.

⁵³ The amendments made by the Working Group are the following: (a) the word "that" was inserted after the word "extent" in the first sentence of paragraph 1; (b) the phrase "directly or indirectly" was inserted after the word "derogates" in the first sentence of paragraph 1; (c) the phrase "or any similar clause" was inserted after the word "carrier", and the phrase "null and void" replaced the phrase "deemed to derogate from the provisions of this Convention".

During the consideration by the Working Group of this report the following additions and amendments were made at the request of the Chairman of the Drafting Party: (a) Notes (4) and (5) were added to the Notes on the proposed draft provisions; and (b) paragraph 3 of the proposed draft provisions was amended by deleting the colon after the word "that" and the quotation marks around the remainder of the sentence.

4. Where the claimant in respect of the goods has incurred loss as a result of a stipulation which is null and void by virtue of the present article, or as a result of the omission of the statement referred to in the preceding paragraph, the carrier shall pay compensation to the extent required in order to give the claimant full compensation in accordance with the provisions of this Convention for any loss of or damage to the goods as well as for delay in delivery. The carrier shall, in addition, pay compensation for costs incurred by the claimant for the purpose of exercising his right, provided, that costs incurred in the action where the foregoing provision is invoked shall be determined in accordance with the law of the court seized of the case.

Notes on the proposed draft provisions

(b) The attention of the Working Group is drawn to the following:

1. One representative was of the opinion that a separate paragraph should be inserted after paragraph 1 to provide a non-exclusive list of characteristics common to various types of invalid clauses.
2. Some representatives who opposed paragraph 3 of the draft text above expressed the view that it should be placed in brackets to indicate that there should be further discussion on this point. One representative stated that this notice provision did not go far enough as it did not call for the incorporation of the substantive rules of the Convention into the bill of lading or other document evidencing the contract of carriage. Another representative was of the opinion that the phrase "or any other national legislation based on this Convention" should be inserted after the word "Convention".
3. In reference to paragraph 4 one representative stated that the term "including lawyer's fees" should be inserted after the word "costs" in the second sentence of the paragraph.
4. The proposed draft provisions are intended to replace articles 2, 3 (8) and 5 (1) of the 1924 Brussels Convention.
5. In view of the proposed draft provisions, the Working Group may wish to delete paragraph 5 of article A in part J of the Compilation.

D. Consideration of Part IV of the report of the Drafting Party

95. The Working Group considered and approved the above part of the report of the Drafting Party including the proposed draft provisions.⁶⁴ The following comments and reservations were made with respect to the report:

(a) One representative opposed the inclusion of the phrase "directly or indirectly" after the word "derogates" in the first sentence of paragraph 1.

(b) Some representatives were opposed to the inclusion of the provision providing for a sanction since they considered that it was not necessary and, as drafted, it did not in fact provide a sanction.

V. CARRIAGE OF CARGO ON DECK

A. Introduction

96. A working paper prepared by the Secretariat summarized consideration and action by the Working Group at the third session regarding this issue.⁶⁵ It was noted that the definition of "goods" (article 1 (c) of the 1924 Convention) had been revised so as not to exclude the carriage of cargo on deck from the coverage of the Convention.⁶⁶ Attention was also directed to two proposals presented at the third session on which action was still pending.⁶⁷

97. *Pending proposal A* would exempt carriers from liability for risks inherent in the carriage of goods on deck when such carriage was authorized by the contract of carriage.

98. *Pending proposal B* incorporated the principles regarding unauthorized carriage on deck that were recommended by the Drafting Party during the third session of the Working Group.⁶⁸ The main operative provision of pending proposal B were the following: (1) Carriage on deck is only permitted by agreement with the shipper, by usage or where required by statutory rules or regulations; (2) If the agreement with the shipper is not reflected in the bill of lading, the carrier bears the burden of proving the existence of such agreement and, furthermore, the carrier cannot invoke the agreement against a third party who acquired the bill of lading in good faith; (3) If goods are carried on deck without agreement of the shipper, or without justification by usage or statutory rules and regulations, the carrier is liable for loss or damage to the goods due to the carriage on deck (with the provisions on limitation of carrier liability being applicable unless the carrier was guilty of wilful misconduct).

B. Discussion by the Working Group

99. All representatives who commented on pending proposal A stated that a provision exempting carriers from liability for risks inherent in carriage of goods on deck was unnecessary in the light of the revised basic rule on the responsibility of carriers. Accordingly the Working Group decided not to adopt this proposal.

100. A majority of the representatives expressed support for pending proposal B. Most representatives stated that this proposal should be augmented by a rule to the effect that carriage of goods on deck in violation of an express agreement to carry them below deck would be treated as wilful misconduct to which the provisions on limitation of liability would not apply.⁶⁹ These representatives stated, however, that in other cases of unauthorized carriage on deck, the rules on limitation of liability would remain applicable.

101. Several representatives stated that any unauthorized carriage of goods on deck was in fact wilful misconduct and that, therefore, in all cases of unauthorized carriage on deck the carrier should not be able to

⁶⁵ A/CN.9/WG.III/WP.14; report on third session (A/CN.9/63) paras. 23-29; UNCITRAL Yearbook, Vol. III: 1972, part two, VI.

⁶⁶ Part A of the compilation.

⁶⁷ A/CN.9/WG.III/WP.14, at paras. 5 and 13.

⁶⁸ *Ibid.*, para. 11.

⁶⁹ Report on fifth session, paragraph 26 (2); compilation, part J, article C (damage resulting from wilful misconduct).

⁶⁴ See foot-note 53 above.

rely on the provisions establishing limitations on the carrier's liability. Some of these representatives stressed that it was important to provide for unlimited liability for all unauthorized carriage on deck, since full insurance coverage generally was applicable only to goods carried under deck; unauthorized carriage on deck consequently would deprive the shipper or consignee of the benefit of insurance on the goods. This will be all the more unjustifiable in cases where the shipper or consignee took the insurance under the clear understanding that the goods were being carried under deck but found to his dismay that they were carried on deck and that he had no insurance protection.

102. One representative favoured a rule holding the carrier absolutely liable, regardless of fault, for all loss or damage to goods carried on deck without authorization.

C. Report of the Drafting Party

103. Following the discussion by the Working Group, the subject of carriage of goods on deck was referred to the Drafting Party. The report of the Drafting Party, including a draft provision concerning the carriage of goods on deck to which a minor amendment was made by the Working Group,⁶⁰ reads as follows:

PART V OF THE REPORT OF THE DRAFTING PARTY: DECK CARGO

The Drafting Party considered the addition to the Brussels Convention of a provision regarding the carriage of goods on deck. On the basis of views that had been expressed during the Working Group's discussion of the subject, a draft provision was prepared.

The Drafting Party recommends

(a) the following provision on the carriage of goods on deck:

1. The carrier shall be entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper, [with the common usage of the particular trade] or with statutory rules and regulations.

2. If the carrier and the shipper have agreed that the goods shall or may be carried on deck, the carrier shall insert in the bill of lading or other document evidencing the contract of carriage a statement to that effect. In the absence of such a statement the carrier shall have the burden of proving that an agreement for carriage on deck has been entered into; however, the carrier shall not be entitled to invoke such an agreement against a third party who has acquired a bill of lading in good faith.

3. Where the goods have been carried on deck contrary to the provision of paragraph 1, the carrier shall be liable for loss of or damage to the goods, as well as for delay in delivery, which results solely from the carriage on deck in accordance with the provisions of articles [].⁶¹ The same shall apply

when the carrier, in accordance with paragraph 2 of this article is not entitled to invoke an agreement for carriage on deck against a third party who has acquired a bill of lading in good faith.

4. Carriage of goods on deck contrary to express agreement for the carriage under deck shall be deemed to be wilful misconduct and subject to the provision of article [].⁶²

(b) that the above draft provision replace the draft provision set forth in part C of the compilation.

Note on proposed draft provision

In regard to paragraph 3 some representatives were of the opinion that it should be deleted.

D. Consideration of Part V of the report of the Drafting Party by the Working Group

104. The Working Group considered the above part of the report of the Drafting Party⁶³ and approved the report of the Drafting Party, including the proposed draft provision.

105. The following comments and reservations were made by representatives in the Working Group during the consideration of the Drafting Party's report on carriage of goods on deck:

(a) A majority of the representatives objected to the phrase "with the common usage of the particular trade" on a variety of grounds. Some objected on the ground that the phrase was ambiguous. Other representatives stated that it was difficult to determine common usage as it may vary from region to region and even from port to port. One representative reserved his position regarding the above phrase and another representative expressed his opposition to any reference to "custom" or "usage". It was agreed that the question needed further study and consideration; therefore, this phrase in paragraph 1 of the draft provision was placed within square brackets.

(b) Several representatives suggested that paragraph 2 of the draft provision on carriage of deck cargo be amended to require that the bill of lading or other document evidencing the contract of carriage clearly indicate that carriage shall be or may be on deck, whether the carrier was entitled to carry the goods on deck by virtue of an agreement with the shipper, the common usage of the particular trade or statutory rules and regulations. These representatives proposed the following wording to replace the paragraphs 2, 3 and 4 that were recommended by the Drafting Party:

"2. In any of the cases referred to in paragraph 1 above, the carrier shall insert in the bill of lading or other document evidencing the contract of carriage a statement to that effect. In the absence of such a statement the carrier shall have the burden of proving his right of on-deck carriage as referred to in paragraph 1; however, the carrier shall not be entitled to invoke such right against a third party who has acquired a bill of lading in good faith.

⁶⁰ In paragraph 1, the words "with the common usage of the particular trade" were placed within square brackets.

⁶¹ The reference is to the provisions on limitations of liability, to be found in articles A and C of part I of the compilation.

⁶² The reference is to provision on limitation of liability in cases of wilful misconduct, to be found in article C of part I of the compilation.

⁶³ See foot-note 60 above.

"3. Where the goods have been carried on deck contrary to the provisions of paragraph 1, the carrier shall be liable for loss of or damage to the goods, as well as for delay in delivery, which results solely from the carriage on deck in accordance with the provisions of articles [].⁶⁴ The same shall apply when the carrier in accordance with paragraph 2 of this article is not entitled to invoke *the right of on-deck carriage* against a third party who has acquired a bill of lading in good faith.

"4. Carriage of goods on deck *contrary to the provisions of paragraphs 1 and 2 above* shall be deemed to be wilful misconduct and subject to the provision of article []."⁶⁵

(c) The Working Group took note of the comments and draft proposal contained in subparagraph (b) above, and decided to consider that proposal at the next session of the Working Group.

(d) One representative proposed deletion of paragraphs 2 and 3 that were recommended by the Drafting Party and another representative favoured placing these paragraphs within square brackets.

(e) One of the representatives referred to in paragraph (b) above reserved his position regarding paragraphs 3 and 4 as recommended by the Drafting Party as these provisions do not give sufficient protection to the shipper or consignee. This representative stated that if a shipper fails to disclose to the insurer that the goods are carried on deck, the insurance may be void as to goods so carried. In addition, if the shipper does not know that the goods will be carried on deck, he may fail to provide packing that is adequate for such carriage. For these reasons, carriage on deck should be permitted only in accordance with an express agreement. In addition, if the carrier improperly carries the goods on deck, he should be fully liable for all loss or damage to the goods resulting from other forms of negligence, and not merely for loss or damage resulting from the carriage on deck.

VI. CARRIAGE OF LIVE ANIMALS

A. Introduction

106. The Brussels Convention of 1924 excludes "live animals" from the definition of "goods" in article 1 (c), with the result that the carriage of live animals falls outside the scope of the Convention. The Working Group at its third session (1972) considered whether the carriage of live animals should be brought within the scope of the Convention. However, at that session agreement was lacking on the approach to be followed in dealing with the question, and it was decided to request the International Institute for the Unification of Private Law (UNIDROIT) to prepare a study on this question.⁶⁶ A study prepared by UNIDROIT in response to this request was considered at the present session of the Working Group.⁶⁷

⁶⁴ The reference is to the provisions on limitation of liability to be found in articles A and C of part J of the compilation.

⁶⁵ The reference is to the provision on limitation of liability in cases of wilful misconduct, to be found in article C of part J of the compilation.

⁶⁶ A/CN.9/63, paras. 30 and 34, UNCITRAL Yearbook, Vol. III: 1972, part two, IV.

⁶⁷ A/CN.9/WG.III/WP.11; reproduced in this volume, part two, III, 3, below.

107. The UNIDROIT study on live animals set forth three alternative proposals. Proposal I would include the carriage of live animals within the coverage of the Convention. However, in view of the risks involved in such carriage it was proposed that a clause be added to article 3 (8) of the Convention stating the following:

"However, with respect to the carriage of live animals, all agreements, covenants or clauses relating to liability and compensation arising out of the risks inherent in such carriage shall be permitted in the contract of carriage."

108. Proposal II would also involve the inclusion of live animals in the coverage of the Convention but would relieve the carrier of responsibility for the special risks inherent in the carriage of animals. The carrier would have the burden of proving that the loss or damage was caused by such inherent risk. Proposal II states the following:

"With respect to live animals, the carrier shall be relieved of his responsibility where the loss or damage results from the special risks inherent in the carriage of animals. When the carrier proves that, in the circumstances of the case, the loss or damage could be attributed to such risks, it shall be presumed that the loss or damage was so caused, unless there is conflicting proof that such risks were not the whole or partial cause of it. Furthermore, the carrier shall prove that all steps incumbent on him in the circumstances were taken and that he complied with any special instructions issued to him."

109. Proposal III also presupposes the inclusion of live animals within the scope of the Convention. Unlike the other proposals, it places the carriage of live animals within the general rules of liability of the Convention. However, under proposal III a paragraph would be added to article 4 (6) of the Hague Rules regarding notice by the shipper to the carrier of the nature of the danger in the carriage of particular animals and the actions that may be taken by the carrier if such animals become a danger. The paragraph reads as follows:

"Before live animals are taken in charge by the carrier, the shipper shall inform the carrier of the exact nature of the danger which they may present and indicate, if need be, the precautions to be taken. If such animals become a danger to the ship and the cargo, they may, at any time before discharge, be landed at any place or rendered harmless or killed, without liability on the part of the carrier except to general average, if any, provided that he proves that he unsuccessfully took all measures that could reasonably be required in the circumstances of the case."

B. Discussion by the Working Group

110. There was general support in the Working Group for including live animals within the scope of application of the Convention. It was pointed out that the general Convention rules on liability should apply to live animals since the carriage of live animals was just another type of carriage of goods. It was also stated by one representative that the carriage of live

animals, like the carriage of certain fruits and vegetables, required the maintenance of proper ventilation and also called for shippers to give precise instructions to the carrier regarding care of the cargo. Other representatives observed that making the carrier liable under the Convention for the carriage of live animals would encourage decent treatment of live animals.

111. Two representatives did not favour the application of the liability rules of the Convention to the carriage of live animals. In support of this position it was stated by one representative that the UNIDROIT study, in the opinion of this representative, did not contain evidence of unreasonable losses suffered by shippers because of the exclusion of live animals from the Convention; on the other hand, increased liability in this area would lead to higher freight charges. It was pointed out by an observer that under current insurance practice, damage to live animals was not fully insurable in the same manner as damage to other cargo.

112. A majority of the members of the Working Group approved the approach of proposal II (set out at paragraph 108 above). Proposal II would bring the carriage of live animals within the Convention, but would relieve the carrier of liability for special risks inherent in such carriage if the carrier can prove that the loss or damage was caused by a special inherent risk. Some supporters of this proposal observed that live animals were a special category of cargo and therefore a special provision dealing with the subject was required. Two representatives, who stated that they could support the principal aim of proposal II, stated that their support hinged on a change in the proposed burden of proof rule. These representatives suggested that the rule should state that the carrier would only be liable if the claimant proved that the loss or damage to the live animals was due to the fault of the carrier.

113. Some representatives preferred proposal III (see paragraph 109 above) which would bring the carriage of live animals within the Convention with no qualifications regarding special risks but with an addition to the Convention of a provision on dangers relating to the carriage of live animals. It was pointed out by a representative who favoured the basic aim of proposal III that, although special problems could arise in the carriage of live animals, there was no justification for any special treatment of such cargo. Carriers should be aware of the general propensities of animals, and shippers should only be required to inform the carrier of special propensities of a cargo of live animals; the proposed provision dealing with notice of danger was ambiguous in requiring the shipper to state the exact nature of the danger.

114. Two representatives favoured proposal I (see paragraph 107 above) under which, in their view, the Convention would apply to the carriage of live animals subject only to reasonable derogation clauses. In support of this position it was stated that animals are sensitive and react in divergent ways to climatic and other physical changes. On the other hand, other representatives stated that they found proposal I unsatisfactory since it would allow the parties to derogate from the Convention's general rules on liability.

C. Report of the Drafting Party

115. Following discussion by the Working Group, this subject was referred to the Drafting Party on the understanding that, if it proved to be impossible to reach consensus on one draft text, alternative texts should be prepared on the basis of the two proposals (II and III) that had received the widest support in the Working Group. The Drafting Party agreed to a revised definition of "goods" to replace article 1 (c) of the Brussels Convention of 1924. The Drafting Party also agreed to add a special risk rule for the carriage of live animals and made several observations which were included in its report to the Working Group. This report, including the drafting provisions, reads as follows:⁶⁸

PART VI OF THE REPORT OF THE DRAFTING PARTY: CARRIAGE OF LIVE ANIMALS

(a) Based on the views expressed by representatives in the Working Group, the Drafting Party considered the inclusion in the Convention of the carriage of live animals by sea, and recommends the following draft texts:

1. DEFINITION OF GOODS (to replace part A in the compilation):

"Goods" includes goods, wares, merchandise and articles of every kind whatsoever including live animals.

2. SPECIAL RISK RULE FOR LIVE ANIMALS (to become paragraph 4 of part D in the compilation, with the current paragraph 3 of part D becoming a new paragraph 5):*

"With respect to live animals, the carrier shall be relieved of his liability where the loss, damage or delay in delivery results from any special risk inherent in that kind of carriage. When the carrier proves that he has complied with any special instructions given him by the shipper respecting the animals and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it shall be presumed that the loss, damage or delay in delivery was so caused unless there is proof that all or a part of the loss, damage or delay in delivery resulted from fault or negligence on the part of the carrier, his servants or agents."

* It will be noted that the Working Group made no decision at this session regarding a new paragraph 3 of part D of the compilation. This gap could be filled by inserting the draft provision on "delay in delivery: loss of goods" (see paragraph 26 above) as paragraph 3.

⁶⁸ The report of the Drafting Party appears as amended by the Working Group. The Working Group made the following modifications in the draft texts: (a) in paragraph 1 the words after "goods" were changed from "means goods of any kind including live animals" to the text appearing above; (b) in paragraph 2 the first sentence shall end with "results from any special risks inherent in that kind of carriage" instead of "results from any special risks inherent in the carriage of animals"; (c) in the second sentence of paragraph 2 the phrase "loss, damage or delay in delivery" replaced, in all three places where it had appeared, the words "loss or damage" in the English text.

Notes on the proposed draft provisions

(b) The attention of the Working Group is drawn to the following:

1. Some representatives expressed their opposition to a special risk clause for carriage of live animals. These representatives stated that live animals should be treated as any other cargo and that the basic rule on the liability of carriers should apply to the carriage of live animals.

2. Two representatives suggested that the second sentence of the special risk clause on the carriage of live animals should commence:

"When the carrier proves that he has taken all steps incumbent upon him in the circumstances and that he has complied with any special instructions ...".

3. Several representatives proposed that article 4 (6) of the present Convention be expanded to cover the carriage of animals who are dangerous by nature or become dangerous during the voyage. One representative agreed to submit to the Drafting Party, at a future date, a draft text modifying article 4 (6) in this manner.

D. Consideration of Part VI of the report of the Drafting Party

116. The Working Group considered the above part of the report of the Drafting Party.⁶⁹ The report of the Drafting Party, including the draft text, was approved by the Working Group.

117. The following comments and reservations were made with respect to these draft provisions:

(a) One representative favoured retention of the definition of goods that had originally appeared in the report of the Drafting Party, which read as follows:

"'Goods' means goods of any kind including live animals."

(b) Several representatives, who were opposed to paragraph 2 of the proposed draft text, stated that it should be placed in square brackets. Some of these representatives suggested that the words "special risks inherent" should be subject to further study. These representatives expressed concern that the words "special risks inherent" would give rise to difficulties of interpretation.

(c) One representative reserved his position with respect to paragraph 2.

(d) Several representatives indicated that it would be desirable for the United Nations Commission on International Trade Law to request the Inter-Governmental Maritime Consultative Organization (IMCO) to prepare a manual concerning the carriage of live animals by sea. Several other representatives opposed this suggestion, some on the ground that this question should be considered by IMCO on the initiative of its own members. The observer of IMCO stated that he would report the comments set forth above to his organization.

(e) One representative proposed that the second sentence of article 4 (6) of the Brussels Convention of 1924 be amended in the following manner:

The words "or live animals" should be inserted between "shipped with such knowledge and consent" and "shall become a danger".

This suggestion was made in order to extend the scope of that article to the carriage of live animals. Another representative supported the above proposal in principle, but suggested that it should be considered at a future session of the Working Group. This representative also suggested that at such future time the Working Group might wish to further amend article 4 (6) to require that any measures taken by the carrier to protect the ship or its cargo be commensurate with the danger which the cargo involved represents.

VII. DEFINITION OF "CARRIER", "CONTRACTING CARRIER" AND "ACTUAL CARRIER"

A. Introduction

118. The rules of the Brussels Convention of 1924, and the revised rules approved by the Working Group, are concerned with the liability of the "carrier".⁷⁰ This term is defined in article 1 (a) of the Brussels Convention as follows:

"'Carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper."

119. The second report of the Secretary-General, submitted for consideration by the Working Group at its fifth session (1973), referred to some of the problems that arise under the Brussels Convention when the shipper contracts with one carrier (the "contracting carrier") and this carrier arranges to have the goods carried by another carrier (the "actual carrier").⁷¹ In connexion with the above situation it was also necessary to take into account the action taken by the Working Group at its fifth session (1973) with respect to trans-shipment. At that session, the Working Group approved the following provision:⁷²

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.

⁷⁰ See the basic rules governing the responsibility of the carrier approved by the Working Group (replacing articles 3 (1) and (2), 4 (1) and (2) of the 1924 Brussels Convention) compilation, part D.

⁷¹ Second report of the Secretary-General (A/CN.9/76/Add.1, at part five (B); UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 4). This part of the report was directed primarily at problems resulting from the failure to identify clearly the "actual" carrier in the bill of lading. As to the wider problem of substituted performance by a second carrier, see the above report at part two: trans-shipment.

⁷² Report on fifth session (A/CN.9/76 para. 38; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 5). With respect to a proposed article E, see *idem* at paras. 41-44. These provisions appear in the compilation at part I.

⁶⁹ See foot-note 68 above.

"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."

The report of the Drafting Party, which submitted the above provision to the Working Group, included the following notes on that provision:

"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.

"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."

120. The discussion of the above provisions at the fifth session was focused on the situation where the "contracting" carrier arranges to have the goods transferred to a second ("actual") carrier at an intermediate point between the port of loading and the port of discharge.⁷³ However, it was noted that the problem was not analytically different from the case where the "contracting" carrier substitutes carriage by another ("actual") carrier at the port of loading. However, the second report of the Secretary-General noted that when such substitution occurs at the port of loading the problem is further complicated by the fact that the only bill of lading issued to the shipper might bear an inscription stating that the bill of lading was signed "for the master"; it was noted that such a bill of lading might include a "demise" or "identity of carrier" clause stating that the contracting evidenced by the bill of lading was between the shipper and the owner (or demise charterer) of the vessel named in the bill of lading, and that the shipping line or company who executed the bill of lading was subject to no liability under the contract of carriage.⁷⁴

121. The approach to such provisions in the bill of lading had been affected by the emphasis placed on the bill in the Brussels Convention of 1924. However, present consideration of the subject needs to take into account action taken by the Working Group at its current session (see part II of the present report above) with respect to the "documentary" scope of application of the Convention. Thus, in place of the provision in article 1 (b) of the Brussels Convention that "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title . . . the Working Group approved a provision (paragraphs 48-49 above) that "the provisions of this

Convention shall be applicable to all contracts for the carriage of goods by sea."⁷⁵

B. Discussion by the Working Group

122. The Working Group considered the obligations under the Convention which should result when a shipper contracts with one carrier (the "contracting carrier"), and this carrier arranges to have the goods carried by another (or "actual") carrier. It was generally agreed that the question reached beyond drafting problems and presented issues of substance: which carrier, or carriers, should be responsible under the Convention?

123. Several representatives stated that responsibility should be placed on the "contracting carrier", and that he should not be able to escape this responsibility by arranging for another carrier to transport the goods. Some of these representatives stated that the responsibility of the "contracting" carrier was sufficient, and that it was not necessary to impose liability on a "substitute" or "actual" carrier.

124. On the other hand, some representatives stated that it should be possible to transfer responsibility to the "actual" carrier—which might be defined as the operator of the ship that effects the voyage in performance of the contract of carriage. It was suggested that, at least where the "contracting carrier" was not named in the bill of lading, the responsibility of the "actual carrier" would be sufficient. In support of this view it was noted that the "contracting carrier" might not have substantial assets, whereas the "actual" carrier, as owner and operator of the ship, would provide a more substantial basis for responsibility to the shipper or consignee.

125. Other representatives agreed with the above observations that the "contracting carrier" might not be financially sound; however, they noted that confining responsibility to the "actual" carrier could present similar practical problems, since the owner of the vessel that actually performed the carriage might be difficult to find or might have no available assets. In such situations the "contracting carrier" might be the only person who would be in a position to respond to a claim.

126. These representatives noted that the basic provision approved by the Working Group at its fifth session to deal with trans-shipment (article D, quoted at paragraph 119, above) placed responsibility on the initial carrier ("contracting carrier"), and also placed responsibility on the "actual" carrier for the carriage performed by him.⁷⁶ It was suggested that the provision on trans-shipment, with minor amendments,⁷⁷ would

⁷³ Exceptions to this provision appear at para. 48 above.

⁷⁴ It was noted in the second report of the Secretary-General (A/CN.9/76/Add.1, part five (B)); UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 3), that this provision barred the shipper (or consignee) from recovering more from both carriers than the limits prescribed by the Convention (para. 3), and did not prejudice the rights of recourse between the two carriers (para. 4).

⁷⁷ It was noted that the reference in article D (1) to the carrier's exercise of "an option provided for in contract of carriage" would make it difficult to apply this provision to cases where the contracting carrier entrusted the entire carriage to another ("actual") carrier.

⁷³ Report on fifth session (A/CN.9/76, paras. 30 (b) and 33; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 5).

⁷⁴ Second report of the Secretary-General (A/CN.9/76/Add.1, part five (B), para. 5; UNCITRAL Yearbook, Vol. IV: part two, IV, 4).

provide an appropriate solution for cases where the "contracting carrier", at the outset of the carriage, arranged to have the goods carried by another carrier (an "actual" carrier).

127. Most representatives approved this approach as a basis for work by the Drafting Party.

128. Attention was given to revision of the definition of "carrier" in article 1 (a) of the Brussels Convention, and to providing a joint definition for "carrier" and "contracting carrier". It was noted that replies to a questionnaire circulated in 1972 by the Secretary-General included the suggestion that the definition of "carrier" should refer not only to the owner or charterer, but to "any other person" who enters into a contract of carriage; the replies included the further suggestion that the definition should include the requirement that the person defined as "carrier" must "act on his own behalf" in concluding the contract.⁷⁸ Several representatives supported both suggestions.

129. Several representatives suggested that a specific provision was needed to deal with the case (described at paragraph 120, above) where the carrier with whom the shipper has arranged for the issuance, to the shipper, of a bill of lading furnishes a bill of lading which is signed "for the master" of another carrier (the "actual" carrier), and which may also contain a provision that the contract of carriage is only between the shipper and the "actual" carrier.⁷⁹ The problem was whether such provisions might prevent the carrier with whom the shipper had dealt from being the "contracting carrier" and might serve to substitute the second carrier as the "contracting carrier".

130. Most representatives agreed that the carrier with whom the shipper had made a contract of carriage should remain the "contracting carrier" and should be responsible under the Convention for the carriage to the port of destination in spite of the bill of lading provisions described above. Various drafting proposals were submitted to achieve this objective. One approach required identification of the contracting carrier in the bill of lading. Under a second approach, when the goods are received in the charge of either the contracting carrier or the actual carrier, the contracting carrier shall, on demand of the shipper, issue a bill of lading giving specified particulars. Under this approach, the master of the ship carrying the goods would be empowered to issue the bill of lading on behalf of the contracting carrier. Most representatives who spoke on the issue favoured this second approach.

131. Some representatives expressed the view that an approach based on the trans-shipment provisions approved at the fifth session (paragraph 119 above) did not give adequate protection to the consignee, since under article D (2) the "actual" carrier is only responsible for the carriage "performed by him". It

was noted that the "actual" carrier that delivers the goods to the consignee sometimes will not have performed the entire contract of carriage. When the goods are delivered in damaged condition to the consignee, it is difficult for the shipper or consignee to ascertain whether the damage occurred during the carriage performed by him, or during an earlier stage of the carriage. It was noted further that even if it could be ascertained that the goods were damaged during the earlier stage, the carriage in question might be unknown to and remote from the consignee. It was suggested that an "actual" carrier, like the "contracting carrier", should also be responsible for the entire carriage even though he might have performed only part of the carriage. In case the actual carrier performed only a latter part of the carriage and the damage occurred during the earlier part, the actual carrier could then settle the claim with the earlier carrier. These representatives held the view that such an approach would also be more practical.

132. Other representatives noted that this question had been discussed at the fifth session, and the rules on the responsibility of the "actual" carrier had been adopted after giving consideration to conflicting views on this question.⁸⁰ Most representatives concluded that this issue should not be reopened at the present session of the Working Group.

C. Report of the Drafting Party

133. Following the discussion by the Working Group, this subject was referred to the Drafting Party. The report of the Drafting Party, with some amendments made by the Working Group, is as follows:⁸¹

PART VII OF THE REPORT OF THE DRAFTING PARTY: DEFINITION OF CARRIER AND RELATED PROVISIONS

(a) Based on the opinions expressed in the Working Group the Drafting Party formulated draft provisions on the definition of contracting and actual carrier, related rules on liability, and consequential amendments concerning the issuance of bills of lading. The Drafting Party recommends the following provisions:

[Definition of "carrier"]

1. "Carrier" or "contracting carrier" means any person who in his own name enters into a contract for carriage of goods by sea with shipper.
2. "Actual carrier" means any person to whom the contracting carrier has entrusted the performance of all or part of the carriage of goods.

⁸⁰ Report on fifth session (A/CN.9/76, paras. 31-32, 37; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 5). Second report of the Secretary-General (A/CN.9/76/Add.1, part two, paras. 32-33, 41, 43; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 4).

⁸¹ The amendments made by the Working Group are the following: (1) the words "of goods" were inserted after the word "carriage" in paragraph 1 of the Definition of Carrier; (2) the phrase "for the carriage performed by him" in para. 2 of article D was moved from between the words "responsible" and "according" to its present position; (3) in reference to the notes on the proposed draft provisions, note 7 was added; (4) note 5 was amended by the inclusion of reference to article E; and (5) note 1 was amended by the additional language following the first sentence.

⁷⁸ Second report of the Secretary-General (A/CN.9/76/Add.1, part five (B), para. 4; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 4).

⁷⁹ The carrier so mentioned (often without specific identification) as the only carrier under the contract is often the owner of a ship chartered by the carrier with whom the shipper made his contract.

[*Provision on the respective liability of the contracting carrier and the actual carrier: articles D and E of Part I of the Compilation as amended.*]

Article D

1. Where the contracting carrier has entrusted the performance of the carriage or part thereof to an actual carrier, the contracting carrier shall nevertheless remain responsible for the entire carriage according to the provisions of this Convention.
2. The actual carrier also shall be responsible, according to the provisions of this Convention, for the carriage performed by him.
3. The aggregate of the amounts recoverable from the contracting 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 contracting 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 contracting carrier (through bill of lading), the responsibility of the contracting carrier and of the actual carrier shall be determined in accordance with the provisions of article D.
2. However, the contracting 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 contracting carrier.]

[*Provision on issuance of bill of lading*]

1. When the goods are received in the charge of the contracting carrier or the actual carrier, the contracting carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things the particulars referred to in article [].
2. The bill of lading may be signed by a person having authority from the contracting carrier. A bill of lading signed by the Master of the ship carrying the goods shall be deemed to have been signed on behalf of the contracting carrier.
- (b) The Drafting Party also recommends:

(i) That the proposed draft provisions on the definition of carrier replace article 1 (a) of the 1924 Brussels Convention and that this definition be placed in part A of the compilation, which part should be entitled "Definitions" and should also include the provisional definition of "bill of lading" noted earlier in part II of the report of the Drafting Party.

(ii) That the proposed draft provisions amending articles D and E of part I of the compilation should replace these articles and that part I of the compilation be named "Carriage by an actual carrier, including trans-shipment and through carriage".

(iii) And that the proposed draft provisions on the issuance and required contents of a bill of lading, revising article 3 (3) of the 1924 Brussels Convention, should be included in the compilation at a place to be agreed upon at a later stage.

Notes on the proposed draft provisions

(c) The attention of the Working Group is drawn on the following:

1. It was noted by the Drafting Party that it might be desirable to formulate a definition of the "contract of carriage" at a later stage, in the light of subsequent decisions. In this respect, some representatives requested that a study be prepared by the Secretariat on the definition of the contract of carriage and on the relationship between the carrier and the person having the right to the goods. To this end the following provisional definition was proposed:

"The contract of carriage is one whereby the carrier agrees with the shipper to carry specific goods from one port to another against payment of freight. By virtue of this contract the person having the right to delivery of the goods shall be able to exercise the rights of the shipper and will be subject to his duties."

2. One representative proposed a different formulation for the definition of carrier:

"Carrier means any person who in his name concludes a contract of carriage of goods by sea with a shipper. The carrier is also called a contracting carrier when he entrusts the performance of all or part of the carriage of goods to another carrier called the actual carrier."

3. In reference to the definition of carrier, the question was raised by one representative, for consideration at a later stage, whether a definition of the term "person" was required to cover individuals, corporations and partnerships.

4. One representative reserved his position on paragraph 2 of article D since in his opinion any action brought by the consignee against an actual carrier should be governed by the domestic law of the forum.

5. In reference to articles D and E, some representatives raised the question whether, in situations involving trans-shipment and through carriage, the last actual carrier should be responsible for the whole carriage even though only part of the carriage was actually performed by that carrier. It was noted by the Drafting Party, in conformity with the decision of the Working Group, that this issue would be considered at a later stage when the provisions on trans-shipment and through carriage are reviewed.

6. In reference to the inclusion of provisions concerning required statements in the bill of lading designating the contracting and actual carriers and the effect of insufficient or inaccurate statements,⁸² it was noted that this topic should be considered at a future session.

⁸² See part five of the second report of the Secretary-General (A/CN.99/76/Add.1; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 4).

7. One representative objected to the proposed changes in paragraph 1 of article E since in his opinion the adopted definition of "actual carrier" was obviously unsuited for the situation covered by article E, which deals, in fact, with two autonomous carriers.

D. Consideration of Part VII of the report of the Drafting Party

134. The Working Group considered the above part of the report of the Drafting Party and approved the proposed draft provisions.⁸³

135. With respect to paragraph 2 of article D of the provisions on the respective liability of the contracting carrier and the actual carrier, one representative expressed the view that the draft provision was inadequate in determining whether the shipowner involved in a time-charter is a "carrier" with respect to a contract of carriage concluded between the charterer and a shipper. This issue should be determined in accordance with national law outside of this Convention. If the proposed draft provisions in fact intended to make the shipowner under a time-charter liable as the actual carrier with respect to a contract of carriage between the charterer and a third person, this representative would be strongly opposed to such a solution and would reserve his position in this respect. This representative proposed the following draft text:

1. Carrier means the owner, the charterer or any other person who enters into a contract of carriage with a shipper.

2. Where a bill of lading is issued by the charterer of a ship under a charter party such charterer only shall be the carrier for the purpose of this Convention and any stipulation in the bill of lading which is designed to deny that he is the carrier shall be null and void and of no effect.

136. In reply to the above comments, two representatives expressed the view that the draft provisions were not intended to affect the relation between the shipowner and a charterer under a charter-party. Specific reference was made by these representatives to paragraph 4 of article D, which leaves undisturbed the contractual relationship between a contracting carrier and an actual carrier.

VIII. DEFINITION OF "SHIP"

A. Introduction

137. "Part five, section D of the second report of the Secretary-General⁸⁴ dealt with the definition of "ship" in the Brussels Convention of 1924. Article 1 (d) of the Brussels Convention states that:

"Ship" means any vessel used for the carriage of goods by sea."

138. The second report of the Secretary-General stated that the issue that had been raised with respect

to this definition related both to the type of vessel to which the Brussels Convention applies and to the question of whether the Convention applies during loading and discharging operations. This last question was discussed during the third session of the Working Group and the revision of article 1 (d), adopted at that session, was designed to clarify the period of the Convention's application.⁸⁵

139. The second report of the Secretary-General suggested that the revision of article 1 (d), extending the coverage of the Convention to the "period during which the goods are in the charge of the carrier", resolves uncertainties that had arisen under the 1924 Convention with respect to whether the Convention applies to barge or lightering operations conducted by the carrier under his contract of carriage.

B. Discussion by the Working Group

140. Some representatives stated that, in their view, the definition of "ship" should be deleted since, under the revision of provisions in the Convention on the period of responsibility of the carrier (article 1 (e) of the 1924 Brussels Convention), the carrier would be responsible for the period during which the goods are in his charge. Problems as to the time when the goods are loaded on the ship or when the goods are discharged from the ship, which arose under the 1924 Convention, do not arise under the above revision of article 1 (e) that had been approved by the Working Group.

141. Many representatives were of the opinion that a decision as to whether a definition of "ship" be retained or deleted should be postponed to a later session. At the suggestion of some representatives, the Working Group decided to place square brackets around the definition of "ship" in article 1 (d) of the 1924 Brussels Convention in order to indicate that the Working Group wished to leave the matter open until a later stage in its drafting. In this connexion it was observed that it would be desirable to postpone a decision on this definition until it was resolved whether the word "ship" would be used in the provisions of the Convention in such a way as to warrant including a definition of "ship".

IX. FUTURE WORK

Time and place of the seventh and eighth sessions

142. The Working Group considered the time for holding its seventh and eighth sessions.

143. It was suggested that in order to expedite the completion of its work, the seventh session should be held in the course of the current year, i.e. in the late summer or autumn of 1974. It was noted that under the pattern of rotation that had been followed by the Working Group, the seventh session would be held at United Nations Headquarters in New York.

144. The Secretariat reported to the Working Group that the heavy schedule of recurrent meetings

⁸³ See foot-note 81 above.

⁸⁴ A/CN.9/76/Add.1; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 4.

⁸⁵ Report on third session (UNCITRAL Yearbook, Vol. III: 1972, part two, IV), para. 14 (1); compilation, part B.

and major special conferences, already scheduled during the second half of 1974, made it impossible to hold a session in New York in August 1974, and that such a meeting during September-December 1974 could not be held in New York because of the regular session of the General Assembly.

145. The question was raised as to the possibility of holding the seventh session in Geneva during the fall or winter of 1974. The Secretariat reported that the earliest date at which the session could be held in Geneva at a minimum cost would be 25 November-6 December 1974. It was noted, however, that this period would not be feasible because two other meetings in the field of maritime legislation had already been scheduled for part of that period. The Secretariat then reported that space for the meeting would be available in Geneva for 30 September-11 October; it would, however, be necessary to recruit staff to service this meeting with financial implications that could be reported to the Commission at its seventh session (New York, 13-17 May 1974).

146. Most representatives were of the view that it was important to complete the current work as soon as possible. It was indicated that two sessions, each two weeks in length, would be required, and that long periods between sessions interfered with the continuity of the work and delayed the submission of the revised rules to the Commission. These representatives consequently suggested that the seventh session should be held in Geneva from 30 September to 11 October 1974 and that the eighth session should be held in New York during January or February 1975. On the other hand, some representatives opposed the first suggestion, citing both the problem of added cost to the United Nations and to their Governments, and the difficulty of receiving Secretariat studies in advance of such a session. One of these representatives stated that he did not oppose the holding of two sessions in 1975, at times that did not involve serious extra expense, and indicated that such a schedule would not unduly delay completion of the work. One representative stated that his acceptance of the dates set forth above was conditioned upon approval by the Commission of the decision of the Working Group. It was generally understood that a final decision on the matter could only be taken by the Commission at its seventh session, following a statement of financial implications.

147. The Working Group decided to recommend to the Commission that its next two sessions be held: the seventh session at Geneva from 30 September to 11 October 1974 and the eighth session at New York in January or February 1975.

Subjects for consideration at the seventh session

148. Attention was directed to the decision by the Working Group at its fifth session that topics to be considered at the seventh session should include the

following:⁸⁶ (1) contents of the contract for carriage of goods by sea; (2) validity and effect of letters of guarantee; (3) legal effect of the bill of lading in protecting the good faith purchaser of the bill of lading. It was reported that in response to a request of the Working Group at its fifth session, a questionnaire had been circulated by the Secretary-General on the above questions, and that the replies were set forth in document A/CN.9/WG.III/L.2. Attention was also directed to the fact that, under decisions of the Working Group, certain questions had been deferred for further consideration.

149. The Working Group decided that at its seventh session it would consider the topics referred to in paragraph 148 above, together with any other topics necessary to complete the initial consideration of its revision of the 1924 Brussels Convention and the 1968 Protocol, pursuant to the Commission's mandate.

150. To facilitate the work of the seventh session, the Working Group invited its members and interested international organizations to submit any further suggestions and proposals they may wish to have examined, dealing with matters described in paragraph 148 above and with any new topics that, in their view, should be considered prior to completion of the Working Group's initial revision of the Hague Rules. It was requested that such suggestions and proposals be transmitted to the Secretariat by 1 June 1974, for analysis and distribution to members of the Working Group in advance of the seventh session.

151. The Working Group also requested the Secretary-General to prepare a report dealing with the matters described in paragraph 148, for circulation in advance of the seventh session. The Working Group, in addition, requested the Secretary-General to consider, in the above report, a possible definition of "contract of carriage" and the position, with respect to the carrier, of the person entitled to take delivery of the goods.⁸⁷

152. The Working Group decided that the report should focus, as regards "contents of the contract of carriage", on the contents of the bill of lading or other document evidencing the contract of carriage, bearing in mind that different provisions may be necessary to deal with the various types of documents. In particular, it would seem necessary to require that the bill of lading contain information different from that required in relation to transport documents of a more simple type.

153. The Secretariat was also requested to prepare, in advance of the next session, a new compilation of texts, including the texts adopted at the present session.

⁸⁶ Working Group, report on fifth session (A/CN.9/76, UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 5), para. 77.

⁸⁷ See note 1, notes on the proposed draft provision to part VII of the report of the Drafting Party on definition of carrier and related provisions, at para. 133 above.

Annex

COMPILATION OF DRAFT PROVISIONS ON CARRIER RESPONSIBILITY
APPROVED BY THE WORKING GROUP

(Approved by the Working Group at its third, fourth and fifth sessions)*

Note by the Secretariat

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* The present compilation does not embody the decisions taken by the Working Group at its sixth session.

INTRODUCTION

1. At its fourth session the United Nations Commission on International Trade Law (UNCITRAL) decided "that within the priority topic of international legislation on shipping, the subject for consideration for the time being shall be bills of lading" and agreed on the topics that should be considered for revision and amplification.^a

2. At its fifth session the Commission stated that it considered "that the Working Group should give priority in its work to the basic question of the carrier's responsibility" and to that end recommended "that the Working Group keep in mind the possibility of preparing a new convention as appropriate, instead of merely revising and amplifying the rules in the International Convention for the Unification of Certain Rules relating to Bills of Lading (1924 Brussels Convention) and the Brussels Protocol, 1968".^b

3. The Working Group at its third, fourth and fifth sessions examined the topics within its work programme for those sessions.^c The Secretary-General, at the request of the Working Group prepared two reports which served as working documents for the three sessions.^d Also at the request of the Working Group two questionnaires were submitted to Governments and to international organizations active in the field and the replies were utilized in the preparation of the reports of the Secretary-General.

4. The present compilation sets forth the draft provisions of the Convention on the responsibility of ocean carriers for cargo which were prepared at the third, fourth and fifth sessions of the Working Group by the Working Group's Drafting Party and adopted by the Working Group.

5. For reasons of convenience the order of the draft provisions in this compilation generally follows the pattern of the Brussels Convention of 1924. The corresponding provisions in the Brussels Convention are cited in parentheses immediately after the descriptive title of the provision. The final order of the draft provisions will depend on the Working Group's decision as to the form of the new rules. In certain cases where the Brussels Convention of 1924 does not contain an equivalent rule, the draft provision is placed in what appears to be the most appropriate order.

6. In order to give the reader the clearest possible view of the work thus far completed by the Working Group, this compilation includes only the texts that have either been adopted or have been prepared subject to brackets signifying less than general approval. References to the paragraphs in the reports of the Working Group which contains particular draft provisions are given in foot-notes. The foot-notes contain references to the discussion by the full Working Group of each provision proposed by the Drafting Party. The foot-notes also set forth the specific reasons stated by the Working Group for placing various provisions in brackets.

^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; UNCITRAL Yearbook, Vol. II: 1971, part one, II, A.

^b 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. 51; UNCITRAL Yearbook, Vol. III: 1972, part one, II, A.

^c The first two sessions of the Working Group were concerned with organizational and procedural questions. Report of the Working Group on the work of its second session, Geneva, 22-26 March 1971 (A/CN.9/55; UNCITRAL Yearbook, Vol. II: 1971, part two, III).

^d Report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading (A/CN.9/63/Add.1; UNCITRAL Yearbook, Vol. III: 1972, part two, IV, annex). Second report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading (A/CN.9/76/Add.1; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 4).

DRAFT PROVISIONS APPROVED BY THE WORKING GROUP

A. Definition of "goods" (article 1 (c) of 1924 Brussels Convention)

[Revision of article 1 (c) "Goods"]^e

"Goods" includes goods, wares, merchandise and articles of every kind whatsoever [except live animals].^f

B. Period of carrier's responsibility (article 1 (e) of 1924 Brussels Convention)

[Revision of article 1 (e) "Carriage of goods"]^g

(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.

C. Responsibility for deck cargo

[Possible addition to article]^h

[In respect of cargo which by the contract of carriage is stated as being carried on deck and is so carried, all risks of loss or damage arising or resulting from perils inherent in or incident to such carriage shall be borne by the shipper and the consignee but in other respects the custody and carriage of such cargo shall be governed by the terms of this Convention].ⁱ

D. Basic rules governing the responsibility of the carrier

(replacing article 3 (1) and (2), articles 4 (1) and 4 (2) of 1924 Brussels Convention)

^e Report of the Working Group on International Legislation on Shipping on the work of its third session, Geneva, 31 January to 11 February 1972 (herein referred to as Working Group, report on third session) (A/CN.9/63), para. 25 (1); UNCITRAL Yearbook, Vol. III: 1972, part two, IV. The draft was adopted by the Working Group (para. 26).

^f Paragraph 34 of the report of the Working Group on its third session states: "In view of the lack of agreement on the approach to be followed in dealing with live animals, the Working Group decided to defer a decision on the subject."

^g Working Group, report on third session, para. 14 (1); UNCITRAL Yearbook, Vol. III: 1972, part two, IV. The Working Group accepted the revision of article 1 (e) and also decided: "(c) to delete article VII of the Hague Rules on the ground that this article was inconsistent with the above revision (article 1 (e)) and that, in view of the revision of article 1 (e), no further provision was necessary (para. 15). This deletion was subject to reservations by some representatives (para. 17).

^h Working Group, report on third session, para. 25 (2), UNCITRAL Yearbook, Vol. III: 1972, part two, IV.

ⁱ The report *ibid.*, para. 25 (2) foot-note 17, states: "As noted in paragraph 28 below, the Working Group did not reach agreement on this provision, and considered that it should be taken up at a future session of the Working Group."

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 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.^j

E. Period of limitation (article 3 (6) of 1924 Brussels Convention; article 1 (2) (3) of 1968 Brussels Protocol)

Article F^k

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 of damage to the goods, or delay, 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.

F. Saving life and property at sea (replacing article 4 (4) of 1924 Brussels Convention).

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.^l

^j 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 (herein referred to as Working Group, report on fourth session); (A/CN.9/74; UNCITRAL Yearbook, vol. IV: 1973, part two, IV, 1), para. 28 (3). Most members of the Working Group supported the above text (para. 36).

^k Report of the Working Group on International Legislation on Shipping on the work of its fifth session, New York, 5 to 16 February 1973 (herein referred to as Working Group, report on fifth session) (A/CN.9/76; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 5), para. 65 (1). The draft provision was approved by the majority of the Working Group (para. 66).

^l Working Group, report on fifth session (*ibid.*), para. 54 (2). The Working Group adopted the draft provision (para. 55).

G. *Choice of forum clauses* (no corresponding provision in the 1924 Brussels Convention)

[Proposed draft provision]^m

Paragraph A

1. In a legal proceeding arising out of the contract of carriage the plaintiff, at his option, may bring an action in a contracting State within whose territory is situated:

(a) The principal place of business or, in the absence thereof, the ordinary residence of the defendant; or

(b) The place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(c) The port of loading; or

(d) The port of discharge; or

(e) A place designated in the contract of carriage.

2. (a) Notwithstanding the preceding provisions of this article an action may be brought before the courts of any port in a contracting State at which the carrying vessel may have been legally arrested in accordance with the applicable law of that State. However, in such a case, at the petition of the defendant, the claimant must remove the action, at his choice, to one of the jurisdictions referred to in paragraph A for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgement that may subsequently be awarded to the claimant in the action.

(b) All questions relating to the sufficiency or otherwise of the security shall be determined by the court at the place of the arrest.

Paragraph B

No legal proceedings arising out of the contract of carriage may be brought in a place not specified in paragraph A above. The provisions which precede do not constitute an obstacle to the jurisdiction of the contracting States for provisional or protective measures.

Paragraph C

1. Where an action has been brought before a court competent under paragraph A or where judgement has been delivered by such a court, no new action shall be started between the same parties on the same grounds unless the judgement of the court before which the first action was brought is not enforceable in the country in which the new proceedings are brought.

2. For the purpose of this article the institution of measures with a view to obtaining enforcement of a judgement shall not be considered as the starting of a new action.

3. For the purpose of this article the removal of an action to a different court within the same country shall not be considered the starting of a new action.

Paragraph D

Notwithstanding the provisions of the preceding paragraphs, an agreement made by the parties after a claim under the contract of carriage has arisen, which designates the place where the claimant may bring an action, shall be effective.

^m Working Group, report on third session (UNCITRAL Yearbook, Vol. III: 1972, part two, IV), para. 39 (3). The Working Group approved the report of the Drafting Party that contained the draft provision on choice of forum clauses (para. 40).

H. *Arbitration clauses* (no corresponding provision in the 1924 Brussels Convention)

[Proposed draft provision]ⁿ

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.

I. *Trans-shipment* (no corresponding provision in the 1924 Brussels Convention)

Article D^o

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

ⁿ Working Group, report on fourth session (UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 1), para. 47 (2). The majority of the Working Group approved the proposed draft provision (para. 48).

^o Working Group, report on fifth session (UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 5), para. 38 (2). The Working Group approved draft article D (para. 39).

any such loss, damage (or delay) was so caused, shall rest upon the carrier.]^v

- I. *Limitation of liability* (article 4 (5) of 1924 Brussels Convention; article 2 of 1968 Brussels Protocol)

Article A^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

^a Paragraph 43 of the report of the Working Group on its fifth session (*ibid.*) states: "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."

^v Working Group, report on fifth session (UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 5), para. 26 (2). The Working Group approved these proposed draft provisions (para. 27).

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.]^r

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 agent 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.

^r At paragraph 26 (9) of the report of the Working Group on its fifth session (*ibid.*) the report of the Drafting Party noted the following:

"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 that 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."

2. Report of the Secretary-General; third report on responsibility of ocean carriers for cargo: bills of lading (A/CN.9/88/Add.1)*

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GENERAL INTRODUCTION

1. The present study is the third in a series of reports prepared by the Secretary-General¹ to assist in the work on international shipping legislation by the United Nations Commission on International Trade Law (UNCITRAL). At its fourth session, UNCITRAL decided to establish an enlarged Working Group on International Legislation on Shipping² and further resolved 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."³

Topics dealt with at past sessions

2. The matters considered in the present report need to be viewed in connexion with the Commission's over-all work programme in this field. The resolution adopted by the Commission at its fourth session enumerated a number of topics that, "among others, should be considered for revision and amplification of the present rules".⁴ The Working Group at its third session reached decisions as to the following topics:

¹ The first report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading (A/CN.9/63/Add.1; reproduced in UNCITRAL Yearbook, Vol. III: 1972, part two, IV, annex) was prepared to assist the Working Group on International Legislation on Shipping (hereinafter "Working Group") at its third and fourth special sessions, and it dealt with the following topics: the period of carrier responsibility; responsibility for deck cargoes and live animals; clauses of bills of lading confining jurisdiction over claims to a selected forum; and approaches to basic policy decisions concerning allocation of risks between the cargo owner and the carrier. The second report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading (A/CN.9/76/Add.1; reproduced in UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 4.) was prepared to assist the Working Group at its fifth session and covered these subjects: 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.

² 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.

³ *Ibid.* The Commission decided at its sixth session that the Working Group should "continue its work under the terms of reference set forth by the Commission in the resolution adopted at its [the Commission's] fourth session. (Report of the United Nations Commission on International Trade Law on the work of its sixth session (2-13 April 1973), *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 17* (A/9017), para. 61; UNCITRAL Yearbook, Vol. IV: 1973, part one, II, A.

⁴ See foot-note 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 VI of the Convention as amended by the Protocol and their interaction and including the elimi-

(Continued on next page.)

(a) the period of carrier responsibility; (b) responsibility for deck cargoes and live animals; (c) choice of forum clauses in bills of lading; and (d) basic approaches for the allocation of risks between the cargo owner and the carrier.⁵ At its fourth (special) session, the Working Group considered and adopted draft provisions on (a) the basic rules governing the responsibility of carriers and (b) arbitration clauses in bills of lading.⁶ Then, at its fifth session, the Working Group dealt with the following subjects: (a) unit limitation of liability; (b) trans-shipment; (c) deviation; and (d) the period of limitation.⁷

Materials to be presented at the current sixth session

3. At its fifth session the Working Group noted that it had not yet taken action on the topics of definitions under article I of the Convention and the elimination of invalid clauses; the Working Group placed these items on the agenda for its sixth session.⁸ Part five of the second report of the Secretary-General on the responsibility of ocean carriers for cargo: bills of lading⁹ dealt with definitions under article I of the Convention. Part six of that report dealt with the elimination of invalid clauses in bills of lading; this topic is re-examined in further detail with alternative draft legislative texts, in part four of the present report.

4. At its fifth session the Working Group recalled that its work on the subjects of deck cargo and live animals had not been completed¹⁰ and decided that these items would also be taken up at its sixth session.¹¹

(Foot-note 4 continued.)

nation or modification of certain exceptions to carrier's liability; (e) 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.

⁵ Report of the Working Group on the work of its third session, Geneva, 31 January-11 February 1972 (A/CN.9/63; reproduced in UNCITRAL Yearbook, Vol. III: 1972, part two, IV. The first report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading (see foot-note 1) was used by the Working Group as its working paper.

⁶ Report of the Working Group on the work of its fourth (special) session, Geneva, 25 September-6 October 1972 (A/CN.9/74 UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 1). The Working Group used as its working documents the first report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading (see foot-note 1) and two other working papers prepared by the Secretariat: "Approaches to basic policy decisions concerning allocation of risks between the cargo owner and carrier" (A/CN.9/74, annex I *ibid.*, part two, IV, 2) and "Arbitration clauses" (A/CN.9/74, annex II; *ibid.*, part two, IV, 3).

⁷ Report of the Working Group on the work of its fifth session, New York, 5-16 February 1973 (A/CN.9/76; *ibid.*, part two, IV, 5). The Working Group used as its working document the second report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading (see foot-note 1).

⁸ Report of the Working Group on the work of its fifth session, New York, 5-16 February 1973, para. 73, UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 5.

⁹ A/CN.9/76/Add.1; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 4.

¹⁰ See report of the Working Group on the work of its third session (A/CN.9/63), paras. 23-29 and 30-34; UNCITRAL Yearbook, Vol. III: 1972, part two, IV.

¹¹ Report of the Working Group on the work of its fifth session, New York, 5-16 February 1973, A/CN.9/76, para. 74; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 5.

5. Consequently for the present sixth session of the Working Group, the Secretariat has prepared a separate working paper concerning the topic of deck cargo.¹² Another document that will be made available to the Working Group at its current session is an UNIDROIT study on the international transport of live animals and the Hague Rules.¹³

6. The Working Group at its fifth session recommended that the agenda for its sixth session should also include the following topics: (a) liability of the carrier for delay and (b) the scope of application of the Convention.¹⁴ Part one of the present report responds to the request of the Working Group that the Secretary-General prepare a report on the topic of delay, setting forth proposals and indicating possible solutions.¹⁵ The Working Group also requested a working paper on the scope of application of the Convention.¹⁶ In response to this request, part two of the present report deals with "geographical scope", and part three discusses "documentary scope". As has been noted, part four deals with invalid clauses in bills of lading (see paragraph 3, above).

7. The Secretary-General invited comments and suggestions by members of the Working Group regarding the topics dealt with in the present report, and a similar inquiry was addressed to international organizations active in the field. The comments received by the Secretariat, as well as a copy of the note verbale, will be made available to the Working Group as an addendum to this report (A/CN.9/WG.III/WP.12/Add.1). The comments that are now available are summarized at relevant points in the present report.¹⁷

¹² A/CN.9/WG.III/WP.14.

¹³ A/CN.9/WG.III/WP.11; reproduced in this volume in the next section.

¹⁴ Report of the Working Group on the work of its fifth session, New York, 5-16 February 1973, A/CN.9/76, para. 75; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 5.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ It is expected that additional replies will be received subsequent to the preparation of this report. Copies of all replies in their original languages will be available to the members of the Working Group as A/CN.9/WG.III/WP.12/Add.1.

PART ONE: LIABILITY OF OCEAN CARRIERS FOR DELAY

A. Introduction

1. The Working Group at its fifth session decided that the sixth session should consider, among other topics, the liability of ocean carriers for delay with respect to the carriage of cargo.¹ Neither the International Convention for the Unification of Certain Rules Relating to Bills of Lading² nor the Protocol to amend

¹ 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), para. 75; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 5.

² Hereinafter referred to as the "Brussels Convention". League of Nations, *Treaty Series*, Vol. CXX, p. 157; *Register of Texts of Conventions and other Instruments Concerning International Trade Law*, Vol. II, (United Nations publication, Sales No. E.73.V.3) (hereinafter cited as *Register of Texts*).

that Convention⁸ sets forth rules addressed directly to carrier liability for delay, and national legal rules vary with respect to some aspects of this question.

2. Both the second report of the Secretary-General on the responsibility of ocean carriers for cargo: bills of lading,⁴ and the discussions of the Working Group at its fifth session⁵ noted the close relationship between delay and other topics which are covered by existing or proposed legislation on bills of lading. For example, analysis of "deviation" revealed that the central practical issue was damage resulting from delay in the performance of the contract of carriage,⁶ decisions with respect to "deviation" were made on the assumption that the Working Group would deal subsequently with liability of the carrier for delay.

B. Bases for recovery for delay under present law and practice

3. The contract of carriage rarely includes an explicit promise by the carrier as to the exact time when he will deliver the goods at their destination. Sailing schedules announced or customarily maintained by the carrier may provide a basis for an implied undertaking as to the time of arrival; however, the bill of lading will often seek to negate any such undertaking. For example, one standard bill of lading includes the following clause:

"The carrier does not guarantee the dates of the departure or arrival of the ship or engage himself to complete the voyage in a given space of time, and he shall not be liable for any damage which may result for the shipper whether in connexion with the cargo or for any other reason, from the fact that the ship does not depart or arrive at the dates on which it might reasonably have been expected so to do from an extraordinary prolongation of the voyage."⁷

The difficulty of basing a claim for delay on a premise in the contract of carriage gives added importance to guarantees provided by the Convention.⁸

³ Hereinafter referred to as the "Brussels Protocol", Protocol to Amend the International Convention for the Unification of Certain Rules Relating to Bills of Lading, signed at Brussels on 25 August 1924; Brussels, 23 February 1968, *Register of Texts*, ch. II, 1.

⁴ Hereinafter referred to as "second report of the Secretary-General" (A/CN.9/76/Add.1); part three: deviation, paras. 4, 6 and 35, UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 4.

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), paras. 46 and 51; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 5.

⁶ *Ibid.*, para 46; second report of the Secretary-General, para. 35.

⁷ The Single Bill of Lading of the Latin American Ship-owners Association (ALAMAR), Clause II; reprinted in annex III of Bills of lading: report by the secretariat of UNCTAD (E.72.II.D.2), p. 62. Compare the "CONLINE Bill of Lading", clause 13, reprinted *ibid.*, p. 66: No carrier responsibility for loss from delay "unless caused by the carrier's personal gross negligence".

⁸ It has been noted that risks brought about by delay are generally not insurable. Comment by Sweden, UN/IMCO Conference on International Container Traffic, E/Conf.59/39/Rev.1 (Report of the Third Main Committee, 1 December 1972), para. 38. Similarly, the British Institute of Cargo Claims 1973 exclude from their coverage the "loss of adventure", which is one of the common risks resulting from delay. See Hardy-Ivamy, *Marine Insurance*, 1969, p. 531, *et seq.*

4. As has been mentioned, the Brussels Convention contains no provision addressed to the problem of delay in delivery. However, responsibility for loss resulting from delay in delivery may be based on article 3 (2), which provides that "the carrier shall properly and carefully load . . . , carry . . . , and discharge the goods carried".⁹

5. Where delay causes physical damage to the goods (as through spoilage) the legal grounds for recovery are not analytically different from other claims for physical damage under article 3 (2) of the Brussels Convention. When delay results in economic loss to the consignee (as through inability to fulfil a contract for resale or through a drop in the market value of the goods at the place of destination during the delay period), the above provision of the Convention also provides a basis for recovery,¹⁰ although the case law is sparse and difficulties may be encountered as to burden of proof,¹¹ and also as to the carrier's responsibility for certain types of economic loss.¹²

⁹ The replies to the 23 May 1973 note verbale of the Secretary-General by Norway, Sweden, the Comité Maritime International (CMI) and the secretariat of the Asian-African Legal Consultative Committee all mention that arguably the language of the 1924 Brussels Convention encompasses carrier liability for damages from delay. Similarly, the carrier incurs liability for loss when he violates e.g., his responsibility under article 3 (1) of the Brussels Convention to make the ship seaworthy, and delay results. As to the invalidity of attempts to remove or lessen the carrier's liability by contract, see article 3 (8) of the Brussels Convention.

¹⁰ A frequent rationale for this interpretation is that article 2 of the Brussels Convention defines the scope of carrier liability as "in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods . . .", (emphasis added), and that economic loss from delay arises "in relation to" the carriage and discharge. See *Anglo-Saxon Petroleum v. Adamastos Shipping Co.*, 1957 (1) L.I.L. Rep. 87. See also Stephane Dor, *Bill of Lading Clauses and the Brussels International Convention of 1924*, 2d ed., London, 1960, p. 165. See also Bills of lading: report by the secretariat of UNCTAD, 1971, United Nations publication, Sales No. E.72.II.D.2, para. 291.

¹¹ The legal rules of some jurisdictions create a rebuttable presumption of carrier liability when goods are lost or arrive in a damaged condition; the same concept was adopted in the draft rules developed by the Working Group on basic responsibility of the carrier, as set forth at para. 6 *infra*. In these jurisdictions the presumption of carrier liability does not operate where delay, although causing economic loss to the cargo owner, does not result in physical loss or damage to the goods; instead, the cargo owner has the burden of proving not only his losses but also that his losses were caused by the delay. See, France: René Rodière, *Traité général de droit maritime*, Paris, 1970, Vol. II paras. 608 and 612; Belgium: Pierre Wildiers, *Le connaissement maritime*, 2nd ed.; Antwerp, 1961, pp. 39-40.

¹² There is frequently uncertainty as to what types of economic loss may be too remote from the delay and thus not recoverable from the carrier by the consignee. For example, should the carrier be liable for: (a) a foreseeable drop in the market price during the delay? (b) an unforeseen and unforeseeable drop in the market price during the delay? (c) unavailability of the goods for a special use by the consignee, whether known to or unknown to the carrier? (d) liability for contract breach and loss of goodwill by the cargo owner from inability to fulfil resale agreements? Such questions raise general problems with respect to the measure of damages in contract law, and it seems preferable to resolve these issues in the more general context of the extent and limitation of carrier liability under the Convention rather than in the narrow context of delay only.

Several responses would limit carrier liability for economic loss from delay to some formulation of "foreseeability." Thus

(Continued on next page.)

C. *Effect on delay of draft provision on basic responsibility of the carrier*

6. The Working Group at its fourth (special) session developed the following draft provision on the basic responsibility of the carrier and the burden of proof:

"(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 measures that could reasonably be required to avoid the occurrence and its consequence..."¹³

This draft provision was designed to replace articles 3(1), 3(2), 4(1), and 4(2) of the Brussels Convention, i.e. the articles that set forth rules as to the rights and duties of carriers.

7. The draft provision quoted above clearly applies to physical loss or damage to the goods resulting from delay: the carrier is liable unless he can meet the burden of proving that "he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences." However, since the draft provision only holds the carrier liable "for all loss of or damage to goods carried", under a literal reading it would not extend to economic loss suffered by the cargo owner resulting from delay. As has been noted, the draft provision would replace existing rules (such as the article 3 (2) requirement that the carrier

(Foot-note 12 continued)

Pakistan and the secretariat of the Asian-African Legal Consultative Committee propose that the carrier shall not be liable for any loss or damage which could not reasonably be foreseen at the time the delay occurred as likely to result from the delay; the International Chamber of Commerce suggests that a carrier be held only for "reasonably foreseeable" economic damage from delay; the Comité Maritime International (CMI) favours limiting carrier liability to "direct and reasonable expenses which, at the time of the conclusion of the contract, could reasonably have been foreseen by the carrier as a probable consequence of the delay"; while the Baltic and International Maritime Conference (BIMCO) advocates that "the cargo interests must prove their loss and that the shipowner ought to have known of the special market, etc., at the time of issue of the bill of lading".

If the Working Group adopts alternative proposal D, (*infra*), which establishes a special limitation of carrier liability for delay based on [twice the] freight, the practical importance of limiting carrier liability for delay to "foreseeable" or "proximate" economic damages, will be greatly lessened. See the discussion of alternative proposals C and D at paras. 26-31, *infra*.

¹³ 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), para. 28. See also Compilation by the Secretary-General of draft provisions previously approved by the Working Group (hereinafter referred to as "Compilation") (A/CN.9/WG.III/WP.13), part D, reproduced in this volume as annex to the preceding section. This draft provision continues:

"(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 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."

"properly and carefully... carry, keep, care for, and discharge the goods carried") on which carrier liability for economic loss might be based; the revision would thus remove the existing statutory basis for liability in cases of economic loss apart from physical damage to the goods. Therefore, unless the present draft is supplemented, carrier liability for delay will be reduced from its current level under the Brussels Convention and also under several national maritime codes¹⁴ and some national case law.¹⁵

D. *Comparison with other transport conventions*

8. The Conventions governing the three other modes of international transport expressly provide basic rules for carrier liability in cases of delay. The operative provisions of those Conventions with respect to delay are set forth below:

9. Warsaw Convention¹⁶ (air), article 19:

"The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods."

¹⁴ See, e.g., article 130 in the Swedish, Norwegian, Danish and Finnish Maritime Codes each of which imposes carrier liability for delay in substantially the following language: "The carrier shall be liable to pay compensation for any damage resulting from delay on his part, or from the ship being lost or becoming irreparable, unless it must be held that neither the carrier nor anyone for whom he is responsible has been guilty of error or neglect." These articles may be found side by side in Rodière, *Lois maritimes nordiques*, pp. 110-111. Scandinavian legislation to enact the Brussels Protocol also specifically covers delay—for Sweden, see *Statens offentliga utredningar*, 1972: 10, *Godsbefordran*; for Norway, see reply to UNCITRAL questionnaire of 23 May 1973.

Merchant Shipping Code of the USSR, article 149: "The carrier shall be obliged to deliver goods within the established periods and, if none have been established within the periods customarily applied." In Czechoslovakia, pursuant to Order 160/1956, the carrier is liable for damage caused by delay. Jan Lopuski, "Le contrat de transport maritime des marchandises dans le droit des pays socialistes européens, 294" *Le droit maritime français* (juin 1973), pp. 371, 375.

Article 422 of the Italian Code of Navigation holds carriers responsible for loss, damage or delay, unless it is shown that the cause of the loss, damage or delay was not in whole or in part the fault of the carrier. Vol. II, Rodière, *Traité général de droit maritime*, Paris, 1968, p. 258.

¹⁵ United Kingdom: *Renton v. Palmyra Trading Corp.* (1956), (2) L.I.L.R.379 (1957), A.C. 149; *Anglo-Saxon Petroleum Co. v. Adamastos Shipping Co.* (1957), (2) Q.B.233 (1958), (1) L.I.L.R.73 (1959), A.C. 133; *The Makedonia* (1962), (1) L.I.L.R.316. See 1 Carver's *Carriage by Sea*, 12th ed., 1971, pp. 195-196. USA: *Comm. Trans. Internat. v. Lykes Bros.* (1957) A.M.C. 1188; *The Iossifoglu* (1929) A.M.C. 1157. In some countries, while rules of law provide for liability for delay, contractual provisions may eliminate such liability: France (see vol. II, Rodière, *Traité général de droit maritime*, Paris, 1958, p. 294); Bulgaria, Poland and the USSR (see, Jan Lopuski, "Le contrat de transport maritime des marchandises dans le droit des pays socialistes européens, 294" *Le droit maritime français*, juin 1973, pp. 371, 375).

See also the replies of the Secretariat of the Asian-African Legal Consultative Committee and of the Baltic and International Maritime Conference, expressing the view that current British law permits recovery by the cargo owner for at least some types of economic damage from delay.

¹⁶ Convention for the Unification of Certain Rules relating to International Carriage by Air, Signed at Warsaw, 12 October 1929. League of Nations, *Treaty Series*, vol. CXXXVII, p. 11. Liability for destruction, loss or damage to goods is dealt with in article 18 (1).

10. CIM Convention¹⁷ (rail), article 27 (1):

"The railway shall be liable for delay in delivery, for total or partial loss of the goods, and for damage thereto occasioned between the time of acceptance for carriage and the time of delivery."

11. CMR Convention¹⁸ (road), article 17 (1):

"The carrier shall be liable for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery, as well as for any delay in delivery."

12. It will be noted that each of these conventions contains (1) a general rule holding carriers liable for loss or damage to the goods, and also (2) a specific provision imposing liability on carriers solely for delay. In view of the breadth of the general rule concerning "loss or damage to goods", the additional provision on delay would appear to be designed to cover economic loss suffered by the consignee as a consequence of the late arrival of the goods.¹⁹

E. Draft proposal to impose carrier liability for delay

13. To adopt rules expressly governing carrier liability for delay would be in conformity with other major transport conventions. The basic rule on carrier responsibility, adopted by the Working Group at its fourth (special) session could be amended to cover delay, as follows (no words omitted, words to be added are in italics):

Draft provision A

"1. The carrier shall be liable for all loss or or damage in relation to the goods carried if the occurrence which caused the loss or damage took place while the goods were in his charge as defined in article [], and for loss or damage resulting from delay in the delivery of goods subject to a contract of carriage, 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 delay and its consequences."

14. The separate treatment in this draft provision of "loss or damage in relation to goods" and of "loss or damage resulting from delay" follows the pattern of

the other transport conventions discussed above.²⁰ Furthermore, the phraseology "loss of or damage in relation to the goods" preserves the approach of article 2 of the Brussels Convention to prevent the inadvertent narrowing of this basis for recovery and makes it clear that carrier liability in a case where there was no delay extends to both physical damage to the goods and to economic loss.²¹ In the same way, the phrase "loss or damage resulting from delay" covers both physical damage and economic loss suffered as a consequence of delay.

15. The above draft provision extends carrier responsibility to losses from delay without drawing any distinctions on the basis that the delay was occasioned by carrier fault prior to or subsequent to his having taken charge of the goods. Since the concept of "delay" has meaning for purposes of establishing liability for ensuing loss or damage only in terms of divergence from a reasonably expected delivery date, one need not differentiate among delay in taking charge or loading, delay during the voyage, and delay during unloading or surrendering the goods.²²

F. Definition of delay

16. Any attempt to define delay must recognize that precise scheduling is generally not possible in ocean shipping.²³ However, attention may be given to the

²⁰ The replies of Australia, France, Norway, Pakistan, Sweden, Secretariat of the Asian-African Legal Consultative Committee, Office Central des Transports Internationaux par Chemins de Fer (Berne), International Chamber of Commerce, Comité Maritime International and UNIDROIT all favour the inclusion of a separate provision to govern carrier liability for damages from delay. The Baltic and International Maritime Conference and the International Union of Marine Insurance expressed opposition to the inclusion of a provision on delay.

²¹ See discussion in foot-note 10 of the scope of the term "in relation to the goods" in the Brussels Convention. It may be noted that unavailability of the goods to meet the consignee's business needs, with consequent foreseeable economic loss to the consignee, may occur in cases where the goods are lost or seriously damaged in transit, as well as in cases of delay in delivery.

²² It will be noted that the provision on delay does not repeat the limiting phrase, "while the goods were in his charge", which is applicable to loss or damage in relation to goods. The broader language making the carrier responsible "for loss or damage resulting from delay in the delivery of goods . . ." would thus appear to be adequate to include cases in which the carrier, in breach of the contract of carriage, does not take charge of the goods, thereby causing delay in the ultimate delivery of the goods by an alternative carrier who had to be engaged because of the breach by the first carrier.

A draft proposal advanced in the replies of Pakistan and the Secretariat of the Asian-African Legal Consultative Committee would explicitly extend carrier responsibility for damage from delay occurring prior to the time the carrier takes charge. "The carrier shall be liable for all loss or damage caused by delay, whether the delay consists of the late arrival of the vessel for the purpose of performing the contract of carriage, or late performance of the contract of carriage."

²³ Precise timing is made impossible by divergences caused by such factors as weather conditions, different operating speeds of ocean vessels, variances in turn-around times among ports and lines, special handling requirements for some loads, correlation between ship load and speed. One treatise has defined delay as follows: "In any trade, there is a provable bracket between the swiftest and the slowest voyage of vessels of the class employed. Delay is not actionable unless the customary slowest voyage performance is exceeded negligently." A. W. Knauth, *The American Law of Ocean Bills of Lading*, 4th ed., Baltimore, 1953, p. 263.

¹⁷ International Convention Concerning the Carriage of Goods by Rail, signed at Berne, 25 October 1962, United Nations, *Treaty Series*, vol. 241, p. 336. The 1970 revision of CIM incorporates in its article 34 a new procedure for compensation for delay, providing minimal recovery if the claimant did not suffer specific damage as a result of the delay and compensation up to twice the rail freight where there was specific loss or damage due to the delay. See foot-note 35 for the text of this novel provision in the 1970 CIM Convention.

¹⁸ Convention on the Contract for the International Carriage of Goods by Road, signed at Geneva, 19 May 1956, United Nations, *Treaty Series*, vol. 399, p. 189.

¹⁹ The Draft Convention on the International Combined Transport of Goods (TCM Convention) text adopted at the fourth session of the Joint IMCO/ECE Meeting 15-19 November 1971 (CTC IV/18 Rev.1, TRANS/374/Rev.1) provides in article 11 (2): "In case of delay, if the claimant proves that damage has resulted, other than loss of or damage to the goods, the CTO shall pay in respect of such damage compensation not exceeding . . ." See also a discussion of the various proposals as to the coverage of delay in the TCM Convention, in: Economic implications, in particular for developing countries, of the proposed convention on international combined transport of Goods; study by the Secretary-General, ST/ECA/160, 8 May 1972, paras. 86, 135, 146, 154.

flexible definition of delay provided by article 19 in the CMR (Road) Convention:²⁴

"Delay in delivery shall be said to occur when the goods have not been delivered within the *agreed time-limit* or when, failing an agreed time-limit, the *actual duration of the carriage having regard to the circumstances of the case*, and in particular, in the case of partial loads, the time required for making up a complete load in the normal way, *exceeds the time it would be reasonable to allow a diligent carrier.*"²⁵

17. This CMR provision defines delay, in the absence of a specific agreement by the parties, in terms of an excessive "actual duration of the carriage". In formulating a definition of delay in the context of carriage of goods by sea, it may be preferable to place the emphasis on the failure to deliver goods on time, rather than on the actual duration of the carriage, in order to be certain of covering cases in which goods are delayed not by an excessively long voyage, but because the carrier delays or fails to take charge of them. The following draft definition of delay is therefore keyed solely to the delivery date:

Draft provision B

"Delay in delivery occurs when the carrier does not deliver the goods, in accordance with article [],²⁶ by the date for delivery expressly agreed upon by the parties or, in the absence of such agreement, by the latest date that may normally be required for delivery by a diligent carrier having regard for the circumstances of the case."

18. In draft provision B, the reference to the "date for delivery expressly agreed upon by the parties" is intended to give effect to an express agreement of the parties to a specific date for delivery, but not to a general disclaimer freeing the carrier from liability for consequences of delay.

19. As an alternative, the Working Group may wish to consider omitting from the above draft the phrase "by the date for delivery expressly agreed upon

²⁴ The replies of France, Norway, Sweden, UNIDROIT, and the Comité Maritime International all suggest article 19 of the CMR Convention as a model for formulating a draft definition of delay in the new convention on carriage of goods by sea.

²⁵ Italics added for emphasis. There is no definition of delay in the Warsaw (Air) Convention or in the 1962 CIM (Rail) Convention.

Article 11 (1) of the IMCO/ECE Draft TCM Convention (see foot-note 19) defined delay in the following manner: "Delay in delivery of the goods shall be deemed to occur when the CTO (Combined Transport Operator) has not made the goods available for delivery to the consignee within the agreed time-limit, when the actual duration of the whole combined transport operation, having regard to the circumstances of the case, exceeds the time it would be reasonable to allow for its diligent completion." The responses of UNIDROIT and the Office Central des Transports Internationaux par Chemin de Fer (Berne) suggest the TCM definition of delay as a good example to be followed.

²⁶ The reference is to the definition of delivery established by the Working Group in para. (ii) of the proposed revision of art. 1 (e). See Working Group, report on third session para. 14 (1); UNCITRAL Yearbook, Vol. III: 1972, part two, IV. Compilation, part B (reproduced in this volume as annex to the preceding section).

by the parties, or, in the absence of such agreement", thus making all contracts of carriage subject to the standard set by "a diligent carrier having regard for the circumstances of the case"; this single standard may be useful to guard against the possibility that a carrier might avoid liability for delay by inserting in the bill of lading a date for delivery far in the future.²⁷

20. The draft definition of delay combines the general standard of conduct by a "diligent carrier" with a consideration of "the circumstances of the case". In effect, the test may be paraphrased as asking how a diligent carrier placed in the shoes of the contractual carrier would have conducted this particular voyage, under the given circumstances; if a normally diligent carrier would have made this delivery in less time, there was delay. The customs of the particular trade and ports concerned and the characteristics of the vessel involved will be the crucial factors in determining whether or not there was any delay.

21. Of course, the existence of "delay" does not automatically establish carrier liability since the carrier may show that he was not at fault as "he, his servants and agents took all measures that could reasonably be required to avoid the occurrence or the delay and its consequences".²⁸ Furthermore, the draft is based on the view that under the rules on the basic responsibility of carriers, the respective burdens of proof of carriers and cargo-owners should be the same in cases of delay as in other cases of loss or damage.²⁹ Thus under the modified rule on basic responsibility of carriers discussed at paragraph 13 and the above definition of delay, the cargo owner only has to show a *prima facie* case of "delay" in order to shift to the carrier the burden of proving that neither he, nor his agents or servants, were to blame for the delay.³⁰

G. Application of limitation of liability rules to delay

22. Case law has generally held that the rules limiting carrier liability under the 1924 Brussels Con-

²⁷ In the converse situation, however, a carrier may still escape liability based on a very short deadline for delivery, by proving that he was not to blame for the delay. See the discussion on carrier responsibility for delay at para. 21, *infra*.

²⁸ Draft provision A at para. 13 *supra*, the operative section imposing carrier liability for delay, frees the carrier from liability if "the carrier proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence or delay and its consequences".

²⁹ The response of the Union of Soviet Socialist Republics advocates treating delay in the same way as the draft provision imposing general carrier responsibility for loss or damage to the goods in case of carrier fault. See Compilation, part D (reproduced in this volume as annex to the preceding section).

³⁰ It is believed that the "fault" concept incorporates automatically a consideration of the special circumstances both of the particular voyage and of sea transport in general; a number of responses received by the Secretariat were concerned that any definition of delay take into account such special circumstances. Damage from delay occasioned by steps for saving lives and/or property at sea has already been dealt with by the Working Group at its fifth session when it adopted the provision that "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" (Working Group, report on fifth session, paras. 54 (2), 55) (UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 5); see also Compilation, part F, reproduced in this volume as annex to the preceding section.

vention are applicable to loss from delay.³¹ Article 4 (5) of that Convention is as follows:

"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."³²

23. The phrase "in connexion with goods", in italics in the quotation above, was the vehicle permitting case law to hold that the provision on limitation of carrier liability extended to economic loss from delay. Consequently the maximum total carrier liability for physical loss or damage to the goods and economic loss suffered by the shipper or consignee combined could not exceed the limitation established by article 4 (5) of the Brussels Convention.

24. However, the Working Group at its fifth session adopted a draft provision on limitation of liability, stating in part:³³

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."

25. As the foregoing formulation omits the general term "in connexion with goods" that appeared in the Brussels Convention in favour of the more limited phrase "loss of or damage to the goods", in its present form the draft limitation of maximum carrier liability probably does not apply to economic loss incurred by the shipper as a result of delay or even as a result of the physical loss or damage of the goods. If the Working Group takes the view espoused in draft provision A regarding the definition of carrier liability,³⁴ then retention of the restrictive terminology of "loss of or damage to the goods" in the provision on limitation of carrier liability would mean that the per unit or per package

limitation covered only physical loss or damage while these would be no limitation on liability for economic loss.

26. Consequently, the Working Group may wish to consider the following amendment to the rule on limitation of liability developed at the fifth session (words to be added are in italics; words to be deleted are enclosed in square brackets):

Draft provision C

Article A

"1. The liability of the carrier [for loss of or damage to the goods] relating to a contract of carriage under this Convention 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] affected, whichever is the higher."

Article B

"1. The defenses 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)] relating to [the goods covered by] a contract of carriage whether the action be founded in contract or in tort."

27. It will be noted that draft provision C prescribes a single standard for calculating the carrier's limits of liability, without any reference to the nature of the carrier fault giving rise to the carrier's liability or to the type of loss or damage suffered by the goods directly or by the shipper, consignee, as a consequence of the fault of the carrier. On the other hand, two major transport conventions incorporate special limitation rules which are applicable only to cases of carrier liability for delay:

CMR Convention, article 23

"5. In the case of delay, if the claimant proves that damage has resulted therefrom the carrier shall pay compensation for such damage not exceeding the carriage charges."

CIM Convention, article 34

"2. If it is proved that damage has, in fact, resulted from the delay in delivery compensation not exceeding the amount of the carriage charges shall be payable."³⁵

28. The Working Group may wish to consider a similar approach, providing for a special limitation on

³¹ Com. Court of Antwerp, 13 June 1955. J.P.A. 1955, p. 371; *Badliwar v. Colorado* 1955, A.M.C. 2139, affirmed 1957, A.M.C. 1972; *Comercio Transito v. Lykes Bros.* 1957, A.M.C. 1188; *Renton v. Palmyra*, 1956 (2) L.I.I. Rep. at p. 87. See also Stephane Dor, Bill of Lading Clauses and the Brussels International Convention of 1924, 2nd ed., London 1960, p. 165 et seq. *Atlantic Mutual Insurance Co. v. Poseidon Schiffahrt G.m.b.H.* (1963) A.M.C. 665 Commentators are in accord with this view: 1 Carver's *Carriage by Sea*, 12th ed., 1971, p. 193. II-Rodière, *Traité général de droit maritime*, 1968, p. 417.

³² Article 2 (a) of the 1968 Brussels Protocol is substantially similar: "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."

³³ Italics added for emphasis; see Compilation, part J; reproduced in this volume as annex to the preceding section.

³⁴ See discussion at paras. 6-7 as to the effect of the draft provision on basic carrier responsibility that the Working Group had adopted at its fourth (special) session.

³⁵ Under the 1970 revision of the CIM Convention, maximum carrier liability for actual damage from delay has been increased to twice the rail freight.

Article 34 of the 1970 CIM Convention provides: "(1) In the event of the transit period being exceeded by more than 48 hours and, in the absence of proof by the claimant that loss or damage has been suffered thereby, the railway shall be obliged to refund one-tenth of the carriage charges, subject to a maximum of 50 francs per consignment. (2) If proof is furnished that loss or damage has resulted from the transit period being exceeded, compensation not exceeding twice the amount of the carriage charges shall be payable."

recovery for economic loss from carriers, such as the following:³⁶

Draft provision D

Article A

"1. The liability of the carrier under this Convention 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. The liability of the carrier under this Convention, other than for loss of or damage to the goods under paragraph 1 of this article, shall not exceed the amount of [twice the] freight charges attributable to the goods with respect to which such liability was incurred."

"3. In no case shall the aggregate liability of the carrier, under both paragraphs 1 and 2 of this article, exceed the limitation which would be established under paragraph 1 of this article for total loss of the goods with respect to which such liability was incurred."

29. Draft provision D establishes a general per weight or per package limitation on carrier liability for physical loss of or damage to the goods from any cause for which the carrier is held responsible under the Convention. It further provides as a special limitation the amount of [twice the] freight for any damage to the shipper/consignee other than physical loss of or damage to the goods. Draft provision D makes no distinction based on the nature of the act or omission of the carrier giving rise to his liability; the distinction between paragraphs 1 and 2 turns on the nature of the loss or damage suffered. For example, paragraph 1 of draft provision D covers all physical loss or damage to goods, such as spoilage, regardless of whether the spoilage was a consequence of improper handling (e.g. improper refrigeration on board) or of delay in delivery or of a combination of improper handling and delay. In a parallel fashion, under paragraph 2 of draft provision D the special limitation amount of [twice the] freight is applicable to any liability for loss other than physical loss of or damage to the goods (economic loss) and would have particular relevance to such loss resulting from delay.

30. Paragraph 3 of draft provision D makes it clear that the limitations on carrier liability under paragraphs 1 and 2 are not cumulative.³⁷ By virtue of paragraph 3, maximum carrier liability will never exceed the per package or per weight limitation established by paragraph 1 since that is the maximum for which the carrier would be liable in the case of total loss of goods. The application of the above draft provision

may be explained in the setting of the following concrete situation.

Case No. 1: Assume that in the course of carriage the goods are physically damaged to the value of \$600; in addition, the shipment is delayed and as a result thereof the consignee suffers, because of the unavailability of the goods, economic loss in the amount of \$300. Assume further that the limitation on liability under paragraph 1, based on the weight, package formula, is \$500 and the limitation on liability under paragraph 2, based on the freight charges, is \$200. By virtue of the rule of paragraph 3, the carrier's total liability would be limited to \$500, which is the maximum recovery under paragraph 1 for total loss of the goods in question.

Case No. 2: As a variation on the above facts, assume that the goods had been physically damaged only to the extent of \$50, while the economic loss resulting from the delay (as in the above example) is \$300. On these facts, the carrier's total liability would be limited to \$50 (paragraph 1) plus \$200 (paragraph 2), a total of \$250.

Case No. 3: The goods were subject to physical damage of \$600 resulting from faulty refrigeration during carriage; there was additional physical damage of \$300 resulting from spoilage because of delay in carriage, so that total physical damage was \$900. The limitation of \$500 under paragraph 1 would govern the aggregate of both types of physical loss; it would not be necessary to ascertain the degree to which each of these factors produced the loss. Since the recovery for physical loss exhausts the paragraph 1 limitation on liability, there would be no recovery for economic loss resulting from the delay or other cause.

31. It may be useful to note the limitations that would result in the above cases under draft provision C. In cases 1 and 3, the result would be the same under draft provision C as under draft provision D—\$500—since the sole weight/package limitation under draft provision C applies to all types of damage. In case No. 2, under draft provision C, by virtue of its single \$500 limitation, the shipper/consignee could recover the physical damage (\$50) plus his economic loss (\$300), a total of \$350.

32. Alternatively, the Working Group may wish to modify draft provision D so as to have the limitation in paragraphs 1 and 2 operate independently and therefore potentially cumulatively. This consequence could be achieved by deleting paragraph 3. Under such a formulation, maximum carrier liability would be the aggregate of the two limitations which could arise in a case of total loss or heavy physical damage coupled with extensive economic losses. Under another possible approach, draft provision C might be subject to an exception that liability as a consequence of delay, regardless of whether the damage be physical or economic or a combination of the two shall be limited to [twice the] freight.³⁸ A disadvantage of this approach is that it makes maximum carrier liability depend on the nature of carrier fault and is likely to

³⁶ The replies of France, the International Chamber of Commerce, the International Union of Marine Insurance, UNIDROIT, Comité Maritime International all favour freight as the maximum amount of carrier liability for delay; (the French response also mentions the possibility of establishing "twice the freight" as the limitation of carrier liability for delay).

³⁷ The reply of the Comité Maritime International supports this approach. Similarly, article 34 (3) of the 1970 CIM Convention provides that compensation for delay "shall not be payable in addition to that which would be due in respect of total loss of the goods".

³⁸ Such modification of draft provision C would lead to the following results in the cases discussed in paragraph 30, *supra*: case No. 1, \$500; case No. 2, \$250 assuming none of the \$50 physical damage was due to delay; case No. 3, \$500.

create litigation over the underlying basic cause behind acknowledged physical damage from one of several possible causes for each of which the carrier is responsible under the Convention.

H. *Presumption of loss of delayed cargo: Subsequent recovery*

33. If goods have not arrived within a reasonable period, it may not be readily apparent whether they have been lost or merely delayed. The uncertainty may persist indefinitely in cases of loss, or until the goods are finally delivered in cases of delay.

34. The Working Group may wish to consider the adoption of a provision that would enable cargo owners to recover as if the goods were known to have been lost, after an extended period of unexplained non-delivery but prior to a conclusive showing that the goods were in fact lost by the carrier. This provision would specify a fixed point at which goods are presumed lost, but preferably would also include a procedure for preserving both the cargo owner's right to the goods and his course of action for delay should the goods be in fact recovered subsequently.³⁹ Two transport conventions contain rules on presumption of loss and subsequent recovery:

35. CMR (Road) Convention, article 20:

"1. The fact that goods have not been delivered within thirty days following the expiry of the agreed time-limit, or, if there is no agreed time-limit, within sixty days from the time when the carrier took over the goods, shall be conclusive evidence of the loss of the goods, and the person entitled to make a claim may thereupon treat them as lost.

"2. The person so entitled may, on receipt of compensation for the missing goods, request in writing that he shall be notified immediately should the goods be recovered in the course of the year following the payment of compensation. He shall be given a written acknowledgement of such request.

"3. Within the thirty days following receipt of such notification, the person entitled as aforesaid may require the goods to be delivered to him against payment of the charges shown to be due on the consignment note and also against refund of the compensation he received less any charges included therein but without prejudice to any claims to compensation for delay in delivery under article 23, and, where applicable, article 26.

"4. In the absence of the request mentioned in paragraph 2 or of any instructions given within the period of thirty days specified in paragraph 3, or if the goods are not recovered until more than one year after the payment of compensation, the carrier shall be entitled to deal with them in accordance with the law of the place where the goods are situated."

36. CIM (Rail) Convention, article 30:

"1. The person entitled to make a claim for the loss of goods may, without being required to furnish further proof, treat goods as lost when they have not been delivered to the consignee or are not being

held at his disposal within thirty days after the expiry of the transit periods.

"2. (Language identical to article 20 (2) of the CRM Convention quoted above, i.e. request for notification on receipt of compensation by cargo owner.)

"3. Within the 30 days following receipt of such notification, the person entitled as aforesaid may require the goods to be delivered to him at any station on the route, against payment of the charges arising on the consignment from the forwarding station where delivery is made and also against refund of the compensation he received, less any charges included therein but without prejudice to any claims to compensation for delay in delivery under article 34 of this Convention and, where applicable, article 36 of this Convention.

"4. In the absence of the request mentioned in paragraph 2 above or of any instructions given within the period of thirty days specified in paragraph 3 above, or if the goods are not recovered until more than one year after the payment of compensation, the railway shall be entitled to dispose of them in accordance with the law and regulations of the State to which the railway belongs."

37. Should the Working Group decide to adopt provisions with respect to the presumption of loss and subsequent recovery of goods, it may wish to consider the following draft proposal based on the CMR and CIM Conventions provisions quoted above:

Draft provision E

Presumption of loss: subsequent recovery

"1. The person entitled to make a claim for the loss of goods may, without being required to furnish further proof, treat the goods as lost when they have not been delivered to the consignee as required by article [] within [sixty] days following the expiry of the agreed date for delivery, or, if there is no delivery date agreed upon, within [sixty] days following the expiry of the date a diligent carrier would have made delivery under the circumstances.

"2. The person so entitled may, upon receipt of compensation from the carrier for the missing goods, request in writing that he shall be notified immediately should the goods be recovered within [one year] from the date the payment of compensation was received. Such person shall be given a written acknowledgement of the request.

"3. Within the thirty days following receipt of such notification, the person entitled as aforesaid may require the goods to be delivered to him against payment of the charges shown to be due for the shipment of such goods and also against refund of the compensation for loss which the claimant may have received less any charges included therein but without prejudice to any claims to compensation for delay in delivery under article [].

"4. In the absence of the request mentioned in paragraph 2 or of any instructions given within the period of thirty days specified in paragraph 3, or if the goods are not recovered within one year from the date the payment of compensation was received,

³⁹ The response of the Comité Maritime International points out that such a provision will become necessary if the Working Group should adopt freight as the maximum carrier liability for delay.

the carrier shall be entitled to dispose of the goods in accordance with the law of the place where the goods are situated."

38. The procedure outlined above provides a relatively simple method of recovery to the consignee in cases of extended, unexplained delay in the delivery of goods. Although under the circumstances of paragraph 1 the person entitled to delivery of the goods may treat them as lost, the carrier may rebut the presumption of loss by meeting the burden of showing that in fact the goods are merely delayed and are not lost. At the same time, the draft rules on presumption of loss and subsequent recovery of goods offer protection to the consignee of presumptively lost but subsequently recovered goods of a value greatly in excess of the maximum carrier liability under the Convention and thus guard against a quick windfall profit to the carrier as a result of his extended delay in delivery. The Working Group may wish to consider a longer period of possibly two years for the recovery period during which the consignee has the option of relinquishing the compensation for presumptively lost goods in favour of the recovery of the goods.

PART TWO. GEOGRAPHIC SCOPE OF APPLICATION OF THE CONVENTION

A. Introduction

1. The Working Group¹ at its fifth session decided that the sixth session should consider, among other topics, the scope of application of the Brussels Convention for the Unification of Certain Rules Relating to Bills of Lading (Brussels Convention of 1924).²

2. This part of the third report of the Secretary-General responds to the request made by the Working Group to the Secretary-General that a paper be prepared dealing with issues regarding the scope of the Convention in a geographical sense, i.e. the contacts between the carriage of goods and a contracting State that render the rules of the Convention applicable.

B. Provision defining the scope of the Brussels Convention of 1924

3. Article 10 of the Brussels Convention of 1924 provides:

"This convention shall apply to all bills of lading issued in any of the contracting States."

4. This brief provision has been considered unsatisfactory because of the narrow scope given to the Convention and also because of difficulties of interpretation which have resulted in a variety of different national solutions to the problems of scope.³ It may also be noted that some Contracting States in incorporating the substantive rules of the Convention into

their national legal system, have given those rules wider scope than required by article 10.⁴

5. Major problems resulting from the formulation of article 10 of the Brussels Convention of 1924 are the following:

(a) Article 10 does not specifically limit the application of the Convention to the *international* carriage of goods; consequently, under a literal reading of the article the Convention would apply to a contract for carriage from one port to another in the same State. This approach has been followed by some contracting States⁵ while others have refused to apply the Convention to what have been termed to be legal relations of a predominantly "internal" character.⁶ Legal systems employing the Convention only for international carriage have focused on the foreign destination of the cargo (e.g. Italy) or on the nationality of the parties to the contract of carriage (e.g. France).

(b) Under article 10, if the bill of lading is "issued" in a non-contracting State the Convention will not be applicable even though the goods are loaded in a port in a contracting State. In the majority of cases the bill of lading is issued at the port of loading, but there are instances in which the bill of lading is issued in another State.

Many national enactments of the Brussels Convention of 1924 (even prior to the Brussels Protocol of 1968) adopted the criterion of the State where the carriage by sea began instead of the Convention criterion of the State of issuance. For example, the United Kingdom Carriage of Goods by Sea Act states that the rules shall have effect with respect to "ships carrying goods from any port in Great Britain".⁷ The United States Carriage of Goods by Sea Act states that it shall apply:

"To all contracts for carriage of goods by sea to or from ports in the United States . . .".⁸ (Italics added.)

(c) The Convention does not apply in cases where the bill of lading was issued in a non-contracting State even though the State at whose port the goods were discharged was a contracting State. Thus if the State where the goods were discharged is a contracting State but the place of issuance of the bill of lading (or the place of loading) is not a contracting State, the court in a contracting State will not be required to apply the Convention; the court will refer to its rules on conflict of laws to find the applicable law. This issue has been the subject of much discussion; divergent

⁴ e.g. United States Carriage of Goods by Sea Act 46 U.S.C.A. 1300-1315, sec. 13; Belgium, Law of 28 November 1929, Article 91, Belgian Commercial Code as quoted in 2 Carver, Carriage by Sea, p. 1344 (12th ed., 1971); France, Law of 18 June 1966, article 16.

⁵ e.g. United Kingdom, Carriage of Goods by Sea Act, 1924, Art. 4.

⁶ e.g. France and Italy, Carver, Carriage by Sea (12th ed., 1971) pp. 1345, 1347.

⁷ A question has been raised as to whether the Act applies only to goods which are loaded on board in Great Britain or whether it also applies to goods which were loaded on board elsewhere but which were on board when the ship called at a British port during its voyage. Scrutton on Charter Parties (17th ed., 1964) p. 400.

⁸ United States Carriage of Goods by Sea Act, section 13.

¹ Report of the Working Group on International Legislation in Shipping on the Work of its fifth session, Geneva, 5 to 16 February 1973 (A/CN.9/76) para. 75; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 5.

² League of Nations, *Treaty Series*, vol. CXX, p. 157; reproduced in *Register of Texts*, vol. II, ch. II, 1.

³ See International Maritime Committee, XXIVth Conference held at Rijeka, 1959 Proceedings (herein referred to as Rijeka Conference Proceedings), pp. 134-137; Legendre, *La Conférence Diplomatique de Bruxelles de 1968, Droit Maritime Français*, pp. 387, 392-395 (1968).

solutions have been offered which will be discussed below. In this connexion it will be recalled that some national enactments such as those of the United States, Belgium and France have extended the scope of application of the rules of the Convention so that these rules will govern whenever goods are carried to their ports.⁹

(d) Many contracting States have not given full effect to article 10 in their national version of the Convention. Article 10 states that "the Convention shall apply to all bills of lading issued in any of the Contracting States" (*italics added*). However, the text on scope of application as adopted in many contracting States provides that the statutory rules shall apply to bills of lading issued in the *enacting* State or to the carriage of goods from the *enacting* State. Under such enactments the question has arisen whether the courts of a contracting State (C1) will apply the rules of the Convention to a bill of lading issued in another contracting State (C2). If the legislation of C1 provides only that all bills of lading issued in or goods carried from C1 shall be governed by the Convention rules, the courts in C1 may thus not be required to apply those rules for carriage from another contracting State (C2). For example, this problem exists under the United Kingdom Carriage of Goods by Sea Act of 1924, which states in article 1:

"1. Subject to the provisions of this Act, the rules shall have effect in relation to and in connexion with the carriage of goods by sea in ships carrying goods from any port in Great Britain or Northern Ireland to any other port whether in or outside Great Britain or Northern Ireland."¹⁰ (*italics added*.)

It will be noted that this language directs the courts in the United Kingdom to apply the Act (Convention rules) to the carriage of goods from a United Kingdom port, but does not direct application of the Act to carriage from the port of another State even though that State is a party to the Convention. The British court will look to its own conflict of laws rules for the proper law to be applied.¹¹ The conflicts rules may

well lead to the application of the Convention when the goods have been shipped from a State which is a party to the Convention; but the result is not clearly predictable and in such a case the application of the Convention, expected by the States parties to the Convention, may be defeated.

C. Rijeka/Stockholm draft on scope of application

6. Criticism of the rule on scope of application set forth in article 10 of the Brussels Convention of 1924 led to thorough discussion of the subject at the XXIVth Conference of the International Maritime Committee (CMI) held at Rijeka. A draft of a proposed revision of article 10 was adopted at the Rijeka Conference;¹² this draft became part of the draft Protocol adopted at the XXVIth Conference of the International Maritime Committee held in Stockholm in 1963.¹³

7. The Rijeka/Stockholm draft of article 10 reads as follows:

"The provisions of this Convention shall apply to every bill of lading for carriage of goods from one State to another, under which bill of lading the port of loading, the port of discharge or one of the optional ports of discharge, is situated in a Contracting State, whatever may be law governing such bill of lading and whatever may be the nationality of the ship, the carrier, the shipper, the consignee or any other interested person."

8. The Rijeka/Stockholm draft was designed to widen the scope of application and to overcome the ambiguities in the formulation of the Convention provision on scope of application which resulted in divergent national interpretation. The aims of the draft were to be accomplished by setting forth precise criteria to determine the application of the Convention. Significant features of the Rijeka/Stockholm draft included the following:

(a) "from one State to another." This phrase eliminated the possibility raised in article 10 of the Brussels Convention of 1924 that the Convention rules would govern carriage of goods from one port to another of the same Contracting State. This phrase made it clear that application of the Convention was mandatory only with respect to the international carriage of goods, and thus met objections (see paragraph 5 (a) above) to the application of the Convention to coastal trade.

(b) "The port of loading, the port of discharge or one of the optional ports of discharge, is situated in a Contracting State." Unlike article 10 of the Brussels Convention of 1924, the Rijeka/Stockholm draft provided three alternative bases for applying the Convention:

(i) "The port of loading";

bill of lading is nevertheless governed by English law, the English court will not apply the Hague Rules because under our law, the Hague Rules only apply compulsorily outwards from the United Kingdom." Rijeka Conference Proceedings, p. 377. See also Carver, *Carriage by Sea* (12th ed., 1971) pp. 266-268, commenting on *Vita Food Products v. Unus Shipping Co.*, [1939] A.C. 277.

¹² CMI Rijeka Conference Proceedings, p. 391.

¹³ CMI Stockholm Conference Proceedings, p. 551.

⁹ e.g. the Belgium Law provides: "A negotiable bill of lading for the carriage of goods by any vessel, of whatever nationality from or to a port of the Kingdom or the colony is subject to the following rules: ..." See Carver at foot-note 4 above.

¹⁰ The problem is less acute with respect to national enactments such as that of the United States. The United States Carriage of Goods by Sea Act states at sec. 13: "This Act shall apply to all contracts for the carriage of goods by sea to or from ports in the United States in foreign trade." Thus as long as the carriage was to a port in the United States the Convention will apply. However, if the carriage of goods was neither from nor to the United States the bill of lading does not require the application of the U.S. COGSA, and the U.S. courts would not be bound to apply the Convention (or COGSA rules) although the bill of lading was issued in another contracting State, and involved carriage between other ports of contracting States.

¹¹ At the Rijeka Conference of the International Maritime Committee the delegate for Great Britain stated: "under British law the first question which the court has to determine is what is the proper law of the contract, or in other words what is the law that governs the contract. Once it has done that it then looks to see whether or not under the proper law of the contract the Hague Rules shall compulsorily apply. Thus, if a Bill of Lading is issued in a foreign country for a shipment to England, and that country has Hague Rules legislation but the

(ii) "The port of discharge", named in the bill of lading;

(iii) "One of the optional ports of discharge".

This third term was defined in the report of the International Sub-Committee on Conflicts of Law which was presented to the Rijeka Conference as follows: "if for one reason or another, the goods do not reach the port of discharge originally stipulated, the Convention should apply both when the original port of destination is situated in a Contracting State and when the *actual port of discharge* is so situated."¹⁴ It appeared from the discussion at the Stockholm Conference that the rule would apply only if the bill of lading contained a stipulation regarding an optional port or optional ports.¹⁵

(c) "Whatever may be the law governing such bill of lading." This phrase is designed to make it clear that courts of contracting States may not rely on national conflict of law rules to determine whether the Convention applies, provided the bill of lading involved is covered by the definition of article 10. For example, under this rule English courts would not be permitted to resort to English conflict of laws to find the law applicable to a carriage from another contracting State to the United Kingdom; in such a situation British courts would accept the Convention rules as the applicable law.

(d) "Whatever may be the nationality of the ship, the carrier, the shipper, the consignee or any other interested person." This phrase is designed to preclude the use of the nationality of the ship or any person involved in the carriage as a criterion for the application of the Convention. Article 10 of the Brussels Convention of 1924 does not specifically preclude the use of nationality as a criterion and, as has been stated above, in certain cases national courts have made use of this criterion, particularly in a negative sense to prevent the application of the Convention where the contract of carriage had no international element.¹⁶

D. Provision of the 1968 Brussels Protocol defining the scope of the application of the Convention

9. Article 5, the provision in the 1968 Protocol to amend the Brussels Convention of 1924¹⁷ dealing with scope, retained some features of the Rijeka/Stockholm draft, but it also made substantial changes in that draft. Article 5 of the Protocol reads as follows:

Article 5

Article 10 of the Convention shall be replaced by the following:

"The provisions of this Convention shall apply to every Bill of Lading relating to the carriage of goods between ports in two different States if:

"(a) The bill of lading is issued in a contracting State, or

"(b) The carriage is from a port in a contracting State, or

"(c) The Contract contained in or evidenced by the Bill of lading provides that the rules of this Convention or legislation of any State giving effect to them are to govern the contract whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

"Each contracting State shall apply the provisions of this Convention to the Bills of Lading mentioned above.

"This Article shall not prevent a Contracting State from applying the Rules of this Convention to bills of lading not included in the preceding paragraphs."

10. The first paragraph of article 5 of the 1968 Brussels Protocol provision contains the following features:

(a) "Carriage of goods between ports in *two different States*." Like the Rijeka/Stockholm draft, but unlike article 10 of the Brussels Convention of 1924, the Protocol provision expressly limits the application of the Convention to the international carriage of goods.

(b) "Bill of lading is issued in a contracting State." By this language, subparagraph (a) of the Protocol provision retains the basic criterion of the 1924 Brussels Convention for scope of application of the Convention.

(c) "From a port in a Contracting State." Subparagraph (b) adds (in modified language) one of the three alternative criteria found in the Rijeka/Stockholm draft.

(d) Subparagraph (c) requires the application of the Convention whenever the parties to the contract of carriage have specified by a "clause paramount" in their contract that the rules of the Convention should apply.¹⁸ Under this rule, even if none of the above tests for applicability is met, when the parties specify that the Convention rules are to govern their contract, the courts of a contracting State must apply those rules. Subparagraph (c), like the Rijeka/Stockholm draft, also excludes the nationality of the ship or persons concerned as criteria for the application of the Convention.

11. The second paragraph of article 5 of the 1968 Protocol appears to be designed to emphasize that contracting States undertake to apply the Convention not only to bills of lading relating to shipment originating in their own ports, but also to shipment originating in ports of any *other* contracting State; expressed more generally, the contracting State will apply the Conven-

¹⁸ A "clause paramount" is a clause in the bill of lading providing that the Brussels Convention of 1924 shall govern the contract of carriage. For example, the CONFLINE liner bill of lading states: "2. *Paramount clause*. The Hague Rules contained in the International Convention for the Unification of certain Rules relating to Bills of Lading, dated at Brussels the 25th August 1924, as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply." Report by the secretariat of UNCTAD on bills of lading, TD/B/C.4/ISL/6/Rev.1 (United Nations Publication Sales No. E.72.II.N.2), Annex III, B. Some national enactments of the Convention require a "clause paramount" to be inserted in all bills of lading (e.g. United States, United Kingdom) and many carriers insert a "paramount clause".

¹⁴ Rijeka Conference Proceedings, p. 137.

¹⁵ Stockholm Conference Proceedings, p. 516.

¹⁶ See paragraph 5 (a) above.

¹⁷ Protocol to amend the International Convention for the Unification of Certain Rules Relating to Bills of Lading signed at Brussels on 25 August 1924, Brussels 1968, *Register of Texts*, vol. II, ch. II.

tion whenever one of the tests set forth in paragraph 1 is met. This paragraph is addressed to the problem raised by national enactments of the Convention (such as the United Kingdom Carriage of Goods by Sea Act) which require the application of the Convention's rules only if the carriage is from a port of the enacting State. This problem is more fully discussed above at paragraph 5 (d).

12. The third paragraph of article 5 of the 1968 Brussels Protocol emphasizes that contracting States may widen the scope of application of the Convention in their national enactments of the Convention; for example contracting States may include the port of discharge in their national enactment of the Convention as a criterion for the application of the Convention.¹⁹

E. *Provisions on scope of application in conventions on carriage of goods by rail, air and road*

1. *Carriage of goods by rail: CIM Convention*²⁰

13. Article 1 (1) provides:

"This Convention shall apply, subject to the exception set forth in the following paragraphs, to the carriage of goods consigned under a through consignment note for carriage over the territories of at least two of the Contracting States. . . ." (Italics added.)

2. *Carriage of goods by air: Warsaw Convention*²¹

14. Article 1 provides:

"1. This Convention applies to all international carriage of persons, luggage or goods performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

"2. For the purpose of this Convention the expression 'international carriage' means any carriage in which, according to the contract made by the parties, the place of departure and the place of destination whether or not there be a break or a trans-shipment, are situated either within the territories of two High Contracting Parties or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this Convention. A carriage without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party is not deemed to be international for the purpose of this Convention." (Italics added.)

¹⁹ The reply of the Norwegian Government indicates that "in the new legislation based on the protocol, Norway—like the other Nordic countries—has exercised the option contained in the last paragraph of article 5 to extend the scope of application and make the rules applicable also to carriage from a non-contracting State to any of the Nordic States."

²⁰ International Convention concerning the Carriage of Goods by Rail (CIM), 1952, United Nations, *Treaty Series*, vol. 241.

²¹ The Convention for the Application of certain Rules relating to International Transportation by Air, 1929, League of Nations, *Treaty Series*, vol. CXXXVII, p. 13. The 1955 Hague Protocol to the Warsaw Convention changes some language in article 1 but does not change the substance.

3. *Carriage of goods by road: CMR Convention*²²

15. Article 1 (1) states the following:

"This Convention shall apply to every contract for the carriage of goods by road in vehicles for reward, when the place of taking over of the goods and the place designated for delivery, as specified in the contract, are situated in two different countries, of which at least one is a contracting country, irrespective of the place of residence and the nationality of the parties." (Italics added.)

4. *Comparison of provisions of the three transport Conventions*

16. The Carriage of Goods by Rail Convention (OIM) provides that carriage of the goods through the territory of at least two contracting States is a prerequisite for its application. The Warsaw Convention (Carriage by Air) requires that both the place of departure and the place of destination be in a contracting State; the requirement that the carriage be international is preserved in cases where the place of departure and destination are in the same contracting State by considering the carriage international if there is an agreed stopping place in any other State.

17. The Carriage of Goods by Road Convention (CMR) is applicable if either the State where the goods are taken over or the State designated as the place for delivery is a contracting State. It will be noted that this approach is similar to that taken in the Rijeka/Stockholm draft.²³

F. *Alternative draft proposals*

1. *Introduction*

18. The Rijeka/Stockholm draft and article 5 of the 1968 Brussels Protocol are similar in approach in a number of important ways. Both provisions reject the use of the nationality of the parties or of the ship to provide a criterion for applying the Convention. Both formulations reject the unqualified application of the Convention to all international carriage of goods by sea; both provisions also reject the general principle underlying the Warsaw Carriage by Air Convention and the Carriage of Goods by Rail Convention under which application of the Convention depends on contact by the goods during carriage with at least two contracting States. In addition, both the Rijeka/Stockholm draft and the 1968 Brussels Protocol adopt the prerequisite that the carriage must be international before it may be governed by the Convention. Both accept the principle of using a geographical contact between one contracting State and the specific carriage of goods as a criterion to determine whether or not the Convention will be applied.

19. There is one important difference between these two provisions. Under the Rijeka/Stockholm draft both the port of loading and the port of discharge are considered as having sufficient links with the specific carri-

²² The Convention on the Contract for the International Carriage of Goods by Road (CMR) United Nations, *Treaty Series*, vol. 399, p. 189.

²³ The CMR Convention is also similar to the Rijeka/Stockholm draft and the 1968 Protocol in specifically excluding use of the nationality of the parties as a criterion for determining the application of the Convention.

age of goods to be used as alternative criteria for applying the Convention; article 5 of the 1968 Protocol does not set forth the port of discharge of the goods as a criterion for the application of the Convention as amended by the Protocol.

2. *Draft proposal based on article 5 of the 1968 Brussels Protocol*

20. Draft proposal A is based on article 5 of the 1968 Brussels Protocol.²⁴ Some adjustments in the language of the provision have been made to reflect the general approach both as to substance and as to drafting that has been taken by the Working Group; these adjustments are indicated by brackets.

21. Draft proposal A reads as follows:

Draft proposal A

"1. The provisions of the Convention shall apply to every [bill of lading] [contract of carriage] relating to the carriage of goods between ports in two different States if:

"(a) The [bill of lading] [document evidencing the contract of carriage] is issued in [a] [any] Contracting State, or

"(b) The carriage is from a port in [a] [any] Contracting State, or

"(c) The [bill of lading] [document evidencing the] contract of carriage provides that the rules of this Convention or legislation of any State giving effect to them are to govern the Contract.

"2. The provisions of paragraph 1 are applicable without regard to the nationality of the ship, the carrier, the shipper, the consignee or any other interested person.

"3. Each Contracting State shall apply the provisions of this Convention to the contract of carriage.

"4. This article shall not prevent a Contracting State from applying the rules of this Convention to bills of lading not included in the preceding paragraphs."

22. Paragraph 1: the first phrase, subparagraphs (a) and (b) and the last phrase of the paragraph have been described above at paragraph 10. Subparagraph (c) (see paragraph 10 (d) above) appears to have been added to the 1968 Protocol provision partly in order to compensate for the absence of the criterion of the place of discharge.²⁵

²⁴ The replies of the Governments of the United Kingdom, Norway and Sweden indicate support for article 5 of the 1968 Brussels Protocol. Support for the 1968 Brussels Protocol provision was also set forth in the replies of the International Chamber of Commerce (ICC), the Baltic and International Maritime Conference (BIMCO), the International Maritime Committee (CMI), and the Office Central des Transports Internationaux par Chemin de Fer.

²⁵ Proceedings of the Diplomatic Conference on Maritime Law, 12th session (1st phase), Brussels 1967, p. 313. At the Diplomatic Conference no strong objection was made to the inclusion of this provision. Proceedings of the Diplomatic Conference on Maritime Law, 12th session (2nd phase), Brussels 1968, pp. 69-70. The Australian reply raises a question as to the necessity of subparagraph (c) (which is identical to paragraph 5 (c) of the 1968 Brussels Protocol) "which seems to have no substantive effect".

23. Paragraph 3: this rule which is discussed above at paragraph 11 directs the contracting States to use exactly the same formulation of the criteria for application of the Convention rules as does the Convention provision.²⁶ This rule is aimed at preventing the approach found in a number of national enactments of the Convention which would substitute "is issued in the enacting state" for "is issued in any Contracting State" in subparagraph (2) of the first paragraph of draft proposal A and which would substitute "the carriage is from a port in the enacting state" for "the carriage is from a port in a Contracting State" in subparagraph (b) of draft proposal A. As was stated in paragraph 5 (d) above this problem has arisen in the United Kingdom. It may be of some significance that the United Kingdom Carriage of Goods by Sea Act 1971 (1971 C. 19), which is to come into effect when 10 States ratify the Brussels Protocol of 1968, incorporates article 5 of the Protocol with no change in language.²⁷ The Working Group may, nevertheless, wish to consider whether the purpose of paragraph 3 is stated in a sufficiently clear manner to generally evoke the type of response made by the United Kingdom in its revision.

24. Paragraph 4: this paragraph is the result of a compromise made at the Diplomatic Conference of 1968 in response to the proposal to add the port of discharge as a criterion for the application of the Convention.²⁸

²⁶ In comments in response to the *note verbale*, the Government of Pakistan and the Asian-African Legal Consultative Committee secretariat indicate that this paragraph "appears to perform a double duty. It imposes an obligation on contracting states to see that their domestic law giving effect to the Convention is applicable to bills of lading" which fulfil the criteria set forth in the preceding paragraphs. "It also appears to create a mandatory choice of law rule which the courts of contracting states must observe." In view of the diverse interpretations presently given to the provision on scope of application (article 10), the reply proposes the following alternative language for paragraph 3: "Each contracting State shall make applicable, and the courts of each contracting State shall apply the provisions of this Convention to the bills of lading mentioned above."

²⁷ The general note on the provision in 41 Halsbury's Statutes of England (3rd ed., 1971) at p. 1330 states: "Under the Carriage of Goods by Sea Act 1924, S.3 Vol. 31, p. 524, the Hague Rules applied only to bills of lading issued in Great Britain or Northern Ireland. The object of the present article is to give the Rules as wide a scope as possible, and they will be applied as a matter of law in the United Kingdom where the bill of lading is issued in a Contracting State or where the carriage is from a port in a Contracting State, or where the contract itself voluntarily provides that the Rules are to apply to it."

²⁸ Proponents of the inclusion of the port of discharge as a criterion introduced a compromise proposal which failed but which may, it would appear, have helped to bring acceptance of the third paragraph of article 5 of the Protocol. The compromise proposal reads as follows:

"The provisions of this Convention shall apply to every bill of lading for the carriage of goods from one State to another, under which bill of lading the port of loading, of discharge or one of the optional ports of discharge, is situated in a State party to the Convention, whatever may be the law governing such bill of lading and whatever may be the nationality of the ship, the carrier, the shipper, the consignee or any other interested person.

"2. However, a party to this protocol may reserve the right not to apply the provisions of the Convention as amended by the Protocol to bills of lading issued in a State which is not a party to this Protocol."

Proceedings of the Diplomatic Conference on Maritime Law, 12th session (2nd phase), Brussels 1968, p. 66.

3. *Draft proposal based on article 5 of the 1968 Brussels Protocol and the Rijeka/Stockholm draft*

25. Draft proposal B contains parts of both article 5 of the 1968 Protocol and of the Rijeka/Stockholm draft. While following most of the provisions of article 5 of the 1968 Protocol, draft proposal B adds the port of discharge as an alternative criterion for applicability of the Convention. The principal variation from draft proposal A would be effected by the italicized language of paragraph 1 (b) below.

26. Draft proposal B reads as follows:

Draft proposal B

"1. The provisions of the Convention shall apply to every [bill of lading] [contract of carriage] relating to the carriage of goods between ports in two different States if:

"(a) The [bill of lading] [document evidencing the contract of carriage] is issued in a Contracting State, or,

"(b) The port of loading or the port of discharge or one of the optional ports of discharge provided for in documents evidencing the contract of carriage is located in a Contracting State, or,

"(c) The document evidencing the contract of carriage provides that the provisions of this Convention or the legislation of any State giving effect to them are to govern the contract.

"2. The provisions of paragraph 1 are applicable without regard to the nationality of the ship, the carrier, the shipper, the consignee or any other interested person."

27. Subparagraph (a): the criterion of the State of issuance, the only criterion for application under article 10 of the 1924 Convention, was retained in the revision of the rule in the 1968 Brussels Protocol, although it had been eliminated in the Rijeka/Stockholm draft.

28. Subparagraph (b): the phrase "ports of loading... in a Contracting State" is consistent with that used by the Working Group in drafting the provisions on period of responsibility, choice of forum and arbitration.

29. The alternative criterion of "the port of discharge" for the application of the Convention set forth in draft proposal B specifically supported in the replies of the Governments of France,²⁹ Australia and Pakistan

and is specifically opposed in the reply of the United Kingdom.³⁰

30. The port of discharge was included in the Rijeka/Stockholm draft as a criterion for application of the Convention.³¹ However, it was deleted from the draft provision on scope of application presented to the 1968 Diplomatic Conference. At that Conference the inclusion of the port of discharge as a criterion for application of the Convention was supported along the following lines: "The port of discharge is by far the most important port, because disputes take place mostly and claims for damages are mostly lodged at the place of the port of discharge and not at the port of loading."³²

31. At the 1968 Diplomatic Conference the following points were made against the inclusion of the port of discharge:

(a) "In applying these rules [the Convention Rules] States are performing a governmental act, they are exercising governmental powers, and... they must have a scrupulous regard for the jurisdiction of other countries in so doing. The rules regulate the terms on which seaborne traffic is carried. It is true they do not cover such matters as the price or the rate at which those goods may be carried but the principle is very much the same.

"I think that every delegation would object if a single country or a group of countries purported to control the terms on which the rates at which goods arrive in its ports disregarding the rules applicable in the port of departure. That is the simplest explanation of our jurisdictional difficulty."

(b) "In applying the new rules to inward bills of lading, the difficulties of conflict of laws would be increased rather than minimized. The difficulty that the rules under which you carried goods would depend on the court in which you brought your action, rather than the terms which the skipper and shipowner agreed, would be increased."³³

32. With respect to the first objection, the following comment was made at the Diplomatic Conference: "there can in our view be no question of any infringement of the jurisdiction of a non-contracting State, because the provision will only be applicable within the jurisdiction of a Contracting State."³⁴

33. The second objection seems to consist of the view that only the law of the place where the *contract* of carriage was *entered into* should determine whether

The reply of the Government of Pakistan states the following regarding the provision set forth in paragraph 4 of draft proposal A: "If this liberty is used by Contracting States, different national laws may have very different ambits of application, which may produce some uncertainty..." This view is followed in the comments of the Asian-African Legal Consultative Committee Secretariat.

²⁹ The reply of the Government of France states that the French law of 18 June 1966 goes further than extending the scope of application of the Convention as provided in the 1968 Brussels Protocol; the Convention is made applicable to carriage from and to any French port. The reply indicates that a certain number of other States which are parties to the Brussels Convention of 1924 have analogous provisions in their national legislation and adds that this solution should be made uniform in the Convention.

³⁰ The United Kingdom reply states that "it would oppose any extension of the 1968 definition to include the port of discharge as a place creating mandatory application of the rules".

³¹ The port of discharge is used as a criterion in the Convention on the Carriage of Goods by Road (CMR) (see paras. 15 and 17 above). In its reply to the questions set forth in the Secretary-General's *note verbale*, the International Institute for the Unification of Private Law (UNIDROIT) recommended the approach taken in the CMR Convention.

³² Diplomatic Conference, 12th session (2nd phase), Brussels, 1968, p. 51.

³³ Diplomatic Conference, 12th session (2nd phase), Brussels, 1968, pp. 71-72.

³⁴ Diplomatic Conference, 12th session (2nd phase), Brussels, 1968, p. 51.

the Convention rules are applied and that the port of discharge does not have an appropriate relationship with the agreement of the parties. However, the same argument might be made with respect to the port of loading. The goods may be loaded on at one port or another without having any particular connexion with the legal system of the particular port; thus it may be without much significance with respect to the shipper and the carrier that the goods were loaded at a particular place or that the document of transport was issued there.

34. It may be recalled that the Convention is not primarily concerned with the question *whether* a contract of carriage has been made, or even with questions concerning the interpretation of the clauses in the contract. Instead, the main aim of the Convention has been to establish uniform minimum standards as to the duties and obligations of carriers which would override inconsistent provisions in the contract of carriage. It may be suggested that the party who is likely to be most directly concerned with the standards established in the Convention is the consignee.³⁵ Damage in transit is usually discovered only when the goods reach their destination, and the damage total can only be calculated with any degree of certainty after the arrival of the goods. In addition, under the most usual forms of sales transactions (FOB port of loading; CIF; C and F) the risk of damage in transit falls not on the seller-consignor but on the buyer-consignee. Hence, the consignee, for reasons of practicality (because of his proximity to the goods at the end of the carriage) and of law (because he usually bears the risk in transit), is the person who must press the claim against the carrier. The State of the consignee, i.e. the State of the place of delivery, has strong reasons to assure to him the protection of the regulatory provisions of the Convention.

35. The clause "one of the optional ports of discharge provided for in the document evidencing the contract of carriage" reinforces the point that the place of discharge is to be used as a criterion for application of the Convention only if its contact with the carriage of the goods is significant and not accidental. This formulation is based on the Rijeka/Stockholm draft with the addition of language to clarify the context in which the words "optional ports" are used.³⁶

36. Subparagraph (c): this provision has been discussed in connexion with draft proposal A. It might be noted that this provision, although useful, would be less significant in the context of draft proposal B, because of the inclusion of the port of discharge as an alternative criterion for the application of the Convention.

37. Draft proposal B contains a provision, identical to the language used in draft proposal A to exclude the use of nationality as a criterion for the applicability of the Convention.

³⁵ In its reply to the *note verbale* the Australian Government indicated its support for the place of discharge as a criterion for application "on the basis that, in practice, most litigation arising out of the relevant contracts is commenced in the port of destination". The reply of the Government of Pakistan makes the same point.

³⁶ This view of the meaning of "optional ports" was set forth at the Rijeka Conference. See para. 8 (b) above.

PART THREE. DOCUMENTARY SCOPE OF APPLICATION OF THE CONVENTION

A. Introduction

1. The Working Group on International Legislation on Shipping decided at its fifth session¹ to consider at the present sixth session the scope of application of the 1924 International Convention for the Unification of Certain Rules Relating to Bills of Lading.² Part two of the third report of the Secretary-General deals with the "geographical" scope of the Convention—the effect of the origin and destination of the carriage by sea. The present part three discusses the "documentary" scope of the Convention—the effect of the use (or non-use) of certain documents evidencing the contract of carriage.

B. Current law and practice

1. *Provision of the 1924 Brussels Convention concerning documentary scope*

2. The Brussels Convention, in article 1 (b), defines the term "contract of carriage" as follows:

(b) "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; it also applies to any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such instrument regulates the relations between a carrier and a holder of the same.

3. The 1968 Brussels Protocol³ to amend the 1924 Brussels Convention did not modify the foregoing definition of "contract of carriage".

2. *Ambiguities of the current test for documentary scope of "a bill of lading or any similar document of title"*

4. Under article 2 of the 1924 Convention "every contract of carriage" falling within the ambit of the Convention is subject to the responsibilities and liabilities set forth in the Convention. Thus the definition of the term "contract of carriage" in article I (b) is a vital element in determining the scope of the Convention. Pursuant to that definition, "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title."

5. Attention must be given to the precise meaning of two operative terms used in the definition, i.e. "bill of lading" and "document of title". The problems presented by these terms include the following:

(i) What documents are included (and, conversely, excluded) by the term "bill of lading"?

¹ Report of the Working Group on the work of its fifth session, New York, 5-16 February 1973 (A/CN.9/76), para. 75 UNCTRAL Yearbook, Vol. IV: 1973, part two, IV, 5.

² Hereinafter referred to as the "Brussels Convention". League of Nations, *Treaty Series*, vol. CXX, p. 157; reproduced in *Register of Texts*, vol. II, ch. II.

³ Hereinafter referred to as the "Brussels Protocol". Protocol to amend the International Convention for the Unification of Certain Rules Relating to Bill of Lading; *Register of Texts*, vol. II, ch. II.

(ii) What is the effect of the added phrase "or any similar document of title"? More particularly, is this phrase designed to extend the scope of coverage to documents other than "bills of lading"? Or does this phrase restrict the coverage where a bill of lading is not deemed to be a "document of title"? What is the meaning of the expression "document of title"?

(iii) What is the effect on coverage of the failure or refusal to issue a document evidencing the contract of carriage?

(a) *Meaning of "bill of lading"*

6. The first problem arises from the fact that in international shipping practice there are two distinct types of "bills of lading".

7. One type of bill of lading does not irrevocably identify the consignee but provides for example that the goods shall be delivered to "the order of" a designated person.⁴ Under such a bill of lading (often termed an "order" or "negotiable" bill of lading) it is understood that the carrier is obliged to deliver the goods to any person to whom the bill of lading may be endorsed, with the result that the carrier cannot safely deliver (and is not required to deliver) the goods until the bill of lading is surrendered.⁵ Consequently, possession of such an "order" bill of lading controls delivery of the goods. This common, and traditional, type of "bill of lading" falls within the scope of the 1924 Brussels Convention under any of the alternative readings that may be given to the definition of "contract of carriage" in article 1 (b).

8. Problems of interpretation are, however, presented by the fact that in some jurisdictions the contract of carriage may be evidenced by a "bill of lading" in which the identity of the consignee is fixed (e.g., "Consignee: William Buyer"). Under such a bill of lading (often called a "straight" or "non-negotiable" bill of lading), in accordance with its terms and the applicable law, a carrier may safely deliver the goods to the named consignee ("William Buyer", in the above example) without requiring surrender of the document. It follows that possession of such a "non-negotiable" bill of lading does not control delivery of the goods and consequently under widespread (but not universal) usage a straight or non-negotiable bill of lading would not be deemed a "document of title".

9. There is serious doubt as to whether a contract of carriage evidenced by such a "bill of lading" is governed by the 1924 Convention. The problem is complicated by the fact that the functional equivalent of such a "straight" (or "non-negotiable") "bill of lading" may be a document bearing some other label such as "consignment note". In addition, under such documents, the rights as between successive transferees and the obligations of the carrier with respect

to such transferees depend on the varying provisions of the contract and of national law. On the one hand, it has been stated that under French law a bill of lading which is "non-transferable" does not fall within the Brussels Convention.⁶ On the other hand, in the United States certain documents called "straight bills of lading" have received statutory recognition.⁷ In view of this statutory provision, it seems probable that American courts will consider straight "bills of lading" to be "bills of lading or similar documents of title" with the result that the Brussels Convention would cover straight bills of lading. A further source of ambiguity is attributable to the fact that while most jurisdictions recognize received-for-shipment bills of lading as documents of title,⁸ there are some jurisdictions where the national definition of "document of title" may not encompass received-for-shipment bills of lading.⁹

10. In sum, it appears that the term "bill of lading" is subject to serious ambiguity and lack of uniformity since its status under the 1924 Convention depends on whether the carrier employs the term "bill of lading" or some functional equivalent, and on the extent to which the document under local law is characterized as a "bill of lading", as "negotiable" or "transferable", or as a "document of title".

(b) *Meaning of "any other document of title"*

11. It has been stated that "no document of title similar to a bill of lading appears to be generally used in British shipping practice".¹⁰ However, under British law received-for-shipment bills of lading are generally accepted as falling within the scope of the 1924 Convention.¹¹ This result may be reached either by considering received-for-shipment bills of lading as "bills of lading" in the context of the Brussels Convention or by holding them to be "similar documents of title".¹²

⁴ Rodière, vol. 2, *Traité général de droit maritime*, Paris 1969, para. 483, p. 113.

⁷ 1916 Federal Bill of Lading Act, 49 U.S.C.A. 81 et seq.

⁸ See, e.g., Carver, *Carriage of Goods by Sea*, vol. 1, 12th ed.; London, 1971, p. 219 (for the British view), and Rodière, vol. 2, *Traité général de droit maritime*, paras. 440-441, pp. 57-58 (for the French view).

⁹ Thus Rodière notes that under the Codes of Greece, Lebanon and Yugoslavia only the on-board bill of lading is recognized as a "document of title"; Rodière, vol. 2, *Traité général de droit maritime*, p. 58, note 3. The question of coverage prior to loading (and, consequently, the acceptability of received-for-shipment bills of lading as "bills of lading" under the Convention) seems to have been resolved by the Working Group at its third session when it revised article 1 (e) of the 1924 Convention so that "Carriage of goods" covers the period during which the goods are in the charge of the carrier at the port of loading. 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), para. 25 (i); UNCITRAL Yearbook, Vol. III: 1972, part two, IV; see also Compilation, reproduced in this volume as annex to the preceding section.

¹⁰ Carver, vol. 1, p. 218, note 12.

¹¹ Tetley, *Marine Cargo Claims*, Toronto and London, 1965, at p. 2 states the general proposition that the 1924 Convention does apply to received-for-shipment bills of lading. For the same view under British law, see Carver's *Carriage of Goods by Sea*, vol. 1, p. 219; and under French law, see Rodière, vol. 2, *Traité général de droit maritime*, para. 440, pp. 57-58.

¹² For the ambiguities inherent in the term "bill of lading" see the discussion above at paras. 6-10. For the view that received-for-shipment bills of lading fall within the 1924 Convention as "similar documents of title", see Scrutton on *Charter parties and Bills of Lading*, p. 406.

⁴ The person so designated may be the buyer of the goods or a bank that has issued or confirmed a letter of credit providing for payment on the presentation of specified documents, including the bill of lading.

⁵ If the bill of lading is lost or believed to be destroyed, it may be possible to obtain delivery by indemnifying the carrier against his potential liability should there be a claim, subsequently, by an endorsee of the bill who is entitled to receive delivery of the goods.

12. There is substantial doubt as to what, if any, additional types or categories of documents might be held to be "similar documents of title".¹³ Thus, there is authority that the consignment note, the standard document evidencing a contract for carriage of goods by air and a document not infrequently made use of in connexion with the carriage of goods by sea, is not "transferable" and is not a "document of title".¹⁴

13. The relationship between the two parts of the phrase "bill of lading or any similar document of title" is subject to doubt. On the one hand, it can be argued that the concluding phrase ("any similar document of title") reflected an assumption by the drafters that the Brussels Convention should be limited to contracts evidenced by "documents of title". On the other hand, it could be concluded that the drafters expected the 1924 Convention to apply to any "bill of lading" (which was assumed to be a document of title), and that the phrase "any similar document of title" was designed to guard against the possibility that carriers might issue documents which perform the essential function of bills of lading but which are given some other designation.¹⁵ In any event, the term "similar documents of title" has not been a successful vehicle to assure that the 1924 Convention would apply to modern means for evidencing the contract of carriage such as consignment notes, computer punch cards, print-outs or other products of the electronic age.

(c) Effect of failure to issue a document

14. Article 1 (b) of the 1924 Convention refers to contracts of carriage as "covered by a bill of lading or any similar document of title". The emphasis on coverage by a document presents problems of construction when, for a variety of reasons, no document is issued or available.¹⁶

15. Articles 3 (3) and 3 (7) of the 1924 Convention give shippers the right to demand the issuance of a bill of lading containing specified provisions. Although, under a literal reading of the Convention, a question may be raised as to its applicability if a carrier wrongfully refuses to issue a "bill of lading

or any similar document of title", there is no indication that courts have permitted a carrier to avoid coverage of the Convention by the simple expedient of wrongfully refusing to issue a bill of lading.¹⁷

16. Questions of greater difficulty arise when the shipper has the right to demand a document, but he does not in fact make such a demand for its issuance and no document is issued. For some courts the crucial issue is whether or not the carrier and the shipper contemplated that a bill of lading will be issued in due course.¹⁸ Another view focuses on the customs of the particular trade and asks whether the parties intended "that, in accordance with the custom of that trade, the shipper shall be entitled to demand at or after shipment a bill of lading" and "(t)o such a contract the Rules will apply even though no bill of lading is in fact demanded or issued".¹⁹ Under the French law of 1966 concerning maritime contracts of carriage, the shipper has a right to demand a bill of lading, but the Act applies whether or not such a demand is actually made.²⁰ However, the above decisions and national legislation do not deal with all of the circumstances in which non-issuance of a document may occur, and there is no assurance that courts in other countries would interpret article 1 (b) of the Brussels Convention in the same manner.

17. There is widespread doubt as to the Convention's applicability to contracts of carriage intended to be covered by and customarily evidenced by a consignment note or simple receipt or where arrangements as to shipment or delivery of the goods are recorded and transmitted only by computer and related electronic devices.²¹ It appears that ocean carriage of goods under documents other than under traditional bills of lading has increased considerably in recent years. This change in practice seems to be the result of several factors: the diminished use in some trades of documentary credits (letters of credit); increased transportation of goods by sea in standard containers; and

¹³ Shipping orders prepared by the shipper and delivery orders prepared by a holder of a bill of lading are not themselves documents of title according to Rodière, vol. 2, paras. 491-495, pp. 122-127.

¹⁴ For a detailed discussion of consignment notes, emphasizing their non-transferability and lack of status as documents of title, and contrasting them with bills of lading, see, McNair, *The Law of the Air*, 3rd ed., pp. 182-183.

¹⁵ Sejersted, *Om Haagreglerne (Konossementskonventionen)*, 2nd ed., Oslo, 1949, p. 32. It should be noted that the term "similar document of title" first appeared in the 1910 Canadian Water Carriage of Goods Act.

¹⁶ It may be assumed that the 1924 Convention applies to a particular contract of carriage, if at any point in time during its performance the contract of carriage is "covered by" a bill of lading or any similar document of title, even though the document is subsequently lost or destroyed. Article 5 (2) of the Warsaw Convention (Convention for the Unification of Certain Rules relating to International Carriage by Air, Signed at Warsaw, 12 October 1929, League of Nations, *Treaty Series*, vol. CXXXVII p. 11) and article 4 of the CMR Convention (Convention on the Contract for the International Carriage of Goods by Road, Signed at Geneva, 19 May 1956, United Nations, *Treaty Series*, vol. 399, p. 189), both provide specifically that the "absence, irregularity or loss" of the document concerned shall have no effect on the applicability of the Convention.

¹⁷ An argument that applicability of the Convention is based directly on refusal to issue a bill of lading or similar document of title is subject to difficulty in that the provisions of article 3 (3) and 3 (7) which require such issuance, under a literal reading of article 2 are applicable only to a "contract of carriage" as defined in article 1 (b), which refers to contracts "covered by" a bill of lading or similar document of title.

¹⁸ *Carver's Carriage of Goods by Sea*, vol. 1, p. 202, citing *Pyrene v. Scindia Navigation Co.*, 2 Q.B. 402, 420, and *Anticosti Shipping Co. v. Viator St. Armand* (1959) (Can. Sup. Ct.) Lloyd's, vol. 1, Rep. 352 (in the latter case a bill of lading was actually prepared although it was not issued). The same view is expressed in Tetley, *Marine Cargo Claims*, pp. 4-5, but only if the carrier did actually receive the goods. The United States Carriage of Goods by Sea Act has similarly been held to apply when the parties contemplated the issuance of a bill of lading although none was actually issued. See *Krawill Machinery Corp. v. Robert C. Herd and Co.*, 145 F. Supp. 554, 561 (1956).

¹⁹ Scrutton on *Charter parties and Bills of Lading*, p. 405. The author then argues that article 6 of the 1924 Convention applies to cases where, otherwise, a bill of lading would be called for by the customs of that trade. *Ibid.*, p. 406.

²⁰ Rodière, vol. 2, *Traité général de droit maritime*, para. 392, p. 14.

²¹ A/CN.9/WG.3(V)/WP.9, a memorandum submitted by the Norwegian delegation to the fifth session of the Working Group on International Legislation on Shipping, emphasizes the recent trend toward ocean carriage under simple receipts akin to consignment notes, under automatic data systems, and even without any documents at all.

greater reliance on computer and electronic data processing.²²

18. To resolve such ambiguities created by use of the terms "bill of lading" and "document of title" the Working Group may wish to consider revision of article 1 (b) of the Brussels Convention. (See part D, below.)

3. *Exceptions in the 1924 Brussels Convention to the application of the Convention*

(a) *Charter parties*

19. The 1924 Brussels Convention excludes charter parties from its scope. The second paragraph of article 5 states in part:

"The provisions of this convention shall not be applicable to charter parties, but if bills of lading are issued in the case of a ship under a charter-party they shall comply with the terms of this convention. . . ."

20. There is no international convention which defines the charter-party or regulates the agreement evidenced by the charter-party. The types of agreements of which charter-parties are evidence and which are commonly entered into have been defined in the legislation of some States,²³ and in the case-law of other States.

21. According to national law and commercial practice, charter-parties normally evidence a contract between the owner of the ship and a charterer for the whole or a major part of the ship's services. The charter-party itself does not serve as a receipt for goods nor is it a document of title for the goods. A charter-party may be made for purposes other than the carriage of goods (e.g., passenger service, or towage or salvage).²⁴ Bareboat charter-parties evidence agreement whereby the ship itself and control over how it is managed and how and where it is navigated are transferred for a period of time to the charterer. On the other hand, time and voyage charter-parties are made for securing the use of a ship for a specific period of time or a particular voyage or series of voyages of the ship; navigation and management may remain in the hands of the shipowner.

22. International standards regarding the liability of the shipowner have not been established. The reason that charter-parties have escaped regulation has been attributed to the fact that "it has been felt, apparently, that the bargaining power of charterers and owners is equal enough that they may be left to contract freely".²⁵

(b) *Exception with respect to certain non-commercial shipments: article 6 of 1924 Brussels Convention*

23. Article 6 of the 1924 Brussels Convention reads as follows:

²² Selvig, *Konnossement og Remburs*, Göteborg, 1970; see also A/CN.9/WG.3(V)/WP.9, para. 6.

²³ French law of 18 June 1966 on charters and maritime transport defines the agreement under which charters are issued and the types of charters issued.

²⁴ Carver, *Carriage by Sea*, vol. 1, p. 263.

²⁵ Gilmore and Black, p. 175.

Article 6

Notwithstanding the provisions of the preceding articles, a carrier, master, or agent of the carrier and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or concerning his obligation as to seaworthiness so far as this stipulation is not contrary to public policy, or concerning the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect:

Provided that this article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms, and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.

24. Under article 6 of the Brussels Convention of 1924, in order for a contract for the carriage of goods to be considered outside the scope of application of the Convention, the carriage must fit within the complex guidelines set forth therein.²⁶ Problems have arisen with respect to the interpretation of terms such as "particular goods" and "ordinary commercial shipments made in the ordinary course of trade". This article does not appear to have been frequently invoked perhaps because of difficulties of interpretation. Nevertheless, article 6 makes it possible for carriers, under certain circumstances, to contract for the carriage of goods outside the mandatory rules of the 1924 Brussels Convention. It will be noted that a key element is the non-issuance of a bill of lading and the issuance of a non-negotiable receipt which is marked as such.

C. *Relevant provisions of other transport conventions (italics added)*

1. *Carriage by rail: CIM Convention (1970)*²⁷

25. Articles 1 (1), 6 (1), 8 (1) and 16 (1):

Article 1 (1)

"This Convention shall apply, subject to the exceptions set forth in the following paragraphs, to the carriage of goods consigned under a through consignment note made out for carriage over the territories of at

²⁶ The requirements under article 6 have been summarized as follows: "(a) a non-negotiable receipt must be issued; (b) the carriage must be of particular goods; and (c) the carriage must not be of an ordinary commercial shipment." Tetley, *Marine Cargo Claims*, p. 6 (1965).

²⁷ International Convention concerning the Carriage of Goods by Rail, Berne, signed 7 February 1970. Articles 1 (1), 8 (1) and 16 (1) appear in substantially the same form in the CIM Conventions of 1961 and 1952.

least two of the Contracting States and exclusively over lines included in the list compiled in accordance with Article 59."

Article 6 (1)

"The sender shall present a consignment note duly completed for each consignment governed by this Convention . . ."

Article 8 (1)

"The contract of carriage shall come into existence as soon as the forwarding railway has accepted the goods for carriage together with the consignment note. The forwarding station shall certify such acceptance by affixing to the consignment note its stamp bearing the date of acceptance."

Article 16 (1)

"The railway shall deliver the consignment note and the goods to the consignee at the destination station against a receipt and payment of the amounts chargeable to the consignee by the railway."

2. Carriage by air: Warsaw Convention (1929)²⁸

26. Articles 1 (1), 5 and 9:

Article 1 (1)

"This Convention applies to all international carriage of persons, luggage or goods performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking."

Article 5

1. "Every carrier of goods has the right to require the consignor to make out and over to him a document called an "air consignment note"; every consignor has the right to require the carrier to accept this document."

2. "The absence, irregularity or loss of this document does not affect the existence or the validity of the contract of carriage which shall, subject to the provisions of Article 9, be none the less governed by the rules of this Convention."

Article 9

"If the carrier accepts goods without an air consignment note having been made out, or if the air consignment note does not contain all the particulars set out in article 8 (a) to (i) inclusive and (q), the carrier shall not be entitled to avail himself of the provi-

sions of this Convention which exclude or limit his liability."²⁹

3. Carriage by road: CMR Convention (1956)³⁰

27. Articles 1 (1) and 4:

Article 1 (1)

"This Convention shall apply to every contract for the carriage of goods by road in vehicles for reward, when the place of taking over the goods and the place designated for delivery, as specified in the contract, are situated in two different countries . . ."

Article 4

"The contract of carriage shall be confirmed by the making out of a consignment note. The absence, irregularity or loss of the consignment note shall not affect the existence or the validity of the contract of carriage which shall remain subject to the provisions of the Convention."

D. Alternative approaches to scope of application of Convention

1. Scope of application based on reference to additional types of documents

28. As has been noted, the Brussels Convention of 1924 approaches the definition of its scope of application by referring to the issuance of certain types of documents. The difficulties inherent in this approach have been described above (paras. 4-17).

29. One response to the ambiguities and gaps arising under the present formulation would be to list additional types of documents which are now being used or which may be used in the future and which should fall within the Convention. Thus, documents such as consignment notes might be added to the list of documents whose issuance would make the Convention applicable to the contract of carriage. However, this approach probably would add to the complexity and ambiguity of the Convention. In addition, new labels for documents may well be employed in order to circumvent the application of the Convention. Thus, emphasis on the type of document issued (as contrasted with the contract of carriage) appears to be subject to inherent difficulties of draftsmanship, and could needlessly restrict the regulatory objective of the Convention. Gaps in the application of the Convention might well emerge. In order to fill these gaps further additions to the Convention provision would be necessary. For example, a clause would have to be added to the Convention providing for coverage in the case where a document of the type provided for in the Convention is usually issued in the circumstances

²⁸ Convention for the Unification of Certain Rules relating to International Carriage by Air, Signed at Warsaw, 12 October 1929, League of Nations Treaty Series, vol. CXXXVII, p. 11. The 1955 Hague Protocol to the Warsaw Conventions left articles 1 (1), 5, and 9 substantially unaltered. In the Protocol the term "air waybill" replaces the term "air consignment note".

²⁹ The Hague Protocol modified article 9 so that it now reads as follows: "If, with the consent of the carrier, cargo is loaded on board the aircraft without an air waybill having been made out, or if the air waybill does not include the notice required by article 8, paragraph (c), the carrier shall not be entitled to avail himself of the provisions of article 22, paragraph (2)." [On limitation of carrier liability.]

³⁰ Convention on the Contract for the International Carriage of Goods by Road, Signed at Geneva, 19 May 1956; United Nations Treaty Series, vol. 399, p. 189.

of the particular contract of carriage in question but in fact is not issued. It might also be necessary to add a clause in the Convention dealing with the absence or irregularity of a required document. A further clause might be needed to fill a gap in coverage by the Convention when the evidence of the contract of carriage is data recorded by a computer or other electronic processing system.

30. In sum, continuing to focus on the type of document would require a complex set of provisions which would be likely to give rise to a series of new problems of interpretation.³¹

2. Scope of application extending to all contracts of carriage of goods by sea

31. Instead of attempting to set forth a list of documents whose issuance controls the application of the Convention, consideration may be given to an approach whereby the Convention is applicable (subject to stated exceptions) to all contracts of carriage of goods by sea. Under this approach, which has been suggested in a number of replies by Governments,³² documents issued

³¹ Some replies indicate satisfaction with the present formulation of the rule on the scope of application of the Convention. The reply by the USSR states that "the arrangements provided for in article 1 (b) of the 1924 Brussels Convention on bills of lading whereby the Convention is valid in respect of carriage covered by a bill of lading or similar document, does not cause any practical difficulties". In its reply the Baltic and International Maritime Conference (BIMCO) states that there would seem to be no "valid reasons whatsoever for imposing strict rules to informal documents or transport under no documents when it is quite obvious under the present system that any shipper can, if he wants to, demand an ordinary bill of lading". The reply of the Office Central des Transports Internationaux par Chemin de Fer indicated that the present formulation of article 1 (b) was satisfactory; however, with respect to cases where there was no document to evidence the contract of carriage, application of the Convention could be provided for if the contents of the contract can be verified in some convenient fashion.

³² Australia, France, Norway, United States and Belgium. In its reply, Australia stated that it "would wish to apply the Hague Rules irrespective of whether the terms of the contract of carriage are evidenced". Similarly, the Norwegian reply makes reference to the Norwegian memorandum (A/CN.9/WG.III/WP.9, paras. 6 and 7) and states that in accordance with the views expressed therein, the Norwegian Government "submits that the new international law on carriage of goods by sea should apply not only when the contract of carriage is evidenced by a bill of lading or a consignment note or other non-negotiable transport document, but also when the parties have not issued any document at all. In other words, the new international law should in principle apply to any contract for the carriage of goods by sea." The French reply indicates that under French law in cases of maritime transport the law applies no matter what type of document was issued or even in the absence of a document. The French Government finds such a solution desirable in the international context; thus the Convention would no longer be focused on the rules regarding bills of lading but rather on the contract of maritime carriage. Similarly, the reply from the International Institute for the Unification of Private Law (UNIDROIT) states that the Convention should not be based on the issuance of a particular document; the Convention should be applicable even when no document was issued. In this connexion the UNIDROIT reply refers to the CMR Convention which makes that Convention applicable even in the case "absence, irregularity or loss" of the consignment note (article 4). In its reply the International Union of Marine Insurance (IUMI) reports that many of its members "suggest that all transports—except shipment under charter parties—shall be the subject of the Convention, irrespective of whether a bill of lading or other document has been issued or not".

would provide evidence as to the existence of a contract of carriage and its content, but the type of document or the absence of a document would not affect the applicability of the Convention to the contract of carriage. This approach to the definition of the scope of the Convention would not preclude a provision that the shipper may demand particular documents and set requirements for their contents.³³ Certain exceptions to the application of the Convention would be preserved; two such exceptions, presently found in the Brussels Convention, would be charter parties (article 5, second paragraph) and special types of agreements for non-commercial carriage or carriage of special types of goods (article 6). In these cases, and perhaps in other cases which the Working Group might wish to add, the Convention would not be applied to the contract of carriage. These issues could be examined by the Working Group in the light of the desirability of retaining article 6 and possible alternative formulations which might be considered.³⁴

32. A draft provision which would embody the essential elements of this broad approach to the scope of application of the Convention would read as follows:

Draft proposal

1. "Contract of carriage" applies to all contracts for the carriage of goods by sea.

Alternative (a)

2. The provisions of this Convention shall not be applicable to charter-parties, but if [bills of lading, consignment notes or other] documents evidencing contracts of carriage of goods are issued in

The IUMI reply adds, however, that other members are more cautious and recommends that "the expression 'any similar document of title' . . . should . . . be precisely defined on the lines of section 1 (4) of the United Kingdom Factors Act of 1889 . . .".

³³ This approach is similar to that taken under French law. The French Law of 18 June 1966 on charters and maritime transport provides (article 15) that the Law is applicable to all contracts for the carriage of goods by sea. Article 18 provides that on demand of the shipper the carrier must issue a bill of lading.

³⁴ The reply of the Government of the United Kingdom states that there are cases where both parties may prefer not to apply the Convention. Such cases would be: "(a) where goods are of no commercial value, but of a value which might be difficult to quantify are carried. (b) Where experimental forms of packing are used. (A case in point was a recently introduced form of refrigeration for carriage of meat from New Zealand.) (c) Where the special nature of the cargo makes application of the Hague Rules undesirable. (A recent case involved the carriage of highly miscellaneous goods which had been adjudged by a Prize Court. The cost of surveying the goods in order to identify them for the purpose of issuing a bill of lading would have been out of proportion to the value of the goods. It was therefore agreed that they should be carried at the risk of the cargo owner.)" The United Kingdom reply notes that article 6 of the present Hague Rules recognizes these special cases. The United Kingdom reply then sets forth the following proposal: "1. These Rules shall apply to all contracts for the carriage of goods by sea where a bill of lading or similar document of title is issued. 2. These rules shall apply to all other contracts for the carriage of goods by sea unless the parties have expressly agreed otherwise and a statement to that effect is inserted in the document evidencing the contract of carriage. 3. These Rules shall not apply to charter-parties."

the case of a ship under a charter-party they shall comply with the terms of this Convention.

Alternative (b)

2. The provisions of this Convention shall not be applicable to carriage under a charter-party whereby a ship or all or [the major] [a substantial] portion of the carrying capacity of a ship is [engaged] for a [stated] period of time or for a particular voyage. However, if [bills of lading, consignment notes or other] documents evidencing contracts of carriage of goods are issued in the case of a ship under a charter-party they shall comply with the terms of this Convention.

33. Paragraph 1 of the draft proposal is similar in approach and language to the Convention on transport of goods by road and the Convention on carriage of passengers by sea.³⁵ This formulation eliminates the need: (1) to specify and define various types of documents upon whose issuance application of the Convention depends, (2) to deal specifically with cases where new types of documents evidencing the contract are employed, and (3) to deal specifically with cases where no document is in existence because of a variety of ascertainable reasons.³⁶ This approach would appear to minimize the ambiguities and gaps inherent in the approach of the 1924 Convention, and would further the Convention's objective of setting mandatory minimum standards of carrier liability for the carriage of goods by sea.

34. Since the text refers to "contract" it might be asked whether the definition would make the Convention applicable to "quantum" or "requirements" contracts or to other contracts whereby the carrier undertakes to carry cargo for the shipper in the future.³⁷ In this connexion, attention may be directed to the revised version of article I (e) of the Convention which provides that: "(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."³⁸ It would appear that the foregoing language would restrict the scope of the Convention to arrangements for the carriage of specific goods resulting from "quantum", "requirements" or similar contracts.

35. Paragraph 1 refers to "all contracts for the carriage of goods by sea". The purpose of the words "by sea" is to exclude the Convention's application to the carriage of goods by inland waterways. This reference may be sufficient to limit the scope of the Convention to carriage by sea.³⁹

36. Paragraph 2 of the draft proposal sets forth two alternatives for dealing with the exclusion of charter-parties from the Convention.⁴⁰ Alternative (a) retains the language of article 5 of the Brussels Convention of 1924. The language of article 5 is retained on the assumption that in practice charter-parties are distinguishable from the contracts regulated by the Convention and that problems of interpreting the law in border-line cases can be resolved by national courts. The words in brackets are included since it may be considered desirable to take into account the issuance of documents other than bills of lading under a charter. (See paragraphs 11-18 above.)

37. Alternative (b) follows the approach proposed in the reply of the United States.⁴¹ Its purpose is to provide a general definition of charter-parties in order to more clearly distinguish such contracts from contracts for the carriage of goods covered by the Convention.

38. In addition to articles discussed in the third report of the Secretary-General the term "bill of lading" appears in the following articles of the Convention:

³⁵ Working Group, report on third session (A/CN.9/63, para. 26); UNCITRAL Yearbook, Vol. III: 1973, part two, IV.

³⁶ Part two of this report, dealing with Geographic Scope of application of the Convention, sets forth two draft proposals (paras. 21 and 26) which, by bracketed language, would make the Convention applicable to a "contract of carriage". If the Working Group adopts this bracketed language, referring to "contract of carriage", the definition of "contract of carriage" in the above draft proposal (para. 32, *supra*) would appear to be sufficient to restrict the scope of the Convention to carriage "by sea". On the other hand, if the Working Group does not adopt the bracketed reference to "contract of carriage" in the definition of geographical scope, it may be necessary to state elsewhere that the Convention applies to carriage "by sea". See, e.g., article I (e), as adopted by the Working Group: compilation, part B; Working Group, report on third session, paragraph 14 (1).

⁴⁰ The continued exclusion of charter-parties from the scope of application received support in the following replies: United States, Norway and the United Kingdom. The reply of the Government of Belgium states that the issue of whether the charter-parties should be placed within the scope of application of the Convention should be left open provisionally until after provisions regarding the carriage of goods have been formulated with respect to carriage other than under a complete or partial charter of a ship.

⁴¹ The proposal of the United States reads as follows: "The carriage of goods governed by this Convention does not include carriage under charter whereby the entire carrying capacity or a very substantial portion of such capacity is employed for a stated period of time or for a particular voyage. Nevertheless, this Convention shall apply to the carriage of goods for which the vessel is under charter from the moment at which a bill of lading or similar document issued under or pursuant to a charter-party regulates the relations between a carrier and a holder of the same."

³⁵ Article 1.1 of the Convention on the Contract for the International Carriage of Goods by Road, 1956 (CMR); article 1.b of the International Convention for the Unification of Certain Rules Relating to Carriage of Passengers by Sea, Convention on Maritime Law, Ministère des affaires étrangères et du commerce extérieur de Belgique, Service des traités, 1.V.1968, p. 79.

³⁶ In considering the scope of application of the Convention the Working Group may also wish to examine the need to make specific provision for an appropriate article of the Convention on the effect of computer data used with respect to the carriage of goods. In this connexion the reply of the United States to the *note verbale* of May 1973 states that "it is believed that a further expansion of the coverage of the Convention to the various types of informal documents which are now found in maritime transportation would be appropriate. With respect to those shipments for which no actual documentation is issued because the shipment is tracked through computer tapes the present requirement is an unnecessary complication." The reply by the International Institute for the Unification of Private Law also points out the growing use of electronic and automatic data with respect to the carriage of goods by sea.

³⁷ The Norwegian reply states that "contracts for successive shipment of a certain quantity of goods (quantum contracts) should be treated in the same manner as charter-parties for the purposes of the Convention". The reply of the Comité Maritime International (CMI) indicated that in the view of its international sub-committee on the subject "a mandatory system was not suitable for time-charters, volume contracts, contracts for consecutive voyages and voyage charters". Possibly to be included in such a list were "general booking agreements covering certain periods of time".

article 3 (3), (4), (7), article 4 (5) and article 5 (first paragraph). These articles present issues that are separate from the problems of scope of this Convention with which the present study is concerned. The Working Group will, however, wish to bear in mind the action it takes with respect to article 1 (b) when it deals with the problems presented by the above additional articles.

PART FOUR. ELIMINATION OF INVALID CLAUSES IN BILLS OF LADING

A. Introduction

1. The second report of the Secretary-General, in part six, analysed the basic problems raised by invalid clauses and examined four, not necessarily mutually exclusive, approaches (paragraph 7) aimed at achieving the removal from bills of lading of certain clauses that are normally held to be invalid on the basis of article 3 (8) of the Brussels Convention.¹ This report will not repeat the previous discussion; it will supplement the earlier report with alternative draft texts.

2. In examining the alternative proposals set forth below it is useful to recall that the inclusion of invalid clauses has caused uncertainty in the minds of cargo owners as to their rights and liabilities. The removal of such invalid clauses "would facilitate trade, because their continued inclusion [in bills of lading] has the following onerous effects: (a) the clauses mislead cargo interest, 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".²

B. Clarifying and specifying mandatory requirements of the Convention

3. As was noted in the second report of the Secretary-General, the impact of invalid clauses in the bill of lading can be minimized, and doubt and litigation can be reduced by making the mandatory requirements of the Convention clear and explicit, which is a central task of the Working Group. In this connexion, the Working Group may wish to consider 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."

4. Such a provision is a vital part of the Convention, but questions have been raised as to its clarity in

some settings. Thus it has been stated that article 3 (8) as presently formulated offers "a too restricted interpretation" as it relates to "the rules of liability only". Therefore, it has been suggested 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".³

5. The Working Group may wish to consider the desirability of a provision that would implement this view while also serving to clarify some other issues presented under the present formulation. Such a provision could read as follows:

Draft proposal A⁴

1. Any clause or stipulation in the [bill of lading] [contract of carriage] shall be null and void to the extent that it derogates from the provisions of this Convention. The nullity of such a clause or stipulation shall not affect the validity of the other provisions of the contract of which it forms a part. A clause assigning benefit of insurance of the goods in favour of the carrier shall be deemed to derogate from the provisions of this Convention.

2. Notwithstanding the provisions of paragraph 1 of this article, a carrier may increase his responsibilities and obligations under this Convention provided such increase shall be embodied in the [contract of carriage] [bill of lading issued to the shipper].

6. The first sentence of paragraph 1 in draft proposal A is designed to accomplish the following results:

(a) A bill-of-lading clause will be invalid to the extent that it derogates from any provision of the Convention, and not just the provisions that relate directly to liability (as is the case under the present language of article 3 (8)). This would eliminate the current necessity of trying to fit every type of bill-of-lading clause which should be proscribed into the present narrow formulation of the rule in article 3 (8). It may be noted that where a provision of the Convention provides the parties or one of the parties with an option (e.g., arbitration provision), the exercise of the option is, of course, not in derogation of the provision of the Convention.

(b) However, the bill-of-lading clause will be invalid "only to the extent" that it derogates from any of the provisions of the Convention. This clarifies issues, left open under the present language of article 3 (8), where clauses are valid under certain circumstances and invalid under others.⁵

7. The second sentence of paragraph 1 of draft proposal A resolves a basic ambiguity in the Brussels Convention of 1924, namely, what is the effect on the contract of an invalid clause. The reaction of the courts could previously range from (a) declaring that a fundamental breach of the contract has occurred voiding

³ Reply of the Government of Sweden to the Secretariat questionnaire of July 1972.

⁴ At a future stage the Working Group may wish to consider whether the revised language of article 3 (8) may be supplemented by article 6 which gives validity under the Convention to certain special agreements which derogate from the rules of the Convention.

⁵ Second report of the Secretary-General, part six, paragraph 10; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 4.

¹ A fifth possible approach suggested by the reply by Norway to the Secretariat questionnaire of July 1972 would be 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".

² UNCTAD secretariat report on bills of lading, para. 295 (United Nations publication, Sales No. E.72.II.D.2).

the contract to (b) confining invalidity to the specific contract clause which derogates from the Convention provisions.

8. Paragraph 2 of draft proposal A is added in order to permit the parties to the contract of carriage to depart from certain rules set forth in the Convention, but only if the result of such derogation will be to increase the carrier's responsibilities and obligations under the Convention. The provision thus carries forward the substance of article 5, paragraph 1, of the Brussels Convention of 1924, which states that a carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities, or to increase any of his responsibilities under this Convention provided such surrender or increase shall be embodied in the bill of lading issued to the shipper. For example, the second paragraph of article 3 (6) of the Brussels Convention of 1924 provides that "if the loss or damage is not apparent, the notice must be given within three days of the delivery of the goods". Paragraph 2 of draft proposal A would permit the parties to increase, but not decrease, the notice period beyond the three days set forth in the Convention provision. The requirement that the contract of carriage should not derogate from the provisions of the Convention is designed to prevent the drafter of the contract from directly or indirectly escaping the minimum standards that have been developed to deal with the responsibility of the carrier. The draft proposals set forth below, reflecting some other approaches, assume that the Convention will include a general rule on invalid contract clauses, such as that articulated in article 3 (8) or the modification indicated in draft proposal A.

C. Listing specific types of invalid clauses in the Convention

9. A second approach would be to specify in the text of the Convention those types of clauses that should be considered invalid. It will be noted that the Brussels Convention of 1924 specifically bans "benefit of insurance" clauses (last sentence of article 3 (8)).

10. There are certain basic difficulties inherent in listing specific clauses in the Convention and branding them as invalid. The second report of the Secretary-General discussed some of these difficulties:

(a) Many clauses are "invalid" when applied to some factual situations but are valid when applied to other situations. For example, the so-called "freight" clause which specifies that freight is earned vessels and/or goods "lost or not lost" may be invalid where the carrier is legally responsible for the loss but may be valid where the carrier is not legally responsible.⁶

(b) The identification in the Convention of certain clauses as invalid might well lead legal draftsmen to prepare new wording to achieve the same ends. The new clauses would be defended on the ground that they are not among the clauses specifically proscribed by the Convention.⁷

⁶ Second report of the Secretary-General, part six, paragraph 10, foot-note 9; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 4.

⁷ In replies by Governments to the questionnaire, doubts were expressed on the feasibility of identifying invalid clauses. Second report of the Secretary-General, part six, foot-note 11; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 4.

11. The Working Group has already examined problems regarding invalidity raised by a number of clauses not specifically covered by the Brussels Convention of 1924. These problems have been resolved by specific substantive provisions in the revised texts adopted by the Working Group. Among the bill-of-lading clauses that will be regulated by new provisions in the Convention are choice of forum clauses, arbitration clauses and trans-shipment clauses. It may well be that the problems of invalidity raised by specific bill-of-lading clauses can be resolved within the framework of specific substantive provisions. However, if the Working Group's review of the substantive drafting leads it to the conclusion that a particular type of invalid clause remains outside the framework of substantive provisions, the Working Group may wish to decide whether the draft substantive rules should be clarified or extended, or whether it would be necessary to specifically describe and outlaw such a clause.

D. Setting forth sanctions for invalid clauses

12. A third approach would be to penalize the use of invalid clauses in order to eliminate or at least discourage their use as well as to compensate cargo owners for expenses incurred by them as a result of the carrier's inclusion of invalid clauses.

13. One approach would be the removal of the limitation of liability in cases where the carrier, in a court action or in arbitration proceedings, seeks to rely on a clause in the bill of lading or other document of transport which is inconsistent with article 3 (8).

14. A provision based on this approach would read as follows:

Draft proposal B—alternative (1)

"The carrier shall not be entitled to the benefit of the limitations on liability provided for in article () of this Convention if he asserts in judicial or arbitral proceedings any clause in the [contract of carriage] [bill of lading] which is clearly inconsistent with article [3 (8)]."

15. It must be recognized that the word "clearly" which is used to qualify the word "inconsistent" in draft proposal B—alternative (1), can give rise to problems of interpretation. However, if the provision did not require that the clause in question be *clearly* in derogation of the Convention, it would serve to inhibit the carrier from legitimately asserting a defence which could be successful in cases where the validity or invalidity of the clause in question is arguable.

16. Alternative (1) above would not be penal in nature since it would merely involve a removal of the limitation of liability and would make the carrier liable for the actual damages caused the cargo under the rules. However, it could have a significant deterrent effect in the preparation of standard bill-of-lading clauses.

17. A second alternative below is designed to compensate for the damage caused by the interposition of the invalid clause. A provision embodying this idea would become a second paragraph of article 3 (8) and would read as follows:

Draft proposal B—alternative (2)

"The carrier shall be liable for all expenses, loss or damage resulting from a clause which is null and void by virtue of the present article."

18. This alternative requires the carrier to bear liability for "all expenses, loss and damage" resulting from the inclusion of an invalid clause and makes a causal connexion between the presence of the invalid clause and the harm done a prerequisite for liability.⁸ For example, under such a Convention provision the carrier would bear the cost of litigation between carriers and cargo owners or between shippers and consignees involving the invalid clause.

E. Requiring the contract of carriage to contain a notice clause regarding invalid clauses

19. A fourth approach responds to the need to direct attention of the cargo owners to provisions in the Convention which invalidate clauses in the contract of carriage. Cargo owners, particularly those cargo owners who do not have the experience and legal advice available to large business establishments, might consider themselves bound by an invalid clause in the contract of carriage whose effect would be to relieve the carrier from the liability established under the Convention.

20. To this end, a provision could be inserted into the Convention requiring the contract of carriage to state that any provision that is inconsistent with the Convention will not be given effect. It would appear, however, that such specific requirement would have little effect unless it were accompanied by sanctions.⁹

21. A provision requiring notice that the Convention is applicable and setting forth a sanction for the non-inclusion of such notice in the contract of carriage might read as follows:

Draft proposal C

"1. Every [bill of lading] [contract of carriage] shall contain a statement that: (a) the carriage is subject to the provisions of this Convention, and, (b) that any clause of the [bill of lading] [contract of carriage] shall be null and void to the extent that it derogates from the provisions of this Convention."

"2. If the [bill of lading] [contract of carriage] does not contain the statement specified in para-

graph 1 (a) and (b) the carrier shall not be entitled to the benefit of the limitation of liability provided for in article () of this Convention."

22. Paragraph 1 (a) of draft proposal C is aimed at making the cargo owner aware that the contract of carriage is governed by the Convention. This approach has been taken in both the Warsaw (Air) Convention and in the Convention on Carriage by Road (CMR).¹⁰ Moreover, a number of national enactments of the Brussels Convention of 1924 have incorporated such a clause into the text of the Convention.¹¹

23. Paragraph 1 (b) of draft proposal C is aimed at alerting the cargo owner to the fact that the Convention provides protection against certain types of bill-of-lading clauses.

24. Paragraph 2 of draft proposal C responds to the need for stating the consequences of failing to include the prescribed statement in the contract of carriage. It would appear that in the absence of express sanctions the carrier would have little, if any, incentive to include such a statement.

25. In the absence of a Convention rule imposing specific penalties, the application of sanctions for not including the required statement in the contract of carriage would be left to national law, leading to varying solutions and thereby impairing the uniform application of this provision of the Convention. Solutions under national law could range from imposing strict liability upon the carrier to not applying any sanction at all.

26. In examining paragraph 2 of draft proposal C, the Working Group may wish to consider the following: (a) the feasibility of including a provision in the contract of carriage giving notice to the cargo owner of the applicability of the Convention to the carriage and of the invalidity of clauses inconsistent with the Convention; (b) the limited scope of the sanction, which would make the carrier liable for the actual loss or damage to the cargo owner resulting from the carrier's fault.

27. If the Working Group should adopt a provision along the lines of draft proposal C, the Working Group may wish to consider at a later stage whether the provision should be added to the article on the required contents of the contract of carriage (article 3 (3) of the Brussels Convention of 1924).

⁸ Second report of the Secretary-General, part six, paragraphs 11 and 12 and foot-note 12; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 4.

⁹ *Ibid.*, paras. 13-15; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 4.

¹⁰ Second report of the Secretary-General, part six, foot-note 2; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 4.

¹¹ United Kingdom Carriage of Goods by Sea Act, 1924 (14 and 15 Geo. 5, c. 22), Section 3; United States Goods by Sea Act, 46 U.S.C.A. 1300-1315, Section 13.

3. Study on carriage of live animals (A/CN.9/WG.III/WP.11)*

Note by the Secretariat. In accordance with a request made by the United Nations Commission on International Trade Law at its fifth session (1972),** the International Institute for the Unification of Private Law (UNIDROIT) has prepared a study on the carriage by sea of live animals, which is attached hereto.

* 27 December 1973.

** 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)*; UNCITRAL Yearbook, vol. III: 1972, part one, II, A, para. 50.

It will be noted that the conclusions in the study regarding the history and practice on the subject of the carriage of live animals are set forth in paragraphs 99 to 106. Three alternative proposals are made in the study (proposal I at paragraph 108; proposal II at paragraph 113; proposal III at paragraph 118).

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FORWARD

At its third session (31 January-11 February 1972), the UNCITRAL Working Group on International Legislation on Shipping (hereinafter referred to as "the Working Group"), during its discussion of carrier's responsibility for deck cargoes and live animals, agreed to the suggestion made by the observer for the International Institute for the Unification of Private Law (UNIDROIT) that UNIDROIT should prepare a study on the rules which should apply to the carriage of live animals (A/CN.9/63, para. 34*). The scope of the study was subsequently defined in an agreement between the two secretariats as follows: "Preparation of a study on the issue of the inclusion of the carriage of live animals within the scope of application of the Hague Rules, including concrete alternative proposals

dealing with treatment of the problems of the carriage of live animals, and the reasons therefor, based *inter alia* on: (1) any particularly helpful national legal rules and practices, statistics, or other relevant information regarding the ocean carriage of live animals, and (2) practice and law with respect to the handling of this problem in other modes of transportation."

Accordingly, this study, after outlining the problem and describing the difficulties encountered in the course of research, endeavours to define live animals, as the subject of this form of carriage, and also discusses the statistical and health aspects. The study goes on to consider how the carriage of live animals by all modes of transport, with particular emphasis on carriage by sea, is dealt with in the Convention, legislation and practice. After considering the status of the attendant and multimodal transport of live animals, the study concludes with a number of specific proposals for con-

*UNCITRAL Yearbook, Vol. III: 1972, part two IV.

sideration by the Working Group in the context of the revision of the Hague Rules.

I. PRELIMINARY CONSIDERATIONS

Background of the question

1. Almost a century ago the *Pandectes Belges* (*Animal*, No. 6) noted that, although considerable space was devoted to animals in legislation, the provisions concerning them were associated with the most disparate subjects, bearing little relationship to each other. The conclusion was: "This is undoubtedly the reason for the absence of any treatise containing a compilation of all regulations relating to the status of animals in modern law, and particularly in our modern positive law." That observation is still true today. Research carried out by specialists in civil law rarely leads them into the field of transport law; in matters involving animals, they confine themselves to questions of ownership, or of civil liability for damage caused by animals. Even specialists in transport law seldom turn their attention to the transport of animals, which are considered simply as one of the many types of goods which may be the subject of a contract of carriage. Transport circles prefer to concern themselves with the more usual and "safe" types of goods, the carriage of which holds the fewest surprises. Their reaction to animals, which cannot be carried as either freight or passengers, is to give this—to use a fashionable term—hazardous cargo unfavourable treatment or, as in the case in carriage by sea, to treat animals as outlaws in the strict meaning of the word. Yet animals can be goods of considerable economic value, in view of their impact on trade balances, particularly in the developing countries.¹

2. The corollary, inadequate protection of animals being transported, can often be attributed to lack of diligence on the part of those to whose care they are consigned. The high mortality of animals during transport (injured or sick animals almost invariably have to be slaughtered or thrown overboard), an argument which is often invoked to justify reduced liability, is generally due to lack of care on the part of one of the parties to the contract of carriage. The shipper may pack the animals badly, or fail to provide a competent attendant or to give the necessary instructions; the carrier, who is protected almost completely by exemption clauses, may fail properly to man or equip the vehicle to be used for this particular type of transport or to take proper care of the cargo when he assumes responsibility for it. Thoughtless laxity on one side and abdication on the other; stricter regulations might make the parties more aware of their responsibilities, thus avoiding economically unjustifiable trade losses and preventing the animals from being subjected to inhumane treatment.

3. Public opinion can also, over the long term, influence the setting of standards, particularly at present, when the protection of animal species is associated with the protection of natural resources and the environment. The suffering of animals which have been

treated brutally—not too strong a word—has aroused as much indignation and recrimination as did the transport of slaves in slave-ships long ago. Vigorous campaigns to remedy this state of affairs have been launched by the World Federation for the Protection of Animals, the International Union for the Conservation of Nature and Natural Resources and, in England, by the Royal Society for the Prevention of Cruelty to Animals (RSPCA).

4. This introduction would be incomplete if it did not mention the first result—one whose repercussions may be widespread—achieved at the intergovernmental level by these efforts: the European Convention for the Protection of Animals During International Transport (Paris, 13 December 1968) (hereinafter referred to as "the Paris Convention"), which is based on a draft prepared by the World Federation for the Protection of Animals.² The immediate aims of the Convention may not be exactly the same as those of UNCITRAL in its revision of the Hague Rules,³ in which the transport of animals is not the most important element. But the aim of the Paris Convention, as stated in its preamble, is "to safeguard, as far as possible, animals in transport from suffering". Since such suffering almost always involves damage (death, injury, depreciation), the purpose is almost identical to that of the sponsors of the revision, i.e. to prevent the ocean carrier from disclaiming responsibility unless he "proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences".⁴ Similarly, the conviction, also stated in the preamble, "that the requirements of the international transport of animals are not incompatible with the welfare of the animals" will be shared by those who undertook the revision with a view to improving the handling of the goods.

5. The Paris Convention is of a general nature, since it can be acceded to by States which are not members of the Council of Europe (article 49). It may also influence other Conventions on transport law. Resolution (68) 23 of the Committee of Ministers of the Council of Europe recommended that the States parties to that Convention should not only act upon its principles in preparing measures in this connexion, but also take into account its provisions in any "multilateral agreement they may make with States not bound by the said Convention, where these agreements contain clauses relating to the international transport of animals".

Difficulties

6. A number of serious difficulties were encountered in gathering information for this study, which may ex-

² As of 1 June 1973, this Convention had been ratified by Denmark, Iceland, Luxembourg, Norway, Sweden and Switzerland; it has been signed (and is in the process of being ratified) by Austria, Ireland, Italy and the United Kingdom.

³ The expression "the Hague Rules" is used by the Working Group to refer to the Brussels Convention of 25 August 1924 for the Unification of Certain Rules Relating to Bills of Lading. In this connexion, possible confusion with "the Hague Rules, 1921" is immaterial, since the same provision excluding live animals from the definition of "goods" occurs in both the Convention of 1924 and the 1921 Rules.

⁴ See paragraph (1) of the new text on carrier's responsibility prepared by the Drafting Party of the Working Group (fourth session), document A/CN.9/74, para. 28; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 1.

¹ Statement by Dr. N. Singh (Chairman, UNCITRAL Working Group on International Legislation on Shipping), introduction of the report on International Legislation on Shipping, *India News* (Permanent Mission of India to the United Nations).

plain some of its deficiencies. In respect of the international carriage of live animals by rail and road, the task was made easier by the existence of specific international regulations, even though they are not of worldwide application: these are the International Convention Concerning the Carriage of Goods by Rail (CIM), the Agreement on the International Transport of Goods (SMGS) in the socialist countries, and the Convention on the Contract for the International Carriage of Goods by Road (CMR). As yet, the literature has not gone very deeply into the questions raised by these forms of carriage. As for judicial precedents, the clarity of the procedures laid down in the international regulations appears to have left little room for litigation.⁶ It should be pointed out that the International Union of Railways (UIC) is currently preparing a "Register" of applicable regulations (other than the provisions of the Conventions) whether mandatory or in the form of recommendations, concerning the obligations of shippers, attendants, agents and railways.⁸

7. As far as air transport is concerned, the Warsaw Convention of 12 October 1929, as amended by the Hague Protocol of 28 September 1955 does not distinguish between live animals and other goods. A provision added by the Hague Protocol (article 23, paragraph 2) makes certain exemption clauses of the type sometimes applied to live animals in explicit contractual stipulations, permissible. However, air carriers also seem to have realized that the key to the problem lies in defining more precisely the diligence to be exercised by all parties to the contract with respect to this specific type of goods, rather than in sheltering behind the psychologically and commercially questionable defence of exemption clauses. Their trade association, the International Air Transport Association (IATA), established a special organ, the Live Animals Board, to prepare and keep up to date a "Live Animals Manual", which is a comprehensive code covering the packing, handling and careful carriage of 231 different animal species, ranging from insects and fish to elephants and whales.⁷

8. The fact that the Hague Rules exclude the transport of live animals by sea has caused them to be over-

⁶ The Central Office for International Railway Transport (OCTI) very kindly consulted its records for summaries of relevant court decisions in connexion with CIM international rail carriage of live animals; there have been hardly more than a dozen such decisions since the beginning of the century (see annex I). With regard to carriage by road under CMR, which is relatively recent, no significant precedents appear to have been established as yet.

⁷ The preamble of the UIC draft register states that, since "in international traffic, railways account for a substantial proportion of all shipments of live animals . . . (they) must endeavour to protect the animals being transported and to spare them unnecessary suffering by applying standard guidelines consistent with the international conventions and the national regulations of the various countries".

⁸ "This manual is intended as a guideline for use by Member Airlines and shippers concerned with the transport of live animals by air." It covers the aspects which must be considered to ensure that animals are carried without harm to themselves or to the handling personnel." (IATA Live Animals Manual, third edition, page 6.) The third edition of this manual came into effect on 1 June 1973. IATA intends gradually to raise the status of the specifications contained in it from that of recommended practice to that of mandatory resolutions; meanwhile, IATA is taking steps to obtain official government recognition of this manual. Two extracts from the manual appear in annex II.

looked in the literature. Judicial precedents are few, since the injured parties and their insurers (when the animals are insured), faced with the carriers' almost total exemption from liability, generally feel it to be futile to initiate potentially unprofitable legal proceedings. This silence, occasionally broken by decisions designed to protect the shipper,⁸ conceals an unhealthy situation which those involved appear willing to tolerate out of either resignation or self-interest. Attempts to obtain information on contracts, documents and practices in this field, or to secure statistics or even opinions on the question, met with resistance, which indicates the existence of a very real problem and of apprehensions with regard to efforts to find a solution. Until the courageous step taken by UNCTAD to undertake a critical review of the Hague Rules, hardly anyone had attempted to lift the veil. However, the goodwill shown towards this research in many circles made it possible to overcome many obstacles. Special thanks for their help are due to the Government of Australia, FAO, IMCO, the United Nations regional commissions (in particular ECAFE and ECA), OCTI, UIC, IATA, IRU, the Hong Kong International Chamber of Commerce and its Secretary, Mr. R. T. Griffiths, to Mr. F. G. Pemberton, member of the United Kingdom delegation on the UNCITRAL Working Group, and the zoological gardens of Rome and Naples.

II. DEFINITIONS AND RELATED MATTERS

Animal

9. One obstacle from the outset was the difficulty of defining the word "animal", although people generally claim to know perfectly well what it means. Whereas it is easy for man to find a criterion to distinguish between himself and the animal in terms of the faculty of reason,⁹ or of etymology,¹⁰ the dividing line between animal and vegetable is not absolutely clear-cut.¹¹ Certain plants (myxomycetae) have the power of motion, others (the sensitives) respond to tactile stimuli. For the purposes of this research, an FAO expert gave the following—somewhat circular—definition of an animal: "any living being which, according to biological taxonomy, is considered as belonging to the animal kingdom". At the legal level, "an animal may be broadly defined as any living creature typically capable of self-movement; the legal definition restricts 'animal' to creatures other than man. . . . In the language of the law, the term ordinarily includes all living creatures not human or rational and endowed with the power of voluntary self-motion, unless the statute or other contract in which the word is employed

⁸ See, for example, Paris Court of Appeal, 12 February 1964, *Droit maritime français*, 1965, p. 151.

⁹ "In its common acceptation the word 'animal' includes all irrational beings", *Commonwealth v. Turner*, 14 N. E. 130, 145 Mass. 296. "In legal terminology the word 'animal' includes all animate beings not endowed with reason, and therefore excludes man" (*Novissimo Digesto Italiano*, "Animali" para. 1).

¹⁰ In Latin, *animal* = living, animate being; from *anima*, meaning breath, life.

¹¹ "The present state of science makes it impossible to give a definition which distinguishes in a few words between animal and vegetable; it is even debatable whether this distinction is worth preserving in the case of the most primitive organisms". (A. Lalande, *Vocabulaire technique et critique de la Philosophie*, fifth edition, Paris.)

indicates that it should be given another or more restricted meaning".¹²

10. In Roman law animals were classified as *fera* (wild), *mansueta* (tame) and *mansuefacta* (domestic).¹³ This distinction has retained its importance in contemporary systems of law, particularly in transport law, in which the risks involved are assessed according to the degree of "tamelessness" of the animal, thus following the customary approach which stresses the special dangers of this cargo due to the inherent vice of the animal's excitability¹⁴ or simply affirms that it is generally recognized that the transport of animals entails special risks which cannot be dealt with by standard controls embodied in legislation.¹⁵ A different approach to the problem is based more specifically on the rights and obligations of the parties—the shipper, who is necessarily aware of the type of goods being carried, i.e. the animal, and must present them for transport accordingly, and the carrier, who, though under no obligation to carry this or any other goods, must, once he has agreed to carry it, ensure that, like any other goods, it reaches its destination safe and sound. The problem then presents itself as a specific application of the general principles relating to the diligence to be exercised by each of the parties for the protection of the goods carried.

The term "live animals"

11. The standard terminology of transport legislation refers to "live animals",¹⁶ the term used in the title of this study. In this terminology no attempt is made to clarify the meaning of this term, although the French "*vivant*" and the English "live" may not have exactly the same meaning. This lack of concern may be explained by the fact that the literature (notably in the field of Anglo-American law where the idea of exemption originated) has neglected to define the term more accurately. At a time when the need to respect life in all its forms is being impressed upon us, it may seem ironical that the fact that the goods are "live" is invoked in order to claim reduced responsibility, or no responsibility at all, for them.¹⁷

¹² 3 *Corpus Juris Secundum*, "Animals", para. 1 and decision cit.

¹³ Paras. 12-16, I. *De rer. div.* 2.1., and in D. II, 1-6; *de adquir. rer. dom.* 41, 1.3, paras. 14-16, *de adquir. vel amit.* poss., 41, 2.

¹⁴ Carver (by Colinvaux), *Carriage by Sea*, eleventh edition, 1963, para. 15 ("injuries arising from their own vice or timidity").

¹⁵ Knauth, *The American Law of Ocean Bills of Lading*, third edition, 1947, page 194.

¹⁶ With the exception of the Paris Convention, in which it was not felt necessary to specify, since the word "protection" appeared in the title, that the animals to which it relates are live animals (Explanatory Report on the European Convention for the Protection of Animals during International Transport, Council of Europe, Strasbourg, 1969, title and p. 8).

¹⁷ It was in reaction to the disastrous consequences of this approach that the RSPCA launched its SELFA (Stop the Export of Live Food Animals) campaign. In a report (meeting of 17 October 1972, page 2), the RSPCA shows that the trade in animals intended for slaughter is conducted in conditions "which will shock the minds and stir the consciences of every human person" and concludes that "the export carcass trade should be encouraged and developed to the point where the export of live animals for food is totally eliminated". The Explanatory Report of the Paris Convention (page 7, para. 1) recognized that this solution would be ideal from the point of view of the

12. This ambiguous term gives rise to confusion, for to stress the fact that the animals are "live" inevitably leads to the conclusion that they are perishable. The concept of "perishable" goods, although undoubtedly close to that of "live" goods is nevertheless entirely different from it and must not be confused with it. The term has been used from time to time, however, notably in modes of transport other than shipping, in cases of damage to an animal during transport.¹⁸ At any rate, perishable goods transported under ocean bill of lading were definitely not excluded from the Hague Rules;¹⁹ at the very most, these rules might, if put to the test, lead to an exemption being granted in favour of the ocean carrier on the grounds of the "inherent vice" of such goods.

13. Closer analysis of this ambiguous term reveals the idea of "*vivacité*", of "restlessness", of "vitality of the freight",²⁰ and of the "*nature vivante de l'animal*". This brings us to the truly typical characteristic of the animal as a special transport hazard—its capacity for irrational self-movement²¹ which enables it to give outward expression to its "intrinsic qualities and propensities".²² Because of the consequences, which are often unpredictable and uncontrollable, the fear aroused in animals by the unfamiliar experience of transport constitutes a specific risk which is related to the natural disposition of the animal and distinguishes it from inanimate goods and which, in the very nature of things and by virtue of its character, makes it more akin to a passenger than to an inanimate bale of cotton.²³ It was this indisputable fact that led a celebrated author,²⁴ criticizing a decision of the Commercial Court of Marseilles²⁵ which extended the live animal concept, for the purposes of exemption, to cover oysters transported in baskets, to ask whether it was legitimate to give a general and absolute sense to the term "live animals" and whether it might not be better to take account only

protection of animals. This state of affairs is also made possible by the fact that the transport of live animals is conducted in conditions of total freedom from responsibility.

¹⁸ See *American and English Encyclopedia of Law*, volume II, ed. 1887, Bill of lading, page 237; Willes J. in *Blower v. Great Western Railway*, L. R. 7 C. P. 655. See also, on aviation law, the discussion of article 23, para. 2 of the Warsaw Convention, as amended at The Hague.

¹⁹ At The Hague Conference in 1921, a proposal was made to include perishable goods in the exceptions mentioned in article 1 (c) of the 1921 Rules, because of the special danger involved in transporting them. The proposal was rejected only because the Committee felt that they would be covered by the provisions of article V (article 6 of the Brussels Convention of 1924) (International Law Association, Report on thirtieth Conference, volume II, *Proceedings of the Maritime Law Committee on the Hague Rules*, 1921, page 79).

²⁰ Hutchinson, *The Law of Carriers*, ed. 1906, Sect. 336, p. 343.

²¹ The judges noted, in *Kansas, etc. R. Co. v. Reynolds*, 8 Kan. 623, that "the voluntary motion of the stock introduces an element of danger in the transportation against which neither reason nor authority requires that the carrier insure..."

²² See *American and English Encyclopedia of Law*, volume III, ed. 1887, "Carriers of Livestock", p. 8, and the cases cited of "injuries arising from intrinsic qualities of livestock", all injuries caused in one way or another by the mobility of the animals.

²³ Hutchinson, op. cit., sect. 35, emphasizes the difference between this type of transport and the transport of ordinary goods.

²⁴ G. Ripert, *Droit Maritime*, Paris, 1952, II, p. 686, footnote 1.

²⁵ Court of Marseilles, 9 November 1948, *Revue Scapeli*, 1948, 43.

of the criterion of the mobility of animals in deciding whether the discriminatory treatment prescribed in the Rules should be applied to them. Another author,²⁶ in his analysis of this term, concluded that it applied only to "animals for which an attendant is generally provided, or which have at least some freedom of movement", adding that, in both French law and the Hague Rules, "in practice, it is mainly the carriage of cattle which is contemplated".

14. The literature is not the only source of doubts about the scope to be given to this term. The Paris Convention did not consider all animal species, but concentrated on those which made up the majority of international shipments,²⁷ endeavouring in particular to specify the protective measures necessary for "domestic solipeds and domestic animals of the bovine, ovine, caprine and porcine species".²⁸ It devotes only a brief general article to cold-blooded animals (article 46) and excludes from its specific frame of reference many creatures which, according to biological taxonomy, are classified as animals, while holding that "in principle, humane treatment should extend to all species of animals".²⁹

15. A similar observation is called for in the light of the varied aspects of current practice. The accidents involving animals during transport which are reported in the press relate mainly to animals transported in groups (cattle, sheep, equidae, pigs, rodents—rabbits, hares—and poultry), all of which are capable of self-movement. Court precedents, too, relate almost exclusively to these species. The decisions communicated by OCTI (see annex I), for instance, relate to the following species: bovidae (2), horses (2), pigs (2), dogs (2), poultry (2), rabbits (1). Those quoted in the *American and English Encyclopedia of Law*, under "Carriage of Livestock (loc. cit.) are concerned predominantly with cattle, horses, donkeys and mules, sheep, pigs and dogs. The *per capita* limitations laid down in certain standard contracts or national railway tariffs also relate to these species.³⁰ In addition, the way in which standard bills of lading are worded also indicates reluctance to give a general application to the term "live animals", since, in many cases, other

species are listed by name beside this term.³¹ One bill of lading which illustrates these doubts quite clearly is the Regular Long Form Inward Bill of Lading of United States Lines, which stipulates that "the term 'live animals' shall include birds, reptiles, fish and all animate things other than human beings". The Standard Conditions of Carriage of Goods printed on the back of the Contract for Conveyance of Livestock of the Belfast Steamship Co. Ltd. (see annex III), which set out the conditions governing the transport of cattle between Northern Ireland and the United Kingdom, carefully stipulate that "the expression 'animal' includes livestock, domestic and wild animals, birds, fishes and reptiles". Even in statistics the term is not given universal scope. The limited number of species on which there are statistics corresponds approximately to those listed above (cattle, sheep, pigs, poultry, horses, donkeys, mules) with, from time to time, more generic headings such as "live animals for food" (see statistics of ECAFE and Australia).

16. Neither this nor any other similar term occurs in the original Warsaw Convention or in the version amended at The Hague. It does, however, appear frequently in air waybills, in which it is customarily followed by a precise indication of the animal species concerned, in the space provided for "type and description of the goods".

17. Royer notes with approval³² an observation made by Schadee that, under the terms of article 1, paragraph (c) of the Hague Rules, live animals should be taken to mean animals which were alive on delivery for transport. The death of such animals during transport would not have the effect of invalidating any exemption clauses stipulated in respect of them by the carrier in the contract of carriage.

18. To sum up, the term "live animals", which was originally coined for the negative purpose of describing an exception to the range of goods which can be carried by sea, proves to be ambiguous and difficult to define precisely when an attempt is made to make a positive general statement of its substance. Furthermore, in practice, most of the animals transported belong to a limited number of animal species, whose capacity for self-movement may give rise to special hazards, a feature live animals share with other goods (perishable, dangerous, nuclear, etc.) that no one has ever dreamed of excluding from the mandatory framework of standard international rules.

19. This introduction would be incomplete without a brief review of the problem of statistics on the

²⁶ F. Sauvage, *Manuel pratique du transport de marchandises par mer*, Paris, 1955, p. 36. In non-international transport, the French Act of 1966 does not exclude live animals, but allows the ocean carrier to exempt himself by contract from his liability for them. On the same subject, see S. Calero, *El contrato de transporte marítimo de mercancías*, Rome-Madrid, 1957, p. 33 and foot-note 46.

²⁷ Domestic solipeds and domestic animals of the bovine, ovine, caprine and porcine species; domestic birds and domestic rabbits, other mammals and birds; cold-blooded animals (article 2).

²⁸ Explanatory report on the European Convention for the Protection of Animals during International Transport, Council of Europe, Strasbourg, p. 7, para. 3.

²⁹ *Ibid.*, p. 7, para. 2.

³⁰ As in the British Charge Scheme, in which upper limits are specified for: horses, bovidae, pigs, sheep, donkeys, mules, dogs, deer, goats, poultry and other birds, rabbits and other small quadrupeds. The same is true of the General Conditions for the Carriage of Livestock of the Australian Commonwealth Railways (horses, cattle, mules, camels, donkeys, sheep, pigs, dogs or other small animals) and in East Africa, e.g. in Kenya, in the East African Railways and Harbour Act (art. 31: horses, mules, cattle with and without horns, donkeys, sheep, goats, dogs and any other small animals).

³¹ As in clause 8 of the Uniform North Atlantic Bill of Lading Clauses, 1937 (Knauth, op. cit., first ed., 1937, p. 80: standard bill of lading still widely used in, for example, Italian shipping) deals separately with "live animals, birds and fish", while the version used in the Warship-Lading Form 1942 (Knauth, op. cit., third ed., p. 95) adds "reptiles". Clause 8 of the bill of lading of the Holland-Amerika Lijn relates to: "Live animals including reptiles and crustacea . . .". Clause 11 of the bills of lading of the Holland-West Afrika Lijn and of the Holland-Afrika Lijn and clause 9 of the bill of lading of the Australia West Pacific Line refer to "Deck cargo, livestock and plants"; the same formula is found in clause 9 of the Conline Bill 1950-1952 and of the bill of lading of Spain's Naviera Eco.

³² S. Royer, "Le transport sous connaissance en droit néerlandais", in *Le transport maritime sous connaissance à l'heure du Marché Commun*, Paris, 1966, p. 97.

transport of animals and of the health and veterinary aspects of transport of this kind.

Statistics

20. Statistics on the international transport of animals is another area in which it has been found difficult, and sometimes impossible, to gather pertinent information.³³ It is apparent from the information gathered from various sources that the available data must be treated with caution. Analysis of those data shows up their deficiencies and imperfections, which are attributable to, among other things: the lack of uniform criteria for compiling and evaluating the data, the discrepancy between the exports from one country to another and the imports of the latter country, and the incomplete, indeed misleading, nature of these data as a reflection of actual sales and shipping operations. In the last-mentioned context, a trade transaction may follow a course which is, in effect, entirely different from that anticipated and declared in good faith by the informants for statistical purposes. Others are influenced in making declarations by the fear that the information provided may be used for other purposes (taxes, customs, exchange controls), or may deliberately falsify them in order, for example to conceal a destination which they do not wish to reveal and which will be disclosed to the master of the vessel when he is at sea. In addition, cases of completely illegal transport of goods, particularly by sea, are by no means uncommon. An eloquent example of such a case is provided by the RSPCA in its report mentioned above.³⁴ Towards the end of 1970, the RSPCA learned of the signing of a £1 million contract for the shipment of cattle from Ireland to North Africa. Knowing of the inhumane conditions prevailing in such shipments and in the slaughtering process at the point of destination, and suspecting that a considerable proportion of the cattle would come "illegally" from sources in Northern Ireland, the RSPCA carried out an inquiry in co-operation with its Irish counterpart. In March 1971 it was discovered that cargoes of calves were being shipped regularly to North Africa from Greenore, a port in the Republic of Ireland, situated a few miles from the border with Northern Ireland. The producers of these cattle received a substantial subsidy, the cost of which was borne by the British taxpayer and which was intended to protect domestic meat producers against competition from foreign meat.³⁵ These large shipments of animals will undoubtedly not have been reflected in the statistics. In the same report, the RSPCA condemns the common practice of declaring a final consignee who is not the true final consignee, in order to conceal contraventions of the 1957 Balfour Assurances on cattle export from the United Kingdom to continental Europe and the Republic of Ireland.

21. In any event the statistics³⁶ confirm the information regarding the considerable volume and the value

of such shipments; this is true of the numerous intra-continental shipments³⁷ and of the continental or inter-continental coastal trade, both import and export. Statistics often show, in the case of the developing countries, that the purpose of the imports is to improve livestock breeding, while exports consist of animals for slaughter, or so-called "exotic" animals. In this connexion, it is difficult to isolate in the figures provided transactions involving single animals or small groups of animals shipped to zoological gardens, circuses or pet dealers, the value of which exceeds that of animals transported in bulk. Details of such transactions would be interesting, in view of their financial importance to the exporting countries, in terms of the balance of trade.

Health and veterinary measures

22. Sanitary and veterinary controls play a major role in the transport of animals. They are of decisive importance in the initiation and completion of such transport—in, for example, identifying the animals, guaranteeing their fitness for carriage and, especially, preventing epizootic diseases. The veterinary officer may therefore be called upon to inspect prior to shipment the fittings of the vehicle used and its stocks of drinking-water and feeding stuffs, and to take steps at any time during carriage to treat or slaughter ill or injured animals, or to take appropriate measures in case of an epidemic. This is expressly provided for in the Paris Convention (articles 3, 12, 32). In principle, animals intended for international transport are not accepted for loading in the exporting country without a certificate³⁸ identifying them and guaranteeing that they are fit for transport and healthy and that there have been no epidemics at the place of origin for a certain period prior to their shipment. Since such carriage is often multimodal, the issue of certificates must usually be repeated at each break in transport. In the case of carriage by sea, a new veterinary inspection will take place before shipment. Ocean carriers require a veterinary health certificate before animals are loaded, as a guarantee against a refusal to allow unloading at the destination, a refusal which would constitute an obstacle to delivery.³⁹ At the destination the animals

³⁷ See the study by Dr. C. O. Ilori, of the ECA/FAO Joint Agriculture Division, *Economics of Livestock Transport in the West African Sub-region* (Addis Ababa, August 1970.) The importance of this traffic should increase considerably over the next decade, with the extension of intro-continental rail networks and especially road networks which will, among other things, provide land-locked countries with easier access to the sea.

³⁸ A veterinary certificate of origin and health for the animals generally mentions the following: number, species, sex, age of the animals; countries of origin and destination; name and address of the owner and the consignee; mode and means of carriage; date of the health examination. It certifies that the animals have been at the place of origin for a certain period; that they were kept under special observation for a certain number of days during this period and were found to be healthy, free of ectoparasites and fit for transport; that the animals and the districts of origin, transit and loading are free from contagious diseases; that the means of transport have been regularly cleaned and disinfected.

³⁹ A quarantine period must often be observed before shipment, either because the animal has just arrived from another country and is therefore placed under quarantine on arrival until reshipment, or because the country of destination, fearing the introduction of epidemic germs into its territory, re-

³³ Thanks are due to the relevant departments of FAO for their advice and their kind offer to furnish any information available to them.

³⁴ Report referred to in foot-note 17, para. 11, foot-note 13.

³⁵ *Ibid.*, Appendix A, p. 3.

³⁶ Thanks are also due to the Government of Australia, ECAFE, and ECA for information provided.

are generally quarantined for varying periods. Here again, the role of the veterinary officer is decisive, since quarantine cannot be lifted, and consequently delivery cannot be made, without a health certificate.

23. These repeated health inspections can have a number of consequences in the performance of carriage of animals by sea (compulsory slaughtering, delays caused by quarantine or rest periods prescribed as treatment), the entire cost of which is always borne by the shipper. They might also have a decisive effect in determining (in accordance with the applicable law, since the application of the Rules is excluded by definition) the actual times of taking charge of the goods and delivery. The result of these inspections, in practice, is that at the point of shipment, the carrier will actually take the animals into his charge under ship's tackle and on presentation of the health certificate of export. At the destination, on the other hand, the required intervention of the health authorities will separate the time of unloading under ship's tackle and delivery to the consignee.

24. *De lege ferenda*, the effect of the health authorities' action must be taken into account when determining tackle-to-tackle responsibilities, on the basis of the carrier's obligation as custodian of the goods. In other words, the consequences of an extension in time of the carrier's responsibility for animals subject to health controls will have to be studied, since there will be no real "*receptum*" by him or by his agents if the animals are not yet in his custody, or have been withdrawn from his custody prior to loading and after discharge. However, of the rules drafted by the Working Group, the text drawn up at the third session seems to be compatible with these factual situations.⁴⁰ At the point of shipment, the carrier would be responsible for the animals from the time he has taken them over from the health authorities, or on presentation of a certificate from such authorities, and consequently before the animals have passed the ship's rails,⁴¹ or, in other words, from the time when actual *receptum* begins. On the other hand, at the destination the said carrier would be deemed to have delivered the goods by handing them over to an authority or another third party to whom the goods must be handed over under the laws and regulations applicable at the port of unloading, i.e., even after the goods have passed over the ship's rails.⁴² here paragraph (ii) (c) of the proposed text would apply specifically to the health authorities at the port of unloading to whom, under local laws and regulations, the animals must be handed over. In this context, the dele-

quires quarantine before shipment to its ports and, in some cases, action by its official representatives at the place of shipment. For companies participating in the West African Joint Service, "in addition to a veterinary certificate showing that the animal are fit for shipment, a quarantine clearance certificate is also required before the animals are accepted". Likewise, for the Far Eastern Freight Conference, "it is normal in most countries to which a shipment of animals is going to be made to insist on receipt, in advance of the shipment, of a Certificate of Health in respect of the animals, signed by the Government Veterinary Officer in the country of origin and for a Clearance from the country of destination to be made to the country of origin before shipment is allowed".

⁴⁰ Report of the Working Group, third session (A/CN.9/63), para. 14; UNCITRAL Yearbook, Vol. III: 1972, part two, IV.

⁴¹ *Ibid.*, proposed revision of art. 1 (e) preamble of para. (ii).

⁴² *Ibid.*, proposed revision of art. 1 (e); para. (ii) (c).

tion of article 7 of the Hague Rules, decided upon by the Working Group at its third session,⁴³ would be acceptable even in respect of live animals, since a broadening of the scope of responsibility at both ends of the voyage would cover only the periods from the completion of health formalities to loading, at the shipment point, and from unloading to the beginning of the health formalities at the destination. The animals would thus be treated on the same footing as all other goods subject to one form of mandatory action or another by a third party vis-à-vis the contract of carriage. On this very important point, therefore, the carriage of animals would be compatible with the proposed new rules.

III. THE PROBLEM OF THE INTERNATIONAL CARRIAGE OF LIVE ANIMALS BY VARIOUS MODES OF TRANSPORT

A. International carriage by sea

25. Since this subject is dealt with in detail in the following chapter, it will be sufficient to state at this point that the provision of the Hague Rules which refers, by way of exclusion, to this type of carriage is the definition of "goods" (article 1 (c)):

"Article 1. In this Convention the following words are employed with the meanings set out below:

"(c) 'Goods' includes goods, wares, merchandise, and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried."

26. This provision places live animals outside the sphere of application of the Rules. The carrier of live animals will therefore be unable to invoke the protection of the Rules (exclusion of particular cases, limitation of liability, prescription, etc.). But he will be able to include in the contract any non-liability clause which is normally allowed when the Rules do not apply. The rules of liability governing his contract will depend on the law deemed applicable under the rules on conflict of laws. Carriers derive considerable advantages from the narrow scope of this definition. That is why the report by the UNCTAD secretariat suggested that it should include live animals, in order to avoid conflict of laws and to give fair treatment to the owners of this type of goods, which plays an important role in the export trade of many developing countries.⁴⁴

B. International carriage by air

27. Article 23 of the Warsaw Convention, which is based directly on article 3, paragraph 8 of the Hague Rules, made the Convention peremptory law by prohibiting air carriers from including any exemption clause whatsoever in the contract of carriage.⁴⁵

"Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve

⁴³ *Ibid.*, para. 15 (c) and para. 17.

⁴⁴ TD/B/C.4/ISL.6/Rev.1, paras. 187-188 and foot-note 146.
⁴⁵ O. Riese, "Die internationale Luftprivatrechtskonferenz in Haag", *Zeitschrift f. Luftrecht*, 1955, p. 28.

the nullity of the whole contract, which shall remain subject to the provisions of this Convention."

28. After the war, the Legal Committee of ICAO proposed to reduce the severity of this provision and to allow the air carrier to exempt himself from the risks arising from the inherent quality or defect, whether latent or not, of the goods (Rio draft, article XIII). After lengthy discussions, the Hague Protocol added to the above-mentioned article 23 a second paragraph, the English and French versions of which differ:

"2. L'alinéa 1^{er} du présent article ne s'applique pas aux clauses concernant la perte ou le dommage résultant de la nature ou du vice propre des marchandises transportées."⁴⁶

"2. Paragraph 1 of this article shall not apply to provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried."

29. In this connexion, it should be noted, first of all, that goods which would be covered by the clauses referred to in the new text are not excluded from the scope of the Convention (as live animals are in the Hague Rules). In other words, the general prohibition is removed only in this specific case. In all other cases, the Convention will continue to govern the classes of the contract of carriage (those relating to, for example, for a and prescription or other provisions, such as article 25 on wilful misconduct, or its equivalent, on the part of the carrier).⁴⁷

30. Secondly, it seems clear that the carriage of live animals was not contemplated either originally or during the *travaux préparatoires* on this new provision.⁴⁸ This provision cannot be ignored here because of the English version (see para. 28) and because of the standard practice of inserting in air way bills clauses such as "Carrier is not responsible for death of animal due to natural causes",⁴⁹ which some are seeking to legitimize as an admissible exemption clause, relying on the basis of the above-mentioned paragraph 2, on the quality (the word "spéciale" was deleted from the French text at the Hague) or inherent vice (the words "whether latent or not" were also deleted) of the animal. But it has been observed that such clauses tend to affect, sometimes strongly, the general principle of liability set forth in article 20 of this Convention, and that such a clause might even seem superfluous, since, in the context of article 20, it would apply only if, the death of the animal being attributable to natural causes, the carrier "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". However, owing to their formal resemblance to "livestock clauses" in shipping, such clauses may because of being transposed

from one mode of transport to another in people's minds, give rise to confusion, and possibly to the endless litigation which the French delegation at the Hague foresaw.⁵⁰

31. A third point should be noted in connexion with the misunderstandings to which the difference between the English and French texts might give rise. On the one hand, the word-for-word reproduction in the English text of the wording of article 4, paragraph 2 (m), of the Hague Rules should logically, with respect to "inherent defect, quality or vice", lead English-speaking jurists⁵¹ to rely on the body of relevant common law experience, especially in the field of shipping law—that body of experience mentioned in a foot-note citing Carver, on this very subject of live animals, in the Secretary-General's report⁵² which is justly critical of the application to live animals of the exception for "inherent vice" provided for in the above-mentioned paragraph 2 (m).⁵³

32. After the rejection of the proposal to enumerate the goods covered by this exemption (which included "wild animals" in addition to "highly perishable goods"),⁵⁴ the final drafting of the French text was preceded by laboured debates on the causal relationship between the quality or vice of the goods and the production of the damage, and on the consequences of a fault of the air carrier or his agents and servants as a factor contributing to its production. For obvious reasons, continental writers have not adopted as clear-cut a position as their English counterparts on the words "quality" and "inherent vice". Their definitions are rather imprecise and intricate, and in some instances make it possible to classify a specific attribute as either a quality or an inherent vice of the goods, according to the circumstances.⁵⁵

33. On the subject of proof, the air carrier must prove: that an agreement on the exemption in question has been concluded; that the exemption is applicable to the damage which occurred in the case in point; that the cause of the damage must be attributed

⁵⁰ Cit. by Riese, op. and loc. cit.

⁵¹ Thus McNair, in *The Law of the Air*, London, 1964: "This phrase has a well-recognized meaning in cases of carriage by sea (see *Scrutton on Charter-parties*, 17th ed., p. 201, and ... *Carver's Carriage by Sea*, 11th ed., para. 15, p. 15) and by land (*Hambury's Laws*, 3rd ed., vol. 4, p. 145) and in insurance policies (see ... *Arnould on Marine Insurance*, 15th ed., para. 762, p. 717), and it is necessary to consider it further here. Briefly, it may be said that the loss or damage must have resulted from some quality and defect inherent in the article concerned, which in the light of the events which have occurred rendered it unable to withstand the normal incidents of the carriage contemplated by the parties to the contract in question".

⁵² Report of the Secretary-General on the responsibility of ocean carriers for cargo bills of lading, A/CN.9/63/Add.1, para. 67 and foot-note 69; UNCITRAL Yearbook, Vol. III: 1972, part two IV, Annex; for Carver, see foot-note 11 *supra*.

⁵³ A/CN.9/63/Add.1, para. 73; UNCITRAL Yearbook, Vol. III: 1972, part two, IV, annex.

⁵⁴ Belgian proposal at the Hague, afternoon meeting, 14 September 1955.

⁵⁵ On the lack of precision of the text see the opinions concerning the example, cited by Garnault (The Hague, afternoon meeting, 12 September 1955), of lobsters which lose their shells and die at high altitude: is such damage due to the "quality" of the goods or to the act or omission of the carrier or his crew which caused them to be flown at high altitude without taking due precautions?

⁴⁶ The Spanish text, following the French text, reads "... pérdida or daño resultante de la naturaleza o vicio propio de las mercancías transportadas".

⁴⁷ Riese, op. cit., p. 29.

⁴⁸ Australia has rightly pointed out that "as amended by the Hague Protocol and supplemented by the Guadalajara Convention of 1961, this Convention does not purport to treat live animals as different in any way from other goods". (Study on Deck Cargo, Live Animals and Trans-shipment, in A/CN.9/WG.III/WP.4/Add.1 (vol. II), p. 46.)

⁴⁹ Another example: Live animals in the Wood case: "Carrier is not responsible for death of animal due to natural causes".

to the quality or inherent vice of the goods.⁵⁶ In fact, since the burden of proof is on the carrier, he would be wise to invoke both causes at once. The claimant, on the other hand, may prove, in rebuttal, that the damage was not caused by those risks or was only partially caused by them.

34. The IATA Conditions of Carriage⁵⁷ relating to goods⁵⁸ include live animals, together with explosives and perishable goods, among the goods which are accepted for carriage only if certain provisions of the air carrier's conditions of carriage are fulfilled (article 5, paragraph 5). While duly specifying at the outset that they operate subject to the binding provisions of the Convention or the law, these conditions state, with respect to the limitations on the air carrier's liability, that he is liable neither for losses, damage nor costs arising from either the death of an animal during carriage from natural causes or the death or injury of an animal owing to its behaviour or that of other animals (for example, bites, kicks, trampling, strangulation), nor for claims caused by, or having as a contributing cause, the condition, nature or natural disposition of the animals (article 14, paragraph 8).

35. In this context, IATA is to be commended for its efforts (see paragraph 7) to find a constructive solution to the problems raised by live animals by establishing its Live Animals Board and bringing into use the *IATA Live Animals Manual*. The manual will help to prevent damage, bring to light mistakes and omissions by the parties involved, and facilitate proof. It contains practical information on the receiving and handling of animals, customs, health and quarantine operations, and the basic and specific behaviour patterns of animals. With a commendable regard for balance, it sets out, on the one hand, the obligations of and care to be provided by the shipper (loading, stowing, provisioning, etc.), and the special instructions to be given to the carrier when the shipper does not have an attendant accompanying the animals. On the other hand, the manual indicates the measures to be taken by the carrier with regard to animals in general and the 231 species with which it deals, in particular. The fact that the carrier has strictly followed the instructions given in the manual will probably be regarded in many cases as a determining factor if he is required, under the terms of article 20 of the Convention,⁵⁹ to

prove that he took all the necessary measures to avoid damage.

36. According to our information, the question of the carriage of animals by air does not seem to have been specifically raised in the work at present under way at ICAO on the revision of the part of the Air Convention relating to goods.

C. International carriage by rail

37. The unification of the law on the carriage of goods by rail in Europe began with the Berne Convention of 1890—the source of both the International Convention Concerning the Carriage of Goods by Rail (CIM)⁶⁰ and the agreement on international carriage of goods (SMGS).⁶¹ Until the advent of the motor car, railways had from the start been regarded as monopolies controlling their operations and their tracks, against which the public had to be protected—hence the railways' general obligation to perform carriage and the strict liability rules imposed on them. This obligation was counterbalanced by permitting, in addition to the customary exemption clauses a number of special causes of exemption for goods which, in other modes of transport, many carriers might refuse or might accept only on certain conditions. Those goods include live animals. "The risk of carriage in these cases is thus left with the person entitled to the goods, on the view that he is generally the originator of the special dangers involved in them. In all these cases, the Convention removes the presumption of liability from the rail carrier and it is up to the claimant to prove that the damage was not attributable, in whole or part, to one of the risks which are presumed to have caused it."⁶²

38. The CIM (in both 1970 and 1961) contains two groups of causes of exemption of railways from the general principle of liability set forth in article 27, paragraph 1, (CIM 1970), normal causes (paragraph 2) and special (also called "privileged") causes (paragraph 3); the latter include the carriage of live animals:

"3. Subject to article 28 (2) of this Convention, the railway shall be relieved of liability when the loss or damage arises out of the special risks inherent in one or more of the following circumstances:

⁵⁶ W. Goldmann, *Internationales Lufttransportrecht*, Zurich, 1965, p. 138.

⁵⁷ The IATA Conditions of Carriage actually have the status of recommendations, whereas the IATA Conditions of Contract (which contain no provisions on the carriage of animals) are binding on the members of IATA.

⁵⁸ The carriage of animals as luggage of their master, the passenger, will not be considered here. Their acceptance is subject to the prior agreement of the carrier, even in the case of small animals (IATA, Conditions of carriage of passengers and luggage, art. 9, paras. 4 and 13).

⁵⁹ The Warsaw Convention, art. 20.—"The [air] 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". This article should be compared (as was done in the Secretary-General's report in connexion with the Hague Rules: A/CN.9/63/Add.1, para. 236; UNCITRAL Yearbook, Vol. III: 1972, part two, IV, annex) with the new—perhaps more lenient—provision drawn up by the Working Group at its fourth session (A/CN.9/74, para. 28; UNCITRAL Yearbook, Vol. IV: 1973, part two, III, 1).

⁶⁰ The CIM, signed in Rome in 1933, was revised in 1952, 1961 and 1970; the 1970 CIM has not yet come into force. The work of revision is undertaken periodically in Berne by the OCTI.

⁶¹ *Soglasenie o Mezhdunarodnom Gruzovom Soobshchenii* (SMGS), which came into force in 1951; the 1955 version has been in force since 1956. Unlike CIM, this Agreement was concluded (in German, Chinese and Russian) not by the Governments of the socialist countries, but directly by the railways administrations of those countries. For mixed CIM/SMGS traffic, the provisions of the former continue to govern traffic. See the German text with a French translation in annex 1 of *Bulletin des transports internationaux par chemins de fer*, 1960. The work relating to this Convention is handled in Warsaw by the Organization for Railway Collaboration (OSZHD).

⁶² Study by the Secretary-General on the economic implications of the Convention on ... combined transport (ST/ECA/160), para. 42.

"...

"(g) The carriage of livestock;⁶³

"(h) The carriage of consignments which, under this Convention, or under the conditions applicable or by special agreement made with the sender and referred to in the consignment note, must be accompanied by an attendant, in so far as the risks are those which it is the purpose of the attendant to avert".

With regard to the burden of proof, the CIM provides that (article 28, paragraph 2):

"2. When the railway establishes that, in the circumstances of the case, the loss or damage could be attributed to one or more of the special risks referred to in article 27 (3) of this Convention, it shall be presumed that it was so caused. The claimant shall, however, be entitled to prove that the loss or damage was not, in fact, attributable either wholly or partly to one of these risks."

39. The literature stresses the fact that the specific danger of transporting animals by rail arises from their natural disposition.⁶⁴ But some writers have considered that this argument is superfluous and that other causes of exemption (such as those inherent in the nature of the goods, or the fault of the shipper) are quite sufficient.⁶⁵ The general view is, nevertheless, that this exemption is justified because it is the shipper's responsibility to take the necessary measures to avoid damage by supervising his goods or having them supervised. That being so, the justification seems to be based on the shipper's obligation to have his goods accompanied by an attendant. It is, in fact, on this basis and on this condition that animals are accepted for carriage under article 4, paragraph 1 (d) of CIM (1961). Under this provision, consignments of live animals must be accompanied by an attendant provided by the shipper, unless the animals in question are small, and are packed for transport in properly-closed containers, or unless the tariffs or inter-network agreements provide for exceptions; the shipper must specify in the consignment note the number of attendants or the fact that there is no attendant. Nevertheless, the CIM of 1970, in the same subparagraph (d), while reaffirming the shipper's obligation to provide an attendant to accompany the animals, added a new exception: the case in which the railways waive the attendance requirement at the request of the shipper. This new provision could have serious consequences, since "in such cases, except where otherwise provided, the railway is relieved of liability for any loss or damage resulting from a risk which it was the purpose of the attendant to avert"—a clear reference to the above-mentioned special cause of exemption in article 27, paragraph 3 (h). OCTI does not seem to be considering for the next CIM any amendment of the rules just outlined.

⁶³ In 1933 CIM this subparagraph (g) referred to the special danger which transport constitutes for live animals.

⁶⁴ De Nanassy-Wick, *Das Internationale Eisenbahnfrachtrecht*, Vienna, 1965, p. 197, refers to "natural disposition" ("natürliche Beschaffenheit").

⁶⁵ O. Loening, *Internationales Übereinkommen über den Eisenbahnfrachtverkehr vom 23.10.1924*, 1927, p. 681; F. Selgsohn, *Das Internationale Übereinkommen über den Eisenbahnfrachtverkehr (IUG)*, 1930, p. 421, foot-note 56.

40. If the railway establishes that the damage took place during carriage of the animals, it will be exempted from liability if the fact of carriage alone accounted for the damage. But it is unthinkable, notes Rodière,⁶⁶ that the railway carrier should never be liable solely because the damage was sustained by a live animal. If he were to be relieved of liability by the mere fact that the nature of the damage (a broken leg, for example) may arise from the circumstance that the article carried was a live animal, no animals would ever again be entrusted to such a carrier; "and the outcome would be both uneconomic and legally absurd, because the carrier undertook to carry live animals and not the corpses of animals."⁶⁷ The carrier will therefore be unable to confine himself to claiming that live animals were involved. He must establish that, in the circumstances of the case, the loss or damage may have been caused by the live nature of the animals.

41. The CIM therefore sets forth a precise sequence of proofs and rebuttals.⁶⁸ The carrier must prove: (1) that live animals are involved; (2) what the factual circumstances of the occurrence were; (3) that those circumstances justify the affirmation that the damage may have been caused by the fact that live animals were involved. Moreover, in this special case, the railway may also be able to rely on article 4, paragraph 1 (d), 1, and thus to claim that the special clause contained in article 27, paragraph 3 (h), is applicable, since the animals must in principle be accompanied by an attendant. When the carrier has thus met these requirements regarding proof, the claimant, in turn, will have the right to establish that the damage was not caused, totally or partially, by this particular risk. It should be noted at this point that there is still some controversy as to whether the provisions of articles 27 and 28 of CIM, taken together, amount to exemption from carrier's liability (with relief from liability and burden of proof on the claimant) or only to a reversal of the burden of proof.⁶⁹

42. This mechanism will not, therefore, apply when the damage can be traced to an occurrence in which the causal relationship (which is both logical and equitable) between the special risk and the said damage does not exist. A typical case of this would be a derailment or collision in which—through no fault of the claimant—an animal is killed and the railway is at fault. In such a case the claimant must prove the absence of a causal relationship. In this connexion, it is interesting to note that many years ago in an entirely different geographical and legal context, the court decided in *Palmer v. Grand Junction R. Co.*, 4 Mee. and W. 749, that it would be unreasonable to exempt the carrier of live animals from liability for all accidents attributable to the special nature of the goods without regard to the question of fault: such a rule would relieve the carrier of all the necessary precautions imposed on anyone who becomes a "bailee for hire" of animals and put the owner

⁶⁶ R. Rodière, *La CMR*, *Bull. transp.*, 1963, para. 15.

⁶⁷ *Ibid.*, 1970, para. 78 et seq.

⁶⁸ F. Durand, *Les transports internationaux*, 1956, No. 150-151.

⁶⁹ R. Rodière, *op. cit.*, 1963, para. 15; J. Hostie, "Note sur le par. 3 de l'art. 27 CIM", *Bull. transp. intern. par chemin de fer*, 1957, p. 58 et seq.

of the animals entirely at the mercy of the said carrier. In this particular case, which is the subject of a commentary in the 1887 *American and English Encyclopedia of Law* (see "Carriers of Live Stock", loc. cit., p. 4), the damage, caused by a derailment in which horses had been killed, was not linked to the special characteristics of the goods.

43. The SMGS—probably because of its closer historical links with the old railway Conventions—lays greater emphasis on the obligation to provide an attendant and draws the logical conclusions from the key role of the attendant. Article 5, paragraph 2, provides:

"2. Perishable goods . . . , live fish and other live animals shall be carried only when accompanied from the sending station to the station of destination by attendants provided by the sender or by the consignee. Exceptions to this provision are small animals and birds, dispatched singly without trans-shipment in properly-closed cages, crates, baskets, etc."

In addition, article 10 specifies that live animals shall be carried only in waggon-loads accompanied by an attendant. Finally, with regard to the liability of the railway, article 22, paragraph 2, stipulates:

"2. The railway is not liable in case of total or partial loss of goods, goods missing or damage to goods, when the loss, deficiency or damage results:

"(f) from the fact that the attendant provided by the sender or by the consignee has not taken the measures necessary for the safety of the goods;"

and paragraph 7 of the same article 22 states:

"7. When, in the circumstances of the case, the loss or damage can be attributed to one of the causes specified in paragraph 2, . . . (f) . . . , it shall be presumed that it was so caused, unless the sender or the consignee has proved that it did not result therefrom."

44. With regard to national practice, it will be recalled that in certain countries (for example, the United Kingdom, Australia, Kenya: see paragraph 15, footnote 30), the responsible railway is entitled to set limits on compensation which vary according to the species of animal. A statement of value, together with insurance, is possible up to a stipulated maximum value. In its study of the question submitted to the Working Group, Australia suggested that consideration be given to this solution.⁷⁰

45. Like IATA, UIC has devoted attention to helping the parties involved in the carriage of live animals by rail to find a solution of their practical problems, which often fall outside the scope of the Convention. The UIC register, now in preparation (para. 6), sets out in detail the rules to be observed and the measures to be taken to ensure the best conditions of carriage for the animals, distinguishing between the obligations of the railway itself, the shipper and the attendant, and those which are common to them all. A comparison between the UIC draft register and the IATA Manual shows that the texts are complementary to a

large extent and that they could even serve as a basis for a useful intermodal agreement in this field.

D. *International carriage by road*

46. The importance and volume of the national and international carriage of live animals by road are made even more strikingly apparent on occasions when thousands of pitiable cargoes are held up at frontiers by a customs strike. In every continent roads provide a direct internal infrastructure for the carriage of animals. They are an irreplaceable link in the intermodal chain, from the place where the animals are raised to the place where they are taken over by another mode of transport (often the main mode), and from the place of unloading to that of final use. With regard to the developing countries, especially the land-locked developing countries,⁷¹ even a rudimentary road infrastructure plays a vital role in their animal exports (even at the regional or subregional level) and imports (largely for breeding purposes).

47. One of the most recent conventions in transport law, CMR (Convention on the Contract for the International Carriage of Goods by Road), which was signed at Geneva on 19 May 1956, is based on a UNIDROIT draft; it covers road transport in Europe and to and from Europe, interregional and even overseas road transport (by trans-shipment). Its provisions, which are modelled largely on CIM, particularly with regard to the carriage of live animals, represent a first step towards intermodal harmonization of carrier's responsibility.

48. Like CIM, CMR provides for two sets of grounds for exemption from the general principle of the road carrier's liability (article 17, paragraph 1): general grounds (paragraph 2) and particular or "privileged" grounds (paragraph 4), which include the carriage of live animals:

"4. . . . , the carrier shall be relieved of liability when the loss or damage arises from the special risks inherent in one or more of the following circumstances:

"(f) The carriage of livestock."

49. The parallel with CIM is not exact on this point, since CMR does not require the road carrier to perform carriage and contains no provision similar to article 27, paragraph 3 (g) of CIM (carriage accompanied by an attendant). This is explained by the fact that there is no obligation in CMR to have live animals accompanied. The problem of attendance and the possible consequences of its absence are covered by general law. Thus the carriers might prove that the consignment should have been accompanied by an attendant and claim, even if no exemption applied, that that fact relieved him of liability because it constituted determining fault on the part of his client.⁷²

50. What has been stated with regard to burden of proof in paragraph 41 is also valid in the context of CMR, article 18, paragraph 2, of which reproduces the wording of article 28, paragraph 2, subparagraph 1 of CIM:

⁷¹ See, for example, the study by C. O. Ilori, op. cit., and in particular the maps on "Major Trade Flows in Livestock and Meat Products in W. Africa" and "Main Stock Routes in W. Africa".

⁷² R. Rodière, loc. cit., para. 17, p. 483.

⁷⁰ Replies to the questionnaire on bills of lading, A/CN.9/WG.III/WP.4/Add.1 (vol. II), para. 31.

"2. When the carrier establishes that in the circumstances of the case, the loss or damage could be attributed to one or more of the special risks referred to in article 17, paragraph 4, it shall be presumed that it was so caused. The claimant shall however be entitled to prove that the loss or damage was not, in fact, attributable either wholly or partly to one of these risks."

51. With regard to the carriage of animals, CMR is again not exactly similar to CIM. The authors of the UNIDROIT draft found the 1933 CIM (see footnote 63) to be too advantageous for the carrier in this respect. In their opinion, the road carrier should not be able to rely, for relief from liability, on the fact of the carriage of animals unless he proved that he had taken all steps normally incumbent upon him and that he had complied with any special instructions issued to him. This is the way in which article 18, paragraph 3 (g), of the draft CMR prepared by UNIDROIT supplemented the provisions borrowed from the rail Convention. When the UNIDROIT draft was revised at Geneva, the ECE Working Group combined questions of burden of proof in a single provision (article 18 of the present CMR) (this explains why only the principle of exemption remains in article 17, paragraph 3 (g) of CMR) and transferred the part of the former text relating to the burden of proof to form paragraph 5 of article 18, which was accepted without discussion, the effect being considerably to limit the scope of the exemption⁷³ and to favour the claimant:

"5. The carrier shall not be entitled to claim the benefit of article 17, paragraph 4 (f), unless he proves that all steps normally incumbent on him in the circumstances were taken and that he complied with any special instructions issued to him."

The road carrier will thus be in a less favourable position than the railway because he must provide such proof in addition to the three types of proof described in paragraph 41 above, whereas the railway benefits from the additional exemption provided by the presence (or absence) of an attendant.⁷⁴ Note will be taken of the reference in the new paragraph 5 to "any special instructions" issued by the shipper concerning the specific measures and precautions to be taken,⁷⁵ necessitated by the fact that CMR does not require the presence of an attendant.

52. Decision No. 56 on international road transport, adopted under the auspices of the Board of the Cartagena Agreement by the Andean Group on 20 August 1972, refers to animals in so far as it excludes them from the special type of cargo called the

encomienda.⁷⁶ They are not referred to in connexion with *carga* itself.⁷⁷

However, in referring to carrier's responsibility, article 48 (b) of annex I states that the carrier shall be relieved of his liability in principle if loss, damage or delay is due to: (a) fault or negligence of the person authorized to dispose of the cargo or to incorrect instructions given by that person; (b) inherent vice of the cargo; (c) *force majeure* or accident; (d) reservations of the carrier.⁷⁸

53. Attention is drawn, among national regulations, to the position of British road carriers,⁷⁹ who must conclude a special contract in order to be covered by exemptions and limitations on railways. A standard contract is the "Conditions of Carriage of Livestock (other than Wild Animals)" of the Road Haulage Association, under which the carrier is liable only if the claimant proves that the damage was caused by wilful negligence of the carrier or his servants. This contract also lays down *per capita* limitations on compensation for the various types of animals covered by the standard contract. While Spanish road transport law associates damage to live animals with the concept of the nature or inherent vice of the goods, which relieves the carrier of liability,⁸⁰ French law has stringent provisions governing the road carrier in article 103 of the Commercial Code, as amended by the Act of 17 March 1905 (Rabier Act).

54. The International Road Transport Union (IRU) seems to have been impressed by the example given by IATA and UIC in the matter of instructions designed to facilitate the carriage of animals, and it plans to study this matter. The concept of "special instructions" in article 18, paragraph 5, of CMR might serve as a good point of departure for this work. It should be noted that the proposals made by IRU in 1967 for the revision of CMR did not refer to the régime for the carriage of live animals.

E. Carriage by inland waterway

55. With regard to carriage by inland waterway, the most recent subject of transport law unification, the

⁷³ *Encomienda*: cargo of up to 20 kg or 100 dm³ carried by passenger vehicles in a suitable compartment, with the exception of live animals, explosives and substances which are physically hazardous to persons (chapter 1, article 1, Definitions).

⁷⁴ *Carga*: any goods which may be commercially carried, with the exception of *encomiendas* and *equipaje*. (Chapter 1, article 1, Definitions: *equipaje* is defined as personal effects which the traveller normally carries with him).

⁷⁵ These reservations may relate to the quantity of packages, their marks and numbers, their apparent condition and packaging, the gross weight or volume of the cargo, as the case may be. UNIDROIT reserves the right to complete this paragraph, if necessary, when it has received the text of the *Convenio sobre Transporte Internacional Terrestre* between the Argentine Republic, the Republic of the United States of Brazil and the Eastern Republic of Uruguay (to which Chile and Paraguay subsequently acceded).

⁷⁹ O. Kahn-Freund, *The Law of Carriage by Inland Transport*, London, fourth edition, pp. 367-369.

⁸⁰ F. M. Sanchez Gamborino, "La naturaleza y vicios propios de las cosas causa de exoneración de responsabilidad del porteador", *Rev. derecho mercantil*, 1953, p. 36.

⁷³ *Ibid.*, para. 20, p. 483.

⁷⁴ This "privileged" exemption and its corollary in paragraph 5 are viewed sceptically by Rodière (*CMR, Bull. transp.*, 1970, para. 87), who feels that in practice privileged causes of exemption so advantageous are resisted, and that legal arguments tend to concentrate on proof of inherent vice and the definite causal relationship between such vice and the damage.

⁷⁵ This provision creates a logical connexion between the carriage of live animals agreed to by a carrier who is not obliged to perform carriage, and the carriage of dangerous goods knowingly accepted by the carrier. It is similar in purpose to the information which, in combined transport, the consignor of dangerous goods must give to the CTO under article 7, paragraph 1, of the draft TCM Convention.

draft Convention on the Contract for the Carriage of Goods by Inland Waterways (CMN), prepared by UNIDROIT in 1950-1953, followed the ocean carriage example, which still predominated in the early post-war period and, like the Hague Rules, excluded live animals from its definition of "goods" (article 1 (d)).

56. When CMN was revised by the Economic Commission for Europe (ECE) in 1954-1959, that feature was abandoned in favour of provisions of road carriage conventions which offered better safeguards for goods. The revised draft of CMN (1959-1960) embodies this basic change, which was also influenced by CMR, just concluded at that time. Article 16, paragraph 1, of CMN thus uses the wording of article 17, paragraph 3, of CMR, with a subparagraph (f) containing the exemption of the carrier of live animals. With regard to burden of proof, article 16, paragraph 2, of CMN corresponds to article 18, paragraph 2, of CMR. The draft CMN does not, however, reproduce the provision in article 18, paragraph 5, of CMR which requires more rigorous proof from the road carrier in this particular connexion.

57. This draft, which could not be opened for signature in 1960, is now being revised, under the auspices of ECE, by a committee of governmental experts convened by UNIDROIT. So far, no amendments have been proposed to the provisions of the draft relating to live animals.

58. With regard to Danube traffic, an Agreement on the general conditions for goods was signed at Bratislava on 26 September 1955 between the Danube river transport enterprises of Bulgaria, Hungary, Romania, Czechoslovakia and the USSR; it lays down conditions for the carriage on this river of those countries' imports and exports. German and Austrian enterprises have since acceded to the Agreement. Like SMGS (paragraphs 37 and 43), this is not an inter-State convention. It is based on CMN drafts and existing standard bills of lading, particularly those used on the Rhine. It contains no definition of "goods" and makes no reference at all to live animals. It must therefore be assumed that live animals are goods like any others. It should, however, be noted that article 31 provides that:

"Attendants designated by the shipper may accompany the goods during carriage if so agreed by the carrier and the shipper".

In this case, the carriage of livestock does not seem to constitute a special ground for carrier's exemption. At most, under article 50 (d), he will not be liable for:

"(d) damage to goods susceptible by their very nature to total or partial loss, or to damage, particularly by rust, internal decay, frost, desiccation, evaporation, putrefaction, etc., provided that such damage has occurred despite the diligent care exercised by the carrier during the performance of carriage".

59. With regard to commercial practice, note should be taken of the draft Conditions of carriage by inland waterways (*Beförderungsbedingungen der Binnenschifffahrt*) of 31 January 1964, prepared for the Rhine by the International Union for Inland Navigation (UINF). Paragraph 16 (particular cases of exemption from liability) of this text provides that:

"1. The carrier shall not be liable:

"...

"(e) in respect of live animals, for damage caused by the risks inherent in the carriage of such animals.

"2. If damage occurs which may, in the particular circumstances, have been due to one of the risks referred to in paragraph 1, it shall be presumed, unless there is proof to the contrary, to have resulted from the said risk".

60. This text corresponds to paragraph 59 (2), No. 5, of the German *Binnenschiffahrtsgesetz* of 15 June 1895-20 May 1898, of which paragraph 65 (2) provides that the full freight must be paid even for animals which have died *en route*.

F. International combined transport

61. None of the draft Conventions on the contract for the international combined transport of goods, including the draft TCM Convention prepared by the UNIDROIT Round Tables, refer to the carriage of live animals. Based on the "network" system, they would apply, in the event of damage to an animal which occurred on a specific route segment, the régime applicable to the carriage of animals in the mode of transport concerned. With regard to the basic (or residual) system, applicable if the place where the damage occurred is unknown, UNIDROIT's own drafts placed all goods on the same footing and provided exemption for the principal carrier only if he proved that the damage occurred in circumstances which excluded any fault on his part or that of his servants or agents, the proof being determined on the basis of the duties incumbent upon a diligent principal carrier. The TCM drafts, however, contain a long list of exemptions from the basic liability of the CTO, including inherent vice of the goods (article 9, paragraph 2 (e); article 9 A *bis* (a) *in fine*, document E/CONF.59/17). During discussions of these texts, some members wished to include in this concept the special risk inherent in the carriage of live animals (see also chapter VI).

62. In practice, container transport operators already carry live animals (for air transport, the IATA Manual describes a number of model containers designed for various species of animal). Containers for livestock are placed near the tail. Dogs and cats are also carried in kennel containers. In late 1972, Overseas Containers Limited (OCL) began to carry horses, accompanied by a groom engaged by the consignor (who signed a statement of exemption for the groom). The live animals thus carried were covered by OCL's ordinary combined Transport Bill of Lading, on which the following words were stamped:

"Livestock: in addition to and notwithstanding the provision of the tariff, the Carrier shall not be liable for any loss whatsoever and howsoever caused. In the event of the Master, in his sole discretion, considering that any livestock is likely to be injurious to the health of any other livestock or of any person on board, or to cause the vessel to be delayed, such livestock may be destroyed and thrown overboard

without liability attaching to the Carrier.⁸¹ The Merchant shall indemnify the Carrier against the cost of veterinary services on the voyage and of providing forage for any period during which the carriage is delayed for any reason whatsoever and of complying with the regulation of Authority of any country whatsoever with regard to such livestock. The Consignee shall pay 15% of the freight charged for the parent animal, or whichever is the higher figure for any livestock born during the voyage and landed alive".

Some consignments of animals, usually horses, are also carried on the Europe/Australia route in specially designed stall-type containers.

IV. INTERNATIONAL OCEAN CARRIAGE OF LIVE ANIMALS

The Hague Rules and the Harter Act

63. By excluding live animals from the definition of "goods", article 1 (c) of the Hague Rules (as applied to ocean bills of lading) excluded *ipso facto* the carriage of such animals from the scope of the Rules (see para. 25). It merely reproduced the corresponding provision in the 1921 Hague Rules. The *travaux préparatoires* of both Conventions give very little information about this exclusion.⁸² It is usually associated, without further explanation, with the United States Harter Act (13 February 1893), section 7 of which states that sections 1 [loading, custody, proper unloading] and 4 [compulsory issue of a bill of lading] shall not apply to the transportation of live animals.

64. Prior to the Harter Act, it was uncertain, in both the United States and the United Kingdom, whether the carrier of live animals could be deemed to be a common carrier and, in particular, whether live animals could be placed on the same footing as goods which common carriers understood to be ordinary goods. In either case, even when live animals were considered as special goods because of their unpredictable and irrational tendencies and propensities (see para. 13), the carrier could not neglect them with impunity. The courts maintained an equitable balance, subject to the rules on burden of proof, between damage which could be attributed to a kind of vice resulting from the nature of these special goods and damage which clearly had to be attributed to the wrongful acts of the carrier and his servants, as the main cause of the damage (unseaworthiness of the ship, ship not properly manned and equipped, derailment of the train owing to the unsatisfactory condition of the track, etc.). Similarly, although exemption clauses for such carriage were permitted, the courts had the right to keep them under review, particularly in order to ensure that they were fair and reasonable.⁸³ This equitable approach was

not, moreover, confined to American and English courts. Argentine judges of the time held that a clause of non-liability for the carriage of live animals included in the bill of lading did not have the effect of implying the absolute non-accountability of the carrier, but merely of imposing on the claimant the burden of proving that the damage was caused by the wrongful act or neglect of the master.⁸⁴

65. Nearly a century later and until the work of UNCTAD and UNCITRAL, the tendency was to take the exclusion of live animals for granted. On this subject, it is interesting to read Montier's⁸⁵ account of the events preceding the Harter Act's ruling on the carriage of live animals: "When the Harter Act was introduced in the United States Congress, the United States had a considerable trade in live animals, a large proportion of which were exported by sea . . . the Act would have affected shipowners quite seriously. It would also have affected the export of livestock because of the increase in freight rates which would inevitably have followed the much greater responsibility falling on shipowners who carried live animals rather than inanimate goods. Accordingly, to use the amusing words of "Fairplay" (No. 11, August 1924, page 376), since Congress did not want to harm domestic trade, it made an eleventh-hour change removing live animals from the scope of certain articles of the Act, thus indicating the sponsors' belief that the sauce which was good for the English shipping goose was unhealthy for the gander—the American exporters".

Legislation

66. The Protocol of signature of the 1924 Brussels Convention (paragraph 2) permits States to "give effect to this Convention either by giving it the force of law or by including in their national legislation in a form appropriate to that legislation the rules adopted under this Convention". This option, which has been a source of unfortunate differences of opinion, has nullified efforts at unification in many ways. It is the reason why national laws have not applied the principle of exclusion contained in article 1 (c) of the Hague Rules uniformly.

67. These national laws may be divided into three main groups: (a) laws which exclude the application of the Hague Rules to the international carriage of live animals; (b) laws which incorporate the Hague Rules as they stand, but make provision, with regard to such carriage, for exemption for the carrier; and (c) laws which incorporate the Hague Rules as they stand, but do not except such carriage from the general rule declaring exemption clauses void.

68. (a) Many States have reproduced the text of the Hague Rules in their legislation without alteration or with very little alteration. Since the carriage of animals is excluded from the Rules, the rights and obligations of the ocean carrier and his option of exemption in respect of animals will be governed by

⁸¹ The resemblance to the régime of dangerous goods in the Hague Rules (article 4, paragraph 6) will be noted.

⁸² In 1921 the discussion related mainly to the extension of the exclusion to perishable goods (International Law Association, Report on the Thirtieth Conference, 1921, vol. II, *Proceedings of the Maritime Law Committee on the Hague Rules*, 1921, pp. xliii, 78-80).

⁸³ See English and American case law of that time concerning the concept of reasonableness, considered not in abstracto, "Carriers of Livestock", in *American and English Encyclopedia of Law*, vol. III, Northport, L. I., 1887, pp. 10-15.

⁸⁴ Supreme Court of Buenos Aires, 17 March 1898, *Rev. Int. Dr. Mar.*, XIV, p. 203.

⁸⁵ G. F. Montier, *Le Harter Act*, Paris, 1932, No. 37, p. 43.

the general maritime law of each of these States.⁸⁶ While the carrier is not bound by the Rules, neither may he claim the advantages they provide. In such a case, the exclusion creates great uncertainty as to the applicable liability régime.⁸⁷ The determination of the applicable régime will be made according to the conflict rules of the court concerned. Ocean carriers of live animals, emboldened by this inordinate privilege, have drawn up standard bills of lading for such carriage which protect them against any surprises.

69. This first group includes the United Kingdom and all States which have followed the example of the United Kingdom Carriage of Goods by Sea Act of 1924, the United States of America, which adopted the 1936 Carriage of Goods by Sea Act in the wake of the Harter Act, Belgium, the Holy See, Denmark, Egypt, Spain, Finland, Lebanon, Liberia, Norway, Philippines, Portugal, Sweden, Syria, France and Italy (for carriage considered to be "international"). However, there is nothing to prevent the parties from applying the Rules to the contract for the carriage of live animals.⁸⁸

70. (b) The States which have incorporated the 1924 Brussels Convention as it stands in their national legislation obviously had to have regulations to cover the carriage of live animals. The Convention, whose only purpose is the "unification of certain rules", in fact implies the existence of an applicable national law to fill such gaps. In a number of these States, the carrier is permitted, in this particular case, to exempt himself from liability. This will not, however, give him the almost complete freedom given by régime (a) discussed in paragraph 68 above. All other legislation relating to ocean carriage and not touching on the substance of the clause will be applicable to him. Even with regard to liability, according to the general principles of many countries' law, the clause will not be applicable in the event of the wrongful act or fault of the carrier.⁸⁹ The right to exemption will be limited only by public policy (*ordre public et bonnes mœurs*) and any other provisions of general contract law governing a debtor's exemption from liability or the limitation of such liability (see the Turkish Commercial Code, article 1117, paragraph 2).⁹⁰ One of the consequences of this régime will be that the carrier who has not provided for this

exemption will be held liable as in the case of ordinary goods (exceptions, limitations, etc.).

71. This group includes the Federal Republic of Germany, Greece,⁹¹ Japan, Madagascar, the Netherlands, Poland, Switzerland, Tunisia, Turkey, Yugoslavia, France⁹² and Italy ("non-international" carriage) and the Uniform Scandinavian Maritime Code (inter-Scandinavian maritime carriage).⁹³

72. (c) Other States have incorporated the Hague Rules in their legislation, but have extended their application to live animals and do not allow the carrier to disclaim liability for them. Thus, with regard to the carriage of live animals, the Soviet Merchant Shipping Code contains no exception to the article providing for the invalidity of clauses contrary to the mandatory provisions of this Code (article 116, paragraph 3). This rigidity is, however, mitigated by the legal prohibition (see also SMGS, cited in paragraph 43) on the carriage by sea of animals not accompanied by an attendant employed by the shipper or the consignee and by the provision that the carrier is not liable for goods accompanied by a servant of the shipper or consignee unless the latter proves fault on the part of the carrier (article 162 of the Code). Mexico is also to be included in this group.⁹⁴

73. In conclusion, there is no uniformity in the practical application of the Hague Rules to the carriage of live animals, and the operation of rules of private international law by the court may produce unexpected results when a conflict of laws, which might easily arise in this connexion, has to be settled.

74. This uncertainty is reflected in the replies of Governments to questions 3 (a) and (b) in the first UNCITRAL questionnaire on bills of lading (A/CN.9/WG.III/WP.4/Add.1 (Vol. I, II, III)), which tend, moreover, in the age of containerization, to give more attention to deck cargoes than to live animals. The replies also indicate that the disadvantages were less serious for many States not in group (a) (see above, paragraphs 68 and 69) because, in those States the carriage of live animals was not completely devoid of protection under law, but simply, where necessary, subject to lawful exemption clauses. The foot-note in the report of the Secretary-General summarizing the content of the replies,⁹⁵ the clearest of which is that of Brazil, must be broadly interpreted. The Brazilian reply stated that live animals should be considered as much cargo as other goods under the liability of the carrier.⁹⁶

⁸⁶ D. J. Markianos, *Die Übernahme der Haager Regeln in die nationalen Gesetze über die Verfrachterhaftung*, Hamburg, page 82. The same author (p. 56, *et seq.*) analyses the respective advantages of incorporation in the context of national laws and of the unconditional (or nearly unconditional) acceptance of the texts of conventions in national law, thus allowing for the existence, in conjunction with this *lex specialis*, of an underlying general law applicable whenever the special law is not.

⁸⁷ Reply of France to the first UNCITRAL questionnaire on bills of lading (A/CN.9/WG.III/WP.4/Add.1 (Vol. I), page 52).

⁸⁸ W. Tetley, *Marine Cargo Claims*, Toronto, 1965, p. 197.

⁸⁹ Paris, Appeals Court, 12 February 1964, *Droit Maritime Français*, 1965, p. 161: "In accordance with the general principles of law, he (the ocean carrier) may not validly rely on clauses limiting or excluding liability which he stipulates for his own benefit unless the wrongful acts he has committed are not of a negligent nature or do not constitute gross neglect amounting to fraud". This case involved a consignment, which was covered by French law, of 178 horses, 62 of which died during carriage because of very rough weather which had not deterred the carrier from weighing anchor.

⁹⁰ Markianos, *op. cit.*, page 82.

⁹¹ Greece reproduced in its 1958 Code of private maritime law the substance of the 1924 Brussels Convention, to which it had not acceded, through the German codification of 1937.

⁹² This had already been the case in the Act of 2 April 1936. Under article 30 of the Act of 18 June 1966, by way of derogation of the provision declaring contrary clauses void, "all causes relating to liability or to compensation shall be permitted in the carriage of live animals..."

⁹³ See the reply of Norway to the first UNCITRAL questionnaire, *op. cit.*, vol. I, page 140.

⁹⁴ See the reply of Mexico to the first UNCITRAL questionnaire, *op. cit.*, vol. III, page 10; see also the reply of the Republic of Korea, *op. cit.*, vol. I, page 120.

⁹⁵ Report of the Secretary-General on the responsibility of ocean carriers (A/CN.9/63/Add.1, foot-note 71; UNCITRAL Yearbook, Vol. III: 1972, part two, IV, annex).

⁹⁶ See the reply of Brazil to the first UNCITRAL questionnaire, *op. cit.*, vol. III, page 71.

Documents

75. Another, perhaps subconscious reason for the tendency to exclude the carriage of live animals from the scope of the Convention—incorrectly named for the documents which it covers, bills of lading, rather than for the contract of carriage which it regulates—may be that it is nearly always conducted without an admission ticket, a negotiable bill of lading. As a general rule, a carriage document serves to prove receipt of the goods and of the contract relating to them. The function of representing the goods is an additional characteristic peculiar to bills of lading. But in the case of the carriage of animals, which requires special import licences and certificates of health, the consignee is generally known and the underlying sale a firm transaction long before shipment. Thus, the first two functions mentioned are all that is required and the documents are no more than a receipt (particularly in the case of single small animals), a consignment note or a non-negotiable instrument of the consignment note type. In the majority of cases, the carriers do not issue bills of lading; "instead they issue a consignment note, or some other form of receipt, the terms of which purport to exempt them from any liability arising from any cause whatsoever".⁹⁷ When they use an ordinary bill of lading form, they over-stamp it with the exemption clause (livestock clause) and often with the words "on deck cargo at shipper's risk" (since animals often have to travel on deck—for example, in hot climates) and with a "non-negotiable" stamp. The name and address of the consignee may be given without a "to order" clause; or the form may have printed on it "not negotiable unless consigned to order" and the parties will act accordingly. Some documents used exclusively for the carriage of animals are not even described as "bills of lading" but as "contract for the conveyance of livestock—non-negotiable" and stipulate expressly that: "Any receipt for goods issued by or on behalf of the Company shall be a non-negotiable document. The Owners shall not be entitled to the issue of Bills of Lading" (see document in annex III).

Practice

76. Whatever the documents which cover the carriage of animals, they are in effect adhesion contracts which invariably give the carrier the most sweeping exception clauses, thus going back a century to the days of negligence clauses, when "the master was in a position to carry what he wanted, when he wanted, where he wanted, how he wanted and in the conditions which suited him".⁹⁸

77. In order to provide a clearer understanding of the legal conditions governing such carriage, annex IV reproduces a selection of the usual exception clauses and phrases which, in the minds of those who devised them, provide a barrier which has been justly criticized as being impregnable against any imputation of respon-

sibility to the ocean carrier of animals.⁹⁹ The documents customarily used may be divided into three major groups:

78. (a) The standard bill of lading forms over-stamped with special additional clauses concerning the carriage of animals. An ocean carrier, particularly if he does not specialize in such carriage, can thus use his ordinary bills of lading when he carries animals. He adds the exception clause of his choice, by either stamping or typing it on the first page of the bill of lading generally in the space headed "number and kind of package—description of goods"; for a selection of such clauses see annex IV, section I.

79. (b) Standard bills of lading having several printed clauses which are applicable when the bills are used to cover the carriage of live animals. The clauses on the back of standard bills of lading frequently contain, in print so small as to be illegible, one or more printed clauses concerning deck cargo and live animals. For a selection of such clauses, ranging from the simple to the complicated, see annex IV, section II.

80. (c) Documents expressly designed for the carriage of animals and drafted accordingly.¹⁰⁰ It would be impossible within the framework of the present study, to give a detailed analysis (one going beyond the problem of responsibility for such carriage) of these documents; they are sometimes described as bills of lading (livestock bill of lading) and sometimes omit this expression in order to make it clear that they are non-negotiable documents and that the owners of the animals are not entitled to the issue of bills of lading.

81. The substance of such documents is a fairly systematic arrangement of a number of the clauses reproduced in annex IV. In general, the phrasing is that formerly used in bills of lading before the Hague Rules. They are specially adapted to cover the carriage of live animals and contain an impressive number of negligence clauses. Thus, in addition to the traditional catalogue of exceptions (act of God, etc.), worded as comprehensively as possible, there is total exemption from liability on the grounds of the unseaworthiness or unsuitability for carriage of animals of any vessel or device employed for that purpose: the right of the captain at his discretion to deviate, load the animals on deck, trans-ship them or unload them at any time; the obligation to pay freight on the number of animals loaded, i.e. even for animals which die on the voyage or are lost when the vessel sinks owing to its unseaworthiness or to lack of skill on the part of the crew; the last-mentioned constitutes a special exception for this type of cargo. Other clauses relate to the feeding and watering of the animals, the freight to be paid on the surplus feeding stuffs unloaded at the destination, the status of the attendant or of the carrier himself if he agrees to superintend the cargo (see paragraph 83

⁹⁷ Report of the Secretary-General, op. cit., para. 67, footnote 67.

⁹⁸ G. van Bladel, *Connaissances et Règles de la Haye*, Brussels, 1929, No. 1. This is practically the same as what one of the clauses (No. 6) reproduced in annex IV expressly states.

⁹⁹ Report of the Secretary-General, op. cit., paras. 42 and 43. In addition to such clauses and references, there is often another clause authorizing the carriage of deck cargo at the shipper's risk.

¹⁰⁰ It is not unusual for breeders to charter a complete vessel to carry their animals. The conditions applicable to such operations naturally vary from one charter party to another. Such arrangements are outside the scope of this study. Furthermore, when a document other than the charter party is issued, it does not usually fulfil the requisite conditions for the application of the Hague Rules.

et seq). In cases where the text of such documents does not regulate these matters, they are accompanied by extracts from price tariffs which show, according to the species and number of animals, the freight per head payable, the supplies and feeding stuffs to be provided by the shipper and carrier respectively and, if applicable, the cost of the fare of the attendant(s) or the gratuity payable to the employees of the carrier who are authorized to look after the animals.

82. In order to give a better understanding of current practice, it seems simpler and more comprehensive to annex one of the last-mentioned documents (annex III), the Non-negotiable Contract for Conveyance of Livestock of the Belfast Steamship Company, Ltd.; the general conditions laid down in it are an excellent illustration of the inequality now prevailing between the parties to a contract for the carriage of live animals.¹⁰¹

V. THE ATTENDANT

83. In principle, if some person (attendant, groom, drover, handler/carer, etc.) accompanies the animals,¹⁰² the legal owner (shipper or consignee) is liable to the carrier for the cost of the fare of such accompanying person and the cost of his board on the voyage. The attendant or attendants (in sufficient number) are required to look after the animals on behalf of the lawful owner and assume on his behalf all responsibility for them. Sometimes animals are carried unaccompanied either because the carrier himself assumes the functions of attendant or because, for any of a variety of reasons, the parties waive attendance—for example, a single harmless animal (pet), a short trip, assured attention by authorized agents during the voyage, indifference in the case of animals exported for slaughter.¹⁰³

84. The legal status of the attendant, a kind of personification of the owner's care for his property during carriage, has been studied in detail in railway law. For a railway, the shipper's obligation, under article 4 of CIM, to have certain goods or articles, which are accepted for carriage subject to conditions,¹⁰⁴ accompanied by qualified persons, counterbalances the obligations to perform carriage imposed by article 5 of CIM. The invariable principle is that the attendant is

in all cases the representative of the shipper and his agent, and not the agent of the railway; it is the shipper who is responsible for the acts and omissions of the attendant. In the case of an unaccompanied consignment, there is, in theory, no objection to the railway assuming the functions of attendant. But in practice it refrains from so doing in order not to take on such a responsibility under regulations which it finds stringent and because it does not have the necessary qualified employees. The 1970 CIM convention introduces some relaxation of the requirement in earlier versions to provide an attendant (article 4, paragraph 1 (d), third line) (see paragraph 38 above) but it maintains the requirement to add the word "unaccompanied" to the consignment note when consignments need not be and are not accompanied. The SMGS, under which such a requirement is still enforced, not only provides a "special" exemption for the railway in the event of damage being due to the fact that the attendant has not taken the necessary measures to safeguard the goods (article 22, paragraph 2 (j) and paragraph 7), but, in article 10, makes the owner providing the attendant responsible for any damage which the railway may suffer through the fault of the said attendant.

85. The primary task of the attendant, according to Nanassy-Wick,¹⁰⁵ is to give the animals the necessary care and supervision during carriage (food, water, milking, prevention of injury, participation in veterinary inspections, etc.) and to superintend the orderly unloading and subsequent transport of the animals from the railway station. He should, in particular, take timely action in the event of danger—for example, to prevent an animal strangling itself with its halter, to ensure ventilation, check that the truck is properly closed, prevent fire, etc. He has, however, no obligation to ensure that railway officials carry out their duties correctly.¹⁰⁶ It is the duty of the attendant to remain near his animals, and the railway can invoke the special exemption clause on the ground of the requirement of attendance laid down in the Convention if, at the time the injury occurs the attendant is in another wagon or with another consignment he is also accompanying.¹⁰⁷

86. One of the interesting features of the draft register of the UIC (see paragraphs 6 and 45) is that it specifies, not only the obligations of the shipper and the railway, but also those of the attendant, which are additional to those prescribed in the Convention. The IATA Live Animals Manual states (section II, General Acceptance and Handling Standards, paragraph 12—"Attendants") that attendants will be permitted, at the discretion of the air carrier, to accompany animals on all freight aircraft or in the freight compartment of mixed cargo/passenger aircraft. Furthermore, the specific instructions in the manual with regard to each individual species of animals are a guide for both the attendant and the carrier which accepts the consignment (preparations prior to dispatch, feeding guide, general care and loading).

87. In its "General Provisions", the Paris Convention contains provisions on attendance which are applicable to all modes of transport. Article 10 states

¹⁰¹ Similar documents, kindly provided by the Australian Government include: the Bill of Lading for Carriage of Livestock of the C. Clausen Dampskibsselskab A/S, Copenhagen, used for the carriage of sheep from Australia to the Middle East; the Australia Outward Livestock Bill of Lading of Saf-ocean (Pty.) Ltd., applicable to the carriage of cattle between Australia and South Africa; the Australian Outward Livestock Bill of Lading of Royal Inter-ocean Lines of the Netherlands, which carries animals from Australia to East Africa, India and Sri Lanka; the bill of lading used by Aries Shipping (Singapore) Pty. Ltd. and the Livestock Bill of Lading of the Abdul-Moshin and Youssef Ahmed Al-Sager and Co. shipping company of Kuwait for the transport of sheep between Western Australia and the Persian Gulf.

¹⁰² This, naturally, does not apply to domestic pets travelling with their owners who are passengers; they are generally treated as accompanied baggage.

¹⁰³ The sufferings of horses exported for slaughter from Ireland to Continental Europe gave rise to the Paris Convention and, generally speaking, to the RSPCA campaign (see foot-note 17, *supra*).

¹⁰⁴ Railway rolling stock running on its own wheels; funeral consignments (deleted from the 1970 CIM), live animals; articles the carriage of which will give rise to special difficulty (CIM Art 4).

¹⁰⁵ De Nanassy-Wick op. cit., p. 17, para. 21.

¹⁰⁶ *Ibid.*, p. 199, para. 55.

¹⁰⁷ *Ibid.*, p. 198, para. 54.

that as a general rule livestock shall be accompanied "in order to ensure the necessary care of the animals during transport"¹⁰⁸ ... except ... where livestock is consigned in containers which are secured; where the transporter undertakes to assume the functions of the attendant; where the sender has appointed an agent to care for the animals at appropriate staging points". With regard to transport by water, the Convention further stipulates (article 29) that "a sufficient number of attendants shall be provided taking into account the number of animals transported and the duration of the voyage".

88. At sea, "animals (especially wild animals) may be accompanied by an attendant or keeper over whom the carrier has no authority".¹⁰⁹ The fact remains, however, that the captain, the agent of the carrier, is always master of his vessel and any improper act by the animals' attendant (or owner, who very often accompanies them) which results in damage, would, as in every other case, relieve the carrier of liability to some degree.

89. Experience of shipping practice shows that in this mode of transport, which unlike the railways, is not bound to perform carriage, the relationship between the attendant, the animals and the vessel is generally satisfactory. In fact such fears as are expressed on this score often seem to be based on a desire to perpetuate a very favourable régime, rather than reflecting real contractual friction which would justify a special régime. In practice, the tariffs (in the absence of special bills of lading) lay down in a few short clauses the provisions for attendance or performance of this service by the carrier himself and for the transport of the attendant.

90. A form commonly used in the first two cases reads as follows:

"Arrangements to be made by shipper for attendance on animals, etc. If butcher or any member of the crew attends to animals (with Company's or Master's consent) a gratuity to be paid to him as shown above. Gratuity will be collected with the freight." (Clause from the Conditions for the Conveyance of Livestock in the south-bound and north-bound tariffs of the West African Joint Service.)

91. From the legal standpoint, in the first case the attendant is the agent of the owner of the cargo he accompanies. As such, he is subordinated to his principal, so that the position is the same as if the latter was himself accompanying the animals. The advice and care provided by either are the reason for their presence on board and will be valuable to the captain, who is more skilled in nautical matters than in zoology. If they make a mistake, the issue is not one of disputed authority: error of the shipper or his agents *relieves the carrier* of liability in all modes of transport without any need to adduce grounds for special exemption. In the text recommended by the Working Group, the carrier could easily prove, if such a loss occurred, that "he, his servants and agents took all measures that could reason-

ably be required to avoid the occurrence and its consequences".

92. At first sight, the situation may seem to be more complex from the legal standpoint when, by virtue of an agreement with the shipper, the carrier undertakes the functions of attendant and entrusts them to his own employees. By so doing he combines in his own person, directly or indirectly, his functions under the contract of carriage and the functions arising out of the principal/agent relationship—which is regulated by the relevant domestic legislation—by virtue of which he represents the party with whom he concluded the first contract. The exemptions which may be applicable within the framework of the contract of carriage do not, however, extend *ipso facto* to the principal/agent relationship, in which a breach of contract or negligence—which amounts to the same thing—on the part of the agent would in any case give the principal an independent right to compensation.

93. But, in practice, the prudent carrier does not agree to take charge of animals without receiving clear written instructions from the shipper/principal concerning them which would doubtless list the measures that might reasonably be required to avoid occurrences which might cause loss or damage (to use the phraseology quoted in paragraph 91).¹¹⁰ In this context there is a tendency to treat animals in the same way as another type of goods with which they have several similarities, namely, goods of a dangerous nature shipped with the knowledge and consent of the carrier (Hague rules, article 4, paragraph 6, last sentence); the two types of goods are already treated on the same footing in a number of bills of lading (see, for example, annex IV, No. 18). In the same way as animals entrusted to the carrier, dangerous goods travel unaccompanied, but the carrier, before loading them, will normally require the shipper to give him precise instructions regarding their nature and the precautions to be taken. By working out the valuable code of dangerous goods,¹¹¹ IMCO has encouraged this practice, which is also embodied in other conventions.¹¹² These considerations should help to dispel the fears sometimes expressed about the idea of the carrier making himself directly responsible for the care of live animals.

94. Lastly, the transport of the attendant himself is a subsidiary but important aspect of the problem. Once again, railway law has an answer. The Additional Convention (Berne, 20 February 1966) to the International Convention concerning the Carriage of Passengers and Luggage by Rail (CIV) of 25 February 1961, expressly includes in its definition of the "passengers" protected by it, in the event of liability on the part of the railway for death or injury, attendants of consignments dispatched in conformity with CIM (article 1, para. 1 b). With regard to transport by air, the Warsaw Convention is applicable to the carriage of the

¹¹⁰ The need for a handbook, similar to the IATA Manual, for ocean carriage is obvious.

¹¹¹ IMCO, International Maritime Dangerous Goods Code, vols. I, II and III (Sales No. IMCO 1972.9(E)) and Supplement 1972 (Sales No. IMCO 1973.2(E)).

¹¹² See CMR, article 22; see also draft TCM Convention, article 7.

¹⁰⁸ Article 11 *et seq.* cover the obligations to look after the animals, feed and water them, and, if necessary, to milk them at regular intervals, to arrange for veterinary attention in case of need and to keep the vehicles and containers thoroughly cleaned.

¹⁰⁹ Report of the Secretary-General, *op. cit.*, para. 68.

attendant, even if he is to be regarded as non-fare-paying (article 1, paragraph 1, second sentence).¹¹³

95. The Convention of 29 April 1961 on the carriage of passengers by sea should also apply to the contract of carriage of the attendant (article 1 (b)), who should not be excluded from the definition of "passenger" (article 1 (c)).¹¹⁴ The question of deciding whether he is a fare-paying or non-fare-paying passenger was raised in the nineteenth century. But even if free passes issued to drovers specify that the carrier disclaims responsibility for their personal safety, the carrier is required to treat them as passengers; the contract of carriage for live animals and the free pass must be considered in the context of a single contractual relationship and the attendant cannot therefore be regarded as a non-fare-paying passenger.¹¹⁵

96. In practice, the carrier often makes the shipper sign a guarantee statement (Livestock Attendants Indemnity). In it the shipper attests the requisite professional competence of the attendant or attendants, and undertakes not only to pay the fare but also to hold the carrier and his agents

"... indemnified in respect of all claims arising out of loss of life, personal injury or illness of the said livestock attendants, or damage to their effects, whether arising from negligence of yourselves [the carrier] or your Servants or Agents or from defects in the vessel or her appurtenances or otherwise. This indemnity includes the cost of deporting attendants who are refused permission to land at destination as well as repatriation of sick or injured attendants and hospital, medical, funeral and legal expenses."

VI. MULTIMODAL TRANSPORT OF LIVE ANIMALS

97. Only rarely is the carriage of live animals confined to one form of transport. Even if the longer part of the journey is often by sea or air, it is nearly always necessary—unless periods of quarantine are included in the total journey—to precede or follow it by transport by some other mode in order to bring the animals from the place where they have been bred or to take them to the places where they are to be used.

98. But the intermodal transport of live animals is very different from the traditional types of combined transport to which those concerned with international unification have recently given their attention. Live animals, like human beings, are the only cargo which almost immediately shows outward signs when it has been damaged, which makes it possible to notice and verify the damage. This unique characteristic makes it possible to surmount the major obstacle encountered in the combined transport of other goods: namely, to determine the place where the damage occurred, i.e. the mode of transport involved and the law to be applied. For this reason one wonders whether the combined transport of live animals might not constitute a useful testing-ground for current activity in the wider field of

multimodal transport in general. This consideration suggests that present efforts should be aimed, as regards these particular goods, at a solution which would not necessarily impede at least *de facto* harmonization with existing régimes applicable to them in other modes of transport (see chapter III).

VII. CONCLUSIONS AND RECOMMENDATIONS

A "prejudgement" proposal

99. The first conclusion to be drawn from the foregoing account—and it amounts to a foregone conclusion or prejudgement—is that it would be desirable to put an end to a situation in which transport by sea alone, unlike other modes of transport, treats live animals as outlaws. In brief, this situation is prejudicial to the interests of the shippers, since their goods are thus abandoned to the whim of a contracting partner firmly entrenched behind the leonine clauses of an adhesion contract. It is economically harmful to countries, particularly developing countries, for which the export and import of live animals constitute a significant component of their trade balance, since it adversely affects the cost of goods which are practically unprotected *en route*. It harms the reputation of the shipping industry, besmirched by a small number of carriers and above all by a group of parasitical and expensive middlemen. It is also harmful from the humanitarian standpoint, particularly in the light of the Paris Convention, which imposes specific obligations on the contracting States.

100. The replies by Governments to the first UNCITRAL questionnaire seemed to indicate that a majority favours the inclusion of live animals within the scope of the Hague Rules and holds that, as the timely suggestion by Brazil puts it, they "should be considered as much cargo as other goods under the liability of the carrier" (see paragraph 74 and foot-note 96). Some Governments failed to reply on this point, probably because, at least in some cases, they were more interested in the question about deck cargo, which is mentioned in the same section of the Rules. With regard to the Governments which did not favour inclusion,¹¹⁶ it must be pointed out that, in the case of those which have incorporated the Hague Rules directly into their domestic law, it is not a question of total arbitrary exclusion, which would be quite inconceivable (see paragraph 70) but of whether or not to preserve the ocean carrier's right, under that domestic law, to exempt himself by contract from liability with regard to this type of cargo.

The discussions at the third session of the Working Group

101. During the discussion held at the third session of the Working Group,¹¹⁷ there seemed to be considerable support for the inclusion of the carriage of live animals in the Hague Rules, with or without the retention of the carrier's option to exempt himself from liability. Essentially, the delegations opposed to that principle based their position on the fear of friction between carriers and the owners of the goods with

¹¹³ The IATA Live Animals Manual states: "Arrangements for the carriage of attendants shall be made in advance of travel. The attendants' fare will be levied in accordance with IATA resolution 514, as quoted in the carrier's tariff." (section II, paragraph 12).

¹¹⁴ IMCO is engaged in revising this Convention (see paragraph 124).

¹¹⁵ See *American and English Encyclopedia of Law* (vol. III, para. 4 (e)): *Drovers' Passes*, p. 16, and cases cited.

¹¹⁶ Report of the Secretary-General, *op. cit.*, para. 71, and foot-notes 71 and 72.

¹¹⁷ Report of the Working Group, third session, *op. cit.*, para. 31.

regard to ascertaining the cause of loss or damage and were disposed to suggest the drawing up of separate rules for this type of carriage.¹¹⁸

102. At that session, however, the Working Group reached no conclusion on the general question of the responsibility of the ocean freight carrier. It did subsequently compile at its fourth session, a set of texts which differed somewhat from the provisions which subsequently compile at its fourth session, a set of texts are designed to replace paragraphs 1 and 2 of article 3, and paragraphs 1 and 2 of article 4 of the Hague Rules. In order to make the position clear, the first paragraph (hereinafter called "the basic paragraph") of those texts is reproduced below:

"1. The carrier shall be liable for all loss 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."

This puts the problem of live animals in a different light, particularly if its solution depends on ascertaining the cause of damage, the subject of the apprehensions mentioned above. The issue of ascertainment, if it exists at all, must arise with all types of goods under a general rule of responsibility based on fault with a transfer of the burden of proof, as set out in the basic paragraph.

103. The material in this study should dispel any doubts about the first conclusion, namely, the desirability of including the carriage of live animals within the scope of revised Hague Rules. The "prejudgement" proposal is, therefore, to delete the words "live animals and" from article 1 (c) of the Rules; or, better still, to delete from the text adopted by the Working Group at its third session¹¹⁹ the words in brackets (except "live animals").

104. This initial advance on the Hague Rules would give parties all the benefits to be derived from the fact that this type of carriage would then be covered by a unification convention, a step required in any case, to deal with all the questions not involving the responsibility of the carrier which have hitherto also been governed solely by the conditions agreed by the parties, i.e., by the will of the carrier as expressed in the adhesion contract (see paragraphs 76 to 82).

105. Two further proposals were made at the third session by delegations which supported the extension of the Rules to live animals. Poland proposed the following text:¹²⁰

"Live animals, whether carried on deck or below deck, shall be considered as 'goods' within the meaning of this article, if it is proved that damage or loss resulted exclusively from the unseaworthiness of the ship or from careless action by the carrier".

Now, however, this proposal does not appear to be compatible with the basic paragraph which is designed to replace—*inter alia*—articles 3 and 4, to which

Poland's proposal implicitly referred. The French delegation proposed¹²¹ the addition to article 1 (c) of the Rules (in which the reference to the exclusion of live animals would obviously be deleted) of the following text:

"However, with respect to the carriage of live animals, all clauses relating to liability and compensation arising out of the risks inherent in such carriage shall be permitted" (v. para. 108).

106. Also at the third session, other delegations which were in favour of that addition felt that the provisions of article 4, paragraph 2, of the Rules were sufficient to protect carriers against any special risks inherent in the carriage of animals.¹²² From the formal standpoint, their position is no longer relevant in view of the basic paragraph, which would replace the aforesaid paragraph 2 also.¹²³ From the standpoint of substance, their view remains valid in the context of the basic paragraph, which was accepted for the very reason that the Working Group considered that its provisions would provide sufficient protection to the carrier once the latter proved that, having regard to the special risk associated with the goods in question, he and his agents had taken all measures which could reasonably be required of them to avoid the occurrence giving rise to the damage and its consequences.

Alternative proposals

107. The second conclusion, once the possibility of maintaining the *status quo* is rejected, is to submit to the Working Group three alternative proposals, with a recommendation in favour of the third. The basis of the first proposal would be an explicit statement of the will of the parties to a contract for the carriage of live animals by sea with regard to the responsibility of the carrier, by means of a clause expressly exempting the latter. The second would be grounded in the question of proof, its point of departure being a legal presumption of non-liability based on the risk inherent in carriage of this type. The third would take account of the fact that the Working Group's extensive discussions have resulted in a shift in the balance between the carrier and the shipper in the basic paragraph referred to above, whose scope is extremely general and whose provisions, as they stand, appear to be equally applicable to the carriage of live animals and to any other kind of goods.

Proposal I

108. (a) The first proposal is to remove the exclusion of live animals ("prejudgement proposal": see paragraph 103) and to add to article 3, paragraph 8 of the Rules (or the corresponding provision of the revised Rules) the following new paragraph:

"However, with respect to the carriage of live animals, all agreements, covenants or clauses relating

¹²¹ A/CN.9/WG.III(III)/CRP.4.

¹²² Report of the Working Group, third session, op. cit., para. 32.

¹²³ The acceptance of the basic paragraph by the Working Group would also render unnecessary the possible inclusion of "special risks" attaching to the transport of animals under article 4, paragraph 2 (m) ("inherent vice") of the Rules, which was contemplated in some quarters and mentioned, not without reservations, in the report of the Secretary-General, op. cit., para. 73.

¹¹⁸ *Ibid.*, para. 33. This suggestion is pursued further in paragraph 121, which suggests the possibility of IMCO's co-operation on this specific point.

¹¹⁹ Report of the Working Group, third session, para. 25 (report of the Drafting Party, para. 1) and para. 26; UNCITRAL Yearbook, Vol. III: 1972, part two, IV.

¹²⁰ A/CN.9/WG.III(III)/CRP.3.

to liability and compensation arising out of the risks inherent in such carriage shall be permitted in the contract of carriage."

109. In essence, it would include the transport of live animals in the revised Rules, but would authorize parties, in consideration of the risks involved in such carriage, to agree on clauses dealing with the carrier's liability and any damages payable. The original French proposal (see paragraph 105) derived from article 30 (deck cargoes and live animals) of the French Act of 18 June 1955.¹²⁴ The reasons why an exclusion such as that incorporated in the International Convention in the case of live animals could not be entertained in the immediate context of a national act have already been pointed out (see paragraph 70). As to the positioning of the proposed text, it appeared logical to take as a model the French Act, in which the said article 30 follows the provision corresponding to article 3, paragraph 8, of the Rules (nullity of clauses conflicting with the peremptory norms of the Convention). The wording is based in part on that of article 3, paragraph 8, of the Rules.

110. This proposal thus assures the parties of the general benefits of a convention having binding force (notably with regard to definitions, scope, fora, arbitration, restrictions on the master's freedom to enter reservations on the bill of lading, etc.). Nevertheless, it still leaves the carrier free to add to the bill of lading provisions regarding his responsibility and compensation for damage (exemptions, limitations on the amount of damages). Like the French proposal, it imposes a desirable limitation on the general scope of the aforementioned article 30 of the French Act and corresponding provisions of other acts: the liability or compensation must derive from the risks inherent in such carriage.

111. This proposal also has the advantage of being convenient. Thus, practically no changes would be involved in the case of a number of States (see paragraph 71) which already have such a system. In other States (see paragraph 69), where shipping law is in practice modelled on the Rules, some changes will be necessary but these will be less onerous in view of the possibility of exceptions, which is left open. Nevertheless, this latter observation means that, while proposal I represents an undeniable improvement on the existing situation, the argument of convenience loses its force, particularly from the standpoint of other States which are directly concerned in the carriage of animals and had anticipated a more radical change on this point, in line with the general reform undertaken by UNCITRAL.

112. The proposal also calls for other observations:

(1) The expression "live animals" is ambiguous (see paragraph 11 *et seq.*, paragraph 18).

(2) The expression "the risks inherent in such carriage" is also ambiguous in that the risks in question are not otherwise identified. Those who want to interpret it as covering the risks deriving from the perishable nature of the cargo, inherent vice or defect of any other kind should remember the compromise whereby the

¹²⁴ Under the terms of this article 30, as an exception to the general nullity provision of article 29 of the same Act, "all clauses relating to liability or compensation shall be permitted in the case of the transport of live animals".

Working Group decided at its fourth session¹²⁵ to delete the "catalogue of exceptions" from article 4, paragraph 2, of the Hague Rules. The introduction of the wording of proposal I should not be regarded as a revocation of that compromise through the revival of the exception, embodied in that paragraph, based on inherent defect, quality or vice of the goods.

(3) It says nothing as to the burden of proof system for the attribution of damage to the special risks of such carriage operations or for rejecting such attribution.

(4) The resort to clauses to be agreed upon by the parties leaves the question of the proliferation of such clauses (see Annex IV) unchanged—a source of litigation and of uncertainties as to conflict of laws in that the proposal contains no substantive limitation on the scope of such clauses (wilful fault, neglect by the carrier or his agents, unseaworthiness),¹²⁶ a matter which is regulated by the municipal law deemed applicable by the court before which proceedings are instituted.

(5) Difficulties could also arise for States parties to the Paris Convention in that proposal I refers expressly to live animals and would therefore eventually form part of a multilateral agreement containing clauses dealing with the international carriage of live animals concluded with States not parties to the said Convention (see the recommendation mentioned in paragraph 5), in other words, the future revised Hague Rules.

Proposal II

113. A second proposal would involve an attempt to bring the régime applicable to the carriage of live animals by sea into line with that of the Conventions governing the same carriage operations by road and rail and of the draft Convention on [the contract for the] carriage [of goods] by inland waterways. The Secretary-General's report envisaged a solution on these lines.¹²⁷ Proposal II would involve the inclusion of live animals in the Rules (see "prejudgement" proposal, paragraph 103), and adding a paragraph 2 *bis* to the text regarding carriers' responsibility formulated by the Working Group at its fourth session:¹²⁸

"With respect to live animals, the carrier shall be relieved of his responsibility where the loss or damage results from the special risks inherent in the carriage of animals. When the carrier proves that, in the circumstances of the case, the loss or damage could be attributed to such risks, it shall be presumed that the loss or damage was so caused, unless there is conflicting proof that such risks were not the whole or partial cause of it. Furthermore, the carrier shall prove that all steps incumbent on him in the circumstances were taken and that he complied with any special instructions issued to him."

114. The model used was the CMR rather than the CIM. The CMR imposes no obligation on the carrier

¹²⁵ Report of the Working Group, fourth session, *op. cit.*, paras. 23-25, 30, 35.

¹²⁶ On this issue see the Polish proposal in para. 105.

¹²⁷ Report of the Secretary-General, *op. cit.*, para. 74. For the corresponding provisions in the Conventions see paras. 38 (CM), 43 (SMGS), 48-51 (CMR), 56 (CMN).

¹²⁸ Report of the Working Group, fourth session, *op. cit.*, para. 28 (report of the Drafting Party, para. 3) and para. 36.

to carry goods or on the shipper to provide an attendant for the animals, thereby resembling shipping practice. Subject to drafting changes, the two first sentences reproduce articles 17, subparagraph 4 (f), and 18, paragraph 4, of the CMR (see paragraphs 48-50). The third sentence provides for the additional protection established in article 18, paragraph 5 of CMR (see paragraph 51) and confirms the principle of "special instructions" which may be given either by the shipper or by the attendant (e.g. as in the case of dangerous goods (see note 75) or in a handbook similar to those of IATA or UIC (see paragraph 121)).

115. A first advantage of proposal II over the present régime and proposal I—based as it is on the subjective element of the stipulation of contractual clauses between parties one of whom is economically stronger—is that it is based on an objective fact, the carriage of live animals, recognized as a special risk which may be presumed to be the cause of the damage. This is a purely presumptive point of reference because the owner of the goods, for his part, may prove that there is no nexus between the animal and the damage and that the latter is due entirely to the fault of the carrier, or that such fault contributed partially to the damage. Furthermore, the analogy with the solution which has been tried successfully in the conventions governing two modes of transport, and is shortly to be extended to a third, may facilitate the acceptance of this proposal by States already parties to these Conventions. Moreover, proposal II would involve a degree of harmonization with other modes of transport the usefulness of which in this context is enhanced by the fact that most animal transport operations are multimodal (see paragraph 97). Finally, with regard to proof, it offers precise, simple rules which have been tested in rail (see annex I) and road practice.

116. Proposal II might, however, give rise to reservations:

1. With regard to the ambiguity of the expression "live animals", see paragraph 112, (1).

2. With regard to the ambiguity of the expression "special risk", see paragraph 112, (2). Nevertheless, the link between the damage and this risk is not the same as that in proposal I, because the express recognition, as in CIM and CMR, that there is a special risk inherent in such transport operations, is a determining factor.

3. It might be contended that this "special" exemption clause (to follow the formula used in the rail Convention) perpetuates a régime favourable to the carrier in the rules governing proof and would open a second loop-hole, the other being fire, in the compromise which brought about the deletion of "the catalogue of exceptions".

4. On the possibilities of conflict with the Paris Convention, see paragraph 112, (5).

Proposal III

117. The third proposal, which also presupposes the inclusion of live animals within the scope of the revised Rules "prejudgement" proposal (see paragraph 103), would be part of the new provisions on responsibility drafted by the Working Group at its

fourth session.¹²⁹ Previously, when articles 3 and 4 of the Rules were under consideration, there was a much broader range of possible solutions. However, the new balance achieved, in the form of the basic paragraph, by establishing, firstly, an affirmative general rule of responsibility based on fault, followed by a second—and equally general—unified burden of proof rule has simplified matters greatly. The new mechanism is adaptable—as it was designed to be—to goods of all kinds, and there is no apparent reason why live animals should be excluded from its application. Once they are included, the fundamental principle of "*receptum*" proclaimed in the first rule can be extended to them automatically; the same is true of the second rule, which really achieves such "remarkable simplification and clarification of complex and ambiguous provisions of the Brussels Convention... that it was not desirable to retain the exemplification of exonerations in the 'catalogue of exceptions'";¹³⁰ *a fortiori*, it is not desirable to perpetuate the present unconscionable situation with regard to the carriage of live animals. The effect is that the carrier can no longer take refuge behind an exception: he must furnish the proof henceforth required of him, a task clearly varying in difficulty according to the damage involved. Predetermined impunity is replaced by a régime common to all goods. In the event of fault on the part of the shipper (for instance, defective packing, faulty instructions or inadequate health documentation) or of the attendant (for instance, incompetence or disregard of instructions) or of damage attributable to the nature of the goods (for instance, death of an animal from illness despite the provision of all necessary care, injury caused by kicks from horses although they were unshod) which all reasonable measures prove powerless to prevent, proof of non-liability can quite easily be furnished by the carrier who, under the new régime as in the past, cannot be expected to guarantee such goods and the consequences deriving from the fact that they are live. The basic paragraph satisfies the requirements in respect of live animals laid down by Hutchinson: "... the carrier is relieved from responsibility if he can show that he has provided all suitable means of transportation, and exercised that degree of care which the nature of the property requires".¹³¹

118. Proposal III thus amounts to taking only the action contemplated in the "prejudgement" proposal, i.e. to delete either the words "live animals and" in article 1 (c) of the Rules or the words in square brackets in the definition of "goods" adopted by the Working Group at its third session.¹³² The effect of the proposal would be that the basic texts on carrier's responsibility would regulate the responsibility of the carrier of live animals by the same yardstick applied to all other goods. As the quotation from Hutchinson shows, this solution is fully in accordance with general principles. There is nothing unprecedented about it, since the situation with which it deals is exactly the

¹²⁹ See foot-note 128.

¹³⁰ Report of the Working Group, fourth session, op. cit., para. 30.

¹³¹ Hutchinson, op. cit., section 336, page 343 and cases cited.

¹³² Report of the Working Group, third session, op. cit., para. 25 (report of the Drafting Party, para. 1).

same as that covered by the Warsaw Convention, which lays down, almost word for word, the same rules of liability¹³³ and which in none of its provisions envisages any exception to those principles for a particular type of goods—for instance, live animals.¹³⁴

119. There are many advantages to this proposal. Firstly, it has the obvious virtue of being simple and clear-cut since it prescribes no special regulations. Furthermore, by its very nature it escapes the criticisms levelled against the other solutions, which resort to ambiguous expressions (such as "live animals" or "special risks" involved in the carriage of animals), conflict with other Conventions (such as the Paris Convention), or could open the way to conflict of laws or worse still, to a whole series of clauses perpetuating privileged positions. In short, this solution, unlike all the others, is in line with the efforts of UNCTAD and UNCITRAL to establish an equitable balance between the carrier and the shipper.

120. Proposal III would be somewhat simplistic if it merely involved applying the general régime pertaining to all other goods to the carriage of this type of goods, the special aspects of which may again emerge as part of the "measures that could reasonably be required to avoid the occurrence and its consequences" and the proof relating thereto. This proposal should be complemented by a recommendation, which appears to be of fundamental importance.

121. There is an instinctive tendency to associate these "measures" with experience in air transport, which has been built up directly on the practical basis of the care to be provided by all concerned to ensure that animals have the best possible chance of reaching their destination safe and sound; in this connexion, the IATA Manual (see paragraphs 7, 35) and the [draft] UIC register (see paragraphs 6, 45) provide useful models. In order to define the aforementioned measures and to facilitate the provision of proof, all those participating in the carriage of live animals by sea should be supplied with some kind of handbook, easy to consult and widely disseminated, containing instructions for the proper handling of such shipments which are as detailed as possible, scientifically sound and based on experience. In view of the IATA and UIC precedents, IMCO appears to be the best qualified and most competent organization to perform this task—as is demonstrated, in a closely related field, by the value of the International Maritime Dangerous Goods Code,¹³⁵ the preparation of which was entrusted to IMCO in 1960 by the International Conference on the Safety of Life at Sea. IMCO should be recommended to carry out that task, taking into account the above-mentioned precedents and acting in co-operation with all interested organizations.

¹³³ Warsaw Convention, art. 18, para. 1: "The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, . . . any goods, if the occurrence which caused the damage so sustained took place during the carriage by air." Paragraph 2: "The carriage by air . . . comprises the period during which the . . . goods are in charge of the carrier. . . ." Article 20: "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."

¹³⁴ On the applicability or non-applicability to live animals of article 23 (2) of this Convention, see para. 30.

¹³⁵ See foot-note 111.

122. The reference to dangerous goods leads on to the closely related subject of the "hazardous" nature of live animals as goods. It may happen that shipments of animals endanger the vessel and the cargo, just as dangerous goods do; certain bills of lading (see annex IV, No. 18) provide a solution similar to that contained in the second sentence of article 4, paragraph 6, of the Rules with regard to dangerous goods shipped with the knowledge and consent of the carrier. The principles embodied in the basic paragraph would doubtless be adequate to cover such a hazard. However, consideration might be given to meeting the concerns of carriers by adding, after paragraph 6 of the Rules, a new paragraph 7 based on article 7, paragraph 1, of the TCM Convention, on the second sentence of article 4, paragraph 6, of the Rules, and on the basic paragraph:

"Before live animals are taken in charge by the carrier, the shipper shall inform the carrier of the exact nature of the danger which they may present and indicate, if need be, the precautions to be taken.¹³⁶ If such animals become a danger to the ship and the cargo, they may, at any time before discharge, be landed at any place or rendered harmless or killed, without liability on the part of the carrier except to general average, if any, provided that he proves that he unsuccessfully took all measures that could reasonably be required in the circumstances of the case."

The latter phrase should make this text consistent with the provisions of the Paris Convention.

123. In the context of these proposals, mention should be made of the proposal of Australia, in its study in response to the first UNCITRAL questionnaire, that the solution to the question of the unit limitation of liability for loss or damage in the carriage of live animals might be based on the mechanism contained in the General Conditions of the Australian Railways.¹³⁷ In some countries (see paragraph 44), the railways may limit the compensation payable to a fixed amount per head on a scale covering various groups of animals (so much per horse; so much per head of cattle, donkey, mule or camel; so much per head of sheep, swine, dog or other small quadruped; and so forth). This mechanism might be regarded as more satisfactory than those in the Rules, the 1968 Brussels Protocol or the various proposals made at the fifth session of the Working Group concerning unit limitation of liability,¹³⁸ since it would reflect a specific existing practice, provide a con-

¹³⁶ In this connexion, the handbook recommended in para. 121 would clearly be useful.

¹³⁷ Document A/CN.9/WG.III/WP.4/Add.1 (Vol. II), para. 31; an extract from the General Conditions for Livestock, which were not reproduced in that document, has been kindly transmitted by the Australian Government. Article 1 of part 6 (Livestock), title 1 (Condition), after affirming para. (a)) that the Commissioner's liability for any horses, cattle or other animals shall not exceed the amounts specified under title 1, save on declaration of value and payment of a supplementary freight charge, stipulates in paragraph (c) that such liability should be limited to \$A 60 per horse, \$A 30 per camel, mule, head of cattle or donkey, and \$A 4 per head of sheep, swine, dog or other small animal.

¹³⁸ Report of the Working Group, fifth session (A/CN.9/76; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 5), paras. 26-28.

venient basis for insurance and obviate the making of declarations of value at practically every stage of shipment, the very principle of which was discussed at that session.

124. There is one last point, which relates to a figure who is intimately involved with the satisfactory conduct of many shipments of live animals: the attendant. In view of the controversy regarding the legal status of the attendant and his legal standing on board ship (see paragraph 95), and bearing in mind the leonine practice of requiring letters of guarantee to be given to the carrier to cover him (see paragraph 96), it might be fair, having determined the carrier's liability towards the animals, to define more precisely his responsibility towards the individual accompanying those animals. The crux of the matter is the Convention regulating the contract of carriage of passengers by sea, which is currently being revised by IMCO. The concepts of "contract of carriage" and "passenger" (Brussels Convention of 29 April 1961, article 1 (b) and 1 (c)) need to be adapted in order to cover contracts for the carriage of attendants accompanying shipments of live animals, as is done in article 1, paragraph 1 (b) of the Berne Convention of

26 February 1966, additional to the International Convention concerning the Carriage of Passengers and Luggage by Rail (CIV) of 25 February 1961.

ANNEX I

Summary of court decisions transmitted by the Central Office for International Railway Transport (OCTI)

[Not reproduced in the present volume.]

ANNEX II

Extracts from the IATA Live Animals Manual

[Not reproduced in the present volume.]

ANNEX III

Conditions of Contract for Conveyance of Live Stock of the Belfast Steamship Company, Limited

[Not reproduced in the present volume.]

ANNEX IV

Standard clauses relating to the carriage of live animals

[Not reproduced in the present volume.]

4. 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, sixth session</i>	
Comments and suggestions by Governments and international organizations on the topics to be considered at the sixth session of the Working Group	A/CN.9/WG.III/WP.12/Add.1
Deck cargo: working paper by the Secretariat	A/CN.9/WG.III/WP.14
Provisional agenda and annotations	A/CN.9/WG.III/L.1
Excerpts from the report of the Sub-Committee on International Shipping Legislation (bills of lading) at the fifteenth session of the Asian-African Legal Consultative Committee	A/CN.9/WG.111/(VI)/CRP.1
Proposal by the United States: liability for delay	A/CN.9/WG.III/(VI)/CRP.2
Proposal by Japan: liability for delay	A/CN.9/WG.III/(VI)/CRP.3
Proposal by France: liability of ocean carriers for delay	A/CN.9/WG.III/(VI)/CRP.4
Revised proposal by the United Kingdom: documentary scope of the convention	A/CN.9/WG.III/(VI)/CRP.5
Excerpts proposed by the International Chamber of Commerce (ICC): uniform rules for a combined transport document; liability for delay	A/CN.9/WG.III/(VI)/CRP.6
Proposal by Argentina: liability for delay ..	A/CN.9/WG.III/(VI)/CRP.7
Proposal by Ghana: liability for delay	A/CN.9/WG.III/(VI)/CRP.8
Proposal by Brazil: definition of delay	A/CN.9/WG.III/(VI)/CRP.9
Proposal by the United States: limitation of carrier liability	A/CN.9/WG.III/(VI)/CRP.10
Proposal by the United States: scope of the convention (documentary and geographical)	A/CN.9/WG.III/(VI)/CRP.11

<i>Title or description</i>	<i>Document reference</i>
Part I of the report of the Drafting Party: provisions proposed in connexion with the inclusion of provisions on carrier liability for delay in delivery	A/CN.9/WG.III/(VI)/CRP.12
Proposal by Norway: definition of carrier	A/CN.9/WG.III/(VI)/CRP.13
Proposal by the United States: definition of carrier	A/CN.9/WG.III/(VI)/CRP.14
Part II of the report of the Drafting Party: draft provisions on the documentary scope of the convention	A/CN.9/WG.III/(VI)/CRP.15
Proposal by Argentina: definition of carrier	A/CN.9/WG.III/(VI)/CRP.16
Proposal by Poland: definition of carrier	A/CN.9/WG.III/(VI)/CRP.17
Proposal by Japan: draft provisions on definition of carrier	A/CN.9/WG.III/(VI)/CRP.18
Proposal by Norway: concept of carrier	A/CN.9/WG.III/(VI)/CRP.19
Proposal by France: definition of carrier	A/CN.9/WG.III/(VI)/CRP.20
Proposal by Chile: definition of carrier	A/CN.9/WG.III/(VI)/CRP.21
Part III of the report of the Drafting Party: geographical scope of the convention	A/CN.9/WG.III/(VI)/CRP.22
Draft report of the Working Group on International Legislation on Shipping on the work of its sixth session	A/CN.9/WG.III/(VI)/CRP.23 and Add.1 to 10
Proposal by France: invalid clauses	A/CN.9/WG.III/(VI)/CRP.24
Proposal by the United States: carriage of live animals	A/CN.9/WG.III/(VI)/CRP.25
Proposal by Chile: definition of carrier	A/CN.9/WG.III/(VI)/CRP.26
Part IV of the report of the Drafting Party: invalid clauses	A/CN.9/WG.III/(VI)/CRP.27
Part V of the report of the Drafting Party: deck cargo	A/CN.9/WG.III/(VI)/CRP.28
Part VI of the report of the Drafting Party: carriage of live animals	A/CN.9/WG.III/(VI)/CRP.29

IV. RATIFICATION OF OR ADHERENCE TO CONVENTIONS CONCERNING INTERNATIONAL TRADE LAW

Report of the Secretary-General (A/CN.9/91)*

I. INTRODUCTION

1. The Commission, at its sixth session, decided "to maintain on its agenda the question of the widest ratification of or adherence to conventions concerning international trade law".¹ The Commission also requested 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, the 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".²

2. The Commission further decided "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."³

3. The present report is submitted in response to the above decision of the Commission. The report takes into account information received from other United Nations organs and specialized agencies and the views expressed by some representatives to the Commission in reply to inquiries by the Secretariat.⁴

II. THE CAUSES OF DELAY IN RATIFICATION OR ADHERENCE

4. The replies to the above-mentioned inquiries indicate that the causes of delay in the ratification of or adherence to conventions are of two distinct types: (1) those that are related to the preparatory stages preceding the adoption of a convention and (2) those

that relate to the implementation of a convention on the national level.⁵

A. Causes related to the preparatory stages⁶

5. The following causes which originate at the preparatory stages of work on a convention may affect the subsequent implementation of a convention on the national level.

(a) Non-participation in the elaboration of a convention

Non-participation in the elaboration of a convention may result, on the part of the non-participating State, in a lack of interest in the subject-matter of the Convention. It may be noted that such lack of interest may reflect a view that the proposal does not respond to practical difficulties presented by divergency of legislation, but is prompted by projects for "unification for the sake of unification".

(b) Defects of substance

Defects of substance may cause dissatisfaction with certain provisions of a convention and in turn impair the prospects of ratification or adherence. Examples given are:

- (i) Narrowness of approach as to legal systems, in that in some cases conventions have been proposed without adequate attention being paid to solutions in various legal systems. It may be noted that such narrowness of approach may lead to deficiencies as to substance, in that modern solutions to certain problems are not taken into account, and to deficiencies as to drafting, through the use of legal idioms of one legal system that may not be comprehensible in another legal setting.
- (ii) Narrowness of approach as to geography, in that conventions have been prepared without a recognition that for many countries international trade involves the carriage of goods across oceans rather than merely across land borders.⁷
- (iii) Drafting by compromise, as there appears to be a tendency, in the preparation of international conventions, to draft legal provisions

* 30 April 1974.

¹ Report of the United Nations Commission on International Trade Law on the work of its sixth session (1973), *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 17 (A/9017)*, para. 132; UNCITRAL Yearbook, Vol. IV: 1973, part one, II, A.

² *Ibid.*

³ *Ibid.*

⁴ It regards previous documentation related to the item, see A/CN.9/60 (UNCITRAL Yearbook, Vol. II: 1971, part two, IV) setting forth the proposal by the French delegation for the establishment of a union for *jus commune*, and A/CN.9/81 setting forth the comments and observations on this proposal by member States of the Commission.

⁵ In this report, the terms "ratification" and "implementation" include any action on the national level, such as legislative action, that may be necessary to give a convention municipal effect.

⁶ The information given under this subheading is based on the written communications of three representatives to the Commission.

⁷ The representative to the Commission who listed this defect mentions that the 1964 Hague Convention on the International Sale of Goods was subject to this objection.

by compromise which often results in a failure to face up to difficult problems by omitting provisions relating to them or to deal with them adequately by including only weak provisions based on the "lowest common denominator".

- (iv) Inadequate study, in that not enough time and energy is spent on the preparatory work of conventions.⁸

B. Causes related to the implementation of conventions on the national level

6. The causes under this heading relate to difficulties inherent in the constitution of a State and to difficulties of an administrative character.

7. Ratification or adherence may present problems in the case of a State with a federal structure when, under the constitution, the subject-matter of a convention falls within the jurisdiction of the constituent units of the federation.⁹

8. Administrative delays may be due to a great many factors. The following have been mentioned:

(a) Administrative inertia and indifference on the part of an administration towards international law;

(b) The heavy burden which national administrations face as a result of the activities of international organizations in the legal field;

(c) Lack of urgency or priority which a convention has or is being given, having regard to the workload of an administration or a parliament;

(d) Priority of matters of a domestic or political interest over matters dealt with in a convention;

(e) Some national administrations do not have the necessary expert staff to examine the merits of a convention, in particular when they have not participated in the preparatory work;

(f) The text of a convention must be translated into the national language which is often a difficult task. Where two or more countries with the same language are considering adhering to a convention drafted in a language other than that of these countries, it is desirable that the translations be identical and this requires the organization of translation conferences;

⁸ The representative to the Commission who listed this defect of substance refers in his comments to the prodigious amount of time and energy that has been spent in the United States on, for example, the Uniform Commercial Code or the Uniform Consumer Credit Code. He notes that "this is due to the much greater interest that is provoked among the bar and other interested groups by proposals for domestic legislation, the enactment of which seem likely".

⁹ For instance, one representative to the Commission, referring to the constitution of the United States of America, states that although the federal Government has the power to regulate interstate commerce, the private law aspects of commerce have in fact been left largely to the States. He notes that it is, for example, the States and not the federal Government that have enacted the Uniform Commercial Code; that Congress is not accustomed to deal with problems of sales or commercial paper in domestic commerce and that this may deter it from doing so in international commerce. He further notes that it is of interest in this connexion that the United States has acted favourably on conventions in two areas in which it has also enacted legislation: arbitration and shipping.

(g) In view of the fact that conventions usually enter into force upon their ratification by a specified number of countries, national administrations adopt a wait-and-see attitude and will take action only when the entry into force appears certain;¹⁰

(h) A national administration may be more favourably disposed to initiate ratification or adherence procedures if the convention in question is in force in neighbouring countries or in countries with which the administration's country has extensive economic relations.

III. PROCEDURES AND METHODS DESIGNED TO ACCELERATE THE ADOPTION AND IMPLEMENTATION OF INTERNATIONAL RULES

9. The procedures and methods developed to accelerate the adoption and implementation by national authorities of international rules, as reported in response to the Secretariat inquiries, fall into two distinct categories: (a) procedures that are designed to dispense with the process of formal ratification or adherence ("negative notification procedure"), and (b) methods that are designed to expedite the process of ratification or adherence.

(a) Negative notification procedure

10. Under the negative notification procedure, also referred to as an "opting-out" or "objection" procedure, rules adopted by an international body ("sponsoring body") will, on a specified date, become binding upon a member State of the sponsoring body unless such State, before such date, has declared that it does not wish to be bound.¹¹

11. Examples of this type of procedure are the following:

(i) International Civil Aviation Organization (ICAO)

Under article 37 of the Chicago Convention on International Civil Aviation of 1944, ICAO shall adopt, as may be necessary, international standards and recommended practices and procedures.¹² These international standards are considered binding on member States of ICAO unless a member State has given notice to ICAO that it "finds it impracticable to comply in

¹⁰ One representative of the Commission suggested that this problem may be mitigated by the requirement that Governments submit a convention to the competent authorities within a specified period of time. See paragraph 13, *infra*.

¹¹ Under the Treaty establishing the European Atomic Energy Community (EURATOM) of 1957, the Council of the Community is empowered to determine basic standards for maximum permissible levels of ionizing radiation (articles 30 and 31). Member States "shall enact the legislative and administrative provisions required to ensure compliance with the basic standards so determined..." (article 33). It will be noted that this legal obligation is not subject to any procedure for "opting-out".

See also articles 100-103 of the Treaty of 1957 establishing the European Economic Community regarding the issue of directives by the Council of the Community.

¹² These deal with communications systems and air navigation aids, rules of the air and air traffic control practices, licensing of operating and mechanical personnel, airworthiness of aircraft, registration and identification of aircraft, collection and exchange of meteorological information, log books, aeronautical maps and charts, customs and immigration procedures, aircraft in distress and investigation of accidents, and such other matters concerned with the safety, regularity, and efficiency of air navigation.

all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord" with any such standard or procedure (article 38 of the Chicago Convention). Under article 38, it falls to each member State to notify ICAO immediately of non-compliance, and of any difference between its own practice and that established by the international standard.

(ii) *World Health Organization (WHO)*

A similar procedure obtains under article 21 of the Constitution of WHO. In five specified technical areas, the WHO Assembly may adopt regulations which become binding upon members of WHO unless they expressly opt out. The members of WHO are notified by the Director-General of WHO of the adoption of a regulation. The notification specifies the period within which a member can reject a regulation or make reservations thereto. In WHO practice, the Assembly has occasionally rejected certain reservations on the ground that they substantially detracted from the character and purpose of the regulation. On other occasions, reservations have been accepted for a limited period of time with the possibility of subsequent extension. Regulations adopted under article 21 of the WHO Constitution have so far been adopted only in respect of relatively non-contentious matters with a highly technical content.

(iii) Amongst current proposals is that by the Inter-Governmental Maritime Consultative Organization (IMCO) for a tacit acceptance procedure for technical conventions. IMCO's Legal Committee has prepared draft model provisions for bringing amendments into force upon their adoption by the appropriate bodies.

(b) *Methods to expedite ratification*

12. These methods are designed to ensure that, immediately after their adoption within the sponsoring body, conventions are examined by the competent national authorities of member States and submitted to these authorities for ratification or other action.

13. Examples of these methods are the following:

(i) *International Labour Organisation (ILO)*

Under article 19, paragraph 5 (b) to (d) and paragraph 7 of the ILO Constitution, States members of the ILO are obliged to submit conventions adopted by the International Labour Conference, within a period of 12, or in exceptional circumstances 18, months of their adoption, to the national authorities within whose competence the matter lies for the enactment of legislation or other action. Article 19 also provides that if a State member obtains the consent of the competent authority, it will communicate the formal ratification of the convention to the Director-General of the ILO and will take such action as may be necessary to make effective the provisions of the Convention. These provisions of the ILO Constitution are reported to have two purposes. One is to bring conventions before the authority—usually the legislative authority—which has the power to take the measures necessary to give effect to conventions; the second purpose is to bring the conventions to the notice of public opinion.

Article 19, paragraph 5 (c) of the ILO Constitution also provides that States members shall inform the Director-General of the ILO of the measures taken to

submit conventions to the competent national authorities, with particulars of the action taken by them. On the basis of the information supplied under this provision, the ILO supervisory bodies follow up the way in which States members fulfil their obligations relating to submission of newly adopted conventions to the competent authorities.

14. Other provisions of the ILO Constitution (article 19, paragraphs 5 (c) and 7 (a) and (b) (iv)) provide further that when the Governing Body of the ILO so requests in relation to a given convention, States members which have not ratified the convention in question shall report the position of their law and practice on the matters dealt with in it and state the difficulties which prevent or delay ratification. On the basis of these reports, the ILO Committee of Experts on the Application of Conventions and Recommendations prepares a general survey in which it examines and comments on the reasons given as preventing or delaying ratification.

15. Among the means of action that are not based on a constitutional provision, it is reported that from time to time appeals for the ratification of a given Convention or group of conventions are made by the International Labour Conference or by the Regional Conference of the ILO. Also, since 1970, the regional advisory committees and regional conferences of the ILO, which meet periodically for the African, American and Asian regions, have included in their agenda the examination of the difficulties encountered in the ratification and application by State members in respect of selected international labour conventions. The studies made of these conventions and the resulting conclusions have led to a better understanding of the position in each region and to improved ratification prospects.

16. There has also been developed by the ILO a practice of having ILO conventions examined by regional organizations, in particular as regards the position of the member States of such organizations in relation to these conventions. The International Labour Office cites the example of the Social Committee of the Council of Europe, which since 1962 has examined the position in respect of over 50 conventions, chosen after consultations with the International Labour Office.

17. At each session of the International Labour Conference the ILO secretariat includes an "Information on Conventions Service" which is available to discuss, with government delegations, ratification possibilities as well as difficulties encountered and the means of overcoming them. Similar arrangements are made at ILO regional conferences.

18. The Director-General of the ILO is regularly requested by Governments to provide written opinions explaining the provisions of conventions. These opinions are communicated to the Governing Body of the ILO and published in the ILO Official Bulletin. While the formal interpretation of international labour conventions is the responsibility of the International Court of Justice, the explanations provided by the ILO are said to facilitate in certain cases a decision as to whether the convention in question can be ratified.

19. Other measures include a procedure for direct contacts, introduced in 1969, under which a repre-

sentative of the Director-General visits the country concerned, with the agreement and usually at the invitation of the Government, in order to examine with the competent national officials difficulties in implementing ratified conventions. This procedure has recently been extended to cases in which the Government wishes to discuss possible obstacles to the ratification of a given convention.

20. Through the methods described above, the ILO has been able to contribute to the current total of about 4,000 ratifications covering over 130 of its Conventions.

(ii) *World Health Organization*

21. Pursuant to article 19 of the Constitution of the World Health Organization, the WHO Assembly, by a two-thirds majority, may adopt conventions relating to any matter within the competence of WHO. Under article 20 of the WHO Constitution, the member States of WHO are obliged to take action with regard to ratification by the competent national authorities and to notify, within 18 months, the Director-General of WHO of the action they have taken.

IV. CONCLUSIONS

22. A survey of the constitutions and practice of international law-making and regulatory bodies indicates that the procedure under which rules adopted under their auspices become binding upon member States, unless they opt out within a specified period of time, has been used only in the context of international rules and standards that are of a technical nature. It does not appear that the rules contained in or envisaged for the conventions now being prepared by the commission are of the technical nature of conventions in respect of which an opting-out procedure has thus far been employed.

23. The Commission may, therefore, wish to give particular attention to those procedures, which are now in use or which may be developed, that have special relevance to the preparation of conventions by UNCITRAL, and their subsequent implementation on the national level. Such procedures may include the following:

(a) Selections of those projects for unification for which there is a widely-felt need, on the basis of an

examination of the extent of the divergencies between the rules of different legal systems and, most especially, on the basis of evidence of practical difficulties resulting therefrom.

(b) Wide participation in the preparatory work on projects, not only by States which are members of the Commission, but also by others, and by international organizations with special expertise in the subject-matter to be dealt with in a convention. Such participation could take various forms, such as the circulation of questionnaires concerning the need for and the proposed content of new uniform rules, the circulation of draft texts for comments, and periodic consultations with interested circles.¹³

(c) Once a convention has been adopted, the General Assembly might be asked to request the Secretary-General to transmit the convention to Governments, inviting them, within a specified period of time, to supply him with information on the steps that have been taken with regard to ratification.¹⁴

(d) Encouragement to regional bodies that they should consider recommending to their member States the ratification of, or adherence to, conventions prepared by the Commission.

(e) Regional seminars, held where feasible in collaboration with regional international organizations, for the explanation and analysis of proposed conventions.

(f) A request to States to designate a person who would have the responsibility to make pending conventions known to governmental and private circles in his country. The Commission might also wish, at some future time, to consider establishing procedures for liaison within each region between representatives of members of the Commission and such persons.

¹³ Such procedures have been followed, for instance, in the course of the preparatory work on negotiable instruments and arbitration.

¹⁴ It may be noted that a similar course has been followed in respect of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. See report of UNCITRAL on the work of its sixth session (A/9017; UNCITRAL Yearbook, Vol. IV: 1973, part one, II, A), para. 85 (1), and para. 5 of General Assembly resolution 3108 (XXVIII), reproduced in this volume, part one, I, C *supra*.

V. ACTIVITIES OF OTHER ORGANIZATIONS

Report of the Secretary-General on current activities of international organizations related to the harmonization and unification of international trade law (A/CN.9/94 and A/CN.9/94/Add.1 and 2)*

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), at the fifth session in 1972 (A/CN.9/71), and at the sixth session in 1973 (A/CN.9/82). The present report, prepared for the seventh session (1974), 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 Some of the international organizations, whose activities were described in the earlier reports to the Commission, either did not submit statements as to their current activities or reported that they were not currently engaged in work related to the work programme of the Commission.

I. UNITED NATIONS ORGANS AND SPECIALIZED AGENCIES

A. UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE (ECE)

Group of Experts on International Trade Practices relating to Agricultural Products

3. (a) Rules for Survey (Valuation) in Fresh Fruit and Vegetables.

These Rules for Survey, adopted by the Group of Experts in April 1973 are part of the General Conditions for International Dealings in Fresh Fruit and Vegetables (AGRI/WP.1/GE.7/35 and Add.1).

(b) General Conditions for International Dealings in Potatoes. Rules of Valuation for Potatoes.

On the basis of documents AGRI/WP.1/GCS/24/Rev.1 and AGRI/WP.1/GCS/29 General Conditions and Rules for Survey for the international trade in potatoes were adopted by the Group of Experts at its sessions in April 1973 and February 1974. The texts will be published in 1974.

(c) Draft General Conditions for International Dealings in Dry Fruit (shelled and unshelled) and Dried Fruit. Draft Rules of Valuation for Dry and Dried Fruit.

Work continued in 1973 on the two instruments concerning international trade in dry and dried fruit (AGRI/WP.1/GCS/16/Rev.3 and AGRI/WP.1/GE.7/R.4/Rev.1).

(d) Draft Arbitration Rules for International Dealings in Agricultural Products.

Work continued in 1973 on rules for arbitration on the basis of document AGRI/WP.1/GCS/30. In 1974 the Group of Experts will devote a session to this question. On that occasion it is expected that experts on international commercial arbitration will participate. It should then be possible to establish whether arbitration rules for international dealings in agricultural products should be established under the auspices of the ECE.

Group of Experts on International Contract Practices in Industry

4. (a) The Guide on Drawing up Contracts for Large Industrial Works was published in English and French in 1973, in Russian in 1974 (United Nations publication, Sales No. (English): E.73.II.E.13).

(b) In 1973 work was initiated for preparing a guide on drawing up international contracts on industrial co-operation.

* 6, 8 and 10 May 1974.

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), the fifth session (A/CN.9/71) and the sixth session (A/CN.9/82) (UNCITRAL Yearbook, Vol. IV: 1973, part two, V); 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 of 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: 1968-1970, 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 Secretariat, 1 April 1970 (UNCITRAL/III/CRP.2).

Group of Experts on Data Requirements and Documentation

5. In 1973 the Group of Experts decided to transfer two items from its long-term to its short-term work programme, i.e.

(a) Purpose and modalities of signature on international trade documents, and

(b) Legal validity of documents transmitted automatically.

The Group of Experts was set up in 1972 by the Working Party on Facilitation of International Trade Procedures. Its terms of reference are reproduced in document TRADE/WP.4/113.

B. UNITED NATIONS ECONOMIC COMMISSION FOR LATIN AMERICA (ECLA)

International intermodal transport

6. The immediate objective of this project is to carry out economic and legal studies and collaborate with UNCTAD, pursuant to Economic and Social Council resolution 1734 (LIV), so that the Intergovernmental Preparatory Group on a Convention on International Intermodal Transport will have the information needed to prepare a draft convention dealing with documentation and liability problems of international intermodal transport and the institutionalization of combined transport operators.

7. The Economic Commission for Latin America is aiding the creation and work of the national and regional working groups on facilitation of commerce and international intermodal transport, which for the present are studying the legal and economic aspects of this issue in order to advise the Latin American members of the Intergovernmental Preparatory Group. Individual Latin American experts on international transport or maritime law are also collaborating by contributing recommendations regarding the proposed convention, and these contributions will be brought together in an anthology by the Commission. The Commission itself is engaged in studies regarding the impact of the introduction of a new Combined Transport Document with relation to present documentation requirements for international trade, and regarding the economic and institutional implications of different technological options for international intermodal transport.

8. At the same time, the Commission and the Institute for Latin American Integration (INTAL) are studying the legal and other non-tariff barriers to facilitation of land transport movements between the Plate River Basin and the Andean Group countries. This project is sponsoring experimental cargo movements and advising the Governments and the transporters of new agreements, procedural modifications and insurance or guarantee systems which need to be made in order to permit the creation of regular transport services, taking advantage of existing infrastructure.

9. The Commission has prepared a document: "International intermodal transport: statement of the immediate problem for Latin America and action programme for affected institutions" (E/CN.12/L.103,

3 December 1973), and will prepare additional documents during the year on the activities described above.

C. UNITED NATIONS ECONOMIC COMMISSION FOR ASIA AND THE FAR EAST (ECAFE)

International payments

10. A draft agreement establishing the Asian Clearing Union was adopted at the Meeting of Senior Officials of Governments and Central Banks for the Establishment of an Asian Clearing Union, which was convened at Bangkok 23-28 February 1973. The agreement was opened for signature by interested central banks at the Tokyo session of ECAFE (11-23 April 1973).

International legislation on shipping

11. The secretariat of ECAFE plans to undertake a comprehensive survey of existing maritime legislation in the ECAFE region with a view to promoting uniformity in the national legislations. Based on the results of the above survey, guidelines shall be developed for formulation of maritime law for use by countries in the ECAFE region. This work will be carried out with the co-operation and support of UNCTAD and UNCITRAL.

D. 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)

12. The early stages of ICAO's work on revision of the Warsaw Convention of 1929, as amended by the Hague Protocol of 1955, were described in the report submitted to UNCITRAL at its sixth session (A/CN.9/82; UNCITRAL Yearbook, Vol. IV: 1973, part two, V; para. 6). The report of the ICAO Sub-Committee on Revision of the Warsaw Convention (ICAO document LC/SC.Warsaw (1972)—report) will be placed before the full ICAO Legal Committee, which will meet at Montreal in September and October 1974.

Research in regard to measures for promoting the uniform interpretation of international private air law conventions

13. A rapporteur appointed for this subject has not yet presented a report.

E. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD)*

14. Earlier stages of UNCTAD's work on liner conference practices, charter parties and combined transport were described in the report submitted to the sixth session of the Commission (A/CN.9/82, paras. 7-13; UNCITRAL Yearbook, Vol. IV: 1973, part two, V).

15. A Convention on a Code of Conduct for Liner Conferences was adopted at the conclusion of the United Nations Conference of Plenipotentiaries on a Code of Conduct for Liner Conferences, on 6 April

* For further information see addendum 1 below.

1974. The report of the Conference is expected to be published during May 1974 as TD/CODE/10.

F. INTER-GOVERNMENTAL MARITIME CONSULTATIVE ORGANIZATION (IMCO)

International legislation on shipping

16. 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, para. 12 and A/CN.9/71, paras. 9 and 10). IMCO continues to participate in the work of UNCITRAL on this subject.

G. INTERNATIONAL MONETARY FUND (IMF)⁴

International negotiable instruments

17. Members of the staff of the Fund have been participating in work in respect of a draft uniform law on international bills of exchange and promissory notes which is at present being considered by the UNCITRAL Working Group on International Negotiable Instruments.⁵

H. WORLD BANK (INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT—IBRD)

Procurement training courses

18. In the past few years the World Bank has taken an active interest in procurement training courses and the curricula and contents thereof for officials in developing countries. It has, for instance, made staff available and made a modest financial contribution to the first two UNITAR/SIDA regional seminars on the topic as well as to the UNDP-sponsored seminar on procurement in Indonesia.

I. UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION (UNIDO)

The evaluation of multinational projects and the basis of a policy for their establishment in developing countries

19. The first part of a UNIDO study on this topic discusses the need for multinational projects including their functions, economies of scale and their relation to the development of smaller developing countries. It then considers the terms of co-operation, which include the sharing of the benefits of co-operation, the concept of a "package deal" of projects, the location of projects, arrangements for ensuring access to markets in co-operating countries, the provision of finance and entreprenuring and the negotiation of a "package deal" of multinational projects. The third part of the study deals with the evaluation of multinational industrial projects and attempts to quantify the benefits resulting from such projects. The study will be published by UNIDO in 1974.

⁴ 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)).

⁵ 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; UNCITRAL Yearbook, Vol. IV: 1973, part two, II, 1.

A critical appraisal of regional industrial co-operation in East Africa

20. This UNIDO study discusses critically regional industrial co-operation in the East African Community since its inception up to the present time. It considers the three stages of regional economic co-operation in the evolution of the East African Community; economic development in East Africa; and lastly, the critical evaluation of industrial co-operation and recommendations with regard to measures which could facilitate more co-operation in the industrial field in future. It is scheduled for publication by UNIDO in 1974.

The role of multilateral financial institutions in the promotion of international industrial co-operation

21. This paper was prepared by UNIDO for a meeting convened by the Secretary-General of UNCTAD to discuss the role of multilateral financial institutions in the promotion of economic integration in the developing countries. It has been published by UNIDO (publication reference UNIDO/IPPD.138).

Contract planning

22. This is a manual which attempts to show industrial managers, administrators and engineers in developing countries how proper planning, organization and control can alleviate many of the problems in the field of contracting. The manual gives the systematic view of how the contracting work is arranged in a proper way and what the functions of the various project departments are. The manual is to be published in 1974.

Guidelines for the formation of contractual agreements for industrial projects

23. These guidelines aim at showing the relevant staff in developing countries how to formulate contracts for consultants, civil works contractors and equipment suppliers. Those issues which are particularly important for developing countries are shown as well as the basic procedures for the preparation of contracts. The guidelines also include a section on international arbitration. The study is presently being finalized.

Subcontracting and licensing agreements

24. UNIDO documents ID/WG.136/3 and ID/WG.136/20 are the results of a UNIDO meeting on Transfer of Technology to Developing Countries through Subcontracting and Licensing Agreements.

J. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (FAO)

Programmes on investment in agriculture

25. FAO's programmes of relevance to foreign investment in agriculture, on the basis of preinvestment studies and surveys, are aimed partly at facilitating the establishment of contacts between potential investors, whether public (e.g. IBRD, regional development banks, bilateral aid programmes) or private, and the authorities of the developing country responsible for the particular sector in need of investments. Of relevance in this respect is the work of the FAO Industry Co-operative Programme (ICP).

26. A second aspect of FAO's programmes is the dissemination of information regarding methods for the stimulation and control of investment, and guidelines for the establishment and operation of enterprises involving some measure of joint investment or joint participation in various substantive sectors of agriculture, forestry and fisheries. Examples of such work are the study on "Foreign Investment Laws and Agriculture" and the "Handbook on Forest Utilization Contracts on Public Land", FAO, 1971. A similar study on joint ventures in the fishery sector is currently in preparation.

II. INTERGOVERNMENTAL ORGANIZATIONS

A. ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

Uniform rules governing the international sale of goods

27. This subject has been included in the programme of work of this Committee since 1969. The Uniform Law on the International Sale of Goods, together with the revisions thereto proposed by the UNCITRAL Working Group on the International Sale of Goods, has been considered by a Standing Sub-Committee at the annual sessions held at Accra (1970), Colombo (1971) and New Delhi (1972).

Prescription (limitation) in the international sale of goods

28. The proposed UNCITRAL draft convention on this subject was considered in detail by the Standing Sub-Committee on the International Sale of Goods at the session held in New Delhi (1973), together with a study thereon prepared by the secretariat of the Committee. The report of the Sub-Committee generally approved the approach of the Convention as a workable compromise, and submitted specific suggestions for its revision. The report was circulated among member States for their comments, and some member States have generally approved the report. Any further comments received will be forwarded to the UNCITRAL secretariat.

General conditions of sale

29. The work already done, commencing with the session held at Accra (1970), included adoption of a programme of work proposed by the Standing Sub-Committee, the preparation of a draft standard form of f.o.b./f.a.s. contract for use in relation to the sale of commodities in the region, the consideration and suggested revision of the draft by the Sub-Committee, and the circulation of the draft and proposals for revision to member States, other States of the Asian-African region, and interested trade associations in the region for their comments. A study is now being prepared analysing the responses received. This analysis, and a commentary thereon prepared by the secretariat, will shortly be circulated together with a detailed questionnaire designed to elicit further information necessary for the continuation of the project. Further work, including the drafting of another standard form contract, is envisaged after receipt of the replies to the questionnaire.

International payments

30. The work done by UNCITRAL in the field may be considered at an appropriate stage.

International commercial arbitration

31. A detailed study on certain aspects of international commercial arbitration was prepared by the secretariat of the Committee. This covered the following topics: (1) institutional arbitration and *ad hoc* arbitration; (2) constituting the arbitral tribunal; (3) venue of arbitration; (4) the applicable law to determine the rights and obligations of the parties under the contract; (5) procedure in arbitration; (6) arbitral awards; (7) the enforcement of foreign arbitral awards. The study was placed before the Committee at its session at Tokyo (1974) and considered in detail by a Sub-Committee. The report of the Sub-Committee with the recommendations contained therein has been forwarded to UNCITRAL for its attention.

It is proposed to follow up the study in the light of the discussion at the Tokyo session (1974) in order to consolidate and carry further the work already done. For this purpose, a detailed questionnaire is being prepared with a view to eliciting further essential information from Governments and trade associations in the region.

Bills of lading

32. In reply to an UNCITRAL questionnaire on certain topics relating to bills of lading, which were due to be considered by the UNCITRAL Working Group on this subject, a detailed answer to the questionnaire was prepared by the secretariat, and circulated to member Governments for their comments. The topics in question were also considered by a Sub-Committee at the session of the Committee in Tokyo (1974) and the report of the Sub-Committee was forwarded to UNCITRAL for consideration by the Working Group. The future work of UNCITRAL will be kept under review.

A code of conduct for liner conferences

33. A detailed study was prepared by the secretariat on the proposals which culminated in the holding of a Conference of plenipotentiaries for drafting a convention on this subject in November last year. This was circulated to member Governments and other Governments of the region. After the Conference concludes its deliberations, a further study will be undertaken, if necessary.

Multinational enterprises

34. This subject is under review, and will be appropriately considered, if the need arises.

B. ASIAN DEVELOPMENT BANK

Credit and security research project

35. For the past three years, the Asian Development Bank has been associated with the Law Association for Asia and the Western Pacific (LAWASIA) in the undertaking of a credit and security research project. This project involves a study of the security arrangements available to national development banks and similar financial institutions situated in the region. Eight country reports and one integrated report have, so far, been published by the University of Queensland Press,

Queensland, Australia. The report on Australia is expected to be completed towards the end of the year.

C. BANK FOR INTERNATIONAL SETTLEMENTS

International negotiable instruments

36. Through its Legal Adviser, the Bank for International Settlements has participated in work on a draft uniform law on international bills of exchange and promissory notes which is being considered by the UNCITRAL Working Group on International Negotiable Instruments.⁶

D. COUNCIL OF EUROPE⁷

Uniform rules in the field of "time limits"

37. Earlier stages of the work on "time limits" by the Council of Europe were described in the reports submitted to the fourth session (A/CN.9/59, para. 23), the fifth session (A/CN.9/71, paras. 21 and 22), and the sixth session of UNCITRAL (A/CN.9/82; UNCITRAL Yearbook, Vol. IV: 1973, part two, V; paras. 37 and 38). The European Convention on the Computation of Time Limits was opened for signature on 16 May 1972, but has not yet entered into force.

38. At its 229th meeting, held 19-27 February 1974, the Committee of Ministers authorized the setting-up of a Committee of Experts to examine the outcome of the United Nations Diplomatic Conference on Prescription (Limitation) in the International Sale of Goods and the action to be taken on the European rules on extinctive prescription drawn up by a CCJ committee of experts.

Recognition and enforcement of foreign judgements in private and commercial matters

39. Earlier stages of work on the preparation of a practical guide on the subject were described in the reports submitted at the fourth session (A/CN.9/59, para. 24), the fifth session (A/CN.9/71, para. 23), and the sixth session of UNCITRAL (A/CN.9/82, para. 39). The Committee of Ministers of the Council of Europe authorized the setting-up of a drafting committee which is to finalize the practical guide to recognition and enforcement of foreign judicial decisions.

Products liability

40. A committee of experts, appointed in 1972, has been engaged in the preparation of a draft uniform law or a draft convention, in order to harmonize in the member States the laws on liability of producers for damage caused by their products.

E. 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

41. The above Convention was discussed in the reports submitted to the fifth session (A/CN.9/71, para. 26) and the sixth session of UNCITRAL (A/CN.9/82, UNCITRAL Yearbook, Vol. IV: 1973, part two, V; para. 42). The Convention entered into force on 13 August 1973.

42. The Convention provides that all disputes between economic organizations arising from contractual or other civil law relations in the course of economic, scientific and technological co-operation among countries parties to the Convention shall be subject to arbitration, provided that such disputes do not fall within the competence of national courts.

Uniform rules for arbitration courts

43. This topic was discussed in the report submitted to the sixth session of UNCITRAL (A/CN.9/82, para. 43). The uniform rules for arbitration courts attached to the chambers of commerce of the member countries of CMEA, which include provisions concerning court fees for arbitration, and expenses and costs borne by the parties, were prepared by the Legal Conference of representatives of CMEA member countries on the basis of the Comprehensive Programme for the Further Intensification and Enhancement of Co-operation for the Development of the Socialist Economic Integration of the Member States of CMEA. The uniform rules were approved by the Executive Committee in February 1974.

44. The rules provide for the uniform settlement of questions relating to the competence of arbitration courts, their organization and activities and their working procedures. The Executive Committee recommended that CMEA member countries should adopt measures to ensure that regulations corresponding to the uniform rules should be applied to disputes between the economic organizations of CMEA member countries which fall within the competence of these courts.

General conditions for technical servicing of machines and equipment delivered in trade among CMEA member countries

45. With a view towards the further refinement of the system of technical servicing of machines and equipment delivered in trade among CMEA member countries, CMEA's Standing Commission on Foreign Trade has carried out work on the improvement of the General Conditions of Technical Servicing, CMEA, 1962, and the General Conditions of Assembly, CMEA, 1962. This work has made the above-mentioned 1962 documents responsive to the growing demands for technical servicing of machines and equipment delivered in trade among the member countries of CMEA; they now define more clearly the rights and obligations of sellers and buyers in the organization and execution of technical servicing and assembly and related matters. These documents have been prepared to fit in with the General Conditions of Delivery, CMEA,

⁶ 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 (UNCITRAL Yearbook, Vol. IV: 1973, part two, II, 1) para. 3.

⁷ This report on the current activities of the Council of Europe was derived from several sources; it may be incomplete in view of the fact that the Secretariat has not yet received a communication from the Council describing its activities relating to international trade law.

1968. As a result of the improvement of the 1962 documents, CMEA's Standing Commission on Foreign Trade was able to prepare the General Conditions for the technical servicing of machines, equipment and other industrial products delivered among organizations of the member countries of the Council for Mutual Economic Assistance authorized to engage in foreign trade (General Conditions of Technical Servicing, CMEA, 1973) and the General Conditions of Assembly and the provision of other technical services connected with the delivery of machines and equipment among organizations of the member countries of the Council for Mutual Economic Assistance (General Conditions of Assembly, CMEA, 1973).

46. These latter documents were approved by the Executive Committee in April and September 1973 respectively. The Executive Committee recommended that CMEA member countries should bring the above-mentioned documents into force on 1 January 1974, so that they would be applicable to contracts entered into on or after 1 January 1974 between organizations of the member countries of CMEA authorized to engage in foreign trade.

47. CMEA's Standing Commission on Foreign Trade has also improved the General Principles for the provision of spare parts for machines and equipment delivered in trade among member countries of CMEA and with the Socialist Federal Republic of Yugoslavia. The General Principles were approved by the Executive Committee in April 1973.

Report on legal questions relating to the conclusion and execution of treaties on specialization and co-operation in production

48. This report was prepared by the Legal Conference of representatives of CMEA member countries as a means of promoting co-operation among CMEA member countries and their economic organizations in the uniform solution of certain legal questions relating to the conclusion and execution of treaties on specialization and co-operation in production.

49. The report was approved by the Executive Committee in December 1973. The Executive Committee recommended to the member countries of the Council that their economic organizations should take the recommendations contained in the report into account when concluding treaties on specialization and co-operation in production; it also instructed CMEA organs to take account of these recommendations when drawing up such treaties. The Legal Conference of representatives of CMEA member countries was requested to prepare, on the basis of this report, a description of existing practice concerning the conclusion of treaties on specialization and co-operation in production, and draft uniform rules for the settlement of questions relating to the conclusion and execution of such treaties.

**F. INTER-AMERICAN JURIDICAL COMMITTEE
(ORGANIZATION OF AMERICAN STATES)**

The Inter-American Specialized Conference on Private International Law

50. Earlier stages of work by the Committee were described in the reports submitted to the fifth session

(A/CN.9/71, paras. 36 and 37) and the sixth session of UNCITRAL (A/CN.9/82, UNCITRAL Yearbook, Vol. IV: 1973, part two, V; para. 49). Among the draft conventions and other documents prepared by the Inter-American Juridical Committee for the Inter-American Specialized Conference on Private International Law are the following: resolution on multinational commercial companies; resolution on the international sale of goods; draft convention on bills of exchange, checks and promissory notes of international circulation; draft convention on international commercial arbitration; and draft convention on contracts of maritime and terrestrial transportation.

51. These documents were approved by the Committee during its meeting in July-August 1973. The Inter-American Specialized Conference on Private International Law will be held in Panama starting on 14 January 1975.

G. INTERNATIONAL BANK FOR ECONOMIC CO-OPERATION (IBEC)

International commercial arbitration

52. The draft international convention on settlement through arbitration of civil disputes which may occur within the framework of economic and scientific-technological co-operation was approved in 1972. The Russian text of the Convention was signed on 26 May 1972 by representatives of the eight Governments of the CMEA member countries. The text was published in the official bulletins of the countries signers of the Convention (e.g. the official text of the Convention in Russian was published together with its Polish translation in issue No. 7, 1974, of "Dziennik Ustaw").

53. The Convention came into force on the ninth day from the day of the placement with the depositary of the fifth instrument of ratification, i.e. as of 13 August 1973. The Convention has been ratified by six of the eight CMEA countries. The Convention is open for other countries to join, subject to approval by the countries which have previously ratified the Convention.

54. The Convention involves the system of permanent arbitration attached to the chambers of commerce in the participating countries. All disputes between economic organizations (including international economic organizations of the CMEA countries provided their Statutes stipulate application of the Convention) resulting from contract and other civil relations occurring during economic and scientific-technological co-operation of the participating countries, are to be submitted to the arbitration tribunal attached to the Chamber of Commerce in the defendant's country or, at the parties' discretion, in a third country party to this Convention. The Convention envisages and secures the execution of arbitration decisions in the participating countries. The articles of the Convention do not affect interstate organizations.

Multinational enterprises

55. Establishment by the CMEA member countries of a number of international economic organizations gave rise to problems connected with opening and keeping accounts of these organizations with IBEC and

granting loans to these institutions. At present IBEC is studying the above problems, as it can be expected that these institutions may approach IBEC for loans.

H. INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT)

56. Detailed discussions of the work of UNIDROIT in areas relating to international trade law may be found in the reports submitted to the fifth session (A/CN.9/71, paras. 38-53) and the sixth session of UNCITRAL (A/CN.9/82, UNCITRAL Yearbook, Vol. IV: 1973, part two, V; paras. 51-58).

Progressive codification of the general part of the law of contracts

57. A preliminary report of comparative law on the non-performance of contracts and the sanctions for non-performance was prepared by the secretariat of UNIDROIT and presented to the Governing Council of UNIDROIT at its fifty-second session (April 1973) (Document U.D.P. 1973—Etudes: L—Droit des obligations, Doc. 4). The Council authorized the continuation of the work in this field and decided to set up a restricted Committee of governmental experts with special knowledge of the different common law systems, of the civil law systems and of those of the Socialist States and moreover directly interested by the problems of international trade.

58. At its fifty-third session (February 1974), the Council examined a comparative chart prepared by the secretariat giving provisions currently in existence on the formation, validity, interpretation, performance and non-performance of contracts (document Etudes L, Doc. 5, UNIDROIT 1973). This document should facilitate the work of the restricted Committee which started examining these various problems during its first meeting held in February 1974.

Preliminary draft law for the unification of certain rules relating to validity of contracts of international sale of goods

59. The above-mentioned preliminary draft uniform law together with the explanatory report prepared by the Max-Planck Institut für ausländisches und internationales Privatrecht (documents U.D.P. 1972—Etudes XVI/B—Doc. 20 and 21) were distributed at the sixth session of UNCITRAL. It is expected that the Commission will decide on the future steps to be taken in this field at a future session.

Draft uniform law on the protection of the bona-fide purchaser of corporeal movables

60. This draft, accompanied by an explanatory report (Doc. U.D.P. 1968, paper XLV, Doc. 37), was submitted to a Committee of governmental experts which held two meetings during 1973 and which will hold a third meeting in June 1974; work on this subject will presumably be terminated during 1974. The revised draft will be presented, in the form of a Convention providing a Uniform Law, for the approval of Governments at a Diplomatic Conference.

Agency

61. This draft, revised by a Committee of governmental experts (Etude XIX, Doc. 55, UNIDROIT 1974) should be submitted, in the form of a convention providing a uniform law, for the approval of Governments at a diplomatic conference for its adoption in the near future.

Harmonization of the legal régimes, relating to the liability of the carrier of commodities and persons—Study of the gold-clause in international conventions in connexion with transport

62. In the framework of this general theme included as a priority topic on the work programme by the Governing Council at its fifty-third session as a result of a wish expressed at the special Day on the Unification of Transport Law (Rome, 27 April 1973), the Secretariat drew up a report and a questionnaire studying the problem posed by the various monetary units (gold clauses) contained in international conventions, in particular as regards transport, and the conversion of these units into the national currencies. The Secretariat is in the process of drawing up a report on the basis of the answers received to the questionnaire.

The legal status of air-cushion vehicles (especially sea-going vehicles, e.g. hovercraft and naviplanes)

63. The conclusions of the report prepared by the Secretariat of UNIDROIT as a result of the enquiries it made as regards the situation of the law existing in this field in the various countries, were presented before a restricted exploratory Committee of governmental experts which worked out guidelines for the future work to be undertaken by an enlarged Committee of governmental experts on the basis of a list of priorities including the different topics making up the subject. The first of these topics, to be examined by the Committee during 1974, deals with the registration and nationality of air-cushion vehicles.

Transport of live animals

64. The Secretariat has undertaken a study on behalf of UNCITRAL relating to the transport of live animals in the various modes of transport with a view to including this form of transport in the Hague Rules currently being revised by UNCITRAL (document A/CN.9/WG.III/WP.11*). The conclusion of this study favours this inclusion and makes different suggestions as to ways of going about it. The Working Group on International Legislation on Shipping decided at its sixth session (Geneva, 4-20 February 1974) to include this form of transport in the revised Rules and it adopted one of these proposals after having made a slight amendment.

Road transport

65. The Convention relating to the Contract for the International Carriage of Passengers and Luggage by Road (CVR), drawn up by the United Nations Economic Commission for Europe on the basis of a UNIDROIT draft, was opened for signature in Geneva on 1 March 1973.

* Reproduced in this volume, part two, III, 3.

66. The same Commission asked UNIDROIT to prepare a commentary of the Convention on the Contract for the International Carriage of Goods by Road (CMR) signed in Geneva on 19 May 1956, and drawn up by the United Nations Economic Commission for Europe on the basis of an UNIDROIT draft.

River transport

67. The Convention on the Limitation of the Liability of Boat Owners (CLN) drawn up by the United Nations Economic Commission for Europe on the basis of an UNIDROIT draft, was opened for signature in Geneva on 1 March 1973.

68. The draft convention on the contract for the carriage of passengers and luggage by inland waterway (CVN) drawn up by UNIDROIT is currently being revised by the Economic Commission for Europe with a view to its adoption by Governments.

69. The draft convention on the contract for the carriage of goods by inland waterway (CMN), drawn up on the basis of an UNIDROIT draft by the same Commission and which had not been opened to the signature of Governments in 1960 is currently being revised at the request of the Commission by a Committee of governmental experts convened by UNIDROIT.

Liability of producers

70. At the request of the Council of Europe, UNIDROIT drew up a comparative study on the liability of producers in the member States of the Council of Europe, the United States, Canada and Japan. The Institute takes an active part in the work of the Council of Europe's Committee of experts which has undertaken the elaboration of a draft international convention in this field.

Hotelkeepers' contract

71. The Secretariat of UNIDROIT has prepared a preliminary report on the hotelkeepers' contract which has been presented before an UNIDROIT Working Committee of Experts. This Committee met in March 1974 when it worked out guidelines with a view to elaborating a first preliminary draft of uniform provisions on the subject.

III. INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS

A. INTERNATIONAL CHAMBER OF COMMERCE (ICC)

International sale of goods

72. The ICC Working Party on Trade Terms has been given a wider mandate; its current tasks are the following:

(a) A final draft of the definition of a term to be known as "free airport", being as near as possible an air-freight equivalent to FOB, is now to be circulated to national committees of the ICC for their comments, with a view to final adoption in the autumn of this year.

(b) In co-operation with the Economic Commission for Europe, a standardized set of three-letter abbreviations has been proposed for each of the INCOTERMS 1953 and other trade terms defined by

the ICC. It is hoped that, going on from this, it may be possible to have a numbered coding system to translate the same terms for automatic data processing. This work is envisaged in co-operation with the ECE.

(c) In connexion with specific trade terms in the two separate fields of combined and containerized transport, a questionnaire to ascertain present practice is now to be circularized.

International payments

73. The ICC headquarters has submitted a progress report on uniform customs and practices and on contractual guarantees to the United Nations Secretariat. This report is issued as a document of UNCITRAL (A/CN.9/89), to be considered at its seventh session.

74. It is expected that the final version of the above report will be established in May 1974 by the Working Group of the ICC Commission on Banking Technique and Practices.

International commercial arbitration

75. The process of revision of the ICC's Rules of Conciliation and Arbitration is now under way, in order to take account of developments throughout the world since the present Rules came into effect on 1 June 1955. The time-table is such that it is hoped that the revised Rules may come into effect either early in 1975 or perhaps later the same year.

76. The increasingly wider geographical and linguistic spread of ICC Arbitration has led to publication of the present Rules in Arabic, German and Spanish apart from the official ICC working languages of French and English. In addition to these editions published by international Headquarters, a considerable number of the national committees have also published translations into their national languages.

International legislation on shipping

77. The ICC has participated actively in the work of the UNCITRAL's Working Group on International Legislation on Shipping during 1973 and has submitted its views on several occasions on questions being studied in relation to the revision of the Hague Rules.

78. At the present time, a Working Party of the General Transport Commission is undertaking a study to give an indication as to the possible influence on total amounts of insurance premiums resulting from a certain change in risk allocation (e.g. deletion of defences of the carrier for error in navigation and management of the ship and for fire) between carrier and cargo owner in marine transportation. The study, which is being carried out with the co-operation of shippers, shipowners, P and I clubs, cargo insurers and legal experts, is hoped to be completed towards the end of 1974.

79. The ICC is also organizing a three-day Conference entitled "International shipping—a commercial view" in New Delhi in October, at which time certain broad aspects of international shipping legislation will be considered.

Uniform Rules for a Combined Transport Document

80. The ICC's Uniform Rules for a Combined Transport (CT) Document, published in November 1973, comprise a set of minimum rules that are intended to govern an acceptable and easily recognizable combined transport document. They are suited to being given a legal effect by their incorporation into private contracts for combined transport. By issuing a CT document, subject to ICC Rules, the combined transport operator accepts full responsibility for performance of the complete transport operation, including liability for loss, damage, and delay.

81. Work on these rules began in October 1972 by the ICC's Joint Committee on Containerization, which includes representatives of the various modes of transport and of transport users, bankers, insurers, trade facilitation bodies and forwarders from countries throughout the world. The Rules were developed with the co-operation of the International Federation of Forwarding Agents' Associations (FIATA), the International Maritime Committee (CMI), the International Union of Railways (UIC), the International Road Transport Union (IRU), the International Chamber of Shipping (ICS), the International Union of Marine Insurance (IUMI) and several other international organizations.

82. The Rules are not meant to prejudice the results which may be achieved by UNCTAD in the development of an international intermodal transport convention but to fill the gap until such a convention can be agreed upon and implemented, and to provide a basis for standardizing CT documents and the rights and responsibilities of the parties to a contract for combined transport.

Multinational enterprises

83. The questionnaire received from UNCITRAL on this subject was considered by the ICC Commission on International Commercial Practice. The reply to this questionnaire, *inter alia*, drew attention to the ICC Guidelines on International Investment.

84. In relation to multinational enterprises, the ICC also made a submission through Mr. Renato Lombardi, its President, to the group of eminent persons set up by the United Nations Economic and Social Council to examine their role and impact.

B. INTERNATIONAL MARITIME COMMITTEE (CMI)*International legislation on shipping*

85. The International Maritime Committee is primarily engaged in the preparation of international legislation on shipping. In addition, work has been initiated with respect to international commercial arbitration in maritime affairs. The present working programme includes the following:

Revision of the 1957 International Convention relating to the liability of owners of seagoing ships;

Revision of the International Convention for the unification of certain rules of law relating to bills of lading (1924) and the Protocol to amend that Convention (1968);

Revision of the York/Antwerp Rules relating to general average shipbuilding contracts;

Combined transports and documentation relating thereto.

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD) (Addendum 1)*International shipping legislation**Code of conduct for liner conferences*

1. The Preparatory Committee established by General Assembly resolution 3035 (XXVII), requesting 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 held its first session from 8 to 26 January 1973 and its second session from 4 to 29 June 1973 in Geneva.¹ The Preparatory Committee had before it, among other documents, the draft code of conduct for liner conferences annexed to UNCTAD resolution 66 (III). At the second session, 16 developed market-economy countries submitted counter-proposals for a draft code of conduct for liner conferences.² The Preparatory Committee annexed to the report on its second session its proposed text of a code of conduct for consideration by the United Nations Conference of Plenipotentiaries on a Code of Conduct for Liner Conferences.³

2. The United Nations Conference of Plenipotentiaries on a Code of Conduct for Liner Conferences held two sessions in Geneva from 12 November to 15 December 1973 and from 11 March to 6 April 1974. Altogether 92 States members of UNCTAD participated in the Conference.

3. The members of the Joint UNCTAD/United Nations Office of Legal Affairs shipping Legislation Unit serviced both the meetings of the Preparatory Committee and the Conference.

4. The Conference completed its task on 6 April 1974 when it adopted the Convention on a Code of Conduct for Liner Conferences. The Convention was adopted by a roll-call vote of 72 votes in favour, 7 against, and 5 abstentions. The final Act of the United Nations Conference of Plenipotentiaries was adopted by the Conference and signed by all but eight participating States, at the conclusion of the Conference.

5. The Convention will be open for signature at United Nations Headquarters from 1 July 1974 to 30 June 1975 inclusive and will thereafter remain open for accession.

International intermodal transport

6. A 58-member Intergovernmental Preparatory Group on a Convention on International Intermodal Transport was established by the Trade and Development Board, in its decision 96 (XII) of 10 May 1973, to elaborate a preliminary draft of a convention on international intermodal transport, in response to the request by the Economic and Social Council in paragraph 2 of its resolution 1734 (LIV) of 10 January 1973.

7. In that decision, the Board requested the UNCTAD secretariat to prepare the studies referred to in paragraph 1 of Economic and Social Council resolution 1734 (LIV), taking into account any additional guidance which the Intergovernmental Preparatory Group, at its first session, might give to the secretariat concerning the studies.

8. The Intergovernmental Preparatory Group held its first session in Geneva, from 29 October to 2 November 1973.

¹ The reports of the first and second sessions of the Preparatory Committee are contained in document TD/CODE/1 and TD/CODE/PC/5 and TD/CODE/2 and TD/CODE/PC/9.

² For the text of the counter-proposals, see document TD/CODE/2, annex III.

³ *Ibid.*, annex I.

9. The basic document before the Group, and on which discussion by the first session was based, was the note by the UNCTAD secretariat: "Some problems involved in inter-modal transport".⁴ Representatives from developed market-economy, developing and some socialist countries from Eastern Europe also submitted working papers.⁵

10. At its 8th meeting, the Chairman of the Intergovernmental Preparatory Group, in summing up the work of the Group, said that the working papers which were submitted constituted useful guidance to the UNCTAD secretariat. Members of the Joint Shipping Legislation Unit assisted in servicing the session.

Co-operation with UNCITRAL

11. Members of the Joint Shipping Legislation Unit prepared drafts for studies on the following subjects: "Liability of ocean carriers for delay", "Documentary scope of application of the Convention" and "Geographic scope of application of the Convention", which were among the subjects included in the working paper entitled "Third report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading" (A/CN.9/WG.III/WP.12, vol. 1-3).^{*} This report was submitted to the sixth session of the UNCITRAL Working Group on International Legislation on Shipping.

12. The Chief of the Joint Shipping Legislation Unit attended, as the observer for UNCTAD, the sixth session of the Working Group on International Legislation on Shipping.

13. Two members of the Joint Unit assisted the UNCITRAL secretariat in servicing the sixth session of the UNCITRAL Working Group on International Legislation on Shipping. Members of the Joint Unit are working on a draft study authorized at the fifth session of the Working Group, incorporating the first and third questions of the third questionnaire on bills of lading, on "Contents of the contract of carriage of goods by sea" and "the legal effect of the bill of lading in protecting the good faith purchaser of the bill of lading" respectively. Studies on these topics will be incorporated in the report submitted by the UNCITRAL secretariat to the seventh session of the Working Group.

Charter parties

14. A report entitled "Charter-parties" on the legal, commercial and economic aspects of chartering has been completed by the UNCTAD secretariat for submission to the UNCTAD Working Group on International Shipping Legislation at its fourth session. It is contained in document TD/B/C.4/ISL/13. The fourth session of that Working Group is tentatively scheduled to be held from 27 January to 7 February 1975 at the Palais des Nations, Geneva.

Attendance at conferences

15. The Organization of African Unity invited UNCTAD to participate in an item on its agenda concerning the Code of Conduct for Liner Conferences at the twenty-second ordinary session of its Council of Ministers from 25 February to 5 March 1974 in Addis Ababa, Ethiopia. Two members of the Joint Shipping Legislation Unit attended.

Second UNCTAD Training Course (in French) in Shipping Economics and Management, 1973

16. A member of the Joint Shipping Legislation Unit gave a series of lectures on maritime law at the course which was held at the Palais des Nations, Geneva, between 2 July and

23 November 1973. The subjects included legal aspects concerning bills of lading, charter parties and marine insurance, and the code of conduct for liner conferences.

Technical assistance

17. The secretariat of UNCTAD, as part of its programme of technical assistance and in co-operation with other bodies in United Nations systems, participated in various programmes to assist developing countries in legal matters connected with maritime transport.

Multinational enterprises

Working Group on the Charter of Economic Rights and Duties of States and Regulation of Transnational Corporations

18. The Working Group on the Charter of Economic Rights and Duties of States was established in accordance with Conference resolution 45 (III) to draw up a draft charter.

19. The Group held its first and second sessions in Geneva from 12 to 23 February and from 13 to 22 July 1973. The General Assembly at its twenty-eighth session in 1973 considered the report of the Working Group on its first and second sessions and the comments made thereon by the Trade and Development Board at its thirteenth session (August-September 1973). In its resolution 3082 (XXVIII), the General Assembly decided, in the light of the progress achieved, to extend the mandate of the Working Group for two further sessions, as recommended by the Trade and Development Board in its decision 98 (XIII).

20. At its third session which was held in Geneva from 4 to 22 February 1974, the Group continued to elaborate further on the work of its previous session and presented in its report a consolidated text reflecting the work done at this session. The text contains some generally accepted paragraphs but in most cases there are several alternatives (report of the Working Group on its third session, document TD/B/AC.12/3).

21. The fourth session of the Group will be held in Mexico City from 10 to 28 June 1974. It is expected that there and then the Working Group will, as requested by General Assembly resolution 3082 (XXVIII), "complete as the first step in the codification and development of the matter, the elaboration of a final draft Charter of Economic Rights and Duties of States, to be considered and approved by the General Assembly at its twenty-ninth session".

22. From the outset proposals made by some Member States to include in the Charter provisions relating to transnational corporations have been before the Group. These proposals relate to the regulation of the activities of these corporations and to the co-operation among States with respect to this regulation. The Working Group has not yet reached agreement on this question which will be further considered in Mexico on the basis of the alternative formulations shown under paragraph 11 of chapter II in paragraph 7 of the report on the third session of the Group (TD/B/AC.12/3). (See also reports of the Working Group on its first and second sessions, documents TD/B/AC.12/1, TD/B/AC.12/2 and Add.1.)

Restrictive business practices

23. As indicated in a note on multinational enterprises (A/CN.9/83 of 16 March 1973) submitted by the Secretary-General at the sixth session of UNCITRAL, the United Nations Conference on Trade and Development (UNCTAD) at its third session adopted a resolution on restrictive business practices, namely resolution 73 (III). The text of this resolution was set out in annex III of that note.

24. As a result of this resolution UNCTAD has been called upon to study and identify all restrictive business practices including among others those resulting from activities of multinational corporations and enterprises which adversely

⁴ Document TD/B/AC.15/2.

⁵ Document TD/B/AC.15/3 and TD/B/AC.15/3/Add.1 containing submissions by the Economic Commission for Africa, Asia and the Far East, Europe and Latin America as well as documents TD/B/AC.15/L.2, TD/B/AC.15/L.3, TD/B/AC.15/L.5 and TD/B/AC.15/L.6.

^{*} Reproduced in this volume, part two, III, 2 *supra*.

affect the trade and development of developing countries. In this connexion, the Conference decided that attention should be paid to the possibility of drawing up guidelines for the consideration of Governments of developed and developing countries regarding restrictive business practices adversely affecting developing countries. In addition, it also called upon the secretariat to give consideration to formulating the elements of a model law or laws for developing countries in regard to restrictive business practices.

25. As also indicated in the above-mentioned note, the Conference established an *Ad Hoc* Group of Experts on Restrictive Business Practices. This group of experts participating in their individual capacities, met in Geneva from 19 to 30 March 1973 and their report is contained in document TD/B/C.2/119. Paragraphs 29 to 55 of this report specifically relate to restrictive business practices in relation to the operations of multinational corporations in developing countries. The report of this Group was subsequently considered in August 1973 by the UNCTAD Committee on Manufactures at the first part of its sixth session, and the Committee decided that another *ad hoc* group of experts should be convened by the Secretary-General of UNCTAD to carry on further the work requested in resolution 73 (III).⁶ This group is scheduled to meet later this year.

26. With regard to the work going on in other organizations in the field of restrictive business practices, it should be mentioned that the Economic and Social Council, in resolution 1721 (LIII), requested that the Study Group of Eminent Persons on the Impact of Multinational Corporations on the Development Process and International Relations should take into account the work of the UNCTAD *Ad Hoc*

Group of Experts on Restrictive Business Practices. In the light of this, the Committee on Manufactures requested the Secretary-General of UNCTAD to inform the Study Group of Eminent Persons of the work of the *Ad Hoc* Group of Experts on Restrictive Business Practices and of the relevant parts of the report of the Committee.

COUNCIL OF EUROPE (Addendum 2)

1. *Draft European rules on extinctive prescription in private and commercial matters*

The draft European rules will be considered after the United Nations Diplomatic Conference on Prescription (Limitation) in the International Sale of Goods, in the light of the outcome of the Conference, in order to determine what action might be taken on the draft rules.

2. *International aspects of legal protection of the rights of creditors*

In view of the work being done on the subject by the European Communities, the European Committee on Legal Co-operation has decided not to recommend, for the time being, the establishment of a committee of experts within the Council of Europe.

3. *Recognition and enforcement of foreign judgements in private and commercial matters*

The final text of a practical guide on the subject will probably be ready in a few months and will be published.

4. *Liability of producers*

The committee of experts is continuing its work; at its fourth meeting, in January 1974, it completed its first reading of some texts for a draft convention on liability of producers.

⁶ Official Records of the Trade and Development Board, Thirteenth Session, Supplement No. 5 (TD/B/466-TD/B/C.2/134), chapter 5, paras. 211-247.

I. TEXTS ADOPTED BY THE UNITED NATIONS CONFERENCE ON PRESCRIPTION (LIMITATION) IN THE INTERNATIONAL SALE OF GOODS (20 MAY-14 JUNE 1974)*

A. Final Act (A/CONF.63/14 and Corr.1)

1. The General Assembly of the United Nations, having considered chapter II of the report of the United Nations Commission on International Trade Law on the work of its fifth session in 1972 (*Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 17 (A/8717)*), chap. II,¹ which contained a draft Convention on Prescription (Limitation) in the International Sale of Goods, decided, by its resolution 2929 (XXVII) of 28 November 1972,² that an international conference of plenipotentiaries should be convened in 1974 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 might deem appropriate. Subsequently, the General Assembly, by its resolution 3104 (XXVIII) of 12 December 1973,³ requested the Secretary-General to convene the Conference at United Nations Headquarters, New York, from 20 May to 14 June 1974.

2. The United Nations Conference on Prescription (Limitation) in the International Sale of Goods was held at United Nations Headquarters, New York, from 20 May to 14 June 1974.

3. Sixty-six States were represented at the Conference, as follows: Algeria, Australia, Austria, Barbados, Belgium, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Canada, Chile, Colombia, Costa Rica, Cuba, Cyprus, Czechoslovakia, Democratic People's Republic of Korea, Denmark, Ecuador, Egypt, El Salvador, Finland, France, German Democratic Republic, Germany (Federal Republic of), Ghana, Greece, Guatemala, Guyana, Holy See, Hungary, India, Indonesia, Iran, Iraq, Ireland, Japan, Kenya, Mali, Mexico, Mongolia, Morocco, Netherlands, Nicaragua, Nigeria, Norway, Pakistan, Philippines, Poland, Qatar, Republic of Viet-Nam, Sierra Leone, Singapore, Spain, Sweden, Switzerland, Syrian Arab Republic, Thailand, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United Republic of Cameroon, United Republic of Tanzania, United States of America, Yugoslavia and Zaire.

4. Three States, Madagascar, Peru and Romania, sent observers to the Conference.

5. The General Assembly requested the Secretary-General to invite interested specialized agencies and

international organizations, and the United Nations Council for Namibia, to attend the Conference as observers. The Council of Europe, the International Chamber of Commerce, the Hague Conference on Private International Law and the United Nations Council for Namibia sent observers.

6. The Conference elected Mr. Jorge Barrera Graf (Mexico) as President.

7. The Conference elected as Vice-Presidents the representatives of the following States: Algeria, Australia, Belgium, Brazil, Chile, Cyprus, Denmark, France, Germany (Federal Republic of), Ghana, Guyana, India, Japan, Kenya, Nigeria, Philippines, Poland, Singapore, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America and Zaire.

8. The following Committees were set up by the Conference:

General Committee

Chairman: The President of the Conference

Members: The President and Vice-Presidents of the Conference, and the Chairmen of the First and Second Committees

First Committee

Chairman: Mr. Mohsen Chafik (Egypt)

Vice-Chairmen: Mr. Nehemias Gueiros (Brazil), Mr. L. H. Khoo (Singapore), Mr. Elias A. Krispis (Greece)

Rapporteur: Mr. Ludvik Kopač (Czechoslovakia)

Second Committee

Chairman: Mr. György Kampis (Hungary)

Vice-Chairmen: Mr. T. I. Adesalu (Nigeria), Mr. G. C. Parks (Canada), Mr. G. S. Raju (India)

Drafting Committee

Chairman: Mr. Anthony G. Guest (United Kingdom)

Members: Austria, Brazil, Czechoslovakia, France, India, Mexico, Nigeria, Norway, Philippines, Singapore, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America and Zaire

* The Official Records of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods will appear as document A/CONF.63/16.

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

² *Ibid.*, vol. IV: 1973, part one, I, C.

³ Reproduced in this volume, part one, I, C.

Credentials Committee

Chairman: Mr. José M. Zelaya (Nicaragua)

Members: Brazil, Ghana, Japan, Mongolia, Netherlands, Nicaragua, Union of Soviet Socialist Republics, United Republic of Tanzania and United States of America

9. The Secretary-General of the United Nations was represented by Mr. Blaine Sloan, Director of the General Legal Division, Office of Legal Affairs of the United Nations, and in his absence by Mr. John O. Honnold, Chief, International Trade Law Branch. Mr. G. W. Wattles, Principal Officer, Office of the Legal Counsel, acted as Executive Secretary.

10. The General Assembly, by its resolutions 2929 (XXVII) and 3104 (XXVIII) convening the Conference, referred to the Conference as the basis for its consideration of prescription (limitation) in the international sale of goods the draft Convention contained in chapter II of the 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)*),⁴ together with the commentary thereon (A/CONF.63/5)⁵ and the analytical compilation of comments and proposals by Governments and interested international organizations (A/CONF.63/6 and Add.1 and 2).

11. The Conference initially assigned parts I and III of the draft Convention to the First Committee, and parts II and IV to the Second Committee. Subsequently it reallocated articles 37 and 38 to the Second Committee. A working group composed of Belgium, Ghana, Mexico, Singapore and the Union of Soviet Socialist Republics was entrusted with the preparation of the preamble, the Final Act and the resolutions.

12. On the basis of the deliberations recorded in the records of the Conference (A/CONF.63/SR.1 to SR.10) and the records of the First Committee (A/

⁴ UNCITRAL Yearbook, Vol. III: 1972, part one, II, A.

⁵ The commentary previously appeared in document A/CN.9/73; *ibid.*, part two, I, B, 3.

CONF.63/C.1/SR.1 to SR.25), its report (A/CONF.63/9 and Add.1 to 8), the records of the Second Committee (A/CONF.63/C.2/SR.1 to SR.4) and its report (A/CONF.63/12 and Corr.1), the Conference drew up the *Convention on the Limitation Period in the International Sale of Goods*.

13. That Convention was adopted by the Conference on 12 June 1974, and opened for signature on 14 June 1974 until 31 December 1975, in accordance with its provisions, at United Nations Headquarters in New York. The Convention was also opened for accession in accordance with its provisions.

14. The Convention is deposited with the Secretary-General of the United Nations.

15. The Conference also adopted the following resolution, which is annexed to this Final Act: "Tribute to the United Nations Commission on International Trade Law".

IN WITNESS WHEREOF the representatives have signed this Final Act.

DONE at United Nations Headquarters, New York, this fourteenth day of June, one thousand nine hundred and seventy-four, in a single copy in the Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

[Signatures of representatives]

ANNEX

Tribute to the United Nations Commission on International Trade Law

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

Having adopted the Convention on the Limitation Period in the International Sale of Goods on the basis of a draft convention prepared by the United Nations Commission on International Trade Law,

Resolves to express its deep gratitude to the United Nations Commission on International Trade Law for its outstanding contribution to the unification and harmonization of the law of the international sale of goods.

B. Convention on the Limitation Period in the International Sale of Goods (A/CONF.63/15)*

Preamble

The States Parties to the present Convention,

Considering that international trade is an important factor in the promotion of friendly relations amongst States,

Believing that the adoption of uniform rules governing the limitation period in the international sale of goods would facilitate the development of world trade,

Have agreed as follows:

PART I. SUBSTANTIVE PROVISIONS

Sphere of application

Article 1

1. This Convention shall determine when claims of a buyer and a seller against each other arising from a

* A commentary on the Convention, to be prepared by the Secretariat in response to a request made by the Conference, will appear as document A/CONF.63/17.

contract of international sale of goods or relating to its breach, termination or invalidity can no longer be exercised by reason of the expiration of a period of time. Such period of time is hereinafter referred to as "the limitation period".

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

3. In this Convention:

(a) "buyer", "seller" and "party" mean persons who buy or sell, or agree to buy or sell, goods, and the successors to and assigns of their rights or obligations under the contract of sale;

(b) "creditor" means a party who asserts a claim, whether or not such a claim is for a sum of money;

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

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

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

(f) "person" includes corporation, company, partnership, association or entity, whether private or public, which can sue or be sued;

(g) "writing" includes telegram and telex;

(h) "year" means a year according to the Gregorian calendar.

Article 2

For the purposes of this Convention:

(a) a contract of sale of goods shall be considered international if, at the time of the conclusion of the contract, the buyer and the seller have their places of business in different States;

(b) the fact that the parties have their places of business in different States shall be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract;

(c) where a party to a contract of sale of goods has places of business in more than one State, the place of business shall be that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at the time of the conclusion of the contract;

(d) where a party does not have a place of business, reference shall be made to his habitual residence;

(e) neither the nationality of the parties nor the civil or commercial character of the parties or of the contract shall be taken into consideration.

Article 3

1. This Convention shall apply only if, at the time of the conclusion of the contract, the places of business of the parties to a contract of international sale of goods are in Contracting States.

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

3. This Convention shall not apply when the parties have expressly excluded its application.

Article 4

This Convention shall not apply to sales:

(a) of goods bought for personal, family or household use;

(b) by auction;

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

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

(e) of ships, vessels or aircraft;

(f) of electricity.

Article 5

This Convention shall not apply to claims based upon:

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

(b) nuclear damage caused by the goods sold;

(c) a lien, mortgage or other security interest in property;

(d) a judgement or award made in legal proceedings;

(e) a document on which direct enforcement or execution can be obtained in accordance with the law of the place where such enforcement or execution is sought;

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

Article 6

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

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

Article 7

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

The duration and commencement of the limitation period

Article 8

The limitation period shall be four years.

Article 9

1. Subject to the provisions of articles 10, 11 and 12 the limitation period shall commence on the date on which the claim accrues.

2. The commencement of the limitation period shall not be postponed by:

(a) a requirement that the party be given a notice as described in paragraph 2 of article 1, or

(b) a provision in an arbitration agreement that no right shall arise until an arbitration award has been made.

Article 10

1. A claim arising from a breach of contract shall accrue on the date on which such breach occurs.

2. A claim arising from a defect or other lack of conformity shall accrue on the date on which the goods are actually handed over to, or their tender is refused by, the buyer.

3. A claim based on fraud committed before or at the time of the conclusion of the contract or during its performance shall accrue on the date on which the fraud was or reasonably could have been discovered.

Article 11

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

Article 12

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

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

*Cessation and extension of the limitation period**Article 13*

The limitation period shall cease to run when the creditor performs any act which, under the law of the court where the proceedings are instituted, is recognized as commencing judicial proceedings against the debtor or as asserting his claim in such proceedings already instituted against the debtor, for the purpose of obtaining satisfaction or recognition of his claim.

Article 14

1. Where the parties have agreed to submit to arbitration, the limitation period shall cease to run when either party commences arbitral proceedings in the manner provided for in the arbitration agreement or by the law applicable to such proceedings.

2. In the absence of any such provision, arbitral proceedings shall be deemed to commence on the date on which a request that the claim in dispute be referred to arbitration is delivered at the habitual residence or place of business of the other party or, if he has no such residence or place of business, then at his last known residence or place of business.

Article 15

In any legal proceedings other than those mentioned in articles 13 and 14, including legal proceedings commenced upon the occurrence of:

- (a) the death or incapacity of the debtor,
 - (b) the bankruptcy or any state of insolvency affecting the whole of the property of the debtor, or
 - (c) the dissolution or liquidation of a corporation, company, partnership, association or entity when it is the debtor.
- the limitation period shall cease to run when the creditor asserts his claim in such proceedings for the purpose of obtaining satisfaction or recognition of the claim, subject to the law governing the proceedings.

Article 16

For the purposes of articles 13, 14 and 15, any act performed by way of counterclaim shall be deemed to have been performed on the same date as the act performed in relation to the claim against which the counterclaim is raised, provided that both the claim and the counterclaim relate to the same contract or to several contracts concluded in the course of the same transaction.

Article 17

1. Where a claim has been asserted in legal proceedings within the limitation period in accordance with article 13, 14, 15 or 16, but such legal proceedings have ended without a decision binding on the merits of the claim, the limitation period shall be deemed to have continued to run.

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

Article 18

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

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

3. Where the legal proceedings referred to in paragraphs 1 and 2 of this article have ended, the limitation period in respect of the claim of the creditor or the buyer against the party jointly and severally liable or against the seller shall be deemed not to have ceased running by virtue of paragraphs 1 and 2 of this article, but the creditor or the buyer shall be entitled to an additional year from the date on which the legal proceedings ended, if at that time the limitation period had expired or had less than one year to run.

Article 19

Where the creditor performs, in the State in which the debtor has his place of business and before the expiration of the limitation period, any act, other than

the acts described in articles 13, 14, 15 and 16, which under the law of that State has the effect of recommencing a limitation period, a new limitation period of four years shall commence on the date prescribed by that law.

Article 20

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

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

Article 21

Where, as a result of a circumstance which is beyond the control of the creditor and which he could neither avoid nor overcome, the creditor has been prevented from causing the limitation period to cease to run, the limitation period shall be extended so as not to expire before the expiration of one year from the date on which the relevant circumstance ceased to exist.

Modification of the limitation period by the parties

Article 22

1. The limitation period cannot be modified or affected by any declaration or agreement between the parties, except in the cases provided for in paragraph (2) of this article.

2. The debtor may at any time during the running of the limitation period extend the period by a declaration in writing to the creditor. This declaration may be renewed.

3. The provisions of this article shall not affect the validity of a clause in the contract of sale which stipulates that arbitral proceedings shall be commenced within a shorter period of limitation than that prescribed by this Convention, provided that such clause is valid under the law applicable to the contract of sale.

General limit of the limitation period

Article 23

Notwithstanding the provisions of this Convention, a limitation period shall in any event expire not later than 10 years from the date on which it commenced to run under articles 9, 10, 11 and 12 of this Convention.

Consequences of the expiration of the limitation period

Article 24

Expiration of the limitation period shall be taken into consideration in any legal proceedings only if invoked by a party to such proceedings.

Article 25

1. Subject to the provisions of paragraph (2) of this article and of article 24, no claim shall be recog-

nized or enforced in any legal proceedings commenced after the expiration of the limitation period.

2. Notwithstanding the expiration of the limitation period, one party may rely on his claim as a defence or for the purpose of set-off against a claim asserted by the other party, provided that in the latter case this may only be done:

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

(b) if the claims could have been set-off at any time before the expiration of the limitation period.

Article 26

Where the debtor performs his obligation after the expiration of the limitation period, he shall not on that ground be entitled in any way to claim restitution even if he did not know at the time when he performed his obligation that the limitation period had expired.

Article 27

The expiration of the limitation period with respect to a principal debt shall have the same effect with respect to an obligation to pay interest on that debt.

Calculation of the period

Article 28

1. The limitation period shall be calculated in such a way that it shall expire at the end of the day which corresponds to the date on which the period commenced to run. If there is no such corresponding date, the period shall expire at the end of the last day of the last month of the limitation period.

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

Article 29

Where the last day of the limitation period falls on an official holiday or other *dies non juridicus* precluding the appropriate legal action in the jurisdiction where the creditor institutes legal proceedings or asserts a claim as envisaged in article 13, 14 or 15, the limitation period shall be extended so as not to expire until the end of the first day following that official holiday or *dies non juridicus* on which such proceedings could be instituted or on which such a claim could be asserted in that jurisdiction.

International effect

Article 30

The acts and circumstances referred to in articles 13 through 19 which have taken place in one Contracting State shall have effect for the purposes of this Convention in another Contracting State, provided that the creditor has taken all reasonable steps to ensure that the debtor is informed of the relevant act or circumstances as soon as possible.

PART II. IMPLEMENTATION

Article 31

1. If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations shall be notified to the Secretary-General of the United Nations and shall state expressly the territorial units to which the Convention applies.

3. If a Contracting State described in paragraph (1) of this article makes no declaration at the time of signature, ratification or accession, the Convention shall have effect within all territorial units of that State.

Article 32

Where in this Convention reference is made to the law of a State in which different systems of law apply, such reference shall be construed to mean the law of the particular legal system concerned.

Article 33

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

PART III. DECLARATIONS AND RESERVATIONS

Article 34

Two or more Contracting States may at any time declare that contracts of sale between a seller having a place of business in one of these States and a buyer having a place of business in another of these States shall not be governed by this Convention, because they apply to the matters governed by this Convention the same or closely related legal rules.

Article 35

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

Article 36

Any State may declare, at the time of the deposit of its instrument of ratification or accession, that it shall not be compelled to apply the provisions of article 24 of this Convention.

Article 37

This Convention shall not prevail over conventions already entered into or which may be entered into, and which contain provisions concerning the matters covered by this Convention, provided that the seller and buyer have their places of business in States parties to such a convention.

Article 38

1. A Contracting State which is a party to an existing convention relating to the international sale of goods may declare, at the time of the deposit of its instrument of ratification or accession, that it will apply this Convention exclusively to contracts of international sale of goods as defined in such existing convention.

2. Such declaration shall cease to be effective on the first day of the month following the expiration of 12 months after a new convention on the international sale of goods, concluded under the auspices of the United Nations, shall have entered into force.

Article 39

No reservation other than those made in accordance with articles 34, 35, 36 and 38 shall be permitted.

Article 40

1. Declarations made under this Convention shall be addressed to the Secretary-General of the United Nations and shall take effect simultaneously with the entry of this Convention into force in respect of the State concerned, except declarations made thereafter. The latter declarations shall take effect on the first day of the month following the expiration of six months after the date of their receipt by the Secretary-General of the United Nations.

2. Any State which has made a declaration under this Convention may withdraw it at any time by a notification addressed to the Secretary-General of the United Nations. Such withdrawal shall take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the Secretary-General of the United Nations. In the case of a declaration made under article 34 of this Convention, such withdrawal shall also render inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that article.

PART IV. FINAL CLAUSES

Article 41

This Convention shall be open until 31 December 1975 for signature by all States at the Headquarters of the United Nations.

Article 42

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

Article 43

This Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 44

1. This Convention shall enter into force on the first day of the month following the expiration of six months after the date of the deposit of the tenth instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the tenth instrument of ratification or accession, this Convention shall enter into force on the first day of the month following the expiration of six months after the date of the deposit of its instrument of ratification or accession.

Article 45

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

2. The denunciation shall take effect on the first day of the month following the expiration of 12 months after receipt of the notification by the Secretary-General of the United Nations.

Article 46

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

II. BIBLIOGRAPHIC MATERIALS AND CHECK LIST OF DOCUMENTS

A. Compilation of bibliographies on international trade law (A/CN.9/L.25)*

INTRODUCTION

At its fourth session (1971), the Commission requested the Secretary-General to invite members of the Commission to provide him with bibliographies relating to subject-matters included in the work of the Commission, i.e. international sale of goods (uniform rules, time-limits and limitations (prescription), and general conditions of sale and standard contracts), international payments (negotiable instruments, bank guarantees, security interests in goods and bankers' commercial credits), international commercial arbitration and international legislation on shipping. The Secretary-General was requested to publish such bibliographies as documents of the Commission.¹

The present document is a compilation of bibliographical materials supplied by Australia, Austria, Belgium, Brazil, Chile, Hungary, India, Italy, Romania, the United Kingdom of Great Britain and Northern Ireland and the Union of Soviet Socialist Republics.² The materials are presented under the following headings:

	Page
I. International sale of goods	216
II. International payments	224
III. International commercial arbitration	227
IV. International legislation on shipping	233
V. General	241

I. INTERNATIONAL SALE OF GOODS

Australia³

- Bright, C. H. Contracts of adhesion and exemption clauses. November 1967. *Australian Law Journal*, vol. 41, p. 261.
- Commercial Law Association. Frustration of contract: Suez Canal closure. March 1968. *Bulletin*, No. 1, article No. 1.
- Breaches of contract and repudiation—vital consequences in long-term contracts. November 1971. *Bulletin*, vol. 3, No. 6, p. 31.

* 28 August 1973

¹ Report of the Commission on its fourth session (A/8417), para. 137; UNCITRAL Yearbook, Vol. II: 1971, part one, II, A. Three previous documents containing bibliographical information have been submitted to the Commission: bibliography on arbitration law (A/CN.9/24 of 10 March 1969, and Add.1 and 2); bibliography on international sale of goods, standard trade terms, negotiable instruments and bankers' commercial credits (A/CN.9/R.3, of 20 March 1970); survey of bibliographies relating to international trade law: report of the Secretary-General (A/CN.9/L.20, of 5 March 1971, and Add.1), reproduced in UNCITRAL Yearbook, Vol. II: 1971.

² In some cases members of the Commission, to increase the usefulness of the bibliographical data, have included translations of items into a second language.

³ As noted in the introduction, these bibliographical materials have been prepared by members of the Commission. The bibliographies with respect to each topic are presented under the name of the member State which supplied the material in question.

Breach of contract—some aspects of the remedy of damages. November 1968. *Bulletin*, No. 5, article No. 7.

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Walter, J. S. (with H. Muntz and D. A. Walsh). Incoterms. 1970 *Law Council Newsletter*, vol. 5, No. 1, p. 23.

Austria

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Kanada. Nichterfüllung eines internationalen Kaufvertrages, Die Regelungen des tschechoslowakischen Gesetzes über den internationalen Handel und des Haager Einheitlichen Kaufgesetzes (non-performance of an international contract of purchase; the rules of the Czech law on international commerce and the Hague Uniform Law on the International Sale of Goods). *RabelsZ* 1970, 315.

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Brazil

- Azulay, Fortunato. Três Teses (three theses): (a) Venda Condicional com Reserva de Domínio (conditional sale with reserved right of ownership); . . . Rio de Janeiro, 1950.
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- l'importation et l'exportation des produits). *Arbitrajul de Stat*, No. 6/1969.
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United Kingdom

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ABBREVIATIONS

ICLQ	<i>International and Comparative Law Quarterly</i>
JBL	<i>Journal of Business Law</i>
JWTL	<i>Journal of World Trade Law</i>
MLR	<i>Modern Law Review</i>

GENERAL AND COMPARATIVE

1. Aubrey, Michael D. Frustration reconsidered—some comparative aspects. (In (1963) 12 ICLQ 1165-1188) A. description of frustration of contract in English, French, German and Swiss law is followed by a discussion of those aspects of the concepts which are common to each of these legal systems. Although frustration is considered in this article in relation to the field of contract as a whole, many of the cases cited refer to international sale of

goods and the common aspects are compared with the ECE's General Conditions.

2. The British Institute of International and Comparative Law. Some comparative aspects of the law relating to sale of goods. A report of a symposium held on January 28, 1964, under the auspices of the British Institute of International and Comparative Law at the Law Society's Hall, Chancery Lane, London W.C.2. 1964, vi, 91pp. (ICLQ Supplementary Publication No. 9. (1964)). See items nos. 8, 16, 35 and 38 for details of contents. The texts of the Conventions and Uniform Laws are reprinted in an appendix.
3. Cheshire, G. C. International contracts for the sale of goods. (In (1960) JBL 282-286). This brief article explains with illustrations the choice of law problems in litigation over contracts for the international sale of goods. It discusses the possible solution to this problem through ratification of the Draft Convention on the Contract for the International Sale of Goods put forward at the Hague Conference on Private International Law in 1951.
4. Goldstajn, Aleksander. International conventions and standard contracts as means of escaping from the application of municipal law—I. (In Schmitthoff, The sources of the law of international trade. 1964. p.103-117. See item no. 10.) The author examines *inter alia* the possibilities of the unification of the law of international trade between the West and the East.
5. Johnson, A. Bissett. Efficacy of choice of jurisdiction clauses in international contracts in English and Australian Law. (In (1970) 19 ICLQ 541-556). Some English and Australian decisions involving choice of law problems in international contracts litigation are reviewed.
6. Kopelmanas, Lazare. International conventions and standard contracts as means of escaping from the application of municipal law—II. (In Schmitthoff, The sources of the law of international trade. 1964. p.118-126. Item no. 10.)
7. Lagergren, Gunnar. The limits of party autonomy—II. (In Schmitthoff, The sources of the law of international trade. 1964. p.201-224. See item no. 10.) The full title of this report indicates that it includes the admissibility of conflict avoidance devices, and the municipal conflict of laws rules for the ascertainment of the law governing international trade transactions.
8. Riese, Otto. International problems in the law of sale. (In Some comparative aspects of the law relating to sale of goods... 1964. p.32-37. See above, item no. 2).
9. Schmitthoff, Clive M. Colloquium on some problems of non-performance and *force majeure* in international contracts of sale. (In (1960) 9 ICLQ 677-682). This report summarises the proceedings of the colloquium held in Finland in 1960 and organised by the International Association of Legal Science.
10. Schmitthoff Clive M. ed. The sources of the law of international trade with special reference to East-West trade. London: Stevens & Sons Ltd., 1964. xxvi, 292pp. This is a report of the proceedings of the London colloquium in the series arranged by the International Association of Legal Science on various aspects of international trade law. It contains the papers presented by the participants and a note of discussions. Although only some of the papers relate specifically to international sale of goods, this is an important source book on international trade law. There are lists of participants and contributors; international and municipal legislation and customs; cases; and an index. Foot-notes refer to legislative and judicial

sources and literature from many countries. See also item nos. 4, 6, 7 and 30.

11. Sundström, G. O. Z. International sales and the conflict of laws. (*In* (1966) JBL 122-127, 245-250).
An academic article on the concept of the proper law of the contract. Foot-note references to an international range of publications.
12. Szaszy, S. Proper law of the contract in trade between Eastern Europe and the West; the position of East European socialist States. (*In* (1969) 18 ICLQ 103-128). The writer draws on sources and literature from many jurisdictions in discussing the East European attitude to the proper law of the contract. A long list of East European legal textbooks on private international law, foreign trade, and sale contracts is included in a foot-note.
13. Wortley, B. A. Need for more uniformity in the law relating to the international sale of goods in Europe. (*In* Legal problems of the European Economic Community and the European Free Trade Association pp. 45-57. ICLQ, Supplementary Publication No. 1 (1961)).
A uniform law for the contract for the international sale of goods would lessen the risk of conflicts of laws and lengthy litigation. Difficulties such as formal requirements, measure of damages on breach, passing of risk and property are considered with reference to conflicting practices in legal systems in Europe and a solution offered in the form of the Rome Institute's draft Convention on the Uniform Law on International Sales of Goods.

NATIONAL PRACTICE

(a) Czechoslovakia

14. Drucker, A. Code of international trade. (*In* (1964) 13 ICLQ 671-675).
The Czechoslovak Code of International Trade 1963, which "regulates the whole body of commercial law in the international trade of Czechoslovakia", is discussed and compared with the Hague draft of a uniform law on international sale of goods.
15. Kalenský, Pavel. The new Czechoslovak International Trade Code (*In* (1966) JBL 179-186).
The scope and contents of the Czechoslovak International Trade Code 1963 is described against the background of international efforts to unify the law of international trade.

(b) Federal Republic of Germany

16. Zweigert, Konrad. Aspects of the German Law of sale. (*In* Some comparative aspects of the Law relating to sale of goods... 1964. p. 1-15. See above, item no. 2).
A comparison is made between the German and the English law on sale of goods, which are both then compared with the (then) draft uniform law on international sale of goods.

(c) People's Republic of China

17. Smith, Alan H. Standard form contracts in the international commercial transactions of the People's Republic of China. (*In* (1972) 21 ICLQ 133-150).
This is a useful survey for practical and academic purposes of the international trade organisation and practice of the People's Republic of China. It covers formation, arbitration, language, payment terms, commodity inspection, insurance, shipping documents, quality of goods and breaches of contract in the standard form contracts used by the People's Republic of China. There are extracts from their standard contracts to illustrate the points made.
Foot-note references to English language articles on Chinese foreign trade.

(d) Union of Soviet Socialist Republics

18. Ramzaitsev, Dmitri. The law of international trade in the new Soviet legislation. (*In* (1963) JBL 229-237).
This is an examination of those rules in the 1961 "Fundamentals of Civil Legislation of the USSR and Union Republics" and the "Fundamentals of Civil Procedure of the USSR and Union Republics" which have a bearing on international trade law.

(e) United Kingdom

19. Chalmers' Sale of Goods Act, 1893 including the Factors Acts 1889 & 1890. 16th ed. by Michael Mark. London: Butterworths, 1971. xcii, 350pp.
A commentary on the Sale of Goods Act, the Factors Acts and various other acts is preceded by an introduction which covers the relationship of the law of sale with the general law of contract and international contracts of sale. Table of statutes, cases and index.
20. Eisemann, F. Incoterms and the British export trade. (*In* (1965) JBL 114-122).
Standards trade terms and uniform laws are complementary as a means of standardising international trade law. The significance of Incoterm 1953 as evidence of international commercial custom is discussed.
21. Feltham, J. D. Uniform Laws on International Sales Act 1967. (*In* (1967) 30 MLR 670-676).
A résumé is given of the background to the Uniform Laws on formation and sale. The Uniform Laws on International Sales Act is compared with the Sale of Goods Act 1893.
(For academic lawyers.)
22. Graveson, R. H., Cohn, E. J. and Graveson, D. The Uniform Laws on International Sales Act 1967. London: Butterworths, 1968. xii, 195pp.
This legal textbook discusses the implications for English law of the enactment of the Uniform Laws on International Sales and on Formation of Contract for International Sales; reprints the text of the Act with annotations; and reprints in French and English the conventions relating to Uniform Laws on the International Sale of Goods and the Formation of Contracts for the International Sale of Goods. There are tables of cases and statutes, a bibliography and an index.
23. Sassoon, David M. CIF and FOB contracts. London: Stevens & Sons, 1968. (British Shipping Laws Vol. 5). xxxiv, 460, [6] pp.
A legal textbook for exporters, practising and academic lawyers on two important aspects of the sale of goods contracts gives extensive coverage to English case law supplemented by references to American and Commonwealth decisions.
Table of statutes, cases and index.
24. Sassoon, David M. Damage resulting from natural decay under insurance, carriage and sale of goods contracts. (*In* (1965) 28 MLR 180-192).
Questions of liability for, and onus of proof of, damage to goods in transit are discussed with reference to mainly English cases involving international sales.
25. Sassoon, David M. Deterioration of goods in transit. (*In* (1962) JBL 351-362).
English judicial decisions concerning deterioration of goods in transit to a buyer abroad are discussed. English definitions of terms are compared with suggested international standard definitions in Incoterms 1953 and Trade Terms 1953, and with the American Uniform Commercial Code.
26. Schmitthoff, Clive M. The export trade. The law and practice of international trade. 5th ed. London: Stevens & Sons Ltd., 1969. xxxvii, 451pp.
All aspects of the export trade are covered; a substantial

portion deals with the contract for the international sale of goods. Amendments to the text are contained in the British Business Law section of the Journal of Business Law. There are lists of cases, statutes, international conventions and other formulations of international trade law and a short bibliography of major works on export trade law published in English, French, German, or Spanish is attached to chapter 3. (Standardization of terms in international sales.) Chapter 4 (Market information for exporters) is a brief guide to English non-legal literature on export trade. Appendices reproduce parts of statutes and statutory instruments and the "Standard Trading Conditions 1956" of the Institute of Shipping and Forwarding Agents.

27. Schmitthoff, Clive M. Legal aspects of export sales. 2nd ed. London: Institute of Export, 1969. xi, 76pp. This book is based on five lectures given to the Institute of Export. It describes "the legal mechanism of the export sale transaction in the light of modern legal and commercial experience". It covers the formation of the contract of sale; the passing of property, possession and risk; F.O.B. and related clauses; C.I.F. and related clauses; breach of contract; and conflict of laws. It is written for students of British export practice and has little to say on international attempts to unify international trade law. Short table of cases, statutes and index.
28. Schmitthoff, Clive M. The sale of goods including the Hire-Purchase Act 1965 and other enactments. 2nd ed. London: Stevens & Sons Ltd., 1966. xxxviii, 381pp. The field of British sales law is covered in three parts: the history, concepts, modern tendencies and suggested reforms; a commentary on the Sale of Goods Act 1893; and notes on and reprints of other statutes related to sale of goods, and the Uniform Laws on International Sales. Throughout the book there are many references to international sale of goods. Table of statutes, cases and an index.

INTERNATIONAL PRACTICE

(a) General

29. Schmitthoff, Clive M. The unification or harmonisation of law by means of Standard Contracts and General Conditions. (In (1968) 17 ICLQ 551-570). This practical guide to the various methods of unifying contracts for the international sale of goods could be useful to practising lawyers as well as academics and students. [Copious foot-note references to an international range of relevant publications].
30. Malintoppi, Antonio. The uniformity of interpretation of international conventions on uniform laws and of standard contracts. (In Schmitthoff, The sources of the law of the international trade. 1964. p.127-137. See above, item no. 10). Measures to prevent divergences in interpreting uniform law and standard contracts can be taken both during and after the drafting of the texts and by means of their revision.

(b) Council for Mutual Economic Assistance (CMEA)

31. East European trade council. Contracts with Eastern Europe. London, 1969. 77 pp. This is a practical guide, for the exporter, to negotiating sales contracts with Eastern European buyers and to the legal and practical aspects of the contract itself.
32. Eörsi, G. 1968 General Conditions of Delivery. (In (1970) JBL 99-108). Member States of Comecon have adopted the 1968 General Conditions of Delivery, which revised the 1958 General Conditions in the light of practical experience. The

revision included conflict of laws matters, prescription and additional legal remedies.

(c) Uniform Laws on International Sales

33. Aubrey, M. Formation of international contracts, with reference to the Uniform Law on Formation. (In (1965) 14 ICLQ 1011-1022). English, French and German law relating to offer and acceptance are described to illustrate the difference in national practices and thus the difficulties which arose in formulating the Uniform Law on the Formation of Contracts for the International Sale of Goods.
34. Bernini, Giorgio. The Uniform Laws on International Sale: the Hague conventions of 1964 (In (1969) 3 JWTL 671-695). The solution offered by the Uniform Laws on International Sales to the problems of offer and acceptance and remedies for breach in international contracts are discussed and compared with English and Italian law, representing common and civil law practices respectively.
35. Eliwood, L. A. The Hague Uniform Laws governing the International Sale of Goods. (In Some comparative aspects of the law relating to sale of goods... 1964. p. 38-56. See above, item no. 2). This article was written before the Diplomatic Conference at the Hague but revised before publication in the light of the final texts of the Conventions.
36. Foreign Office. Final act of the Diplomatic Conference on the Unification of Law governing the International Sale of Goods, The Hague, 25 April, 1964, together with Convention relating to a Uniform Law on the International Sale of Goods and Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods opened for signature on July 1, 1964. London; HMSO, 1964. (Miscellaneous No. 19 (1964) Cmnd. 2415.)
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- . Organisation et fonctionnement de l'arbitrage pour le commerce extérieur dans la République socialiste de Roumanie. *Il diritto negli scambi internazionali*, Milano, No. 2/1969.
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United Kingdom

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Abbreviations

BYIL	<i>British Yearbook of International Law</i>
ICLQ	<i>International and Comparative Law Quarterly</i>
JBL	<i>Journal of Business Law</i>
MLR	<i>Modern Law Review</i>

JOURNALS

1. Arbitration. London: Institute of Arbitrators. 1915
This quarterly journal includes articles on the whole range of arbitration under English law. Occasional articles briefly cover aspects of international commercial arbitration.
2. International Law Association. Reports of conferences. London: International Law Association. 1873
The annual reports of the International Law Association usually contain a report from the Association's Committee on International Commercial Arbitration covering recent developments in this field.

GENERAL AND COMPARATIVE

3. International arbitration: a symposium. (In (1966) 15 ICLQ 718-748)
This is a report of a one-day symposium held on 20 January 1966 by the British Institute of International and Comparative Law on "The principles and practice of international arbitration". For details of the papers presented to the symposium see item nos. 8, 11, 14 and 15.
4. Lalive, Jean-Flavien. Contracts between a state or a state agency and a foreign company. Theory and practice: choice of law in a new arbitration case. (In (1964) 13 ICLQ 987-1021)

The general principles of law to be applied in arbitration are examined in relation to oil concession contracts where one party is a state-owned agency and the other, a foreign corporation. Extracts from the arbitral judgement in the dispute between Sapphire International Petroleum Ltd. and the National Iranian Oil Company are given in an appendix, and a list of similar arbitrations appears in a foot-note. Reference to an international range of relevant publications is made throughout the article.

5. Mann, F. A. State contracts and international arbitration. (In (1967) 42 BYIL 1-37)
The first part of the article deals with the question of the law—municipal or public international law—to which an arbitration between a State and a foreign national is subject. This is followed by a detailed examination of the difficulties which may arise over such arbitrations.
6. Schmitthoff, Clive M. The sources of the law of international trade, with special reference to East-West trade. London: Stevens & Sons Ltd., 1964 xxvi, 292pp.

This is a report of the proceedings of the London colloquium in the series arranged by the International Association of Legal Science on various aspects of international trade law. It contains the papers presented and a note of discussions. There are lists of participants and contributors; international and municipal legislation and customs; cases; and an index. International commercial arbitration is considered in the general context of international trade law in several of the papers. For the papers dealing substantially with the subject see items 7 and 35 of this bibliography.

7. Tallon, Denis. The Law applied by arbitration tribunals—II (In Schmitthoff, Clive M. The sources of the law of international trade. 1964 p. 154-166 Item 6)

The author considers first the determination of the law governing the arbitration and the law governing the substance of the dispute, and secondly the determination of the content of the law governing both procedure and

dispute, which the arbitrator is to apply. A brief bibliography supplements the foot-note references in the text to a wide range of publications.

8. Tangley, Lord. International arbitration today. (In (1966) 15 ICLQ 719-725)

Lord Tangley introduced the symposium on "The Principles and practice of International Arbitration" with comments on the increase in complexity of international trade and therefore of the scope of international commercial arbitration; and also on the unfortunate multiplicity of arbitral bodies due in part to politically based suspicion among nations.

9. Verdross, Alfred. Quasi-international agreements and international economic transactions. (In Year Book of World Affairs 1964, Vol. 18 230-247)

The nature of, and law governing, "quasi-international agreements", i.e. investment or concession agreements between a State and a foreign national, is examined in the light of decisions of arbitration tribunals set up to decide disputes arising between such parties.

10. Wall, E. International congress on arbitration (Venice, October 6-8, 1969). (In (1970) 19 ICLQ 153-155)

This is a brief report of a Congress which examined the extent of recourse to international commercial arbitration and the difficulties involved; and made recommendations as to possible methods of encouraging greater use of arbitration.

INTERNATIONAL CONVENTIONS AND RULES

(a) *Commodity associations*

11. Faure, J. C. A. Commodity market arbitrations with special reference to the Incorporated Oil Seed Association Rules. (In (1966) 15 ICLQ 736-742)

The purpose and organization of trade associations is described with particular reference to the Incorporated Oil Seed Association. Its Rules of Arbitration are explained through examples of possible disputes followed by the method of their solution and appeal procedure.

(b) *World Bank (International Bank for Reconstruction and Development)*

12. Sassoon, David M. Convention on the settlement of investment disputes. (In [1965] JBL 334-339)

The reasons for, and background to the drafting of the Convention by the World Bank are described. The convention is intended to make provision for permanent "facilities to which states and foreign investors could voluntarily submit disputes for settlement through conciliation and arbitration". The article describes the jurisdiction of the International Centre for the Settlement of Investment Disputes and the Convention's provisions for submitting investment disputes to it.

(c) *International Chamber of Commerce*

13. Cohn, E. J. The Rules of Arbitration of the International Chamber of Commerce. (In (1965) 14 ICLQ 132-171)

A short introduction to the disadvantages of litigation over international contracts and the advantages of arbitration is followed by a thorough description of the arbitration machinery of the International Chamber of Commerce. This description covers their officially recommended arbitration clause; the Rules on Conciliation and Arbitration; and comparative material on the differences between the Rules and arbitration and litigation procedure under various national legal systems.

14. Eisemann, Dr. F. Arbitrations under the International Chamber of Commerce rules. (In (1966) 15 ICLQ 726-736)

Disputes taken to the International Chamber of Commerce for arbitration vary greatly as to the identity and geographical location of the parties, the commodities involved, and the type of contract. This is illustrated by reference to statistics and brief summaries of recent cases. The process of arbitration is described from receipt of the claimants' request for arbitration to the enforcement of awards.

- (d) *United Nations Economic Commission for Asia and the Far East*

15. Sanders, Pieter. Trade arbitrations between East and West. (In (1966) 15 ICLQ 742-748)

In this article East means developing Asian countries and West, the developed countries of Europe, the Soviet Union and the United States. It is a report of the 1966 second ECAFE arbitration conference in Bangkok. The conference, having decided on the need for arbitration rules for trade disputes between East and West, formulated principles from which rules could be drafted. Some of the problems in deciding on principles are described.

- (e) *United Nations Economic Commission for Europe*

16. Benjamin, P. I. The European Convention on International Commercial Arbitration. (In (1961) 37 BYIL 478-495)

The problems which can arise before, during and after arbitration in international trade are discussed with reference to the possible effect on them of the European Convention on International Commercial Arbitration, 1961.

17. Cohn, E. J. The Rules of Arbitration of the United Nations Economic Commission for Europe. (In (1967) 16 ICLQ 946-981)

The background to, and contents of, the European Convention on International Commercial Arbitration are summarized. Although the United Kingdom has not ratified the Convention, nevertheless the Arbitration Rules of UNECE are important for United Kingdom firms doing business abroad because they may be adopted by the parties to international contracts. The Rules are explained in detail and compared with those of the International Chamber of Commerce and with English arbitration practice.

18. Sarre, David A. Godwin. European Commercial Arbitration. (In (1961) JBL 352-360)

The text of the European Convention on International Commercial Arbitration 1961 is preceded by a brief note on the background to the Convention and the difficulties involved in reaching agreement over the provisions of article 4—the organization of the arbitration.

NATIONAL PRACTICE

- (a) *United Kingdom*

19. Cohn, E. J. The Arbitration Act 1960 [sic, ie 1950] section 4 (2) and the Geneva Protocol. (In (1962) 11 ICLQ 569-573)

This note on a case concerning stay of arbitration proceedings under Arbitration Act 1950 S.4 (2) considers the implementation by that section of the Geneva Protocol on Arbitration Clauses. The author contends that the words of the subsection do not implement the whole of article 4 of the Protocol.

20. Cohn, E. J. The fifth report of the Private International Law Committee. (In (1962) 25 MLR 449-454)

The report on recognition and enforcement of foreign arbitral awards by the Private International Law Committee is reviewed. The 1958 New York Convention which is the subject of the report, is analysed in comparison with the Geneva Protocol of 1923 and Convention of 1927. Its effect, if implemented, on English law is examined.

21. Commercial Court users' conference report. London: HMSO, 1962. 34pp. (Cmd. 1616)

The purpose of the conference, held in 1960, was to ascertain the views of the commercial community, represented at the conference by 24 organizations, upon the decline of the business of the Commercial Court and how its constitution, practice and procedure might be improved to meet their needs. The report and appendices, containing detailed comments and suggestions by the participating associations, also considers the Court's relation to commercial arbitration and its importance to the international commercial community.

22. Lord Chancellor's Department. Private International Law Committee. Fifth report (recognition and enforcement of foreign arbitral awards). London: HMSO, 1961. 33pp (Cmd. 1515)

The Committee was asked to study the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 and advise Her Majesty's Government on its acceptance. The report presents the conclusions of the Committee and a commentary on articles I-VI of the Convention. The text of the Convention and of the 1923 Protocol on Arbitration Clauses are set out in appendices.

23. Mann, F. A. English procedural law and foreign arbitrations. (In (1969) 18 ICLQ 997-1001 and (1970) 19 ICLQ 693-696)

The question of what is the procedural law governing an international commercial arbitration was discussed in an English judgement concerning an arbitration in Scotland. In the first article, the author sets out his reasons for disagreeing with the Court of Appeal's decision; in the second, he analyses the House of Lords' reversal of this decision and considers the implication of the House of Lords' judgement.

24. Marshall, E. A. Law of arbitration—a difference between Scots and English. (In (1970) Juridical Review 115-134)

Following a discussion of a recent House of Lords' decision concerning an arbitration in Scotland, there is a detailed comparison of the Scottish and English law of arbitration.

25. Polonsky, Michael. Arbitration of international contracts. (In (1971) JBL 1-11)

The distinction, which arose in two recent English decisions, between the law governing the contractual rights of the parties to an international contract and the law governing the arbitration proceedings; and the relationship of the arbitration clause to the determination of the proper law of the contract are examined.

26. Russell P. Russell on the law of arbitration. 18th ed. by Anthony Walton. London: Stevens & Sons Ltd, 1970. lvi 542pp.

This major textbook covers the whole field of English arbitration law and practice under such headings as, *inter alia* what matters may be referred to arbitration; who may be an arbitrator; powers and duties of arbitrators; control of the reference by the court; and enforcement of awards. International commercial arbitration is dealt with as it occurs within the scheme of the book. Many of the examples and cases cited relate to international commercial arbitration. There are the usual lists of statutes, delegated legislation, cases and Rules of the Supreme Court referred to in the text. Useful appendices contain reprints of the Arbitration Act 1950; the Rules of the Supreme Court relating to arbitration and a list of notes on arbitration attached to other Rules; a short list of practical books on arbitration; and many forms including the arbitration clauses of the International

Chamber of Commerce and the American Arbitration Association. The book concludes with an index.

27. Schmitthoff, Clive M. Arbitration: the supervisory jurisdiction of the courts. (In (1967) JBL 318-328)

Of the two elements in arbitration, the contractual and the judicial, the latter predominates in England. Judicial control of the substantive correctness of arbitration awards by way of the power of the Courts to break an arbitration clause and the statement of a special case for the opinion of the court is described. This supervisory jurisdiction is explained and justified historically in this article. Suggestions for reforms to judicial supervision, are made including use of judicial arbitration, statements of special cases to the Court of Appeal, and the use of amicable compositors.

(b) *Other countries*

28. Faragó, L. Organisation and activity of the Court of Arbitration of the Hungarian Chamber of Commerce. (In (1960) 9 ICLQ 682-688)

29. Faragó, L. Decisions of the Hungarian Chamber of Commerce in "Comecon" arbitrations. (In (1965) 14 ICLQ 1124-1143)

Law Decree No. 22/1952 provided for two forms of arbitration. It is with the second, the Court of Arbitration of the Hungarian Chamber of Commerce, that these articles are concerned. The first article describes the administrative organization and rules of procedure of the Court and the function of its Legal Secretary. In the second article, the basis of jurisdiction of, and the law applied by, the Court is described briefly. The greater part of the article comprises selected extracts from eleven judgements of the Court in cases in which both parties were State enterprises of Comecon countries.

30. Govindaraj, V. C. Foreign arbitral awards and foreign judgements based upon such awards. (In (1964) 13 ICLQ 1465-1468)

This is a note on a test case before the Supreme Court of India on the enforcement of a foreign arbitral award.

31. Hossain, Kamal. International commercial arbitration, state succession and the Commonwealth. (In (1960) 36 BYIL 370-375)

The divergent approaches to the enforcement of English arbitral awards taken by the Indian and Pakistani Courts since their countries' Independence in 1947 is set out. The difficulty arises from the question whether they are parties to the Geneva Protocol on Arbitration Clauses 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 *vis-à-vis* England since 1947 because of the conditions for recognition of Parties contained in the English and Indian implementing legislation.

32. Jakubowski, J. The settlement of foreign trade disputes in Poland. (In (1962) 11 ICLQ 806-821)

This article describes international commercial arbitration procedure in Poland. The judicial practice and procedure of the Court of Arbitration of the Polish Chamber of Foreign Trade is covered in detail, including résumés of several recent cases. The International Arbitration Court for Maritime and Inland Navigation and the Gdynia Cotton Arbitration Chamber are described in less detail. There are foot-note references to works on Polish foreign trade and international law in a variety of languages.

33. Kos-Rabcewicz-Zubkowski, L. East European rules on the validity of international commercial arbitration agreements. Manchester: University Press, 1970. xii, 332pp.

The countries covered by this book are Albania, Bulgaria, Czechoslovakia, German Democratic Republic,

Hungary, Poland, Romania, Union of Soviet Socialist Republics and Yugoslavia. Their practice relating to the capacity to conclude international commercial arbitration agreements, their form, and what may be submitted to arbitration both generally and before any specified arbitral body is described by reference to their legislation, international conventions to which they are parties and arbitration decisions. Bibliographical sources are quoted extensively in footnotes, often with indications of where to find English translations of laws or codes.

The remaining two thirds of the book consists of appendices reprinting in English translations (except for Albania, where the translation is into French) the rules of foreign trade arbitration bodies of these countries; international arbitration conventions to which one or more of the East European countries are parties; and various other rules or laws relating to arbitration. An extensive bibliography of an international range of books and articles is followed by a list of arbitral decisions cited in the text and an index.

34. Ramzaitsev, Dmitri. The application of private international law in Soviet foreign trade practice. (In (1961) JBL 343-351)

The application of private international law is described through the decisions of the Soviet Foreign Trade Arbitration Commission. Aspects of Soviet trade law discussed are the form of the transaction; legal capacity and competence of the parties; determination of the law to be applied to a transaction; manner of applying foreign law; application of international customs; and questions relating to arbitration agreements.

35. Ramzaitsev, D. F. The law applied by arbitration tribunals—I (In Schmitthoff, Clive M. The sources of the Law of international trade. 1964 pp. 138-153. Item 6)

This report, in two parts, is concerned with the practice of the East European countries' permanent foreign trade arbitration tribunals, especially the Foreign Trade Arbitration Commission at the Soviet Chamber of Commerce, in applying rules of law to disputes. In the first part the application of legal rules to the competence of arbitration tribunals is considered while the second part examines their application to the substance of the dispute, with examples from arbitration decisions. There are frequent references to the sources of the law and decisions discussed.

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C. Check list of UNCITRAL documents

Documents of the seventh session of the Commission

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Document reference

A. GENERAL SERIES

Provisional agenda, notes on the provisional agenda, and tentative schedule of meetings: note by the Secretary-General	A/CN.9/85
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Progress report of the Working Group on the International Sale of Goods on the work of its fifth session (Geneva, 21 January-1 February 1974)	A/CN.9/87
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* In Spanish only.

** In French only.

*** In English, Russian and Spanish only.

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Working Group on the International Sale of Goods, fifth session**A. WORKING PAPERS**

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Proposal by the Observer of the International Chamber of Commerce (ICC) article 72 *bis* A/CN.9/WG.2/V/CRP.5/Rev.1

Proposal of Drafting Party II: articles 60 [*bis*], 69 and 71 of ULIS A/CN.9/WG.2/V/CRP.6

Proposal of Drafting Party III: article 71 of ULIS A/CN.9/WG.2/V/CRP.7

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