

**United Nations
Commission on
International
Trade Law**

YEARBOOK

Volume VI: 1975



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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 sixth volume in the series of Yearbooks of the United Nations Commission on International Trade Law (UNCITRAL).¹ The fifth volume concerned 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. This volume covers the period from June 1974 to the end of the Commission's eighth session in April 1975.

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 seventh session by including material (such as action by the General Assembly) which was not available when the manuscript for the fifth volume was completed. Part One also contains the Commission's report on the work of its eighth session which was held in Geneva in April 1975.

Part Two reproduces most of the documents considered at the eighth session of the Commission. These documents include reports of the Commission's Working Groups, comments and proposals submitted by Governments, and reports of the Secretary-General. At the end of each section there are references to any documents that have not been included in this volume.

Part Three contains annexes, among which are a report of the Secretary-General and a General Assembly resolution relating to the United Nations Conference on Prescription (Limitation) in the International Sale of Goods.

¹ The volumes published to date are referred to respectively as follows: *Yearbook of the United Nations Commission on International Trade Law* (abbreviated herein 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); *Volume IV: 1973* (United Nations publication, Sales No. E.74.V.3) and *Volume V: 1974* (United Nations publication, Sales No. E.75.V.2).

I. THE SEVENTH SESSION (1974): 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 (12 September 1973-13 September 1974)* (A/9615/Rev.1).

K. *Progressive development of the law of international trade: seventh annual report of the United Nations Commission on International Trade Law (agenda item 12 (b)).*

539. At its 406th meeting on 9 September 1974 the Board took note with appreciation of the report of the United Nations Commission on International Trade Law (UNCITRAL) on the work of its seventh session.⁹⁰

* Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 15.

⁹⁰ Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 17 (A/9617).

B. General Assembly: report of the Sixth Committee (A/9920)*

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I. INTRODUCTION

1. At its 2237th plenary meeting, on 21 September 1974, the General Assembly included the item entitled "Report of the United Nations Commission on International Trade Law on the work of its seventh session"¹ in the agenda of its twenty-ninth session and allocated it to the Sixth Committee for consideration and report.

2. The Sixth Committee considered this item at its 1497th to 1502nd meetings, from 13 to 20 November

and at its 1506th and 1508th meetings, on 26 and 27 November 1974.

3. At the 1497th meeting, on 13 November, Mr. Jerzy Jakubowski (Poland), Chairman of the United Nations Commission on International Trade Law at its seventh session, introduced the Commission's report on the work of that session (A/9617)². In view of the fact that Mr. Jakubowski was unable to remain in New York for the duration of the debate, Mr. Emmanuel Sam (Ghana), Vice-Chairman of the Commission at its

* 6 December 1974. *Official Records of the General Assembly, Twenty-ninth Session, Annexes*, agenda item 89.

¹ *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 17 (A/9617)*; UNCITRAL Yearbook, vol. V: 1974, 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).

seventh session, replied to statements made in the course of the debate. The Sixth Committee also had before it a note by the Secretary-General (A/C.6/L.984), setting forth the comments on the Commission's report by the Trade and Development Board of the United Nations Conference on Trade and Development.

4. At the 1506th meeting, on 26 November, 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 the Commission's report. 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 its 1508th meeting, on 27 November, the Committee decided that, in view of the nature of the subject-matter, the report on agenda item 89 should include a summary of the main trends of opinion expressed during the debate.

II. PROPOSAL

5. At the 1506th meeting, the representative of Ghana introduced a draft resolution (A/C.6/L.944) on behalf of Austria, Canada, Cyprus, Czechoslovakia, Egypt, the German Democratic Republic, Germany (Federal Republic of), Ghana, Greece, Guyana, Honduras, Hungary, Japan, Kenya, Mexico, Nepal, Nigeria, Norway, the Philippines, Poland, Singapore, Somalia, Swaziland, Uganda, the United Kingdom of Great Britain and Northern Ireland, the United Republic of Tanzania, Yugoslavia and Zaire, later joined by Australia, Brazil, India, Italy, Jordan and Mali (for the text, see para. 42 below).

III. DEBATE

6. The main trends of opinion expressed in the Sixth Committee on the report of the Commission on the work of its seventh session 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 seventh 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), multinational enterprises (section F), ratification of or adherence to conventions concerning international trade law (section G), training and assistance in the field of international trade law (section H), liability for damage caused by products intended for or involved in international trade (section I), and future work (section J).

A. General observations

7. Many representatives stressed the importance of the Commission's work in that the unification and harmonization of international trade law would promote the development of equitable commercial and economic relations between developed and developing countries and between countries with different social and economic systems. Several representatives noted that the establishment of universally acceptable uniform rules and practices of international trade were an essential condition for the development of international trade.

8. Most representatives commended the Commission and its Working Groups on the progress of their

work since the sixth session of the Commission. It was generally observed that the work entailed great complexity, since the unification and harmonization of international trade law had to take into account the different economic and legal systems of the world and existing international trade practices.

9. Representatives of developing countries stated that it was essential that the Commission continue to promote international trade through the development of uniform laws that reflected the need of those countries for a fair and equitable share in the benefits of such trade.

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

10. Most representatives commended the Commission on the flexible working methods it had developed since its inception. Special reference was made to the preparatory work carried out by the Commission's secretariat, in consultation with interested international organizations and commercial institutions wherever appropriate, and to the reliance on Working Groups in which the expertise of representatives on the Commission was effectively utilized.

11. With regard to the Commission's programme of work, most representatives expressed support for the order of priorities and the target dates for the completion of specific subjects that had been set by the Commission. One representative expressed the view that the Commission should only be asked to take up a new topic if such a course was supported by a large majority of the States representing the main legal systems of the world.

12. With regard to the Commission's working methods, it was stated that it was very important that the Commission seek, whenever possible, the assistance of experts drawn from trade and banking circles so as to ensure that the uniform laws being developed reflected existing international trade practices. Several representatives stressed the need for co-operation between the Commission and other United Nations bodies, as well as intergovernmental and international non-governmental organizations which were working on topics of concern to the Commission.

13. One representative raised the question of the relationship between the Commission and its secretariat, and stated the view that the Commission should avoid requesting the secretariat to do work which properly fell within the terms of reference set for the Commission by the General Assembly. Other representatives, however, held that the Commission's secretariat played an indispensable role in the Commission's work and performed a valuable service in preparing background studies and draft texts for the Commission's consideration.

14. Several representatives expressed their support for the practice of the Commission and of its Working Groups to proceed, wherever possible, by consensus. It was stated that decision-making by consensus would ensure that the uniform rules derived from the work of the Commission were acceptable to all States. On the other hand, the view was expressed that the Commission should perhaps adopt alternative texts in cases where there existed basic differences, leaving the final decision to a conference of plenipotentiaries.

15. Some representatives noted that the recent enlargement of the membership of the Commission, from 29 to 36 States, increased the number of experts upon whom the Commission and its Working Groups could rely.

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

C. International sale of goods

17. All representatives stressed the importance of the work of unifying the rules governing the international sale of goods. They expressed their satisfaction that the Working Group on the International Sale of Goods had finished its first reading of the Uniform Law on the International Sale of Goods (ULIS) annexed to the Convention of The Hague of 1964 and that the revised ULIS was less complex than the earlier text. It was noted that, in accordance with the time-table envisaged by the Commission, the Working Group would conclude its work of revising ULIS within the next two years. Many representatives expressed the hope that the revised ULIS would be widely acceptable to States with different legal and economic systems and that it would take into account the particular interests of the developing countries.

18. Some representatives noted that the Working Group on the International Sale of Goods still had a great deal of work left, since it had yet to consider the Convention on the Law Applicable to the International Sale of Goods done at The Hague in 1955 and the Uniform Law on the Formation of Contracts for the International Sale of Goods done at The Hague in 1964.

19. One representative stressed the importance of the Commission's work in developing general conditions of sale in that such general conditions would greatly facilitate international trade. Another representative expressed the view that the development of general conditions of sale should be left to commercial practice.

D. International payments

20. Many representatives reiterated their support for the Commission's decision to prepare uniform rules applicable to an international negotiable instrument for optional use in international payments. They noted with appreciation the progress made by the Working Group on International Negotiable Instruments and stressed the importance of continued close collaboration by that body with international organizations and banking and trade institutions.

21. Several representatives welcomed the inquiries being made by the Secretariat, at the request of the Working Group, with a view to determining whether the proposed uniform rules on bills of exchange and promissory notes should be expanded to cover cheques.

22. Several representatives commented favourably on the revision by the International Chamber of Commerce (ICC) of its "Uniform Customs and Practice for Documentary Credits". In that connexion, they welcomed the efforts of the Commission to transmit to ICC the views of commercial centres in countries not represented in that organization.

E. International legislation on shipping

23. All representatives who spoke on the subject commended the Working Group on International Legislation on Shipping on the progress made in revising the existing rules governing the liability of carriers of goods by sea. It was stated that the results achieved by the Working Group represented a well-balanced compromise between the different interests involved and also reflected the interests of developing countries having small or no merchant fleets.

24. Several representatives supported the decision of the Working Group that the revised rules should form a new convention rather than a second Protocol to the International Convention for the Unification of certain Rules relating to Bills of Lading signed at Brussels in 1924. One representative stated that the Commission should limit itself to revising the Convention of 1924 and its Protocol of 1968.

F. Multinational enterprises

25. Many representatives observed the Commission had an important role to play in this field and welcomed the fact that a questionnaire on legal problems presented by multinational enterprises had been circulated to Governments. Several representatives expressed the hope that a large number of Governments would answer the questionnaire in order to enable the Commission to conduct its work in full knowledge of the issues involved.

26. Many representatives noted the complexity of the problems arising from the activities of multinational enterprises. They stressed that the Commission should confine itself to a consideration of the legal problems presented by those enterprises and should not duplicate work undertaken by other United Nations organs.

27. Some representatives expressed doubt as to the feasibility of the Commission's engaging in a study of the legal problems arising from the operation of multinational enterprises and took the view that all work on the subject be initially undertaken by the Economic and Social Council.

G. Ratification of or adherence to conventions concerning international trade law

28. Several representatives supported study by the Commission of the question of accelerating the process of ratification of or adherence to conventions on international trade. They stressed, however, the necessity of respecting the sovereignty and particular constitutional provisions of States.

29. It was observed that the Commission could best consider this question in the light of the state of ratification and adherence in respect of a particular convention, such as the recently adopted Convention on the Limitation Period in the International Sale of Goods.

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

30. All representatives who spoke on the subject stressed the importance of the Commission's programme of training and assistance in the field of international trade law. They particularly welcomed the Commission's decision to organize a symposium on the teach-

ing of international trade law, which would be held at Geneva in April 1975, in connexion with the Commission's eighth session.

31. Several representatives expressed their appreciation to those Governments that had pledged voluntary contributions to meet the travel and subsistence expenses of participants from developing countries in the symposium, and expressed the hope that further voluntary contributions would be forthcoming.

32. Several representatives expressed their gratitude to the Governments that had offered scholarships to young lawyers and government officials from developing countries for the study of or practical training in international trade law.

33. One representative suggested that the Commission should consider holding regional seminars on international trade law in developing countries, in co-operation with the United Nations Institute for Training and Research and other interested international organizations.

34. One representative noted the importance of disseminating Commission documents to research centres and universities throughout the world and of keeping these institutions informed of the progress made by the Commission. Another representative stated that it would be useful if the Commission disseminated information concerning national legislation and case law relating to international trade.

I. *Liability for damage caused by products intended for or involved in international trade*

35. Several representatives supported the decision of the Commission to initiate preliminary work on this subject and to consider the work of other organizations in this field. Some representatives stated that the Commission should undertake work in this field only if it did not interfere with the completion of the priority items on its agenda.

36. Some representatives noted that liability for damage caused by products involved a question of civil liability and was not therefore within the Commission's terms of reference. It was also observed that this topic gave rise to complex problems which could perhaps

better be considered on a regional rather than a universal level.

J. *Future work*

37. Most representatives expressed their support for the work programme and the order of priorities established in respect thereof by the Commission.

38. Some representatives observed that the Commission should also give consideration to the harmonization and unification of the rules of private international law, while continuing its work of unifying the substantive rules of international trade law.

39. Some representatives commented on the Commission's work on international commercial arbitration and stressed the need for close collaboration with business circles and international institutions active in this field, such as the International Chamber of Commerce.

40. One representative stated that the Commission should endeavour to develop uniform rules governing the validity of contracts in general, since there was little difference between the various types of contracts. This representative stated further that the Commission should consider as its final goal the adoption of a uniform code of international trade law.

IV. DECISION OF THE SIXTH COMMITTEE

41. At its 1508th meeting, on 27 November, the Sixth Committee adopted the draft resolution (A/C.6/L.994) by consensus (see para. 42 below).

RECOMMENDATION OF THE SIXTH COMMITTEE

42. 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

[Text not reproduced in this section. The draft resolution was adopted without change by the General Assembly as General Assembly resolution 3316 (XXIX). The resolution in final form is reproduced below in section C.]

C. General Assembly resolution 3316 (XXIX) of 14 December 1974

3316 (XXIX). REPORT OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

The General Assembly,

Having considered the report of the United Nations Commission on International Trade Law on the work of its seventh session,¹

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

Further recalling its resolution 2421 (XXIII) of 18 December 1968, 2502 (XXIV) of 12 November 1969, 2635 (XXV) of 12 November 1970, 2766 (XXVI) of 17 November 1971, 2928 (XXVII) of 28 November 1972 and 3108 (XXVIII) of 12 December 1973 concerning the reports of the United Nations Commission on International Trade Law on the work of its first to sixth 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 discrimina-

¹ Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 17 (A/9617); UNCITRAL Yearbook, vol. V: 1974, part one, II, A.

II. THE EIGHTH SESSION (1975)

A. Report of the United Nations Commission on International Trade Law on the work of its eighth session (Geneva, 1-17 April 1975) (A/10017)*

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INTRODUCTION

1. The present report of the United Nations Commission on International Trade Law covers the Commission's eighth session, held at Geneva from 1 to 17 April 1975.

2. 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

3. The United Nations Commission on International Trade Law (UNCITRAL) commenced its eighth session on 1 April 1975. The session was opened on behalf of the Secretary-General by Mr. Blaine Sloan, Director of the General Legal Division, Office of Legal Affairs.

B. Membership and attendance

4. 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,* Barbados, 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,

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.

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

Singapore,* Somalia,* Syrian Arab Republic, Union of Soviet Socialist Republics,* United Kingdom of Great Britain and Northern Ireland,* United Republic of Tanzania,* United States of America and Zaire.

5. With the exception of Guyana, Kenya, Somalia, the United Republic of Tanzania and Zaire, all members of the Commission were represented at the session.

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

(a) *United Nations organs*

United Nations Conference on Trade and Development; Economic Commission for Europe.

(b) *Specialized agencies*

Inter-Governmental Maritime Consultative Organization; International Monetary Fund.

(c) *Intergovernmental organizations*

Commission of the European Communities; Council of Europe; Council for Mutual Economic Assistance; East African Community; European Free Trade Association; Hague Conference on Private International Law; International Institute for the Unification of Private Law.

(d) *International non-governmental organizations*

International Bar Association; International Chamber of Commerce; International Law Association; International Union of Marine Insurance.

C. Election of officers

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

ChairmanMr. R. Loewe (Austria)
Vice-ChairmanMr. E. Sam (Ghana)
Vice-ChairmanMr. N. Gueiros (Brazil)
Vice-ChairmanMr. L. Gorbanov (Bulgaria)
RapporteurMr. L. Sumulong (Philippines)

D. Agenda

8. The agenda of the session as adopted by the Commission at its 151st meeting, on 1 April 1975, was as follows:

1. Opening of the session
2. Election of officers
3. Adoption of the agenda; tentative schedule of meetings
4. International sale of goods:
 - (a) Uniform rules governing the international sale of goods
 - (b) General conditions of sale and standard contracts
5. International payments:
 - (a) Draft uniform law on international bills of exchange and international promissory notes
 - (b) Bankers' commercial credits
 - (c) Bank guarantees (contract and payment guarantees)
 - (d) Security interests in goods

² The elections took place at the 151st meeting, on 1 April 1975, and at the 153rd meeting, on 2 April 1975. In accordance with a decision taken by the Commission at its first session, the Commission has three Vice-Chairmen, so that, together with the Chairman and Rapporteur, each of the five groups of States listed in General Assembly resolution 2205 (XXI), section II, paragraph 1, will be represented on the bureau of the Commission (see *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/7216)*, para. 14; (*UNCITRAL Yearbook*, vol. 1: 1968-1970, part two, I, A).

6. International legislation on shipping
7. International commercial arbitration
8. Multinational enterprises
9. Liability for damage caused by products intended for or involved in international trade
10. Training and assistance in the field of international trade law
11. Future work
12. Other business
13. Date and place of the ninth session
14. Adoption of the report of the Commission

E. Decisions of the Commission

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

F. Adoption of the report

10. The Commission adopted the present report at its 171st and 172nd meetings, on 17 April 1975.

CHAPTER II. INTERNATIONAL SALE OF GOODS

A. Uniform rules governing the international sale of goods

Report of the Working Group

11. The Commission had before it the report of the Working Group on the International Sale of Goods on the work of its sixth session, held at New York from 27 January to 7 February 1975 (A/CN.9/100). The report sets forth the progress made by the Working Group in implementing the mandate given to it by the Commission 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 text capable of wider acceptance, or to elaborate a new text for the same purpose.³

12. The report describes the action taken by the Working Group at its sixth session on articles 1 to 83 of ULIS. In respect of those articles, the Working Group considered only those provisions concerning which there was either a pending question at the conclusion of its fifth session⁴ or substantial support for consideration of the matter. The report also sets forth in annex I the revised text of the uniform rules, which is the result of action taken by the Working Group at its first six sessions. The report includes comments and proposals of representatives on the pending questions. The progress made by the Working Group at its sixth session is summarized below.

(a) Before proceeding to a discussion of the articles of the revised text of ULIS, the Working Group decided that the revised text should be drafted in the form

³ *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18 (A/7618)*, para. 38, para. 3 (a) of the resolution contained therein (*UNCITRAL Yearbook*, vol. I: 1968-1970, part two, II); *ibid.*, *Twenty-sixth Session, Supplement No. 17 (A/8417)*, para. 92, subpara. 1 (c) of the resolution contained therein (*UNCITRAL Yearbook*, vol. II: 1971, part one, II). The 1964 Hague Convention relating to a Uniform Law on the International Sale of Goods and the annexed Uniform Law (ULIS) appear 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, sect. 1.

⁴ *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 17 (A/9617)*, para. 15.

of an "integrated" convention entitled "Convention on the International Sale of Goods" rather than as a uniform law annexed to a convention (A/CN.9/100, para. 13), and requested the Secretariat to structure the draft provisions accordingly.⁵

(b) The Working Group also decided that the formulations in the Convention on the Limitation Period in the International Sale of Goods (A/CONF.63/15) should be followed to the largest extent possible whenever there was a similar text in the Convention on the International Sale of Goods (A/CN.9/100, para. 16). However, the Working Group pointed out that, since the issues arising in limitation and the sale of goods were not always similar, it would not be desirable to adopt the text of the Limitation Convention in the Sales Convention where that would lead to an inappropriate result.

(c) Because the sixth session of the Working Group was devoted primarily to questions not settled at the fifth session, no major changes in concept or structure were proposed.

(d) The provisions on usages were redrafted by the Working Group to make it clear that usages become binding on a party only as a part of the contract of sale. The parties are considered, unless they have otherwise agreed, to have impliedly made applicable to their contract a usage of which they knew or had reason to know and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned (A/CN.9/100, paras. 34-42; annex I, art. 8).

(e) In regard to the period of time during which the buyer could give notice of lack of conformity of the goods, the Working Group decided that the buyer shall lose that right if he had not given notice thereof to the seller at the latest within a period of two years from the time the goods were actually handed over, except that the parties might derogate from such a limitation by providing for a period of guarantee (A/CN.9/100, paras. 60-65; annex I, art. 23).

(f) In regard to the right of the parties to declare the contract avoided, the Working Group decided that they should not lose that right by delay in giving notice (A/CN.9/100, paras. 75-79, 96-98; annex I, arts. 30 and 45). In this connexion, the view was expressed in the Working Group that losing the right to declare the contract avoided would be excessively hard on the party not in breach, because in certain circumstances the proposed text would require two notices; a first notice of his intention to avoid, and a second of his actual avoidance.

(g) In regard to excused non-performance of obligations under a contract, the Working Group adopted a text, which provides that, where a party has not performed one of his obligations, 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 fault on his part. The Working Group decided that 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 impediment (A/CN.9/100, paras. 102-107; annex I, art. 50).

⁵ The text (A/CN.9/100, annex I) is presented in the form of a convention and has been renumbered.

(h) The Working Group requested the Secretariat to draw up a commentary on the Convention on the International Sale of Goods based on the reports of the sessions of the Working Group and the various studies made and to transmit a draft of the commentary to representatives for unofficial comment. It was agreed that the commentary should have an unofficial character (A/CN.9/100, para. 119).

13. With respect to its future work, the Commission noted that the Working Group expects to be able to hold at its next session a preliminary discussion on the formation and validity of contracts of sale⁶ so as to give the Secretariat, if appropriate, directions as to the studies which the Working Group may wish it to undertake in that field.⁷

Consideration of the report by the Commission⁸

14. In considering the report of the Working Group, the Commission followed its general policy of only considering the progress made and not the substance of the work carried out by a Working Group until it had completed that work.

15. The Commission considered whether, once the Working Group had completed the final text of the draft Convention on the International Sale of Goods, it should follow the same procedure as that followed in respect of the draft Convention on the Carriage of Goods by Sea, prepared by the Working Group on International Shipping Legislation, and request the Secretary-General to transmit the draft Convention to Governments and interested international organizations for comment, prior to its consideration by the Commission in plenary session. Some representatives were in favour of a restricted consultation, limited only to the members of UNCITRAL. Other representatives were of the view that as wide a consultation as possible should be effected before the consideration of the draft Convention by the Commission at its tenth session. The Commission decided to follow the procedure adopted in respect of the draft Convention on the Carriage of Goods by Sea and that, therefore, once the text of the Convention on the International Sale of Goods was completed by the Working Group, it should be circulated to Governments and interested international organizations for comment. It was agreed that they should be invited to focus their observations, as far as possible, on fundamental issues.

16. The Commission also considered the following:

(a) Whether the proposed Sales Convention and the rules on the formation and validity of contracts of sale should be incorporated in a single convention; or

(b) Whether the rules on the formation and validity of contracts of sale should be the subject-matter of a separate convention.

If the latter course were adopted, the Commission considered:

(a) Whether this separate convention should be considered at the conference of plenipotentiaries at which the Sales Convention will be considered; or

⁶ For the mandate of the Working Group, see *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 17* (A/9617), para. 93.

⁷ *Ibid.*, para. 118.

⁸ The Commission considered the subject at its 151st and 152nd meetings on 1 April 1975, its 159th meeting on 8 April 1975, and its 168th meeting on 14 April 1975.

(b) Whether this separate convention should be considered at a different conference. There was general agreement that it would be desirable for the Sales Convention and the rules on formation and validity to be considered at the same conference. However, the view was also expressed that consideration of the Sales Convention should not be postponed if it appeared that the rules on formation and validity would not be ready for some time. It was agreed to defer any decision on this question until the tenth session of the Commission.

Decision of the Commission

17. The Commission, at its 159th meeting, on 7 April 1975, 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 sixth session;

2. *Requests* the Working Group to continue its work under the terms of reference set forth by the Commission at its second session and to complete the work expeditiously;

3. *Requests* the Secretary-General:

(a) To transmit the draft Convention on the International Sale of Goods, when completed by the Working Group, to Governments and interested international organizations for their comments, and when doing so, to recommend that they should, as far as possible, focus their observations on fundamental issues in view of the fact that they would again be invited to submit comments on and amendments to, the draft Convention in connexion with a conference of plenipotentiaries to which the draft Convention, as approved by the Commission, would be submitted for adoption;

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

B. General conditions of sale and standard contracts

18. The Commission, at its third session, requested the Secretary-General "to commence a study on the feasibility of developing general conditions embracing a wider scope of commodities".⁹ Pursuant to this request, the Secretary-General submitted progress reports to the Commission at its fourth (A/CN.9/54)¹⁰ and fifth (A/CN.9/89) sessions. The final report on the feasibility study, submitted to the Commission at its sixth session, concluded that "it appears feasible to draw up a set of 'general' general conditions that would be applicable . . . to a wide range of commodities" (A/CN.9/78, para. 198).¹¹ On the basis of that report, the Commission requested the Secretary-General "to continue

work on the preparation of a set of uniform general conditions".¹²

19. At the present session, the Commission had before it a report of the Secretary-General to which was annexed a draft set of "general" general conditions (A/CN.9/98).

20. The report indicates that the draft set of general conditions proceeds from the idea that "general" general conditions applicable to a wide range of commodities and a law of sales, also applicable to a wide range of commodities, are closely interconnected.¹³ In both cases a general framework of rights and obligations is established and the parties may adapt those rights and obligations to their own needs by agreeing on the elements unique to their contract, that is, description of the goods, quantity, price etc., and by varying the general rights and obligations by specific contract clauses if that would seem necessary or appropriate.

21. It was also suggested in the report that the general conditions should be in harmony with the Convention on the International Sale of Goods in the form in which it is being revised by the Commission's Working Group on the International Sale of Goods. The report suggests that the best means of assuring this harmony is to use the language of the Convention for the basic provisions of the general conditions. In some specific trades, it would be necessary or desirable to vary or add to these general provisions. It was suggested in the report that, if the Commission were to accept this approach, it might wish to request the Secretariat to consult with representatives of these trades when drafting the substitutive or additional clauses of the "general" general conditions for the use of their trade.¹⁴

Consideration of the report by the Commission¹⁵

22. Many representatives expressed themselves in favour of the continuation of work on general conditions. There was a wide measure of agreement that the general conditions should not conflict with the provisions in the Convention on the International Sale of Goods. Doubts were expressed, however, whether the general conditions should contain the same provisions as those laid down in the Sales Convention, taking into consideration that the general conditions are part of the contract.

23. Several representatives were of the opinion that a set of "general" general conditions would not correspond to commercial needs. Some of those representatives observed that "general" general conditions could only be based on general provisions which would necessarily be analogous to the provisions of the uniform law on sales; for this reason, and because of the work carried out in respect of the revision of the Uniform Law on the International Sale of Goods (ULIS), there would be little interest, if any, in preparing "general" general conditions. The view was expressed that the Commission should prepare general conditions for use

⁹ Official Records of the General Assembly, Twenty-fifth Session Supplement No. 17 (A/8017), para. 102, para. (b) of the resolution contained therein (UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A).

¹⁰ For the printed text, see UNCITRAL Yearbook, vol. II: 1971, part two, I, B, 1.

¹¹ For the printed text, see UNCITRAL Yearbook, vol. IV: 1973, part two, I, B.

¹² Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 17 (A/9017), para. 24 (UNCITRAL Yearbook, vol. IV: 1973, part one, II, A).

¹³ The relationship between the proposed general conditions of sale and the law of sales was discussed in the report (A/CN.9/98, paras. 8-25).

¹⁴ *Ibid.*, para. 21.

¹⁵ This subject was considered by the Commission at its 152nd meeting, held on 1 April 1975.

in specific trades or for specific commodities only if a desire for such conditions had been expressed by the trade concerned.

24. The Commission was in agreement that the Secretariat should continue its work on general conditions. In particular, the Secretariat should consult with interested commercial circles in respect of the practical need for "general" general conditions or for general conditions for use in a specific trade or for a specific commodity and should report thereon to the Commission at a future session. It was agreed that, for this purpose, the Secretariat would be authorized to establish a study group composed of representatives of regional commissions, interested trade associations, chambers of commerce and similar organizations from different regions.

Decision of the Commission

25. The Commission, at its 152nd meeting, on 1 April 1975, unanimously adopted the following decision:

The United Nations Commission on International Trade Law

Requests the Secretary-General:

(a) To make inquiries about the practical need for "general" general conditions for use in a wide variety of trades, and, if appropriate, to continue work on the preparation of such conditions;

(b) To establish, for purposes of consultation, a study group composed of representatives of regional commissions, interested trade associations, chambers of commerce, and similar organizations from different regions;

(c) To report to the Commission at a future session on the progress made in respect of this project.

CHAPTER III. INTERNATIONAL PAYMENTS

A. Negotiable instruments

Report of the Working Group

26. The Commission had before it the report of the Working Group on International Negotiable Instruments on the work of its third session, held at Geneva from 6 to 17 January 1975 (A/CN.9/99). The report sets forth the progress made by the Working Group (a) in preparing a final draft uniform law on international bills of exchange and international promissory notes, and (b) in considering the desirability of preparing uniform rules applicable to international cheques.¹⁶

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

27. As indicated in the report, the Working Group at its third session considered articles 63 to 78 of the draft uniform law on international bills of exchange and international promissory notes prepared by the Secretary-General in response to a decision by the Commission.¹⁷ The proposed uniform law will establish uniform rules applicable to an international negotiable

instrument (bill of exchange or promissory note) for optional use in international payments.

28. The report sets forth the deliberations and conclusions of the Working Group with respect to notice of dishonour upon non-acceptance or non-payment, the sum that is due to the holder and to a party secondarily liable, discharge of liability on an instrument and the question of limitation of legal proceedings and prescription of rights arising in the context of an international instrument.

(ii) Uniform rules applicable to international cheques

29. 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. At its third session, the Working Group had before it a note by the Secretariat (A/CN.9/WG.IV/CRP.5) setting forth the first results of inquiries made by the Secretariat in consultation with the UNCITRAL Study Group on International Payments. The Working Group requested the Secretariat and the Study Group to complete their inquiries and to submit, at a future session, a full report on the use of cheques for settling international payments and the legal problems arising in this connexion. In particular, the Secretariat was requested to obtain information regarding the impact, in the near future, of the increased use of telegraphic transfers and of the development of telecommunication systems between banks on the use of cheques for settling international payments.

Consideration of the report by the Commission¹⁸

30. 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 made by the Working Group.

31. The Commission decided to consider the timing of the fourth session of the Working Group in relation to schedules for other working groups under item 11 of the agenda, entitled "Future work".¹⁹

Decision of the Commission

32. The Commission, at its 154th meeting on 3 April 1975, adopted unanimously the following decision:

The United Nations Commission on International Trade Law

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

¹⁸ The Commission considered this subject at its 154th meeting on 3 April 1975.

¹⁹ See chap. IX, para. 116 below.

¹⁶ For the terms of reference of the Working Group, see *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.

¹⁷ *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.21.

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, in accordance with the directives of the Working Group on International Negotiable Instruments, further work in connexion with the draft uniform law on international bills of exchange and with the inquiries regarding the use of cheques for 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*²⁰

33. This subject is concerned with the revision by the International Chamber of Commerce (ICC) of "Uniform Customs and Practice for Documentary Credits", drawn up by ICC in 1933 and subsequently revised by it in 1951 and 1962. At previous sessions,²¹ the Commission stressed the importance of commercial letters of credit in ensuring payment for international trade transactions and expressed the opinion that it would be in the interest of international trade if the views of countries not represented in ICC were taken into account by ICC in the revision of "Uniform Customs". In order to achieve this, the Commission, at its third session, requested the Secretary-General to invite Governments and interested bank 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 the Commission on Banking Technique and Practice of ICC entrusted with the revision.

34. At the present session, the Commission had before it a note by the Secretary-General, setting forth, in annex I, the observations of ICC in respect of its work and, in annex II, the text of the 1974 revision of "Uniform Customs and Practice for Documentary Credits" (A/CN.9/101). The Commission also had before it a report of the Secretary-General, setting forth an analysis of the observations received in respect of the 1962 version of "Uniform Customs and Practice

for Documentary Credits" and its revision by ICC (A/CN.9/101/Add.1).

35. There was general agreement among representatives that, while the Commission could not adopt the 1974 revision of "Uniform Customs", it should consider the desirability of commending the use of "Uniform Customs" in transactions involving the establishment of a documentary credit.

36. The observer of ICC, in commenting on the 1974 text of "Uniform Customs", expressed his appreciation for the valuable assistance which the Commission and its secretariat had given to ICC in the work of revision and commended the secretariat for the depth and accuracy of its analysis of the observations and comments submitted in respect of the 1962 text. That analysis indicated the changes that had been made in the 1962 text and listed the proposals that had been rejected. The observer of ICC stated that the rejection of certain proposals was due to a variety of reasons, but mainly because these proposals related to special cases and were therefore not a suitable basis on which to frame a general rule.

37. Representatives who spoke on the subject emphasized the importance of the rules contained in "Uniform Customs" in that they promoted international trade through the facilitation of payment. Several representatives commended ICC for the efficient manner in which it had promoted co-operation between ICC and those countries whose Chambers of Commerce were not members of ICC. As a result of that approach, the 1974 revision of "Uniform Customs" was a much more acceptable text than the 1962 version.

38. Some representatives, while expressing general agreement with the 1974 revision of "Uniform Customs", drew attention to the fact that "Uniform Customs" were not a set of legal rules. Because of this, they had doubts about the language used in paragraph (a) of the General Provisions and Definitions, according to which the provisions, definitions and articles of "Uniform Customs" were "binding upon all parties thereto unless otherwise expressly agreed" (A/CN.9/101, annex II). In the view of these representatives, that language was more suited to a statutory legal provision than to a rule expressive of usage or practices. The rules of "Uniform Customs" were in the nature of general conditions and were binding upon parties only if expressly accepted by them. These representatives hoped that ICC, in a future revision, would modify the formulation of the paragraph in question. The observer of ICC stated in reply that the rules contained in "Uniform Customs" were actually written into every documentary letter of credit and every application for a letter of credit; the forms used for letters of credit and for applications contained an express clause to the effect that the credit was subject to the provisions of "Uniform Customs". It was against that factual background that paragraph (a) of the General Provisions and Definitions had been formulated.

39. With regard to what action the Commission should take in respect of the 1974 revision of "Uniform Customs", most representatives expressed the opinion that, in view of the practical importance of "Uniform Customs" for international trade and of the successful collaboration between the Commission and ICC in

²⁰ The Commission considered this subject at its 155th meeting on 3 April 1975, and at its 171st meeting on 17 April 1975.

²¹ *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/7216)*, para. 48, subparas. 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, vol. II: 1971, part one, II, A); *ibid.*, *Twenty-seventh Session, Supplement No. 17 (A/8717)*, paras. 63-66 (UNCITRAL Yearbook, vol. III: 1972, part one, II, A); *ibid.*, *Twenty-eighth Session, Supplement No. 17 (A/9017)*, paras. 37-45 (UNCITRAL Yearbook, vol. IV: 1973, part one, II, A); and *ibid.*, *Twenty-ninth Session, Supplement No. 17 (A/9617)*, paras. 30-35 (UNCITRAL Yearbook, vol. V: 1974, para. one, II, A).

respect of the subject, the Commission should recommend the use of the revised rules. One representative expressed doubts whether the Commission was authorized to commend a document emanating from another source. It was noted that the Commission, at its second session, had commended the use of "Uniform Customs" and of "Incoterms".

40. The Commission, at its 155th meeting on 3 April 1975, established a drafting group, composed of the representatives of Australia, Brazil, Egypt, Hungary and Japan, under the chairmanship of the representative of Brazil, to prepare a draft decision in respect of the item entitled "Bankers' commercial credits".

Decision of the Commission

41. After consideration of the draft decision, the Commission, at its 171st meeting on 17 April 1975, adopted unanimously the following decision:

The United Nations Commission on International Trade Law,

Expressing its appreciation to the International Chamber of Commerce for having transmitted to it the revised text of "Uniform Customs and Practice for Documentary Credits", which was approved by the Commission on Banking Technique and Practice of the International Chamber of Commerce on 14 October 1974 and adopted by the Executive Committee of the International Chamber of Commerce on 3 December 1974,

Congratulating the International Chamber of Commerce on having made a further contribution to the facilitation of international trade by bringing up to date its rules on documentary credit practice to allow for developments in transport technology and changes in commercial practice,

Having regard to the fact that, in revising the 1962 text of "Uniform Customs", the International Chamber of Commerce has taken into account the observations made by Governments and banking and trade institutions of countries not represented within it and transmitted to it through the Commission,

Noting that "Uniform Customs" constitutes a valuable contribution to the facilitation of international trade,

Commends the use of the 1974 revision, as from 1 October 1975, in transactions involving the establishment of a documentary credit.

C. Bank guarantees²²

42. The Commission had before it a note by the Secretary-General setting forth the observations of ICC in respect of its work on contract guarantees and payment guarantees (A/CN.9/101).

43. The Commission was informed that ICC had encountered in its work on bank guarantees a number of fundamental problems, partly because it had attempted to prepare one set of rules applicable to several different types of guarantee. The observer of ICC stated that ICC was now carrying out a fundamental re-examination of the problem and of the working methods that should be used to carry the work to a

successful conclusion. In this connexion, he stated that ICC hoped that the Commission's participation in the work might be enhanced and that this might be achieved either by the Commission nominating a representative to attend the meetings of ICC on the subject or by the establishment of a study group, similar to the one on international payments, that would be consulted by ICC in connexion with its work on bank guarantees.

44. Representatives who spoke on the subject expressed their appreciation to ICC for wishing to strengthen its collaboration with the Commission in the field of bank guarantees. However, they were of the view that no one representative of the Commission would be able to attend the meetings of ICC and express the views of the Commission as a whole when the Commission had not yet decided what its views were.

45. Following consultations among representatives of the Commission, the Secretariat and the observer of ICC, the observer of ICC informed the Commission that ICC would not press for the participation of representatives of the Commission in the work of its Working Group, and that instead it would establish a study group on contract guarantees, in which representatives of the Commission who were interested in the question could participate in their personal capacity, together with representatives of the Commission's secretariat and of other international organizations. The Commission took note, with satisfaction, of the suggestions of the observer of ICC.

Decision of the Commission

46. The Commission, at its 156th meeting on 4 April 1975, adopted unanimously the following decision:

The United Nations Commission on International Trade Law,

1. Takes note of:

(a) The progress made by the International Chamber of Commerce in respect of the preparation of uniform rules on contract guarantees and payment guarantees;

(b) The suggestions made by the International Chamber of Commerce in respect of methods of work that would ensure a closer co-operation between it and the Commission in the field of bank guarantees;

(c) The intention of the International Chamber of Commerce to establish a study group on contract guarantees and to invite representatives of the Commission to participate in meetings of this study in a personal capacity;

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

D. Security interests in goods

47. At its third session, the Commission requested the Secretary-General to make a study of the rules on security interests in goods under the principal legal

²² The Commission considered this subject at its 155th and 156th meetings on 3 and 4 April 1975.

systems and to make the information available to the Commission.²³

48. At the present session, the Commission had before it a "Study on security interests", prepared by Professor Ulrich Drobnig of the Max Planck Institute for Foreign and Private International Law, Hamburg, the Federal Republic of Germany (ST/LEG/11), and a report of the Secretary-General, entitled "Security interests in goods" (A/CN.9/102). Section I of the Secretary-General's report summarizes the study, while section II sets forth the conclusions reached in respect of the possible unification or harmonization of the law of security interests in the context of international trade, and suggestions for future work on this subject.

49. The "Study on security interests", which is based on existing studies in this area and on the replies sent by 19 Governments in response to a request for information, contains a comparative study of the law on this subject in a number of countries.

50. The report of the Secretary-General suggests that, on the basis of the study, it could be concluded that an important need in international commerce would be filled if a security interest, which would be enforceable by the foreign creditor against the debtor and third parties in the country where the goods are situated, were made available, through uniform rules, to merchants and trade and financing institutions.

51. The report also suggests that the Commission might wish to consider the feasibility of preparing uniform rules at a later stage in the light of a further study that would bring into focus the kind and scope of such rules.

Consideration of the study and report of the Commission²⁴

52. The suggestion was made by several representatives that the "Study on security interests" (ST/LEG/11) should be completed by including the law of additional countries, in particular of the socialist States of Eastern Europe, in view of the fact that it contained erroneous information on security interests recognized by the laws of several countries, and in particular those of the socialist States of Eastern Europe.

53. The Commission was informed of the current programme of work of the European Economic Community in respect of security interests. The observer of the Commission of the European Communities stated that the Community was preparing three drafts: one draft convention concerned the unification of rules of conflict concerning rights *in rem*, in respect of movable goods; a second draft convention dealt with the recognition and enforcement of security interests and their effect in the event of bankruptcy or other liquidation proceedings resulting from the insolvency of a debtor; a third draft directive was designed to ensure the recognition of a security interest established in one member State of the Community when the encumbered goods were moved to another.

54. The Commission was also informed that the Law Association for Asia and the Western Pacific (LAWASIA), in collaboration with the Asian Development

Bank, was engaged in a programme of research on the types of security interests which national development banks and other financing institutions of the same kind might employ.

55. The Commission was in agreement that, in view of the possible practical importance of security interests in international trade, the subject deserved to be studied further. It was suggested that a further study should include a consideration of the practical economic significance of creating a security interest for international trade, as well as the form which any such security interest might take.

56. Some representatives stated that the study should concentrate on the rights of the unpaid seller. Other representatives were of the view that the rights of institutions financing the sale should also be considered. One representative suggested that the study should concentrate on security for medium-term credit. Still other representatives considered that, at this stage, no limitations should be put on the study to be conducted by the Secretariat on the principle that the Commission could not decide on the direction its work should take until the study had been completed.

57. Several representatives suggested that special attention should be given to the trust receipt. It was suggested that the Secretariat consult with the International Chamber of Commerce on the feasibility of preparing uniform rules governing trust receipts where banks are financing the transaction.

58. Some representatives suggested that the study should consider whether a new security interest for the financing of international trade should be limited to the financing of goods not intended for resale, since security interests in inventory raised difficult problems in respect of the rights of third party purchasers of goods encumbered by a security interest.

59. The observer of the International Institute for the Unification of Private Law (UNIDROIT) referred to the growing practice of leasing equipment and machinery where the user was able to specify exactly which type of equipment he wished the lessor to purchase. It was suggested that this form of contract served many of the same economic functions as a security interest.

60. One representative suggested that, if it were considered desirable that any security interest for the financing of international trade should have as one element a system of registration, the possibility of a world-wide computer-assisted registration system should be explored.

61. Another representative suggested that the relationship between the rights of the creditor under a security interest in specific goods and the rights of the State to seize those goods because of unpaid taxes should be explored.

62. Several representatives requested the Secretariat to make available in a document the introduction given by it orally to the Commission in respect of article 9 of the Uniform Commercial Code of the United States of America.

Decision of the Commission

63. The Commission, at its 158th meeting, on 7 April 1975, adopted unanimously the following decision:

²³ 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).

²⁴ The Commission considered this subject at its 157th and 158th meetings on 7 April 1975.

The United Nations Commission on International Trade Law,

Requests the Secretary-General:

(a) To complete the "Study on security interests" by including the law of additional countries, in particular of the socialist States of Eastern Europe;

(b) To continue the feasibility study on the possible scope and content of uniform rules on security interests in goods and, for this purpose, to consult with interested international organizations and trade and financing institutions;

(c) To submit a progress report to the Commission at its ninth session and a final report at its tenth session.

CHAPTER IV. INTERNATIONAL LEGISLATION
ON SHIPPING

A. Introduction

64. The Commission, at its fourth session, decided to examine the rules governing the responsibility of ocean carriers for cargo.²⁵ The Commission decided 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)²⁶ 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."

65. To carry out this programme of work, the Commission established an enlarged Working Group on International Legislation on Shipping consisting of 21 members of the Commission. The reports of the Working Group on its first six sessions have been previously reviewed by the Commission.²⁷ At the present session²⁸ the reports of the Working Group on the work of its seventh (A/CN.9/96) and eighth (A/CN.9/105) sessions were placed before the Commission, and introduced by the Chairman of the Working Group.

²⁵ 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 of international legislation on shipping, see *ibid.*, Twenty-fourth Session, Supplement No. 18 (A/7618), paras. 114-133 (UNCITRAL Yearbook, vol. I: 1968-1970, part two, II, A); *ibid.*, Twenty-fifth Session, Supplement No. 17 (A/8017), paras. 157-166 (UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A); *ibid.*, Twenty-seventh Session, Supplement No. 17 (A/8717), paras. 44-51 (UNCITRAL Yearbook, vol. III: 1972, part one, II, A); *ibid.*, Twenty-eighth Session, Supplement No. 17 (A/9017), paras. 46-61 (UNCITRAL Yearbook, vol. IV: 1973, part one, II, A); and *ibid.*, Twenty-ninth Session, Supplement No. 17 (A/9617), paras. 38-53 (UNCITRAL Yearbook, vol. V: 1974, part one, II, A).

²⁶ League of Nations, *Treaty Series*, vol. CXX (1931-1932), No. 2764.

²⁷ For references to the reports of the work of the Commission at these sessions, see foot-note 25 above.

²⁸ The Commission considered the subject at its 156th meeting on 4 April 1975.

B. Report on the seventh session of the Working Group

66. In his introduction of this report, the Chairman of the Working Group pointed out that the Working Group had considered the following subjects: contents and legal effect of documents evidencing the contract of carriage; validity and effect of letters of guarantee; and definition of contract of carriage and of consignee. The work of the Working Group at its seventh session is summarized in paragraphs 67 to 69 below.

(i) *Contents and legal effect of documents evidencing the contract of carriage*

67. The Working Group considered the advisability of formulating a definition of the term "bill of lading", and decided that such a definition would serve a useful purpose (A/CN.9/96, paras. 17-19 and 61). The Working Group also considered the required contents of a bill of lading, and decided that the bill of lading should set out certain items of information additional to those required to be set out by the Brussels Convention of 1924 (A/CN.9/96, paras. 21-36 and 61). With respect to documents evidencing contracts of carriage other than bills of lading, the Working Group decided that when a carrier issues a document other than a bill of lading, such a document should be *prima facie* evidence of the taking over by the carrier of the goods as therein described (A/CN.9/96, paras. 56-59 and 61). In regard to particulars supplied by the shipper concerning the description of the goods, the Working Group decided that, where the carrier had reasonable grounds for suspecting that they did not accurately represent the goods taken over, or where he had no reasonable means of checking their accuracy, he should be bound to make special note on the bill of lading of such grounds or inaccuracies, or of the absence of reasonable means of checking (A/CN.9/96, paras. 39-42 and 61). In regard to the evidentiary effect of particulars stated by the carrier in the bill of lading, the Working Group decided that, except for particulars in regard to which the carrier had entered a reservation, the bill of lading should be *prima facie* evidence of the taking over by the carrier of the goods described in the bill of lading, and that proof to the contrary should not be admissible when the bill of lading had been transferred to a third party who in good faith had acted in reliance on the description of the goods therein (A/CN.9/96, paras. 46-49 and 61). The Working Group adopted texts giving effect to these decisions (A/CN.9/96, para. 61).

(ii) *Validity and effect of letters of guarantee*

68. The Working Group considered difficulties which might arise where a letter of guarantee was given to the carrier by a shipper undertaking to indemnify the carrier for the liability the carrier might incur towards a third party as a result of inaccurate information in the bill of lading regarding matters such as the weight, quantity and condition of the goods. The Working Group decided that such a letter of guarantee or agreement should be void as against any third party to whom the bill of lading had been transferred (A/CN.9/96, para. 61). It also decided that it should be void as against the shipper where the carrier, by omitting a reservation relating to the condition of the goods, intended to defraud a third party who acted in

reliance on the description of the goods in the bill of lading (A/CN.9/96, paras. 75-84 and 86). The Working Group adopted texts giving effect to these decisions (A/CN.9/96, para. 86).

(iii) *Definition of contract of carriage and of consignee*

69. The Working Group considered it desirable that definitions of these terms should be formulated, and adopted texts containing such definitions (A/CN.9/96, paras. 97-103 and 105).

C. *Report on the eighth session of the Working Group*

70. In his introduction of this report, the Chairman of the Working Group stated that the Working Group had at its eighth session completed two assignments. Firstly, it had considered and adopted texts on the topics not considered at previous sessions of the Working Group; and secondly, it had completed the second reading of the preliminary version of a draft convention on the liability of carriers of goods by sea, which consisted of the draft provisions approved by it at its third to the seventh sessions. The work of the Working Group at its eighth session is summarized in paragraphs 71 to 73 below.

71. The topics considered by the Working Group for the first time were: the basic rule on the exoneration of the shipper from liability;²⁹ dangerous goods;³⁰ notice of loss, damage or delay;³¹ relationship of the draft convention with other conventions;³² and general average.³³ The Working Group adopted texts on all these topics.

72. The Working Group completed the second reading of the preliminary version of a draft convention on the liability of carriers of goods by sea, and adopted a text entitled "Draft Convention on the Carriage of Goods by Sea" (A/CN.9/105, sect. B, para. 2). The text adopted by the Working Group is set forth as an annex to its report (A/CN.9/105). The Working Group did not consider draft provisions concerning implementation, declarations and reservations or final clauses for the draft Convention. It requested the Secretariat to prepare draft articles dealing with these topics for consideration by the Commission at its ninth session (A/CN.9/105, sect. B, parts VIII, IX and X). The Working Group noted that, in accordance with a decision taken by the Commission at its seventh session,³⁴ the text of the draft Convention on the Carriage of Goods by Sea should be transmitted to Governments and interested international organizations for comment and that the Secretary-General was requested to prepare an analysis of such comments for consideration by the Commission at its ninth session.

²⁹ A/CN.9/105, sect. A, 1. For the text adopted on this topic by the Working Group, see the Draft Convention on the Carriage of Goods by Sea (A/CN.9/105, annex), art. 12.

³⁰ *Ibid.*, sect. A, 2. For the text adopted on this topic, see *ibid.*, annex, art. 13.

³¹ *Ibid.*, sect. A, 3. For the text adopted on this topic, see *ibid.*, annex, art. 19.

³² *Ibid.*, sect. A, 4. For the text adopted on this topic, see *ibid.*, annex, art. 25.

³³ *Ibid.*, sect. A, 5. For the text adopted on this topic, see *ibid.*, annex, art. 24.

³⁴ *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 17 (A/9617)*, para. 53 (UNCITRAL Yearbook, vol. V: 1974, part one, II, A).

73. In conclusion, the Chairman of the Working Group expressed his appreciation of the spirit of co-operation which had prevailed within the Working Group, and which had enabled it to complete its task successfully.

D. *Discussion of the reports of the Working Group*

74. All representatives congratulated the Working Group on the successful completion of the task assigned to it. They also congratulated the Chairman of the Working Group, Professor Mohsen Chafik (Egypt), and the Chairman of the Drafting Party, Professor E. Chr. Selvig (Norway), for the outstanding contributions they had made to the work.

75. There was also agreement that the draft Convention should be considered by the Commission at its ninth session, in the light of the comments received from Governments and interested international organizations. In this connexion, the hope was expressed that, in view of the economic importance of the proposed Convention, many Governments would submit comments.

76. In regard to the future status of the Working Group, the Commission was agreed that the Working Group should, for the time being, be kept in existence, since it might be necessary to refer certain matters to it after the Commission had considered the draft Convention, but that, for the present, no new mandate should be given to the Working Group. The Commission was also agreed that it would revert to its programme of work in the field of international legislation on shipping after it had completed its work on the draft Convention on the Carriage of Goods by Sea.

Decision of the Commission

77. The Commission, at its 156th meeting, on 4 April 1975, adopted unanimously the following decision:

The United Nations Commission on International Trade Law

1. *Takes note with appreciation* of the reports of the Working Group on International Legislation on Shipping on the work of its seventh and eighth sessions;

2. *Congratulates* the Working Group on the expeditious and successful completion of the task entrusted to it;

3. *Decides* to consider the draft Convention on the Carriage of Goods by Sea at its ninth session.

CHAPTER V. INTERNATIONAL COMMERCIAL ARBITRATION

78. The Commission, at its sixth session, requested the Secretary-General:

"In consultation with regional economic commissions of the United Nations and centres of international commercial arbitration, giving due consideration to the Arbitration Rules of the United Nations Economic Commission for Europe and the ECAFE Rules for International Commercial Arbitration, to prepare a draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade."³⁵

³⁵ *Ibid.*, *Twenty-eighth Session, Supplement No. 17 (A/9017)*, para. 85 (UNCITRAL Yearbook, vol. IV: 1973, part one, II, A).

79. The Commission had before it the report of the Secretary-General setting forth a preliminary draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade (UNCITRAL Arbitration Rules) (A/CN.9/97). The Commission noted that, in accordance with its decision, the preliminary draft⁸⁶ had been given widespread circulation, and had been transmitted for comments to the regional commissions of the United Nations and to some 70 centres of international commercial arbitration. The Commission was informed that the preliminary draft rules had been considered at the Fifth Conference of the Inter-American Commercial Arbitration Commission, held at Bogotá, from 4 to 6 December 1974, and at the Fifth International Arbitration Congress, held at New Delhi, from 7 to 10 January 1975.

80. The Commission had also before it observations submitted by the Government of Norway and by interested national and international organizations and institutions (A/CN.9/97/Add.1, 3 and 4) and a document setting forth suggested modifications to the draft rules resulting from the discussions by the Fifth International Arbitration Congress (A/CN.9/97/Add.2).

81. The Commission was agreed that, in considering the preliminary draft arbitration rules, it would concentrate on the basic concepts underlying the draft and on the major issues dealt with in the individual articles thereof. The Commission was further agreed that, at the present session, it should not reach final conclusions on matters of substance, and that the main purpose of its deliberations was to have a general debate on the preliminary draft as a whole.

82. A summary of the Commission's deliberations⁸⁷ is set forth in annex I below.

Decision of the Commission

83. The Commission, at its 171st meeting on 17 April 1975, adopted unanimously the following decision:

The United Nations Commission on International Trade Law,

Having considered the report of the Secretary-General setting forth a preliminary draft set of arbitration rules for optional use in ad hoc arbitration relating to international trade,

Requests the Secretary-General:

- (a) To prepare a revised draft of these Rules, taking into account the observations made on the preliminary draft in the course of its eighth session;
- (b) To submit the revised draft Arbitration Rules to the Commission at its ninth session.

CHAPTER VI. MULTINATIONAL ENTERPRISES

84. 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".

85. In response to a decision taken by the Commission at its sixth session,⁸⁸ a questionnaire concerning legal problems presented by multinational enterprises was sent to Governments and international organizations.

86. At its seventh session, the Commission had before it a note by the Secretary-General (A/CN.9/90), which set forth the text of the questionnaire and information in respect of the replies received at that time from Governments, United Nations organs and agencies, and international and national organizations.

87. At its current session, the Commission had before it a report of the Secretary-General (A/CN.9/104) setting forth (a) a description of the studies and activities within the United Nations system in respect of multinational enterprises, especially as those studies and activities concerned legal problems; (b) an analysis of legal problems presented by multinational enterprises based on an analysis of replies to the questionnaire received from Governments and interested organizations and on an analysis of studies within the United Nations system; (c) a description of existing national legislation affecting multinational enterprises and (d) conclusions and suggestions for future work. The report also sets forth in an annex a note on investment laws.

Consideration of the report by the Commission⁸⁹

88. The Commission noted that, in December 1974, the Economic and Social Council had created the Commission on Transnational Corporations, which was to be assisted by an Information and Research Centre on Transnational Corporations. It was also noted that the Commission on Transnational Corpo-

⁸⁶ The initial version was prepared by the Secretariat in consultation with Prof. Pieter Sanders of the University of Rotterdam, the Netherlands, who serves as a consultant to the Secretariat on the subject. At the invitation of the Secretariat, the International Committee on Commercial Arbitration of the International Arbitration Congress, a body composed of representatives of centres of international commercial arbitration and of experts in this field, appointed a Consultative Group composed as follows: (a) Dr. Carlos A. Dunshee de Abranches, Director-General of the Inter-American Commercial Arbitration Commission; (b) Professor Tokusuke Kitagawa, Tokyo Metropolitan University; (c) Mr. Donald B. Straus, President of the Research Institute of the American Arbitration Association; (d) Professor Heinz Strohbach, President of the Court of Arbitration attached to the Chamber of Foreign Trade of the German Democratic Republic. This consultative group submitted comments on two earlier versions of the draft arbitration rules.

⁸⁷ The Commission considered the subject at its 159th and 160th meetings held on 8 April 1975, its 161st and 162nd meetings, held on 9 April 1975, its 163rd and 164th meetings, held on 10 April 1975, its 165th and 166th meetings, held on 11 April 1975, its 167th meeting, held on 14 April 1975, and its 171st meeting, held on 17 April 1975.

⁸⁸ *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, para. 116).

⁸⁹ The Commission considered this subject at its 170th meeting, on 15 April 1975, and its 171st meeting on 17 April 1975.

rations would submit to the Economic and Social Council, in 1976, a detailed draft programme of work on the full range of issues relating to transnational corporations. The Commission further noted that the Commission on Transnational Corporations, at its first session, held in New York from 17 to 28 March 1975, had considered a draft programme of work which included several items with significant legal aspects.

89. There was general agreement that the legal issues in respect of multinational enterprises were closely intertwined with those of an economic, social and political nature and that, at the present time, no specific legal issues susceptible of action by UNCITRAL had been identified. Some representatives pointed out that matters clothed in a legal form always have an economic and social character, and are oriented towards an end constituting legislative policy. The Commission discussed the means it should take to identify such issues.

90. Several representatives were of the view that UNCITRAL should itself engage in a programme of studies intended to identify legal issues on which it might take action. Among the subjects suggested for study by the Commission were (a) the legal provisions in company laws, investment laws and the like that are designed to elicit information about the activities of multinational enterprises and (b) the feasibility of developing an information system, including standardized accounting procedures and statistical systems for specific data reporting.

91. Other representatives, however, were of the opinion that UNCITRAL should follow closely the work of the newly created Commission on Transnational Corporations and the studies to be carried out by the Information and Research Centre on Transnational Corporations, and that it should defer a decision on its own programme of work in this field until the Commission on Transnational Corporations had identified specific legal issues that would be susceptible of action by UNCITRAL.

92. The Commission, after deliberation, was agreed that it should follow the latter course of action and that, through its Chairman, it should inform the Commission on Transnational Corporations of its decision and of its readiness to consider favourably any request which the Commission on Transnational Corporations might wish to address to it. At the same time, the Commission on Transnational Corporations should be informed of the views expressed by many representatives that work could usefully be carried out by UNCITRAL on the development of model rules which States could embody in their national legislation with a view to exercising a greater degree of control over the activities of multinational enterprises and on the development of an information system, including standardized accounting procedures and statistical systems for specific data reporting.

93. The Commission requested the Secretariat to keep it informed about the programme of work of the Commission on Transnational Corporations.

Decision of the Commission

94. The Commission, at its 170th meeting, on 15 April 1975, adopted unanimously the following decision:

The United Nations Commission on International Trade Law

1. *Takes note* of the establishment by the Economic and Social Council of the Commission on Transnational Corporations and of the Information and Research Centre on Transnational Corporations;

2. *Decides*:

(a) To maintain on its agenda the item concerning multinational enterprises;

(b) To inform, through its Chairman, the Commission on Transnational Corporations that the United Nations Commission on International Trade Law had not taken a definitive decision concerning its programme of work in the field, but would continue to keep the subject under review, pending the identification by the Commission on Transnational Corporations of specific legal issues that would be susceptible to action by the United Nations Commission on International Trade Law, and that it will favourably consider any request which the Commission on Transnational Corporations may wish to address to the United Nations Commission on International Trade Law.

3. *Requests* the Secretary-General to submit at future sessions reports concerning the programme of work carried out by the Commission on Transnational Corporations and the Information and Research Centre on Transnational Corporations.

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

95. 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."

96. At its seventh session the Commission had before it a note by the Secretary-General (A/CN.9/93) setting forth background information relating to this paragraph of the resolution, and suggesting possible action by the Commission in response thereto. At that session, the Commission adopted 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."⁴⁰

97. At the present session the Commission had before it a report of the Secretary-General on "Liability for damage caused by products intended for or involved in international trade" (A/CN.9/103), prepared in response to the request made to the Secretary-General by the Commission. The report contains a survey of the work of other organizations in respect of civil liability for damage caused by products, a study of the main problems that may arise in this area and the solutions that are being contemplated therefor by international organizations and suggestions with respect to the Commission's future course of action.

*Consideration of the report by the Commission*⁴¹

98. The discussion of the report by the Commission revealed a large measure of agreement on several matters. There was general agreement that, for certain reasons, the feasibility of formulating unified rules on liability deserved serious consideration. Many of the products manufactured today had the potential for causing serious injury to person or damage to property. Apart from giving rise to legal problems, the consequences of such injury or damage had both a social and an economic impact. One aspect of this was the feeling that the law should give adequate protection to the consumer of products. Another aspect was the need to consider the availability and cost to producer and consumer of liability insurance. Many representatives also believed that divergencies in the rules relating to liability might lead to distortion of the terms of trade. It was further noted that uniform rules would enable the producer to know in advance the extent of his liability. It was observed that the proposed uniform rules should not deal with damage to the product itself; this question should be dealt with in the uniform law on the international sale of goods.

99. It was generally acknowledged that the preparation of uniform rules on products liability posed serious problems. At a technical level, it would be necessary to evolve a set of legal rules which would be acceptable within the framework of different legal systems. It would also be necessary to formulate a criterion which would identify the international trade transactions to which the proposed uniform rules were to apply. Further, in order to define the scope of the rules, agreement would have to be reached on certain extra-legal considerations which would determine the legal solutions adopted for the problems involved.

100. In view of the difficulties mentioned above, some representatives expressed the view that the Commission should not undertake work in this field until the projects on which the Commission was presently engaged had been completed. They pointed out that certain other international organizations had com-

menced or completed work in this field, and that it might be desirable to observe the results of their work before the Commission itself undertook any project. They also noted that in many States the national law in this field was at present somewhat uncertain, and that it might therefore be more expedient to postpone work until the law was more settled. It was further suggested that an increase in the extent of products liability in a time of economic inflation might lead to an increase in the prices of goods.

101. Most representatives, however, were of the view that further preparatory work designed to enable the Commission to take a final decision on its future course of action should be undertaken. It was observed that the work presently being carried out by other organizations was at a regional level, and that an examination of the subject in a wider context was therefore desirable. It was thought that the fact that national law was at present relatively undeveloped might facilitate rather than hinder efforts at unification. It was also pointed out that an increase in the extent of liability for products need not necessarily lead to an increase in the prices of goods.

102. There was general agreement that, for the time being, further work should be carried forward through the Secretariat, and that it was premature to establish a working group. It was also felt that, while the work should not be unduly delayed, it should proceed at a pace which would permit a full investigation of the many problems involved, and would allow consultations with regional bodies and interested commercial organizations. The Commission was of the view that the Secretariat should also consider the advisability of circulating, at an appropriate time, a questionnaire designed to elicit information on relevant legal rules and case law, and also on governmental attitudes to the issues involved.

Decision of the Commission

103. The Commission, at its 153rd meeting, on 5 April 1975, 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,

Having considered the report of the Secretary-General entitled "Liability for damage caused by products intended for or involved in international trade",⁴²

1. *Decides to continue work in respect of this subject and, to this end,*

2. *Requests the Secretary-General to prepare a further report for consideration by the Commission, if possible at its tenth session, that would examine, inter alia, the following issues:*

(a) *The extent to which the absence of unified rules on products liability affects international trade;*

(b) *The practicability and advantages of unification at a global level, as opposed to unification at a regional level;*

⁴⁰ *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 17 (A/9617), para. 81 (UNCITRAL Yearbook, vol. V: 1974, part one, II, A).*

⁴¹ The subject was considered by the Commission at its 152nd and 153rd meetings, held on 4 and 5 April 1975.

⁴² A/CN.9/103.

(c) The relationship between this subject and schemes of insurance which have been or may be developed in relation thereto;

(d) The extent to which and the manner in which liability may be limited, and the possible effects of different techniques of limitation;

(e) The types of product in regard to which liability should be imposed;

(f) The classes of persons on whom liability may be imposed and the classes of persons in whose favour liability may be imposed, with particular reference to the protection of consumers;

(g) The kinds of damage for which compensation may be recoverable;

(h) The kinds of transaction falling within the scope of the proposed uniform rules;

(i) The relationship between any proposed uniform rules and standards of safety in relation to products which are mandatorily imposed in many States by national law.

CHAPTER VIII. TRAINING AND ASSISTANCE IN THE FIELD OF INTERNATIONAL TRADE LAW

104. The Commission had before it a note by the Secretary-General (A/CN.9/107), which sets forth the action taken by the Secretariat to implement the Commission's decision⁴³ on training and assistance in the field of international trade law taken at its sixth session.

Consideration of the subject by the Commission⁴⁴

105. The Commission noted with satisfaction that, in 1974, a commercial bank in Austria had awarded two fellowships enabling the recipients to spend six months in the bank's legal office as interns. Similarly, the Government of Belgium had awarded two fellowships for academic and practical training at the University of Louvain. The Government of Belgium had renewed its offer of fellowships for 1975.

International Trade Law Symposium

106. On the occasion of the Commission's eighth session, pursuant to the decision taken at its sixth session,⁴⁵ the Commission sponsored a symposium on the role of universities and research centres with respect to international trade law. The Commission noted with appreciation that funds for fellowships to cover the travel costs of participants from developing countries had been contributed by the Governments of Austria, the Federal Republic of Germany, Norway and Sweden. The symposium was held without cost to the United Nations.

107. Fellowships were awarded to participants from 14 countries. In addition, 13 professors from nine countries participated in the symposium.

108. The Commission considered whether future symposia should be held and, if so, whether they should be held every two years. It was pointed out that, if a symposium were held every two years in connexion with the session of the Commission, it would always be held at Geneva and that it might be advisable to

hold the symposium on occasion in New York. However, there was general agreement that another symposium should be scheduled on the occasion of the Commission's tenth session and that, at that time, the Commission would decide about a further symposium.

109. The Commission was informed that the Secretariat had accepted contributions only from Governments to cover the cost of the symposium because of the wording of the Commission's decision at its sixth session. The decision stated that the Secretary-General was requested "to seek voluntary contributions from Governments, international organizations and foundations to cover the cost of travel and subsistence of participants from developing countries."⁴⁶ The Commission was generally agreed that the Secretariat could solicit funds from private sources for the next symposium on the understanding that the receipt of such contributions could place no restrictions on the organization of the symposium.

110. There was general agreement on the suggestion made by several representatives that the Secretariat should consult with UNITAR on the possibility that UNCITRAL and UNITAR might each organize symposia on international trade law in alternate years, those organized by UNITAR to be held in developing countries.

111. Some representatives expressed the view that, as was the case in the International Law Commission Seminar, participants in a symposium organized in connexion with a session of the Commission should have a greater opportunity of observing the deliberations of the Commission. One of these representatives also expressed the wish that the participants should be encouraged to write reports or research papers with the assistance of the Secretariat or representatives on the subjects under consideration by the Commission.

112. Eight members of delegations to the eighth session of the Commission gave lectures to the participants. Professor Mary Hiscock (Australia) and Professor Mohsen Chafik (Egypt) spoke on the teaching of international trade law. Lectures on the programme of work of the Commission were given by Mr. Stein Rognlien (Norway) on the international sale of goods, Professor Sergei Lebedev (USSR) on the carriage of goods by sea, Professor Eric Schinnerer (Austria) on commercial letters of credit and contract guarantees, Professor Anthony Guest (United Kingdom) on negotiable instruments, Professor Kazuaki Sono (Japan) on limitation (prescription) in the international sale of goods and Professor Jerzy Jakubowski (Poland) on international commercial arbitration.

Decision of the Commission

113. The Commission at its 169th meeting, on 15 April 1975, adopted unanimously the following decision:

The United Nations Commission on International Trade Law

1. Expresses its appreciation to those Governments which have made available fellowships in their countries for the purpose of giving practical training to nationals from developing countries, and

⁴³ Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 17 (A/9017), para. 107 (UNCITRAL Yearbook, vol. IV: 1973, part one, II, A).

⁴⁴ The Commission considered this subject at its 169th meeting on 15 April 1975.

⁴⁵ Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 17 (A/9017), para. 107 (UNCITRAL Yearbook, vol. IV: 1973, part one, II, A).

to those Governments which have made voluntary contributions to cover the costs of transportation and subsistence for participants in the symposium on the role of universities and research centres with respect to international trade law organized in connexion with its eighth session;

2. *Requests the Secretary-General:*

(a) To organize, in connexion with its tenth session, an international symposium on international trade law, and to seek voluntary contributions from Governments, international organizations, foundations and private sources to cover the cost of travel and subsistence of participants from developing countries;

(b) To explore the possibility of having the United Nations Institute for Training and Research organize seminars in developing countries on international trade law;

(c) To submit to the Commission, at its ninth session, a report setting forth suggestions regarding possible themes for the second symposium on international trade law.

CHAPTER IX. FUTURE WORK⁴⁶

A. *Membership of the Working Group on the International Sale of Goods*

114. The Commission, at its seventh session, appointed Czechoslovakia to replace Iran as a member of the Working Group on the International Sale of Goods. With regard to the nomination of Czechoslovakia in the place of Iran, it was understood that this 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, reoccupy the seat vacated by Iran. It was also understood that Czechoslovakia was nominated for the duration of the Working Group's consideration of a uniform law on the international sale of goods and that the composition of the Working Group would be reconsidered when new tasks were undertaken by it.⁴⁷

115. It was stated on behalf of the group of Asian States that the group wished to reoccupy the seat vacated by Iran and that it suggested that the Philippines should be appointed a member of the Working Group on the International Sale of Goods as from the commencement of the seventh session of the Working Group, and that, at the end of the session, the original regional composition of the Working Group should be restored. The Commission decided accordingly.

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

116. The Commission decided that its ninth session and the sessions of its Working Groups should be scheduled as follows:

(a) The ninth session of the Commission would be held at New York from 26 April to 21 May 1976, during which a Committee of the Whole would be

established. The Commission itself would meet from 26 April to 19 May 1976 and consider the draft Convention on the Carriage of Goods by Sea, prepared by the Working Group on International Legislation on Shipping, in the light of comments submitted by Governments and interested international organizations, as well as other matters on the Commission's agenda with the exception of international commercial arbitration. The Committee of the Whole would meet during the first two weeks of the ninth session, from 26 April to 7 May 1976, to consider the revised set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade;

(b) The seventh session of the Working Group on the International Sale of Goods would be held at Geneva from 5 to 16 January 1976;

(c) The fourth session of the Working Group on International Negotiable Instruments would be held in New York from 2 to 13 February 1976.

CHAPTER X. OTHER BUSINESS⁴⁸

A. *General Assembly resolution 3316 (XXIX), of 14 December 1974, on the report of the United Nations Commission on International Trade Law on the work of its seventh session**

117. The Commission took note of this resolution.

B. *General Assembly resolution 3317 (XXIX) of 14 December 1974, on the report of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods***

118. The Commission also took note of this resolution.

C. *Report of the Secretary-General on current activities of other international organizations*

119. The Commission took note of this report (A/CN.9/106).

120. The observer of the International Institute for the Unification of Private Law (UNIDROIT) referred to the terms of reference of the Commission laid down by the General Assembly in resolution 2205 (XXI), establishing the Commission. Under these terms of reference, the Commission "shall further the progressive harmonization and unification of the law of international trade by: (a) Co-ordinating the work of organizations active in this field and encouraging co-operation among them . . .". The observer of UNIDROIT suggested that, for purposes of co-ordination, the legal texts prepared by other organizations should be considered by the Commission for possible submission to a conference of plenipotentiaries. In this connexion, he referred to the work of the Commission on uniform rules governing the international sale of goods and the formation and validity of contracts of international sale of goods in respect of which UNIDROIT had prepared draft texts. He proposed that the Commission should develop a procedure which would permit it to select draft texts on matters of international trade law that could appropriately be considered by the Commission.

⁴⁶ The Commission considered this subject at its 172nd meeting, on 17 April 1975.

⁴⁷ Official Records of the General Assembly; Twenty-ninth Session, Supplement No. 17 (A/9617), para. 84 (UNCITRAL Yearbook, vol. V: 1974, part one, II, A).

⁴⁸ The Commission considered this subject at its 172nd meeting on 17 April 1975.

* Reproduced in this volume, part one, C.

** Reproduced in this volume, part three, B.

121. At the request of several representatives, the observer of UNIDROIT stated that his organization would submit to the Commission at a future session a note setting forth concrete suggestions with respect to collaboration.

D. Legal interest rate for bills of exchange, promissory notes and cheques

122. The Commission considered a note by the Austrian delegation on the legal interest rate for bills of exchange, promissory notes and cheques. The representative of Austria informed the Commission that the present economic and financial situation had led the Austrian authorities to reconsider the legal interest rate to be imposed by the courts. This rate was, at present, 4 per cent in civil cases, 5 per cent in commercial cases and 6 per cent for bills of exchange and promissory notes and for cheques. This latter rate was based on articles 48 and 49 of the Uniform Law on Bills of Exchange and Promissory Notes and on articles 45 and 46 of the Uniform Law on Cheques, which constitute, respectively, annex 1 of the Convention providing a Uniform Law for Bills of Exchange and Promissory Notes, done at Geneva, 7 June 1930,⁴⁹ and annex 1 of the Convention providing a Uniform Law for Cheques, done at Geneva, 19 March 1931.⁵⁰ The change envisaged in the legal interest rate should, if it were to be effective, be accompanied by a modification of the rate of exchange provided for in national laws promulgated at the time to meet the requirements of the two Conventions. The Geneva Conventions contained, in their annexes II, lists of reservations, some of which might be declared at any time, whereas others could be formulated, at the latest, at the time the instrument of ratification or accession was deposited. This latter procedure was laid down for reservations to article 13 of the Uniform Law on Bills of Exchange and Promissory Notes and to article 23 of the Uniform Law on Cheques. Accordingly, States which failed to enter these two reservations at the time they deposited their instrument of ratification or accession were no longer allowed to do so, and this was Austria's position in respect of article 13 of annex II to the Convention on the Uniform Law on Bills of Exchange and Promissory Notes. If, in these circumstances, a State considered it necessary to change the interest rate, it would have to denounce the Convention in question; it could accede to it once again at a later date by entering the reservation. Owing to the inadequacy of legal interest rates at the present time, some courts tended to grant additional amounts by way of damages for belated payment. Obviously a solution of this kind in no way corresponded to the intention of the national or international legislator when he fixed a certain interest rate.

123. The representative of Austria stated that he wished to know whether other States that were Contracting Parties to the Geneva Conventions of 1930 and 1931 had experienced difficulties similar to those encountered by this country. If so, the possibility might be considered of amending the relevant articles of the two Uniform Laws, or of concluding one or two protocols enabling States which had not entered reserva-

tions at the time they deposited their instrument of ratification or accession to do so at any subsequent date.

124. There was general agreement that the Commission itself should not undertake any initiative in this respect and that the Governments concerned should either concert with a view to reaching agreement on procedures that would lead to the result intended by these Governments, or inform the Secretary-General as depository of the instruments of ratification or accession.

ANNEX I

Preliminary draft set of Arbitration Rules for optional use in *ad hoc* arbitration relating to international trade:

Summary of discussion by the United Nations Commission on International Trade Law

A. DISCUSSION OF THE PRELIMINARY DRAFT ARBITRATION RULES^a CONSIDERED AS A WHOLE

1. During the discussion, the issues set forth below received special attention.

Scope of the Rules

2. Article 1, paragraph 1, of the Rules states that disputes between parties may be settled according to the Rules "where parties have concluded an agreement in writing that a dispute existing between them, or disputes that may arise out of a contract concluded by them, shall be referred to arbitration under the UNCITRAL Rules . . .". The commentary to paragraph 1 notes that, while the purpose of the UNCITRAL Rules is to facilitate arbitration in international trade, the Rules do not include a provision limiting their scope of application to international trade.

3. A suggestion was made that, since the priority subject adopted for consideration by the Commission had been defined as international commercial arbitration, the scope of the rules should be limited to cover only arbitration of disputes arising out of international trade transactions. On the other hand, it was observed that the imposition of such a limitation would give rise to the need to define the term "international trade transaction", which would be a difficult task. It was also observed that, since the rules were not of a mandatory character and could be modified by the parties, the imposition of such a limitation would have no legal effect and could not prevent parties from using them in arbitrations of a purely domestic character if they so desired. It was also noted that the fact that the Rules might be made applicable by the parties to arbitrations of a purely domestic character did not create any difficulty, and that, on the contrary, there might be an advantage to giving such scope to the Rules.

Municipal law

4. It was observed that certain issues arising in an international commercial arbitration would always be resolved by the provisions of the municipal law applicable to those issues. Neither the parties nor the arbitrators could act in contravention of such provisions except to the extent permitted by the law itself. It would therefore follow that, where parties adopted the UNCITRAL Rules, any provisions of the Rules would be of no effect to the extent to which it conflicted with the provisions of the applicable municipal law. In this context, it was observed that the Rules did not draw the attention of parties and arbitrators to this overriding effect of the applicable municipal law, and that the absence of a statement of this fact might mislead businessmen into thinking that the provisions of the Rules were definitive and not subject to review by judicial tribunals. It was suggested that attention might be drawn to the overriding effect of the applicable municipal law whenever

⁴⁹ League of Nations, *Treaty Series*, vol. CXLIII, No. 3313, p. 259.

⁵⁰ *Ibid.*, No. 3316, p. 357.

^a Herein referred to as UNCITRAL Rules.

it was appropriate in relation to any article in the Rules. Statements formulated to achieve this result might be incorporated either in the article in question, or in the commentary thereto.

Autonomy of the parties

5. It was observed that the autonomy of the parties to regulate the arbitration to the extent permitted by the applicable municipal law was a basic principle of arbitration. This principle was incorporated in article 1, paragraph 1, of the UNCITRAL Rules, which states that, where parties referred disputes to arbitration under the Rules, such disputes are to be settled according to the Rules "subject to any modifications that may be agreed upon by the parties". It was suggested, however, that in some respects the Rules did not sufficiently give effect to this principle. Thus, certain articles were drafted in a form which might lead businessmen to suppose that they were incapable of modification. Further, the manner in which a modification might be made under article 1, paragraph 1, was not clearly specified in the Rules. Again, the provisions of several articles specified that decisions in regard to the regulation of the arbitration proceedings were to be taken by the arbitrators, and not by the parties. Reference to those provisions will be made in the account set forth below in section B of the present annex of the discussion by the Commission of the individual articles. It was stated that the extent to which the Rules should give greater emphasis to the principle of party autonomy should be considered when the Rules were being redrafted.

"Administered" arbitration

6. The scope of the Rules in their present form includes two categories of arbitration, which are referred to in article 2 of the Rules as "administered" and "non-administered" arbitration. Article 2, paragraph 1, and the commentary thereto describe "administered arbitration" as arbitration which takes place where the parties have at any time selected an arbitral institution to administer the arbitration under the UNCITRAL Rules. The term "non-administered arbitration" refers to arbitration which takes place where the parties have agreed to arbitration under the UNCITRAL Rules without selecting an arbitral institution to administer the arbitration.

7. Differing views were expressed as to the desirability of including "administered arbitration" within the scope of the Rules. On the one hand, it was suggested that there were good reasons for excluding such arbitration from the scope of the Rules. Most arbitral institutions possessed their own set of arbitral rules, and might be unwilling to apply rules other than their own. Before including "administered arbitration" within the scope of the Rules, investigation was necessary as to the extent to which arbitral institutions were willing to apply the UNCITRAL Rules. It was observed that arbitral institutions wished to maintain an appreciable degree of control over arbitrations conducted under their auspices, and that the UNCITRAL Rules did not give arbitral institutions the requisite degree of control. It was further noted that *ad hoc* arbitration as commonly understood did not involve the participation of an arbitral institution as an administering authority, and that therefore in this regard the Rules might not accord with the mandate given by the Commission at its sixth session. On the other hand, it was observed that "administered arbitration" as envisaged in the Rules was an innovation in arbitral procedure which may prove to be acceptable. Under the Rules the function of the arbitral institution in the case of "administered arbitration" related to the appointment of arbitrators, including initial appointment, challenges and substitution, and to the fixing and collection of arbitrators' fees, which were matters closely related to appointment. Therefore such "administered arbitration" could not be classified as "institutional arbitration", as opposed to *ad hoc* arbitration. Since the Rules were of an optional character, parties should have the freedom to choose in advance a specific individual or institution to exercise these appointing authority functions. Even where parties chose "administered arbitration", the individual or insti-

tution selected was free to agree to act, or decline to act, in accordance with the UNCITRAL Rules. It was felt that it might be desirable to give parties the option of choosing one or the other form of arbitration.

8. After a full discussion on the subject, the prevailing view among representatives was to exclude, for the time being, "administered arbitration" from the scope of the Rules, but to permit the parties to designate in advance a person or an institution to carry out the functions of an appointing authority as specified in the Rules.

Time-limits

9. It was observed that the provisions of several articles contained time-limits within which action relating to the arbitration had to be taken by the parties, or by the arbitrators. Under the Rules such time-limits were capable of modification. Thus, under article 12, paragraph 1, the time-limits set forth in section II of the Rules for the appointment of arbitrators could at any time be extended by agreement of the parties. Under article 20, paragraph 2, the parties could agree to extend the time-limits laid down in section III of the Rules. In the absence of such agreement, the arbitrators were entitled to extend the time-limits if they concluded that such extension was desirable. Further, under article 1, paragraph 1, a provision of the Rules (including a provision as to a time-limit) was subject to any modifications that may be agreed upon by the parties. The view was expressed that the time-limits laid down by the Rules were too short and did not give the parties sufficient time for deliberation or consultation prior to taking action. It was felt that longer time-limits would accord with the needs of current arbitration practice, and that it would be preferable to lengthen the time-limits rather than compel parties to extend the time-limits specified at present under the provisions for extension noted above. In any event, extension under articles 1, paragraph 1, 12, paragraph 1 and 20, paragraph 2 depended on the agreement of the parties to such extension, and it was possible for one party to withhold unreasonably his consent to an extension.

Appointing authority

10. Article 6, paragraph 2 (a), (b) and (c), and article 7, paragraph 7, of the Rules contain provisions specifying three authorities, one of whom would, on the application of the claimant, appoint a sole arbitrator or a presiding arbitrator in the event of a failure by the parties to reach agreement either on the identity of such an arbitrator or on the identity of an appointing authority to appoint such an arbitrator. There was general agreement that it was necessary that the Rules should contain provisions specifying such an authority, and that it was desirable that the Rules should specify only a single appointing authority. However, there were differences of view as to which authority could be considered as the most suitable.

- (i) Article 6 paragraph 2 (a). "An appointing authority designated pursuant to United Nations General Assembly resolution . . . () by the Government of the country where the respondent has his principal place of business (*siège réel*) or habitual residence".

11. The view was expressed that the designation of an appointing authority in this way was not appropriate. It was observed that, in the first place, it was questionable whether the resolution contemplated by this provision could be obtained from the General Assembly. Further, even if such a resolution were obtained, there would be no certainty that all Governments would designate an appointing authority pursuant to the resolution. It was also stated that it was undesirable that the appointing authority should be designated by the Government of a country with which one of the parties was closely connected. While in certain countries there existed arbitral or trade institutions with a high reputation for impartial conduct which could be designated as appointing authorities, such institutions may not exist in all countries.

- (ii) *Article b, paragraph 2 (b).* "An arbitral institution in the country where the respondent has his principal place of business or habitual residence, or a chamber of commerce in that country with experience in appointing arbitrators".

12. The view was reiterated that it was undesirable that the appointing authority should belong to a country with which one of the parties was closely connected. It was also observed that, while chambers of commerce with experience in appointing arbitrators would be available in some countries, they may be lacking in others.

- (iii) *Article 6, paragraph (c).* "The appointing authority designated by the Secretary-General of the Permanent Court of Arbitration at The Hague".

13. There was some support for this provision. It was observed that, while the primary function of the Court was arbitration involving issues of public international law, arbitration rules had been framed for the settlement by the Court of international disputes between two parties, of which only one was a State, and that the Court had some experience of international commercial arbitration in disputes of this character. However, the view was also expressed that the Permanent Court of Arbitration lacked sufficient knowledge and experience in the practice of commercial arbitration, that it did not have a universal character, and that therefore it was not an appropriate body for the designation of an appointing authority. The view was also expressed that the competent authority should be the competent authority at the place of arbitration. Recourse to a central authority can only be envisaged in cases where there had been no designation of the place of arbitration, or of a competent authority at the place of arbitration. In such cases an *ad hoc* committee connected with the secretariat of UNCITRAL should be established as the central authority.

14. There was considerable support for the view that the establishment of an appointing authority under the aegis of the United Nations was desirable and deserved careful consideration.

Need for the Rules

15. There was considerable agreement on the need for a set of rules such as the UNCITRAL Rules to regulate *ad hoc* arbitration. It was observed that existing arbitral rules were not designed for application in all areas of the world. The arbitration rules formulated by the regional commissions of the United Nations such as ECE or ECAFE (now ESCAP) were primarily designed for regional application. The UNCITRAL Rules could therefore perform a valuable function in facilitating international trade.

B. DISCUSSION BY THE COMMISSION ON THE INDIVIDUAL ARTICLES OF THE DRAFT UNCITRAL ARBITRATION RULES

ARTICLE 1

"1. Where parties have concluded an agreement in writing that a dispute existing between them, or disputes that may arise out of a contract concluded by them, shall be referred to arbitration under the UNCITRAL Rules, such disputes shall be settled according to these Rules, subject to any modifications that may be agreed upon by the parties.

"2. 'Parties' means physical or legal persons, including legal persons of public law.

"3. 'Agreement in writing' means an arbitration clause in a contract or a separate agreement, including an exchange of letters, signed by the parties, or contained in an exchange of telegrams or telexes."

SUMMARY OF DISCUSSION

Paragraph 1

16. Differing views were expressed as to whether this paragraph should be reworded so as to make the UNCITRAL Rules only applicable to the arbitration of disputes arising out of international trade transactions. These views are set forth in section A above under the heading "Scope of the Rules" (paras. 2 and 3).

17. The paragraph as now formulated permits parties to agree to refer to arbitration disputes existing between them, or future disputes "that may arise out of a contract concluded by them . . .". It was observed that the specific reference to "a contract concluded by them" unduly narrowed the scope of the Rules, and that it might be desirable to grant a wider latitude to parties in respect of the type of transactions, in regard to which possible future disputes might be submitted to arbitration. It was accordingly suggested that a phrase such as "defined legal relationships existing between parties" might be substituted for the phrase "contract concluded by them". It was pointed out, however, that such a modification might introduce an element of uncertainty into the scope of application of the rules.

18. In its present wording, paragraph 1 only applies where the parties have concluded an agreement *in writing* for the submission of disputes to arbitration. The question was discussed as to whether this requirement of writing should be dispensed with. Although the view was expressed that the restriction introduced by this requirement was undesirable, there was considerable support for maintaining it. It was noted that article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958,^b only included within its scope an "agreement in writing" by parties to submit disputes to arbitration; certain national laws also only gave legal effect to arbitration clauses or agreements which were in writing. It was therefore observed that maintaining this requirement increased the chances that the arbitral proceedings would result in an enforceable award. In this connexion, some representatives suggested that, if the requirement of writing were maintained, it would be desirable to specify that the modifications referred to in the last phrase of the paragraph should also be in writing.

19. It was noted that the model clause set forth in the report of the Secretary-General (A/CN.9/97, para. 6) permitted parties to refer to arbitration "Any dispute, controversy or claim, arising out of or relating to this contract (or the breach thereof), . . .".^c However, paragraph 1 of article I of the Rules permitted parties to refer to arbitration ". . . a dispute existing between them or disputes that may arise out of a contract concluded by them . . .".^c It was suggested that the model clause and paragraph 1 should be brought into harmony in this respect. It was also observed that the phrase "Where parties have concluded an agreement in writing that a dispute existing between them, or disputes that may arise out of a contract concluded by them, shall be referred to arbitration under the UNCITRAL Rules, . . ." might be regarded as implying that persons who were not parties to such an agreement could not participate in an arbitral proceeding. It was suggested that a provision should be included in the Rules defining the circumstances in which a person not a party to such an agreement might participate in an arbitral proceeding, since in certain circumstances the participation of such persons might be desirable.

Paragraph 2

20. There was considerable support for the view that this paragraph should be deleted. It was argued that a definition of the type of persons who would qualify as "parties" was a matter to be left to the applicable municipal law. It was also observed that, if it were considered desirable that the term "parties" be defined, it might be considered equally desirable to define a number of other terms which appeared in the Rules. On the other hand, it was suggested that the definition should be retained, since it served a desirable purpose in clarifying that a Government, State agency, or State organization could be a party to an agreement for arbitration under the Rules.

Paragraph 3

21. There was some support for the view that this paragraph should be deleted, since it attempted to resolve a question which should be left to be decided by the applicable

^b United Nations, *Treaty Series*, vol. 330, No. 4739.

^c Italics added.

municipal law. Those representatives who had been of the view that the requirement in paragraph 1 that the agreement to submit disputes to arbitration must be in writing should be deleted observed that, if this view were accepted, paragraph 3 would become superfluous and should be deleted.

Article 1 considered as a whole

22. The view was expressed that the whole of article 1 should be deleted. The draft Rules were not mandatory, and any provision therein could be modified by agreement of parties. It was therefore inappropriate to include provisions attempting either to delimit the scope of the Rules, or to formulate definitions of terms appearing in the Rules.

ARTICLE 2

"1. The parties may at any time select an arbitral institution to administer the arbitration or may choose non-administered arbitration.

"2. If the parties reach no agreement regarding the choice of administered or non-administered arbitration, they shall be deemed to have selected non-administered arbitration.

"3. If the arbitral institution selected by the parties is for any reason unable or unwilling to administer the arbitration, and if the parties do not select another arbitral institution, the parties shall be deemed to have selected non-administered arbitration."

SUMMARY OF DISCUSSION

23. The consideration of this article centred on the issue of whether the scope of the Rules should include "administered arbitration" as defined herein. The discussion on this issue is set forth in section A above under the heading "Administered Arbitration" (see paras. 6 to 8). An observation was also made that, even if "administered arbitration" were excluded from the scope of the UNCITRAL Rules, provision should be made to regulate the effect of an arbitration agreement in which parties had agreed that disputes were to be referred to arbitration under the UNCITRAL Rules, and had also agreed to select an arbitral institution to administer the arbitration. It was suggested that a provision as set forth below might be appropriate:

"Where the parties have agreed to select an arbitral institution to administer the arbitration, they shall be deemed to have selected the arbitration rules which such institution may have established for such purpose, unless they have expressly specified otherwise."

ARTICLE 3

"1. The party initiating recourse to arbitration (hereinafter called the 'claimant'), shall give to the other party (hereinafter called the 'respondent'), notice that an arbitration clause or agreement concluded by the parties is invoked.

"2. Such notice (hereinafter called 'notice of arbitration') shall contain the following:

"(a) the names and addresses of the parties;

"(b) a reference to the arbitration clause or agreement that is invoked;

"(c) a reference to the contract out of which the dispute arises;

"(d) the general nature of the claim and an indication of the amount involved, if any;

"(e) the relief or remedy sought;

"(f) a reference to any agreement between the parties as to having one or three arbitrators, or, if the parties did not previously reach such agreement, the claimant's proposal as to their number (i.e. one or three).

"3. In the case of administered arbitration, the notice of arbitration shall also be sent to the arbitral institution. The following shall also be attached to such notice:

"(a) a copy of the contract out of which the dispute arises;

"(b) a copy of the arbitration clause or agreement, if not contained in the contract annexed pursuant to subparagraph (a) of this paragraph."

SUMMARY OF DISCUSSION

Paragraph 1

24. It was noted that paragraph 1 of the commentary to this paragraph stated that "The notice of arbitration under article 3 serves to inform the respondent (and any administering arbitral institution) that arbitral proceedings have been started and that a particular claim will be submitted for arbitration". There was considerable support for the view that the text of the article itself should clearly specify the point of time at which arbitration proceedings commenced. The time of commencement would have particular relevance to the question of whether provisions on prescription of rights or limitation of claims were operative in relation to the dispute or disputes submitted to arbitration. In this connexion, it was suggested that, since both the draft Rules and the Convention on the Limitation Period in the International Sale of Goods (A/CONF.63/15) were texts produced by the Commission, it might be desirable to incorporate the language used in article 14 of the Convention in the text of this paragraph. However, the view was also expressed that the Rules should not deal with the issue of the point of time at which arbitration proceedings commenced in relation to the question of prescription or limitation, since that issue would be regulated by the Convention or by municipal law where the Convention or municipal law would regulate questions of prescription or limitation.

25. The view was expressed that the paragraph should lay down a rule as to the language in which the notice was to be given, since each party to an international trade transaction might use a different language. It was suggested that, where parties had not agreed beforehand on the language to be used, it should be the language of the contract, or the language used in their correspondence with each other. However, it was observed that a rule as to what language should be used might be unnecessary, as the notice in question would be comparatively short and in a simple form.

26. It was suggested that the paragraph should specify the method by which the notice was to be transmitted by one party to the other.

Paragraph 2

27. The question was raised whether it was desirable to amalgamate the notice of arbitration under this article with the statement of claim required by article 16. The view was expressed that such an amalgamation would be undesirable for several reasons. Article 16 contained several requirements with regard to the statement of claim which could not be met at the stage at which the notice of arbitration was required to be given under this article. Thus, at this early stage, there may be inadequate time to obtain all the relevant documents required to be annexed to the statement of claim by article 16, paragraph 1; and it may be impracticable to give a full statement of the facts and a summary of the evidence as required by article 16, paragraph 2 (b). Further, it was suggested that it may be premature to impose an obligation to communicate the details required by article 16 at the early stage of the arbitral process to which article 3 applied, since parties may still be discussing the terms of a possible settlement. It was also observed that the notice of arbitration under this article and the statement of claim under article 16 referred to two distinct stages in the arbitral process. The notice of arbitration was given when one party first apprised the other party of his intention to have recourse to arbitration, while the statement of claim occurred as part of the process of clarifying the points at issue between the parties. The notice and statement should therefore be kept apart. It was further suggested that the requirement that the notice of arbitration contain "the relief or remedy sought" be deleted, and that such statement be only required to appear in the statement of claim. On the

other hand, it was observed that, if the claimant were given an option to amalgamate the notice of arbitration under this article and the statement of claim, if he so desired, this might serve to accelerate the arbitral proceedings, and also might reduce expenses. It was noted that these were important considerations in relation to arbitration.

28. It was also suggested that the words "*inter alia*" should be added after the word "contain" in the opening words of this paragraph, since the applicable municipal law might require that additional particulars be stated.

Paragraph 3

29. It was observed that, if "administered arbitration" were excluded from the scope of the Rules, paragraph 3 would be unnecessary and could be deleted.

ARTICLE 4

"1. Any party may be represented by a counsel or agent upon the communication of the name and address of such person to the other party, and, in the case of administered arbitration, also to the arbitral institution. This communication is deemed to have been given where an arbitration is initiated by a counsel or agent or where a counsel or agent submits a statement of defence and counter-claim for the other party.

"2. All communications between the parties, or between the parties and the arbitrators, or, in the case of administered arbitration, between the arbitral institution and the parties or arbitrators, shall be effective when received by the addressee.

"3. It is presumed that a communication sent by telegram or telex has been received one day after it was sent, and a communication by registered air mail five days after it was sent."

SUMMARY OF DISCUSSION

Paragraph 1

30. It was observed that the second sentence of paragraph 1 appeared to assume that the initiation of an arbitration, or the submission of a statement of defence and counter-claim, by a counsel or agent was sufficient evidence that such counsel or agent possessed the requisite authority to act for the party on whose behalf he purported to act. It was suggested that such an assumption might be unjustified and that therefore the present formulation of this sentence should be reconsidered. It was also suggested that the word "considered" might be substituted in the second sentence of this paragraph for the word "deemed" as being more appropriate.

Paragraph 2

31. The view was expressed that this paragraph might be deleted, since the rule contained in it was universally accepted and did not need to be expressly stated. Most representatives, however, felt that its retention would be desirable as it resolved with certainty an important issue. It was also suggested that the paragraph might be brought into harmony with article 14, paragraph 2 of the Convention on the Limitation Period in the International Sale of Goods by adopting the rules contained in that article to determine when a communication shall be effective. It was further observed that the rule contained in this paragraph should be reconsidered in relation to the various articles of the Rules laying down time-limits and in particular in relation to article 9.

Paragraph 3

32. Divergent views were expressed on the question of whether this paragraph should be retained or deleted.

33. Many representatives expressed the view that the paragraph should be deleted. In support of this view, it was stated that the paragraph created a presumption; presumptions, however, were matters of law which were regulated by the rules of the applicable law, and should not be regulated by a set of optional rules, such as the ones now being considered.

Further, the provision was of the nature of a rule of evidence, and could therefore be in conflict with article 21, paragraph 5, which stated that conformity to legal rules of evidence shall not be necessary. If it were necessary to establish with certainty the time of the receipt of a communication, this could be better done by evidence (such as a postal receipt) obtained from the postal authorities. The provision also did not eliminate possible disputes as to the actual time of receipt, since, as seen from the commentary to the paragraph, it was possible to rebut the presumption created therein by contrary evidence. Further, it was noted that the applicable municipal law would contain a rule on this issue, and that the paragraph was therefore unnecessary.

34. The view was expressed, however, that the rule contained in the paragraph was both necessary and useful. Since paragraph 2 of the article stated that a communication was to be effective when received by the addressee, it was necessary to have a rule as to when receipt took place. Further, since the sending of communications by one party to another was an essential part of arbitral proceedings, it was necessary to have simple rules by which arbitrators could determine that a communication had been received. In the absence of such a rule, difficulties may arise when a party chooses to ignore the communications of the other party, or claims not to have received them.

35. It was also suggested that, if the paragraph were retained it would be necessary, in the interests of clarity, to insert in the text of the paragraph the statement at present contained in the commentary that the presumptions created by the paragraph might be rebutted by evidence to the contrary.

36. There was general agreement that the periods of time specified in the paragraph might be too short in the light of the experience of the working of the postal services in certain regions. If the paragraph were to be retained, these time periods would have to be reconsidered.

37. It was also suggested that it might be inappropriate to specify a single time period in respect of all communications required to be sent under the Rules; it might be necessary to specify different time periods as appropriate to communications of different kinds.

38. It was also noted that the paragraph needed to be supplemented by rules specifying how the time periods specified therein were to be calculated and dealing, *inter alia*, with questions such as whether holidays and non-working days were excluded or included in estimating the periods.

ARTICLE 5

"If the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within [8] days from the date of receipt by the respondent of the claimant's notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed. In the case of administered arbitration, any such agreement by the parties regarding the number of arbitrators shall be communicated promptly to the arbitral institution."

SUMMARY OF DISCUSSION

39. Different views were expressed in regard to the rule stated in the first sentence of the article to the effect that, if within a specified period of days from the date of receipt by the respondent of the claimant's notice of arbitration, the parties had not agreed that there shall be only one arbitrator, three arbitrators shall be appointed. One view was that in these circumstances one arbitrator should be appointed. This view was supported by the argument that the arbitration proceedings would thereby be rendered less expensive than would be the case with three arbitrators. As against this, it was stated that it was the commonly accepted practice in international commercial arbitration to have a tribunal with three arbitrators. Further, in a major arbitration involving a substantial sum of money, the presence of three arbitrators was necessary to ensure that the tribunal possessed a sufficient degree of competence and expertise. It was also observed that, where the

tribunal was composed of three arbitrators, each of the two party-nominated arbitrators, who was usually of the same nationality as the party nominating him, brought to the tribunal a special knowledge of the commercial law and practice of the country to which the party who nominated him belonged. This was of great benefit to the presiding arbitrator.

40. It was also suggested that, while the tribunal should be composed of three arbitrators where a substantial sum of money was at stake in the arbitration, it might be desirable for the article to provide for one arbitrator where the sum involved was comparatively small. However, it was noted that there might be cases where, although the sum involved was comparatively small, an important principle was in issue, which made a tribunal composed of three arbitrators desirable.

41. There was general agreement that the period of eight days, tentatively proposed in the article, within which parties had to agree whether there should be only one arbitrator, was too short and should be extended.

42. The suggestion was also made that, even if the rule were to be that the tribunal was to consist of three arbitrators where the parties failed to agree within the stipulated time on one arbitrator, provision should be made in the article to enable the parties to agree at a later stage to a tribunal consisting of only one arbitrator.

ARTICLE 6^d

"1. If a sole arbitrator is to be appointed, such arbitrator shall be of a nationality other than the nationality of the parties.

Non-administered

"2. The parties shall endeavour to reach agreement on the choice of the sole arbitrator. The claimant shall, by telegram or telex, propose to the respondent the names of one or more persons, one of whom would serve as the sole arbitrator.

"If within 15 days of the receipt by the respondent of the claimant's proposal, the parties have not agreed on the choice of the sole arbitrator and if the parties have not previously agreed on an appointing authority, the claimant may, by telegram or telex, propose the names of one or more third parties, one of whom would serve as appointing authority.

"If within 15 days of the receipt of the last-mentioned proposal the parties do not agree on the designation of an appointing authority, the claimant may apply to:

"(a) an appointing authority designated pursu-

Administered

"2A. The arbitral institution shall invite the parties to agree on the choice of the sole arbitrator.

"If within 15 days of the receipt of such invitation by both parties, the arbitral institution has not received a communication evidencing agreement by the parties on the choice of the sole arbitrator, the arbitral institution shall serve as appointing authority."

Non-administered

ant to United Nations General Assembly resolution . . . (. . .) by the Government of the country where the respondent has his principal place of business (*siège réel*) or habitual residence, or,

"(b) an arbitral institution in the country where the respondent has his principal place of business or habitual residence, or a chamber of commerce in that country with experience in appointing arbitrators, or,

"(c) the appointing authority designated by the Secretary-General of the Permanent Court of Arbitration at The Hague.

"2 bis. If the appointing authority selected pursuant to para. 2 above agrees to function as such, the claimant shall send a copy of his notice of arbitration (article 3) to the appointing authority, together with a copy of the contract out of which the dispute arises and a copy of the arbitration agreement if it is not contained in that contract.

"3. The appointing authority shall appoint the sole arbitrator according to the following list-procedure:

- the appointing authority shall communicate to both parties an identical list containing at least three names;
- within 15 days after the receipt of this list, each party may indicate to the appointing authority his order of preference or objections regarding the names on the list;
- after the expiration of the above period, the appointing authority shall appoint the sole arbitrator from among the names on the list transmitted to the parties, taking into account, as far as possible, any preferences and objections that may have been stated by the parties."

Administered

"3A. The arbitral institution shall appoint the sole arbitrator according to the following list-procedure:

- the arbitral institution shall communicate to both parties an identical list containing at least three names;
- within 15 days after the receipt of this list, each party may indicate to the arbitral institution his order of preference or objections regarding the names on the list;
- after the expiration of the above period, the arbitral institution shall appoint the sole arbitrator from among the names on the list transmitted to the parties taking into account, as far as possible, any preferences and objections that may have been stated by the parties."

^d Article 6 contains provisions in parallel columns, one of which deals with "non-administered" arbitration, and the other with "administered" arbitration. As a consequence of the views expressed by many representatives that "administered" arbitration should be excluded from the scope of the Rules, paragraphs 2A and 3A in the column dealing with "administered" arbitration were not considered.

SUMMARY OF DISCUSSIONS

Paragraph 1

43. The Commission considered the requirement under this paragraph that, in cases where "a sole arbitrator is to be

appointed, such arbitrator *shall* be of a nationality other than the nationality of the parties".

44. The view was expressed that the rule in its present wording appeared to be of a mandatory nature. Thus, even if both parties desired to have as the sole arbitrator a person having the nationality of one of the parties, this would not be permissible. It was stated that such a result was unsatisfactory, since it militated against the principle of the autonomy of the parties to appoint an arbitrator of their choice. It might also have the result that the most competent person to serve as arbitrator might be excluded from appointment. It was therefore suggested that this restriction regarding nationality should be eliminated. An alternative suggestion was that it should be eliminated where the appointment was by agreement of parties, but should be retained where the appointment was by an appointing authority.

45. It was observed, however, that the interpretation set forth in paragraph 44 above was of doubtful validity. For if both parties agreed to the appointment of an arbitrator of the nationality of one of the parties, it followed that the parties had exercised the power given to them under article 1, paragraph 1, to modify the rule contained in article 6, paragraph 1. The appointment would therefore be valid.

46. It was noted, however, that the interrelation between this paragraph and article 1, paragraph 1, as set forth in paragraph 45 above was not self-evident and might need to be clearly expressed. It was not clear, for instance, whether a modification by implication, such as by the mere selection of an arbitrator of the same nationality as that of one of the parties, would suffice to make article 1, paragraph 1, applicable. Clarification on this issue was therefore desirable. Such clarification might either take the form of a suitable modification to the text of the paragraph, or of an appropriate statement to be inserted in the commentary.

47. It was stated by some representatives that the object of the requirement that the sole arbitrator be of a nationality other than that of the parties appeared to be to secure his independence and impartiality in the performance of his duties. If this was the object of the provision, it was suggested that it might be achieved more directly by specifying in this article that these criteria should be applied when making an appointment, rather than by the indirect method of specifying the requirement of a different nationality.

48. It was further observed that a provision which required for its application a determination as to the nationality of the parties might cause serious difficulties where one or both of the parties was a firm, corporation, or enterprise. Such a determination would have to be made in accordance with the rules of the applicable system of the conflict of laws, and such systems did not have identical rules on this matter. It was therefore suggested that this was an additional reason for seeking to eliminate the criterion of nationality from the rule contained in the paragraph.

Paragraph 2

49. It was stated that the first two subparagraphs of this paragraph in some cases required that two consecutive steps be taken by the parties in order to secure the appointment of a sole arbitrator. Under the first subparagraph, the parties were to endeavour to reach agreement on the choice of a sole arbitrator. If this endeavour failed, under the second subparagraph, the parties were to endeavour to reach agreement on the choice of an appointing authority, who would then, under paragraph 3, appoint the sole arbitrator. The view was expressed that the requirement under the second subparagraph that the parties should endeavour to reach agreement on the choice of an appointing authority was unnecessary; for if the parties could not agree on the choice of a sole arbitrator, it was very unlikely that they would be able to agree on the choice of an appointing authority. It was therefore suggested that the provision for the choice of an appointing authority be deleted.

50. The view was also expressed that, in relation to the two consecutive steps in regard to choice which the parties might have to take under this paragraph, the mandatory allocation of 15 days for making each choice should be modified. It was suggested that a composite period of 30 days should be granted within which the parties would be free to make their choice. The observation was also made that, even if the allocation of separate time periods were maintained, the period of 15 days was too short and should be extended.

51. Points (a), (b) and (c) of the third subparagraph specify three appointing authorities where the parties fail to reach agreement under the previous provisions on the choice of a sole arbitrator or the choice of an appointing authority. The views expressed on this issue are set forth in section A above under the heading "Appointing authority" (paras. 10-14).

Paragraph 2 bis

52. There was general agreement in respect of the provisions of this paragraph.

Paragraph 3

53. The view was expressed that, where the appointment of a sole arbitrator was to be made by an appointing authority, the list-procedure prescribed in this paragraph was undesirable. The appointing authority should be left free to make a direct appointment, and thereby avoid the delay necessarily arising from the list-procedure; such an appointment would also be in conformity with the will of the parties, who had left the choice of the sole arbitrator to the appointing authority.

54. As against this, it was noted that the list-procedure should be maintained since it served a useful purpose. Experience in the use of the list-procedure had shown that it often demonstrated that there was a great measure of agreement between the parties as to the most suitable persons appearing on the list, one of whom was to serve as the sole arbitrator. Thus the list-procedure enabled the appointing authority to appoint the sole arbitrator as closely as possible in accordance with the wishes of the parties.

Appointment of three arbitrators

ARTICLE 7^e

"1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the president of the arbitral tribunal.

"2. The presiding arbitrator shall be of a nationality other than the nationality of the parties.

Non-administered

"3. If within 15 days after receipt of the claimant's notice appointing an arbitrator, the respondent has not, by telegram or telex, notified the claimant of the arbitrator he appoints, and if the parties have not previously agreed on an appointing authority, the claimant may propose, by telegram or telex, the names of one or more third persons, one of whom would serve as appointing authority.

Administered

"3A. The arbitral institution shall invite each party to appoint an arbitrator and to notify, by telegram or telex, both the other party and the arbitral institution of such appointment within 15 days after receipt of the invitation.

* Article 6 contains provisions in parallel columns, one of which deals with "non-administered" arbitration, and the other with "administered" arbitration. As a consequence of the views expressed by most representatives that "administered" arbitration should be excluded from the scope of the Rules, paragraphs 3A, 4A and 6A in the column dealing with "administered" arbitration were not considered.

<i>Non-administered</i>	<i>Administered</i>	<i>Non-administered</i>	<i>Administered</i>
<p>"If within 15 days after receipt of such proposal the parties agree on the designation of an appointing authority, that appointing authority will appoint the second arbitrator. The appointing authority may determine the method for appointing the second arbitrator.</p> <p>"4. If within the above 15 days the parties do not agree on the designation of the appointing authority, the claimant, in accordance with the provisions of article 6, para. 2 above, may apply to any of the appointing authorities mentioned in that article for the designation of the second arbitrator.</p> <p>"4. The appointing authority may determine the method for designating the second arbitrator and its appointment of the second arbitrator is binding upon the parties.</p> <p>"5. If within 15 days after the appointment of the second arbitrator, the two arbitrators appointed in accordance with the foregoing procedures have not agreed on the choice of the presiding arbitrator, the parties shall endeavour to agree on the designation of the presiding arbitrator.</p> <p>"6. The claimant shall, by telegram or telex, communicate to the respondent the names of one or more persons, one of whom would serve as the presiding arbitrator.</p> <p>"If, within 15 days after such communication, the parties have not agreed on the choice of the presiding arbitrator and if the parties have not previously agreed on an appointing authority, each of the parties may, by telex or telegram, propose the names of one or more third persons, one of whom would serve as the appointing authority.</p> <p>"7. If, within 15 days after receipt of such proposal, the parties agree on the designation of an appointing authority, that appointing authority will appoint the presiding arbitrator.</p> <p>"If, within the above 15 days the parties do not reach agreement on the designation of an appoint-</p>	<p>"4A. If within the above 15 days the respondent has not notified the arbitral institution of the name of the arbitrator he appoints, the institution shall appoint the second arbitrator.</p> <p>"The arbitral institution may determine the method for designating the second arbitrator and its appointment of the second arbitrator is binding upon the parties.</p> <p>"6A. The claimant shall, by telegram or telex, communicate to the respondent the names of one or more persons, one of whom would serve as the presiding arbitrator.</p> <p>"If within 15 days after such communication, the parties have not agreed on the choice of the presiding arbitrator, the arbitral institution, on request by either party, shall appoint the presiding arbitrator.</p> <p>"7A. The arbitral institution shall appoint the presiding arbitrator in accordance with the list-procedure in article 6, para. 3."</p>	<p>ing authority, the claimant, in accordance with the provisions of article 6, para. 2 above, may apply to any of the appointing authorities mentioned in that article for the designation of the presiding arbitrator. The appointing authority mentioned in this paragraph shall appoint the presiding arbitrator in accordance with the list-procedure in article 6, para. 3."</p> <p>SUMMARY OF DISCUSSION</p> <p><i>Paragraph 1</i></p> <p>55. There was general agreement that the provisions of this paragraph were acceptable.</p> <p><i>Paragraph 2</i></p> <p>56. The Commission considered the rule contained in this paragraph which specified that the presiding arbitrator shall be of a nationality other than the nationality of the parties. It was agreed that the relevant considerations on this issue corresponded to those arising out of the requirement in article 6, paragraph 1, that a sole arbitrator should be of a nationality other than the nationality of the parties. An account of the consideration of article 6, paragraph 1, is set forth in paragraphs 43 to 48 above.</p> <p>57. It was suggested that the rule may be modified to permit the appointment of a presiding arbitrator of the nationality of one of the parties in cases where the parties agreed in writing to such an appointment.</p> <p><i>Paragraph 3</i></p> <p>58. The rules contained in this paragraph generally correspond to the rules contained in the first two subparagraphs of article 6, paragraph 2. It was agreed that the issues raised by this paragraph likewise corresponded to those raised by the aforementioned subparagraphs of article 6, paragraph 2. An account of the consideration of article 6, paragraph 2, is set forth in paragraphs 49 to 51 above.</p> <p><i>Paragraph 4</i></p> <p>59. This paragraph, made operative, in the circumstances mentioned therein, the provisions of article 6, paragraph 2 (a), (b) and (c). An account of the consideration of those provisions is set forth in section A above, under the heading "Appointing authority" (paras. 10 to 14). There was general agreement that the concluding subparagraph of this paragraph was acceptable.</p> <p><i>Paragraph 5</i></p> <p>60. It was observed that under this paragraph, the parties are permitted to endeavour to agree on the designation of the presiding arbitrator only after the two arbitrators appointed in accordance with the procedures laid down in the article had failed to reach agreement on such a designation. It was stated that it would be preferable if the paragraph were to provide that in the first instance the parties should endeavour to reach agreement on the designation of a presiding arbitrator; only if the parties could not so agree shall the designation be made by the two arbitrators appointed pursuant to this article.</p> <p><i>Paragraph 6</i></p> <p>61. It was noted that the provisions of subparagraph 1 of this paragraph corresponded to those of the second sentence of subparagraph one of article 6, paragraph 2, and that the provisions contained in subparagraph 2 of this paragraph corresponded to the provisions of subparagraph 2 of article 6, paragraph 2. It was agreed that the issues raised by this paragraph accordingly corresponded to those raised by the latter</p>	

provision. An account of the consideration of article 6, paragraph 2 is set forth at paragraphs 34-36 above.

Paragraph 7

62. There was no objection to the acceptance of the provisions of subparagraph 1 of this paragraph.

63. It was noted that the first sentence of subparagraph 2 of this paragraph made operative, in the circumstances mentioned therein, the provisions of article 6, paragraph 2 (a), (b) and (c). An account of the consideration of those provisions is set forth in section A above, under the heading "Appointing authority" (paras. 10 to 14).

64. It was noted that the first sentence of subparagraph 2 of this paragraph made the provisions of article 6, paragraph 3 applicable to the cases coming within the ambit of this paragraph. An account of the consideration of article 6, paragraph 3, is set forth in paragraphs 38 and 39 above.

ARTICLE 8

"1. Either party may challenge an arbitrator, including an arbitrator nominated directly by a party, if circumstances exist that give rise to justifiable doubts as to his impartiality or independence.

"2. The circumstances mentioned in para. 1 include any financial or personal interest in the outcome of the arbitration or any family or commercial tie with either party or with a party's counsel or agent.

"3. A prospective arbitrator shall disclose to those who approach him in connexion with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed, shall disclose any such circumstances to the parties and the arbitral institution unless they have already been informed by him of these circumstances."

SUMMARY OF DISCUSSION

Paragraph 1

65. At the commencement of the consideration of this paragraph, a statement was made on behalf of the Secretariat that the text which appeared in document A/CN.9/97 contained certain typographical errors. The text should correctly read as follows:

"1. Either party may challenge an arbitrator, including the arbitrator nominated directly by the other party, if circumstances exist that give rise to justifiable doubts as to his impartiality or independence".

66. It was pointed out that the text in its present wording would permit a party to challenge even the arbitrator nominated by him, while the intention was that a party should only be permitted to challenge an arbitrator nominated by the other party.

67. The prevailing view, however, was that a party should be permitted to challenge even the arbitrator nominated by him. For circumstances unknown at the time of the nomination may emerge thereafter revealing that the arbitrator had a bias against the party nominating him, or in favour of the other party. There were valid grounds, therefore, for retaining the text as reproduced in document A/CN.9/97.

68. It was noted that a challenge could be made under this paragraph if circumstances existed that gave rise to justifiable doubts as to the impartiality or independence of any arbitrator, including a party-appointed arbitrator. This implied that it was incumbent on a party-appointed arbitrator to be impartial and independent even in regard to the party who nominated him. Divergent views were expressed on the question as to whether an arbitrator should be required to be impartial and independent in regard to the party who appointed him. On the one hand, it was stated that the imposition of such a duty was desirable. The institution of arbitration would gain greater respect if arbitrators acted with such independence and impartiality. It was further observed that the provision was in accord with the arbitration law of many countries, would be

widely acceptable, and would not conflict with the applicable law governing the arbitration. It was also pointed out that, under article 1, paragraph 1, parties were free to waive this requirement by agreement if they chose to do so.

69. As against this, it was noted that it was impractical and unrealistic to impose such an obligation on a party-appointed arbitrator. One reason for this was that such an arbitrator would often depend for his fees on the party who appointed him. It was therefore suggested that the possibility of a challenge on this ground should be restricted to challenge of a presiding arbitrator. Another suggestion was that the grounds for challenge of party-appointed arbitrators should be restricted to the grounds specifically mentioned in paragraph 2 of this article.

Paragraph 2

70. It was noted that this paragraph listed certain specific grounds for challenge which were among the circumstances giving rise to justifiable doubts as to the impartiality or independence of an arbitrator within the meaning of paragraph 1. It was stated that it was unnecessary to make specific mention of these grounds, since they were already included within the general description set forth in paragraph 1. On the other hand, it was argued that specific mention of these grounds served to focus the attention of parties and arbitrators on them and that the provision therefore served a useful purpose.

71. Divergent views were expressed as to the advisability of retaining a "commercial tie with either party or with a party's counsel or agent" as a ground for challenge of an arbitrator. It was observed that businessmen frequently acted as arbitrators, and that they would often have such a commercial tie with one of the parties. If this ground were maintained, many otherwise well-qualified arbitrators would be excluded from appointment. It was therefore suggested that a commercial tie should be a ground for challenge only where it was likely to result in a lack of independence or impartiality on the part of the arbitrator. However, a contrary view was expressed to the effect that this ground of challenge should be retained as it encouraged the appointment of arbitrators possessing impartiality and independence. In regard to the advisability of retaining a "family tie" as a ground for challenge, it was observed that the closeness of the family tie which would constitute such a ground should be defined. It was also suggested that commercial or family ties of the kind specified in this paragraph should constitute grounds for challenge only in those cases where such ties gave rise to justifiable doubts as to an arbitrator's impartiality or independence. In this connexion, a suggestion was made that the possible grounds for challenge might be divided into two categories: "absolute" grounds for challenge and "relative" grounds for challenge. The former category would only include as grounds for challenge a direct financial or personal interest in the outcome of the dispute on the part of an arbitrator, and certain specified close ties, such as close family ties, between an arbitrator and a party. Proof of these grounds would result automatically in the success of the challenge. The latter category would include other grounds for challenge, such as remote family ties. For a challenge based on these grounds to succeed, it would be necessary to prove not only that they existed, but that they gave rise to justifiable doubts as to the impartiality or independence of an arbitrator.

72. There was wide agreement that any financial or personal interest in the outcome of the arbitration should be a ground for challenge.

73. The question was raised whether it would be desirable to insert in this paragraph an exhaustive list of the grounds for challenge. On the one hand, it was stated that it would be undesirable to have an exhaustive list, as cases falling outside the list might occur which could nevertheless be regarded as justifiable grounds for challenge. On the other hand, it was stated that, if a list were to be included at all, it would serve no useful purpose unless it were exhaustive. It was also observed that, if the paragraph were not intended to contain an

exhaustive list of the grounds for challenge, this situation should be clarified.

74. The observation was also made that the specific grounds for challenge mentioned were worded in general terms, and might give rise to difficulties of interpretation.

Paragraph 3

75. It was noted that this paragraph imposed a duty of disclosure at two stages. At the first stage, a prospective arbitrator was bound to disclose to those who approached him in connexion with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. Once appointed, an arbitrator was also bound to disclose such circumstances to the parties and the arbitral tribunal unless they had already been previously informed by him of such circumstances. It was observed that it was only necessary to impose an obligation of disclosure on an arbitrator who was appointed, and that an obligation of disclosure prior to appointment might be considered unnecessary.

76. It was also suggested that the duty of disclosure at the second stage might be intended to apply to cases where, after the appointment of an arbitrator, circumstances arose giving rise to justifiable doubts as to his impartiality or independence. Such circumstances could not have been disclosed at the stage when he was first approached with regard to his possible appointment.

The article considered as a whole

77. It was noted that the question of challenge of arbitrators would ultimately be regulated by the provisions of the applicable municipal law. It might therefore be desirable to insert a provision in the text of the article, or a statement in the commentary, drawing the attention of the parties to this fact.

ARTICLE 9

"1. The challenge of an arbitrator shall be made within 15 days after his appointment has been communicated to the challenging party or, if the circumstances mentioned in article 8 became known to such party at a later time, within 15 days after such time.

"2. The challenge shall be made by written notice to both the other party and the arbitrator and shall state the reasons for the challenge.

"3. When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. In both cases a substitute arbitrator shall be appointed pursuant to the procedure that was applicable to the initial appointment."

SUMMARY OF DISCUSSIONS

Paragraph 1

78. It was noted that it was undesirable to set time-limits within which a challenge to an arbitrator should be made. The time within which a challenge should be made would be determined by the applicable municipal law and, under the arbitration laws of many countries, a challenge was permissible at any stage of the hearing. For this reason, it was suggested that paragraph 1 might be deleted.

79. On the other hand, it was suggested that a challenge could be made before arbitral proceedings commenced and therefore before the applicable law began to govern such proceedings. The objection noted above would therefore not be relevant to the setting of time-limits for challenges which may be made prior to the commencement of the arbitral proceedings. Furthermore, it was observed that it was reasonable to permit parties to enter into contractual agreements concerning the time-limits for challenging arbitrators.

Paragraph 2

80. It was suggested that it was undesirable to specify that the challenge had to be made in writing. It should be open to the parties to make a challenge in any form. On the other

hand, it was stated that it was desirable to maintain the requirement of writing, which introduced an element of formality to the making of the challenge, since a challenge was a matter of importance having serious consequences both for the arbitrator challenged and for the party nominating him.

Paragraph 3

81. There was general agreement that the provisions of this paragraph were acceptable.

The article considered as a whole

82. It was observed that, as was the case with article 8, the questions regulated by this article would ultimately be regulated by the applicable municipal law. It might therefore be desirable to insert a provision in the text of the article itself, or a statement in the commentary, drawing the attention of the parties to this fact.

ARTICLE 10^f

"1. If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the arbitral institution or appointing authority that made the initial appointment shall decide whether the challenge is justified.

"2. If the initial appointment was not made by an arbitral institution or appointing authority, the decision on the challenge will be made:

Non-administered

by an appointing authority to be agreed upon by the parties, if they have not previously agreed on such an authority. If the parties do not promptly agree on an appointing authority, the challenging party in accordance with the provisions of article 6, paragraph 2, may request any one of the appointing authorities mentioned in that article, to decide on the challenge.

Administered

by the arbitral institution that administers the arbitration.

"3. The decision of the arbitral institution or appointing authority concerning the challenge is final. If the decision sustains the challenge, a substitute arbitrator shall be appointed pursuant to the procedure that was applicable to the initial appointment."

SUMMARY OF DISCUSSIONS

Paragraph 1

83. It was observed that, under this paragraph, a decision as to whether a challenge of an arbitrator was justified was to be made by the very institution or appointing authority that had appointed the arbitrator. It was suggested that this was undesirable, since the institution or appointing authority might be reluctant to uphold a challenge to its own appointee. It would therefore be preferable if the decision were taken by an independent authority.

84. However, it was stated in reply that experience had shown that arbitral institutions and appointing authorities acted with complete impartiality when one of their appointees was challenged. Such institutions and appointing authorities were deeply concerned with preserving their reputation for integrity and, in fact, upheld a challenge whenever it was justified.

^f Article 10 contains parallel columns in relation to paragraph 2, one of which deals with "non-administered" arbitration, and the other with "administered" arbitration. As a consequence of the views expressed by most representatives that "administered" arbitration should be excluded from the scope of the Rules, paragraph 2, in so far as it dealt with "administered" arbitration, was not considered.

85. On the assumption that it was desirable that an independent authority should decide on the challenge, the question was considered as to the possible identity of such an authority. One possibility was that the other two members of the arbitral tribunal should decide the question. But it was noted that this might not lead to any decision, as these members might not agree. It was therefore suggested that the rules should provide that the court of first instance established at the place where the arbitration was being held should decide on a challenge. It was observed that, under many legal systems, this court would possess the necessary jurisdiction and competence. It was further suggested that provision should be made that the president of the chamber of commerce at the place of arbitration should make the decision where this court did not possess the necessary jurisdiction and competence.

Paragraph 2

86. There was general agreement that the provisions of this paragraph were acceptable.

Paragraph 3

87. It was observed that the decision of the arbitral institution or appointing authority concerning the challenge could be subject to review by a judicial tribunal, which would decide the question in accordance with the applicable municipal law. It was possible that the statement, in the first sentence of this paragraph, that the decision of the arbitral institution or appointing authority was final might mislead the parties by making them believe that judicial review was excluded. It was suggested, therefore, that the attention of the parties might be drawn in some form to the possibility of judicial review.

88. It was stated, however, that it was clear from the context in which the word "final" appeared in this paragraph that the word only referred to finality of decision within the framework of the arbitral proceedings, and that no special provision drawing attention to the possibility of judicial review was therefore necessary.

ARTICLE 11

"1. In the event of the death, incapacity or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed pursuant to the procedures that were applicable to the initial appointment.

"2. If the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated. If any other arbitrator is replaced, such prior hearings shall be repeated at the discretion of the arbitral tribunal."

SUMMARY OF DISCUSSION

Paragraph 1

89. The reference in this paragraph to the "resignation" of an arbitrator was examined. It was pointed out that this term might not be sufficiently wide to cover certain situations which might arise in relation to the conduct of an arbitrator. One such situation arose where an arbitrator did not formally resign, but simply ceased to attend the arbitral hearings, or otherwise ceased to participate in the arbitral proceedings. It was suggested that an appropriate provision should be added for a presumption of resignation in such cases. Alternatively it was suggested that the phrase "failure to act" might be added to cover this situation and that such failure should entail the appointment of a substitute arbitrator under this paragraph. It was also suggested that a provision be inserted to the effect that, where an arbitrator resigns or ceases to act, he must give his reasons for such action.

90. It was pointed out that the article did not specify who would decide whether an arbitrator was subject to incapacity. One possibility would be for the other members of a three-member arbitral tribunal to decide this question. However, this may not lead to any decision since these members might not agree. Further, if there were only one arbitrator, this solution would not be practicable.

91. In the context of the discussion referred to in paragraph 90 above, it was pointed out that the present paragraph 1 of article 11 only dealt with the procedure to be followed in the event of the death, incapacity or resignation of an arbitrator, and not with questions concerning the definition of "incapacity" or "resignation". It was suggested that the advisability of adding provisions dealing with these latter questions might be considered.

Paragraph 2

92. The rule stated in the first sentence of this paragraph to the effect that, if a sole or presiding arbitrator is replaced, any hearings previously held *shall* be repeated, was considered. The view was expressed that, if a verbatim record had been kept of those hearings, there should be no rehearing, since it was unnecessary and would only add to the cost of the arbitral proceedings. It was pointed out, however, that, while in most cases a rehearing in these circumstances was not desirable, cases might occur in which the sole or presiding arbitrator had made an inspection, or done some other act not fully reflected in the verbatim record. In such cases, a rehearing would be necessary. It was also suggested that, where the arbitral tribunal consisted of a sole arbitrator, a decision as to the holding of a rehearing should be made by the new sole arbitrator.

93. On the other hand, the view was expressed that, where a sole or presiding arbitrator was replaced, a rehearing should be held in all cases. Such a rehearing was necessary because of the crucial part to be played by such an arbitrator in the arbitral proceedings. It was necessary, therefore, that the new sole or presiding arbitrator should rehear any oral evidence or arguments that had been presented prior to this appointment.

94. Where an arbitrator other than the presiding arbitrator was replaced, it was suggested that there was no imperative need for a rehearing. It was therefore suggested that the word "shall" in the second sentence of this paragraph might be replaced by the word "may". It was further suggested that, where a party-appointed arbitrator was replaced, the decision as to a rehearing should be made by those members of the arbitral tribunal who had participated in the prior hearings. However, the view was also expressed that, where a party-appointed arbitrator was replaced by another party-appointed arbitrator, any hearings held prior to the replacement should always be repeated, unless the party making the replacement agreed to, and the arbitral tribunal decided to, dispense with the repetition of such prior hearings.

ARTICLE 12

"1. The time-limits set forth in Section II for the appointment of arbitrators may at any time be extended by agreement of the parties. If the arbitration is administered by an arbitral institution, such time-limits may also be extended by that institution on its own initiative.

"2. Where names for the appointment of arbitrators are proposed either by the parties or by an appointing authority, including an arbitral institution serving as appointing authority, full names and addresses shall be given, accompanied, as far as possible, by a description of their qualifications for appointment as arbitrators."

SUMMARY OF DISCUSSION

Paragraph 1

95. There was general agreement that the first sentence of this paragraph was acceptable. It was noted that, if "administered" arbitration were excluded from the scope of the rules, the second sentence of this paragraph could be deleted.

Paragraph 2

96. It was observed that, if the principle, which was at present set forth in articles 6, paragraph 1, and 7, paragraph 2, that a sole or presiding arbitrator shall be of a nationality other than that of the parties, were retained, proposals of

names of persons under this paragraph to serve as sole or presiding arbitrators should conform to that principle.

ARTICLE 13

"1. Subject to these Rules, the arbitrators may conduct the arbitration in such a manner as they consider appropriate, provided that the parties are treated with absolute equality.

"2. The arbitrators may decide that the proceedings shall be conducted solely on the basis of documents and other written materials, unless both parties agree that oral arguments shall be presented.

"3. Oral hearings must be held if one of the parties offers to produce evidence by witnesses [unless the arbitrators unanimously decide that such proposed evidence is irrelevant].

"4. All documents or information supplied to the arbitrators by one party shall be communicated by that party at the same time to the other party."

SUMMARY OF DISCUSSION

Paragraph 1

97. Different views were expressed as to the desirability of the rule, stated in paragraph 2, that the arbitrators may conduct the proceedings in such a manner as they consider appropriate. On the one hand, some representatives observed that this rule infringed the principle of party autonomy; the parties should be given the power to regulate the conduct of the arbitral proceedings, and the arbitrators should regulate the proceedings only in cases where the parties failed to do so. On the other hand, most representatives stated that the present rule giving the arbitrators the power to regulate the conduct of the proceedings was preferable and should be retained.

98. It was noted that the paragraph required the arbitrators to treat both parties with "absolute equality". The view was expressed that the meaning of this requirement should be clarified. A statement was made on behalf of the Secretariat that examples of equal treatment would be the giving to each party of an equal opportunity to present his case and the ensuring that copies of documents sent by one party to the arbitrators were also sent to the other party at or about the same time. It was not possible, however, to give an exhaustive list of examples illustrating the operation of the principle of "absolute equality". In this connexion, it was observed that the adjective "absolute" was unnecessary and should be deleted; however, the view was also expressed that it should be retained.

99. In this context, the comment was made that what was important was not the imposition of an obligation to observe the principle of equal treatment, since in certain circumstances (such as when the parties made conflicting requests to an arbitral tribunal) such treatment was impossible; the real need was to stress that both parties should receive fair treatment. It was suggested, however, that the best course might be to modify the paragraph so as to impose an obligation on the arbitrators to treat the parties both with equality and with fairness.

Paragraph 2

100. There was wide agreement that the provisions of this paragraph were too restrictive in giving arbitrators the option to decide that the proceedings shall be conducted solely on the basis of documents or other written material, unless both parties agreed that oral arguments were to be presented. It was observed that the arbitrators should be obliged to hear oral arguments even if requested to do so by only one of the parties. It was also suggested that the paragraph should be broadened to permit arbitrators to decide that proceedings should be conducted on the basis of documents and other written materials coupled with the inspection of goods.

Paragraph 3

101. There was wide agreement that this paragraph should be redrafted so as to state that the arbitrators should as a rule hold oral hearings for the presentation of evidence. It was observed that an oral hearing should be obligatory if either party requested it.

102. There was some support for the retention of the concluding words of this paragraph, which were placed within square brackets. It was argued by those favouring retention that the power given to the arbitrators by those words to exclude evidence which they considered irrelevant was necessary for the expeditious conduct of the proceedings.

Paragraphs 2 and 3 considered together

103. It was observed that the provisions of paragraphs 2 and 3 were closely connected, but that the exact interrelationship between them was not sufficiently clear. In this context, it was noted that the interrelationship of those provisions had been discussed at the Fifth International Arbitration Congress, held at New Delhi from 7 to 10 January 1975, and that a new text to replace both paragraphs 2 and 3 had been proposed. That text, which is reproduced in document A/CN.9/97/Add.2, paragraph 16, read as follows:

"If either party so requests, the arbitrators shall hold hearings for the presentation of evidence by witnesses or for oral argument. In the absence of such a request, the arbitrators may decide whether the proceedings shall be conducted solely on the basis of documents and other written materials."

Some representatives considered that this provision was acceptable and could replace both paragraphs 2 and 3 of article 13.

Paragraph 4

104. It was suggested that the objective of this paragraph might be better achieved by modifying it to require that documents or information supplied by one party to the arbitrators should not be acted upon by the arbitrators unless they had also been communicated to the other party.

ARTICLE 14

"1. Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitrators.

"2. If the parties have agreed upon the place of arbitration, the arbitrators may determine the locale of the arbitration within the country or city agreed upon by the parties.

"3. The arbitrators may decide to hear witnesses, or to hold interim meetings for consultation among themselves, at any place they deem convenient.

"4. The arbitrators may meet at any place they deem appropriate for the inspection of goods, other property, or documents. The parties shall be given sufficient notice to enable them to be present at such inspections."

SUMMARY OF DISCUSSION

Paragraph 1

105. It was observed by some representatives that the paragraph in its present wording gave the arbitrators an unfettered discretion to decide on the place of arbitration in the absence of agreement by the parties on this point. It was suggested that such a discretion was undesirable; it should be controlled by inserting into the text relevant considerations which the arbitrators would be bound to take into account in deciding on the place of arbitration. However, the present wording of the paragraph was acceptable to most representatives.

106. The Secretariat drew the attention of the Commission to two suggestions for the improvement of this paragraph, which had been made at the Fifth International Arbitration Congress. The first was that the term "place of arbitration" should be replaced by the term "seat of arbitration". The second was that the paragraph should be modified so as to

require the arbitrators to determine the seat of arbitration at the commencement of the arbitration proceedings. The Commission took note of these suggestions.

Paragraph 2

107. It was suggested by some representatives that this paragraph should be deleted as being superfluous, since the arbitrators would in any event have the power granted to them by this paragraph.

Paragraph 3

108. It was observed that, in cases where the parties had agreed on the place of arbitration, the power given by this paragraph to the arbitrators to hold hearings or interim meetings "at any place they deem convenient" was undesirable. Holding such hearings and interim meetings at places other than the place of arbitration agreed on by the parties would increase the costs of the arbitration. On the other hand, it was stated in reply that such hearings or interim meetings might be necessary in certain circumstances, such as when witnesses refused to come to the place of arbitration, or where goods or sites to be inspected were at some other location. It was also observed that any such hearings or interim meetings would only be held by arbitrators in the interests of the parties, and that a provision such as the one contained in this paragraph was therefore desirable.

Paragraph 4

109. There was general agreement that the provisions of this paragraph were acceptable.

The article considered as a whole

110. It was suggested that a provision might be added to the article which could enable the parties to indicate the place where the award should be delivered.

ARTICLE 15

"1. Subject to any provision that has been made by the parties in their agreement, the arbitrators, promptly upon their appointment, shall determine the language or languages to be used in the proceedings. This determination shall apply to any written notice or statement, and, if hearings should take place, to the language(s) to be used in such hearings.

"2. Arbitrators may order that documents, delivered in their original language, shall be accompanied by a translation into the language(s) determined by the parties or the arbitrators."

SUMMARY OF DISCUSSION

Paragraph 1

111. It was observed that this paragraph gave complete freedom to the arbitrators to determine the language or languages to be used in the arbitral proceedings. It was suggested that the granting of such complete freedom was unnecessary. For, if the parties had not expressly agreed on a language to be used, either the language of the contract or the language used in correspondence between the parties should be used in the arbitral proceedings. These languages could be considered to have been impliedly chosen by the parties.

112. On the other hand, it was stated in reply that any rigid rule as to the language to be used could cause difficulties in an international arbitration. Thus one or more of the arbitrators might not understand the language of the contract or the language used in the correspondence between the parties. It may sometimes be necessary to use two languages, for example, where the three arbitrators did not all possess sufficient knowledge of a single language which could be used in the arbitral proceedings.

113. In this context, it was suggested that the difficulties which had been referred to as arising from the choice of language by the arbitrators might be reduced if a provision were added that the arbitrators should arrange for the translation of documents and for interpretation at the hearing so that parties and arbitrators would understand the proceedings.

Paragraph 2

114. The Secretariat brought to the notice of the Commission a suggestion made at the Fifth International Arbitration Congress that the words "determined by the parties or arbitrators" appearing at the end of the paragraph should be replaced by the words "agreed on by the parties or determined by the arbitrators". The object of the suggested amendment was to give effect in more exact language to an agreement between the parties on the issue in question. The Commission took note of this suggestion.

The article considered as a whole

115. It was noted that there was a close connexion between the subject-matter of this article and that of article 13. It was therefore suggested that the amalgamation of the provisions of the two articles into a single article should be considered.

ARTICLE 16

"1. Within a period to be determined by the arbitrators, the claimant shall send his written statement of claim to each of the arbitrators and to the respondent. All relevant documents, including a copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed thereto.

"2. The statement of claim shall include the following particulars:

"(a) the names and addresses of the parties;

"(b) a full statement of the facts and a summary of the evidence supporting these facts;

"(c) the points at issue;

"(d) the relief or remedy sought.

"3. During the course of the arbitral proceedings, the claim may, with the permission of the arbitrators, be supplemented or altered provided the respondent is given an opportunity to express his opinion concerning the change."

SUMMARY OF DISCUSSION

Paragraph 1

116. It was noted that this paragraph required the claimant to annex to his statement of claim "all relevant documents". It was argued that this requirement should be omitted, since it was impossible for a claimant to determine at such an early stage of the arbitral proceedings what would be all the relevant documents; for example, the relevance of certain documents would depend on the position taken by the respondent in his defence. It was therefore suggested that the claimant should only be required to annex the documents on which he relied to support his claim; however, the arbitrators should be empowered to require the submission to them of all documents relevant to the points at issue after these points had been clarified at a later stage of the arbitral proceedings. Another suggestion was that the reference to "all relevant documents" be deleted from this paragraph, and that at the same time a new subparagraph (e), as set forth below, be added to paragraph 2 of the article:

"(e) a reference to documents which the claimant will present or will offer to present."

117. It was stated in reply, however, that the need to reduce costs and the expeditious conduct of arbitral proceedings, both called for disclosure at an early stage. It was therefore advisable to retain this requirement.

118. During the consideration of the scope of article 1, paragraph 1, it had been suggested that the word "contract" appearing in that article should be replaced by a phrase such as "defined legal relationship". If this modification to article 1, paragraph 1, were adopted, it was observed that the reference in this paragraph to the need to annex "a copy of the contract" might have to be altered, so that the description of the documents to be annexed would accord with the modification to article 1, paragraph 1.

Paragraph 2

119. It was observed that the requirement imposed by subparagraph (b) that the statement should include "a full statement of the facts and a summary of the evidence supporting those facts" was too stringent. It was suggested that it was only necessary to require the inclusion of a statement of the relevant facts or a statement of the facts supporting the claim. The reasons adduced in favour of this suggestion corresponded to those set forth in paragraph 116 above in relation to the requirement in paragraph 1 that "all relevant documents" needed to be annexed. The arguments in reply corresponded to those set forth in paragraph 117 above.

120. In relation to the requirement imposed by subparagraph (c) that the statement should include "the points at issue", it was observed that those might not emerge until the respondent had stated his defence to the claim and that, therefore, it might be impractical to impose this requirement. It was suggested that the claimant should instead be required to state his submissions as to what in his view were the points at issue.

121. In relation to the requirement set forth in subparagraph (d) that the statement of claim should include "the relief or remedy sought", it was stated that it would be desirable to require the inclusion of a reference to a claim for interest, whenever such a claim was made.

122. It was pointed out that one method by which the difficulties referred to in paragraphs 119 and 120 might be resolved would be to make the requirement that the particulars described in subparagraphs (b) and (c) be included in the statement of claim optional and not mandatory; thus the subparagraphs might be amended to require such particulars to be stated where they were known, or when it was possible to do so.

Paragraph 3

123. It was stated on behalf of the Secretariat that the words "to express his opinion concerning the change" appearing at the end of the paragraph should be replaced by the words "to exercise his right of defence respecting the change".

124. There was an extended consideration of this paragraph, and the observations made in the course of the discussion are grouped under the following headings:

(a) *Extent of freedom to be accorded to the claimant to supplement or alter his claim*

125. It was noted that under this paragraph the claimant could supplement or alter his claim only with the permission of the arbitrators. The view was expressed that this restriction was unjustified, and that he should be free to supplement or alter his claim whenever he so desired. It was noted that, as it was in the interest of the claimant that the arbitration proceed expeditiously, he would in all likelihood exercise his right to supplement or amend his claim sparingly, and only when it was clearly necessary to do so.

126. It was stated in reply, however, that some control over the power of the claimant in this regard was desirable, and that the arbitrators were the most suitable persons to exercise such control. The claimant should be prevented from misusing this power with a view to obstructing the course of the arbitral proceedings, either by making frequent changes in his position as set out in the statement of claim, or by making frivolous or vexatious amendments. It was therefore argued that the power of the arbitrators to disallow amendments of the claim should be retained.

(b) *Meaning of certain terms*

127. It was noted that the possible amendments of the claim were described in the paragraph in terms of the claim being "supplemented" or "altered". It was observed that the distinction between these terms was not clear, since a claim which had been "supplemented" might be thought also to have been "altered". It was also pointed out that the term "supplemented" suggested that the claim was in some way being increased,

whereas the alteration might consist in a reduction of the claim. It was therefore suggested that the single term "modification" might be employed to embrace both these terms.

128. A statement was made by the Secretariat that the word "supplemented" was intended to denote a minor modification not involving the scope of the claim, while the term "altered" was intended to denote a substantive modification involving the scope of the claim.

129. It was suggested that the desirability of maintaining the present terminology should be reconsidered.

(c) *Permissible scope of amendment*

130. The question of the permissible scope of an amendment of a claim was considered. The view was expressed that no amendment should be permitted which would introduce a claim falling outside the scope of the arbitration agreement.

131. The question of the possible addition of a new claim, or the amendment of the scope of an existing claim, was also considered. It was noted that, in some circumstances, it might be permissible to allow the claimant to amend the claim as regards certain of its particulars, for example, regarding principal and interest, or amount of damages. Such an amendment would not affect the substance of the claim originally made. It should, however, not be permissible to add a claim falling outside the scope of that originally made, that is, outside the subject-matter of the dispute, or to alter the substance of the claim originally made so that it became in effect a new claim.

(d) *The costs occasioned by amendment*

132. It was suggested that, where an amendment of a claim resulted in expense to the other party, for example, in that he had to prepare a new defence, the claimant should be required to bear such expense as costs unless the arbitrators decided otherwise.

Relationship of this article with article 3

133. The consideration of this question has been set forth in the account of the deliberations in regard to article 3.

ARTICLE 17

"1. Within a period to be determined by the arbitrators, the respondent shall communicate in writing, a statement of defence to each of the arbitrators and to the claimant.

"2. In his statement of defence, the respondent may make a counter-claim arising out of the same contract. The provisions of article 16 with respect to the claim also apply to the counter-claim."

SUMMARY OF DISCUSSION

Paragraph 1

134. It was noted that this paragraph did not describe the particulars that needed to be included in the statement of defence. It was desirable that the statement of defence should not be a very brief one, but should include some or all of the particulars required by article 16, paragraph 2, to be included in the statement of claim. It was suggested that, if this objective were sought to be achieved through the second sentence of paragraph 2 of this article, making the provisions of article 16, paragraph 2, applicable to the statement of defence, this might be further clarified by an appropriate modification of the paragraph.

Paragraph 2

135. It was observed that the first sentence of this paragraph was open to the construction that a counter-claim could only be made in the statement of defence, and not at a later stage. It was suggested that a limitation of this kind was undesirable, and that the language should be modified to make it clear that, in appropriate circumstances, a counter-claim could be made even after the statement of defence had been communicated.

136. It was also observed that the counter-claim had to fall within the scope of the arbitration agreement under which the claim was made. The case was considered where there was a

series of separate contracts arising out of the same transaction between the same parties, each of which contained an arbitral clause in identical terms. If a claim were made under one of those contracts by a party, the question was raised whether it would be permissible to regard a claim made at or about the same time by the other party under a separate contract in the series as a counter-claim in terms of this paragraph. It was suggested that provision should be made permitting such a claim to be regarded as a counter-claim and, to achieve this purpose, the words "same contract" might be replaced by the words "same transaction".

137. A statement was made on behalf of the Secretariat that it was not intended that a claim of the type referred to in paragraph 136 was to be regarded as a counter-claim. It was pointed out by the Secretariat, however, that it would be normal arbitral practice in such a case to consolidate the hearings of the two claims. In this context, it was observed that it would be desirable that the Rules should contain provisions relating to the consolidation of hearings in appropriate cases.

138. It was observed that the same principles which would apply to regulate the amendment of claim should also apply to regulate the amendment of a counter-claim. The consideration of the questions relating to the amendment of the claim is set forth above in the account of the deliberations in regard to article 16.

139. It was noted that the paragraph referred only to a counter-claim by the respondent, but not to a plea of set-off raised by him. It was suggested that the wording of the paragraph should be modified to include both concepts.

140. During the consideration of the scope of article 1, it had been suggested that the word "contract" should be replaced by a phrase such as "defined legal relationship". If this modification were adopted, it was observed that the reference in the paragraph to "the same contract" might need to be replaced by a reference to the new phrase. It was also suggested that the addition to article 17 of the formulation used in article 16 of the Convention on the Limitation Period in the International Sale of Goods might be considered.

ARTICLE 18

"1. The arbitrators shall be the judges of their own competence and shall rule on objections that the dispute is not within their jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

"2. An objection to the competence of the arbitrators shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim. Where delay in raising a plea of incompetence is justified under the circumstances, the arbitrators may declare the plea admissible.

"3. The arbitrators may rule on such an objection as a preliminary question or they may proceed with the arbitration and rule on such objection in their final award.

"4. The arbitrators have jurisdiction to determine the existence or the validity of the contract of which an arbitration clause forms a part."

SUMMARY OF DISCUSSION

Paragraph 1

141. The view was expressed that the rule as now stated in paragraph 1 could mislead parties, because questions as to the competence and jurisdiction of arbitrators were ultimately a matter for the courts to settle in accordance with the *lex fori*. Since the rule in its present wording might thus mislead the parties and might even be in conflict with some national laws, it was suggested by some representatives that the provision should be deleted. Similar objections were raised as to the power which paragraph 1 granted to the arbitrators to rule on "objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement".

142. The prevailing view, however, was that the rule as set forth in paragraph 1 corresponded to modern arbitral practice and should be retained, subject to the insertion in the text of the article or in the commentary of a statement drawing the attention of the parties to the fact that the question of the competence and jurisdiction of the arbitrators remained subject to the applicable municipal law. It was also observed that the meaning of the term "competence" appearing in paragraphs 1 and 2 of this article, of the term "jurisdiction" appearing in paragraphs 2 and 4 thereof, and of the phrase "existence or validity of the contract" appearing in paragraph 4 thereof, might need clarification, since the term "competence" might include the others within its meaning.

Paragraph 2

143. There was general support for the rules set forth in paragraph 2. It was observed however, that provision should be made making it possible in appropriate cases to raise an objection to the competence of the arbitrators later than the statement of defence or the reply to the counter-claim; for example, if the objection were based on newly discovered facts. In this connexion, it was stated that this possibility was probably covered by the second sentence of paragraph 2, according to which the arbitrators might declare a delayed plea of incompetence admissible if the delay in raising the plea were justified under the circumstances.

144. Attention was drawn to the fact that the commentary to paragraph 2 stated that it did not seem necessary for the Rules to deal with objections that the arbitrators had exceeded their terms of reference. It was observed that the reason for such omission might have been the view taken by the authors of the Rules that paragraph 1 of article 18 covered this case. However, this interpretation of paragraph 1 was not self-evident and it was, therefore, suggested that the article should specifically deal with the case where such objections were made.

Paragraph 3

145. Under the present wording of paragraph 3, the arbitrators may rule on pleas regarding competence and jurisdiction as a preliminary question. The view was expressed that the plea regarding jurisdiction should in general be ruled on as a preliminary question, since such a ruling would affect the status of the arbitration itself. Under another view, however, this was a procedural question which should be left for the arbitrators to decide, and the present wording of paragraph 3 should therefore be maintained.

Paragraph 4

146. It was suggested that the provisions of paragraph 4 should be redrafted to make it clear, as stated in the commentary, that the validity of the arbitration clause did not depend on the validity of the contract. Hence, the validity of the arbitration clause would not be affected by a decision by the arbitrators that the contract itself was null and void.

147. The view was also expressed that paragraph 4 should be deleted or should be merged with paragraph 1.

ARTICLE 19

"1. Arbitrators shall decide what further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them, and shall fix the periods for presenting such statements. However, if the parties agree on a further exchange of written statements, the arbitrators shall receive such statements.

"2. If a counter-claim is raised in the statement of defence, the arbitrators shall afford the claimant an opportunity to present a written reply to this claim.

"3. At any time during the arbitral proceedings the arbitrators may require the parties to produce supplementary documents or exhibits within such a period as they shall determine."

SUMMARY OF DISCUSSION

Paragraph 1

148. There was general agreement that the provisions of this paragraph were acceptable.

Paragraph 2

149. It was suggested that, where a counter-claim was raised in the statement of defence and the claimant replied, the respondent should be given the right to answer (*duplique*).

Paragraph 3

150. There was general agreement that the provisions of this paragraph were acceptable.

ARTICLE 20

"1. The periods of time allowed by the arbitrators for the communication of written statements should, as a rule, not exceed 30 days.

"2. The parties may agree to extend the various time limits laid down in Section III of the Rules. In the absence of such agreement, the arbitrators shall be entitled to extend the time-limits if they conclude that an extension is justified."

SUMMARY OF DISCUSSION

151. There was general agreement that the provisions of this article were acceptable. In respect of paragraph 1, however, it was suggested that the time-limit of 30 days, within which written statements must be submitted, was too short and should be extended.

ARTICLE 21

"1. In the event of an oral hearing, the arbitrators shall give the parties adequate advance notice thereof.

"2. If witnesses are to be heard, at least 15 days before the hearing each party shall communicate to the arbitrators and to the other party the names and addresses of the witnesses he intends to call and the language in which such witnesses will give their testimony.

"3. The arbitrators shall make arrangements for interpretation of oral statements made at a hearing and for a stenographic record of the hearing if either is deemed necessary by the arbitrators under the circumstances of the case or if the parties have agreed thereto and have notified the arbitrators of such agreement at least 15 days before the hearing.

"4. Hearings shall be held *in camera* unless the parties agree otherwise. The arbitrators may decide whether persons other than the parties and their counsel or agent may be present at the hearing. The arbitrators may require the retirement of any witness or witnesses during the testimony of other witnesses. Arbitrators are free to determine the manner in which witnesses are interrogated.

"5. Arbitrators shall determine the relevancy and materiality of the evidence offered. Conformity to legal rules of evidence shall not be necessary."

SUMMARY OF DISCUSSION

Paragraph 1

152. There was general agreement that the provisions of this paragraph were acceptable.

Paragraph 2

153. It was noted that under this paragraph each party was bound to communicate to the other the names of the witnesses he intended "to call". It was observed that the words "to call" might suggest that the parties had the power to order the issue of compulsory summonses for the appearance of witnesses at a hearing of an arbitral tribunal. It was observed, however, that the parties could not issue such a summons without the assistance of a judicial tribunal, and that for this reason the appropriateness of the words "to call" might be reconsidered.

154. In regard to the question as to whether parties should have the power to issue enforceable summonses, it was suggested that this should be left to be decided by the applicable municipal law.

Paragraph 3

155. There was general agreement that the provisions of the paragraph were acceptable.

Paragraph 4

156. It was noted that the second sentence of this paragraph gave the arbitrators the power to permit persons other than the parties and their counsel or agent to be present at a hearing irrespective of the wishes of the parties. It was stated on behalf of the Secretariat that what was intended was that persons other than the parties and their counsel or agent should be permitted to be present only in exceptional circumstances, and then only with the consent of the parties. There was wide agreement that the language of this sentence should be modified to reflect the intention underlying the drafting of the sentence.

157. It was observed that, at the Fifth International Arbitration Congress, it had been suggested that provision should be made for flexibility in the manner in which evidence was presented at arbitral hearings. It had been suggested that it would often save time and expense if the evidence of witnesses could be presented in the form of written statements. Such written statements could be either sworn or unsworn statements. In this connexion, it had been suggested (A/CN.9/97/Add.2, para. 19) that the following might be added as a new paragraph after paragraph 4: "Evidence of witnesses may also be presented in the form of written statements."

158. It was noted that the last sentence of paragraph 4 gave freedom to the arbitrators to determine the manner in which witnesses were interrogated. It was pointed out that the customary methods of interrogation varied under different legal systems. It was suggested that it would be inadvisable to adopt in the Rules any one of these methods. If the method of interrogation were not mandatorily regulated by the applicable municipal law, the arbitrators should be left free to devise a pragmatic solution which would best serve the needs of the arbitration in question.

Paragraph 5

159. It was noted that, while the second sentence of this paragraph stated that conformity to legal rules of evidence shall not be necessary, this position might be contrary to the applicable municipal law. It was observed in reply that some systems of law gave the arbitrators a discretion as to whether to adopt the legal rules of evidence or not, and that the provision might be given effect under such systems. The prevailing view, however, was that, since in any event the need to conform with the legal rules of evidence depended on the applicable municipal law, this sentence might be deleted.

160. It was observed that, if the second sentence of paragraph 5 were deleted, the scope of the first sentence might need to be widened, since issues additional to those of relevancy and materiality specified therein would arise, for example, under the common law rules of evidence.

ARTICLE 22

"The arbitrators may take any interim measures they deem necessary in respect of the subject matter of the dispute, including measures for the conservation of the goods forming the subject matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods."

SUMMARY OF DISCUSSION

161. At the beginning of the consideration of this article, it was stated on behalf of the Secretariat that the suggestion had been made at the Fifth International Arbitration Congress that the following words should be added to the article: "Such interim measures may be established in the form of an interim award" (A/CN.9/97/Add.2, para. 20).

162. The relationship between the power given by the article to the arbitrators to take interim measures and the possible need to seek the assistance of judicial tribunals for the taking of such measures, was examined. It was noted that the different systems of law varied as to the extent to which arbitrators might be permitted to take such measures independently of judicial tribunals. It was suggested that, since judicial tribunals would always have the power to take interim measures, it might be simpler to provide that parties should apply to the appropriate judicial tribunals, rather than to the arbitrators, for the taking of such measures. In this connexion, attention was drawn to article VI, paragraph 4, of the European Convention on International Commercial Arbitration, done at Geneva, 21 April 1961,⁸ which reads as follows:

"4. A request for interim measures or measures of conservation addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement, or regarded as a submission of the substance of the case to the court."

163. It was observed that a practical solution would be to make separate provision for two distinct situations. Where the parties had agreed to the interim measures to be taken by the arbitrators, and there was no need for the enforcement of such measures, the assistance of judicial tribunals would be unnecessary. If, however, the interim measures to be taken had to be enforced, it would be necessary to seek the assistance of judicial tribunals, and provision should be made for this in the Rules.

164. It was noted that the article in its present form conferred a power on the arbitrators to take interim measures independently of the wishes of the parties. It was suggested by some representatives that it would be desirable to modify the article so that this power could only be exercised at the request of both parties, or at least at the request of one party, and, if possible, after the other party had had an opportunity of being heard.

165. A suggestion was made that the arbitrators might be authorized to take interim measures, which would consist of requiring one of the parties to take some action in relation to the goods forming the subject-matter in dispute; for example, depositing the goods with a third party. It was observed, however, that interim measures taken in this manner would be ineffective if the party in question failed to comply with the requirement.

166. It was also suggested that consideration might be given to the possible addition of a provision to the article securing the payment to the arbitrators by the parties of any costs which might arise from the necessary interim measures taken by the arbitrators.

ARTICLE 23

"1. The arbitrators may appoint one or more experts to report to them, in writing, on specific issues to be determined by the arbitrators. A copy of the expert's terms of reference, established by the arbitrators, shall be communicated to the parties.

"2. The parties shall give the expert any relevant information he may require of them. Any dispute between a party and such expert as to the relevance of any required information shall be referred to the arbitrators for decision.

"3. Upon receipt of the expert's report, the arbitrators shall transmit a copy of the report to the parties who shall be given an opportunity to express, in writing, their opinion of the report.

"4. On request of either party the expert, after delivery of the report, may be heard in a hearing where the parties and their counsel or agent are present and may interrogate the expert. At this hearing either party may bring expert witnesses in order to testify on the points at issue. The provisions of article 21 are applicable to such proceedings."

⁸ United Nations, *Treaty Series*, vol. 484, No. 7041.

SUMMARY OF DISCUSSION

Paragraph 1

167. It was noted that this paragraph only provided for the appointment of experts by the arbitrators. It was observed that the parties might also wish to appoint experts for the purposes set out in the paragraph. It was explained on behalf of the Secretariat that the draft Rules contemplated that, where parties wished to present the views of experts, they would be called as witnesses under the provisions of article 21. It was thereupon suggested that specific reference should be made in article 21 to the fact that a party could call an expert as a witness, since under certain legal systems experts could not be called as witnesses by the parties.

168. It was noted that, if provision were made for the appointment of experts by the parties, the relationship of the evidence of such experts to that of experts appointed by the arbitrators might need to be clarified.

169. It was noted that the first paragraph of the commentary to this article appeared to contemplate the appointment of experts on questions of law. It was observed that, while arbitrators were free to seek the assistance of experts in the matter, the actual determination on questions of law had to be made by the arbitrators.

Paragraphs 2, 3 and 4

170. There was general agreement that, subject to the observations made in relation to paragraph 1, the provisions of these paragraphs were acceptable.

ARTICLE 24

"1. If the respondent, after having been duly notified, fails to submit his statement of defence, or if either party fails to appear at a hearing properly called under these Rules, without showing sufficient cause for such failure, the arbitrators may proceed with the arbitration and may render an award as if all parties were present.

"2. If either party, after having been duly notified, fails, without sufficient cause, to submit documentary evidence when an award is to be rendered on the basis of such evidence without an oral hearing, then the arbitrators may render their award on the evidence before them."

SUMMARY OF DISCUSSION

Paragraph 1

171. It was noted that this article only made provision for the case where one of the parties failed to appear at a hearing properly called under the Rules, without showing cause for such failure. It was observed that the case might arise where both parties failed to appear.

172. It was stated on behalf of the Secretariat that a practical solution which would normally be adopted in such circumstances would be for the arbitrators to call a second hearing; if both parties failed to appear again, the arbitral proceedings would normally be terminated. It was suggested by one representative that, although paragraph 2 of the commentary to this article stated that it did not seem necessary to do so, express provision should be made for the case where the claimant does not present his statement of claim.

Paragraph 2

173. There was general agreement that the provisions of this article were acceptable.

ARTICLE 25

"Any party who knows or should know that any provision or requirement of these Rules has not been complied with and proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object."

SUMMARY OF DISCUSSION

174. There was general agreement that the provisions of this article were acceptable.

175. It was noted that the French and English texts of this article should be harmonized.

ARTICLE 26

"1. The award shall be binding upon the parties. The award shall be made in writing and shall contain reasons, unless both parties have expressly agreed that no reasons are to be given.

"2. The award by an arbitral tribunal shall be determined by a majority of arbitrators.

"3. The award shall be signed by the arbitrators. Where there are three arbitrators, the failure of one arbitrator to sign the award shall not impair the enforceability of the award. The award shall state the reason for the absence of an arbitrator's signature, but shall not include any dissenting opinion.

"4. The award may only be published with the consent of both parties.

"5. Copies of the award duly signed by the arbitrators shall be transmitted to the parties by the arbitrators. If the arbitration is administered by an arbitral institution (article 2), a signed copy of the award shall also be transmitted to the arbitral institution.

"6. If the arbitration law of the country where the award is rendered requires that the award be filed or registered, the arbitrators shall comply with this requirement within the time required by law."

SUMMARY OF DISCUSSION

Paragraphs 1 and 2

176. There was general agreement that the provisions of these paragraphs were acceptable.

Paragraph 3

177. In relation to the second sentence of this paragraph, which states that the failure of one arbitrator to sign the award shall not impair its enforceability, a suggestion was made, where a tribunal consisted of three arbitrators, the award should not be enforceable unless the presiding arbitrator had signed it. It was suggested that the crucial position occupied by the presiding arbitrator on the arbitral tribunal should lead to this result. Most representatives, however, were satisfied with the rule as at present formulated.

178. It was observed that the rule contained in the second sentence of paragraph 3 might also conflict with certain national laws, under which an award was not enforceable unless signed by all the arbitrators. It was suggested that the attention of the parties might be drawn in the commentary to this possibility of conflict.

179. Divergent views were expressed on the question as to whether the arbitrator should be entitled to include a dissenting opinion in the award. On the one hand, several representatives suggested that a dissenting opinion might be instructive and that therefore its inclusion in the award should be permitted. It was also suggested that the principle of fairness demanded that a dissenting arbitrator should be entitled to express his dissent in the award. On the other hand, some representatives observed that the inclusion of dissenting opinions was undesirable. A provision that an arbitrator was entitled to include a dissenting opinion in the award might put pressure on an arbitrator to express in the form of a dissenting opinion his support for the party nominating him.

180. The view was also expressed that the absence of the signature of an arbitrator did not necessarily mean that the arbitrator who had not signed the award had dissented from it. The failure to sign might, for example, be due to the absence of the arbitrator when the award was delivered, or to his death prior to the rendering of it. It was also suggested

that consideration be given to the substitution of another term for the word "enforceability" appearing in this paragraph, since that word might give rise to a misunderstanding.

Paragraph 4

181. There was general agreement that the provisions of this paragraph were acceptable.

Paragraph 5

182. It was noted that paragraph 4 of the commentary to this article stated that the term "award" is meant to include interim, interlocutory or partial awards, as well as final awards. A suggestion was made to the effect that a definition of an award in the sense indicated in the commentary might be desirable and could be included in the text of this paragraph or at some other point within the article. Such a definition might also facilitate the enforcement of awards, since there would be certainty as to what decisions of arbitrators could be classed as "awards".

Paragraph 6

183. It was noted that the paragraph only imposed an obligation on the arbitrators to file or register an award if the arbitration law of the country where the award is rendered requires such filing or registration. It was observed that, if the country where the award was to be enforced was known at the time the award was rendered, and the law of such country required filing or registration, it would be desirable that the arbitrators file or register the award in the latter country as well. It was suggested that a reference to such desirability might be included in the commentary.

184. It was suggested that the paragraph should be modified to make it clear that the obligation imposed on the arbitrators to file or register the award, if the arbitration law of the country where the award is rendered requires it should only arise where the law of the country in which the award is rendered requires that this be done by the arbitrators themselves, as distinct from, for example, requiring that it be done by the parties. Another suggestion was that the obligation to file the award should only be imposed on the presiding arbitrator.

ARTICLE 27

"1. The arbitrators shall apply the law expressly designated by the parties as applicable to their contract.

"2. Failing such designation by the parties, the arbitrators shall apply the law determined by the conflict of laws rules that the arbitrators deem applicable.

"3. The arbitrators shall decide *ex aequo et bono* (as "amiable compositeurs") if the parties have authorized the arbitrators to do so and the arbitration law of the country where the award is rendered permits such arbitration.

"4. In any case, the arbitrators shall take into account the terms of the contract and the usages of the trade."

Paragraph 1

185. There was general agreement with this paragraph in so far as it was based on the principle of the autonomy of the parties. Views differed, however, as to whether this autonomy was, as in some jurisdictions, absolute or whether, as in other jurisdictions, it was limited in that the law chosen by the parties had to have some connexion with the transaction. In this context, it was observed that paragraph 1 erroneously referred to the law expressly designated by the parties as applicable to their contract. The prevailing view was that the paragraph should be modified to indicate that parties could designate the law to be applied by the arbitrators to the substance of their dispute.

186. The following further suggestions were made to improve the wording of paragraph 1:

(a) The word "expressly" should be deleted on the ground that, in the absence of an express designation, the choice of law might result from the contract itself. In this connexion, it was observed that the designation of the law by the parties could be either express, implied, presumptive or hypothetical.

(b) The words "expressly designated by the parties" should be replaced by the words "agreed to by the parties" or "determined or clearly indicated by the parties".

(c) Paragraph 1 should be redrafted on the lines of article 2 of The Hague Convention on the Law Applicable to International Sales of Goods of 15 June 1955,^h as follows:

"The arbitrators shall apply the law designated by the parties . . . Such designation must be contained in an express clause, or unambiguously result from the terms of the contract."

(d) Paragraph 1 should follow the wording of article VII of the European Convention on International Commercial Arbitration, done at Geneva on 21 April 1961, as follows: "The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute."

(e) It should be made clear in the text that the parties could not only designate "the law" to be applied by the arbitrators, but also "rules"; often parties did not refer to a law, but to general conditions, or even to a legal text (*projet de loi*) which had not yet entered into force.

187. It was further observed that paragraph 1 should be reworded so as to make it clear that the provision only referred to the law applicable to the substance of the dispute and not also to arbitral procedure.

Paragraph 2

188. It was generally agreed that, in the absence of a designation by the parties of the law applicable to the substance of the dispute, reference by the arbitrators to conflict of laws rules was inevitable. It was observed that, in this respect, arbitrators should not have the same freedom that the parties have. The view was expressed that it would be desirable if paragraph 2 set forth an objective element that would direct the arbitrators as to the conflict of laws rules they should apply for the purpose of determining the law applicable to the substance of the dispute. In this connexion, several possibilities were mentioned: the conflict of laws rules of the place of arbitration; of the place of business of the claimant; of the place of business of the respondent; and of the place of enforcement. As to the suggestion that the place of enforcement should be the determinant factor, it was objected that the country in which the award would be enforced by the successful party was not always known in advance, and some disputes only involved the interpretation of the contract.

189. A suggestion was made that the paragraph should be modified to read as follows: "Failing such designation by the parties, the arbitrators shall apply the law indicated by the conflict rules that appear to the arbitrators to be applicable."

190. It was further suggested that paragraphs 2 and 4 of article 27 should be merged, by adding to the present words of paragraph 2 the following phrase: ". . . taking into account the terms of the contract and the usages of trade".

Paragraph 3

191. Opinions were divided concerning the retention of paragraph 3. It was observed that "*ex aequo et bono*" arbitration was not permitted under the law of several countries and that, therefore, the provision in paragraph 3 should be modified to make it clear that the rule was subject to the applicable municipal law; the present wording was apt to mislead parties.

192. It was suggested that the phrase at the end of paragraph 3, which reads "and the arbitration law of the country where the award is rendered permits such arbitration", should be deleted. It was also suggested that this phrase should be replaced by the following: "and the decision is not repugnant to the law of the country where the award is rendered".

Paragraph 4

193. The prevailing view was that, in view of the importance of trade usages as a source of law, this paragraph should be retained. The view was expressed that article 27 should establish the following order of importance in regard to the legal

rules to be applied by the arbitrators: mandatory provisions of the law governing the substance of the dispute, the express terms of the contract and trade usages.

Settlement

ARTICLE 28

"1. If, before the award is rendered, the parties agree on a settlement of the dispute, the arbitrators shall either issue an order for the discontinuance of the arbitral proceedings or, if requested by both parties and accepted by the arbitrators, record the settlement in the form of an arbitral award on agreed terms. The arbitrators are not obliged to give reasons for such an award.

"2. The arbitrators shall, in the order for the discontinuance of the arbitral proceedings or in the arbitral award on agreed terms, fix the costs of the arbitration as specified under article 31. Unless otherwise agreed to by the parties, these costs shall be borne equally by both parties.

"3. Copies of the order for discontinuance of the arbitral proceedings or of the arbitral award on agreed terms, duly signed by the arbitrators, shall be transmitted by the arbitrators to the parties and if the arbitration is administered by an arbitral institution to that institution."

Paragraph 1

194. It was observed that, under this paragraph, arbitrators were obliged to record in the form of an arbitral award a settlement of a dispute agreed on by the parties only if the request of both parties to this effect were accepted by the arbitrators. It was argued that, when such a request was made by both parties, the arbitrators should have no power to refuse to record the settlement in the form of an award, since in that event the parties were entitled to have their wishes prevail. However, most representatives were of the view that the discretion currently given in this regard to the arbitrators was useful and should be retained, as the settlement agreed on by the parties might be unlawful or contrary to public policy.

195. One representative suggested that, as a compromise, the paragraph might be retained in its present form, but that a new paragraph might be added to read as follows:

"If the arbitrators are of the view that the settlement will be contrary to mandatory rules of law on public policy in commercial matters, they shall refuse to record the settlement in the form of an arbitral award. In such a case the arbitrators shall limit themselves to the issue of an order for the discontinuance of the arbitral proceedings."

196. It was noted that a discontinuance of the arbitral proceedings might be caused by circumstances other than the agreement by parties on a settlement. It was suggested that the ambit of the article should therefore be widened so as to include suitable provisions in regard to discontinuance when caused by such other circumstances. It was further suggested that, in some of these circumstances, such as when a respondent decided during the course of the arbitral proceedings that the claim was well founded, it might be desirable to make provision for the recording of an arbitral award, so that the time and effort already invested in the proceedings would not be wasted.

197. It was pointed out that the phrase "*orden de suspensión*" used in the Spanish language version might be inappropriate as a translation of the French phrase "*ordonnance de clôture*".

Paragraph 2

198. The rule stated in the second sentence of this paragraph to the effect that, unless otherwise agreed to by the parties, the costs of the arbitration shall be borne equally by both parties, was considered. It was suggested that such a rule might not be appropriate in every case of a settlement, and that other principles for apportioning costs, such as apportionment on the basis of the proportion between the amount agreed to in the settlement and the sum claimed in the statement of claim, should also be considered. It was observed by most representatives, however, that no single principle would be appropriate

^h United Nations, *Treaty Series*, vol. 510, No. 7411.

for all cases and that the best rule to be adopted might be one which left the matter to the discretion of the arbitrators.

Paragraph 3

199. It was observed that the issue of the need for conformity of the Rules with the applicable law had already been considered in the context of other articles and it was noted, in this connexion, that the procedural steps required under this paragraph might have to conform to the applicable municipal law.

Interpretation of the award

ARTICLE 29

"1. Within 30 days after the communication of the award to the parties, either party, with notice to the other party, may request that the arbitrators give an official interpretation of the award, which will be binding upon the parties.

"2. Such an interpretation shall be given in writing and duly signed by the arbitrators within 45 days after receipt of the request and shall be transmitted by the arbitrators to both parties and, if the arbitration is administered by an arbitral institution, to that institution."

Paragraph 1

200. The view was expressed that the meaning of the adjective "official" used to qualify the phrase "interpretation of the award" was not clear, and that the word did not serve a useful purpose. It was accordingly suggested that it might be deleted. The suggestion was also made that substitution of the adjective "authentic" for the adjective "official" might be considered.

201. It was stated that the meaning to be given to the word "interpretation" in the phrase quoted above was not clear. In reply, it was suggested that the word was intended to bear the meaning "clarification", and that the latter word might therefore be substituted for it.

202. It was suggested that the time-limit of 30 days imposed by the paragraph within which a request for interpretation might be made should be deleted. It was argued in reply, however, that this time-limit was reasonable and should be retained.

Paragraph 2

203. The view was expressed that the requirement in this paragraph as to the signing of the interpretation by the arbitrators should be brought into conformity with the requirements in article 26, paragraph 3, as to the signing of the award.

204. It was suggested that a time-limit should be imposed within which the interpretation should be communicated by the arbitrators to the parties, which would take account of the provisions of article 4.

Article 29 as a whole

205. The view was expressed that the article did not serve a useful purpose and should be deleted. It was suggested that, if the "interpretation" of the award had no legal effect and was intended only as a guide for the parties, the article served no useful purpose. If, however, the "interpretation" was intended to have legal effect, difficulties would arise in relation to its execution; in particular, the question would arise whether such an "interpretation" would fall within the ambit of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958. If the meaning to be attached to "interpretation" in this context was only "clarification", then an appropriate provision might be added to article 30 to enable a party to secure clarification of the award.

206. On the other hand, it was stated that the article was necessary and should be retained. The language chosen for conducting the arbitral proceedings might not be the mother tongue of all the arbitrators, and the language of the award may consequently need clarification. It was necessary to provide a formal procedure enabling the parties to secure clarification of the award where necessary. There would be a special need for such a procedure by reason of the fact that, under certain systems of law, the competence of the arbitrators would

end with the making of the award, unless the parties agreed that the arbitrators were to have competence after the making of the award.

Correction of the award

ARTICLE 30

"1. Within 30 days after the communication of the award to the parties, the arbitrators, on their own initiative or on request of a party, may correct any error in computation, any clerical or typographical error, or any error of similar nature in the award.

"2. Any such correction, in writing and duly signed by the arbitrators, shall be communicated by the arbitrators to the parties and, if the arbitration is administered by an arbitral institution, to that institution.

"3. Within 15 days of the communication of the award to the parties, a party may request the arbitrators to render an additional award as to claims presented in the arbitral proceedings but omitted from the award. A copy of such request shall be sent to the other party. If the arbitrators consider the request justified, they shall complete their award within 60 days of receipt of the request. The additional award shall comply with the provisions of article 26."

Paragraph 1

207. The view was expressed that the time-limit of 30 days imposed by this paragraph, within which the arbitrators might correct errors of the kind specified in the paragraph, should be removed; the arbitrators should be free to correct such errors even after the expiry of the 30 days. It was also suggested, however, that this time-limit should be retained, but made applicable only where a correction was requested by a party.

208. A suggestion was made that the period of 30 days should be specified as commencing not from the communication of the award, but from the day fixed in the award for the performance by the parties of their obligations thereunder.

Paragraph 2

209. There was general agreement that the provisions of this paragraph were acceptable.

Paragraph 3

210. A suggestion was made that the scope of the paragraph might be restricted to claims unintentionally omitted from the award owing to a mistake or to negligence on the part of the arbitrators.

211. It was stated that the time-limit of 15 days provided in this paragraph for requesting the rendering of an additional award was too short; if the paragraph were retained, the period should be 30 days, as in paragraph 1.

212. The view was expressed that the provisions of this paragraph were useful and should be retained; the brackets enclosing it should therefore be deleted. However, it was also stated that the paragraph could be deleted, and that a party aggrieved by an omission in the award should be left free to decide on the action to be taken by him.

Costs

ARTICLE 31¹

"1. The arbitrators shall fix the costs of arbitration in their award. The term 'costs' includes:

Non-administered

"(a) the fee of arbitrators, to be stated separately and to be fixed by the arbitrators themselves;

Administered

"A(a)(i) the fee of arbitrators, to be stated separately and to be fixed by the arbitrators themselves after consultation with the

¹ Article 31 contains provisions in parallel columns, one of which deals with "non-administered" arbitration, and the other with "administered" arbitration. As a consequence of the views expressed by many representatives that "administered" arbitration should be excluded from the scope of the Rules, paragraphs A (a) (i) and A (a) (ii) in the column dealing with "administered" arbitration were not considered.

*Non-administered**Administered*

arbitral institution which may make any comment it deems appropriate concerning the fee suggested by the arbitrators;

"(ii) the costs of administration as declared by the arbitral institution;

"(b) the travel and other expenses incurred by the arbitrators;

"(c) the costs of expert advice and of other assistance required by the arbitrators;

"(d) the travel expenses of witnesses, to the extent such expenses are approved by the arbitrators;

"(e) the compensation for legal assistance of the successful party, if the arbitrators deem that legal assistance was necessary under the circumstances of the case and if such compensation was claimed during the arbitral proceedings, and only to the extent that the compensation is deemed reasonable and appropriate by the arbitrators.

"2. The costs of arbitration shall, in general, be borne by the unsuccessful party. The arbitrators may, however, apportion the costs between the parties."

Paragraph 1

213. There was general agreement that the provision contained in the first sentence of this paragraph was acceptable.

Subparagraph (a)

214. In regard to the provision in this subparagraph which empowered the arbitrators themselves to fix their fees, the view was expressed that there should be some limitation on this power. It was suggested that the article should set out a scale of fees for arbitrators, which would, *inter alia*, impose a ceiling on the fees payable. It was also pointed out that different factors, for example, the amount in dispute in the arbitration and the duration of the arbitration, might need to be taken into account in determining the ceiling on the fees.

215. In a case where the parties had agreed on the designation of an appointing authority for the appointment of arbitrators, it was proposed that a provision should be added to this subparagraph requiring consultation between the arbitrators and such appointing authority on the subject of the fees of the arbitrators.

Subparagraphs (b), (c) and (d)

216. There was general agreement that the provisions contained in these subparagraphs were acceptable.

Subparagraph (e)

217. It was noted that, under this subparagraph, the term "costs" included compensation for legal assistance of the successful party only if, *inter alia*, "the arbitrators deem that legal assistance was necessary under the circumstances of the case". The view was expressed by several representatives that the question whether legal assistance was necessary for a party under the circumstances of the case was a matter which should be left exclusively to the judgement of that party, and that the opinion of the arbitrators on this issue should be regarded as irrelevant in the awarding of costs in respect of such assistance. It was suggested, therefore, that the words "if the arbitrators deem that legal assistance was necessary under the circumstances of the case" should be deleted.

218. It was also noted that, under certain legal systems, each party bore the expenses of legal assistance obtained by it, and a party was required to pay compensation for the legal expenses of the other party only where the former party was a claimant who had made a frivolous claim in bad faith, or a respondent who had used dilatory tactics or had set up a frivolous defence. A suggestion was made that this system of apportionment might be adopted in regard to the costs of legal assistance.

Paragraph 2

219. It was proposed that the rule contained in this paragraph that the costs of arbitrators shall, in general, be borne by the unsuccessful party should be stated in unqualified terms, and that the words "in general" appearing in the first sentence should therefore be deleted. The view was also expressed, however, that, while the words "in general" might be regarded as inappropriate, the rule should not be stated in unqualified terms, but that other language such as "ordinarily", or "in principle" should be inserted at an appropriate point in the sentence, in order to safeguard the right of arbitrators to apportion costs on a different basis if there were good reasons for doing so.

220. It was observed that any possible interrelationship between the rule on the apportionment of costs contained in this paragraph and that contained in article 28, paragraph 2, should be examined.

221. It was also observed that, during the consideration of article 16, paragraph 3, the proposal had been made that the costs occasioned to the other party by supplementing or altering a claim should be borne by the claimant. It was suggested that, if this proposal were adopted, a suitable provision giving effect to it might be inserted in this paragraph.

Article 31 as a whole

222. A suggestion was made that this article needed to be supplemented by an additional article laying down rules with respect to certain questions related to the ones dealt with herein. Such rules might, for instance, require arbitrators to keep the expenses of the arbitration to a minimum, or state that arbitrators should not be entitled to additional remuneration if they interpreted the award, or corrected mistakes in it.

*Deposit of costs*ARTICLE 32¹*Non-administered**Administered*

"1. Arbitrators, on their appointment, may require each party to deposit an equal amount as an advance for the costs of arbitration.

"2. During the course of the arbitral proceedings, the arbitrators may require supplementary deposits from the parties.

"3. If the required deposits are not paid in full within 30 days, the arbitrators shall notify the parties of the default and give an opportunity to either party to make the required payment.

"4. The arbitrators shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties."

"1A. The arbitral institution may require, after consultation with the arbitrators, that each party deposit an equal amount as an advance for the costs of arbitration.

"2A. During the course of the arbitral proceedings, the arbitral institution may require supplementary deposits from the parties if requested to do so by the arbitrators.

"3A. If the required deposits are not paid in full within 30 days, the arbitral institution shall notify both the arbitrators and the parties of the default and give an opportunity to either party to make the required payment.

"4A. The arbitral institution shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties."

¹ Article 32 contains provisions in parallel columns, one of which deals with "non-administered" arbitration, and the other with "administered" arbitration. As a consequence of the views expressed by many representatives that "administered" arbitration should be excluded from the scope of the Rules, paragraphs 1A, 2A, 3A and 4A in the column dealing with "administered" arbitration were not considered.

Paragraphs 1 and 2

223. There was general agreement that the provisions of these paragraphs were acceptable.

Paragraph 3

224. It was observed that, according to the commentary to the article, this paragraph was intended to give a party an opportunity to make the deposit of the other party, who had failed to make payment when required under paragraphs 1 or 2. It was suggested that in certain language versions the text may need to be revised to clarify the meaning.

225. The question was raised as to the effect of a failure by one or more of the parties to make a deposit when required

to do so. It was observed in reply that arbitrators were engaged under a contract of service, a term of which would be that the deposits in question were to be made. If such deposits were not forthcoming, the arbitrators would be entitled not to perform their contract.

ANNEX II

List of documents before the Commission

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

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

<i>Title or description</i>	<i>Document reference</i>
Provisional agenda, notes on the provisional agenda, and tentative schedule of meetings: note by the Secretary-General	A/CN.9/108
International payments; study on security interests: note by the Secretariat	ST/LEG/11*
Symposium on international trade law	A/CN.9/VIII/CRP.2
Future work; legal interest rate for bills of exchange, promissory notes and for cheques: note by the Austrian delegation	A/CN.9/VIII/CRP.3
Draft letter from the Chairman of UNCITRAL to the Chairman of the Commission on Transnational Corporations	A/CN.9/VIII/CRP.4
List of participants	A/CN.9/INF.7 and Add.1
Summary records of the eighth session of the Commission	A/CN.9/SR.151 to 172

* English only.

I. INTERNATIONAL SALE OF GOODS

1. Report of the Working Group on the International Sale of Goods on the work of its sixth session (New York, 27 January-7 February 1975) (A/CN.9/100)*

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* Annexes to this report are reproduced in the present volume as Sections 2 to 5 of this chapter.

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, Czechoslovakia, France, Ghana, Hungary, India, Japan, Kenya, Mexico, Sierra Leone, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and United States of America.

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

3. The Working Group held its sixth session at the Headquarters of the United Nations in New York from 27 January to 7 February 1975. All members of the Working Group were represented except Sierra Leone.

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

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

(a) Provisional agenda and notes (A/CN.9/WG.2/L.2);

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

(c) Comments and proposals of representatives on the revised text of the Uniform Law on the International Sale of Goods as approved or deferred for further consideration by the Working Group at its first five sessions: note by the Secretariat (A/CN.9/WG.2/WP.20).[‡]

(d) Pending questions with respect to the revised text of a uniform law on the international sale of goods: report of the Secretary-General (A/CN.9/WG.2/WP.21 and Add.1 and 2).[§]

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

7. At its first meeting, held on 27 January 1975, the Working Group elected the following officers:

Acting Chairman: Mr. Gyula Eörsi (Hungary)

Rapporteur: Mr. Roland Loewe (Austria).

8. The Working Group adopted the following agenda:

(1) Election of officers

(2) Adoption of the agenda

(3) Provisions of the Uniform Law on the International Sale of Goods deferred by the Working Group for further consideration

(4) Second reading of the revised Uniform Law on the International Sale of Goods

(5) Future work

(6) Adoption of the report of the session.

9. In the discussion on the adoption of the agenda it was decided to proceed article by article through the revised text of the Uniform Law on the International Sale of Goods (ULIS) as it appears in annex I to document A/CN.9/87|| but to discuss matters not in square brackets only if there was substantial support for doing so.

¹ Report of the United Nations Commission on International Trade Law on the work of its second session (1969), *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18* (A/7618); UNCITRAL Yearbook, vol. I: 1968-1970, part two, II, A.

[†] UNCITRAL Yearbook, vol. V: 1974, part two, I, 2.

[‡] Reproduced in this volume, part two, I, 4.

[§] *Ibid.*, part two, I, 3.

|| UNCITRAL Yearbook, vol. V: 1974, part two, I, 1.

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

11. Before proceeding to a discussion of the articles of the revised text of ULIS, the Working Group considered two general questions: (1) whether the articles should be in the form of a uniform law annexed to a convention or whether they should form part of an "integrated" convention, and (2) whether the revised text should include provisions in respect of formation of contracts.

12. As to the first question, the Working Group noted that the rules on the limitation period were cast in the form of an integrated convention. It was also noted that the same content could appear in either a uniform law or in an integrated convention.

13. The Working Group decided to draft the revised text in the form of an integrated convention and set up Drafting Party I, consisting of the representatives of Austria and the United Kingdom and the observer from the Hague Conference on Private International Law, to report to the Working Group on the changes in ULIS which would be necessary to create an integrated convention.

14. The Working Group adopted the recommendation of Drafting Party I that the title be changed to "Convention on the International Sale of Goods". The title of chapter I was changed to "Sphere of application". The present text of article 1, paragraph 3, which provides that "the present Law shall also apply where it has been chosen as the law of the contract by parties" was moved to a new article 3 *bis* and article 5, which provides that "the parties may exclude the application of the present Law or derogate from or vary the effect of any of its provisions" was moved to a new article 3 *ter*. Paragraphs (d) and (e) of article 4 were deleted and they will be considered when the clauses in respect of implementation, and declarations and reservations and the final clauses are considered. The only other changes considered necessary in the substantive part of the Convention were to replace all references to "the present Law", "the Uniform Law" and similar phrases by "this Convention".

15. As to the second question, the Working Group was of the opinion that there should be no attempt to incorporate the provisions on formation of contracts in the Convention.

16. The Working Group also agreed that the formulations in the Convention on the Limitation Period in the International Sale of Goods (A/CONF.63/15)[¶] should be followed to the largest extent possible whenever there was a similar text in the Sales Convention. It was pointed out, however, that the issues arising in limitation and sale of goods are different and that it would not be desirable to adopt the text of the Limitation Convention in the Sales Convention where that would lead to an inappropriate result.

PENDING QUESTIONS

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:

[¶] *Ibid.*, part three, I, B.

"(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."

Subparagraph 1 (b)

17. It was suggested that subparagraph 1 (b) be deleted on the grounds that:

(i) The rules of private international law in some States could lead to the application of the law of one State to the obligations of the buyer and of a different law to the obligations of the seller. It would be difficult in such a situation to know whether under paragraph 1 (b) all of the provisions of the Convention would be applicable to any dispute between the parties or only those provisions relating to the buyer or the seller, as the case may be.

(ii) Subparagraph 1 (b) created the possibility of applying any one of three legal régimes to a contract of sale: the domestic law of the forum, the domestic law of the State of the other party to the contract and the Convention, rather than only two as before.

(iii) If the forum was not in a Contracting State but the rules of private international law of the forum referred the dispute to the substantive law of another State which was a Contracting State, the question would arise whether the forum would feel bound by this subparagraph to apply the Convention rather than the domestic law of the other State.

(iv) Subparagraph 1 (b) had no counterpart in the Limitation Convention.

18. In support of retaining subparagraph 1 (b) it was pointed out that the reason why it had no counterpart in the Limitation Convention was because rules of private international law in matters of the period of limitation were too unsettled and that the current text of article 1 was a compromise reached after long discussion on the earlier text of article 1 of the 1964 ULIS.

19. The Working Group decided to retain subparagraph 1 (b).

Paragraph 2

20. A proposal was made to add the words "and consequently the present Law shall not apply" following the word "disregarded" in paragraph 2. The Working Group was of the opinion that the proposal would make the meaning of the text clearer but that it was nevertheless desirable to keep to the text of the Convention on the Limitation Period (article 2 (b)). Therefore, no changes were made by the Working Group to article 1 and the square brackets were deleted.

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."

Subparagraph 1 (a)

21. The Working Group considered subparagraph 1 (a) which excludes consumer transactions from the scope of the Convention. Three approaches to drafting this subparagraph were suggested: the present text with the bracketed words, the present text with the bracketed words deleted and the text of article 4 (a) of the Limitation Convention.

22. It was observed that the main advantages of adopting the text of the Limitation Convention were its simplicity and the desirability of keeping the two Conventions in harmony. However, it was objected that this was not appropriate to the more complex problems of the law of sales. Moreover, the use of the subjective test in the Limitation Convention was feasible because the determination whether the transaction was an excluded consumer transaction did not need to be made until after a dispute had arisen whereas in the law of sales generally it was important to know from the outset what law applied. The Working Group decided to adopt a text based on the Limitation Convention and set up Drafting Party II consisting of the representatives of France, Hungary and the United States to draft a text.

23. One representative stated that the wording of subparagraph 1 (a) should be as close as possible to the Convention on the Limitation Period.

24. The Working Group considered two texts: the text proposed by Drafting Party II which excluded from the application of the Convention the sale "of goods bought for personal, family or household use if the seller knows or ought to know of the intended use", and a text proposed by an observer which excluded from the Convention the sale "of goods bought for personal, family or household use, unless the seller, at the time of the conclusion of the contract, did not realize and had no reason to realize that the goods were bought for any such use".

25. In the ensuing discussion it was urged that it was important to state that the knowledge of the seller should be at the time of the conclusion of the contract. It was also observed that in some legal systems the use

of the word "if" as used in the text proposed by Working Party II would require the party relying on the "if" clause to prove that which was in the clause. In contrast, the use of the word "unless", as in the text presented by the observer, would put the burden on the seller to prove his knowledge or lack of knowledge of the intended use of the goods.

26. The Working Group adopted the text proposed by the observer. However, several representatives expressed themselves in favour of the text proposed by the Drafting Party subject to certain amendments to meet the points raised in the discussion.

Subparagraph 2 (a)

27. The question was raised whether, by the effect of subparagraph 2 (a), documentary sales of goods were excluded from the convention. The Working Group agreed that they were not intended to be excluded, since documentary sales of goods were a major form of the international commercial sales of goods which the Convention was intended to govern. It was pointed out that there was an ambiguity in the French and Spanish texts which could be read to mean that sales of documents, and therefore documentary sales, were excluded. Nevertheless, the Working Group decided to retain the text in the various languages as it was in order to establish harmony with the Limitation Convention, but with the clear understanding that documentary sales of goods are governed by the Convention.

Subparagraph 2 (b)

28. The Working Group decided to delete the bracketed words in subparagraph 2 (b) in order to use the same language as the Limitation Convention. The discussion focused on the difficulty of distinguishing between registration of ocean vessels and the "administrative" registration of all boats, as is required in some countries. It was finally decided that the exclusion from the Convention of commercial sales of small pleasure craft, which is one of the results of deleting the bracketed words, was necessary in view of the precedent established by the Limitation Convention and the different registration régimes in different countries.

29. The Working Group decided that the structure of article 2 should conform to the structure of the corresponding provisions in article 4 of the Limitations Convention. Therefore, the new text of article 2 contains only one major paragraph listing six categories of sales not governed by the Convention.

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.] . . ."

30. The Working Group decided to replace paragraph 1 of article 3 by paragraph 1 of article 6 of the Convention on the Limitation Period in the International Sale of Goods, which reads as follows:

"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."

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;] . . ."

31. It was agreed to use the language of article 2 (c) of the Limitation Convention in substitution for the above text of subparagraph (a). This article differs from the present text in only minor editorial ways. It reads as follows:

"For the purposes of this Convention: . . .

"(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; . . ."

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."

32. It was suggested that article 8 be deleted on the ground that it was not necessary and that, since what was covered by the Convention was obvious, it was not necessary to say what was not covered. However, the Working Group decided that article 8 served a useful purpose in that it made clear that provisions such as article 57 of the Convention in respect of the determination of a price which is not fixed or determinable are not intended to make valid a contract which would not otherwise be valid under the domestic legislation of one of the Contracting States.

33. It was suggested that the words "in particular" should be deleted as being misleading. However, there was no consensus for deletion and the words were retained.

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.]"

Paragraph 1

34. The Working Group agreed that the parties should be bound by any usage to which they have expressly or impliedly agreed and by any practices which they have established between themselves as provided in paragraph 1.

Paragraph 2

35. However, the question was raised as to what criteria should decide whether the parties had impliedly agreed to a usage, in particular whether the parties had to know specifically of the usage or whether they could be held to a usage of which they were unaware, if it was widely applied. The question was also raised whether, if the parties could be held to a usage of which they were unaware, the usage had to be in the particular trade or whether it was sufficient that the usage was used in international trade generally. Part of the discussion centred on the point at which the will of the parties to incorporate the usage could be implied and at what point it became hypothetical.

36. A different point of view considered usages as a means of imposing the will of the stronger party on the weaker. In this connexion reference was made to the interests of developing States whose merchants had not participated in the development of usages and who might not be aware of them.

Paragraph 3

37. Representatives who opposed a broad definition of implied usages were also opposed to paragraph 3 which provides that in case of conflict between a provision of the uniform law and usages applicable to the contract under paragraph 2, the latter shall prevail. In addition some representatives stated that as a constitutional matter or as a matter of public policy it was unacceptable that usages would take precedence over a statute or a convention.

Paragraph 4

38. The Working Group deleted paragraph 4. Some representatives were of the opinion that it was often difficult to find any meaning which was widely accepted and regularly given to various expressions, provisions and forms of contract which are used in international trade. Other representatives were of the view that the difficulties could be resolved by analogy to the provisions on usages. However, one observer doubted that this solution was adequate and regretted the deletion of this paragraph.

Drafting Party III

39. The Working Group set up Drafting Party III composed of the representatives of the Federal Republic of Germany, Japan and the United States of America to redraft paragraph 2 in the light of the discussion and to

make such changes in paragraph 1 as might be considered necessary.

40. Drafting Party III recommended the following text in replacement of the above text of article 9:

"1. The parties shall be bound by any usage to which they have agreed and by any practices which they have established between themselves.

2. The contract shall be considered, unless otherwise agreed, to include a usage of which the parties knew or had reason to know and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."

41. The Drafting Party recommended the deletion of paragraph 3 of the present text of article 9 on the ground that it was unnecessary. Those usages which were incorporated into the contract under paragraphs 1 and 2 automatically took precedence over the provisions of this Convention by virtue of article 5² which embodies the principle of party autonomy.

42. There was considerable support in the Working Group for deleting all of article 9. There was also support for deleting paragraph 2 only. The Working Group, after deliberation, adopted the text of paragraph 1 as recommended by the Drafting Party and of paragraph 2 amended as below:

"2. The parties shall be considered, unless otherwise agreed, to have impliedly made applicable to their contract a usage of which the parties knew or had reason to know and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."

Article 10

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

43. The Working Group agreed that the definition of "fundamental breach" was important because the remedy of avoidance of the contract rested upon it. After a number of drafting suggestions were considered, Drafting Party IV, consisting of the representatives of India and Mexico and the observer from the International Chamber of Commerce, was set up to draft a new text.

44. Drafting Party IV proposed the following text:

"For the purposes of this Convention, a breach of contract shall be regarded as fundamental whenever the failure of a party to perform the contract results in substantial detriment to the other party and the party in breach had reason to be aware thereof."

In explanation of this text it was stated that the Drafting Party was of the view that it was unsatisfactory to

² Article 5 was moved to article 3 *ter*. As approved by the Working Group at this session it reads as follows: "The parties may exclude the application of this Convention or derogate from or vary the effects of any of its provisions."

rely on a test under which the party not in breach would not have entered the contract or would not have had any interest in concluding the contract if he had anticipated the breach.

45. The Working Group accepted the recommendation of the Drafting Party, subject to minor drafting changes that were necessary for the purpose of establishing concordant texts in English and French. The text adopted by the Working Group is as follows:

"A breach committed by one of the parties to the contract shall be regarded as fundamental if it results in substantial detriment to the other party and the party in breach had reason to foresee such a result."

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."

46. This article was deleted when the word "promptly" was dropped from the three places it appeared in the Convention, articles 38, 42 and 73.

Proposed new article 12

47. Consideration was given to a proposal submitted by an observer to create a new article 12 which would govern the obligation of a party in respect of the acts of those for whom he is responsible.³ There was opposition to a special article on agency relationships in a convention on sales and no consensus was reached on the adoption of this proposal. At the same time it was agreed to delete any reference to agency relationship in other articles of the Convention, notably articles 76, 79 and 96.

Article 14

48. Consideration was given to a proposal submitted by an observer to add a new paragraph 2 to article 14 providing that if a notice has been sent properly and in time, the sender can rely upon it even if the notice does not arrive or arrives late.⁴ This would be a generalization of the rule in article 39, paragraph 3 of the present text. It was observed that this was contrary to the rule throughout much of the world which places the risk of transmission on the party who chooses the means of communication. The proposal was withdrawn.

Article 15

"[A contract of sale need not be evidenced by writing and shall not be subject to any other require-

³ *Alternative A*: "Where the present Law refers to the act or (actual or presumed) knowledge of a party, such reference shall include the act or knowledge of his agent or of any person for whose conduct such party is responsible [provided that such agent or person is acting within the scope of an employment for the purpose of the contract]."

Alternative B: "For the purposes of the present Law the seller or the buyer shall be responsible for the act or the [actual or presumed] knowledge of his agent or of any person for whose conduct he is responsible, as if such act or knowledge were his own [, provided that such agent or person is acting within the scope of an employment for the purpose of the contract]."

⁴ "2. Where any notice referred to in the present Law has been sent in due time 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 party giving such notice the right to rely thereon."

ments as to form. In particular, it may be proved by means of witnesses.]”

49. The Working Group considered two points: first, whether article 15 was properly in a law of sales or whether it belonged in a law on formation and validity of contracts and second, whether the rule should be that contracts of sale need not be in writing or that they must be in writing.

50. Several attempts at formulating compromises were attempted which would preserve the freedom to create contracts not in writing for those States for whom this is a standard way in which business is done but at the same time to preserve the requirement of writing for the States which presently require it. All such attempts failed.

51. Similarly, certain representatives were in favour of deleting article 15 altogether. Other representatives expressed themselves in favour of the present text, which they considered essential for the Convention. Still other representatives considered that this article was partially formation, partially validity and partially proof. In view of the foregoing the Working Group decided to leave the article in brackets as an article in respect of which no agreement had been reached.

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.”

52. After a discussion of the relationship between article 16, article 42, paragraph 1 and article 71, paragraph 2, the Working Group adopted the following new text of article 16:

“Where, in accordance with article 42, paragraph 1, or article 71 paragraph 2, 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 a judgement providing for specific performance unless this could be required by the court under its own law in respect of similar contracts of sale not governed by this Convention.”

53. The current text was considered a more appropriate form for an integrated Convention. In addition, it does not speak of the enforcement of a judgement for specific performance, a subject thought not to be appropriate for a Convention on the law of sales.

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].]

54. Some representatives were in favour of the retention of this article as it was. The Working Group, nevertheless, decided to use the text of article 7 of the Convention on the Limitation Period. Consequently, the

present text was adopted without the words “in its interpretation and application”.

Title of section I

Delivery of the goods [and documents]

55. It was decided to delete the square brackets and keep the words “and documents” in the title.

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 at or were to be manufactured or produced at a particular place at the time of the conclusion of the contract, by placing the goods at the buyer's disposal at that place;

“(c) In all other cases by placing the goods at the buyer's disposal at the place where the seller carried on business at the time of the conclusion of the contract or, in the absence of a place of business, at his habitual residence.”

56. The Working Group agreed with the suggestion of an observer that article 20 may not always give the results intended. The introduction to paragraph (c), i.e. “In all other cases”, caused many fact situations to be assigned to paragraph (c) which obviously did not fit. Drafting Party V, consisting of the representative of the United Kingdom and the observers for Bulgaria and Norway, was set up to consider article 20. It reported a text which listed several means by which delivery could be made other than those covered by article 20 of the present text. However, after discussion, the Working Group decided to retain article 20 as it was except for the deletion of the word “all” in paragraph (c). This change makes it clear that paragraph (c) does not exclude an agreement of the parties that delivery should be made in another manner.

57. A number of minor drafting changes were accepted by the Working Group. The article is to begin “Delivery of the goods is effected:” to make it clear that article 20 does not govern the delivery of documents. In paragraph (a) the word “first” was inserted before the word “carrier”. The words “or, in the absence of a place of business, at his habitual residence” were deleted from paragraph (c) because the matter is covered by article 4 (b).

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."

58. The consideration of article 35 was deferred until the discussion on passing of the risk at the next session of the Working Group.

Article 38

Paragraph 1

"1. The buyer shall examine the goods, or cause them to be examined, promptly."

59. The Working Group decided to delete the word "promptly" and to substitute "within as short a period as is practicable in the circumstances". At the same time article 11, which contained the definition of "promptly", was deleted.

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."

Paragraph 1

60. The bracketed language in the present text raised two problems: the maximum time-limit for giving notice of a lack of conformity of the goods if there is no contractual guarantee, and the effect of a contractual guarantee on that time-limit. One representative mentioned that a so-called "guarantee" that at the time of delivery the goods had the quality stipulated in the contract was not a guarantee which would affect the time-limit for giving notice.

61. The Working Group decided to retain the two-year limit in paragraph 1. However, several representatives were in favour of shortening the period to one year.

62. The Working Group was in agreement that if a guarantee was for a period longer than two years, the buyer should have at least as long as the guarantee period to give notice, subject to the rule in the first two sentences that he must give notice within a reasonable time after he has discovered the defect or ought to have discovered it. There was no consensus as to whether the buyer need only discover the defect within the guarantee period and give notice within some prescribed time thereafter or whether he also had to give notice within the guarantee period. The other problem on which there was no consensus was whether a guarantee period of less than two years should shorten the two-year time-limit during which notice could be given. Certain representatives stated that it was a question of the interpretation of the guarantee and that any rule of interpretation in the Convention in this connexion would be likely to be inappropriate.

63. The Working Group set up Drafting Party VI consisting of the representatives of Czechoslovakia, Japan and the United States and the observer of Norway. The following text was recommended by the Drafting Party for the completion of paragraph 1.

"However, 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 at the latest within a period of two years from the date on which the goods were actually handed over except to the extent that such time-limit is inconsistent with a guarantee covering a different period."

The word "actually" was inserted before "handed over" in order to make it clear that the two-year time-limit begins at the time the buyer is in a position to examine the goods.

New paragraph 2

64. Drafting Party VI recommended the adoption of a new paragraph 2 which would have governed the relationship between a guarantee and the obligation to give notice of lack of conformity. This text was as follows:

"2. In case of breach of an express guarantee by the seller referred to in article 35, paragraph 2, the buyer shall lose the right to rely on such breach if he has not given the seller notice of the lack of conformity within a reasonable time after he has discovered it, but at the latest within a period of three months from the date of the expiration of the period of guarantee."

65. The Working Group accepted the first portion of the proposed amendment to paragraph 1 up to and including the words "were actually handed over". It rejected the remainder of the proposed paragraph 1 and of the entire text of the proposed paragraph 2 in favour of a new text of paragraph 2 based on the principle of party autonomy. A Drafting Party consisting of the representatives of Austria and the United Kingdom was set up to effect this mandate. The text of paragraph 2 as recommended by this Drafting Party and as adopted by the Working Group is as follows:

"2. The parties may, in accordance with article 5, derogate from the provisions of the preceding paragraph by providing for a period of guarantee."

Paragraphs 2 and 3

66. Paragraphs 2 and 3 of this article were re-numbered paragraphs 3 and 4.

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:

"...

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

Paragraph 1

67. The references in subparagraph 1 (b) were changed from "article 82 or articles 84 to 87" to "articles 82 to 89".

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."

Paragraph 1

68. There was general agreement that the buyer's right to require the seller to perform the contract should not be linked to his right to have a court order specific performance of the contract. After discussion, and having redrafted article 16 (see para. 52 above), the Working Group decided to open the paragraph with the words "subject to article 16" and follow with a new text suggested by an observer.

69. A second problem in paragraph 1 was whether the words in brackets in the original text should be retained. Two representatives were in favour of retaining these words so as to emphasize the right of the buyer to cure the goods himself, even though the seller may be prepared to do so. However, the Working Group decided to delete the words in brackets.

Paragraph 2

70. In paragraph 2 the Working Group decided to delete the words "and after prompt notice" and substitute "and after request made within a reasonable time". One observer felt that the right of the buyer to require the seller to deliver substitute goods should be more clearly defined.

71. The new text of article 42 as adopted by the Working Group is thus as follows:

Article 42

"1. Subject to article 16, the buyer has the right to require the seller to perform the contract, unless the buyer has acted inconsistently with that right, in

particular by avoiding the contract under article 44 or by reducing the price under article 45.

"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 request made within a reasonable time."

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."

Paragraph 1

72. An observer proposed adding the words "on account of delay" following the words "unless the buyer". The effect would have been that the buyer could have avoided the contract and thereby cut off the seller's right to cure a defect in the goods only if there was late delivery. The Working Group rejected the proposal.

73. The Working Group decided to delete the words in brackets in conformity with its decision in respect of article 42. The Working Group also amended the end of paragraph 1 to read:

"or has declared the price to be reduced in accordance with article 45."

Paragraph 2

74. The Working Group considered a proposal of an observer to amend the opening phrase of paragraph 2 as follows:

"2. If the seller requests the buyer to make known his decision as to whether he will accept performance, and . . ."

There was no consensus for adopting this amendment.

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*, para. 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."

75. The Working Group considered the relationship between paragraph 2 and paragraph 1 of this article and the similar relationship between paragraph 2 and paragraph 1 of article 72 *bis*. In both articles, paragraph 1 states the buyer's (art. 44) or the seller's (art. 72 *bis*) right to avoid the contract. Paragraph 2 states that the party not in breach would lose that right if he does not give notice of the avoidance within a reasonable time. The point in time from which the reasonable time was to be measured varied depending on the circumstances.

76. There was no agreement in the Working Group on the question whether paragraph 2 (a) of the revised text was drafted in such a manner as to make it clear that it covered cases of both late delivery and non-delivery. In order to draft a text which would clearly govern cases of non-delivery, the Working Group set up Drafting Group VIII consisting of the representative of the United States and the observers from the Federal Republic of Germany and Norway. The Drafting Group was also requested to consider the similar problem in article 72 *bis*.

77. Drafting Group VIII recommended transferring paragraph 2 of article 44 to a new article 44 *bis* worded as follows:

"1. Where delivery is not effected, the buyer may give notice of avoidance at any time, subject to the provisions of articles 43, 43 *bis* and 44.

"2. In other cases 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) In respect of late delivery and subject to the provisions of articles 43 and 43 *bis*, after the buyer has become aware that delivery has been effected;

"(b) In respect of lack of conformity or any other breach not covered by subparagraph (a), after the buyer has discovered or ought to have discovered such breach, or where avoidance is based on the seller's failure to cure such breach in accordance with articles 43 or 43 *bis*, after the expiration of the applicable period of time referred to therein."

78. The text proposed by the Drafting Group was rejected by the Working Group on the grounds that it was hard on the seller because, in certain circumstances, it required two notices, one notice of his intention to avoid and a second notice of his actual avoidance. As a result of this decision of principle against the requirement of two notices, paragraph 2 of article 44 was

deleted, as were the words "by notice to the seller" in the opening line of paragraph 1.

79. Two representatives stated that they reserved the right to return to this matter, which is reflected in article 72 *bis* as well as in this article, at a later time because there had not been sufficient time to reflect on the proposals during this session of the Working Group. One observer was of the view that the decision taken by the Working Group was not correct, and suggested that it should be reconsidered in the plenary session of UNCITRAL. Another observer remarked that, as a result of the decision to delete article 44 *bis* and 72 *ter* as they had been proposed by the Drafting Group, the right of a party to declare the contract avoided seems to subsist for an unlimited period of time and therefore he expressed his doubts as to the deletion of those provisions or of any other provision to a similar effect.

Article 46

80. Article 45 was added to the list of articles to which this article makes a cross-reference.

Article 52

81. The Working Group moved article 52 on the transfer of property to a new article 40 *bis*.

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."

82. Several representatives recommended deletion of article 57 on the ground that the problems of contracts of sale in which the price is not determined or determinable relate to the validity of the contract and should not be dealt with by the Convention. It was also observed that such contracts were and should be invalid and that nothing in this Convention should appear to give them validity.

83. Other representatives were of the view that article 57 did not make a contract valid if it was otherwise invalid under the appropriate law. They suggested that article 57 served the useful function of specifying how to determine the price if the price was not determined or determinable from the contract itself. In their opinion article 57 could take effect only if the contract was valid under the appropriate law.

84. Since there was no consensus to delete article 57, the Working Group decided to retain it in its present form.

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."

Paragraph 1

85. The Working Group decided to delete the words "or if he does not have a place of business, at his

habitual residence" since the matter is covered by article 4.

Article 59 bis

"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."

Paragraph 3

86. The Working Group discussed the proposal of an observer that paragraph 3 should read as follows:

"3. The buyer shall not be bound to pay the price until he has had an opportunity to inspect the goods, unless the *contract requires payment against documents or the parties have agreed upon other procedures* for delivery or payment, *that* are inconsistent with such opportunity."

87. There was no consensus to amend paragraph 3 as proposed by the observer. Some representatives stated that since a contractual requirement for payment against documents was inconsistent with a right of inspection prior to payment, the fact situation envisaged by the proposal was already covered by the "unless" clause in paragraph 3.

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.]"

88. A proposal was made to delete this article on the grounds that it was superfluous. However, several representatives stated that the article could be useful in certain situations. The representatives who proposed the deletion stated that there was no opposition in principle to the article and the Working Group decided to retain it.

Paragraph 1

89. In order to make it clear that under the contract the buyer may have an obligation to specify the form, measurement or other features of the goods as well as a right to do so, paragraph 1 was amended to begin as follows:

"If the contract envisages that the buyer will subsequently determine . . ."

90. The Working Group adopted two amendments to make it clear that the seller has a right to specify if buyer does not, but has no duty to do so. In the first amendment the words "may have recourse to the remedies

specified in articles 70 to 72 *bis*, or make the specification" were deleted in favour of "may, without prejudice to any other rights he may have under the contract and the present Convention, specify". In the second amendment the words "in accordance with the requirements of the buyer in so far as these are known to him" were deleted in favour of "in accordance with any requirement of the buyer that may be known to him".

91. The text of paragraph 1 of article 67 as amended by the Working Group is as follows:

"1. If the contract envisages that the buyer will subsequently 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, without prejudice to any other rights he may have under the contract and this Convention, make the specification himself in accordance with any requirement of the buyer that may be known to him."

92. The Working Group was of the view that the extensive discussions in respect to article 67 demonstrated that it was properly a provision on remedies. Therefore, the Working Group decided to move the provision to a new article 72 *ter*.

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 article 71 to 72 *bis*; and

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

Paragraph 1

93. The Working Group made only minor amendments. In subparagraph 1 (a) the references were changed to "articles 71 to 72 *ter*". At the end of subparagraph 1 (a) the word "and" was deleted. In subparagraph 1 (b) the references were changed to "articles 82 to 89".

Article 71

"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."

Paragraph 2

94. In a decision similar to that made in article 42, the Working Group decided to begin this paragraph with the words "subject to the provisions of article 16 . . ." and to delete the portion of the paragraph which begins with "to the extent . . .".

The Working Group also decided to add the words "his obligation" to the new end of paragraph 2.

95. The new text of paragraph 2 is as follows:

"2. Subject to the provisions of article 16, if the buyer fails to take delivery or to perform any other obligation in accordance with the contract and this Convention, the seller may require the buyer to perform his obligation."

Article 72 bis

Alternative A

"[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

"[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

"[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 six months [one 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.]"

96. The Working Group adopted paragraph 1 of alternative A.

97. Drafting Group VIII recommended parallel action in article 72 bis to that which it recommended in article 44. In its proposal, paragraph 2 would have been transferred to a new article 72 ter, and what is now article 72 ter would have become article 72 cuater. The proposed article 72 ter would have been worded as follows:

"1. Where delivery is not taken or the price is not paid, the seller may give notice of avoidance at any time, subject to the provisions of articles 72 and 72 bis.

"2. In other cases 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) In respect of late performance of the buyer's obligations and subject to the provisions of article 72, after the seller has become aware that performance has been rendered;

"(b) In respect of any other breach not covered by subparagraph (a), after the seller has discovered or ought to have discovered such breach, or where avoidance is based on the buyer's failure to perform within an additional period of time under article 72, after the expiration of the period of time referred to therein."

98. The proposed article 72 ter and, thereby, paragraph 2, alternative A, was rejected by the Working Group at the same time, and for the same reasons that paragraph 2 of article 44 was deleted (paras. 75 to 78 *supra*). As a result article 72 bis as approved by the Working Group consists of paragraph 1 of alternative A, with the words "by notice to the buyer" in the first line deleted.

Article 73

"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 obligation."

Paragraph 1

99. The Working Group discussed the criteria by which it would be determined that a party may suspend his performance. Some representatives stated that "a serious deterioration in the economic situation of the other party" was too vague a test to be employed without difficulty.

100. The Working Group decided to replace those words by "a serious deterioration in the capacity to perform or creditworthiness of the other party . . .".

101. The Working Group decided to replace the word "promptly" in paragraph 3 by the word "immediately".

Article 76

Alternative A

"[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

"[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]."

Alternative C

"[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 [or to circumstances which have] occurred without fault on his part. 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 impediment [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 be so exempt if the provisions of that paragraph were applied to him.

"3. Where the impediment to the performance of an obligation is only temporary, the exemption provided by this article shall cease to be available to the non-performing party when the impediment is removed.

"4. The non-performing party shall notify the other party of the existence of the impediment and its effect on his ability to perform [of the circumstances which affect his performance and the extent to which they affect it]. If he fails to do so within a reasonable time after he knows of the impediment [circumstances], he shall be liable for the damage resulting from this failure.]"

102. The Working Group had three proposals before it: alternatives A and B which had been proposed at the fifth session of the Working Group (A/CN.9/87, annex I)** and alternative C which had been proposed by a representative (A/CN.9/WG.2/WP.20, annex VI).††

103. The Working Group was of the opinion that alternative C contained an appropriate combination of the two main positions which had been advanced at earlier sessions of the Working Group, i.e. (a) that the non-performing party should be excused from the consequences of his non-performance if he was impeded from performing by objective conditions, and (b) that

** UNCITRAL Yearbook, vol. V: 1974, part two, I, 1.

†† *Ibid.*, part two, I, 4.

a non-performing party can be excused only if there was no fault on his part.

104. Certain minor amendments to the wording of alternative C were adopted by the Working Group and, in order to provide a text which could more easily be rendered into French, a slightly different paragraph 3 was adopted.

105. The text of article 76 as adopted by the Working Group is as follows:

"1. Where a party has not performed one of his obligations, 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 fault on his part. 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 impediment.

"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 be so exempt if the provisions of that paragraph were applied to him.

"3. The exemption provided by this article shall have effect only for the period before the impediment is removed.

"4. The non-performing party shall notify the other party 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 impediment, he shall be liable for the damage resulting from this failure."

106. The Working Group considered a new article 76 *bis* which had been proposed in connexion with alternative C of article 76 and which read as follows:

"Where the non-performing party has notified the other party, in accordance with article [76], of an impediment to [circumstances which affect] the performance of one of his obligations, the rights of the parties shall be as follows:

"(a) The non-performing party may declare the contract avoided if by reason of the impediment [circumstances] above-mentioned, the performance required of him by the contract has become impossible or has so radically changed as to amount to performance of a quite different contract.

"(b) The other party may either (i) if he is the buyer, reduce the price in the proportion which the value of any goods delivered bears to the total value of the goods which the seller contracted to deliver, or (ii) declare the contract avoided if a reasonable person in his situation would not have entered into the contract if he had foreseen the non-performance and its consequences."

107. Although this proposal was supported by some representatives, other representatives thought it gave too much relief to the non-performing party. Still another view was that it was too complicated. The Working Group decided that it would not attempt to govern the consequences of non-performance beyond the relief given in article 76.

Article 78

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

Paragraph 1

108. The Working Group recognized that the revised text of this article might lead to the conclusion that all provisions in a contract of sale are annulled when a contract is avoided. This was not the effect intended. For instance, an arbitration clause in the contract may be invoked to permit the arbitration tribunal to decide whether the avoidance was valid. After attempting several formulations to state which contract clauses are not annulled by avoidance, the Working Group decided to add a new sentence to paragraph 1 as follows:

"The avoidance shall not affect provisions for the settlement of disputes."

Article 79

"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."

109. The Working Group decided to delete paragraph 2 (a) on the grounds that it was subsumed under paragraph 2 (d). Paragraph 2 (d) was moved to paragraph 2 (a) because it is the most important subparagraph of paragraph 2.

110. The Working Group decided to amend paragraph 1 by adding "substantially" before the words "in the condition". With the addition of the word "substantially" to paragraph 1, the Working Group decided that paragraph 2 (e) was no longer necessary and it was deleted.

111. In the original paragraph 2 (d) the words "or of returning them in the condition in which they were received" and "or of some other person for whose conduct he is responsible" were deleted.

112. The text of paragraph 2 (d), which will become paragraph 2 (a) in the new numbering, is thus as follows:

"(d) If the impossibility of returning the goods is not due to the act of the buyer."

Article 81

"1. . . .

"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."

113. One representative stated that he believed it to be incorrect that paragraph 2 (b) applied only to the situation in which the buyer had exercised his right to have the contract avoided. In the view of that representative, the obligation to account must apply whether it is the buyer or the seller who has avoided the contract. Another representative took the view that the situation in which the seller had avoided the contract was covered by subparagraph 2 (a).

Article 82

"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."

114. Several representatives stated that the second sentence of this article should be deleted because it is a limitation on the right of full damages. The Working Group decided to retain the sentence. A reservation was expressed by one representative.

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 is in arrears 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."

115. The Working Group decided to delete the words "or, if he has no place of business, his habitual residence". The Working Group also decided to add to the end of the article the following words:

"but his entitlement shall not be lower than the rate applied to unsecured short-term commercial credits in the seller's country".

It was observed that since the rate of interest for commercial credits was often considerably more than 1 per cent higher than the official discount rate, the rule in the text was an invitation to the debtor to delay payment.

Article 84 (1)

"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."

116. The Working Group considered whether to replace the words "on which the contract is avoided" by the words "on which delivery was or should have been effected". The Working Group did not reach a decision as to which text was preferable and decided to include both phrases in square brackets in the text for consideration at the seventh session.

FUTURE WORK

117. The Working Group decided to recommend to the Commission that its seventh session should be held in Geneva for two weeks early in 1976, preferably between 5 and 16 January. At its seventh session the Working Group will complete its examination of pending questions in the Convention on the International Sale of Goods and will approve the text of the Convention.

118. The Working Group noted that the Commission at its seventh session requested it to consider, upon the completion of its present work, the establishment of uniform rules governing the validity of contracts for the international sale of goods, on the basis of the draft of the International Institute for the Unification of Private Law (UNIDROIT), in connexion with its work on uniform rules governing the formation of contracts for the international sale of goods. The Working Group expects to be able to hold at its next session a preliminary discussion on the formation and validity of such contracts so as to give the Secretariat, if appropriate, directions as to the studies which the Working Group may wish it to undertake in that field.

119. The question was raised whether it was desirable to have the Convention accompanied by a commentary. Several representatives expressed themselves in favour of such a commentary on the ground that it would make the preparatory work more readily available. The Working Group was of the view that such a commentary would be useful but that it should have an unofficial character. The Working Group requested the Secretariat to draw up a commentary based on the reports on the work of its sessions and the various studies made and to transmit a draft commentary to representatives for unofficial comments. The Working Group also requested the Secretariat to structure the draft provisions adopted by it in the form of a convention and to submit the text to it at its next session.

2. Revised text of the Convention 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 six sessions (A/CN.9/100, annex I)*

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Draft Convention on the International Sale of Goods¹

CHAPTER I. SPHERE OF APPLICATION

Article 1 (Article 1)

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

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

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

Article 2 (Article 2)

The present Convention shall not apply to sales:

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

* 18 February 1975.

¹ At its sixth session the Working Group decided that the rules on the international sale of goods should appear in the form of an integrated convention rather than as a uniform law annexed to a convention. In conformity with this decision the Working Group requested the Secretariat to prepare the text as it had been approved by the Working Group during its first six sessions in the form of a convention. The articles have been renumbered with the corresponding articles of revised ULIS (A/CN.9/87, annex I; UNCITRAL Yearbook, vol. V: 1974, part two, I, 2), in parentheses. Those matters which are still unresolved by the Working Group are in square brackets, including those headings which were not in the 1964 ULIS and which have been proposed by the Secretariat.

- (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 3 (Article 3)

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

2. Contracts for the supply of goods to be manufactured or produced shall be considered to be sales within the meaning of the present Convention 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 (Article 1, paragraph 3)

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

Article 5 (Article 5)

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

Article 6 (Article 4)

For the purpose of the present Convention:

- (a) 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;

- (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 of the contract shall be taken into consideration.

Article 7 (Article 8)

The present Convention shall govern only the obligations of the seller and the buyer arising from a contract of sale. In particular, the present Convention 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 8 (Article 9)

1. The parties shall be bound by any usage to which they have agreed and by any practices which they have established between themselves.

2. The parties shall be considered, unless otherwise agreed, to have impliedly made applicable to their contract a usage of which the parties knew or had reason to know and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Article 9 (Article 10)

A breach committed by one of the parties to the contract shall be regarded as fundamental if it results in substantial detriment to the other party and the party in breach had reason to foresee such a result.

Article 10 (Article 14)

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

Article 11 (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 12 (Article 16)

Where, in accordance with article 27, paragraph (1), or article 43, paragraph (2), 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 a judgement providing for specific performance unless this could be required by the court under its own law in respect of similar contracts of sale not governed by this Convention.

Article 13 (Article 17)

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

CHAPTER III. OBLIGATIONS OF THE SELLER

Article 14 (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 Convention.

SECTION I. DELIVERY OF THE GOODS AND DOCUMENTS

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

Article 15 (Article 20)

Delivery of the goods is effected:

(a) Where the contract of sale involves the carriage of goods, by handing the goods over to the first carrier for transmission to the buyer;

(b) Where, in cases not within the preceding paragraph, the contract relates to specific goods or to unidentified goods to be drawn from a specific stock or to be manufactured or produced and the parties knew that the goods were at or were to be manufactured or produced at a particular place at the time of the conclusion of the contract, by placing the goods at the buyer's disposal at that place;

(c) In 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.

Article 16 (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 identified 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 17 (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 18 (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.

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

Article 19 (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. Where not inconsistent with the contract the goods shall:

(a) Be fit for the purposes for which goods of the same description would ordinarily be used;

(b) Be 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) Be 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 20 (Article 35)

1. The seller shall be liable in accordance with the contract and the present Convention 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 21 (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 55.

Article 22 (Article 38)

1. The buyer shall examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

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 23 (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 22 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. However, 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 at the latest within a period of two years from the date on which the goods were actually handed over.

2. The parties may, in accordance with article 5, derogate from the provisions of the preceding paragraph by providing for a period of guarantee.

3. In giving notice to the seller of any lack of conformity the buyer shall specify its nature.

4. 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 24 (Article 40)

The seller shall not be entitled to rely on the provisions of articles 22 and 23 if the lack of conformity relates to facts of which he knew, or of which he could not have been unaware, and which he did not disclose.

Article 25 (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.

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

Article 26 (Article 41)

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

- (a) Exercise the rights provided in articles 27 to 32;
- (b) Claim damages as provided in articles 55 to 60.

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 27 (Article 42)

1. Subject to article 12, the buyer has the right to require the seller to perform the contract, unless the buyer has acted inconsistently with that right, in particular by avoiding the contract under article 44 or by reducing the price under article 31.

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 request made within a reasonable time.

Article 28 (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 Convention.

Article 29 (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 30 or has declared the price to be reduced in accordance with article 31.

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 30 (Article 44)

The buyer may 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 Convention 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 29.

Article 31 (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 32 (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 28 to 31 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 33 (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 55. If the buyer accepts the whole or part of the excess quantity, he shall pay for it at the contract rate.

CHAPTER IV. OBLIGATIONS OF THE BUYER

Article 34 (Article 56)

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

SECTION I. PAYMENT OF THE PRICE

Article 35 (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 36 (Article 57)

When 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 37 (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 38 (Article 59)

1. The buyer shall pay the price to the seller at the seller's place of business 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 39 (Article 59 bis)

1. The buyer shall pay the price when the seller, in accordance with the contract and the present Convention 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 40 (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.

SECTION II. TAKING DELIVERY

Article 41 (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.

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

Article 42 (Article 70)

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

- (a) Exercise the rights provided in articles 43 to 46;
- (b) Claim damages as provided in articles 55 to 60.

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 43 (Article 71)

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

2. Subject to the provisions of article 12, if the buyer fails to take delivery or to perform any other obligation in accordance with the contract and this Convention, the seller may require the buyer to perform his obligation.

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 45.

Article 44 (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 Convention.

Article 45 (Article 72 bis)

The seller may 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 Convention 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 44.

Article 46 (Article 67)

1. If the contract envisages that the buyer will subsequently 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, without prejudice to any other rights he may have under the contract and this Convention, make the specification himself in accordance with any requirement of the buyer that may be 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.

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

SECTION I. ANTICIPATORY BREACH

Article 47 (Article 73)

1. A party may suspend the performance of his obligation when, after the conclusion of the contract, a serious deterioration in the capacity to perform or creditworthiness 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 immediately 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 48 (Article 74)

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 con-

tract 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 49 (Article 75)

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.

SECTION II. EXEMPTIONS

Article 50 (Article 76)

1. Where a party has not performed one of his obligations, 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 fault on his part. 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 impediment.

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 be so exempt if the provisions of that paragraph were applied to him.

3. The exemption provided by this article shall have effect only for the period before the impediment is removed.

4. The non-performing party shall notify the other party 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 impediment, he shall be liable for the damage resulting from his failure.

SECTION III. EFFECTS OF AVOIDANCE

Article 51 (Article 78)

1. Avoidance of the contract releases both parties from their obligations thereunder, subject to any damages which may be due. The avoidance shall not affect provisions for the settlement of disputes.

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 52 (Article 79)

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 substantially in the condition in which he received them.

2. Nevertheless the preceding paragraph shall not apply:

(a) If the impossibility of returning the goods is not due to the act of the buyer;

(b) If the goods or part of the goods have perished or deteriorated as a result of the examination prescribed in article 22;

(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.

Article 53 (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 52 shall retain all the other rights conferred on him by the present Convention.

Article 54 (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 56, 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 55 (Article 82)

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 56 (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 is in arrears at a rate equal to the official discount rate in the country where he has his place of business plus one per cent but his entitlement shall not be lower than the rate applied to unsecured short-term commercial credits in the seller's country.

Article 57 (Article 84)

1. In case of avoidance of the contract, the party claiming damages may rely upon the provisions of article 55 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 delivery was or should have been effected] [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 58 (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 55 or 57, recover the difference between the contract price and the price paid for the goods bought in replacement or that obtained by the resale.

Article 59 (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 60 (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 Convention.

SECTION V. PRESERVATION OF THE GOODS

Article 61 (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 62 (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 63 (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 64 (Article 94)

1. The party who, in the cases to which articles 61 and 62 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 65 (Article 95)

Where, in the cases to which articles 61 and 62 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 64.

CHAPTER VI. PASSING OF THE RISK

Article 66 (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.

Article 67 (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 68 (Article 98)

1. In cases not covered by article 67 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 69 (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.]

3. Text of comments and proposals of representatives on the revised text of a uniform law on the international sale of goods as approved or deferred for further consideration by the Working Group at its first five sessions (A/CN.9/100, annex II)*

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INTRODUCTION

1. The Working Group on the International Sale of Goods, at its fifth session (Geneva, 21 January to 1 February 1974), invited representatives of Member States and the observers who attended that session, to submit to the Secretariat their comments and proposals on the text of the Uniform Law on the International Sale of Goods as approved or deferred for further consideration by the Working Group at its first five sessions.**

2. At the time of issuing this note, comments and proposals had been received from the representatives of Austria, Bulgaria, Mexico, Norway, the Union of Soviet Socialist Republics and the United Kingdom of Great Britain and Northern Ireland. The text of these comments and proposals is set forth in the annexes to this note.

I. COMMENTS BY THE REPRESENTATIVE OF AUSTRIA CONCERNING THE PRELIMINARY DRAFT OF THE NEW ULIS

[Original: French]

A. GENERAL COMMENTS

The following observations seek to be brief and not to touch on too many points on which consensus has already been reached within the Working Group.

At the present stage it seems appropriate to abandon the concept of a uniform law annexed to a convention and purely and simply to envisage a convention which would itself contain the basic provisions, as in the case of the Convention on the Limitation Period of 14 June 1974. It would then be necessary to draft a short preamble and final clauses.

* 18 February 1975.

** Progress report of the Working Group on the International Sale of Goods on the work of its fifth session (A/CN.9/87), paragraph 245 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1). The revised text of the Uniform Law is set forth in annex I of the progress report (reproduced in UNCITRAL Yearbook, vol. V: 1974, part two, I, 2).

B. COMMENTS ON VARIOUS ARTICLES

Article 1

The restriction of the sphere of application to relations between Contracting States (para. 1 (a)) is regrettable. It would, however, be preferable to delete paragraph 1 (b) which introduces an element that is foreign to the unification of substantive law and whose merits can be contested. Paragraph 2 should be retained.

Article 2

It would be useful to retain the part of the sentence within square brackets in paragraph 1 (a). Paragraph 2 (a) should state clearly whether or not documents controlling disposition of the goods, such as bills of lading are also excluded. Article 59 *bis*, paragraph 2, seems to indicate that they are not.

Article 4

The wording of subparagraph (a) should be reviewed in the light of the parallel provision in the Convention on the Limitation Period. In the event that it is decided to opt for the form of a simple convention (see section A, second paragraph above), subparagraph (d) could be omitted while subparagraph (e) would have to be expanded.

Article 8

There does not seem any point in including this article. Its inclusion in the 1964 ULIS can be explained by the fact that that Law provided that all matters which were not expressly settled therein were to be settled in conformity with its spirit.

Article 9

Paragraph 2 could be simplified.

Article 11

The expression "promptly" or "prompt" seems now to be used only in article 38, paragraph 1, and article 42, paragraph 2. Elsewhere, mention is made of a reasonable time. Either the definition of promptly could be deleted or the content of the article could be trans-

ferred to article 38, paragraph 1. For article 42, paragraph 2, see below.

Article 15

It would be preferable to retain this provision.

Article 16

This article is incorrectly worded for it cites the 1964 ULIS. If the draft uniform law becomes a draft convention (see section A, second paragraph above), this article would become superfluous as article 42, paragraph 1, would be sufficient by itself.

Article 17

The Austrian delegation has always been of the opinion that this declaration of principle could be dispensed with.

Article 39

The last sentence in paragraph 1 should be retained. It should end with the words "a longer period".

Article 42

The end of paragraph 1 could be retained. The combination of "prompt" at the end of paragraph 2 and "reasonable time" in article 39, paragraph 1, would create a system which would be difficult to understand; it would be better to delete any reference to the giving of notice in article 42, paragraph 2.

Article 43 bis

The end of paragraph 1 could be retained.

Article 44

The words "by notice to the seller" in paragraph 1 duplicate the more precise formulation in the introductory sentence of paragraph 2; they should therefore be deleted.

Article 67

The article should be retained where it is. The remedy mentioned in the words in square brackets in paragraph 1 seems to go too far; it is sufficient that the right of specification should pass to the seller. These words should therefore be deleted.

Article 72 bis

It would seem appropriate to take alternative A as a basis for further discussion of this very complicated article.

Article 76

Paragraphs 1, 3 and 4 of alternative A are consistent with paragraphs 1, 2 and 3 of alternative B in so far as the content is concerned. However, both paragraph 2 of alternative A and paragraph 4 of alternative B seem to merit inclusion. Alternative A could be improved by the addition of paragraph 4 of alternative B which would become paragraph 5 of that text.

Article 79

Paragraph 2 (a) is already covered by paragraph 2 (d) and is therefore superfluous. The French text of paragraph 2 (d) should refer to "le fait de l'acheteur" instead of "son fait". Paragraph 2 (e) should be dropped for the same considerations which led to the deletion of article 33, paragraph 2, of the 1964 ULIS.

Article 84

The words "on which the contract is avoided" at the end of paragraph 1 should be replaced by the words "on which delivery was or should have been effected".

Article 89

As one delegation proposed, it should be added that, in case of fraud, the damages can in no case be less than those to be allocated under the uniform law (or convention, see section A, second paragraph above) where there is no fraud.

Article 98

The sentence in square brackets in paragraph 2 should be retained.

Article 98 bis

The article should be retained. However, it seems that the wording of paragraph 2 could be improved and might, for instance, read as follows:

"Where the seller commits 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 of the goods resulting from such breach."

II. COMMENTS AND PROPOSALS OF THE REPRESENTATIVE OF BULGARIA

[Original: French]

1. Article 1, paragraph 3, should be discussed with a view to incorporating in the Law the principle set forth in the last part of article 4 of 1964 ULIS, namely, that the application of the Uniform Law by virtue of the choice and will of the parties shall not affect the application of any mandatory provisions of law in the State in whose territory one of the parties has his place of business which would have been applicable if the parties had not chosen the Uniform Law as the law of the contract.

The rationale for such a provision is the principle that the will of the parties cannot override mandatory rules, which have binding force.

2. With regard to article 3, paragraph 1, it is felt that the proposed formulation may give rise to doubts as to whether the Law covers deliveries (contracts of sale) of industrial complexes and plant, that is to say, entire factories. The text seems to mean that they are excluded from the sphere of application of the Law, but it would be desirable to clarify this question by adding to the text a reference to such deliveries, by way of example.

3. With regard to article 9 of ULIS and of the revised text concerning the priority of commercial usages over the Law, we consider that the opposite course should be adopted, in other words, that, in the event of conflict between the Law and usages, the Law should prevail and should apply unless the parties have agreed otherwise. The arguments in favour of this course are the variety of existing usages that are unknown to parties in international trade and the fact that the other course might adversely affect the security of their relations. The purpose of the Law, after all, is exactly the opposite: to establish uniformity and

security. Moreover, both the Uniform Law and newer and more modern laws include provisions that reproduce current usages and commercial practice.

4. The wording of article 10 is too complicated, although the substance is satisfactory. Simpler wording would be advisable, for example: "A breach of contract shall be fundamental wherever a reasonable person (normally a merchant) would not have concluded the contract if he had supposed at the time of its conclusion that the party in breach would commit that breach."

5. It would be better to keep articles 12 and 13 of ULIS rather than to delete them, as is done in the draft revised text.

6. With regard to article 15, on the form of the contract, we consider reasonable and acceptable the proposed amendment that "the contract . . . shall be in writing if so required by the laws of at least one of the countries in the territories whereof the parties have their place of business" (A/CN.9/52, 5 January 1971, para. 115).^{*} This amendment would make the Law more acceptable to a greater number of States, including those whose legislation stipulates that international commercial transactions shall be in writing.

7. We support the proposed amendment to article 17 to the effect that private international law shall apply to questions which are not settled by the Uniform Law (A/CN.9/52, para. 133).^{*} The Uniform Law must provide a rule on how to decide matters which are not regulated by that Law, i.e., in the event of omissions. One such matter might be, for example, a claim for compensation or damages over and above the amount stipulated in the penalty clause.

8. Article 20 might be amended by providing for and regulating the case of delivery of the goods to the buyer by handing them over for storage or bond warehousing to a third party who would hold and take possession of them on behalf of the buyer.

Similarly, provision should be made here for effecting delivery by handing over the goods to the buyer (or to his representative). This is the most common and priority case, and gives rise to all others. By so doing, the controversial and difficult problems raised by the definition of "delivery" would not have to be gone into. The same procedure was used with regard to delivery to the carrier. The concept of "handing over" was used. The use of that concept and its definition are two different matters. The question of defining delivery which led to argument and difficult controversies, does not come up.

Provision should also be made for effecting delivery of the goods by handing over the documents giving title to possession and disposal of the goods.

9. Article 33, paragraph 2, should be amended so as to state that the seller shall not be liable when the buyer knew or could not have been unaware of defects of the goods, not only at the time of contracting but also "at the time of delivery of the goods, in the case of the goods concerned".

10. It is proposed that article 38, paragraph 2, should be amended by adding the words "and at the

place where the buyer first has the opportunity to examine the goods".

It would be well to delete from paragraph 3 the words "and the seller knew or ought to have known, at the time when the contract was concluded, of the possibility of such redispach". If, nevertheless, the seller did not know of the possibility, the responsibility of the seller should be maintained in cases in which it is not possible for the goods to be examined at the place of destination, for example, at the port or station itself.

This article should include as a basic provision the rule that the examination of the goods shall be performed at the time and place and in the manner specified in the contract.

11. We hold that the wording of article 41 of the 1964 ULIS is preferable to the new text, as it gives an exhaustive list of the rights and penalties applicable in the event of the seller failing to perform his obligations.

12. We feel the same way about article 48, which should not be deleted. The same applies to articles 50 and 51, because they deal with the sale of goods through documents conferring title to and the right to dispose of the goods, the handing over or transmission of the documents constituting delivery of the goods.

13. With respect to article 57, we believe that a contract of sale must not be considered valid if the price is not or cannot be determined. For that reason, we do not share the view that the price generally prevailing should be made payable, as that would lead to difficulties and instability.

14. We find the wording of article 65 of the 1964 ULIS more felicitous and acceptable. The phrase "all such acts which could reasonably be expected" is more subjective than the phrase "all such acts as are necessary" used in the original version.

15. It would be desirable to amend article 59 *bis* by adding to it the substance of article 72, paragraph 2, of the 1964 ULIS which states that "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". That provision gives a decisive rule for this case (sale against documents) whereas the text of article 59 *bis*, paragraph 3, is a general provision for such cases to be governed by the provisions of the contract.

16. With regard to article 76 of the revised text, dealing with relief from liability, we feel that alternative B is more acceptable. The article should state that in the event that performance of the obligations is impossible, the obligations of the parties to the contract are extinguished.

17. We would prefer to keep article 90 of the 1964 ULIS because it contains a rule which is in conformity with the relevant provisions of most legislations and is consistent with practice.

^{*} *Ibid.*

III. COMMENTS AND PROPOSALS OF THE REPRESENTATIVE OF MEXICO ON ARTICLES 1 TO 17 OF THE REVISED TEXT OF ULIS

[Original: Spanish]

Article 1, paragraph 2

1. The text of this paragraph, which is awaiting approval, reads as follows:

[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.]

2. The new text approved by the Working Group responds to the need for simplification as advocated by the delegation of Norway during the first session (January 1970), as stated in document A/CN.9/35, paragraph 42 and annex V.* The idea of simplification was taken up by the delegations of the USSR¹ and the United Kingdom.² However, the criteria proposed by Norway—which retained the inter-State transport criterion (alternative I), or the criterion that the offer and the acceptance have not been effected in the same State (alternative II)—were not those that prevailed in the text approved; instead, taking the simplification principle further, the approved text retains only the requirement common to all the proposals, namely, that the parties must have their places of business in different States.³ This also agrees with one of the alternatives (No. III) that the Working Group took into account at its first session concerning the contents of a uniform law; furthermore, that alternative corresponds in substance to article III of the 1964 Hague Convention.⁴

3. Nevertheless, as was noted as early as the second session of the Working Group (A/CN.9/52, para. 22), the simplification of article 1, considered alone, would broaden the scope of the Law's applicability; consequently, the so-called "consumer sales" were excluded,⁵ and it was also indicated that the parties would be considered not to have their places of business in different States—and therefore ULIS would not apply—if at the time of the conclusion of the contract one of the parties neither knew nor had reason to know that the place of business of the other party was in a different State.⁶

* UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5.

¹ Observations and proposals by Mr. G. S. Burguchev, contained in a letter dated 3 August 1970 from the Secretariat addressed to the members of the Working Group (reproduced in UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 2, annex C to the report of Working Party II).

² Uniform Law of International Sales, Revision of Article 1.

³ This was the criterion adopted by the Working Group. See document A/CN.9/35, p. 8 *et seq.*, and annex III (UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 2) as well as the report on the second session (A/CN.9/52), p. 8 *et seq.* (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

⁴ A/CN.9/35, para. 11 (UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 2). However, the new text of article 1 of ULIS omits the reference to habitual residence where a party does not have a place of business, as indicated in the said article III.

⁵ For the text of article 5, para. 1 (a), as approved by the Working Group, see document A/CN.9/52, paras. 51-57 (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

⁶ A/CN.9/52, paras. 13 and 25 (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

4. Later, at the third session of the Working Group (January 1972), the first modification of article 5 was transferred to article 2, paragraph 1 (a), and the second, with drafting changes, remained as article 1, paragraph 2, but was not approved by the Working Group (A/CN.9/62, annex I).*

5. This part of the paper by the Mexican delegation is confined to the above-mentioned article 1, paragraph 2, since it is the only paragraph of article 1 that the Working Group left pending.

6. In our view, this paragraph should be interpreted as a severe restriction on the scope of the application of ULIS because in the event of the parties' having their places of business in different States, which is stated in article 1, paragraph 1, as a condition for the application of the Uniform Law, the requirement is that that circumstance should be known by the parties, for one of the following reasons: first, that it was stipulated in the contract; second, that it flows from other operations or dealings between them; or, third, that the fact may be inferred from information disclosed by the parties either before or at the conclusion of the contract.

If none of the three conditions stated in paragraph 2 applies, the parties should be considered not to have their places of business in different States, and therefore ULIS would not be deemed to apply under the conditions laid down in article 1, paragraphs 1 (a) and (b).⁷ On the other hand, ULIS would apply in the case of paragraph 3, concerning which it is immaterial whether the parties have their places of business in the same State or in different States.

7. In connexion with this restriction imposed on the scope of the application of ULIS, the first question that arises is whether the restriction is justified: on the assumption that it is so justified, the second question is whether the criteria proposed in paragraph 2 are the most convenient and appropriate.

(a) As to the first question, we do consider it justified for ULIS to apply only when the parties know that their places of business are in different States, and we believe that therefore ULIS should not apply when the said places of business are in the same State (except in the case of article 1, paragraph 3), or when the parties are not aware of the fact that their places of business are in different States, either because that fact was not stipulated in the contract itself or in other agreements or because no information was given.

This restriction is certainly wider than that established in article 1, paragraphs 1 (a), (b) and (c), of the current text of ULIS, which provide for the application of the Law in each of the three cases indicated therein, whether or not the parties know or have reason to know that their places of business are in different States.

We prefer the solution provided in the version of paragraph 2 that we are now considering, as proposed by the Working Group, since it is based on concrete, objective and explicit information, such as a stipulation in a contract or in other dealings, or the information disclosed by the parties.

⁷ It is not clear, however, that in paragraph 1 (b) ULIS ceases to apply in the case we are now considering.

(b) Furthermore, the solution we are now analysing seems preferable not only to the current text of ULIS but also to the previous proposal by the Working Group (see para. 3 above), under which the parties would be considered not to have their places of business in different States if they neither knew nor had reason to know at the time of the conclusion of the contract that the contrary was the case. This formula, which has been justly criticized for introducing a subjective element—namely, the knowledge of one of the parties that the place of business of the other is in a State different from that of his own—is also unacceptable because it appears to place the burden of proof on the demonstration of a negative fact, namely, that the party neither knew nor had reason to know that circumstance.

8. Consequently, we support the contents of article 1, paragraph 2, as proposed by the Working Group; however, we wish to propose an addition because the text approved appears to be insufficiently clear. To say "The fact that the parties have their places of business in different States shall be disregarded" does not necessarily imply that in such cases ULIS would not apply; the fact is that, however strange the opposite conclusion might appear to be, such an expression could be interpreted as implying that, in the cases to which the provision refers, the parties are presumed to have their places of business in different States and that, consequently, ULIS is indeed applicable.

We therefore propose that this text should read:

"The fact that the parties have their places of business in different States shall be disregarded, and consequently the present Law shall not apply, 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."

Article 2, paragraph 1 (a)

9. In paragraph 1 (a), the following formula was left unresolved and kept in square brackets by the Working Group at its third session (Geneva, January 1972):

[or from any dealings between, or from information disclosed by the parties at any time before or at the conclusion of the contract.]

10. We support this text, not so much for the purpose of symmetry and analogy with article 1, paragraph 2, but rather because this wording limits the scope of the restriction introduced into ULIS for the case of the so-called "consumer sales".

It is justifiable to exclude from the application of a law governing international trade goods ordinarily bought for personal, family or household use; but when they are bought for a different use and that fact arises from the contract, ULIS should apply.

11. In order to nullify the effect of the fact that the goods are ordinarily intended for consumption, either of two conditions should suffice: an express stipulation in the contract of sale or in any other dealings between the parties (indicating, of course the buyer's intention to acquire for "different use" the goods which are the

subject of the contract) or information disclosed to the seller.

Article 2, paragraph 2 (b)

12. The Working Group, during its second session,⁸ left pending the question of the inclusion in this paragraph, which exempts from the application of ULIS "any ship, vessel or aircraft", of the words:

[which is registered or is required to be registered].

13. These words seem unacceptable to us. If the exemption of the transaction from ULIS were made subject to the registration of the ships, vessels or aircraft, the legal regulations would depend on a fact independent of the buyer and possibly unknown to him; an element of uncertainty absent from the other conditions of paragraph 2 [2 (a) and (c)], which refer to easily identifiable goods without laying down any additional requirement, would also be introduced.

14. *A fortiori*, the stipulation that the goods "are required to be registered" should be rejected, because it makes reference to provisions of the different internal laws of the parties, and there are no grounds for supposing that they will be known to parties under the jurisdiction of different States.

15. In any case, if the intention is to limit the scope of this exemption to exclude—and consequently to leave subject to ULIS regulations—sales of smaller boats or aircraft, reference should be made to ships, vessels or aircraft which, as set forth in the report of the Working Group,⁹ are under internal laws, normally subject to national registration, and not to local or municipal registration.

16. We therefore advocate that this exclusion of ships, vessels or aircraft should be restricted to those for which national registration is normally required.

Article 3, paragraph 1

17. Approval of paragraph 1 of this article is still awaiting approval, although the report of the Working Group on its second session gives the impression that it has been approved.

The text of the paragraph is the following:

[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.]

18. The paragraph in question constitutes an addition to article 6 of ULIS, which becomes article 3, paragraph 2 of the Working Group draft under consideration. However, the two paragraphs of article 3 have opposite effects: whereas the first excludes the contracts referred to from ULIS, the second places in the same category as sales, and therefore includes within the scope of ULIS, "contracts for the supply of goods to be manufactured or produced".

19. We support the criteria adopted in the new text by the Working Group, namely, that article 2, which excludes specific sales of goods from the scope of ULIS, should be supplemented by another exclusion, not of contracts for the sale of goods but of other contracts

⁸ A/CN.9/52, paragraph 55 (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

⁹ *Ibid.*

under which the obligations of the parties are other than those characterizing contracts for the sale of goods, and that article 3 itself should embody the rule which assimilates to contracts for the sale of goods covered by ULIS those other contracts under which the seller assumes the obligation of producing the goods that are to be the object of the future sale.

20. Moreover, in our view it is clear that when the obligations of the parties are *substantially* other than the delivery of and payment for the goods, the contract is not one for the sale of goods, and accordingly, there is no reason for applying ULIS. This aspect of the obligations will inevitably have to be determined and precisely stipulated in each concrete case, whether the rule under consideration is retained or rejected; however, as indicated in paragraph 67 of the report of the Working Group (A/CN.9/52),* this will not prevent the parties to the complex transactions involved in such mixed contracts from specifically providing for the applicability of ULIS, in accordance with the principle of autonomy of will embodied in article 1, paragraph 3.¹⁰

21. For the reasons stated above, we propose that the Working Group should give final approval to the text of article 3, paragraph 1.

Article 4 (a)

22. The text of this subparagraph refers to the case in which one or both of the parties have several places of business, in which case article 1, paragraph 4, requires that, in order for ULIS to apply, one place of business of one party and one of the other party should be situated in different States. The text, which is awaiting approval, reads as follows:

[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.]

23. This rule, which introduces the concepts of *principal place of business* and *place of business having a closer relationship to the contract*, seeks to fill a gap in the current text of article, paragraph 1, of ULIS, which does not provide for cases in which one of the parties to the contract has two or more places of business. The text was approved by the Working Group, as shown by the reports on its second session (A/CN.9/52, paras. 23-31)* and its third session (A/CN.9/62, annex I).**

24. The solution under consideration has been criticized for introducing subjective elements; however, we do not think such a criticism is valid, since the method of determining the location of a particular place of business would depend not on any decision or specification by the parties but on an objective fact that existed prior to the contract, such as that the place of business was the buyer's or seller's principal

place of business, or that in view of the circumstances *known to or contemplated by* the parties at the time of the conclusion of the contract, there existed a place of business having a closer relationship to the contract.

25. The determination of the place of business in accordance with the criteria laid down in the text under consideration may give rise to litigation and problems of proof. It must be recognized, however, that litigation and uncertainties would not be avoided if ULIS failed to make provision for this case; for if one of the parties, for example the buyer, has a place of business, possibly even the one with the closest relationship to the contract, in the State in which the seller is domiciled, and another, which may be his principal place of business, in another contracting State, what criterion would be applied to resolve the conflict?

Moreover, there would be difficulties of proof in any event; under the text in question, which imposes the burden of proof on whoever seeks to specify the location of the principal place of business or that having a closer relationship to the contract, they might be less severe than under one which places the burden on whoever has to prove that the places of business of the two parties are in different States, although, as previously mentioned, one or both of the parties have or may have several places of business in the same State or in different countries.

26. It might be thought that in order to prevent litigation and problems of proof, an alternative solution could be that ULIS should embody an absolute presumption of the international nature of the sale of goods *whenever* the parties have their places of business (whatever they might be) in different contracting States. However, such a solution would very greatly widen the scope of the application of ULIS, so as to exclude only the sales listed in article 2 (and those expressly excluded by the parties under the terms of article 5).

27. Moreover, another principle mentioned above (whose final approval we have advocated (see paragraph 9 above)), namely, that embodied in article 2, paragraph 1, is of relevance to the problem of the existence of places of business in different States. According to that principle, the fact that the parties have places of business in different States is not sufficient; that fact must also appear from the contract of sale or other dealings between the parties, or from previous information received by one of them.

In supporting this principle and proposing the addition indicated in paragraph 9 above, we rejected the inclusion in ULIS of the concept of absolute presumption (to which we referred in paragraph 26 above). On the contrary, we hold that the existence in different countries of the places of business of the parties should be known to the latter, through any of the means set forth in article 1, paragraph 2. Do we, then, need to include not only article 1, paragraph 2, but article 4 (a) as well?

We think so, because article 1, paragraph 2, requires knowledge by one of the parties that the other party has his place of business in a different country, whereas the conditions of article 4 (a) are fulfilled when one or both parties have places of business in more than

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

** UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5.

¹⁰ Which corresponds in essence to the present article 4 of ULIS.

one State. In other words, the former rule results in either the application or the non-application of ULIS; that of article 4, on the other hand, presupposes the application of ULIS but defines and specifies the place of execution of the contract (the principal place of business, or the one with a closer relationship to the contract) for the purpose of delivery of the goods, inspection of their quality, payment, etc.

28. For all of the above reasons, we advocate the retention of article 4 (a).

Article 9

29. At its second session, the Working Group submitted the following text (A/CN.9/52, para. 73)* to UNCITRAL for consideration:

"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."*

30. In the above text, paragraph 1 is identical to article 9, paragraph 1 of ULIS; paragraph 3 is substantially the same as the second version of article 9, paragraph 2 of ULIS (but instead of reading: "usages shall prevail", as now provided for by ULIS, it reads "such usages shall prevail"), and paragraph 4 is similar to article 9, paragraph 3 of ULIS, with the two following changes: (a) the wording in ULIS, "they shall be interpreted according to the meaning given to them in the trade concerned" has been replaced by the following: "they shall be interpreted according to the meaning widely accepted and regularly given to them in the trade concerned". (b) it is proposed that the following be added to paragraph 4, "unless otherwise agreed by the parties".

31. More substantial amendments have been made to the first part of article 9, paragraph 2 of ULIS. It is proposed that the reference to "usage which reasonable persons in the same situation as the parties usually consider to be applicable to their contract", be deleted, since this expression neither defines nor distinguishes objectively and clearly the usage to be applied to the contract, and because the concept of "reasonable persons", besides being vague, would give rise to inexactitude and confusion, since "two reasonable men from

different parts of the world might consider different usages as regularly applied to their contracts."¹¹

32. Instead of the first version of paragraph 2, the Group recommends a new paragraph 2, in which the usages which would be impliedly applicable should be stipulated, i.e. those of which the parties are or should be aware because they are widely known in international trade and regularly observed under contracts of the type involved.

33. It should be first stated that in our opinion the following principles established by article 9 both under the existing Law and in the text recommended by the Working Group should be observed and maintained: (a) that the parties to a contract of international sale of goods should be bound by usages and practices of international trade; (b) that such usages should prevail over ULIS in the case of a conflict between them and it, and (c) that also in this respect the autonomy of the parties, now established as a general principle in article 3 of ULIS (article 5 of the new text) should be recognized.

34. The amendments proposed by the Working Group are in general acceptable to us. However, there are some differences concerning paragraphs 2, 3 and 4; these are discussed below and subsequently changes are proposed (paras. 36-38).

35. With reference to paragraph 2, we do not think that the implied application of the usages requires the two qualifications included in paragraph 32 above. Either of the two qualifications would be sufficient for the respective usage to be considered applicable. In other words, any usage would be applied of which the parties are or should be aware because it is widely known in international trade, regardless of whether "it is regularly observed by parties to contracts of the type involved".

In the case of a local usage (which is none the less applied and known in international law) that does not have this latter characteristic, but of which the parties are or should have been aware, it will be applicable to the contract. Clearly, the burden of proof for these facts, one subjective (that the party is or should be aware of it) and the other objective (that it is known, i.e., is applied in international law), would be incumbent on whoever invokes the application of the usage, as it is also clear that the parties may provide in their contracts that the usages should not apply (or that these should not prevail over ULIS).

Similarly, if a usage in international trade is regularly observed in contracts of the type involved, it will be applicable to the case in point, even if the parties were not aware of it. On this assumption, the usage would be normative, with the same compulsory nature as the Law and, therefore, should be known to the parties; for it not to be applicable, it would have to be expressly excluded by the provisions of the contract, in application of the principle of the autonomy of the parties.

Secondly, (still with reference to para. 2) the wording "shall include" used in the first part of this para-

¹¹ According to the objection raised by the Hungarian delegation which proposed to the Working Group the text under consideration.

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

graph is inappropriate, since, assuming that this paragraph provides for the implied—not express—application of the usages, the only usages applicable should be those to which the paragraph itself refers and no other.

Finally, article 9, paragraph 2 should be redrafted and simplified in order to avoid repetition and ambiguous or confusing expressions such as the word “parties” (in contracts of the type involved).

36. The text we propose, in the light of the objections raised in the above three paragraphs, is as follows:

[2. *It shall be considered that the usages that the parties have impliedly made applicable to their contract shall be those of which they are or should be aware because such usages are widely known in international trade, or those which are regularly observed in contracts of the type involved.*]

37. In article 9, paragraph 3, the clause “unless otherwise agreed by the parties” is superfluous and inappropriate. It is superfluous, because the principle of autonomy provided for in article 5 of the text recommended by the Working Group (article 3 of ULIS) makes this wording unnecessary. It is inappropriate, because it might be considered, on interpreting ULIS, that when this wording or something similar is not used in its other provisions, the principle in article 5 is not applicable. This same objection can be made to article 9, paragraph 4.

Therefore, we propose that paragraph 3 should read as follows:

[3. *In the event of conflict with the present Law, such usages shall prevail.*]

38. In paragraph 4, besides omitting the expression “unless otherwise agreed by the parties”, for the reasons given in the preceding paragraph, we share the criticisms which some representatives in the Working Group made concerning this provision, and agree with the text proposed at that time (see A/CN.9/52, para. 82).^{*} which reads as follows:

[4. *Where expressions, provisions or forms of contracts commonly used in commercial practice are employed, the meaning usually given to them in the trade concerned shall be used in their interpretation in accordance with the provisions of paragraphs 1 and 2.*]

Article 10

39. At its second session, the Working Group decided to defer discussion of article 10 of ULIS until the substantive rules of the Uniform Law were discussed (A/CN.9/52, para. 84). The text of article 10 is as follows:

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

40. A problem arose in the discussions of this text concerning the expression “reasonable person”; sugges-

tions were made to delete it or replace it (paras. 85 and 86 *ibid.*). Clearly, the basic criticisms that may be levelled against this term are similar to those made concerning article 9, paragraph 2 (see para. 31 above), with the added objection that this term “would lead to different interpretation by the courts in different countries” (end of para. 86, *ibid.*).

41. However, there is no reason to postpone discussion of the problem of fundamental breach since the Working Group, in its five sessions, has considered the principles of ULIS and has, at least provisionally, adopted the articles dealing with the concept of fundamental breach.

42. The articles of ULIS approved by the Working Group which refer explicitly to a fundamental breach of contract are the following:

(a) *With regard to non-performance by the seller:* Articles 42, paragraph 2; 43, paragraph 1; 44, paragraph 1 (a);¹² 46, paragraph 2;¹³ and 52, paragraph 2.¹⁴

(b) *With regard to non-performance by the buyer:* Article 72 *bis*, paragraph 1 (b).

(c) *With regard to non-performance by either party:* Article 74, paragraph 1;¹⁵ and article 75.

(d) *In the case of passing on of risks:* Article 98 *bis*, paragraphs 1 and 2.

43. The problems of the definition of fundamental breach, as given in article 10, are essentially still present in the Working Group's new version of ULIS, since although it is true that the notion of fundamental breach is resorted to in some cases where no provision for it is made in the present ULIS (articles 42, para. 2; 75, para. 1; and 98 *bis*), in the other articles the previous system is retained.

Similarly, the present version is still open to the same objections and criticisms which were directed at a definition based on a subjective datum (that the party knew, or ought to have known) and on so many hypothetical assumptions: (i) that a reasonable person (ii) in the same situation as the party damaged by the non-performance (iii) would not have entered into the contract (iv) if he had foreseen the breach and its effects.

44. Such a concept and such a definition cannot be satisfactory, since it defines nothing and leaves the solution of any problem up to a difficult analysis of the intentions of the parties, and ultimately to the discretion of the interpreters or the judge. A simpler and

¹² This rule, together with article 72 *bis*, grants the right to declare the contract avoided by reason of non-performance by the other party.

¹³ This is equivalent to article 74, which provides for the consequences of non-performance by the buyer in the case of sales by instalments.

¹⁴ This rule corresponds to article 52, paragraph 3, of ULIS; however, the latter provision presupposes the existence of a fundamental breach, as defined in article 10, if the buyer is to have the right to declare the contract avoided and to damages, whereas the rule cited in the text inverts the solution and considers a fundamental breach to exist when the seller fails “to take appropriate action in response to the request” of the buyer, independently of the definition contained in article 10.

¹⁵ This rule is equivalent to article 75, paragraph 1, of ULIS; however, the latter does not require the existence of a fundamental breach but merely requires fear of future non-performance.

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

clearer objective criterion should be striven for. In our opinion, such a criterion would be that *the non-performance alters substantially¹⁶ (to a significant extent) the scope or content of the rights of the affected party*. We believe that this criterion, applied to each and all of the articles we have enumerated in paragraph 42 above, would yield a simpler and fairer solution in the various hypothetical situations.

45. This criterion would, in fact, apply more naturally in the case of article 42, paragraph 2, in which the definition of article 10, on the other hand, seems to be improper, for it is based on the idea that the party damaged by the non-performance may declare the contract avoided, whereas article 42 has as its purpose the maintenance of the contract.

It would also apply more satisfactorily in the cases provided for in articles 44, paragraph 1 (a); 74, paragraph 1;¹⁷ 46, paragraph 2; 75; and 98, paragraphs 1 and 2.

In the case of article 43 *bis*, paragraph 1, i.e. the case of delay, the new criterion would be more in keeping with the other two principles of "unreasonable inconvenience" and "unreasonable expense".

Lastly, in the case of article 52, paragraph 2, the criterion we propose and the definition given in article 10 would be equally applicable, since that article defines and states a concept proper to a fundamental breach for the cases of rights or claims of third parties; nevertheless, we believe that it would be easier to prove that the rights or claims affect or alter substantially the rights of the innocent party than it would be to test the extremes of article 10.

46. We therefore propose the following definition for article 10:

"For the purposes of the present Law, a breach of contract shall be regarded as fundamental whenever non-performance of any obligation by either of the parties alters substantially (or to a significant extent) the scope or content of the rights which are possessed by the other party and which are derived from the contract or from this Law."

Article 15

47. The text of this article, which is awaiting approval, is the following:

[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.]

48. In its consideration of this text, the Working Group failed to reach unanimous agreement at its second session, owing to one delegation's position that the contract should be concluded in writing if the national law of either party so required.¹⁸ Accordingly, it was agreed to refer the article to the Commission for final consideration.¹⁹

¹⁶ In favour of the expression "substantially" we may cite two articles of ULIS in which it is used, namely, article 3, paragraph 1 (see above, para. 17) and article 73, paragraph 1.

¹⁷ Paragraph 2 in each of these articles would limit the scope of the principle.

¹⁸ See A/CN.9/52, para. 115. (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

¹⁹ *Ibid.*, para. 123.

49. We support the text proposed by the Working Group, which is substantially the same as that of ULIS. We believe, in fact, that the above-mentioned requirement of municipal law should not be applied to international sales governed by ULIS if it is desired to give the latter the uniform character it should have, if it is desired to avoid any uncertainty or surprise in the mind of the party opposed to the omission of the written form and if, in addition, it is desired to eliminate serious problems concerning the application and interpretation of its provisions.

50. Indeed, the considerations indicated in report A/CN.9/52, paragraph 117, of the Working Group²⁰ are persuasive both with regard to retaining the above-mentioned text, even though it refers to an element of form which would be more proper to the Uniform Law on the Formation of Contracts and is already contained therein (article 3), and with regard to the difficulties that would result from the adoption of any of the modifications or intermediate solutions which were analysed by the Working Group and which are referred to in paragraphs 118-122 of the said report.²¹

51. It should be borne in mind, in support of the text under examination, that the principle of autonomy of will which is indicated in the article of the very text of ULIS permits either of the parties to the contract of sale to require a written form without necessitating or justifying a special reservation in article 15;²² obviously in countries in which foreign trade constitutes a monopoly reserved to the States, *this requirement* by one of the parties would be facilitated.

Article 17

52. The Working Group at its second session proposed the following text to replace the present text of article 17 of ULIS:

"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]."

53. This text was not adopted unanimously by the Working Group but referred to UNCITRAL for decision, together with other proposals that were made.²³

54. We think that the text submitted by the Working Group is unsatisfactory because, in our view, it is incomplete. We are not opposed to retaining it since it indicates the two features or principal characteristics of ULIS, namely, its international character and the need to promote uniformity in the international sale of goods; however, we believe that it should be supplemented by a second paragraph as was proposed at the aforementioned second session,²⁴ which would provide

²⁰ As well as the study and the comments by the United Kingdom delegation at the second session.

²¹ The requirements of written form would in fact, as the United Kingdom report stated, pose such serious additional problems as those of defining what should be meant by "writing" (telex, teletype, etc.), whether the formality should be one *ad substantiam* or *ad probationem*, whether the consequence of non-compliance with such a formality should entail declaring the contract avoided or simply denying execution of it, and the like.

²² See our position in paragraph 37 above with regard to a similar problem.

²³ See A/CN.9/52, paras. 126-137 (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

²⁴ *Ibid.*, p. 131.

for the application of the general principles on which the Law is based in the case of questions concerning matters governed by the Law which are not expressly settled therein or, in other words, cases involving gaps not covered by ULIS.

55. It is inevitable that gaps will be encountered in the interpretation and application of ULIS; such gaps might occur because of the omission of express provisions concerning questions covered by the Law (excluding, of course, questions relating to matters beyond the scope of ULIS, as set forth in articles 5 and 8 of the present text) or because some provisions, despite the best efforts of those contributing to and preparing the final text of the Law, might be vague and inadequate. Accordingly, we believe that the text proposed by the Working Group (see para. 52 above) would not be adequate to fill these gaps and to assist interpreters of the Law without giving them undue powers of discretion which could lead to interpretations contrary to the spirit and history of ULIS. It would be necessary to adopt one of two solutions: to include either a reference to the general principles of the Law²⁵ or a reference to the rules governing conflicts of laws in the various national legal systems. The latter solution would be prejudicial to the uniformity and the international character of the Law.

56. Consequently, we support the following formulation of article 17, which has as its first paragraph the text proposed by the Working Group (see para. 52 above) and as its second paragraph the present text of article 17 of ULIS;

Article 17

1. *In interpreting and applying the provisions of this Law, regard shall be had to its international character and to the need to promote uniformity.*

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

IV. AMENDMENTS PROPOSED BY THE REPRESENTATIVE OF NORWAY TO THE REVISED TEXT OF ULIS

[Original: English]

Article 1

Paragraph 3 shall read:

"3. The present Law shall also apply where it has been chosen as the law of the contract by the parties, to the extent that this does not affect the application of any mandatory provision of law which would have been applicable if the parties had not chosen the present Law."

Comment

Cp. ULIS arts. 4 and 8.

Article 8

In the second sentence the two words "in particular" are misleading and should be deleted.

²⁵ Which all legal systems and most national legal orders expressly recognize, as was noted in the study on article 17 prepared by Prof. Tunc for the Working Group's second session.

Article 12 (new)

Alternative A:

Where the present Law refers to the act or (actual or presumed) knowledge of a party, such reference shall include the act or knowledge of his agent or of any person for whose conduct such party is responsible [provided that such agent or person is acting within the scope of an employment for the purpose of the contract].

Alternative B:

For the purposes of the present Law the seller or the buyer shall be responsible for the act or the [actual or presumed] knowledge of his agent or of any person for whose conduct he is responsible, as if such act or knowledge were his own [, provided that such agent or person is acting within the scope of an employment for the purpose of the contract].

Comment

See articles 76, 79 (d), 96, cp. arts. 9 (2), 10, 33 (2), 38 (3), 40, 42, 76, 82, 89, 97.

Article 14

Add the following as a new paragraph 2:

"2. Where any notice referred to in the present Law has been sent in due time 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 party giving such notice the right to rely thereon."

Comment

See ULIS article 39 (3); cp. arts. 21 (1), 39 (1), 43 bis (2), 44, 72 bis, 73 (3), 74, 76 (3), 94.

Article 16

This article should be retained but redrafted as follows (cp. articles 42 and 71 subpara. 3):

"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 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."

Article 20

In subparagraph (b) replace the word "unascertained" by "unidentified".

In subparagraph (c) delete the reference to "habitual residence", cp. article 4 (b).

Article 21

In paragraph 1 substitute "appropriated" by "identified."

Article 33

Paragraph 1 shall read:

"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, the goods shall:*

"(a) be fit for the purposes for which goods of the same description would ordinarily be used;

"(b) be 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 sample or model;

(d) be contained or packaged in the manner usual for such goods."

Comment

The meaning will be clearer by omitting the words "and which" in the initial passage. (Subparas. (a) and (b) are not necessarily cumulative with the first sentence.)

In paragraph 2 the word "liable" is used in a broader sense than liability for damages, cp. "tenu" in the French text. Should this be reflected by using "responsible" in the English text? The same applies to article 35.

Article 35

Paragraph 1 should read:

"1. The seller shall be *responsible* in accordance with the contract and the present Law for any lack of conformity which exists at the time when, *according to the provisions of articles 97 and 98*, the risk passes to the buyer, even though such lack of conformity becomes apparent only after that time."

Comment

The present passage in brackets should be deleted and substituted by a reference to the pertinent articles in chapter VI on passing of the risk, i.e. present articles 97 and 98, but not present 98 *bis* (in the Norwegian proposals *infra* the pertinent articles will be 97, 98 and 98 *bis* but not 98 *ter*).

As regards paragraph 2, see comments to article 39.

Article 39

In paragraph 1 the second full stop sentence seems superfluous and may perhaps be deleted.

The last full stop sentence of paragraph 1 should be transferred to a new paragraph 2 and read as follows:

"2. *Notwithstanding the provisions of the preceding paragraph*, 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, [except to the extent that such time-limit is inconsistent with a guarantee [undertaking] by the seller covering a different period]."

Add the following as a further new paragraph 3:

"3. In case of breach of a guarantee [or other undertaking] by the seller referred to in article 35, paragraph 2, the buyer shall lose the right to rely on

such breach if he has not given the seller notice of the lack of conformity within a reasonable time after he has discovered or ought to have discovered it. The buyer shall, however, lose his right to rely on such a guarantee [undertaking] if he has not given notice to the seller within a period of [1 year] from the date of the expiration of the period of guarantee."

The present paragraph 2 will be new paragraph 4.

The present paragraph 3 should be transferred to article 14 as a new paragraph 2.

Comment

Dealing with the problem of guarantee one should consider three possible categories of guarantees or undertakings:

(1) A guarantee that the goods are without any lack of conformity existing at the time of delivery (original lack of conformity), eventually combined with an agreement on the period within which complaints may be advanced. Any reference in the text to this type of guarantee or agreement is superfluous (see article 5).

(2) A guarantee or an undertaking by the seller that the goods will remain fit with certain qualities for a specified period, see article 35, paragraph 2. This type of guarantee gives rise to special problems which should be dealt with separately in article 39; see proposed paragraph 3 *supra*. Such a guarantee may have certain impacts on the two years period presented in the present paragraph 1, but not necessarily. If the period of such guarantee is longer, it seems to be reasonable to presume that it covers also an original lack of conformity which the buyer ought not to have discovered before the expiration of the two years period. If the period is shorter, there seems to be no justification for a corresponding presumption, unless the guarantee is combined with an agreement (express or implied) that any complaint should be advanced within the shorter period, cp. under (1) *supra*.

(3) An undertaking by the seller to remedy any defect which may appear (arise, be discovered) within a specified period. Such an undertaking is usually implied in a guarantee referred to in article 35, paragraph 2 (and under (2) *supra*).

If the problem of a guarantee or undertaking as mentioned under (2) and (3) is dealt with in a separate paragraph 3 as proposed *supra*, it would presumably not be necessary to refer to any guarantee in the proposed paragraph 2. If this nevertheless is deemed desirable, the language in brackets should be used in order to make it clear that the two years period may be inconsistent with a guarantee covering a different period, a question which will depend on the contract.

The proposed distinction between an original lack of conformity (new paragraph 2) and a guarantee against later defects (new paragraph 3) will make it clear that the buyer has a choice between basing his claim on the one or the other category, and that the pertinent period may be different in the two cases.

Article 41

Subparagraph (b) should read:

"(b) Claim damages as provided in articles 82 to 89."

Article 42

Paragraph 1 should read:

"1. The buyer has the right to require the seller to perform the contract, unless the buyer has acted inconsistently with that right, in particular by avoiding the contract under article 44 or by reducing the price under article 45 [or by notifying the seller that he will himself provide for the cure of the lack of conformity]."

Comment

The condition for requiring specific performance is proposed to be incorporated into article 16. The buyer should otherwise have the right to require performance, even if specific performance can not be enforced under article 16. The present text adopted by the Working Group is difficult to apply as long as the parties do not know which court will ultimately be seized with the case.

In paragraph 2 substitute at the end for the words "and after prompt notice" the following: "and provided that he gives notice thereof within a reasonable time as provided in article 44."

Article 43 bis

In paragraph 1, delete the passage (exception) starting with "unless". This passage seems inconsistent with the right given to the seller in the preceding passage. It is also (or might be construed to be) contrary to the corresponding provisions in ULIS (articles 43 and 44). If the exception should be retained, it would have to be redrafted, e.g. as follows:

"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, on account of delay, has declared the contract avoided in accordance with article 44 or has declared the price to be reduced in accordance with article 45."

Paragraph 2 has a somewhat wider scope than the buyer's decision under paragraph 1 and should commence as follows:

"2. If the seller requests the buyer to make known his decision as to whether he will accept performance, and . . ."

Article 44

Paragraph 2 shall read:

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

(a) with respect to avoidance based on non-delivery or later delivery [and subject to the provisions of article 43 bis], within a reasonable time after the buyer has been informed that the goods [or documents] have been delivered late;

(b) with respect to avoidance based on lack of conformity or any other breach not covered by the preceding subparagraph, within a reasonable time after the buyer has discovered or ought to have discovered such breach, or, where avoidance is based

on the seller's failure to cure such breach in accordance with articles 43 or 43 bis, after the expiration of the applicable period of time referred to therein."

Article 47

Paragraph 1 should read:

"1. Where the seller tenders delivery of the goods before the date fixed, the buyer may refuse to take such delivery if it will cause him unreasonable inconvenience or unreasonable expense."

Article 52

This article 52 and section III of chapter III should be transferred forward to section I of the same chapter as a new article 40 bis under a new subsection 3: Obligations of the seller as regards transfer of property. (The subsections 1, 2 and 3 might better be designated as subsections A, B and C.)

Article 59 bis

For the sake of clarity the provisions of ULIS article 72, paragraph 2 should be added to or incorporated into paragraph 3 of article 59 bis. This paragraph could then read:

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

SECTION III

The placement of article 67 in relation to section III may be questioned. Article 67 should perhaps be transferred forward to a place before section III, for instance as the last article under section II.

Article 70

In paragraph 1 delete the word "and" between subparagraphs (a) and (b); cp. article 41.

Subparagraph (b) should read:

"(b) Claim damages as provided in articles 82 to 89."

Article 71

Paragraph 2 should read (cp. articles 16 and 42 (1)):

"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 his obligation."

Article 72 bis

In paragraph 1 the provision of subparagraph (b) seems to have been given too wide a scope. Cp. ULIS articles 62 (2) and 66 (2) and revised article 44, paragraph 1, subparagraph (b). It is proposed to draft the present subparagraph (b) as follows:

"(b) Where the buyer has not paid the price [or taken delivery] within an additional period of time fixed by the seller in accordance with article 72."

In paragraph 2 Norway prefers alternative C. This would be the case even if the Working Group decides to delete the last sentence (starting with "In any event . . .").

Article 73

Paragraph 1 should commence as follows:

"1. A party may suspend the performance of his obligation when, after the conclusion of the contract, the appearance of a serious deterioration . . ."

Article 74

Paragraph 2 should read:

"2. A buyer, avoiding the contract in respect of any given delivery or of future deliveries, may also, provided that he does so at the same time, declare the contract avoided in respect of previous deliveries, if by reason of the interdependence of the deliveries, the goods already delivered could not [neither] be used for the purpose contemplated by the contract [nor serve any other useful purpose for the buyer?]."

Article 76

Norway prefers *alternative B*. We can also support support paragraph 2 under *alternative A*. The article would then read:

"1. Where a party has not performed one of his obligations, he shall *neither be required to perform nor* be liable in damages for such non-performance if he proves that it was due to an impediment [which has occurred without fault on his side and being] of a kind which a party in his situation could not reasonably be expected either to take into account at the time of the conclusion of the contract or to avoid or overcome.

"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 provided the subcontractor would also be exempt if the provisions of that paragraph were applied to him.

"3. Where the circumstances which gave rise to the non-performance constitute only a temporary impediment, the exemption provided by this article 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, the performance has so radically changed as to amount to the 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 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 such failure.

"5. The exemption provided one of the parties by this article 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."

Article 78

Add the following as a new paragraph 3:

"3. If the contract has been avoided in part, the provisions of this article shall apply to such part only."

Article 79

In paragraph 2 transfer the present subparagraph (d) forward to the front as a new subparagraph (a) and shift the other subparagraphs accordingly. The reference to some other person should be deleted; see proposed article 12 *supra*.

Article 82

Add after the word "which" in the third line, the following text omitted by error in annex I: "the party in breach had foreseen or ought to have foreseen at the time of".

Transfer the provision of article 85 to the present article 82 as a new paragraph 2 reading:

"2. 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, as part of the damages referred to in the preceding paragraph, recover the difference between the contract price and the price paid for the goods bought in replacement or that obtained by the resale."

Article 83

The reference to "habitual residence" may be deleted, see article 4, subparagraph (b).

Article 84

Add after the word "price" in the fourth line of paragraph 1, the words "on the date" omitted by error in annex I.

Article 85

See above the proposal of transfer of article 85 to article 82 as a new paragraph 2.

Article 88

Substitute the words "as may be reasonable" by: "as are reasonable". The fourth line should read: "may claim a reduction in the damages equal to the amount by which the loss should have been mitigated."

Add the following at the end as a new paragraph 2:

"2. Where it is reasonably possible for the buyer to buy goods in replacement of the goods to which the contract relates, or for the seller to resell the goods, and he nevertheless neglects to do so within a reasonable time after the breach of the contract by the other party the damages shall not include any loss which could have been avoided or mitigated thereby."

CHAPTER VI. PASSING OF THE RISK

Article 96

Same as ULIS (adopted by the Working Group), but substitute "damage to" for "deterioration of" and delete the reference to some other person; see proposed article 12 *supra*.

Article 97

"1. Where the contract of sale involves carriage of the goods and the seller is not required to deliver

them at a particular destination, the risk shall pass to the buyer when the goods are handed over to the carrier for transmission to the buyer. (If, however, the seller is required to deliver the goods at a particular destination, the risk shall not pass to the buyer until the goods either are taken over by him or are placed at his disposal at such place when time for delivery has come.) (cp. U.S. Uniform Com. Code Section 2-509)

"2. The provisions of paragraph 1 shall also apply if at the time of the conclusion of the contract the goods are already in transit. If, however, the seller at that time knew or ought to have known that the goods or part thereof had been lost or damaged, the risk of such loss or damage shall remain with him, unless he discloses such fact to the buyer.

"3. Nevertheless, if the goods are not marked with an address or otherwise clearly identified for delivery to the buyer, the risk shall not pass until the seller has given the buyer notice of the consignment and, if necessary, sent some document specifying the goods."

Comment

To meet practical situations paragraph 1 should be made more elaborate than the provision adopted by the Working Group at the fifth session CP. U.S. Uniform Com. Code, Section 2-509.

The new paragraph 3 corresponds to ULIS article 100; cp. revised article 21, paragraph 1, second sentence.

Article 98

1. In cases not within article 97 the risk shall pass to the buyer [from the moment] when the goods are taken over by him.

2. If, however, the seller is authorized or required to deliver the goods by placing them at the buyer's disposal at a place other than any place of the seller [at a place of the buyer or of a third person], the risk shall pass when time for delivery has come and the goods are so delivered.

Comment

Paragraph 2 is new and takes care of situations where delivery is effected in accordance with article 20, subparagraph (b). Cp. ULIS article 97 (1). See also the report of the Working Group from its fifth session (A/CN.9/87)* under paragraphs 236-238.

Article 98 bis

1. In all cases where the buyer has failed to take delivery in due time, the risk shall pass to the buyer at the latest from the moment when the goods are placed at his disposal and he has committed a breach of contract by failing to take delivery.

2. Where the contract, in cases outside article 97, relates to 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 marked with an address, separated or otherwise clearly identified to the contract and the buyer has been notified of such identification, if necessary, specifying the goods.

Comment

Paragraph 1 corresponds to present article 98, paragraph 2, first sentence. Paragraph 2 corresponds to the second sentence of the same paragraph (in brackets).

Article 98 ter

Alternative I:

If the seller has committed a fundamental breach of contract, the provisions of articles 97-98 bis shall not impair the remedies afforded the buyer on account of said breach.

Alternative II:

If the buyer avoids the contract or requires substitute goods in the case of fundamental breach of contract by the seller, the seller shall bear the risk of loss of or damage to the goods occurring even after the moment when the risk would otherwise, according to the provisions of articles 97-98 bis, have passed to the buyer.

Alternative III:

Delete the whole article 98 ter; cp. article 79, subparagraph 2 (d).

Comment

Alternative II corresponds quite closely to the present article 98 bis. Alternative I treats the same problem in a different way, which is principally recommended. However, the whole provision of this article could well be deleted since the problem virtually is solved by the provisions of article 79, paragraph 2, in particular subparagraph (d).

V. OBSERVATIONS OF THE REPRESENTATIVE OF THE UNION OF SOVIET SOCIALIST REPUBLICS

[Original: Russian]

1. It would be advisable in formulating the articles contained in the draft law under consideration which are similar to articles in the Convention on Prescription (Limitation) in the International Sale of Goods to bring them into line with those articles. In particular, the bracketed portions of article 1, paragraph 2, article 2, paragraph 1 (a), article 3, paragraph 1, article 4, paragraph (a) and article 17 relate to articles in that Convention.

2. Paragraph 4 of article 9 should be omitted for the reasons set out in paragraph 82 of the report of the second session of the Working Group (A/CN.9/52).*

3. The law should not regulate questions relating to the form of contracts and the consequences of the non-observance thereof, and therefore article 15 should be deleted from the text of the law.

If, however, it is decided to retain in the law the provision on the form of contracts, then it should be indicated that contracts must be drawn up in writing if that is required by the national legislation of one or more of the parties. With regard to the consequences of disregarding the requirement for a written contract, the law could provide either that such a contract would be considered invalid or that the laws of the state requiring a written contract should be applied.

* UNCITRAL Yearbook, vol. V: 1974, part two, I, 1.

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

As has already been observed, depending on what decision is taken about this article, it may prove necessary to revise article 14 and to widen the concept of "communications."

4. The brackets should be removed in article 35, paragraph 1, article 39, paragraph 1 (except for the word "longer"), and in articles 42, 43 *bis* and 98.

5. The wording of article 57 is unacceptable. The price should be determined or determinable.

6. In order to simplify the text of the law article 67 could be omitted.

7. In article 72 *bis* the most acceptable alternative is Alternative A.

8. In preparing the final wording of article 76 of the draft law it would be advisable to work on the basis of Alternative A.

9. In article 82 it would be preferable to include the possibility of full damages for proven losses.

10. The Working Group in drafting the law worked on the assumption that references to actions of the seller or the buyer always cover the actions of the persons for whom they are responsible as well. Therefore for the sake of clarity a special article containing that principle could be included in the law, and the words "or of some other person for whose conduct the seller is responsible" could be omitted from article 96.

VI. STUDY BY THE REPRESENTATIVE OF THE UNITED KINGDOM ON PROBLEMS ARISING OUT OF ARTICLE 74 OF THE REVISED TEXT OF ULIS

[Original: English]

1. I undertook at the end of the fifth session of the Working Group to prepare a study of the unresolved questions presented by article 74 of ULIS, in the light of what was said at plenary meetings of the Working Group and of discussions of Drafting Party V (see progress report on the fifth session, A/CN.9/87,* paras. 107-115).

2. The revised text contained in annex 1 of the progress report sets out two versions of article 74 of ULIS (now renumbered 76), alternative A, provisionally adopted by the Drafting Party, and alternative B, proposed by the Observer for Norway. The two alternatives differ, I think, in two principal respects. They differ in their definitions of the circumstances in which exemption from liability in damages shall be available (para. 1). And they differ in that alternative A does not deal with the availability of any other remedies (because the Drafting Party considered that this needed further examination), whereas alternative B does make provision for reduction of the price and avoidance of the contract (paras. 2 and 4). Three main questions arise out of these differences. (a) In what circumstances is a non-performing party exempt from liability in damages? (b) In what circumstances may either party declare the contract avoided? (The remedy of reduction of the price presents no serious problem.) (c) What are the consequences of avoidance of the contract?

(A) WHEN IS A NON-PERFORMING PARTY EXEMPT FROM LIABILITY IN DAMAGES?

3. Before the differences between alternatives A and B are considered, there is a preliminary point which needs to be established. The non-performing party may be exempt from liability in damages without having the right to declare the contract avoided. This is obvious in the case of temporary delay (the possibility of which is envisaged in paragraph 3 of alternative A and paragraph 2 of alternative B). If for example, the seller is prevented from delivering by a temporary suspension of export licences, he may be exempt from liability in damages, but he will not normally be able to avoid the contract. But this is not the only possible instance. The impediment to performance may concern some other obligation. For example, the seller may have undertaken to pack the goods in plastic containers, and the export of such containers may be prohibited. The seller may be exempt from liability in damages for not providing these containers, but it obviously does not follow from this exemption that either he or the buyer can declare the contract avoided. This difference between the circumstances in which a party is exempt from liability in damages and those in which he (or the other party) may avoid the contract, is half hidden in a shift of meaning in the word "obligation" between paragraph 1 and paragraph 2 of alternative B (and similarly in the ULIS version). Paragraph 1 speaks of "non-performance of one of his obligations" (which may, for example, be the obligation to deliver by a certain day, or to pack in plastic containers), but paragraph 2 speaks of relief from an obligation which has become "quite different from that contemplated by the contract". This must refer to the totality of obligations created by the contract (or, perhaps better, the central or essential obligations) and not to the particular obligation mentioned in paragraph 1. This is not to say, of course, that the two may not coincide, as for example, where export licences have been permanently suspended and the obligation affected by paragraph 1 is therefore the obligation to deliver at all. In this case, if the seller is exempt from liability in damages, he or the other party should obviously be able to avoid the contract. (See part (b) of this study.)

4. In the light of this distinction between non-performance of an obligation and non-performance of the contract (a distinction which, though not easy to define, is implicit in ULIS and in alternative B), the difference between the formulation of paragraph 1 in alternative A and in alternative B becomes more significant. Alternative A sets up two tests for the availability of exemption from liability in damages. Performance of the obligation in question must either have become impossible or have "so radically changed as to amount to the performance of an obligation quite different from that contemplated by the contract". Of these two tests, that of impossibility can be applied either to a particular obligation (such as the obligation to deliver by a certain day, or the obligation to pack in plastic containers) or to the contract as a whole, but the test of radical change will usually be appropriate only to the performance of the contract as a whole. It might therefore be suggested that only the test of impossibility should be retained. But to this suggestion

* UNCITRAL Yearbook, vol. V: 1974, part two, I, 1.

the objection is that "impossibility" has different meanings in different systems. (It was to meet this objection that the concept of radical change was introduced into paragraph 1.) Since therefore the test of impossibility by itself leads to ambiguity, and since the addition of the test of radical change may lead to confusion between the particular obligation and the contract as a whole, it seems better to adopt in this respect the looser approach of alternative B (or something like it), and to leave the concept of radical change to the provisions dealing with the avoidance of the contract as a whole, where it is appropriate (see part (b) of this study). The text of alternative C (see para. 9, below) offers alternative formulations in terms either of "circumstances" (as in ULIS) or of "impediment" (as in alternative B).

5. On the other hand, it seemed from the discussion in the Drafting Party that the form of words relating to fault in paragraph 1 of alternative A was more likely to receive general approval than that in alternative B (though it may well be that the difference is ultimately one of words rather than of substance). It is therefore adopted in alternative C.

6. Alternative B has nothing to correspond to paragraph 2 of alternative A, which is self-explanatory. The need for this provision was, I think, generally accepted in the Drafting Party, and it is included in alternative C.

7. The first part of paragraph 3 of alternative A (corresponding to the first sentence of paragraph 2 of alternative B) is obviously necessary, but the second part (and the second sentence of alternative B) introduces the concept of radical change and is more appropriate to the provision on the availability of the remedy of avoidance (see part (b) of this study). It is therefore omitted in alternative C.

8. Paragraph 4 of alternative B is concerned with remedies other than exemption from liability in damages and is therefore left for consideration in part (b) of this study.

9. If these proposals are accepted, the revised version of article 76 (previously article 74) will be concerned only with the availability of exemption from liability in damages and will run as follows:

Article [76]

Alternative C:

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 (or to circumstances which have) occurred without fault on his part. 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 impediment (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 be so exempt if the provisions of that paragraph were applied to him.

3. Where the impediment to the performance of an obligation is only temporary, the exemption provided by this article shall cease to be available to the non-performing party when the impediment is removed.

4. The non-performing party shall notify the other party of the existence of the impediment and its effect on his ability to perform [of the circumstances which affect his performance and the extent to which they affect it]. If he fails to do so within a reasonable time after he knows of the impediment [circumstances], he shall be liable for the damage resulting from this failure.

(B) WHEN MAY THE CONTRACT BE DECLARED AVOIDED?

10. As has been said in paragraph 2 of this study, alternative A does not deal with this question, but alternative B does make some provision. Under paragraph 4 of alternative B (which approximately follows ULIS in this respect), the other party may reduce the price (where this is applicable) or avoid the contract, and the right to avoid the contract is subject to the normal rules governing breach, i.e., the non-performance must amount to a fundamental breach.²⁶ Under paragraph 2 the non-performing party may avoid the contract, but only when a radical change of circumstances has followed a temporary impediment. When the radical change is not preceded by a temporary impediment, or where the performance is not merely changed but is impossible, the non-performing party can do nothing. This is plainly not what is intended, but it seems to be the effect of the paragraph as drafted. What is required is a provision that the non-performing party may avoid the contract when performance of it has, by reason of the circumstances referred to in paragraph 1, become impossible or has radically changed.

11. The test for the existence of a right to avoid is therefore different for the two parties. For the non-performing party the test is that of impossibility or radical change; for the other party the test is that of fundamental breach. That the test should be different seems right. For example, a temporary suspension of export licences may not have any great effect on the character of the performance required of the seller, but it may well make the goods worthless for the purpose for which the buyer intended them. And conversely, if the authorities in the seller's country impose an export tax of 1,000 per cent, this will no doubt effect a radical change in the character of the performance required of the seller, but it should not be ground for the buyer to avoid the contract (if for some reason of his own he wishes to do so). But though the test of fundamental breach seems right in substance, there is some inelegance and a risk of confusion in using the language of breach when there has been, because of

²⁶ The text actually speaks of "any right which he has to declare the contract avoided", but presumably the "*Nachfrist*" provisions would not apply in this situation, and nor presumably would articles [74] and [75]. But the uncertainty in this respect is an additional argument in favour of providing for the consequences of avoidance for non-performance under article [76] separately from those of avoidance for non-performance or breach. See below.

the circumstances provided for in paragraph 1 of article [76], not a breach but a justifiable failure to perform. It seems better, even though more prolix, to incorporate here an adapted form of the definition of fundamental breach given in article 10. This accords with the wider proposal, which is made in part (c) of this study, that the consequences of avoidance for non-performance under article [76] should be independent of those of avoidance on breach.

12. The provision for these remedies would best be made in a separate article, draft of which is set out below. A small change has been made in the formulation of the test of radical change to take account of what has been said in paragraph 3 of this study. It should be noted that if any change is made in the final version of article 10, the formulation in (b) (ii) of the text below should be reconsidered.

Article [76 bis]

Where the non-performing party has notified the other party, in accordance with article [76], of an impediment to [circumstances which affect] the performance of one of his obligations, the rights of the parties shall be as follows.

(a) The non-performing party may declare the contract avoided if by reason of the impediment [circumstances] above-mentioned, the performance required of him by the contract has become impossible or has so radically changed as to amount to performance of a quite different contract.

(b) The other party may either (i) if he is the buyer, reduce the price in the proportion which the value of any goods delivered bears to the total value of the goods which the seller contracted to deliver, or (ii) declare the contract avoided if a reasonable person in his situation would not have entered into the contract if he had foreseen the non-performance and its consequences.

(C) THE CONSEQUENCES OF AVOIDANCE

13. Assuming that the contract has been avoided, alternative B leaves the consequences of that avoidance to be settled by articles 78-81 (and so does ULIS). But those articles are drafted with breach in mind and are not necessarily suitable to the situation where non-performance is not due to the fault of either party. This is obvious in the case of article 79, but some of the other provisions are of doubtful suitability.²⁷ On the other hand, it is not easy to say with confidence what provisions ought to be put in their place.

14. Three hypothetical cases may help to show where the difficulties lie. It is assumed that the question whether a party may avoid or not has been settled in accordance with the preceding paragraphs of this study.

Case (1). The contract provides for the goods to be delivered by instalments and for the price to be paid on completion of all deliveries. After half the deliveries have been made, the authorities in the seller's country prohibit further export of the goods in question. The

buyer is unable to return the goods. The market value of the goods has risen, but the actual benefit to the buyer is less than either the market value or the proportionate part of the price (because, for example, the purpose for which he needed the goods can only be met by a complete delivery, and there will be long delay in obtaining substitute goods from any alternative source).

Case (2). Contract for delivery by instalments, followed by prohibition on further exports, as in case (1). The buyer is unable to return the goods because he has resold at a price considerably higher than the contract price and higher also than the current market price; or he cannot return them because he has incorporated them in a building, and the cost of obtaining substitute goods is higher than the contract price.

Case (3). The seller has contracted to make and supply goods to the buyer's specification, the price to be paid on delivery. Before the goods have been delivered, but after the seller has incurred considerable expense in preparatory work (such as design or the acquisition of machine tools), export of the goods is prohibited, or some impediment within the meaning of article [76] prevents the buyer from taking delivery.²⁸

In all these cases the seller has incurred expenditure, but has received no benefit. In case (1) the benefit to the buyer is less than the value of the goods, however computed. In case (2) the benefit to the buyer is higher than the value of the goods. In case (3) there is no benefit to the buyer at all.

15. There seem to be in principle five possible solutions.

(a) The solution adopted by alternative B and by ULIS, which requires the buyer to return the goods, or, if that is impossible, to account for the benefits which he has derived from the goods. This means that in case (1) the seller will get less than the market value of the goods and less than a proportionate part of the price; that in case (2) he will get the benefit of the buyer's advantageous resale or of the rise in the market price; and that in case (3) he will get nothing.

(b) To allow the seller to claim the amount of the benefit to the buyer, provided that this does not exceed the expenditure incurred by the seller. This is the solution commonly applied by those systems which have a general doctrine of unjustified enrichment. The practical result will be the same as in solution (a) for case (1) and case (3), but in case (2) the seller will be limited to the amount of his expenditure (which may possibly be higher than the contract price if he made a bad bargain in the first place).

(c) To allow the seller to claim the amount of the benefit to the buyer, provided that this does not exceed the proportionate part of the contract price. The practical result will be the same as in solutions (a) and (b) for cases (1) and (3), but the limit on the seller's recovery in case (2) will be different. This is the solution of the American Restatement—Contracts.

²⁷ It should be noted that the revised article 81, para. 2 (b), in any case needs correction, in so far as it applies only to the case where it is the buyer who has exercised his right to declare the contract avoided. It must apply whether it is the buyer or the seller (as in the original ULIS version).

²⁸ It cannot make any difference from whose "side" the impediment comes, unless that party is at fault, an eventuality which is provided for in para. 1 of article (76), alternative C.

(d) To allow the seller to claim the amount of the benefit to the buyer, provided that this is not less than the proportionate part of the contract price. The result will be the same as in solution (a) for case (2), and the same as in solutions (a) (b) and (c) for case (3), but in case (1) the buyer will bear the loss caused by the termination of the contract.

(e) To adopt a system of discretionary apportionment of benefits and losses. This can, of course, be adapted to produce any of the results already considered for cases (1) and (2), but it alone can provide a solution to case (3) which does not simply leave the loss on the seller. A system on these lines is adopted in England and in some other Common Law jurisdictions.

16. Solution (e), though perhaps the best in terms of ideal justice, involves a considerable exercise of judicial discretion and a corresponding amount of uncertainty, and is probably inappropriate in the context of the Uniform Law. Solution (b) presents considerable difficulties in determining what part of the total expenditure of the seller is to be attributed to the performance of this particular contract. (The same difficulty would of course affect solution (e)). Solution (d) is objectionable because it treats a contract for delivery by instalments for a price payable on completion as amounting necessarily to a series of separate contracts for a proportionate part of the price, whereas solution (e) treats it as only presumptively so amounting, and allows the buyer to rebut the presumption by showing that the actual benefit is less than the proportionate part of the price. (Solution (a) ignores the question.) The choice, therefore, lies between solution (a) and solution (c). In regard to solution (a) there seems no merit in requiring the buyer to return the goods, if he can, since this will in some cases make the amount which the seller recovers depend on the chance of whether the goods can be returned or not.

17. The draft which follows expresses solution (c), but an alternative is given to express solution (a), but without any provision for the return of the goods.

Article [76 ter]

1. If either party declares the contract avoided under the provisions of article [76 bis], both parties shall be released from further performance of their obligations under the contract.

2. (a) If the seller has received any part of the price he shall account to the buyer for it, together with interest at the rate fixed by article 83 as from the date of payment.

(b) If the buyer has received any part of the goods he shall account to the seller either for the benefit which he has derived from them or for such proportion of the price as the value of the goods delivered bears to the total value of the goods which the seller contracted to deliver, whichever is the less.

Alternative draft of paragraph 2 (b) to express solution (a)

(b) If the buyer has received any part of the goods he shall account to the seller either for their market value or for the benefit which he has derived from them, whichever is the less.

(D) CONSEQUENTIAL AMENDMENTS

18. If the proposals made above for articles [76], [76 bis], and [76 ter] are accepted, the following consequential amendments will be necessary. The heading of section II of chapter V should be altered to "Relief in case of supervening impediment". The heading of section III of chapter V should be altered to "Effects of avoidance for breach of contract". It would probably be wise to move section II to a position after section V (and renumber the sections). This would make the distinction between non-performance on breach and non-performance because of supervening impediment clearer.

(E) APPLICATION OF ARTICLE [76], ETC. TO LIABILITY FOR DEFECTS

19. The question was raised in discussion (see para. 112 of the progress report) whether article 74 of ULIS, or its eventual replacement, could apply to liability for latent defects in the thing sold (i.e., to non-performance of one or more of the seller's obligations as to conformity). The answer seems to be that article 74 of ULIS and all the drafts considered might be so interpreted as to do so in some circumstances. For example, if the seller could show that the defect was due to a human error which could not be foreseen or guarded against (and it would be admittedly very difficult to show this), he could argue that this was an "impediment" or a "circumstance" within paragraph 1 of article [76]. More realistically perhaps, if he could show that the defect was not one which could have been foreseen or guarded against in the light of the technical knowledge available at the time, he could argue that he was exempt. Of course, he would be exempt only from damages; the buyer could still avoid the contract or reduce the price. But the exemption could be very important in excluding liability for consequential damage (as where the defect has involved the buyer in liability to third parties). The buyer would be unable to recover these damages (unless he had made express provision in the contract). It is true that this is the normal result in some systems, unless the seller was aware of the defect, but it does not seem to have been the intended effect of ULIS. I have not, however, yet found a formula which would certainly exclude liability for latent defects from the exemption set up by paragraph 1 of article [76]. To exclude from the ambit of paragraph 1 all obligations as to the conformity of the goods would be much too wide; and no variation on "impediment" or "circumstances" seems capable of certainly achieving the intended result. To do so would probably involve a more extensive remodelling of the Uniform Law.

4. Report of the Secretary-General: pending questions with respect to the revised text of a uniform law on the international sale of goods (A/CN.9/100, annex III)*

INTRODUCTION

1. The Working Group on the International Sale of Goods at the fifth session (January 1974) completed its initial examination of the Uniform Law on the International Sale of Goods (ULIS).¹ The revised text of a uniform law which resulted from this examination is set forth in annex I to the report on the Working Group's fifth session.² This revised text sets forth a number of provisions in square brackets to indicate that the Working Group had not reached consensus as to these provisions, or that it wished to give further attention to questions of substance or of drafting. In two instances, alternative texts are set forth.

2. The Working Group at the fifth session, in planning its further work, requested the Secretariat to prepare a study of the pending questions presented by the revised text, indicating possible solutions therefor, and taking into consideration the comments and proposals of representatives submitted before 31 August 1974.³ The present report has been prepared in response to this request.

DISCUSSION OF PENDING QUESTIONS WITH RESPECT TO THE REVISED TEXT OF A UNIFORM LAW ON THE INTERNATIONAL SALE OF GOODS

3. The order of presentation in this report follows that of the revised text of the Uniform Law on the International Sale of Goods as approved by the Working Group. The chapter headings were inserted by the Secretariat in preparing the revised text for reproduction in annex I of the report on the fifth session; these headings have not been considered by the Working Group. The descriptive titles for the articles of the revised text have been inserted by the Secretariat in the preparation of this report. The Working Group, in preparing the revised text, so far as possible, retained the numbering of the articles of 1964 ULIS; this numbering, which facilitates reference to the original text of ULIS and to earlier revisions by the Working Group, necessarily leads to gaps in the numbering where articles of the 1964 ULIS have been deleted or consolidated with other articles.

CHAPTER I. SPHERE OF APPLICATION OF THE LAW

Article 1: basic rule on sphere of application

A. *Introduction: basic rules on application*

4. Article 1 sets forth the basic rules on the Law's sphere of application. These rules deal with two ques-

tions: (1) The required internationality of the transaction (e.g., when is a sale "international"); (2) The required contact between the transaction and a Contracting State (Problems of private international law).

(1) *Internationality of the transaction*

(a) *Introduction*

5. This issue was dealt with in article 1 of 1964 ULIS by requiring two types of internationality. *Firstly*: The parties to the contract of sale must have their "places of business in the territories of different states"; *Secondly*: In addition, the transaction must satisfy one of three alternative tests (subparagraphs (a), (b) and (c) of article 1(1)) relating to the international movement of the goods or the international character of the offer and acceptance.

6. The Working Group considered these tests at its first and second sessions, and concluded that the second type of criterion (international shipment of the goods and the international character of the offer and acceptance) was difficult to apply in concrete situations. The basic reasons were set forth in detail by the Working Group in the report on its second session.⁴ The Working Group noted that international shipment often was not part of the obligation of the contract: In sales "ex works" and in many "F.O.B." (or "F.O.R." "F.O.T.") transactions, the destination of the goods was of no concern to the seller; in other situations, where the goods were in course of shipment at the time of the contract of where the seller might supply the goods at his election either from local stocks or by international shipment, the origin of the goods would be of no concern to the buyer. In all these situations the question of international movement of goods would be in doubt at the time of the making of the contract—although at that time the governing legal régime needed to be known or determinable. The Working Group also concluded that the alternative tests of internationality in 1964 ULIS relating to the place of the making of the contract (article 1(1), subparagraphs (b) and (c)) were unworkable since international transactions were often concluded by a series of international communications; in these circumstances, it was often difficult to determine *where* the contract had been made.⁵

7. In view of these difficulties, the Working Group concluded that the sphere of application of the law would be clarified by retaining only one of the requirements set forth in article 1 of ULIS: the requirement that the parties to the sales contract have their places of business in different States.⁶

8. The above clarification would broaden the scope of the Law. To avoid excessive breadth, and to preserve various types of regulatory laws enacted for the

* 18 February 1975.

¹ The 1964 Hague Convention Relating to a Uniform Law on the International Sale of Goods and annexed Uniform Law (ULIS) appear 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) at chap. I, 1.

² Progress report of the Working Group on the International Sale of Goods on the work of its fifth session, A/CN.9/87, herein cited as Working Group, report on fifth session. (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

³ Working Group, report on fifth session, para. 245 (c). The comments and proposals so submitted by representatives are reproduced in a note by the Secretary-General, contained in annex II to that document, which will be cited as "Comments by representatives" (UNCITRAL Yearbook, vol. V: 1974, part two, I, 3).

⁴ Progress report of the Working Group on the work of its second session (cited as "Working Group, report on second session"), A/CN.9/52, para. 17, (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

⁵ Working Group, report on second session, para. 19 (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

⁶ The Working Group also noted that ULIS did not deal with the common problem where a party has places of business in two or more States. *Ibid.*, para. 23. This is dealt with in article 4 (a) of the redraft.

protection of consumers, the Working Group decided to exempt consumer transactions from the law; this exemption appears in article 2 (a). With these modifications the Working Group concluded that the scope of application of the Uniform Law would be clearer. The Commission at its fourth session reaffirmed its approval of the approach taken by the Working Group with respect to the scope of the Law.⁷ It should be noted that the United Nations Convention on the Limitation Period in the International Sale of Goods, adopted on 12 June 1974 (A/CONF.63/15), adopted the same approach as that of the Working Group on Sales: the only criterion as to the internationality of the transaction is that "the buyer and seller have their places of business in different States" (article 2 (a)).⁸

(b) *Pending issue: knowledge that the other party has his place of business in another State*

9. The only aspect of article 1 which was left open for further consideration was the wording of a provision designed to preclude application of the Law when the foreign character of a party was unknown to the other party—as, for example, when a sales transaction was effected through a broker or agent who did not disclose that he was acting for a foreign principal.⁹ A provision, initially prepared by the Working Group at its second session, was redrafted in its present form at the third session, and appears as paragraph 2 of article 1. The Explanatory Report does not disclose any difficulty of substance with the provision;¹⁰ however, paragraph 2 was placed within square brackets, apparently so that the drafting could be given further consideration. In the meantime, the provision has been carefully re-examined in the observations submitted by the representative of Mexico, and a clarifying amendment has been proposed by him.¹¹ The Working Group will also wish to note that the present language of paragraph 2 of the revised text was adopted in the United Nations Convention on the Limitation Period in the International Sale of Goods (article 2 (b)).

(2) *Contact between the transaction and a Contracting State*

(a) *Introduction*

10. ULIS directed the *fora* of Contracting States to apply the Law to all international sales even though neither the seller nor buyer (nor the sales transaction) had any contact with any Contracting State (ULIS article 1(1), article 2 (exclusion of rules of private international law)). This broad rule of applicability of the Law (sometimes termed the "universalist" approach) was subject to the possibility of reservations under articles III, IV and V of the 1964 Hague Sales Convention.

⁷ Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17 (A/8417), para. 69 (UNCITRAL Yearbook, vol. II: 1971, part one, II, A) (cited as "UNCITRAL, report on fourth session").

⁸ A/CONF.63/15; herein cited as "Convention on Limitation".

⁹ Working Group, report on second session, para. 25. (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

¹⁰ Working Group, report on third session, annex II (A/CN.9/62/Add.1, paras. 6-10, UNCITRAL Yearbook, vol. 3: 1972, part two, I, A, 5).

¹¹ Comments by representatives (A/CN.9/WG.2/WP.20). Observations of Mexico, para. 8.

11. At the first session of the Working Group it was observed that the "universalist" approach of 1964 ULIS had proved to be a barrier to the adoption of ULIS, and that the complex pattern of reservations which resulted from that approach made it difficult for parties to an international sale to know which States might apply the Law to their transaction. At that session, the Working Group gave initial consideration to a revised text reflecting the approach that now appears in article 1, para. 1;¹² under the current text the Law applies to sales contracts between parties whose places of business are in different States:

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

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

12. UNCITRAL at its third session (1970) approved the approach reflected in the present text¹³ and the above-quoted provision was drafted and approved at the third session of the Working Group.¹⁴

13. The observations submitted by the representative of Austria suggested that it was unfortunate that paragraph (a) was restricted to sales between parties both of whom are in Contracting States. It was further suggested that, in any event, it would be advisable to delete paragraph (b) on the ground that this reference to the rules of private international law was alien to unification of substantive law, and was inadvisable.¹⁵

B. *Applicability of law by choice of parties; relation to mandatory rules*

14. Article 1(3) of the current draft states:

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

15. The observations submitted by the representative of Norway suggested that, at the end of the above provision, the following should be added:

"... to the extent that this does not affect the application of any mandatory provision of law which would have been applicable if the parties had not chosen the present law."

¹² The Working Group, report on first session, paras. 10-25. (UNCITRAL Yearbook, vol. I, 1968-1970, part three, I, A, 2). The initial text, at para. 19, was subject to stylistic modifications to produce the current text quoted above.

¹³ UNCITRAL, report on third session, paras. 22-31. (UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A). Commission considered possible reservations as to sphere of application.

¹⁴ Working Group, report on third session, annex I; annex II (A/CN.9/62/Add.1; UNCITRAL Yearbook, vol. 3: 1972, part two, I, A, 5), paras. 1-14.

¹⁵ The United Nations Convention on the Limitation Period in the International Sale of Goods employed the approach in article 1(1) (a) of the present sales draft as the sole basis for applicability of the Convention (article 3(1)); in that Convention, recourse to the rules of private international law is rejected (article 3(2)). In the field of limitation (prescription) the rules on private international law vary so widely, even in basic approach, that recourse to such rules was considered inappropriate. See Commentary on the draft convention, A/CN.9/73, introduction, para. 4, commentary on article 3, paras. 3-5 (UNCITRAL Yearbook, vol. III: 1972, part two, I, B, 3).

16. The commentary accompanying the above suggestion draws attention to articles 4 and 8 of ULIS. Article 4 of ULIS also deals with the effect of a contract that the uniform law shall apply, and at the end of article 4 includes the language proposed by the representative of Norway. Article 8 of ULIS has been retained without change in the present draft.

17. The inclusion of the language proposed above was considered by the Working Group at its second session. The Working Group concluded that the effect of mandatory rules should be dealt with in a general provision, since this problem could also arise when the Law is automatically applicable—as contrasted with applicability resulting from the agreement of the parties.¹⁶ In the latter regard, it should be noted that the omission from the Law of “consumer” sales (article 2(1)) avoids many, if not most, of the situations in which there are mandatory rules of law; under most legal régimes in commercial transactions full effect is given to the agreement of the parties.

Article 2: Exemptions

18. Article 2 provides for two types of exemptions from the law. The first paragraph exempts certain types of transactions—e.g., consumer sales as defined in subparagraph (a). The second paragraph excludes certain types of commodities.

A. Consumer sales: paragraph 1 (a)

19. As has been mentioned, paragraph 1 (a) excludes consumer sales—an exclusion not found in 1964 ULIS. The reasons for this exclusion appear in the report of the Working Group’s second session (paras. 22, 57); the language of the current text was adopted at the third session.

20. The current text states the basic rule for exclusion in objective terms—“goods of a kind and in a quantity ordinarily bought by an individual for personal, family, household or similar use”; under this language the purpose of the particular buyer is irrelevant. However, the provision adds an exception based on the purpose of the buyer in the instant transaction: the sale would be covered by the Law if the buyer did not in fact purchase the goods for personal, family, household or similar use, and that fact is made evident in specified ways. Thus, the Law would govern the sale if the above-mentioned purpose of the buyer appeared “from the contract”. Following these last words, the current text includes in brackets: “[or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract]”.

21. The principal reason for including the bracketed language was that a buyer’s proposed use for goods would not normally be stated or otherwise appear in the “contract” but the seller might know from communications or information apart from the contract that the buyer bought the goods for a commercial purpose, as contrasted for personal or household use.

22. The only comments directed to this provision (Austria and Mexico) state that the bracketed language should be retained.

¹⁶ Working Group, report on second session, paras. 38-41 (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

B. Negotiable documents representing goods: paragraph 2 (a)

23. The comments by Austria suggest that a problem of interpretation may arise under paragraph 2 (a), which excludes sales

“(a) Of stocks, shares, investment securities, negotiable instruments or money”.

24. The question is raised as to whether the exclusion of sales of “negotiable instruments” might be construed to exclude sales of goods effected by the transfer of negotiable documents of title, such as negotiable bills of lading or warehouse receipts.

25. Certainly such a construction would be inconsistent with the intent of the draftsmen of ULIS (where the same provision is employed) and of the Working Group. The reference to “negotiable instruments” was clearly intended to exclude only such instruments calling for the payment of money—such as negotiable notes, bills of exchange or cheques. Any ambiguity on this point would be serious, for the transfer of goods is often effected by the delivery of negotiable documents of title controlling delivery of the goods. The Working Group might consider rewording the end of paragraph 2 (a) to read:

“... money or negotiable instruments calling for the payment of money”.

C. Ships, vessels and aircraft: the question of registration; paragraph 2 (b)

26. A pending question is presented by paragraph 2 (b) whereby the Law shall not apply to sales “(b) of any ship, vessel or aircraft [which is registered or is required to be registered]”. The bracketed language was drafted to take the place in article 5(1) (b) of ULIS of the similar phrase “which is or will be subject to registration”. The Working Group inserted the square brackets to indicate that these words present a problem for further drafting.¹⁷ The exclusion was not meant to depend on whether the vessel was registered, or was required to be registered, at the time of sale; instead, the intent was to exclude the type of vessels which, in normal course, would become subject to national legislation.

27. This problem is considered in the observations submitted by the representative of Mexico who has proposed a draft provision to effectuate the intent of the Working Group.¹⁸

Article 3: “mixed” contracts

28. Article 3 deals with the applicability of the law to “mixed” contracts—i.e., contracts which combine the sale of goods (article 1(1)) with other obligations which, standing alone, would not fall within the Law.

29. Paragraph 2 of article 3 is identical with article 6 of ULIS which is directed to the case where the party who orders goods “undertakes to supply an essential and substantial part of the materials” necessary for the manufacture or production of the goods in question.

¹⁷ Working Group, report on second session, para. 55. (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

¹⁸ Comments by representatives (A/CN.9/WG.2/WP.20); observations of Mexico, paras. 11-16.

The Working Group concluded that this provision of ULIS, while satisfactory in itself, was an incomplete and unsatisfactory approach to the problem of "mixed" contracts, since this problem could also arise where the principal obligation relates (e.g.) to the supply of services, or land, or other matters other than the delivery of and payment of goods. It was recognized that such contracts could arise in an infinite variety of combinations, so that detailed provisions would not be practicable. However, a general rule was considered necessary; to fill this gap in the law, paragraph 1 was prepared by the Working Group at its second session.¹⁹ The report on that session does not indicate any objection of substance or any specific problem of drafting. The representative of Mexico, in his observations, examines this provision and finds it satisfactory; the other observations submitted by representatives do not comment on this provision.

Article 4: definitions and other provisions related to sphere of application

A. Rule on applicability when a party has more than one place of business: paragraph (a)

30. Paragraph (a) was drafted by the Working Group to supply a serious omission in 1964 ULIS. Under ULIS (and the current draft) the Law is applicable only when the seller and the buyer have their places of business in different States. However, parties often have places of business in two or more States: one of those places of business may be in a State where the other party has a place of business.²⁰ In these situations, problems as to the applicability of the Law arise for which 1964 ULIS provides no solution.

31. The Working Group concluded that it was necessary to include a rule dealing with this question, and at the second session prepared the provision that now appears as paragraph (a) of article 4.²¹ At that session, this provision was the subject of considerable discussion, and was placed in square brackets to permit later reconsideration.

32. The observations submitted by Mexico for the present session analyse article 4 (a) and concludes that it is satisfactory.

33. On the other hand, the observations submitted by Austria suggest that article 4 (a) should be reviewed in the light of the comparable provision embodied in the United Nations Convention on the Limitation Period in the International Sale of Goods. Article 2 (c) of that Convention provides:

"(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;"

34. A provision identical with that prepared by the Sales Working Group was submitted to the Conference on the Limitation Period; at the Conference it was suggested that the drafting of the provision could be simplified. The above-quoted article 2 (c) resulted from that suggestion.

35. The Working Group may wish to conform article 4 (a) of the Uniform Law on Sales to the provision approved by the Conference on Prescription.

B. References to reservations; uniform law or convention: article 4 (d) and (e)

36. The observations of Austria note that the current draft (like 1964 ULIS) is in the form of a uniform law annexed to a convention, whereas the Convention on the Limitation Period embodies the uniform rules in the Convention. It is suggested that the manner of presentation should conform to that of the Convention on the Limitation Period.

In considering this suggestion it should be recalled that the Convention on Limitation opens with a short preamble and sets forth the uniform rules in part I, substantive provisions. These uniform substantive rules are followed by part II, implementation; part III, declarations and reservations and by part IV, final clauses.

37. It is further suggested that if the "integrated" approach of the Convention on Limitation is adopted, paragraph (d) of article 4 could be omitted, while paragraph (e) (which refers to the possibility of a declaration under article [III] of the Convention) should be drafted in greater detail.

Paragraph (d)

Paragraph (d) of article 4 states:

(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;

38. The Working Group at its second session noted that the foregoing provision "takes account of the possibility that a new convention might provide for reservations such as those permitted under article V of the 1964 Sales Convention whereby the law is applicable only when it is chosen as the applicable law by the parties".²²

39. The Working Group and the Commission have not yet taken a position on the inclusion of a provision on reservations like that of article V of the 1964 Hague Convention. It would simplify the problem of presentation with respect to article 4 (d) if the Working Group could take a decision on whether the current sales convention should include a provision on reservations like article V of the 1964 Convention.

40. Article V was included in the 1964 Convention because several States were dissatisfied with certain

¹⁹ Working Group, report on second session, paras. 61-67. (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

²⁰ Under 1964 ULIS, the question whether the place of business is in a Contracting State could be decisive under the reservations permitted in article III of the Convention. Under the rules on sphere of application, prepared by the Working Group, this issue had wider significance.

²¹ Working Group, report on second session, paras. 13, 23-25. (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2). The provision then appeared as article 2 (a), but was moved to its present position at the third session.

²² Working Group, report on second session, para. 34. (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2). The provision then appeared as article 2 (e).

basic provisions of ULIS. The Working Group may now wish to consider whether the current revision has sufficiently removed such objections so that a provision like article V need not be included in the current convention.

Paragraph (e)

Paragraph (e) of article 4 states:

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

41. The reference to a declaration under article [III], relates to a declaration by two or more States, having closely related legal rules, that transactions among their area would not be governed by the Convention. Such a provision was included in the Convention on Limitation in part III: declarations and reservations (article 34). In the Convention on Limitation, the substantive articles on sphere of application (articles 1-7) do not include a reference to the above provision in part III providing for a reservation restricting the scope of application.* From the foregoing, it will be noted that if the approach of the Convention on Limitation is followed, the reference to declarations in paragraph (e) of article 4 would be deleted, and a provision permitting declarations, comparable to article II of the 1964 Hague Convention, would be included in a later part of the Convention on Declarations and Reservations. (Compare part III of the Convention on Limitation.)

42. The Working Group may conclude that, in some settings, substantive provisions that are subject to modification by reservation should include references to the possibility of such reservations. Such references may be useful to direct attention to reservations which otherwise might be overlooked. These considerations have some weight even where the uniform rules are in one part of a convention and provisions on reservations are included in another part. (e.g., the "integrated" approach employed in the Convention on Limitation.) However, such a reference may not be important with respect to the type of reservation referred to in article 4 (e), since most lawyers in States (or regions) with similar or uniform laws may be aware of the possibility that international conventions would include provisions for reservations preserving such laws.

The choice between an "integrated" convention and a uniform law annexed to the convention

43. If the Working Group should decide to delete paragraphs (d) and (e) of article 4, it would not be necessary to decide at this time whether the revised sales convention should follow the approach of 1964 ULIS (which annexes a Uniform Law to the Convention) or of the Convention on Limitation (which incorporates the substantive uniform rules in part I of the Convention). On the other hand, the Working Group may find it useful to consider and decide the matter at this time.

44. As has been noted, the Convention on Limitation provides a precedent for an "integrated" approach. This approach seems to have certain technical advantages in relation to constitutional and legislative practices of some States. On the other hand, the Working Group may wish to consider the following considerations: (1) a uniform law on the international sale of goods is of basic importance and is of substantial size; these facts may incline some States, in implementing the convention, to enact its substantive provisions as a separate uniform law; (2) perhaps more important, some States have adopted the 1964 Hague Convention, which annexes the substantive provisions as a Uniform Law. Such States will wish to consider replacing the 1964 ULIS with the revised law prepared by UNCITRAL. This step, which would contribute significantly to international unification, may be facilitated if the UNCITRAL convention does not deviate on this point from the approach of the 1964 Hague Convention.

Article 5: effect of agreement of the parties

45. This article is based on article 3 of 1964 ULIS, but has been redrafted in the interest of simplicity and clarity. As was noted by the Working Group at its second session, "article 3 of ULIS and of the proposed revision both emphasize that the provisions of the Uniform Law are supplementary and yield to the agreement of the parties".²³ However, the revision by the Working Group brings out more clearly than the 1964 ULIS that the parties may either (1) totally exclude the law or (2) "derogate from or vary the effect of any of its provisions".

46. No comments or proposals in the studies submitted to the present session have been directed to this article.

Articles 6 and 7

47. These articles of ULIS have been integrated into other articles of the current draft. Article 6 of ULIS appears in article 3(2) and article 7 appears in article 4 (c).

Article 8: subjects excluded from the law

48. This article, which is the same as in 1964 ULIS, was adopted by the Working Group at its second session; the report noted that no comments or proposals had been made in connexion with the article.²⁴ The article is designed to make clear that certain questions are excluded from the scope of the law, e.g. formation, title to property, validity.

49. The observations submitted by the representative of Austria to the present session suggest that the article is unnecessary and should be deleted. It is suggested that article 8 had been included in 1964 ULIS because that Law included a provision (article 17) which provided that questions concerning matters governed by that law "which are not expressly settled therein shall be settled in conformity with the general principles" on which the law is based. The Working Group has deleted this language and replaced it with a provision emphasizing that in interpreting the Law

* The text of the Convention is reproduced in UNCITRAL Yearbook, vol. V: 1974, part three, I, B.

²³ Working Group, report on second session, para. 46. (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

²⁴ *Ibid.*, para. 71.

regard should be had to its international character and to the need to promote uniformity.²⁵

50. The need for article 8 has been diminished by the deletion of the above language in article 17 of 1964 ULIS. Moreover, in the absence of article 8 there seems little likelihood that a reader would suppose that the law dealt with the formation of the contract, or the effect of the contract on the property in the goods sold. But there may be utility in preserving at least the provision of article 8 that the present Law does not deal with the validity of the contract or of usages. Substantive provisions of the uniform law state that the seller shall deliver the goods and the buyer shall pay for them in accordance with the contract, and article 9 gives general effect to usages. Without a provision like article 8, some courts may conclude that the convention setting forth these rules would override national rules concerning validity of the contract or of usages. Moreover, deletion of this provision contained in ULIS might give rise to the incorrect inference that such deletion implied that the rule of ULIS is rejected.

51. The representative of Norway, in his observations, suggests that the words "in particular", which open the second sentence, are misleading and should be deleted.

CHAPTER II. GENERAL PROVISIONS (ARTICLES 9-17)

Article 9: usages and practices

A. Basic rule as to usages and practices: paragraph 1

52. Paragraph 1 is the same as article 9(1) of ULIS. Under this provision, the parties are bound (1) "by any usage which they have expressly or impliedly made applicable to their contract" and (2) "by any practices which they have established between themselves". The two parts of the paragraph are distinct, in that the first part relates to patterns established generally in a trade or line of commerce, while the second part relates to practices that have been followed by these parties in relation to each other—i.e. their own "course of dealing". Both parts of this paragraph proceed on the theory that such usages and practices are part of the contractual undertaking of the parties, either by express agreement or by an implied expectation that performance will follow such established patterns.²⁶

B. Implied applicability of usages: paragraph 2

53. The principal difficulty with article 9 has arisen from paragraph 2 of 1964 ULIS. As has been noted, under paragraph 1, the parties are bound by any usage which they "have expressly or impliedly made applicable to their contract". To this, paragraph 2 of 1964 ULIS adds:

"2. They shall also be bound by usages which reasonable persons in the same situation as the parties usually consider to be applicable to their contract . . .".

54. Members of the Working Group and of the Commission have raised questions concerning the extent to which paragraph 2 extended beyond paragraph 1, and concerning the justification for such extension.²⁷ It will be noted that article 9(1) of ULIS gave effect to any usage which the parties have "expressly or impliedly made applicable to their contract", and that paragraph 2 provided that the parties shall "also" be bound to certain further usages, this wording suggested that paragraph 2 was not based on the presumed expectation of the parties but upon some other principle which was unstated, possibly some normative obligation independent of the implied contractual undertaking by the parties. It was also noted that the references to what "reasonable persons" in the same situation as the parties "usually consider" to be applicable to their contract injected elusive factors into the formula and would be difficult to apply in practice.

55. To meet these difficulties paragraph 2 of article 9 of ULIS, was redrafted by the Working Group to set forth a definition of those usages which under paragraph 1, the parties had "impliedly made applicable to their contract". Under this redraft, the usages which the parties "shall be considered as having impliedly made applicable to their contract" are determined under two tests: (1) whether the parties are (or should be) aware of the usage and (2) whether the usage "in international trade is widely known to, and regularly observed by parties to contracts of the type involved".

56. Under this revision, the second of these tests is stated twice—once in connexion with usages of which the parties are aware, and once in connexion with usages of which the parties should be aware. This repetition seems to be the reason for comments that the provision is complex and should be simplified. The observations submitted by Mexico include a redraft of this provision which simplifies the text by avoiding this repetition.²⁸ It will also be noted that this proposed redraft would somewhat broaden the applicability of usage, and facilitate proof by a party relying on usage, since, under this redraft, the conclusion that the parties are or should be aware of a usage could be based on either (1) the fact that the usage is widely known in international trade or (2) the fact that the usage has been regularly observed in contracts of the type involved.²⁹

57. In previous consideration of this topic, some members of the Working Group have expressed concern over the breadth of the recourse to usage per-

²⁵ The observations submitted by Mexico (paras. 52-56) propose that the substance of article 17 of 1964 ULIS be added as a second paragraph of the present redraft. See para. 79, below.

²⁶ Article 9(1) needs to be considered in relation to article 5 (a clarification of ULIS 3), which gives effect to the agreement of the parties, by which they "may exclude the application of the present law or derogate from or vary the effect of any of its provisions".

²⁷ Working Group, report on first session, paras. 73-90 (UNCITRAL Yearbook, vol. 1: 1968-1970, part three, I, A, 2); report on second session, paras. 72-82 (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2); UNCITRAL, report on third session, paras. 35-42 (UNCITRAL Yearbook, vol. 1: 1968-1970, part two, III, A).

²⁸ Comments: observations by Mexico, paras. 29 to 38. The proposed redraft appears at para. 36 (reproduced in this volume, part two, I, 3).

²⁹ The reasons for this approach are explained at para. 35 of the observations by Mexico, *supra* (reproduced in this volume, part two, I, 3).

mitted under paragraph 2 of article 9. This scope has been clarified and narrowed under the text prepared by the Working Group at its second session and under the simplified redraft proposed by Mexico. However, if members would still be concerned about the breadth of this provision, consideration might be given to making more explicit the justification for recourse to custom: the expectation that the other party will perform in the manner that is customary in the trade. The draft text prepared by the Working Group and the redraft by Mexico are much more helpful in this regard than was ULIS, for these drafts tie paragraph 2 to the basic rule of paragraph 1 by the phrase "The usages which shall be considered as having *impliedly made applicable to their contract* . . ."; the emphasized language indicates that the basic test is the expectation of the parties in making the contract. However, the justification and scope of the provision might be made even more explicit by language along the following lines, which is based on the redraft proposed by Mexico.

Draft proposal for paragraph 2

"2. The parties shall be considered to have impliedly made applicable to their contract a usage which is so widely known in international trade or [and] so regularly observed in contracts of the type involved as to justify an expectation that it will be observed with respect to the transaction in question."

58. It will be noted that the underscored language at the end of the above redraft takes the place, in the current draft, of the tests that the parties "are aware" or "should be aware" of a certain usage. Substituting this objective test for the subjective tests in article 9(2) of ULIS is suggested because the proof of the state of mind of the other party is inherently difficult: the only practicable approach is through the second phrase "should be aware". But it is doubtful that "awareness" (or the obligation to be "aware") of a usage is the most appropriate ultimate test. The ingredient of a usage that would justify its inclusion as part of the contract is that degree of knowledge of the usage in international trade or its regular observance in international trade which would justify an expectation that it would be observed in the transaction in question. Perhaps this essential idea is implicit in the current draft of article 9(2) but the provision might be easier to apply if this ultimate test were made explicit.

C. Rules of the present Law and agreement of the parties: paragraph 3

59. Paragraph 3 states:

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

The observations by Mexico suggest (para. 37) that the final phrase "unless otherwise agreed by the parties" should be deleted. Attention is drawn to the general rule of article 5 (ULIS article 3) giving effect to the agreement of the parties; it is also noted that misunderstanding could result if only some of the provisions of the Law state that the agreement shall prevail.

60. It will be noted that the proposed deletion is made possible since paragraph 2 of the redraft (unlike article 9(2) of ULIS) makes it clear that the ground

for the applicability of usages is an implied agreement by the parties. It might also be suggested that, in view of this approach, all of paragraph 3 is redundant. Article 9(1) refers to both (1) usages and (2) practices which the parties have established between themselves. Paragraph 9(3) refers only to usages—perhaps on the ground that article 9(2) of ULIS made certain usages effective independently from an implied contractual undertaking. Under the Working Group redraft, usages and practices are given parallel treatment. Hence, it would seem advisable either (a) to delete paragraph 3 or (b) to modify paragraph 3 by adding after "such usages" the words "and practices".

D. Interpretation of commercial terms: paragraph 4

61. The observations by Mexico suggest (para. 38) that paragraph 4 be revised to conform to a proposal set forth in the report on the second session of the Working Group (para. 82). It will be noted that this proposal is designed to make the rules on interpretation of commercial terms conform to the rules in paragraphs 1 and 2 of this article. In addition, this proposal would delete, as unnecessary, the concluding phrase "unless otherwise agreed by the parties".

Article 10: definition of "fundamental breach of contract"

A. Introduction

62. Article 10 of ULIS sets forth a definition of "fundamental breach of contract", a concept employed in numerous articles of 1964 ULIS.³⁰

63. The Working Group at its second session gave preliminary consideration to article 10 of ULIS, but concluded that a decision on this provision should be deferred until after consideration of the substantive provisions that employ the concept of "fundamental breach of contract".³¹

64. In its review of the substantive provisions of ULIS, the Working Group has retained the concept of "fundamental breach", although the consolidation of the various sets of remedial provisions in ULIS has sharply reduced the number of occasions in which it has been necessary to use this concept.

65. The most important of these provisions are (a) article 44(1)(a), under which the buyer may declare the contract avoided where the seller has committed a "fundamental breach of contract", and (b) the parallel provision of article 72 *bis* governing avoidance of the contract by the buyer.³²

³⁰ Articles 26(1), 27, 28, 30, 32, 43, 52(3), 55(1)(a), 62, 66, 70(1)(a) and 76.

³¹ Working Group, report on second session, paras. 83-88. (UNCITRAL Yearbook, vol. II: 1971, part 2, I, A, 2).

³² The basic provisions of ULIS are written in terms of the right (e.g.) of the buyer to "declare the contract avoided" rather than in terms of his right to reject (or duty to accept) defective goods. This approach could give rise to some doubt as to the legal situation that arises when the seller's tender of performance in some respect fails to conform to his contractual performance but does not amount to a "fundamental breach". It is clear that in this circumstance the buyer may not "declare the contract avoided", but the drafting approach of ULIS does not clearly state that the buyer has a duty to receive and accept the tender—subject, of course, to a right to be compensated by damages. It is assumed that such a duty may be implied from the general structure of the remedial provisions of ULIS; this construction is aided by article 98 *bis* (para. 1) as redrafted by the Working Group.

66. The definition of "fundamental breach of contract" thus plays an important role in connexion with the right to avoid a contract. However, the right of avoidance may be established without using the test of "fundamental breach": This is true by virtue of provisions authorizing the buyer (art. 43) and the seller (art. 72) to request the other party to perform within a specified additional period of time of reasonable length (the *Nachfrist* notice); failure to comply with this request is an independent ground for avoidance without recourse to the concept of "fundamental breach" (article 44(1)(b) and 72 bis (1)(b)).³³

B. Criticisms of the definition of "fundamental breach" in article 10: proposals

67. Studies and comments submitted by States and organizations prior to the second session, and observations made at the second session of the Working Group, criticized article 10 on the ground that it was too complex, and also on the ground that the article included subjective standards that would be difficult to apply.³⁴ The observations submitted to the present session by Mexico thoroughly analyse the criticisms of this article, and propose a revision which is designed to overcome these difficulties.³⁵ It will be noted that this proposal eliminates the subjective test (i.e. what a party "knew or ought to have known"), and also the related speculative element as to whether a "reasonable person" would have "entered into the contract if he had foreseen the breach and its effects". Instead, this proposal employs a single objective criterion: whether the breach *substantially* alters the scope or contents of the rights of the other party.

³³ There may be a problem of construction with respect to the buyer's request under article 43 (and the consequent automatic right to avoidance under article 44(1)(b) as applied to minor non-conformity in the seller's tender of delivery. Thus, under article 43, the buyer may fix an additional period not only "for delivery" (as in cases where the seller has delivered no goods) but also "for curing of the defect or other breach". This problem would occur when the seller tenders a slightly smaller quantity than that specified in the contract (98 bags instead of 100) or where a small part of the goods (e.g. 2 bags) are deficient in quality, and where these deficiencies do not constitute a "fundamental breach of contract". If the buyer refuses to accept the goods and requests a perfect tender within a specified time, and the seller (perhaps because of remoteness from the buyer) is unable to make a perfect tender, may the buyer declare the avoidance of the contract? The controlling provision is article 44(1)(b), under which the buyer may declare the contract avoided "(b) Where the seller has not delivered the goods within an additional period of time fixed by the buyer in accordance with article 43". The question is whether the emphasized phrase "delivered the goods" refers only to a delivery in perfect conformity with the contract, or whether this phrase extends to a delivery that is non-conforming but where the breach is not "fundamental". Under the latter construction, the *Nachfrist* notice under article 43 would set a limit to the period of time within which the seller may tender delivery that substantially conforms to the contract, and the time within which the seller may cure a defective tender (article 43 bis) but would not provide a basis for avoidance of the contract where the breach is not fundamental. The same questions could arise under articles 72 and 72 bis of the redraft and under the corresponding sections of 1964 ULIS.

³⁴ Analysis of comments and proposals (A/CN.9/WG.2/WP.6, UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 1). Working Group, report on second session, paras. 83-88 (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

³⁵ Comments, observations of Mexico, paras. 39-46; the proposed redraft appears at para. 46 (reproduced in this volume, part two, I, 3).

68. The Working Group will wish to give careful consideration to such an approach which would simplify and clarify article 10. In considering the basic approach to this question, it may be relevant to note that deviations from perfect performance occur in a virtually infinite number of settings and degrees, so that it will be impossible in this law (as it has been impossible in national legal systems) to prescribe detailed rules; the most that can be done is to point to the basic issue: whether the breach has substantially impaired the value of performance required under the contract.³⁶

69. If the Working Group decides to simplify article 10 along the lines of the above proposal, consideration might be given to a possible clarification of the phrase which refers to the alteration of "the scope and contents of the rights" of the other party. From one point of view (at least in the English version) it may be difficult to conclude that a breach has altered the *rights* of the other party; his rights have been established by the Law and have not been altered by the breach; it might be more appropriate to refer to the extent to which the breach has impaired the value of the performance required by the contract. A proposed revision of article 10, based on the proposal of Mexico, that would take account of the above drafting point, is as follows:

Proposed revision of article 10

For the purposes of the present Law, a breach of contract shall be regarded as fundamental wherever such breach substantially [to a significant extent] impairs the value of the performance required by the contract and the present Law.

Article 11: definition of "promptly"

70. The observations of Austria note that the term "promptly" is used only in articles 38(1) and 42(2)³⁷ and also, in discussing article 42, suggest that paragraph 2 be revised in a manner that would omit a reference to prompt notice. It is suggested that if this change is made the definition of "promptly" be transferred to article 38 or, in the alternative, omitted.

71. It would appear desirable to postpone action on this suggestion until after the consideration of article 42, and possibly until after the consideration of all the substantive rules in which the term "promptly" is or might be employed.

³⁶ One study, based on standard contracting practices, indicated that it may be inadequate to consider only the degree of the breach, and indicated that a relevant consideration is whether compensation for the breach can be clearly and adequately assured. For instance, in the case discussed above, where the contract calls for 100 units and the seller tenders only 98, or where 2 of the units are defective, there is a decisive difference between cases (a) where the seller in tendering the goods demands cash payment for all 100 units and (b) where the seller voluntarily makes a full adjustment in the price for the missing or defective units. In case (a) the buyer is asked to take a substantial burden and risk in pressing the seller for a cash refund, while in case (b) such burdens of litigation and of possible deterioration of the seller's financial position are avoided. Thus, cases (a) and (b) could lead to different results as to avoidance although from a narrow viewpoint the degree of breach is the same. See 97 U. Pa. L. Rev. 457.

³⁷ Comments, observations by Austria (article 11) (reproduced in this volume, part two, I, 3).

Proposed new article 12: act or knowledge of agent

72. The observations of Norway, in setting forth proposed amendments to the current revised text, note that some of the articles (e.g. 76(4) and 96) state that a party is bound by the acts of another person for whose conduct the party is responsible. On the ground that such a principle should be effective throughout the Law, it is proposed that such a general principle be included in the law as a new article 12. It is further proposed that this new article should also state that references to knowledge of a party (e.g. arts. 33(2), 38(3)) shall include the knowledge of an agent or of any person for whose conduct the party is responsible.

Article 13

73. This article of ULIS was deleted by the Working Group.

Article 14: communications

74. The observations by Norway propose adding a second paragraph to this article which would state a general rule dealing with notices which are sent by appropriate means but which are delayed or fail to arrive. The commentary cites several articles which refer to notices; only one of these (39(3)) deals with the above problem. The proposed new paragraph of article 14 would set forth a general rule based on article 39(3).

75. Examination of the various articles which deal with notices reveal that some (e.g. 21(1)) require that a party "send" a notice while others (e.g. 39(1), 94) require a party to "give" notice; still others use neutral expressions like "notice" or "notify" (cf. art. 74 ("declare")). Under most of these articles, litigation could arise concerning the effect of delay or miscarriage of communications. Hence, a general rule on the question would seem to be useful.

Article 15: requirements as to form of contract

76. This article has been thoroughly discussed by the Working Group and by the Commission.³⁸ Two sets of observations submitted for the current session refer to article 15; both conclude that the article should be retained.³⁹ The observations by Mexico draw attention to the complexities and divergencies among rules of national law on this question, as summarized in the report on the Working Group's second session (para. 117). It is also noted that the fact that the parties may make a contract without the formality of a writing does not imply that they will make such informal contracts or that the parties are without means to protect themselves from a false claim that an informal contract has been made.

77. It may also be noted that the Law does not attempt to codify or supersede national rules on the authority of an agent to bind his principal. To illustrate this point, we may suppose that at the beginning of a negotiation, the principal notifies the other party as

follows: "The agent negotiating with you has no authority to conclude an agreement; any contract will be authorized only when it has been approved in writing by our Vice-President in charge of Sales". Unless this notice is withdrawn or modified, there would be a presumption that, unless the contract is concluded in the prescribed manner, (1) there was no intent to conclude a contract and (2) any attempt by the subordinate negotiator to conclude a contract would be unauthorized and would not bind the principal. It will be noted that both of the above issues (which in practical application are closely intertwined) lie outside the scope of the present Law, and would not be controlled by the rule of article 15. Article 15, in stating that there is no general legal requirement of a writing, does not affect the inference in some settings that a contract has not been made in the absence of a writing and does not overturn applicable rules as to whether an agent has authority to bind his principal. The latter point would seem to be particularly significant where a Government, by rule of law, defines the circumstances in which a subordinate official has the authority to bind the Government or a State trading organization.

Article 16: limitation on right of specified performance

78. The observations by Austria note that this article erroneously refers to the 1964 Convention. (The provision was designed to refer to any provision on reservations as to specific performance comparable to that in article VII of the 1964 Convention.) A redraft of this article that, *inter alia*, would correct this matter, has been submitted by Norway.⁴⁰

Article 17: general rule of interpretation

79. The observations of Austria express the view that this general rule could be omitted. The observations of Mexico propose that this provision be maintained, and that a second paragraph be added preserving the rule of article 17 of 1964 ULIS whereby matters governed by the present law which are not expressly settled therein "shall be settled in conformity with the general principles on which the present law is based".

80. It should be noted that this subject was discussed at the United Nations Conference on the Limitation Period in the International Sale of Goods. The Conference included in the Convention on Limitation, as article 7, a provision which (except for stylistic adjustments) follows article 17 as approved by the present Working Group. The provision adopted by the Conference on limitation is as follows:

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.

CHAPTER III. OBLIGATIONS OF THE SELLER
(ARTICLES 18-55)

A. GENERAL INTRODUCTION

81. The Working Group gave preliminary consideration to chapter III of ULIS at the third session, and

³⁸ Working Group, report on second session, paras. 113-123. UNCITRAL, report on fourth session (1971), paras. 70-80 (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

³⁹ Comments: observations by Mexico (paras. 47-51) and by Austria (article 15) (reproduced in this volume, part two, I, 3).

⁴⁰ Comments, observations by Austria (art. 16) and by Norway (redraft of art. 16) (reproduced in this volume, part two, I, 3).

took final action at the fourth session.⁴¹ The Working Group based its work on comments and proposals by members of the Group,⁴² and on reports by the Secretary-General on "Delivery" in ULIS,⁴³ *ipso facto* avoidance⁴⁴ and the obligations of the seller in chapter III of ULIS.⁴⁵

(1) THE CONCEPT OF "DELIVERY"

82. One of the troublesome problems presented by chapter III resulted from the use by ULIS of a single concept—"delivery"—as a solvent for a number of different issues, such as the time for the payment of the price and the transfer of risk of loss.⁴⁶ This effort to make a single concept provide the solution for different practical problems led to a definition of "delivery" which was artificial and which was so complex that it led to unintended consequences. For example, article 19(1) of ULIS provides that "Delivery consists in the handing over of goods which conform with the contract". No difficulty would have arisen from a provision that a seller has a *duty to deliver* goods which conform to the contract, but the above definition of "delivery" led to the surprising conclusion that if the buyer accepts non-conforming goods (subject, of course, to a price adjustment or damage claim) and uses (or even consumes) them, the goods are never "delivered" to the buyer. More important, the attempt to use this concept in allocating risk of loss meant that it was necessary to piece together widely separated provisions of the Law (e.g. arts. 19 and 97), with results in some circumstances that seemed to have been unintended by the draftsmen. In the light of these considerations, the Working Group at the third session decided that problems of risk of loss (chapter VI of ULIS) would not be controlled by the concept of "delivery", and at the fourth session decided to delete article 19.⁴⁷ As a further consequence, articles 20-23 could deal directly with the steps required of the seller to perform his contractual *duty to deliver* the goods, without attempting to compress into one article a definition of the concept of "delivery".

(2) CONSOLIDATION OF SEPARATE SETS OF REMEDIAL PROVISIONS

83. Chapter III of 1964 ULIS contained six separate sets of remedial provisions applicable to breach by

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

84. These separate remedial systems differed from each other in ways that appeared to be accidental; some of the separate systems, without apparent reason, omitted provisions that were included in the other systems. In addition, the boundary-lines between the various systems were not clear. Thus, with respect to the separate remedies as to (1) date of delivery and (2) place of delivery, it was noted that if the goods were late in arriving one could state either that the goods (1) were at the right place but at a late date or (2) at the specified date were at the wrong place. It was also difficult to distinguish between (1) non-delivery of part of the goods and (2) non-conformity, where boxes were empty or part of the goods were worthless. The difficulty of ascertaining which remedial system would be applicable created possibilities for confusion and litigation. Finally, it was noted that these six remedial systems contributed to the length and complexity of ULIS—characteristics which had been one of the grounds for serious criticism of ULIS and a barrier to its widespread adoption.⁴⁸

85. For these reasons, the Working Group at its fourth session, approved a single consolidated set of remedial provisions applicable to chapter III; these provisions appear in the revised text as articles 41-47. As a result of this consolidation, it was possible to delete the remedial provisions appearing in articles 24-32, 48, 51, 52(2) and (3), 53 and 55. This consolidation simplified the structure of article III and reduced its length by over one third.

(3) AUTOMATIC (IPSO FACTO) AVOIDANCE OF THE CONTRACT

86. Two types of avoidance of the sales contract were provided in 1964 ULIS: (1) avoidance by a declaration or notice from the innocent party to the party in breach;⁴⁹ and (2) automatic (*ipso facto*) avoidance for which no notification need be given.⁵⁰ The Working Group at its third session concluded that *ipso facto* avoidance created uncertainty as regards the rights and obligations of the parties and should be eliminated from the remedial system of the Law.⁵¹ This decision has been preserved in the consolidated system

⁴¹ Working Group, report on third session (A/CN.9/62, UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5); Working Group, report on fourth session (A/CN.9/75), UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

⁴² See Analysis of comments and proposals relating to articles 18-55 of ULIS (A/CN.9/WG.2/WP.10, UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 3) and documents cited in the reports on third session (para. 7). UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5) and on the fourth session (para. 6) (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

⁴³ A/CN.9/WG.2/WP.8 (UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 1).

⁴⁴ *Ibid.*, p. 41.

⁴⁵ A/CN.9/WG.2/WP.16, reproduced in annex II to the Working Group's report on its fourth session (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

⁴⁶ See the report of the Secretary-General on "delivery" in ULIS, cited above at note 3.

⁴⁷ Working Group, report on third session, A/CN.9/62/Add.1, para. 17; (UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5); report on fourth session (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3) para. 21.

⁴⁸ The problems presented by the separate sets of remedial provisions and draft provisions consolidating the remedial provisions into a single unified system are set forth in the report of the Secretary-General on the obligations of the seller (chapter III of ULIS). This report (A/CN.9/WG.2/WP.16, UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 2) was reproduced as annex II to the report of the Working Group on its fourth session.

⁴⁹ Articles 24, 26, 30, 32, 41, 44, 55, 62, 67, 70, 75 and 76.

⁵⁰ Articles 25, 26, 30, 61 and 62.

⁵¹ Working Group, report on third session, annex II (A/CN.9/62/Add.1), para. 29 (UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5). The reasons underlying this decision are explained more fully in the report of the Secretary-General on *ipso facto* avoidance in ULIS, A/CN.9/WG.2/WP.10 (UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 3).

of remedies, discussed above, which was approved by the Working Group at its fourth session.

B. PENDING QUESTIONS WITH RESPECT TO CHAPTER III. OBLIGATIONS OF THE SELLER

Article 18: general obligations of the seller

87. This article is in substance the same as in ULIS. The article serves to introduce the reader to the structure of chapter III; in addition, the closing phrase is useful in making explicit that the seller shall carry out the various aspects of his performance "as required by the contract and the present Law". Article 5 of the revised text (based on article 3 of ULIS) provides that the parties may derogate from or vary the effect of any of the provisions of the Law, but an obligation of the seller to perform the sales contract in accordance with the provisions of the contract is made explicit by the present article.

SECTION I. DELIVERY OF THE GOODS

Article 19 (deleted)

88. This article of ULIS, which set forth a definition of the concept of "delivery", was deleted by the Working Group⁵² for reasons that have been summarized.

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

Article 20: manner of effecting delivery

89. The Working Group reached consensus on this article.⁵³ The only pending proposals are the following drafting suggestions by Norway: (1) In paragraph (b), to replace the word "unascertained" by "unidentified", to conform with the drafting of article 98(2).⁵⁴ (2) In paragraph (c), to delete the final phrase "or, in the absence of a place of business, at his habitual residence", since the effect of the absence of a place of business is dealt with by a general provision in article 4(d).

Article 21: delivery to a carrier

90. The observations submitted by Norway suggest that the word "appropriated" should be replaced by "identified"; the reason, as was noted above under article 20, is to conform with the drafting of article 98(2).

Articles 22-23

91. There are no pending proposals with respect to these articles.⁵⁵

Articles 24-32 (deleted)

92. These nine articles of ULIS set forth separate remedial systems regarding the failure of the seller to perform his obligation, with respect to (1) the date of delivery and (2) the place of delivery. These articles

⁵² Working Group, report on fourth session, para. 21 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

⁵³ *Ibid.*, paras. 22-29.

⁵⁴ Reasons for the use of "identified" in place of "ascertained" or "appropriated" are set forth in the Report of the Secretary-General, Issues presented by chapters IV to VI of ULIS (A/CN.9/WG.2/WP.19), also reproduced as annex IV to the Working Groups report on its fifth session, para. 84 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

⁵⁵ Working Group, report on fourth session, paras. 31-35 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

have been deleted in view of the approval of a consolidated set of remedies for chapter III, which appear in articles 41-47 of the revised text. The reasons for this revision have been summarized above.

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

Article 33: basic rules on conformity

93. The Working Group reached consensus on this article.⁵⁶ Certain stylistic modifications are set forth in the revised provisions submitted by Norway.

Article 34 (deleted)

Article 35: time for determining conformity

94. Article 35(1) of 1964 ULIS states the basic rule as follows: "whether the goods are in conformity with the contract shall be determined by their condition at the time when risk passes". The report of the Secretary-General on the Obligations of the Seller⁵⁷ observed that while such a rule is not always stated expressly in codifications of the law of sales, it is a necessary implication of rules on risk of loss, and may be illustrated by the following situation: A contract calls for the sale of "No. 1 quality cane sugar, F.O.B. Seller's city" (under this contract, the risk of loss in transit falls on the buyer). The seller ships No. 1 cane sugar, but during transit the sugar is damaged by water and on arrival the quality is No. 3 rather than No. 1. In this situation, of course, the buyer has no claim against the seller for non-conformity of the goods, since the goods did conform to the contract at the point when risk of loss passed to the buyer; the buyer's responsibility for deterioration after that point is a necessary consequence of the provisions of the contract (or of the Law) as to risk of loss. Although it might seem that such a principle is so self-evident that it need not be stated, it was concluded that it might be useful in the interest of clarity to state the principle explicitly.⁵⁸ The Working Group retained this principle as the first sentence of article 35(1), subject to redrafting, and the addition of a concluding phrase designed to show that the rule is applicable even if the lack of conformity is latent.⁵⁹

95. The first paragraph of article 35, consisting of the basic rule as approved by the Working Group, and a second sentence which has not yet been considered by the Working Group, is as follows:

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.]

⁵⁶ *Ibid.*, paras. 37-44.

⁵⁷ Report of the Secretary-General on obligations of the seller (A/CN.9/WG.2/WP.16, reproduced as annex II to the Working Group's report on its fourth session), paras. 65-72 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 2).

⁵⁸ *Ibid.*, para. 65.

⁵⁹ Working Group, report on fourth session, paras. 46-52 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

96. The Working Group concluded that it was not feasible to consider the second sentence until after the rules on passing of the risk had been formulated.⁶⁰ Indeed, this complex provision is one of the consequences of the attempt in ULIS to use the concept of "delivery" as a means of solving problems of risk of loss.⁶¹ With the simpler formulation of the rules on risk adopted by the Working Group, this and other complex provisions are no longer needed. This view is reflected in the observations by Norway, which also propose certain drafting changes in the article as approved by the Working Group.⁶²

97. Under the redraft proposed by Norway, the second paragraph of article 35, dealing with express guarantees, would be omitted, and in lieu thereof a special provision on the time for giving notice under a guarantee would be added to article 39. Such a change in emphasis and arrangement would appear to be helpful. The second paragraph of article 35, as it now stands, may not be necessary, for the provisions of an express guarantee would be given effect under the general principle that the parties are legally bound by the provisions of their contract.⁶³

Article 36

(Incorporated into article 33)

Article 37: early delivery

98. There are no pending questions with respect to this article.

Article 38: time and place for inspection of the goods

99. There are no pending questions with respect to this article. However, the close relationship between this article and article 39 (notice of lack of conformity) makes it advisable to recall the decisions taken by the Working Group with respect to article 38.

100. The Working Group considered article 38 at its first session.⁶⁴ Under article 38 of 1964 ULIS (paras. 1 and 2), the buyer was required to examine the goods "promptly" at "the place of destination"; the only exception was that provided under paragraph 3 where, under limited circumstances, "the goods are re-dispatched by the buyer *without transshipment*". The Working Group noted that these rules governing the time and place for inspection were linked to the important rules of article 39 under which the buyer "shall lose the right to rely on a lack of conformity of the goods if he has not given the seller notice thereof *promptly* after he has discovered the lack of conformity or *ought to have discovered it*". Thus the time for giving "prompt" notice began to run at destination; delay in the case of redispach of the goods was per-

mitted only in certain cases where there was no "transshipment", and the concept of "transshipment" was undefined and unclear. The Working Group concluded that the rules of ULIS on the required time and place for inspection by the buyer were impractical as applied to "chain" contracts and to containerized shipments. The Working Group noted that failure to give "prompt" notice after that specified time and place for inspection led to the drastic consequences that the buyer would "lose the right to rely on a lack of conformity of the goods"—i.e., he would be required to pay the full price for defective goods.⁶⁵ Consequently, the Working Group approved more flexible rules in paragraph 3 of article 38; this redraft, *inter alia*, deleted the "transshipment" restriction. The rules of paragraphs 1-3 were reviewed and approved by the Working Group at its third session.⁶⁶

101. Paragraph 4 of article 38 provided that, in the absence of agreement by the parties, the methods of examination would be governed "by the law or usage of the place where the examination is to be effected". It will be noted that the phrase "is to be" (in French, "doit être") assumes that the inspection must be made at a predetermined place, whereas in international practice the place for inspection may be determined by circumstances that arise subsequent to the sale; as already stated the revision of paragraph 3 reflected the need for such flexibility. In addition, the emphasis in paragraph 4 on the law or usage "of the place" of examination could lead to the application of local rules or usages which would be inconsistent with the principle that international transactions should be governed by international practices and usages. See article 9 (2). Consequently, the Working Group deleted paragraph 4 of article 38.⁶⁷

Article 39: notice of lack of conformity

102. In discussing article 38, above, attention was directed to the close relationship between its rules on the time and place for inspection and the rules of article 39 on notice of lack of conformity. It will be observed that failure to give such notice as required by this article has drastic consequences: the buyer "shall lose the right to rely on" the failure of the goods to conform with the contract, i.e. he must pay the full price for defective goods and has no claim for damages.

103. The rigors of this requirement of article 39 have been somewhat mitigated by making the rules of article 38 on the time and place of inspection somewhat more flexible (see paras. 100-101 above). In addition, the Working Group concluded that the requirement of article 39 (1) that the buyer shall notify the seller "promptly" (as defined in article 11), should be modified to permit the buyer to notify the seller "within a reasonable time" after the buyer has discovered the lack of conformity or ought to have discovered it.

104. The principal pending question under the present article relates to the retention of a two-year outside limit on the time for giving notice. At the end of

⁶⁰ *Ibid.*, para. 48.

⁶¹ Both article 35(1) (second sentence) and article 97(2) of ULIS are complex provisions necessitated by the rule that goods are not "delivered" when they are not in conformity with the contract.

⁶² Comments, observations by Norway (redraft of art. 35).

⁶³ E.g., articles 5 and 18 of the revised draft. See also report of the Secretary-General on obligations of the seller, para. 69. There could be little doubt under the revised text that the parties are legally obligated to perform the provisions of their contract of sale. If there should be doubt on this score, the most appropriate approach would be to include an explicit general provision to this effect.

⁶⁴ Working Group, report on first session, paras. 105-111 (UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 2).

⁶⁵ *Ibid.*, paras. 106, 107.

⁶⁶ Working Group, report on third session, para. 109 (UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5).

⁶⁷ Working Group, report on fourth session, paras. 57-63 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

paragraph 1 the following sentence appears in square brackets:

[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.]

105. This provision is the same as in article 39 (1) of 1964 ULIS, except that the Working Group inserted the word "different" as a possible substitute for the word "longer".⁶⁸

106. Such a cut-off period presents a significant issue of policy, which received considerable attention at the Working Group's fourth session.⁶⁹

107. Several representatives considered that such a cut-off period was important: claims notified to the seller more than two years after delivery of the goods would be of doubtful merit and when the seller received his first notice of such a contention at such a late period it would be difficult to obtain evidence as to the condition of the goods at the time of delivery, or to invoke the liability of a supplier from whom the seller may have obtained the goods or the materials for their manufacture. These representatives emphasized that the retention of such a cut-off period was essential for the acceptability of the Law.

108. Several other representatives were of the view that the seller received adequate protection from the requirement that the buyer give notice of the lack of conformity "within a reasonable time after he has discovered the lack of conformity or ought to have discovered it". In the rare case where the application of this standard would permit the giving of notice after the expiration of two years, to preclude the buyer from relying on the non-conformity would be unjust.

109. In the course of its discussion at the fourth session, the Working Group gave attention to the relationship between a two-year cut-off period for notice and the UNCITRAL uniform rules on the limitation period in the international sale of goods.⁷⁰ Subsequent to that discussion the Convention on the Limitation Period has been finalized and opened for signature.⁷¹ Under that Convention, claims arising from a contract of international sale of goods are subject to a general limitation period of four years (article 8). A claim arising

from a defect or other lack of conformity in the goods accrues on the date on which the goods are *actually handed over* to, or their tender refused by, the buyer (article 10 (2)); the limitation period is not extended where a latent defect is discovered subsequent to the receipt of the goods.⁷²

110. Various (and conflicting) inferences could be drawn concerning the significance of the Convention on the Limitation Period with respect to the current problem. On the one hand it might be suggested that the Limitation Convention makes no special provision for late discovery of latent defects. On the other hand it could be suggested that the limitation period of four years following the handing over of the goods adequately protects the seller with respect to the late discovery of latent defects; the defect would need to be discovered (and notice given) in advance of the four-year period to permit legal proceedings to be brought within that period.

111. It has been generally agreed that if a cut-off period is specified in the law, some provision should be made for claims arising under an express guarantee covering a longer period. The problem is illustrated by a guarantee that a complex machine or an industrial plant will maintain a specified level of soundness and performance for a period of three years. It might be supposed that a two-year cut-off period would be so inconsistent with such a guarantee that the contract would override the statutory provision by virtue of article 5 (article 3 of 1964 ULIS). On the other hand, it has been generally considered that the matter is sufficiently doubtful (and important) to require a specific qualification of the two-year cut-off provision.

112. The two-year cut-off provision in 1964 ULIS attempted to deal with the problem by the following clause: "unless the lack of conformity constituted a breach of a guarantee covering a longer period". As a matter of drafting, the above provision seems inadequate, since the provision fails to specify the period for notice applicable to a breach of such a guarantee. Under one view, the above language would seem to make the cut-off period completely inapplicable; under another reading, the two-year period would be extended to the end of the guarantee period—a construction that would allow little or no time for notice when the breach occurs near or at the end of the guarantee period.⁷³ These same ambiguities would also be present if the bracketed word "different" replaced the word "longer". In addition, a reference to a "guarantee covering a *different* period" than two years could be construed to extend to a wide variety of so-called "guarantees" which really are limitations on the seller's obligations: i.e. a "guarantee" providing that the seller's obligation is limited to replacing any defective part if the buyer notifies the seller within 30 days after he receives the goods.

113. The observations submitted by the representative of Norway recommend that the two-year cut-off

⁶⁸ For prior discussion see: Working Group, report on third session, paras. 21 and 22, and annex II to the report, paras. 74-80 (UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5); Working Group, report on fourth Session, paras. 64-77 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

⁶⁹ Working Group, report on fourth session, paras. 66-70 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

⁷⁰ *Ibid.*, paras. 66 and 68. In this discussion it was recognized that distinct legal issues were presented by a cut-off period for notice and a limitation period for action. However, it was suggested that both related to the extent to which an action could be maintained when latent defects came to light a substantial period of time after delivery. In the preparation of the uniform rules on the limitation period, it was proposed by several delegates that a special limitation period of two years should be applicable to claims based on non-conformity of the goods, and that this period should not be subject to extension where the defect was discovered after the expiration of the period.

⁷¹ A/CONF.63/15.

⁷² The effect of an express guarantee stated to have effect for a certain period of time dealt with in article 11 of the Convention on the Limitation Period) considered at paras. 111-113, below.

⁷³ See report of the Secretary-General, obligations of the seller (A/CN.9/WG.2/WP.16; annex II to Working Group report on fourth session, UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 2).

period be maintained. On this assumption, provisions are proposed to deal with express guarantees; these provisions seem to meet the drafting difficulties that have been outlined above.

114. There are no pending questions concerning paragraph 2, as revised by the Working Group.⁷⁴

Delayed communication: paragraph 3

115. Attention is directed to the proposal under article 14 (paras. 74-75, above), that a second paragraph be added to article 14 which would set forth a general rule based on article 39 (3). If that proposal is adopted, paragraph 3 of article 39 would, of course, be deleted.

Article 40: knowledge by the seller

116. There are no pending questions with respect to this article.

SUBSECTION 3. OBLIGATIONS OF THE SELLER AS REGARDS TRANSFER OF PROPERTY

Article 40 bis (relocating article 52, below)

117. The remedial provisions of articles 41-47, below, were designed to be applicable to all of the obligations of the seller, including his obligation to transfer property in the goods. That obligation is now set forth in article 52. In connexion with the revision of the remedial provisions, it was contemplated that the substance of article 52 should precede articles 41-47 which provide remedies for breach. As is noted in the observations of the representative of Norway, it would be appropriate to relocate that provision among the substantive obligations of the seller, as article 40 bis.

SECTION II. REMEDIES FOR BREACH OF CONTRACT BY SELLER (ARTICLES 41-47)

118. This section sets forth consolidated remedial provisions which are applicable to any breach of contract by the seller. The background for the provisions has been summarized at paragraphs 83 to 85 above, and is set forth more fully in the report on the Working Group's fourth session and in the report of the Secretary-General that was considered at the session.⁷⁵

Article 41: buyer's remedies in general

119. The representative of Norway notes that paragraph 1 (b) should read "as provided in articles 82 to 89". The representative of Bulgaria suggests that it would be preferable to follow the style of 1964 ULIS, and refer more exhaustively to the types of remedies which are available to the buyer.⁷⁶

⁷⁴ The reasons for the revision of this provision of 1964 ULIS are summarized in report of the Secretary-General on obligations of the seller, para. 91.

⁷⁵ Working Group report on fourth session, paras. 79-82 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3); report of the Secretary-General on obligations of the seller (A/CN.9/WG.2/WP.16, reproduced as annex II to Working Group report on fourth session, UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 2), paras. 27-29, 93-101, 158-162, 177.

⁷⁶ Comments, observations of Bulgaria and Norway (reproduced in this volume, part two, I, 3). As to the insertion of "and" after para. 1 (a), see article 70, and para. 133 foot-note 84 below.

Article 42: specific performance of the contract

120. The right to require specific performance, as set forth in article 42 of 1964 ULIS, was subject to important exceptions set forth in article VII of the 1964 Sales Convention. This separation of the rule from the exceptions was confusing.⁷⁷ Consequently, the Working Group consolidated the two provisions.⁷⁸

121. The representative of Austria suggests that paragraph 1 be maintained, including the final phrase which the Working Group placed in square brackets. This representative also suggests a drafting change in paragraph 2.

122. The representative of Norway proposes a redraft of article 41, paragraph 1, which omits any reference to "specific performance". The commentary to this proposal states that the right to specific performance is subject to a general limiting rule in article 16 and adds that the buyer should "have the right to require performance, even if specific performance can not be enforced under article 16".

123. One problem presented by this approach is the need to maintain the distinction between (1) the substantive obligations of the parties as derived from the contract and the Law and (2) remedies for breach of those obligations.

124. The substantive obligations of the seller appear in section I—articles 18-40; the remedies for breach of these obligations are set forth in section II—articles 41-47. Article 44, of course, is in this latter category.

125. The basic substantive obligation of the seller is to perform the contract of sale; this obligation is clearly set forth in section I—articles 18-40. When, in addition, in the section II on remedies the Law states that the buyer "has the right to require the seller to perform the contract", many readers would assume this established a legal remedy to compel performance (a remedy sometimes called the remedy of "specific performance").

126. Under article 16, any provision of the Law that a party is "entitled to require performance" would lead to a remedy of specific performance only to the extent that specific performance could be required under the law of the forum. Article 16 consequently serves as an exception to article 42, and to the comparable provision in article 71. The problem of drafting thus seems to be whether readers of articles 42 and 71 will be aware of this exception set forth in article 16, or whether some specific reference to this exception should be included in those articles.

127. Prior reports have suggested that the scope of the remedy of specific performance is not of great practical significance. Even in domestic trade, in areas where a remedy to compel performance is theoretically available, that remedy is seldom invoked since the buyer usually must supply his needs before the goods can be provided by means of litigation;⁷⁹ these practical

⁷⁷ See report of the Secretary-General on obligations of the seller (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 2), paras. 117-124.

⁷⁸ Working Group report on fourth session (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3), paras. 87-97.

⁷⁹ Report of the Secretary-General on obligations of the seller (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 2).

limitations have added significance in international trade. The only significant interest is to avoid confusion in the drafting; the more explicit text prepared by the Working Group was designed to minimize the possibility that the rule of article 16 might be overlooked.

Article 43: buyer's notice fixing additional period

128. There are no pending questions with respect to this article. The significance of this article, and of the parallel provision in article 72 (the *Nachfrist* notice) have been discussed in connexion with the definition in article 10 of "fundamental breach" (para. 66 above).

Article 43 bis: cure by seller

129. The only pending question indicated by the Working Group is the retention of the concluding language in brackets: "[or has notified the seller that he will himself cure the lack of conformity]". The observations of the representative of Austria conclude that this language should be retained.⁸⁰

130. The observations by Norway propose alternative drafting changes for paragraph 1 designed to broaden the scope of the provision. A clarifying amendment is also proposed for paragraph 2.⁸¹

Article 44: avoidance of the contract

A. Introduction

131. Where the seller has failed to perform his obligations under the circumstances described in paragraphs 1 (a) and (b) the buyer may "declare the contract avoided". The most significant consequence is that the buyer is no longer obligated to receive and accept the goods.⁸²

132. As was noted in the general introduction to this chapter (para. 86 above), two types of avoidance were provided in 1964 ULIS: (1) avoidance by a declaration by the innocent party to the party in breach; (2) automatic (*ipso facto*) avoidance. The Working Group concluded that automatic (*ipso facto*) avoidance left the parties in doubt as to their obligations under the contract. Consequently, in the revised text avoidance is effected only by a declaration transmitted to the other party.

133. The very concept of "avoidance" of the contract, which was employed in 1964 ULIS and retained by the Working Group, is subject to misinterpretation, since "avoidance" of the contract could imply that all rights and duties under the contract thereby come to an end. On the contrary, it is intended that a party who "avoids" the "contract" because of breach by the other party will retain the right to recover damages that resulted from the breach. Since the concept of "avoidance of the contract" could be understood as wiping out a claim for damages for breach of contract, 1964 ULIS inserted several provisions that were designed to prevent such a misinterpretation.⁸³ The re-

vised text prepared by the Working Group meets the problem in article 78 (1): "Avoidance of the contract releases both parties from their obligations thereunder, subject to any damages which may be due".⁸⁴

B. Pending questions

134. In paragraph 2 (a), at two points, after the words "the goods" the words "[or documents]" were provisionally added.⁸⁵ The issue is whether specific references to "documents" are needed at this point in the Law. The seller's obligation to supply necessary documents is dealt with in general provisions in articles 18 and 23. If specific references were to be made to documents wherever documents would be required in performance of the contract, a substantial number of such references would be required and there would be a danger that such references might be incomplete. The Working Group might conclude that it would be better to rely on the general rules on the obligation to supply documents.⁸⁶

135. The representative of Norway proposes the restructuring of the subparagraphs in paragraph 2.⁸⁷ The Working Group may conclude that this would add to the clarity of the provision.

Article 45: reduction of the price

136. There are no pending questions with respect to this article.

Article 46: Non-conformity as to part of delivery

137. There are no pending questions with respect to this article.

Article 47: early tender; excess quantity

138. The first paragraph, based on article 29 of 1964 ULIS, seems to say that the buyer may reject an early delivery even if the advance arrival of the goods causes the buyer no inconvenience or expense. Such a rule would be inconsistent with other provisions of the law.

139. The representative of Norway proposes a re-draft that would meet the above problem.⁸⁸ Another approach would be to conclude that this paragraph does not deal with a sufficiently significant problem to require a separate provision.

Articles 48-51 (deleted)

140. The matter dealt with in article 48 of 1964 ULIS is covered in chapter V, section I, anticipatory breach, at article 75 below.

141. Article 49 of 1964 ULIS establishes a rule of limitation (prescription) which is applicable to one of the various types of claim that may arise from a sales

⁸⁰ Comments, observations by Austria (reproduced in this volume, part two, I, 3).

⁸¹ Comments, observations by Norway (reproduced in this volume, part two, I, 3).

⁸² Article 72 *bis* similarly empowers the seller to declare the contract avoided, with the consequence that the seller is no longer obligated to supply the goods to the buyer.

⁸³ 1964 ULIS, art. 24 (2) ("may also claim damages"); art. 41 (2) (same); art. 52 (3); art. 55 (1) (a); art. 63 (1) and 78.

⁸⁴ This intent is reinforced, in the corresponding provision in article 70, by the word "and" at the end of paragraph 1 (a); the Working Group may wish to make articles 41 and 70 consistent on this point. It should be borne in mind that article 78 has been bracketed by the Working Group. If paragraph 1 of article 78 should be deleted, the effect of "avoidance" would be subject to serious doubt.

⁸⁵ Working Group report on fourth session (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

⁸⁶ The bracketed cross-reference at the end of paragraph 2 (a) will need to be reviewed in the light of the decision on the final phrase of article 43 *bis*, para. 1.

⁸⁷ Comments, observations by Norway (reproduced in this volume, part two, I, 3).

⁸⁸ *Ibid.*

contract; this provision is inadequate for the further reason that it fails to deal with various problems that are presented by a rule of limitation (prescription). The Commission at its third session decided that this provision should be deleted from the present law, and that the matter would be governed by the Convention on Limitation.⁸⁹

142. In 1964 ULIS, articles 50 and 51 comprised a separate section entitled "Handing over of documents". Article 50, the only substantive provision in the section, now appears among the consolidated substantive obligations of the seller as article 23.⁹⁰ Article 51 has become unnecessary in view of the establishment of consolidated provisions on remedies (articles 41-47).

Article 52: transfer of property

143. As has been noted under proposed article 40 *bis* (para. 117 above), article 52 should be moved to a position among the substantive obligations of the seller, in advance of the consolidated remedial provisions.

Articles 53-55 (deleted)

144. The Working Group concluded that article 53 of ULIS (like article 34) was unnecessary and should be deleted.⁹¹ Article 54 was placed among the other substantive obligations of the seller as article 21. Article 55 constituted one of the six separate remedial provisions provided by 1964 ULIS and became unnecessary in view of the consolidated set of remedies.

CHAPTER IV. OBLIGATIONS OF THE BUYER (ARTICLES 56-70)

A. GENERAL INTRODUCTION

(1) CONSOLIDATION OF SEPARATE SETS OF REMEDIAL PROVISIONS

145. Chapter IV of 1964 ULIS follows the system of organization employed in chapter III of that law: performance of the sales contract is subdivided into categories and separate remedial provisions are established for each category. (See the general introduction to chapter III at paras. 83-85, above.) The performance by a buyer that is of practical importance to the seller is simply the payment of the price at the appropriate time and place. None the less, performance by the buyer is divided into three categories, and separate remedial provisions are provided for each.⁹² As in chapter III of 1964 ULIS, the attempt to subdivide an essentially unitary contractual duty results in ambiguities as to which set of remedial provisions is applicable.

⁸⁹ UNCITRAL, report on third session (UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A), para. 34. See also the Convention on Limitation (A/CONF.63/15); Working Group report on fourth session (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3), para. 135.

⁹⁰ See Working Group report on fourth session (UNCITRAL Yearbook, vol. IV, 1973, part two, I, A, 2), paras. 21-26.

⁹¹ Working Group report on fourth session, para. 146; (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3); Report of the Secretary-General, obligations of the seller, para. 157 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 2).

⁹² Remedial provisions for section I (payment of the price) are in articles 61-64, for section II (taking delivery) are in articles 66-68 and for section III ("other obligations") are in article 70.

In addition, the three sets of remedial provisions differ in ways that appear to be accidental.⁹³ Consequently, the Working Group at its fifth session decided that chapter IV (like chapter III) should be reorganized by consolidating the rules on the substantive obligations of the buyer and, similarly, by establishing a consolidated set of remedial provisions applicable to any breach by the buyer of his obligations under the sales contract.⁹⁴

(2) CONSOLIDATION OF RULES ON PLACE AND DATE OF PAYMENT

146. A second problem of organization under 1964 ULIS was presented by subsection I B, "place and date of payment" (articles 59-60). The report of the Secretary-General submitted to the Working Group at its fifth session noted that the foregoing provisions fail to deal with the one issue that is of greatest practical importance: the time for buyer's payment in relation to performance by the seller. To deal with this question it is necessary to read articles 59 and 60 in connexion with widely scattered articles in various other parts of the law: article 69 in section III, articles 71 and 72 in chapter V and article 19 in chapter III. Then, after a reader has assembled these various provisions, it is difficult to work out a clear solution for the most important problems that arise in international trade.⁹⁵ For these reasons, the Working Group decided to establish consolidated provisions in chapter IV on the payment of the price.⁹⁶

B. PENDING QUESTIONS WITH RESPECT TO CHAPTER IV. OBLIGATIONS OF THE BUYER

Article 56: general obligations of the buyer

147. This article (like article 18 in chapter III) introduces the reader to the structure of the chapter, and also makes explicit the duty of the buyer to perform the contract of sale "as required by the contract and the present Law". This article, as approved by the Working Group, is the same as article 56 in 1964 ULIS.⁹⁷

SECTION I. PAYMENT OF THE PRICE

Article 56 bis: assuring payment of the price

148. As has been noted (para. 146 above), one aspect of the fragmentation in 1964 ULIS of the various aspects of the buyer's performance is the separate treatment, in articles 57-60, 69 and 71-72, of related aspects of the buyer's obligation to pay the price. As a

⁹³ For example, article 67 of 1964 ULIS seems to provide that any delay by the buyer in providing specifications empowers the seller to avoid the contract, even if that delay is of little or no significance—an approach that is inconsistent with articles 26(1), 30(1), 32(1), 43, 45(2), 52(3), 55(1)(a), 62(1), 66(1) and 71(1)(a).

⁹⁴ Working Group report on fifth session, paras. 36-59, 71-72, 86-87 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

⁹⁵ Report of Secretary-General, issues presented by chapters IV-VI, paras. 4-21.

⁹⁶ In the revised draft, these provisions appear as articles 56, 56 bis, 57, 58, 59, 59 bis and 60. Article 59 bis replaces 71 and 72, which appear in chapter V of 1964 ULIS. See Working Group report on fifth session, paras. 26-35 (UNCITRAL Yearbook, vol. V: 1974, two, I, i).

⁹⁷ Working Group report on fourth session, para. 150. (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

result of the decision to consolidate these substantive provisions, a revision of article 69 of 1964 ULIS has been placed in section I (payment of the price) as article 56 *bis*.⁹⁸ There are no pending questions with respect to this article as revised by the Working Group.

A. FIXING THE PRICE

Article 57: price not stated in contract

149. This article reflects revisions in article 57 of 1964 ULIS, as made by the Working Group at its fourth session.⁹⁹ The most significant modification was to make provision for the case where the seller at the time of contracting had not generally established a price for the goods in question.¹⁰⁰

Article 58: net weight

150. There are no pending questions.¹⁰¹

B. PLACE AND DATE OF PAYMENT

Article 59: place of payment

151. There are no pending questions.¹⁰²

Article 59 bis: time of payment

152. As has been noted (para. 146, above), section 1B of 1964 ULIS ("place and date of payment") failed to deal with the basic question of the time when the buyer must pay in relation to performance by the seller.¹⁰³ The present position, approved by the Working Group at its fifth session, supplies this omission.¹⁰⁴

153. The only pending question is presented by a proposal, in the observations submitted by the representative of Norway, that a reference to "payment against documents", which appears in article 72(2) of 1964 ULIS, be incorporated in paragraph 3 of article 59 *bis*.¹⁰⁵ The observations of the representative of

Bulgaria are to similar effect.¹⁰⁶

Article 60: no formalities required before payment

154. There are no pending questions.¹⁰⁷

Articles 61-64 (deleted)

155. These four articles in 1964 ULIS established a remedial system for those aspects of the buyer's obligation which were set forth in articles 57-60. With the establishment of a consolidated and unitary system of remedies for chapter IV (articles 67-72 *bis*, below), articles 61-64 became unnecessary.¹⁰⁸

SECTION II. TAKING DELIVERY

Article 65: in general

156. This article embodies certain clarifying amendments to the corresponding provision of 1964 ULIS. The most significant of these is that the article now is addressed to the buyer's obligation to take delivery, instead of attempting to define the concept of "taking delivery".¹⁰⁹

157. The observations submitted by the representative of Bulgaria suggest that the word "necessary", as used in 1964 ULIS, would be preferable to the phrase "could reasonably be expected of him".¹¹⁰

Article 66 (deleted)

158. Article 66 in 1964 ULIS is one of the separate remedial provisions which has been incorporated in the consolidated system of remedies. (Articles 70-72 *bis*, below).

SECTION III. REMEDIES FOR BREACH OF CONTRACT BY THE BUYER

Article 67: specification by buyer

159. The present article of the revised text is based closely on article 67 of 1964 ULIS. The one significant change is the omission of the provision that the seller may avoid the contract for any delay in providing specifications, even though that delay is slight and

⁹⁸ Working Group report on fifth session, paras. 35 (a), 84-85. (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

⁹⁹ Working Group report on fourth session, paras. 151-164 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

¹⁰⁰ The observations submitted by the representative of Bulgaria oppose the inclusion of such an article. This issue would appear to have been considered by the Working Group and resolved at its fourth session. See Working Group report on fourth session, paras. 152-153 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

¹⁰¹ Article 58 is the same as in 1964 ULIS. See Working Group report on fourth session, paras. 165-171 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3); report on fifth session, paras. 12-16 (UNCITRAL Yearbook, vol. V: 1974, part three, I, 1).

¹⁰² Article 59 is the same as in 1964 ULIS. See Working Group report on fourth session, paras. 172-177 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3); report on fifth session, paras. 17-21 (UNCITRAL Yearbook, vol. V: 1974, part three, I, 1).

¹⁰³ Report of the Secretary-General on issues presented by chapters IV-VI of ULIS (A/CN.9/WG.2/WP.19, annex IV to Working Group report on fifth session), paras. 4-21 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 5).

¹⁰⁴ Working Group report on fifth session, paras. 26-35 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1). This provision leads to the deletion of articles 71 and 72 of ULIS.

¹⁰⁵ Comments, observations by Norway (reproduced in this volume, part two, I, 3). The report of the Secretary-General on issues presented by chapters IV-VI, at paras. 18-20, considered the advisability of retaining the "payment against documents" language in article 72(2) of 1964 ULIS and concluded that the more general language, approved by the Working Group, would be preferable. It would appear that the more specific language "payment against documents" would produce unintended results in case No. 1 as discussed at paras. 19-20

of the above report. In addition, the phrase, "when the contract requires payment against documents" in article 72(2) of ULIS is subject to at least two interpretations: (1) The contract provides (or implies) that the buyer may not receive the bill of lading until he pays; this provision may not always be intended to preclude inspection before payment—as in cases where the contract also provides that payment is not due until after arrival of the goods. (2) The contract may use the phrase "payment against documents" in a setting where course of dealing or usage that imply that the buyer may not inspect before he pays. Of course, on this second hypothesis, no statutory provision is needed since the correct result is produced by virtue of the agreement of the parties. See articles 5 and 9 of the revised text.

¹⁰⁶ Comments, observations by Bulgaria (reproduced in this volume, part two, I, 3).

¹⁰⁷ Article 60 is the same as in 1964 ULIS; see Working Group report on fifth session, paras. 22-25 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

¹⁰⁸ Working Group report on fifth session, paras. 36-59 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1). See also the general introduction to chapter IV, at para. 145, above.

¹⁰⁹ Working Group report on fifth session, paras. 60-70 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1). See also the general introduction to chapter III at para. 82, above, with respect to the problems presented in 1964 ULIS by the concept of "delivery".

¹¹⁰ Comments, observations by Bulgaria (reproduced in this volume, part two, I, 3).

of no importance to the seller.¹¹¹ Instead, the revised text makes applicable the general provisions on the remedies of the seller. The Working Group approved the revised text in principle, but deferred final action until a later session.¹¹²

160. The observations by the representative of Norway suggest that this article should be removed from section III (remedies for breach of contract by the buyer); the end of the preceding section is suggested. (Stated differently, the heading for section III would be placed immediately after the article rather than immediately before the article.) The observations by the representative of Austria suggest that the article should remain in its present position. These observations also suggest that the reference in brackets to recourse to remedies should be deleted; authorizing the seller to make the specification, under this view, would be adequate.¹¹³

Article 70: seller's remedies in general

161. This is the first of four articles setting forth a consolidated set of remedies afforded to the buyer in the event of breach by the seller. Article 70 is closely patterned on article 41 which is the initial article on remedies afforded to the seller.¹¹⁴

162. The only pending questions are certain amendments for stylistic conformity proposed by the representative of Norway.¹¹⁵

Article 71: requiring the buyer to pay the price or take delivery

163. The present article is parallel to article 42, which deals with the right of the buyer to compel the seller to deliver the goods ("specific performance"). The representative of Norway proposes drafting changes in this article comparable to those proposed for article 42. See the discussion under article 42 at paragraphs 120-127 above. Account should also be taken of article 16, which contains a general rule limiting the right of specific performance.

Article 72: seller's notice fixing additional period

164. This article provides that the seller may request performance, and fix a time therefor (the *Nachfrist* notice); failure to comply with this request provides a basis for avoidance of the contract without establishing a "fundamental breach". This article corresponds to article 43 and presents no pending questions.¹¹⁶

Article 72 bis: avoidance of the contract by the seller

165. This article, dealing with avoidance of the contract by the seller, is comparable to article 44, which deals with avoidance by the buyer. As was noted in connexion with article 44 (para. 132, above) and

in the general introduction to chapter III (para. 89, above), the Working Group at its third session decided to eliminate the concept of automatic (*ipso facto*) avoidance of the contract; instead, avoidance of the contract must be based on a declaration by one party to the other.

166. At the fifth session, the Working Group was not able to reach a final decision as to the drafting of this article and concluded that it would give further consideration to three proposals (alternatives A, B and C) which are set forth in the revised text that appears as annex I to the report on the fifth session.¹¹⁷

167. One typical situation with which this article must deal may be illustrated by the following case (case No. 1): a contract of sale provided that the buyer would establish an irrevocable letter of credit for the price on 1 June, and that the seller would ship the goods on 1 July. On 1 June the buyer had not yet established the letter of credit.

168. The problem presented by the foregoing facts is whether the seller may immediately declare the avoidance of the contract, with the consequence that he need not perform even if the buyer establishes the letter of credit on 2 June, and without regard to whether the delay constituted a fundamental breach of contract. (The same problem would arise from any delay by the buyer in providing shipping instructions or specifications for the goods, or in performing any other aspect of his obligations under the contract.)

169. Alternative A approaches the above problem in the same manner as article 44: the seller may declare the avoidance of the contract either if (para. 1(a)) the delay constitutes a fundamental breach or if (para. 1(b)) the buyer fails to comply with a *Nachfrist* notice under article 72.

170. Alternative B provides rules that, in part, depend on whether the goods have been handed over to the buyer. Where the goods have been handed over, this proposal (para. 1(a)) seems to permit avoidance only on the buyer's failure to comply with a *Nachfrist* notice under article 72. Where the goods have not been handed over (para. 1(b)), avoidance depends on the existence of a fundamental breach; apparently the *Nachfrist* device is unavailable.

171. Alternative C deviates from alternative A only with respect to paragraph 2, which deals with the circumstances under which the seller may lose the right to declare the contract avoided.

172. The emphasis which alternative B places on the question whether the goods have been handed over suggests that this alternative was not directed to problems like those illustrated by case No. 1, above, but instead reflected concern lest a seller, who has delivered goods on credit, might attempt to use "avoidance" of the contract as a basis for recapture of the goods. It may be doubted whether such attempts would be

¹¹¹ Report of the Secretary-General on issues presented by chapters IV-VI, para. 30 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 5).

¹¹² Working Group, report on fifth session, paras. 73-81 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

¹¹³ Comments, observations by Norway and Austria (reproduced in this volume, part two, I, 3).

¹¹⁴ Working Group report on fifth session, paras. 40-41 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

¹¹⁵ Comments, observations by Norway (reproduced in this volume, part two, I, 3).

¹¹⁶ Working Group report on fifth session, paras. 50-52 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

¹¹⁷ Working Group report on fifth session, paras. 53-59. (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1). In the revised text in annex I to this report, a draft provision set forth in the report of the Secretary-General on issues presented by chapters IV-VI of ULIS, at para. 36, is designated alternative A; alternative B reproduces proposal A introduced at the fifth session, and alternative C reproduces proposal B introduced at that session.

frequent under the conditions of international trade; indeed, under some legal systems "avoidance" of the contract does not establish a ground for recovery of goods that have been delivered to the buyer unless the parties have expressly agreed that the seller retains title (or other "security" interest) in the goods which he may enforce if the buyer fails to pay.¹¹⁸ In any event, such consequences of avoidance of the contract are more closely related to the provisions of article 78 (2).¹¹⁹

173. The observations submitted by the representative of Austria support the approach of alternative A; the observations submitted by the representative of Norway suggest drafting modifications in paragraph 1 of alternative A, and, with respect to paragraph 2, prefer the approach of alternative C.¹²⁰

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

SECTION I. ANTICIPATORY BREACH

Article 73: suspension of performance; stoppage of goods in transit

174. Article 73 of 1964 ULIS provided that one party could suspend performance because of the deterioration of the economic situation of the other party. These rules were substantially revised by the Working Group at its fifth session.¹²¹ The principal revisions are as follows: (1) The principal ground for suspension has been made narrower: there must be a "serious deterioration" in the economic situation of the other party; (2) A second ground has been added: conduct by the other party "in preparing to perform or in actually performing the contract"; (3) The provisions on stoppage in transit are made expressly applicable only as between the seller and the buyer; (4) Under 1964 ULIS, the party suspending performance need not notify the other party, and the consequences following suspension are not stated;¹²² a new paragraph 3 included in article 73 provides that a party suspending performance shall give the other party prompt notice thereof, and shall continue with performance if the other party provides adequate assurance for performance. (Typically, such assurance would be provided by an irrevocable letter of credit or, in some areas, by a bank guarantee.)

175. Although at the fifth session some representatives reserved their position with respect to the redraft, the only observation submitted for consideration at the present session is a drafting suggestion by the repre-

sentative of Norway that the words "the appearance of" be inserted prior to the word "a serious deterioration".

Article 74: delivery by instalments

176. This article is based on article 75 of 1964 ULIS, subject to drafting changes made by the Working Group.¹²³ The observations submitted by the representative of Norway include a proposed redraft of the second paragraph.¹²⁴

Article 75: avoidance prior to date for performance

177. This article is the same as article 76 of 1964 ULIS, except for a minor drafting change made by the Working Group at the fifth session.¹²⁵ There are no pending questions with respect to this article.

SECTION II. EXEMPTIONS

Article 76: excuse for non-performance

178. This article (article 74 in 1964 ULIS) deals with the circumstances in which a party will be relieved of liability even though he fails to perform the contract: the underlying legal issue is referred to in various ways which include the terms *force majeure*, impossibility and supervening disability. This problem was discussed by the Working Group at its fifth session, and was the subject of intensive work by a drafting party established during that session.¹²⁶ At the end of the session, the Drafting Party reported that it had not been able to agree on a final draft, but had provisionally adopted a text, which, together with an alternative proposal submitted by an observer, should be included in the report to facilitate later consideration of the article. (These two texts are referred to as alternative A and alternative B, respectively.)

179. At the end of the fifth session, the representative of the United Kingdom (who also had served as Chairman of the Drafting Party) agreed to prepare a study of the unresolved questions presented by this article, and has submitted a detailed study on this subject.¹²⁷ It would not be feasible to summarize this study; it will be sufficient to note that the study, in addition to analysing the problem, sets forth draft provisions for three articles which deal with distinct aspects of the problem.¹²⁸

180. Draft provisions are also proposed in the observations submitted by the representative of Norway, and comments on the topic are included in the observations by the representatives of Austria and of Bulgaria.¹²⁹

¹²³ Working Group report on fifth session, paras. 116-127 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

¹²⁴ Comments, observations by Norway (reproduced in this volume, part two, I, 3).

¹²⁵ Working Group report on fifth session, paras. 128-134 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

¹²⁶ *Ibid.*

¹²⁷ Comments, study by the representative of the United Kingdom of problems arising out of article 74 of ULIS (reproduced in this volume, part two, I, 3).

¹²⁸ The study, at paragraph 9, presents a revision of article 76; this draft, labelled alternative C, is concerned only with exemption from liability in damages. At paragraph 12, the study proposes a second article [76 bis] which is addressed to the circumstances in which the contract may be avoided. At paragraph 17, the study proposes a third article [76 ter] which deals with the consequences of avoidance.

¹²⁹ Comments, observations by Austria, Bulgaria and Norway (reproduced in this volume, part two, I, 3).

¹¹⁸ Working Group report on fifth session, para. 56 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1), refers to a proposal that would limit the right to reclaim goods to those circumstances described above.

¹¹⁹ See Working Group report on fifth session, paras. 138-144 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

¹²⁰ Comments, observations by Austria and Norway (reproduced in this volume, part two, I, 3).

¹²¹ Working Group, report on fifth session, paras. 90-106 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1). Article 73 of ULIS was analysed, and draft proposals for revision were set forth in report of the Secretary-General on issues presented by articles IV-VI of ULIS, paras. 48-63 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 5).

¹²² Report of the Secretary-General on issues presented by chaps. IV-VI of ULIS, paras. 51-58 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 5).

Article 77 (deleted)

181. This article of 1964 ULIS is one of several provisions which are designed to make clear that a party who "avoided" the contract for breach does not lose the right to claim damages (see para. 133, above). The Working Group concluded that this point already resulted from other articles and, consequently, that this article should be deleted.¹³⁰

SECTION III. EFFECTS OF AVOIDANCE

Article 78: damages; return of goods or payments

182. This article of the revised text is the same as in 1964 ULIS. However, in view of proposals for revision made at the fifth session, the Working Group deferred final action on the article.¹³¹

183. The text of one proposal, set forth in the report on the fifth session, would differentiate between the effect of avoidance as to the innocent party (the "avoiding" party) and the party in breach, and also would distinguish between total and partial avoidance.¹³² No proposals have been submitted subsequent to the session with respect to this article.

Article 79: necessity for return of goods

184. This article, as adopted at the fifth session, is similar to article 79 of 1964 ULIS.¹³³

185. The observations submitted by the representatives of Austria suggest that in paragraph 2, subparagraph (a) is covered by paragraph (d) and therefore may be deleted; it is further suggested that subparagraph (e) may be deleted. The representative of Norway suggests that subparagraph (d) should be placed first. In addition, the reference in paragraph (d) to acts of other persons should be deleted in view of a general provision on this point to be added as article 12. (See para. 72, above).

Articles 80 and 81

186. No pending questions or proposals have been presented with respect to these articles.¹³⁴

SECTION IV. SUPPLEMENTARY RULES
CONCERNING DAMAGES*Article 82: basic rule on measure of damages*

187. This article, which includes minor modifications by the Working Group of article 82 in 1964 ULIS, appears at paragraph 165 of the report on the fifth session. (In annex I, through a typing error in the second sentence after "the loss which" there is an omission of the phrase "the party in breach had foreseen or ought to have foreseen at the time of . . .").*

188. The observations submitted by the representative of Norway propose that article 85 (with a draft-

ing adjustment) be moved to article 82 as paragraph 2.¹³⁵

Article 83: interest on sums in arrear

189. The Working Group approved this article in the same form as in 1964 ULIS.¹³⁶ The only current proposal is the suggestion of the representative of Norway that the reference to "habitual residence" is unnecessary in view of the general provision in article 4 (b).¹³⁷

Article 84: calculation of damages

190. This article, as approved by the Working Group, appears at paragraph 176 of the report on the fifth session. (In reproducing this article in annex I, in paragraph 1 the words "on the date" were omitted before the concluding phrase "on which the contract is avoided".)*

191. The revised text differs from the corresponding article of 1964 ULIS in two significant respects: (1) the party claiming damages may, if he chooses, rely instead on the general rule of article 82; 1964 ULIS seemed to restrict a buyer who has avoided the contract to article 84; (2) article 84 of ULIS had referred, in paragraph 2, to "the market in which the transaction took place"—a test which in international sales would be difficult of application. In place of this language, the revised text refers to "the place where delivery of the goods is to be effected". (In the revised text, the place for such delivery is specified in article 20.)

192. The only pending question is the suggestion by the representative of Austria that the test for measuring damages in paragraph 1 should refer to the date on which the goods were (or should have been) delivered, rather than to the date on which the contract was avoided.¹³⁸

Article 85: goods resold or bought in replacement

193. The revised text is based closely on 1964 ULIS, but requires that the resale or repurchase be made not only in a reasonable "manner" but also "within a reasonable time after avoidance".¹³⁹

194. As has been mentioned under article 82 (para. 191, above), the representative of Norway suggests that the rule of article 85 should appear as a second paragraph of article 82; a drafting change to show the relationship between the two paragraphs is included in the proposal.¹⁴⁰

Articles 86 and 87 (deleted)

195. The Working Group at its fifth session concluded that, in view of the revision of other articles in

* UNCITRAL Yearbook, vol. V: 1974, part two, I, 2.

¹³⁵ Comments, observations by Norway (reproduced in this volume, part two, I, 3).

¹³⁶ Working Group, report on fifth session, paras. 166-167 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

¹³⁷ Comments, observations by Norway (reproduced in this volume, part two, I, 3).

¹³⁸ Comments, observations by Austria. This proposal was made at the fifth session and was considered by the Working Group: report on fifth session, para. 170 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

¹³⁹ Working Group, report on fifth session, paras. 177-182 (reproduced in this volume, part two, I, 3).

¹⁴⁰ Comments, observations by Norway (reproduced in this volume, part two, I, 3).

* UNCITRAL Yearbook, vol. V: 1974, part two, I, 2.

¹³⁰ Working group report on fifth session, paras. 135-137 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

¹³¹ *Ibid.*

¹³² *Ibid.*, para. 143. Partial avoidance is provided for in articles 46 and 74 of revised text.

¹³³ *Ibid.*, paras. 145-156. The text of a proposal appears at para. 151.

¹³⁴ *Ibid.*, paras. 152-154 (art. 80); 155-156 (art. 81).

this section, articles 86 and 87 of 1964 ULIS became unnecessary.¹⁴¹

Article 88: mitigation of loss

196. This article requires the innocent party to take steps to mitigate the damages resulting from breach by the other party. The Working Group at its fifth session slightly relaxed the obligation imposed under 1964 ULIS; instead of "all reasonable measures", the innocent party is required to adopt "such measures as may be reasonable in the circumstances"; certain clarifying revisions also were made.¹⁴²

197. The representative of Norway proposes stylistic modifications in this provision, and proposes that it be supplemented by a second paragraph which would deal with the obligation of the buyer to buy goods in replacement and with the obligation of the seller to resell.¹⁴³ It would appear that this new paragraph would provide illustrations of the most important applications of the general principle stated in the article.

Article 89: damages in cases of fraud

198. This article, which permits recourse to applicable national rules to determine damages in cases of fraud, is the same as in 1964 ULIS. The representative of Austria proposes an amendment designed to make clear that proof of fraud would *not* reduce the damages recoverable under the uniform law.¹⁴⁴

Article 90 (deleted)

199. The Working Group decided at the fifth session that this article was unnecessary and was of doubtful value in relation to the usages of international trade. The observations submitted by the representative of Bulgaria suggest that the article should be retained.¹⁴⁵

SECTION V. PRESERVATION OF THE GOODS

Articles 91 to 95

200. These five articles of 1964 ULIS deal clearly and usefully with a practical problem: the need to preserve goods when the buyer delays in taking delivery or when the goods are rejected after their receipt by the buyer. The Working Group decided to approve these articles without change, and there are no pending questions with respect to them.¹⁴⁶

CHAPTER VI. PASSING OF THE RISK

A. GENERAL INTRODUCTION

201. In 1964 ULIS, the basic rule on passing of the risk is the provision in article 97 (1) that risk shall pass to the buyer "when *delivery* of the goods is effected . . .". As a result, consequences of great practical significance turn on the concept of "delivery". This

concept was the subject of an elaborate definition in article 19.

202. The Working Group, at its third session (January 1972), gave intensive consideration to the use in ULIS of "delivery" and concluded that its approach was unsatisfactory.¹⁴⁷ Part of the difficulty arose from the fact that this single concept governed too many distinct problems: e.g. the definition of the parties' contractual obligations; the time for payment of the price; passing of the risk of loss.¹⁴⁸ As a result, the definition became very complex. In addition, parts of the definition which had been developed to deal with one of these problems produced unintended consequences with respect to other problems to which it was applied. For example, in an attempt to deal with the problem of risk of loss when goods were non-conforming, the definition of "delivery" in article 19 provided that "delivery" consists in the handing over of goods "which conform with the contract"—with the result that non-conforming goods were accepted and used by the buyer were never "delivered" to him. Such a definition of "delivery" was not only artificial, but it would lead to the unintended result that the risk of loss indefinitely remained with the seller while the goods were used (or even consumed) by the buyer. To compensate for this problem, article 97 (2) set forth a complex provision providing (in effect) for the retroactive passing of risk where the buyer has neither declared the contract avoided nor required goods in replacement.¹⁴⁹

203. Another example of the complication that resulted from the attempt to deal with problems of risk of loss by way of a general definition of "delivery" is provided by articles 19 (3) and 100. Article 19 (3) included in the definition of "delivery" one of the aspects of performance by transmission by carrier. This provision was found to be inadequate as applied to problems of risk, with the result that an exception to article 19 (3) had to be set forth in article 100, which opens: "If, in a case to which paragraph 3 of article 19 applies . . .". The necessity to refer back and forth between the definition of "delivery" in article 19 and the special rules on risk in chapter VI made it difficult to read and understand the law; in addition, this approach so complicated the drafting process that unintended and unfortunate consequences were produced by a literal application of these various provisions.¹⁵⁰

204. In the light of these considerations, the Working Group at its third and fourth sessions took two basic decisions. The first was to delete the definition of "delivery" in article 19, and formulate the rules at the outset of chapter III (e.g. article 20) in terms of

¹⁴¹ Working Group, report on fifth session, paras. 183-187 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

¹⁴² *Ibid.*, paras. 188-194.

¹⁴³ Comments, observations by Norway (reproduced in this Yearbook, part two, I, 3).

¹⁴⁴ Comments, observations by Austria (reproduced in this volume, part two, I, 3).

¹⁴⁵ Working Group, report on fifth session, paras. 200-201 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1). Comments, observations by Bulgaria (reproduced in this volume, part two, I, 3).

¹⁴⁶ Working Group, report on fifth session, paras. 202-205 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

¹⁴⁷ Working Group, report on third session (annex I), paras. 17-19 (UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5).

¹⁴⁸ The problem is discussed more fully in the 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).

¹⁴⁹ This special provision on risk of loss did not, however, remove the basic difficulty in other settings that resulted from the fact that ULIS seemed to say that the goods were never "delivered" to the buyer even though he used (or consumed) them.

¹⁵⁰ Examples of such unintended consequences are given in the report of the Secretary-General on delivery in ULIS, at paras. 6-25 (risk of loss); 37-40 (time and place for payment of the price).

the specific steps that sellers shall take to fulfil their contractual obligations to supply or deliver goods (see para. 82, above).¹⁵¹ The second decision was that problems of risk of loss (the subject of chapter VI) would not be controlled by the concept of "delivery".¹⁵²

205. This second decision was implemented, at the fifth session, by redrafting provisions of chapter VI so that risk of loss passes to the buyer when the seller performs designated acts of performance of the contract—e.g. (article 97 (1)) when "the goods are handed over to the carrier for transmission to the buyer".¹⁵³ The problem of the effect of non-conformity of the goods (which, under 1964 ULIS was dealt with, in part, by an artificial definition of "delivery") is handled by an article (98 *bis*) addressed directly to the effect of non-conformity on risk of loss. The result is a presentation of the rules on risk of loss more unified and clearer than in 1964 ULIS. The presentation is also somewhat briefer, since the Working Group concluded that articles 99, 100 and 101 had become unnecessary.

B. PENDING QUESTIONS WITH RESPECT TO CHAPTER VI

Article 96: in general

206. This general introductory article makes explicit the rule (which is necessarily implicit in rules on passing of the risk) that loss or deterioration (damage) which occurs after the risk of loss has passed to the buyer does not excuse the buyer from paying for the goods. (Compare article 35 at para. 97 above.) This article, as approved by the Working Group, is the same as in 1964 ULIS. However, a decision was deferred as to whether the article should retain the reference to acts of a third person "for whose conduct the seller is responsible".¹⁵⁴ The representative of Norway proposes that such specific references be deleted in favour of a general provision (proposed article 12, para. 72, above).¹⁵⁵

Article 97: risk where the contract involves carriage

207. Paragraph 1 of this article states the basic rule which (in the absence of agreement or usage) would apply to the most typical international sale: where the contract involves carriage of the goods, risk shall pass "when the goods are handed over to the carrier for transmission to the buyer". The result is the

same as that reached under 1964 ULIS through a combination of article 19 (2) and article 97 (1).

208. The observations of the representative of Norway suggest that the text approved by the Working Group be made explicitly inapplicable where "the seller is not required to deliver [the goods] at a particular destination".¹⁵⁶ A similar exception ("and no other place for delivery has been agreed upon") appears in article 19 (2) of 1964 ULIS; the above observations note that the proposed language is also found in one of the modern formulations of commercial law.¹⁵⁷

209. The Working Group may wish to consider whether such an exception is necessary, and whether it might lead to misunderstanding. Presumably the contractual requirement "To deliver" at a particular destination should be given effect in the present article only in cases where such a requirement is expressed in a manner (like "*ex ship*") which implies that transit risk remains on the seller. On this assumption, the proposed language may be unnecessary, since all of the provisions of the law yield to agreement by the parties (articles 8, 9 (4); specific provision) to this effect need not be made in individual articles.¹⁵⁸ In addition, a reference to a requirement "to deliver" at a particular destination could lead to misunderstanding in connexion with rules on risk of loss. Since the seller usually makes the arrangements for carriage, the contract or shipping instructions often specify the place to which the seller is to dispatch the goods. In addition, some of the most common forms of price quotations ("C. I. F." and "C. & F.") imply that transit risks fall on the buyer even though the seller must bear the cost of freight to the named destination. In these, and in other types of quotations ("freight prepaid: freight allowed", and the like), framing the issue in terms of whether the seller is required "to deliver" has been a source of confusion;¹⁵⁹ the problems can be solved more readily in terms of the narrower and more specific issue as to whether the provision in question implies an exception to the general rule that transit risks pass to the buyer when the seller delivers the goods to the carrier. As has been noted, such an implication from the contract is given effect by article 8 and 9 (4) of the revised text.

210. Omitting such a special reference to a requirement "to deliver" would also make unnecessary the further provision, proposed in the observations by the representative of Norway, dealing with the passing of risk at "destination". Under the simpler text approved by the Working Group, if the contract states (article 8), or uses a trade term which implies (article 9 (4)), that transit risks remain on the seller, the point at the desti-

¹⁵¹ Preliminary discussions at the third session culminated in decisions at the fourth session. Working Group, report on third session (annex II) paras. 18-27; report on fourth session, paras. 16-29 (UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5).

¹⁵² Working Group report on third session (annex II) para. 17 (UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5).

¹⁵³ Draft proposals for such a reformulation of chapter VI were set forth and analysed in the report of the Secretary-General on issues presented by chapters IV-VI of ULIS, paras. 64-105 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 5).

¹⁵⁴ Working Group report on fifth session, paras. 207-212 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

¹⁵⁵ Comments, observations by Norway (reproduced in this volume, part two, I, 3). It is further suggested that the words "deterioration of" be replaced by "damage to". This change seems useful since "deterioration" might imply natural spoilage or evaporation, whereas the article is concerned with casualties in transit.

¹⁵⁶ Comments, observations by Norway (reproduced in this volume, part two, I, 3).

¹⁵⁷ The observations by Norway refer to the United States Uniform Commercial Code, section 2-509 (subparagraph (1) (a)).

¹⁵⁸ The question whether the exception should be retained was discussed in the report of the Secretary-General on issues presented by chapters IV-VI of ULIS, at para. 80 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

¹⁵⁹ It would appear that the "delivery" concept in article 19 (2) of ULIS which the current proposal would in substance restore, made it necessary for ULIS to add article 101, which provides: "The passing of the risk shall not necessarily be determined by the provisions of the contract concerning expenses". The Working Group deleted this cryptic and unhelpful provision.

nation at which risk passes would, of course, be governed by any applicable provision of the contract or by usage implied by trade term. In the absence of such a provision, the transfer of risk would be governed by article 98 of the revised text. Under that article, risk would pass to the buyer when he takes over the goods; when the buyer is late in taking over the goods, risk passes to him from the moment when such a delay constitutes a breach of contract.¹⁶⁰

211. The observations by the representative of Norway propose clarifying amendments for paragraph 2 of article 97, and also propose the addition of a third paragraph based on ULIS article 100, which the Working Group decided to delete.¹⁶¹

Article 98: risk where the contract does not involve carriage

212. The comments of the representative of Norway propose clarifying amendments for paragraph 1, and a revision of paragraph 2, based on a text placed before the Working Group at the fifth session.¹⁶² The

¹⁶⁰ In the proposed addition to deal with transfer of risk at "destination", the concluding phrase "when time for delivery has come" may be less clear than is article 98 (2) in dealing with casualties that occur during a period allowed to the buyer for taking the goods.

¹⁶¹ Working Group report on fifth session, para. 244 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1). The report of the Secretary-General on issues presented by chapters IV-VI of ULIS, para. 87, discussed the question whether art. 100 of 1964 ULIS was needed in the setting of the revised rules on risk (UNCITRAL Yearbook, vol. V: 1974, part two, I, 5).

¹⁶² Comments, observations by Norway (reproduced in this volume, part two, I, 3); Working Group report on fifth session, paras. 233-238 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

considerations with respect to the need for such a special provision would seem to be similar to those applicable to the proposal for a special provision as to delivery at "destination" (see para. 210, above). (One aspect of this proposal is to subdivide article 98, as approved by the Working Group, into two articles which would be numbered 98 and 98 bis.)

213. In paragraph 2 of this article, the second sentence, dealing with identification of the goods, was placed within brackets. The observations by the representative of Austria conclude that this sentence should be retained.¹⁶³

Article 98 bis: effect of non-conformity on passing of the risk

214. The above article has been considered by the Working Group, but final action was deferred until the present session.¹⁶⁴ The significance of this article has been discussed in paragraph 205, above. The representative of Austria concludes that the article is needed, but proposes a redraft of paragraph 2. Amendments for the article are also proposed by the representative of Norway.¹⁶⁵

¹⁶³ Comments, observations by Norway (reproduced in this volume, part two, I, 3). Reasons for retention of this provision are set forth in the report of the Secretary-General on issues presented by chapters IV-VI of ULIS, at paras. 83-84 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 5).

¹⁶⁴ Working Group report on fifth session, paras. 239-240, 241 (c) (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

¹⁶⁵ Comments, observations by Austria, Norway (reproduced in this volume, part two, I, 3). The latter proposal is in an article numbered 98 ter.

5. Report of the Secretary-General (addendum): pending questions with respect to the revised text of a uniform law on the international sale of goods (A/CN.9/100, annex IV)*

1. This annex completes the analysis of the observations submitted by representatives of the Working Group on the International Sale of Goods with respect to pending questions. At the time documents A/CN.9/WG.2/WP.21 and Add.1 were prepared, some of these observations, in particular those submitted by the representative of the Union of Soviet Socialist Republics, had either not yet been received or were not available in English. For the sake of completeness those comments of other representatives which were not mentioned in the report of the Secretary-General are noted herein.

Article 1

2. The representative of the Soviet Union recommended retention of the bracketed language in paragraph 2 in order to make the provision the same as the corresponding provision in the Convention on Prescription (Limitation) in the International Sale of Goods.

3. The representative of Mexico suggested that the language of paragraph 2 did not make it sufficiently clear that the Uniform Law would not apply if the fact that the parties had their places of business in differ-

ent States did not appear in the contract or from the dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract. Therefore, he suggested the addition of the words "and consequently the present Law shall not apply" following the word "disregard".

4. The representative of Bulgaria suggested the insertion of a provision indicating that if parties who are not otherwise governed by the Uniform Law choose it as the law of the contract, that will not affect the application of any mandatory provisions of law which would otherwise have been applicable. This matter is discussed in the report at paragraphs 14-17.

Article 2

5. The representative of the Soviet Union recommended retention of the bracketed language in paragraph 1 (a) in order to make the provision the same as the corresponding provision in the Convention on Prescription (Limitation) in the International Sale of Goods.

Article 3

6. The representative of the Soviet Union recommended retention of the bracketed language in paragraph 1 in order to make the provision the same as the

* 18 February 1975.

corresponding provision in the Convention on Prescription (Limitation) in the International Sale of Goods.

7. The representative of Bulgaria pointed out that it would be helpful if the text of paragraph 1 made it clear whether or not the Law applies to the sale of entire industrial complexes and factories. His comments point out that the text of paragraph 1 would seem to exclude it. In considering this proposal it might be kept in mind that the law governing the sale of goods between the members of the Council for Mutual Economic Assistance, the General Conditions of Delivery of Goods Between Organizations of the Member Countries of the Council for Mutual Economic Assistance (CMEA General Conditions of Delivery, 1968) do apply to the sales of entire plants. See articles 24, 25, 26, paragraph 6, 29, paragraph 2.

Article 4

8. The representative of the Soviet Union recommended retention of the bracketed language in paragraph (a) in order to make the provision the same as the corresponding provision in the Convention on Prescription (Limitation) in the International Sale of Goods.

Article 9

9. The representative of Bulgaria urged that the rule of paragraph 3 should be reversed. In case of conflict the Law should prevail over usages unless the parties have agreed otherwise. He suggested that the current text would impose a variety of existing usages that are unknown to parties in international trade.

10. This concern should be largely overcome by the redrafting of paragraph 2. As the representative of Austria points out, paragraph 2 needs simplification but its point is that the only usages which bind the parties are those of which the parties are aware or should be aware because of the widespread use of the usage. The proposal of the representative of Mexico¹ simplifies and slightly changes the criteria, but the basic test remains the same, the usage is so widely used and known that it justifies an expectation that it will be observed with respect to the transaction in question.

11. The representative of the Soviet Union called for the omission of paragraph 4 for the reasons set out in paragraph 82 of the report on the second session of the Working Group. These reasons, which were not accepted by the Working Group at that time, were first: "that the language of paragraph 4 attempts to draw a line between the effect of usages (a) for the purpose of supplementing or qualifying terms and (b) for the purpose of interpreting terms. [This distinction was said to be] artificial and will pose practical difficulties. The second ground is that paragraph 4 binds a party to an international usage even though that party did not know and had no reason to know it".²

12. The redrafting of paragraph 2 as suggested by the representative of Mexico may satisfy the second of these two grounds.

¹ Comments of the representative of Mexico, para. 36 (reproduced in this volume, part two, I, 3).

² Report of the Working Group on the International Sale of Goods on the second session, A/CN.9/52, para. 82 (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

Article 10

13. In addition to the proposal of the representative of Mexico for a redraft of article 10 in order to simplify it and to eliminate the subjective element, the representative of Bulgaria has also suggested a proposed revision.

Article 12

14. The representative of Bulgaria recommended keeping article 12 of the 1964 ULIS on the definition of "current price". This article was dropped from the text by the Working Group at its second session.³

15. The only provision in ULIS which employs the term "current price" is in article 84 on the damages in case of avoidance of the contract. "The Working Group considered that it was inappropriate to set up a general definition for a term which was used in only one operative article of ULIS. Including a definition of 'current price' in article 84 would not unduly burden the provisions of that article."⁴ Nevertheless, no consideration was given to defining "current price" when article 84 was discussed by the Working Group at its fifth session.⁵

Article 13

16. The representative of Bulgaria recommended keeping article 13 of the 1964 ULIS which defines the phrase "a party knew or ought to have known" rather than deleting it as the Working Group recommended at its second session.⁶ Apart from the difficulties with the definition given by the 1964 ULIS, difficulties which are discussed at length in the report of the Working Group on its second session,⁷ it was pointed out that the precise term being defined was used only in articles 99, paragraph 2, and 100. Subsequently, the Working Group recommended dropping these two articles.⁸

Article 14

17. The representative of the Soviet Union expressed the belief that the definition of "communication" may need to be broadened if article 15 is retained.

Article 15

18. The representative of the Soviet Union recommended the deletion of article 15 because it relates to the form of contracts and the consequences of the non-observance thereof. The representatives of Bulgaria and, if article 15 is to be kept, of the Soviet Union recommended amending article 15 to provide that the contract must be in writing if the laws of at least one

³ Report of the Working Group on the International Sale of Goods on the work of the second session, A/CN.9/52, para. 97. (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2.)

⁴ *Ibid.*, para. 99.

⁵ Progress report of the Working Group on the International Sale of Goods on the work of its fifth session, A/CN.9/87, paras. 168 to 176 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

⁶ Report of the Working Group on the International Sale of Goods on the work of its second session, A/CN.9/52, para. 101. (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2.)

⁷ *Ibid.*, at paras. 102 to 109.

⁸ Report of the Working Group on the International Sale of Goods on the work of its fifth session, A/CN.9/87, paras. 242 to 244 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

of the countries in which the parties have their business so requires. This matter was discussed at length by the Working Group at its second session⁹ and by the Commission at its fourth session.¹⁰ No decision was reached and the Commission concluded that the Working Group should give further consideration both to the principle of freedom of the parties to conclude oral contracts as well as to any modifications of the specific language of the text of article 15.¹¹

Article 17

19. The representative of the Soviet Union suggested that this article should be identical to the corresponding provision in the Convention on Prescription (Limitation) in the International Sale of Goods.

20. The representative of Bulgaria supported the suggestion previously made in the second session of the Working Group¹² that this article should be supplemented by the following:

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

In support of this proposal it was suggested that the Uniform Law cannot attempt to provide a rule for all problems, which might arise and that the matter is best handled by referring back to the law appropriate under the rules of private international law.

20a. When this matter was discussed by the Working group at its second session, the members agreed that it involved questions of principle that should be decided by the Commission.¹³

21. At its fourth session, the Commission concluded that it was not practicable to reach a decision on this matter until the revised text of ULIS could be read as a whole. Therefore, it concluded that the Working Group should further consider the matter at an appropriate time and take into consideration the observations made at that session of the Commission.¹⁴

Article 20

22. The representative of Bulgaria suggested that this article might be amended by providing for and regulating several means by which delivery could be effected which are not currently mentioned in article 20:

(a) Handing over the goods for storage or bond warehousing to a third party, who would hold and take possession of them for the buyer;

(b) Handing over the goods to the buyer himself or to his representative;

⁹ Report of the Working Group on the International Sale of Goods on the work of its second session, A/CN.9/52, paras. 113 to 123. (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2.)

¹⁰ 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. 70 to 80. (UNCITRAL Yearbook, vol. II: 1971, part one, II, A.)

¹¹ *Ibid.*, para. 80.

¹² Report of the Working Group on the International Sale of Goods on the work of its second session, A/CN.9/52, para. 133. (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2.)

¹³ *Ibid.* at para. 137.

¹⁴ Report of the United Nations Commission on International Trade Law on the work of its fourth session, *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17* (A/8417), para. 91. (UNCITRAL Yearbook, vol. II: 1971, part one, II, A.)

(c) Handing over the documents giving title to possession and disposal of the goods.

23. Article 20 was drafted by the Working Group at its third session, to present a complete and unified answer to the question at what point, and more specifically at what place, does the seller complete his obligation as to delivery of the goods. Completeness and unity were achieved by introducing paragraph (c) by the words "in all other cases". The result is that article 20 now provides the place at which the seller is obligated to effect delivery of the goods if the contract of sale involves the carriage of goods (para. (a)) or if the contract relates to specific goods or to unascertained goods and the other criteria of paragraph (b) are met. "In all other cases [delivery shall be effected] 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." (para. (c)).

24. It would seem that each of the examples mentioned by the representative of Bulgaria would currently fall under paragraph (c). The Working Group may wish to consider whether the current language of article 20 leads to the result desired.

25. It would also appear that in the English version of article 20 (b) the words "were at or" were inadvertently left out following the word "goods" in the third line.

Article 33

26. The representative of Bulgaria recommended amending paragraph 2 to provide that the seller shall not be liable when the buyer knew or could not have been unaware of defects of the goods "at the time of delivery of the goods, in the case of the goods concerned". The adoption of this proposal would lead to the result that the buyer could not accept goods which he knew had a defect and hold the seller responsible for the reduced value of the goods.

27. The words "subparagraphs (a) to (d) of" in paragraph 2 might be deleted since subparagraphs (e) and (f) of paragraph 1 of the 1964 ULIS have previously been deleted.

28. In the English language version the comma in the last line of paragraph 2 should follow the word "unaware" rather than the word "of".

Article 35

29. The representative of the Soviet Union recommended the retention of the second sentence in paragraph 1 by removing the brackets.

Article 38

30. The representative of Bulgaria recommended amending article 38, paragraph 2 by adding the words "and at the place where the buyer first has the opportunity to examine the goods". The purpose of the amendment would be to extend the time during which the buyer could discharge his obligation to examine the goods beyond the point of time at which "the goods arrive at the place of destination" if at that time the buyer did not have an opportunity to examine the goods.

31. If the Working Group accepts this proposal, it might consider redrafting the text which has been

suggested. The current language seems to imply that examination could be deferred until the goods arrive at two physically separate places, the place of destination and the place where the buyer can examine the goods.

32. The representative of Bulgaria also recommends deleting from paragraph 3 the words "and the seller knew or ought to have known, at the time when the contract was concluded, of the possibility of such redispach". This recommendation is similar to that in respect to paragraph 2 in that under certain circumstances it would prolong the seller's responsibility for the quality of the goods for a longer period of time than would the current text if the buyer could not examine the goods at the port of destination.

Article 39

33. The representative of the Soviet Union recommended retention of the sentence in brackets in paragraph 1, using the word "different" rather than "longer".

Article 42

34. The representative of the Soviet Union recommended keeping the bracketed language in paragraph 1.

Article 43 bis

35. The representative of the Soviet Union recommended keeping the bracketed language in paragraph 1.

Article 44

36. The representative of Austria suggested that the words "by notice to the seller" in paragraph 1 duplicate the more precise formulation in the introductory sentence of paragraph 2 and recommended that they be deleted.

Articles 48, 50 and 51

37. The representative of Bulgaria recommends reinsertion of articles 48, 50 and 51 of the 1964 ULIS. As noted in A/CN.9/WG.2/WP.21/Add.1, paragraphs 140 and 142, the problems covered by these articles are treated elsewhere in the current revision.

Article 57

38. The representative of the Soviet Union found the wording of article 57 "unacceptable" and stated that "the price should be determined or determinable".

Article 67

39. The representative of the Soviet Union suggests that the entire article might be eliminated for the sake of simplicity.

40. The Working Group might wish to note that the bracketed language in paragraph 1 should be "have

recourse to the remedies specified in articles 70 to 72 *bis*, or".

Article 72 bis

41. The representative of the Soviet Union supports alternative A.

Article 76

42. The representative of the Soviet Union stated that in preparing the final wording of this article, it would be advisable to mention the basis of alternative A.

Article 78

43. If the Working Group accepts the proposals of the representative of the United Kingdom in respect to article 76, it may wish to consider the relationship of the proposed article 76 *ter*¹⁵ and of the current article 78.

44. The representative of Norway proposed a new paragraph 3 which would read as follows:

"3. If the contract has been avoided in part, the provisions of this article shall apply to such part only."

Article 82

45. The representative of the Soviet Union suggested that it would be preferable to include the possibility of full damages for proven losses.

Article 83

46. The second line of the English language version should read "on such sum as *is* in arrear".

Article 84

47. See the comments to article 12 above.

Article 96

48. The representative of the Soviet Union suggested deletion of the bracketed language in this article in favour of a general provision on the liability of the seller or buyer for the actions of the persons for whom they are responsible. This proposal is similar to that of the representative of Norway.¹⁶

Article 98

49. The representative of the Soviet Union recommended retention of the bracketed sentence in paragraph 2.

¹⁵ Comments, observations by United Kingdom, para. 17 (reproduced in this volume, part two, I, 3).

¹⁶ Comments, observations by Norway (reproduced in this volume, part two, I, 3).

6. Report of the Secretary-General: general conditions of sale and standard contracts (A/CN.9/98)*

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INTRODUCTION

1. The Commission at its third session requested the Secretary-General: "To commence a study on the feasibility of developing general conditions embracing a wider scope of commodities. The study should take into account, *inter alia*, the conclusions in [a progress report to be submitted at the fourth session], and the analysis of the General Conditions of the Economic Commission for Europe, to be submitted by the representative of Japan."¹

2. Pursuant to this request, the Secretary-General submitted to the Commission at its fourth session a report comprising the first phase of the study on the feasibility of developing general conditions embracing a wider scope of commodities.² This phase of the study was directed towards the identification and analysis of the issues that were dealt with in the general conditions the text of which appears in document A/CN.9/R.6.

3. In the light of this report the Commission requested the Secretary-General "to continue the study on the feasibility of developing general conditions embracing a wider scope of commodities, and to submit the study, if possible, to the Commission at its fifth session".³

4. In response to this decision, the Secretary-General submitted to the Commission at its fifth session a progress report on the second phase of the feasibility study.⁴ On the basis of this report the Commission requested the Secretary-General: "To submit to the Commission at its sixth session his final study on the feasibility of developing general conditions embracing a wider scope of commodities and, to the extent feasi-

ble, to commence the preparation of guidelines on this subject and of a draft set of such general conditions".⁵

5. In accordance with this request, the Secretary-General submitted to the Commission at its sixth session a final report on the feasibility study.⁶ The report concluded that "it appears feasible to draw up a set of 'general' general conditions that would be applicable at least to a wide range of commodities."⁷

6. On the basis of this report the Commission requested the Secretary-General:

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

[and]

"...

"to report to the Commission at its seventh session of this project."⁸

7. Annex I of the present report contains the draft set of general conditions which has been prepared pursuant to this request.

I. RELATIONSHIP BETWEEN THE PROPOSED GENERAL CONDITIONS OF SALE AND THE UNIFORM LAW ON INTERNATIONAL SALES

8. A previous report called attention to the distinction between a document "which the parties to a contract can use as the contract itself, provided that they sign it and fill in those clauses which require completion, such as those relating to the names of the parties, price, port of dispatch, quantity and description" and a document which "provide[s] a list of clauses which the parties to a contract can incorporate or refer to in their own contract... [but which] is... not supposed to constitute the parties' contract."⁹ Al-

* 6 February 1975.

¹ Report of the United Nations Commission on International Trade Law on the work of its third session (1970), *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 17 (A/8017)*, para. 102 (b); UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A. The study concerning the ECE general conditions prepared by the representative of Japan was distributed to representatives at the fifth session of the Commission.

² A/CN.9/54, UNCITRAL Yearbook, vol. II: 1971, part two, I, B, 1.

³ Report of the United Nations Commission on International Trade Law on the work of its fourth session (1971), *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17 (A/8417)*, para. 106, UNCITRAL Yearbook, vol. II: 1971, part one, II, 4.

⁴ A/CN.9/69.

⁵ Report of the United Nations Commission on International Trade Law on the work of its fifth session (1972), *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 17 (A/8717)*, para. 43, UNCITRAL Yearbook, vol. III: 1972, part one, II, A.

⁶ A/CN.9/78, UNCITRAL Yearbook, vol. IV: 1973, part two, B.

⁷ *Ibid.*, para. 198.

⁸ 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. 24, UNCITRAL Yearbook, vol. IV: 1973, part one, II, A.

⁹ A/CN.9/18, para. 10, UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, C, 1.

though the terminology is not always consistent, the former is generally referred to as a standard contract while the latter is generally referred to as general conditions.¹⁰

9. In practice there is a further distinction between standard contracts and general conditions. Standard contracts are normally printed on one or both sides of one piece of paper. As a result of the limitations of space, they tend to have clauses governing only a small number of the total range of legal problems which might arise in the formation or performance of the contract.¹¹ The remainder of the terms which govern the substantive obligations of the parties are found in trade usages and in the substantive law of some country. Normally that country is the country of the party or trade association which drafted the standard contract. In some standard contracts the reference to a particular substantive law is specific, in others, it is implied from the arbitration clause which specifies the location of the arbitration and provides for appeal on matters of law to the local courts.

10. Since general conditions are not restricted to a single piece of paper, and indeed are often printed in small brochures, they tend to be longer and govern by their own terms more of the questions of contract formation and performance than the standard contracts. Some general conditions are virtual codes of the law of sales as applied to the type of goods in question. This is particularly true in trades with a long history of international co-operation between national trade associations.

11. The all-inclusive nature of general conditions as codes of the law of sales is often reinforced by a reference of all disputes to arbitration under rules either contained in the general conditions of sales or in a separate document promulgated by the same or an allied trade association. The general conditions often do not specify either the use of the substantive law of sales of any country or the appeal to national courts from the decision of the arbitration tribunal.

12. The interchangeability of statute and contract is also evident when the role of the law of sales is examined. The principal function of a national law of sales is to provide a set of general conditions for sales contracts. A basic framework of rights and obligations is established and the parties need only agree on the

elements unique to the individual contract, i.e., description of the goods, quantity, price, delivery date, etc. The parties are free, however, to vary the rights and obligations arising out of the contract as those rights and obligations would be determined by the general law by expressly so providing in their individual contract.¹²

13. Both the Uniform Law on International Sales (ULIS) and the proposed UNCITRAL general conditions are intended to perform this function of providing a basic framework of rights and obligations with respect to the international sale of goods just as the national law of sales performs that function for domestic sales of goods.

14. It is because of this interchangeability of ULIS and the proposed general conditions that it has been suggested that once the revision of ULIS is completed, no UNCITRAL general conditions would be necessary.¹³ However, the proposed general conditions will still serve three functions. They will make available a law of sales approved by UNCITRAL which the individual parties to an international sales contract can make applicable to their transaction even though their countries have not as yet enacted the revised ULIS. Secondly, even after ULIS has been enacted by their country, many businessmen and lawyers may feel more comfortable with a text which they can adopt by agreement than with a new statute. If this estimate is correct, it would be better for UNCITRAL to furnish a set of contract terms which the parties can adopt rather than to leave this role completely to others. Thirdly, a set of UNCITRAL "general" general conditions will furnish the basis on which special clauses can be developed for specialized trades as discussed in paragraphs 18 to 23 below.

15. It has also been pointed out previously by several representatives that any general conditions proposed by UNCITRAL should be in harmony with ULIS.¹⁴ It would not make sense for UNCITRAL to recommend that the Governments adopt one set of solutions for common sales problems and to recommend that the parties adopt a different set of solutions for exactly the same problems.

16. It was this thought which guided the preparation of the draft set of general conditions attached to this report as annex I. As the work progressed, it became increasingly evident that the general conditions would constitute a code of the law of sales for adoption by the parties parallel to ULIS which is being revised for enactment by the Governments. The best manner for assuring that the general conditions would be in harmony with ULIS was to use the language of ULIS

¹⁰ According to another definition, a standard contract "can be described as a model contract or set of standard conditions in the written form, the terms of which have been formulated in advance by an international agency in harmony with international commercial practice or usage, and which has been accepted by the contracting parties after having been adjusted to the requirements of the transaction in hand". C. M. Schmitt-hof, *The Unification or Harmonization of Law by Means of Standard Contracts and General Conditions*, *International and Comparative Law Quarterly*, 1968, vol. 17, p. 551, 557. On the other hand a number of standard contracts, as defined in the text, refer to the individual terms to be filled in by the parties as the "special conditions" of the contract while the printed terms are the "general conditions".

¹¹ The decision whether to use a standard contract or general conditions undoubtedly follows from the decision as to the extent to which the general contract terms need to be set down and the extent to which the parties can rely on general law and does not follow from the amount of paper available. If general conditions are to be used, it is always possible to have a short contract form which incorporates the general conditions by reference.

¹² "The parties may exclude the application of the present Law or derogate from or vary the effect of any of its provisions." Art. 5, revised text of the Uniform Law on International Sales of Goods as approved or deferred for further consideration by the UNCITRAL Working Group on the International Sale of Goods at its first five sessions (hereinafter cited as revised ULIS). A/CN.9/87, annex I (UNCITRAL Yearbook, vol. V: 1974, part two, I, 2).

¹³ 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. 38, UNCITRAL Yearbook, vol. III: 1972, part one, II. A.

¹⁴ *Ibid.*

for the basic provisions of the general conditions. Similarly the provisions on formation have been taken from the Uniform Law on Formation of Contracts (ULFC)¹⁵ and the arbitration clause is that proposed in the report of the Secretary-General on a preliminary draft set of arbitration rules.¹⁶

17. If the Commission approves of this approach to the drafting of the general conditions, all future amendments to ULIS, ULFC or the UNCITRAL arbitration clause would be reflected in the final version of these general conditions.

18. Because the general conditions are a part of the contract between the parties, the Commission may consider it appropriate to provide certain clauses which are not considered appropriate for ULIS.¹⁷ A number of additional clauses are suggested in annex I. Most of the suggested new clauses would govern the trade in all goods but several by their own terms would be applicable only to the trade in specific categories of goods.

19. It is probable that a set of general conditions of the nature proposed would be adequate for the trade in most goods. It would not, however, be sufficient for a number of specific trades. In some cases the members of the trade would wish to vary the terms of the general conditions (and, therefore, substitute a solution different from that of ULIS also). In other cases additional clauses not in the "general" general conditions would be necessary. Examples of the latter might include the designation of specific means of testing the quality of certain commodities or the length and scope of the guarantee of quality after sale.

20. The Commission could approach this problem in several different ways. It could publish a set of "general" general conditions and invite individual importers, exporters or trade associations to adapt them to their own needs as they see fit.

21. Alternatively, the Commission itself could propose clauses to be substituted for or added to the "general" general conditions for those specialized trades in which such clauses are necessary or useful. If the latter approach is chosen, the Commission may wish to invite the representatives of these trades to participate in the work of proposing the substitute and additional clauses of the "general" general conditions for the use of their trade.

22. Although the Commission could not preclude individual importers, exporters or trade associations from adapting the UNCITRAL general conditions to their own needs even if it wished to, there are significant advantages if the process of adapting the "general" general conditions to the needs of individual trades were to take place under the aegis of the Commission.

23. This would tend to guard the uniformity of the text. Deviations from the "general" general conditions

would have to be justified before they received the Commission's approval. Deviations or additions to the text could be standardized for related trades. All of this might be represented by a single numbering system which would permit easy cross-references between different provisions on the same subject.

24. If the Commission approves this approach, the end result would be a co-ordinated series of texts proposed by UNCITRAL. There would be a series of uniform laws for adoption by Governments on the validity and formation of sales contracts, on the substantive law of sales (ULIS), and on such other matters as the Commission may later consider. There would also be a set of "general" general conditions by which the parties to the sales contract could, in effect, adopt the uniform laws and a series of "special" general condition clauses which would adapt the "general" general conditions to the needs of specialized trades.

25. Although the use of this procedure would preclude the drafting of a final text of the "general" general conditions until the final text of the revised ULIS is approved, and perhaps even until the Commission's work on formation and validity of contracts is completed, it would not delay the Commission from considering the clauses which should be substituted for or added to the "general" general conditions for the use of specialized trades. The revision of ULIS is sufficiently completed that the interested parties will have few questions as to how the remaining issues to be resolved would affect their trade. Moreover, it is doubtful that either the problems of contract formation or validity would call for major variations from one trade to another.

II. PROVISIONS ON FORMATION

26. As noted in paragraph 16 above, the proposed draft of the general conditions contains a chapter on the formation of contracts taken from the Uniform Law on the Formation of Contracts. In this respect it is similar to many of the sets of general conditions studied which also contain provisions on formation.¹⁸

27. Such provisions raise a difficult conceptual problem. The general conditions become binding on the parties only by the contract of the parties. It is difficult to see, therefore, how the provisions on formation can become binding until the contract has already been formed.

28. This conceptual dilemma is of no concern unless there is a dispute as to whether the contract was ever formed, one party relying on an allegedly appropriate national law, the other party relying on the general conditions.

29. Two answers could be given to this difficulty. A tribunal, and especially an arbitration tribunal, may be willing to overlook the conceptual problem and decide the case on the basis of the text upon which the two parties apparently agreed. This result is more likely to occur if the parties habitually employ the UNCITRAL general conditions in their transactions with one another.

¹⁵ *Register of Texts of Conventions and other Instruments Concerning International Trade Law*, vol. I (United Nations Publication, Sales No. E.71.V.3).

¹⁶ A/CN.9/97 (reproduced in this volume, part two, III, 1).

¹⁷ One negative effect of including additional clauses is to lengthen the text and make it more complicated. However, it is difficult to see how this can be avoided if the general conditions are to provide in the contract agreed upon terms for all major questions which can arise in the course of formation and performance.

¹⁸ For a discussion of the provisions on formation in the general conditions studied, see A/CN.9/78, paras. 30 to 36, UNCITRAL Yearbook, vol. IV: 1973, part two, I, B.

30. A second answer is that the provisions on formation were in the offer and therefore governed the manner in which the offeree could accept the offer. If this is an acceptable approach to the problem, the Commission may wish to consider whether it should also prepare a short standard form for the offer which would clearly specify that the general terms of the offer, including the manner of acceptance, were contained in the UNCITRAL general conditions. The Commission may also wish to consider preparing a similar short standard form for the acceptance.

III. USE OF TRADE TERMS

31. At its second session the Commission decided that "it would be desirable to give the widest possible dissemination to Incoterms 1953 in order to encourage their world-wide use in international trade".¹⁹ The Commission may, therefore, wish to consider adopting a clause in the general conditions by which Incoterms 1953 are incorporated by reference as the definition of those trade terms.²⁰

32. However, the fact that Incoterms 1953 approaches the unification of contract conditions in a completely different manner from that of the general conditions causes some difficulties in the integration of the two. Incoterms 1953 starts with nine commonly used trade terms (e.g. FOB, CIF, C and F) and defines the obligations of seller and buyer for each of them.²¹ In this way the consequences of quoting a price as, for example, FOB can be determined. On the other hand general conditions, like a typical statute, are organized in such a manner that all the problems of delivery or payment or risk of loss are treated together in one or consecutive articles. This is true whether the general conditions are drafted for the trade in only one industry or commodity or whether they are "general" general conditions. The focus is not on the trade term used but the substantive question to be considered.

33. Another significant difference between Incoterms 1953, and other definitions of trade terms, and general conditions is that general conditions are drafted in the form of a code and can be as complete as the drafters wish whereas Incoterms 1953 are necessarily limited. They do not purport to define all trade terms used in international commerce nor do they state all the obligations of seller and buyer. For instance, Incoterms 1953 do not govern the obligations of seller or buyer on breach of contract, a subject which is often covered in general conditions.

34. There are several means by which the desire to define the rights and obligations of the parties by

reference to a trade term can be reconciled with the desire to state the obligations of the parties beyond those determined by the trade term. In some trades different standard contract forms are drafted for sales on FOB terms, on CIF terms, and for any other terms commonly used in the particular trade.²² The forms will differ only in respect to those provisions governed by the trade term while the remaining provisions will be identical.

35. Another approach is to include definitions of some of the more important trade terms in the text of a single set of general conditions. The definitions are apt to be restricted in scope, setting forth fewer of the rights and obligations of the parties than do Incoterms 1953. The remainder of the rights and obligations of the parties, including some which Incoterms 1953 considers to flow from the use of the trade term, are set out in other articles in the general conditions. For example, the Uniform Commercial Code in the United States of America defines "f.o.b.", "f.a.s.", "c.i.f.", "C and F" and "Ex-ship" in sections 2-320 to 2-322. However, risk of loss is governed by sections 2-509 and 2-510 no matter which trade term is used.

36. The approach which has been used in the draft attached as annex I is to define the rights and obligations of the parties as completely as possible in the general conditions. Where necessary, the provisions of the general conditions give different solutions depending on the trade term used.²³ At the same time these general conditions incorporate the Incoterms 1953 definitions by reference. Since this will lead to overlap, every effort has been made to eliminate potential conflicts. However, conflicts cannot be totally excluded and the Commission may wish to consider this problem.

IV. FUTURE WORK

37. The Commission may wish to consider whether the preparatory work carried out at its direction is now sufficiently advanced to enable it to decide on the following:

(a) The continuation of its work in respect to developing general conditions for use in the trade in a broad range of goods; and if so

(b) Which approach should be followed;

(c) The methods of work.

(a) Continuation of the work

38. As has been pointed out earlier in this report,²⁴ even after a revised ULIS is adopted, the proposed general conditions may be useful in the following ways:

(a) They will make available a law of sales approved by UNCITRAL which the individual parties to an international sales contract can make applicable to their transaction even though their countries have enacted the revised ULIS;

(b) Many businessmen will feel more comfortable with a text which they can adopt by agreement than with a new statute;

²² e.g. see the list of standard forms of contract in the sale of cereals drawn up under the auspices of the United Nations Economic Commission for Europe in annex II.

²³ For example, see article 15.1 (alternative A).

²⁴ Para 14.

¹⁹ Report of the United Nations Commission on International Trade Law on the work of its second session (1969), *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18* (A/7618), para. 60 (3) (a), UNCITRAL Yearbook, vol. I: 1968-1970, part two, I, A.

²⁰ The draft set of general conditions in annex I contains such a clause in article 2.1 (5).

²¹ In addition to the nine terms defined in Incoterms 1953, two additional terms covering "Delivered . . ." have been defined by the International Chamber of Commerce (ICC). These two additional terms, which are not included in Incoterms 1953, appear as a supplement in the brochure "Incoterms 1953" published by the ICC. In the *Register of Texts* they appear as a separate item under the general heading of "Incoterms 1953".

(c) A set of UNCITRAL "general" general conditions will furnish the basis on which special clauses can be developed for specialized trades.

39. In the light of these observations, the Commission may wish to conclude that work in respect of general conditions for use in the trade in a broad range of goods should be carried forward.

(b) *Approach to be followed*

40. It was suggested above that the best means of assuring that the proposed general conditions would be in harmony with ULIS is to use the language of ULIS for the basic provisions of the general conditions.²⁵ Similarly, it was suggested that the provisions on formation might be taken from the Uniform Law on Formation of Contracts for the International Sale of Goods. Any future amendments to either Law would be reflected in the terms of the general conditions.

41. It was also suggested that the general conditions could be adapted for the use of specialized trades by the preparation of special clauses which could be in substitution for or in addition to the clauses in the "general" general conditions.²⁶ To the largest extent possible special clauses could be made uniform for several trades with similar problems and a common numbering system might be developed which would facilitate cross-referencing between comparable provisions.

42. In the light of the above suggestions, if it now decides that work on the preparations of a set of general conditions be continued, the Commission may wish to consider whether it wishes to employ the text of the revised ULIS and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFC) as the basis for the basic provisions of the general conditions.

43. The Commission may further wish to consider whether it is desirable that the "general" general conditions be adapted for the use in specialized trades.

²⁵ Para. 16.

²⁶ Paras. 19 to 23.

(c) *Methods of work*

44. If the Commission decides that work on the preparation of a set of general conditions should be continued and also that there should be identity of substance and use of language between these general conditions and ULIS and ULFC, the final text of the general conditions could not be prepared until the revision of ULIS and ULFC is completed. It was suggested that this need not retard the preparation of special provisions in substitution for or in addition to the provisions of the "general" general conditions since the revision of ULIS has progressed to such a point that few trades would be concerned as to how the matters yet to be decided would affect them. It was also suggested that the questions of formation and validity of contracts are not apt to raise many questions unique to particular trades.

45. In the light of these conclusions the Commission may wish to request the Secretariat to establish a study group, similar to the UNCITRAL Study Group on International Payments, that would be composed of representatives of regional economic commissions, interested international organizations, trade associations, and other interested groups and to request the Secretariat to prepare, in consultation with such group, special provisions for the use of the trades for which such provisions would be desirable.

ANNEX I

Draft general conditions of sale

[Not reproduced in the present volume.]

ANNEX II

Standard forms of contract in the sale of cereals drawn up under the auspices of the United Nations Economic Commission for Europe

[Not reproduced in the present volume.]

ANNEX III

List of general conditions cited in comments in Annex I

[Not reproduced in the present volume.]

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

Working Group on the International Sale of Goods, sixth session

<i>Title or description</i>	<i>Document reference</i>
Provisional agenda	A/CN.9/WG.2/L.2
France: proposal to replace article 10 of revised ULIS	A/CN.9/WG.2/VI/CRP.1
Informational Chamber of Commerce: proposal to replace article 10 of revised ULIS	A/CN.9/WG.2/VI/CRP.2
Proposal by Drafting Party II: article 2(1)(a) of revised ULIS	A/CN.9/WG.2/VI/CRP.3
International Chamber of Commerce: observations	A/CN.9/WG.2/VI/CRP.4
Norway: proposal to revise article 42(3) and article 71(2) of revised ULIS	A/CN.9/WG.2/VI/CRP.5
Proposal by Drafting Party III: revision of article 9 of revised ULIS	A/CN.9/WG.2/VI/CRP.6

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Norway: proposal to revise article 42(3) and article 71(2) of revised ULIS	A/CN.9/WG.2/VI/CRP.5
Proposal by Drafting Party III: revision of article 9 of revised ULIS	A/CN.9/WG.2/VI/CRP.6

<i>Title or description</i>	<i>Document reference</i>
Proposal by Drafting Party VII: revision of article 42(2) of revised ULIS	A/CN.9/WG.2/VI/CRP.7
Proposal by Drafting Party I: modifications to revised ULIS to be made as a result of the adoption of an integrated Convention	A/CN.9/WG.2/VI/CRP.8
Proposal by Drafting Party IV: replacement of article 10 of revised ULIS	A/CN.9/WG.2/VI/CRP.9
Proposal by Drafting Party VI: revision of article 39 of revised ULIS	A/CN.9/WG.2/VI/CRP.10
Proposal by Drafting Party V: replacement of article 20 of revised ULIS	A/CN.9/WG.2/VI/CRP.11
Norway: proposal to replace article 2(1) of revised ULIS	A/CN.9/WG.2/VI/CRP.12
Proposal by Drafting Party VIII: revision of articles 44, 44 <i>bis</i> and 72 <i>ter</i> of revised ULIS	A/CN.9/WG.2/VI/CRP.13
List of participants	A/CN.9/WG.2/VI/INF.1

II. INTERNATIONAL PAYMENTS

1. Report of the Working Group on International Negotiable Instruments on the work of its third session (Geneva, 6-17 January 1975) (A/CN.9/99)*

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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" (ACN.9/WG.IV/WP.2).[†] 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 (arts. 12 to 22), the rights and liabilities of signatories (arts. 27 to 40), and the definition and rights of a "holder" and a "protected holder" (arts. 5, 6 and 23 to 26).³

* 6 February 1975.

† UNCITRAL Yearbook, vol. IV: 1973, part two, II, 2.

¹ Report of the United Nations Commission on International Trade Law on the work of its fourth session, *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17* (A/8417), (UNCITRAL report on the fourth session (1971)), para. 35, 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, *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 17* (A/8717), report on the fifth session (1972), para. 61 (2) (c) (UNCITRAL Yearbook, vol. III: 1972, part one, II, A).

² UNCITRAL report on the fifth session (1972), para. 61 (1) (a), UNCITRAL Yearbook, vol. III: 1972, part one, II, 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).

3. The second session of the Working Group was held in New York in January 1974. At that session the Working Group continued consideration of articles of the draft uniform law relating to the rights and liabilities of signatories (arts. 41 to 45) and considered articles in respect of presentment, dishonour and recourse, including the legal effects of protest and notice of dishonour (arts. 46 to 62).

4. The Working Group held its third session at the United Nations Office at Geneva from 6 to 17 January 1975. The Working Group consists of the following eight members of the Commission: Egypt, France, India, Mexico, Nigeria, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, and United States of America. All the members of the Working Group were represented. The session was also attended by observers of the following members of the Commission: Argentina, Australia, Austria, Brazil, Bulgaria, Czechoslovakia, Germany (Federal Republic of), Hungary, Japan and Poland, and by observers from the International Monetary Fund, Bank for International Settlements, Hague Conference on Private International Law, Commission of the European Communities, Council of the European Communities and the European Banking Federation.

5. The Working Group elected the following officers:

Chairman: Mr. René Roblot (France)

Rapporteur: Mr. Roberto Luis Mantilla-Molina (Mexico)

6. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.IV/WP.3); the draft uniform law on international bills of exchange and international promissory notes, with commentary (A/CN.9/WG.IV/WP.2)[†] revised text of articles 5 (9) (b) and 12 to 41 of the uniform law (A/CN.9/WG.IV/CRP.3); note by the Secretariat on

the desirability of preparing uniform rules applicable to international cheques (A/CN.9/WG.IV/CRP.5),[†] revised text of article 74 of the uniform law (A/CN.9/WG.IV/CRP.7); report of the Working Group on International Negotiable Instruments on the work of its first session (A/CN.9/77),[§] and report of the Working Group on International Negotiable Instruments on the work of its second session (A/CN.9/86).||

DELIBERATIONS AND CONCLUSIONS

7. As at its first and second sessions, 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 63 to 78 of the draft uniform law. The Group also held a general discussion on the desirability of including in the uniform law provisions governing the limitation of legal proceedings and the prescription of rights arising under an international instrument. A summary of the Group's deliberations and its conclusions are set forth in paragraphs 10 to 130 of this report.

9. At the close of its session, the Working Group expressed its appreciation to the representatives of international banking and trade 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 Working 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.

NOTICE OF DISHONOUR (*continued*)^{*} (ARTS. 63 TO 66)

Article 63

"Notice of dishonour may be given in writing or orally and in any terms which identify the instrument and state that it has been dishonoured. The return of the dishonoured instrument shall be sufficient notice."

10. The purpose of notice of dishonour is to inform parties secondarily liable that the instrument was dishonoured by non-acceptance or by non-payment. Article 63 lays down that the manner and form in which such notice is given is immaterial provided that the notice identifies the instrument.

11. The Working Group was agreed that the giving of notice of dishonour should not be subject to any formal requirements. The Group also was agreed that notice of dishonour could be given orally.

12. The question was raised whether the words "notice of dishonour may be given in writing or orally" sufficiently covered all possible ways in which notice

could be given, such as telex and telegram. The Working Group concluded that the present wording should be modified so as to make it clear that notice of dishonour could be given in any form, including by writing or orally.

13. It was pointed out that the proposed article did not provide a rule regarding the effect of a misdescription such as the rule set forth in section 3-508 (3) of the United States Uniform Commercial Code according to which a "misdescription which does not mislead the party notified does not vitiate the notice . . .". The Working Group, after deliberation, was of the view that the present wording of article 63, namely that notice may be given "in any terms which identify the instrument" sufficiently covered the case of misdescription. However, the Group requested the Secretariat to clarify this point in the commentary to the article.

14. It was suggested that the giving of notice should be understood to imply a demand for payment of the instrument. This suggestion was not retained by the Working Group on the ground that the purpose of notice of dishonour was to inform parties secondarily liable that the instrument had been dishonoured and that the obligation to pay resulted from the uniform law.

15. The view was expressed that article 63, in its present wording, did not make it sufficiently clear whether the purpose of the article was achieved by the mere dispatch of the notice or only by the receipt thereof. The Group was agreed that the requirement to give notice was met by the dispatch of the notice within the prescribed period of time, even if it had not reached the party secondarily liable. The Secretariat was requested to modify the wording of article 63 accordingly.

16. Doubts were raised whether the return of the instrument without any further indication of the reason why it was returned constituted due notice of dishonour. It was noted in this respect that an instrument could be returned for reasons other than dishonour. The Working Group, after deliberation, was of the view that if the instrument was returned for the purpose of notice of dishonour, it should be accompanied by a statement indicating that it had been dishonoured.

17. The Working Group considered:

(a) To whom should fall the burden of proving that the requirements of article 63 regarding the giving of notice had been complied with, and

(b) Whether a rule specifying this issue should be included in the article.

The Group was agreed that the burden of proof fell to the person who, under article 63, was obliged to give notice, and that article 63 should set forth an express provision to that effect.

Article 64

"Notice of dishonour must be given within the two business days which follow:

"(a) The day of protest or, where protest is dispensed with, the day of dishonour; or

"(b) The receipt of notice from another party."

[†] Reproduced in this volume, part two, II, 2.

[§] UNCITRAL Yearbook, vol. IV: 1973, part two, II, 1.

^{||} UNCITRAL Yearbook, vol. V: 1974, part two, II, 1.

^{*} The first article on notice of dishonour, article 62, was considered by the Working Group at its second session (see A/CN.9/86, paras. 135-140, UNCITRAL Yearbook, vol. V: 1974, part two, II, 1).

18. Article 64 sets forth the period of time within which notice of dishonour can duly be given. Thus, if the date of maturity of the instrument falls on Monday, the holder may present the bill for payment not only on that day but also on Tuesday or Wednesday (art. 53 (d)). In accordance with the decision taken by the Working Group in respect of article 59, protest must be made within the same period of time, i.e., at the latest on Wednesday. Pursuant to article 64, notice of dishonour can duly be given on the day of protest or one of the two business days which follow, i.e., at the latest on Friday.

When a party secondarily liable has received notice, he in turn can duly give notice on the day on which he has received notice or on one of the two business days that follow.

19. The Working Group considered whether the period of three days, as proposed in article 64, was a sufficient time within which notice of dishonour could be given. Under one view, this period was too short because the person presenting the instrument for acceptance or for payment (usually a bank) would need additional time to advise his principal, who might be in another country, that the bill was dishonoured and, subsequently, to receive further instructions. The general view was, however, that it fell to the principal to give, in advance, instructions to his agent regarding the steps to be taken in the event that the instrument was dishonoured. The Working Group, taking into account the views expressed by banking and trade circles that a period of three days was an adequate and practical period in which to give notice, was agreed that the rule set forth in article 64 regarding the period of time within which notice could duly be given should be maintained.

20. In the course of discussion the following questions arose:

(a) Is notice of dishonour duly given if given by an authorized agent of the holder or of the endorser who received notice? and

(b) If the answer is in the affirmative, should the uniform law set forth a special provision to that effect?

21. As to the first question, the Working Group was agreed that notice of dishonour was duly given if given by an authorized agent of the holder who was in possession of the instrument, even if the instrument had not been endorsed to him or endorsed in blank.

22. As to the second question, the prevailing view was that the conclusion reached under the first question resulted from the relationship between the principal and his agent. This relationship gave rise to a great many complex questions which could not adequately be dealt with within a law on negotiable instruments. Hence, these questions should be left to national law. Furthermore, the Working Group was of the view that, within the compass of negotiable instruments, questions arising from an agency relationship were not restricted to the sole issue of notice of dishonour, but also arose in respect of other issues, such as that of presentment for acceptance. Therefore to deal in the uniform law with agency relationships in all instances where they arose, would complicate matters to the extreme. On the other hand, to deal with an agency in certain instances only might lead to the in-

terpretation that it was excluded in others. One representative expressed disagreement with this view and stated that it would be desirable for the uniform law to include a provision to the effect that, while all rights and liabilities of the parties and of the holder were of a personal nature, certain actions which they could exercise under the uniform law, i.e., presentment for acceptance, protest and notice of dishonour, could be effected by them also through their agents.

23. With regard to the requirement under article 64 that notice of dishonour be given within the time specified, the Working Group was agreed that the article should clarify that such notice should be sent by any means sufficient to bring the dishonour of the instrument promptly to the notice of the party concerned.

Article 65

"(1) Delay in giving notice of dishonour is excused when the delay is caused by circumstances beyond the control of the holder. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

"(2) Notice of dishonour shall be dispensed with:

"(a) Where the drawer or an endorser or a guarantor has waived notice of dishonour expressly or by implication, such waiver shall bind only the party who made it;

"(b) Where the cause of delay in giving notice continues to operate beyond 30 days after the last date on which it should have been given;

"(c) As regards the drawer of the bill, where the drawer and the drawee are the same person, or the drawer is the person to whom the bill is presented for acceptance or payment, or where the drawer has countermanded payment, or where the drawee or the acceptor is under no obligation to accept or pay the bill;

"(d) As regards the endorser, where the endorser is the person to whom the instrument is presented for payment."

24. Paragraph (1) of article 65 sets forth the ground justifying delay in giving notice of dishonour. When delay is excused, the liability of the person, whose duty it is to give notice, for damages (art. 66) is not affected on the ground that there was no due notice. Paragraph (2) states the cases in which notice of dishonour is dispensed with. In such cases, the person obliged to give notice is not liable for damages under article 68. When considering article 62, the Working Group concluded that the holder and the party who received notice were dispensed from giving notice to parties whose address did not appear on the instrument or whose signature or address was illegible (A/CN.9/86, para. 137, (iii)).*

25. The Working Group expressed general agreement with the provisions of article 65.

26. It was observed that article 65, like articles 63 and 64, should make clear that "giving notice of dishonour" had the meaning of sending or dispatching the notice. The Working Group requested the Secretariat to take this observation into account when redrafting the article.

* UNCITRAL Yearbook, vol. V: 1974, part two, II, 1.

Paragraph (1)

27. The Working Group requested the Secretariat to redraft paragraph (1) in the light of the observations made by it in respect of articles 54 (1) and 61 (1) concerning delay in making presentment for payment and in making protest respectively (see A/CN.9/86, paras. 81 and 125).*

*Paragraph (2)**Subparagraph (a)*

28. The Working Group considered the question whether a waiver of notice of dishonour should constitute a ground for dispensation. The Group agreed with the provision set forth in the subparagraph in view of the fact that, unlike in the case of presentment for payment and in that of making protest, waiver under article 65 affected liability outside, and not on, the instrument.

Subparagraph (b)

29. The view was expressed that, unlike in the case of presentment for payment and in that of making protest, notice of dishonour should be dispensed with when, after the exercise of reasonable diligence, notice could not be given to or did not reach the party sought to be charged. Reference was made in this respect to section 50 (2) (a) of the English Bill of Exchange Act, 1882. The Working Group requested the Secretariat to base the redraft of subparagraph (b) on that provision.

Subparagraphs (c) and (d)

30. The Working Group expressed agreement with the principles underlying these subparagraphs and requested the Secretariat to draft a general rule covering the provisions set forth therein.

Article 66

"Failure to give due notice of dishonour shall render the holder liable to the drawer, the endorsers and their guarantors for any damages that they may suffer from such failure [provided that the total amount of the damages shall not exceed the amount of the instrument]."

31. Under this article, failure to give notice of dishonour does not discharge parties secondarily liable of liability on the instrument, but renders the party who failed to give notice liable for damages resulting from such failure. The draft article leaves open the question for consideration by the Working Group, whether the total amount of damages should be limited to the amount of the instrument.

32. The Working Group found itself in agreement with the substance of the article, but made a number of suggestions designed to improve clarity.

33. It was suggested that article 66 should make clear that liability existed only for those damages which were caused directly by negligent failure to give notice. Therefore, consequential damages which were not caused directly by such failure should not be taken into consideration.

34. The Working Group was agreed that the total amount of the damages should not exceed the amount

of the instrument. Consequently, the provision placed between brackets should be retained. It was suggested that the term "amount of the instrument" should be redrafted so as to include the interest and expenses which were due under articles 67 and 68.

35. It was further suggested that the article should refer also to a party who took up and paid the instrument and proceeded against another party liable to him.

*SUM DUE TO THE HOLDER (ART. 67)**Article 67*

"The holder may recover from any party liable,

"(a) At maturity: the amount of the instrument;

"(b) After maturity: the amount of the instrument, interest due at (. . .) per cent per annum above the official rate of discount effective at the place of payment [at the place where the holder has his residence or place of business] calculated on the basis of the number of days and of a year of (365) days, and any expenses of protest and of the notices given;

"(c) Before maturity: the amount of the bill, subject to a discount from the date of making payment to the date of maturity, to be calculated at the official rate of discount effective on the date when the recourse is exercised at the place where the holder has his residence or place of business."

36. Article 67 lays down what sums of money the holder may recover from a party liable to him at maturity, after maturity (upon dishonour by non-payment), and before maturity (upon dishonour by non-acceptance). At maturity, the holder may recover the amount of the instrument. The amount may include interest stipulated by the drawer as part of the sum payable (art. 7). After maturity, the holder may recover this amount, delay interest and any expenses of protest and of the notices given. Before maturity, the amount of the instrument is subject to a discount.

Paragraph (a)

37. It was noted that the maturity date of a demand instrument was the date on which the instrument was presented for payment. The Secretariat was requested to take this point into account when redrafting the article.

Paragraph (b)

38. The Working Group expressed general agreement with the substance of paragraph (b), subject to the following observations:

- (i) The paragraph should specify from which date interest was to run. The Group discussed various possibilities in this respect, e.g., the day of maturity, the day of dishonour and the day of protest. The Group concluded that interest should run from the date of maturity by reason of the fact that the holder had a legitimate expectancy of payment on the date of maturity. In this connexion, the question was raised whether the holder, in the event of presentment on one of the two business days which follow the date of maturity, should nevertheless be entitled to interest as of the date of maturity. The Group concluded that the acceptor or the

* *Ibid.*

party secondarily liable were liable as from the date of maturity since, if payment were made on, say, the second business day after that date, he would have had the benefit of the amount of the instrument. Accordingly, the Group concluded that the holder was entitled to interest as from the date of maturity.

- (ii) The paragraph referred to an official rate of discount calculated on the basis of a year of 365 days. It was observed in this respect that some countries had no official rate of discount and that many banks calculated interest on the basis of a year of 360 days. It was suggested that reference to a "reasonable rate" or an "average rate prevailing in respect of bills of a similar type during the period between default and payment" should replace the present wording. Under another view, the rate should be determined by reference to the applicable national law, e.g., the national law applying to similar instruments in similar circumstances. The Working Group requested the Secretariat to conduct an inquiry on this point amongst banking and trade institutions for the purpose of obtaining information on current practices in this respect.
- (iii) The paragraph referred to the official rate of discount effective *at the place of payment* [at the place where the holder had his residence or place of business]. Under one view, the rate of discount should be the rate prevailing at the place where the holder had his residence or place of business since it was at that place where he would pay interest on the sum of money he might be obliged to borrow as a result of the non-payment of the instrument. Under another view, the holder should have an option between the rate of discount prevailing at either the place of payment or the place where he had his residence or place of business since such an option would best protect his legitimate interests. The Working Group requested the Secretariat to consult with banking and trade institutions and to report back to it at a future session.
- (iv) The paragraph referred to "any expenses of protest and of the notices given". The question was raised whether this wording included expenses resulting from bank charges, lawyers' fees and costs of collection. The Working Group concluded that the paragraph should refer to any legitimate or necessary expenses actually incurred, but that lawyers' fees were not to be included in such expenses.

Paragraph (c)

39. The Working Group requested the Secretariat to redraft paragraph (c) in the light of the conclusions reached in respect of paragraph (b).

40. It was observed that, for the sake of harmony with recent international legislation elsewhere, the phrase "residence or place of business" should be replaced by "habitual residence or seat of business". The Working Group requested the Secretariat to take

into account, when redrafting the paragraph, the deliberations and conclusions reached at its first and second sessions in respect of "place of payment" (A/CN.9/77,* para. 134 and A/CN.9/86,** para. 77).

SUM DUE TO A PARTY SECONDARILY LIABLE WHO PAID THE INSTRUMENT (ART. 68)

Article 68

"A party who takes up and pays an instrument may recover from the parties liable to him:

"(a) The entire sum which he was obliged to pay in accordance with article 67;

"(b) Interest due on that sum calculated at the highest permissible legal rate at the place of payment from the day on which he made payment;

"(c) Any expenses which he has incurred."

41. Article 68 lays down what sums of money a party secondarily liable who has paid the instrument may recover from the acceptor or the maker, the drawer, prior endorsers and their guarantors. For the purpose of the article, it is not necessary that, when such party paid the instrument, it was endorsed to him or was endorsed in blank.

Paragraph (a)

42. The view was expressed that the words "the entire sum which he was obliged to pay" should be replaced by the words "the entire sum which he has paid". The Working Group requested the Secretariat that the revised text of the article should make clear that the party who had taken up and paid the instrument should be entitled to only that amount which he was obliged to pay and had paid. Thus, where an endorser paid to the holder more than the holder, under article 67, was entitled to, the drawer, an action by the endorser against him under article 68, should not be obliged to pay the amount the endorser had paid but only the amount which the latter should have paid. Similarly, if the endorser had paid to the holder less than the sum which the holder, under article 67, was entitled to, the endorser, under article 68, should be entitled to that sum only.

Paragraph (b)

43. The question was raised at what rate interest is due. It was pointed out that the "highest permissible legal rate", referred to in article 68 (b), was unclear and, because such a rate was not found in all countries, impracticable. Moreover, a legal rate, in those countries where it obtained, would not be acceptable because it was often too low. It was suggested that article 68 should refer instead to the highest customary rate or the highest commercial rate. The Working Group, after deliberation, concluded that the rate at which interest should be paid should be the same as the interest rate which would be adopted in respect of article 67 (b). The Secretariat was therefore requested to consult also on this point with banking and trade institutions.

* UNCITRAL Yearbook, vol. IV: 1973, part two, II, 1.

** UNCITRAL Yearbook, vol. V: 1974, part two, II, 1.

44. The Working Group discussed the question whether interest should be paid from the date on which payment was made to the holder under article 67 (as proposed in the present wording of art. 68) or from the date on which payment was demanded under article 68. The Group expressed itself in favour of the date on which payment was made under article 67, on the ground that the party paying under article 68 had had the use of the sum involved.

Paragraph (c)

45. The Working Group was agreed that the expenses referred to in paragraph (c) should be only the legitimate and necessary expenses actually incurred (see para. 38, subpara. (iv) above). Thus lawyers' fees were not to be included in the expenses.

General observations

46. It was pointed out that under article 50 of the Geneva Uniform Law on Bills of Exchange and Promissory Notes an endorser who had taken up and paid a bill of exchange or a note could cancel his own endorsement and those of subsequent endorsers. The Working Group concluded that the uniform law should reach a similar result and requested the Secretariat to take the Geneva rule into account when revising the present text of the draft uniform law.

47. It was observed that a party who had taken up and paid the instrument might under certain circumstances, i.e., when the instrument was endorsed to him or was endorsed in blank, be a holder thereof. In such a case the question arose whether, if such party in turn claimed payment from a party liable to him, he would claim payment under article 67 or article 68. The Working Group was of the view that, in this case, article 68 should apply and that articles 67 and 68 should be revised in a way that would achieve this result.

DISCHARGE OF LIABILITY (ART. 69)

Article 69

"(1) Liability of a party on an instrument is discharged by:

"(a) Payment in accordance with articles 70 to 75 or 80;

"(b) Renunciation in accordance with article 76;

"(c) Reacquisition of the instrument by a prior party in accordance with article 77;

"(d) Discharge of a prior party in accordance with article 78 (1);

"(e) Absence of his assent to a qualified acceptance in accordance with article 40 (2).

"(2) A party is also discharged of his liability on the instrument by any act or agreement which would discharge him of his contractual liability for the payment of money."

48. Paragraph (1) of article 69, as the first article of part VI on discharge, is declaratory in that it sets forth the ways, mentioned in other articles of the uniform law, by which a party is discharged of liability on the instrument. Paragraph (2) of the article lays down that, in addition to the grounds of discharge set

forth in the uniform law, a party shall also be discharged of liability on the instrument under circumstances which under the applicable national law would discharge him of a contractual liability for the payment of money.

Paragraph (1)

49. Doubts were expressed regarding the usefulness of a declaratory paragraph setting forth the ways by which, under the uniform law, a party is discharged of liability on the instrument. It was noted that, with the exception of article 23 which the Working Group had decided to delete, other parts of the uniform law did not open with a declaratory paragraph. Furthermore, an enumeration of ways by which a party is discharged, was not necessarily exhaustive since there might be other provisions in the uniform law which would lead to discharge. On the other hand, it was observed that an enumeration of the ways by which a party can be discharged would ensure a better understanding of the law. It was also pointed out that with the deletion of paragraph (2) of article 69, the significance of paragraph (1) would be more than merely declaratory in that the various ways by which a party is discharged, set forth in the paragraph, would be limitative.

50. The Working Group decided to re-examine the usefulness of paragraph (1) at a later stage and requested the Secretariat to place the paragraph, in the revised version of the uniform law, between brackets.

Paragraph (2)

51. The Working Group considered the effect which paragraph (2) could have on the provisions concerning discharge and also the question as to what extent other articles of the uniform law concerned cases which paragraph (2) was intending to cover.

52. It was noted that paragraph (2) was intended to comprise, *inter alia*, the case where a party liable on the instrument deposited the amount due by him into court or with another competent authority and where such an act constituted payment under the applicable national law. The Working Group was agreed that a deposit made in these circumstances should also constitute payment under the uniform law and, as such, should be dealt with under article 70 concerning payment.

53. It was further noted that paragraph (2) was intended to cover cases where a party liable on the instrument was discharged of liability, under the applicable national law, by such acts as novation, conveyance of land, assignment of land, etc. The Working Group was of the opinion that also these cases should be governed by the provisions of article 70 concerning payment.

54. The Working Group was agreed that any other ways by which a party could be discharged under the applicable law and which paragraph (2) intended to cover, such as a waiver outside the instrument, should fall within the provision of articles 24 and 25, i.e., could be raised as a defence against the holder though not against the protected holder.

55. In view of the above considerations, the Working Group concluded that paragraph (2) served little purpose and should be deleted.

PAYMENT (ARTS. 70 TO 73)

Article 70

"(1) A party is discharged of his liability on the instrument when he pays the holder or a party subsequent to himself the amount due pursuant to articles 67 or 68.

"(2) A person receiving payment of an instrument in accordance with paragraph (1) shall deliver the receipted instrument and any authenticated protest to the person making the payment."

56. Under article 70, a party is discharged of liability when he makes payment under either article 67 or article 68, whether or not such payment is made in good faith or without negligence. Article 70 should be read in conjunction with article 24 (3), according to which a party is obliged to pay the holder even if a third party has a claim to the instrument against the holder. Article 70 should also be read in conjunction with article 22 (1) under which a person who acquires an instrument through an uninterrupted series of endorsements is a holder even if one of the endorsements is forged, provided that such person is without knowledge of the forgery. Therefore, payment under article 70 to such holder discharges the payor irrespective of the fact that the payor knew or did not know of the forgery. It follows that payment made to the forger, to the person who took the instrument from the forger with knowledge of the forgery, or to the person who took an instrument on which the series of endorsements is interrupted, is not a discharge.

*Paragraph (1)**Payment before maturity*

57. The Working Group was agreed that with respect to payment made before maturity:

(a) The holder cannot be compelled to receive payment, and

(b) If the drawee, the acceptor or the maker made payment, they would do so at their own risk.

The Group was of the view that, although these rules could be deduced from article 70—namely that a party is discharged when he makes payment pursuant to articles 67 or 68—article 70 itself should state clearly the legal effect of payment before maturity. The Group therefore requested the Secretariat to include in article 70 a separate paragraph based on the wording used in article 40, subparagraph 1, of the Geneva Uniform Law on Bills of Exchange and Promissory Notes.

Payment to a holder

58. The Working Group considered in what circumstances payment to a holder, as defined in article 5 (b), would constitute a discharge.

59. The Working Group was agreed that there should be a direct relationship between, on the one hand, the right of a holder to demand payment and, on the other hand, payment to such holder operating as a discharge. Therefore, in the view of the Group, when a holder is entitled to payment by a party liable to him, notwithstanding the fact that a third party has a claim to the instrument, payment made to the holder should constitute a discharge even if the party paying

knew of the claim. For example: the payee endorses the instrument to A as a result of fraud committed on him by A; A demands payment from the acceptor who knows of the fraud. Under article 24 (3), the acceptor cannot invoke the claim of the payee to the instrument in order to avoid liability and is therefore obliged to pay the instrument to A even if he knew of the fraud. Therefore, payment by the acceptor to A should constitute a discharge even if made with knowledge of the claim which the payee has to the instrument.

60. Similarly, when a holder is not entitled to payment on the ground that a third party has claimed the instrument from him and had informed the party liable of such claim, payment to the holder should not operate as a discharge. For example, the payee endorses the instrument to A as a result of fraud committed on him by A; the payee claims the instrument from the holder and informs the acceptor of the fraud committed; A demands payment from the acceptor. Under article 24 (3), the acceptor can invoke the claim of the payee to the instrument and thus avoid liability. Therefore, payment by the acceptor to A should not constitute a discharge.

61. The Working Group considered the special case of an instrument endorsed in blank and stolen from its owner. Under article 24 (3), the thief is entitled to demand payment from a prior party unless the owner of the instrument claims the instrument from the thief and informs the prior party that it has been stolen. It follows that under the draft uniform law, if the owner has not claimed the instrument from the thief, payment by the prior party to the thief constitutes a discharge, even if that party had knowledge of the theft. The Group took the view that this consequence might not be justified and decided to reconsider it in the context of article 24 (3). In this connexion, it was suggested that a distinction should be made between the case where the holder demanding payment was the thief himself and the case where payment was demanded by a holder who had received the instrument from the thief and who was not a protected holder.

Payment of an instrument on which an endorsement was forged

62. The Working Group considered in what circumstances payment of an instrument on which an endorsement was forged constituted a discharge.

63. The Working Group was agreed that payment by a party liable to a person who qualifies as a holder under article 22 should operate as a discharge whether or not such party knew of the forgery. For example: the instrument is stolen from the payee; the payee's signature is forged by the thief who endorses the instrument to A; A endorses the instrument to B who takes it through an uninterrupted series of endorsements without knowledge of the forgery. Under article 22, B is a holder and, as such, may demand payment from the acceptor. Therefore, payment by the acceptor operates as a discharge, even if he knows of the forgery.

64. The Working Group was agreed that payment by a party liable to a person who did not qualify as a

holder under article 22, for instance because that person knew of the forgery, should:

(a) Constitute a discharge if such payment was made without knowledge of the forgery, and

(b) Not constitute a discharge if payment was made with knowledge of the forgery.

Pursuant to the conclusions reached by the Group with respect to the definition of "knowledge" in article 6 (A/CN.9/77,* para. 70), the Secretariat was requested to re-examine whether the concept of knowledge, used for the purpose of construing the above rules, should include the element of actual knowledge only or also lack of knowledge because of gross negligence.

Impersonation

65. The Working Group considered in what circumstances payment of an instrument to a person who presents himself wrongfully as the payee or to the person to whom the instrument was especially endorsed constitutes a discharge.

66. The Working Group was agreed that payment made to an impostor should be governed by the same rules that apply to the case where payment is made to the person who forged an endorsement. Therefore, payment made without knowledge of the fact that the person demanding payment is an impostor should operate as a discharge. Conversely, payment made with such knowledge did not so operate.

Paragraph (2)

67. The Working Group expressed agreement with the provision set forth in paragraph (2), subject to the suggestion that the text should make clear that the person receiving payment should also deliver a receipted account as provided in article 50 of the Geneva Uniform Law on Bills of Exchange and Promissory Notes. In the view of one representative, the person paying the instrument had the right to claim a receipt, the protest if any, and the instrument itself.

68. The question was raised whether a person receiving payment was obliged to endorse the instrument to the payor. The Working Group was of the view that the uniform law should not set forth a provision to that effect on the ground that such an endorsement could in certain circumstances impose liability on the person who received payment.

Article 71

"(1) The holder may take partial payment from the drawee or the acceptor or the maker. In that case:

"(a) The acceptor or the maker is discharged of his liability on the instrument to the extent of the amount paid; and

"(b) The instrument shall be considered as dishonoured by non-payment as to the amount unpaid.

"(2) The drawee or the acceptor or the maker making partial payment may require that mention of such payment be made on the instrument and that a receipt therefore be given to him.

"(3) When an instrument has been paid in part, a party who pays the unpaid amount shall be discharged of his liability thereon, and the person receiving the payment shall deliver the receipted instrument and any authenticated protest to the party making the payment."

69. Article 71 provides that the holder is not obliged to take partial payment. However, if he does take partial payment, the liability of the other parties liable on the instrument is discharged *pro tanto*.

70. The Working Group expressed agreement with the substance of article 71.

71. It was suggested that the phrase "the holder may take partial payment" should be redrafted in order to make clear that the holder was not obliged to take partial payment. The Working Group requested the Secretariat to modify the wording of article 71 accordingly.

72. The question was raised whether the article should cover also cases of partial payment made by parties secondarily liable upon dishonour. The Working Group considered that this question should not be dealt with in the framework of article 71. It requested the Secretariat to consider this question and, if need be, draft a separate article covering the point raised.

Article 72

"(1) The holder may refuse to take payment in a place other than the place where the instrument was duly presented for payment in accordance with article 53 (f).

"[(2) If payment is not then made in the place where the instrument was duly presented for payment in accordance with article 53 (f), the instrument shall be considered as dishonoured by non-payment.]"

73. Article 72 provides that the holder is not obliged to take payment in a place other than the place where the instrument must be presented for payment in accordance with article 53 (f). Refusal by the holder to take payment in these circumstances results in dishonour by non-payment.

74. The Working Group expressed agreement with the substance of article 72. It was also agreed that paragraph (2), placed in brackets, should be retained.

Article 73

"(1) Where an instrument has been materially altered as to its amount, any person who pays the instrument pursuant to such alteration without knowledge of the alteration shall have the right to recover the amount by which the instrument was raised from the party who so altered the instrument or from any subsequent party, except a party who was without knowledge of the alteration at the time he transferred or negotiated the instrument.

"(2) In any other case of alteration which is material, as defined in article 29 (2), any person who pays the instrument pursuant to such alteration without knowledge of the alteration shall have the right to receive the amount paid by him from the person who altered the instrument, or from any subsequent party except a party who was without

* UNCITRAL Yearbook, vol. IV: 1973, part two, II, 1.

knowledge of the alteration at the time he transferred or negotiated the instrument.

"(3) Where the signature of the drawer or the maker has been forged, any person who pays the instrument without knowledge of the forgery shall have the right to recover the amount paid by him from the person who forged the signature of the drawer or of the maker, or from any party subsequent to the drawer or the maker except a party who was without knowledge of the forgery at the time he transferred or negotiated the instrument."

75. Article 73 deals with the rights of a person who pays an instrument that has been materially altered or on which the signature of the drawer or the maker has been forged. Under the article, such a person, if he paid without knowledge of the material alteration or of the forgery, is entitled to recover the amount paid in error from the person who materially altered the instrument or who forged the drawer's or the maker's signature, as the case may be, and from any person and any party subsequent to himself who took the instrument with knowledge of the alteration or the forgery.

76. The Working Group, after deliberation, was of the view that article 73 should not be retained on the ground that it dealt with complex situations giving rise to actions outside the instrument. Such actions should not be governed by the uniform law but be left to national law.

PAYMENT OF AN INSTRUMENT DENOMINATED IN FOREIGN CURRENCY (ART. 74)

Article 74

Alternative A

"(1) (a) Where an instrument is made payable in a currency which is not that of the country where payment takes place, the sum payable shall be paid in the currency of that country.

"(b) When such instrument is paid in the currency of the country where payment takes place, the amount payable shall be calculated according to the rate of exchange on the day of maturity or, if so specified, according to the rate of exchange indicated on the instrument.

"(2) Where such instrument is dishonoured by non-acceptance or by non-payment, the sum payable shall be paid in the currency of the country where payment takes place. In that case, the holder may at his option demand from the party liable that the amount payable shall be calculated according to the rate of exchange on the day of dishonour, or the day of maturity or the day of payment.

"(3) The provisions of paragraphs (1) and (2) shall not apply when the drawer or maker has stipulated on the instrument that payment be made in a specified currency."

Alternative B

"(1) Where an instrument is made payable in a currency which is not that of the country where payment takes place, the sum payable shall be paid in the currency stated on the instrument.

"(2)(a) The provision of paragraph (1) shall not apply when the drawer or maker has stipulated on the instrument that payment be made in the currency of the country where payment takes place. In that case, the amount payable shall be calculated according to the rate of exchange on the day of maturity or, if so specified, according to the rate of exchange indicated on the instrument.

"(b) When an instrument containing such a stipulation is dishonoured by non-acceptance or by non-payment, the holder may at his option demand from the party liable that the amount payable shall be calculated according to the rate of exchange on the day of dishonour, or the day of maturity, or the day of payment."

77. Article 74 lays down rules with respect to payment of an instrument denominated in a currency which is not that of the place of payment. The draft uniform law sets forth alternative texts. Under alternative A, the payor has the option to make payment in either the currency in which the instrument is denominated (foreign currency) or in the currency of the place of payment (local currency). Under alternative B, the payor is obliged to pay in the foreign currency stated on the instrument.

78. The Working Group also had before it a revised version of alternative B, considered and adopted by the UNCITRAL Study Group on International Payments at its ninth meeting in October 1974. The text of that version is as follows:

"(1) An instrument shall be paid in the currency in which the amount of the instrument is expressed.

"(2) The drawer or the maker may indicate on the instrument that it shall be paid in a specified currency other than the currency in which the amount of the instrument is expressed. In that case:

"(a) The instrument shall be paid in the currency so specified.

"(b) The amount payable shall be calculated according to the rate of exchange indicated on the instrument. Failing such an indication the amount payable shall be calculated according to the rate of exchange for sight drafts on the date of maturity.

"(i) Ruling at the place of payment, if the specified currency is that of that place (local currency).

"(ii) Determined according to the usages of the place of payment if the specified currency is not that of that place (non-local currency).

"(c) When such instrument is dishonoured by non-acceptance the amount payable shall be calculated according to the rate of exchange indicated on the instrument. Failing such an indication the amount payable shall be calculated according to the rate of exchange on the date of such dishonour.

"(d) When an instrument is dishonoured by non-payment the amount payable shall be calculated according to the rate of exchange indicated on the instrument. Failing such an indication:

"(i) The amount payable by the acceptor or the maker shall be calculated, at the option of

the holder, either according to the rate of exchange on the date of maturity, or according to the rate of exchange on the date when payment is made, or is tendered in accordance with article 75.

- “(ii) The amount payable by any other party liable shall be calculated according to the rate of exchange on the date of maturity.”

79. The reference below to the paragraphs of article 74 will be to the paragraphs of the text set forth in paragraph 75 above.

Paragraph (1)

Payment of an instrument in “foreign” or “local” currency

80. The Working Group considered whether an instrument drawn or made payable in a currency other than that of the place of payment (foreign currency) should, in the absence of an express stipulation, be paid in that currency or whether the payor should have an option of paying either in local currency or in the foreign currency in which the instrument was denominated. The Group took note of the fact that inquiries by the UNCITRAL Study Group on International Payments had revealed that under current commercial and banking practices instruments were usually paid in the currency in which the amount of the instrument was expressed, even though it was not stipulated on the instrument that payment be made in such foreign currency.

81. There was considerable support in the Working Group for the view that the uniform law should provide a rule that would be consistent with such practices and that the rule set forth in paragraph (1) of article 74 should therefore be retained. The opinion was expressed that such a rule would be the most suitable one at a time of frequent fluctuations between currencies. Thus, in the absence of a stipulation on the instrument that payment be made in the currency of the place of payment, the party liable should pay in the currency in which the amount payable is expressed. It follows that, where a drawee accepts to pay the bill of exchange, denominated in foreign currency, at maturity in local currency, such acceptance would be a qualified acceptance which the holder would be at liberty either to take or to refuse. In the latter case, the bill would be dishonoured by non-acceptance. Similarly, the refusal by the holder to take payment of the bill in local currency would result in dishonour of the bill by non-payment.

82. One representative and one observer noted their opposition to the rule set forth in paragraph (1) of article 74 and stated their preference for a provision under which the party liable would have the option of paying either in local or in foreign currency, unless the instrument expressly stipulated otherwise.

Exchange control regulations

83. The Working Group considered the relevance of exchange control regulations to the rule set forth in paragraph (1). It was noted that, in many countries, exchange control regulations imposed restrictions on payment in foreign currency. The Group was of the

opinion that the provisions of the uniform law should be subject to such regulatory measures. In the view of the Group, this could be achieved by either an express provision to that effect in article 74, or by a general provision in the Convention of which the uniform law would form the annex. Most representatives expressed themselves in favour of a general provision in the Convention stating that the provisions of the uniform law shall not prevent a Contracting State from enforcing applicable exchange control regulations with respect to international bills of exchange and international promissory notes.

84. One observer drew attention to article VIII, section 2 (b) of the Articles of Agreement of the International Monetary Fund under which “exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with [the Fund] Agreement shall be unenforceable in the territories of any member”. In the view of this observer, either the Convention or the uniform law, as the matter was ultimately decided, should state that the reference to applicable exchange control regulations should be understood to mean not only those of the forum itself but also those that the forum was bound to apply by virtue of international agreements to which it had adhered.

85. It was noted that, in many countries, if in the event of dishonour an action on an instrument was brought before the courts, judgement would be awarded for a sum in local currency. However, in the view of the Working Group, article 74 provided rules governing the liability of parties to an instrument and not rules regarding the power of the courts. Accordingly, nothing in article 74 could be construed as preventing a court from awarding judgement for a sum in local currency, and payment of that sum in such currency, in compliance with the judgement, would constitute discharge of liability.

Paragraph (2) (a) and (b)

Payment at maturity

86. The Working Group expressed agreement with the rules set forth in paragraph (2) that the drawer of a bill or the maker of a note could stipulate on the instrument that it should be paid in a specified currency other than that in which the amount of the instrument was expressed. The Group also agreed that, in that case, the provisions set forth in subparagraphs (a) and (b) should apply.

87. Under paragraph 2 (b) (i), in the absence of an indication of a rate of exchange, the amount payable shall be calculated according to the rate of exchange for sight drafts on the date of maturity prevailing at the place of payment. The question was raised whether the “place of payment” was the place where the instrument must be presented for payment under article 53 (f) or whether that place was the place where payment was actually made. The Group concluded that the term “place of payment”, in subparagraphs (2) (b) (i) and (ii), referred to the place where the instrument must be presented for payment under article 53 (f).

*Paragraph 2 (c) and (d)**Payment upon dishonour**Issues involved*

88. Where an instrument is dishonoured by non-acceptance the holder has, upon due protest (art. 57), an immediate right of recourse against prior parties (art. 51 (2)) and the instrument becomes due before maturity. In such case, the question arises as to what rate of exchange should prevail; the rate specified on the instrument (if so specified), that ruling on the date of dishonour, on the date of maturity (if payment is made at or after maturity), on the date of deposit under article 75 if the holder refused payment or on the date of actual payment. Similar questions arise where an instrument is dishonoured by non-payment. In this event, the holder has a right of recourse against the acceptor or the maker and, upon due protest (art. 57), against prior parties (art. 56 (2) and (3)). Also here the question arises as to what rate of exchange should prevail when payment is made: the rate specified on the instrument (if so specified), the rate ruling on the date of maturity, on the date of deposit under article 75, or on the date of actual payment. In respect of both dishonour by non-acceptance and by non-payment, the further question arises whether provision should be made for one of several possible rates of exchange or whether the holder or the payor should be entitled to exercise an option between two or more of these rates and, if so, under what circumstances. Yet another question is whether the rules applicable to the rate of exchange should be the same for all parties liable on the instrument or whether a distinction should be made between parties primarily liable and parties secondarily liable. Lastly, the question arises whether the rate of exchange should be that prevailing at the place where the instrument should have been paid upon due presentment for payment or that prevailing at the place where payment is actually made.

89. In considering the above issues the Working Group examined the question as to who should bear the risk of fluctuations between currencies that could occur when an instrument was paid before, at or after the date of maturity. The Group considered this question in the case of dishonour and non-acceptance and in the case of dishonour by non-payment. It concluded that the different issues arising in these cases led to similar solutions and that it was therefore desirable that one general rule should govern all cases of dishonour.

Rate of exchange indicated on the instrument

90. The Working Group considered whether, if a rate of exchange was indicated on the instrument, that rate should prevail in the case of dishonour by non-acceptance or by non-payment. Under one view, the amount of the instrument should be paid at the rate stipulated since this would correspond to the expectation of the parties. Under another view, the rate indicated on the instrument had been stipulated on the assumption that payment would take place at maturity. It was observed in this connexion that to oblige the holder to take payment at the stipulated rate could lead to unjust consequences in that the party liable could delay making payment in the expectation that

the exchange rate would change in his favour. For these reasons, the rate of exchange indicated on the instrument should not be binding upon the holder, but should be one of the rates at which he could demand payment should article 74 give such an option to the holder (see para. 92 below).

91. The Working Group was unable to reach consensus as to a rule that should govern the case of payment upon dishonour of an instrument indicating a rate of exchange. The Group decided to revert to this question at a future session and requested the Secretariat to draft alternative texts reflecting the two views expressed by representatives.

Rate of exchange not indicated on the instrument

92. Opinions were divided on the question as to what should be the rate of exchange at which an instrument denominated in a currency which is not that of the place of payment and on which there is no indication of the rate of exchange, should be paid when the instrument has been dishonoured by non-acceptance or by non-payment.

93. Under one view, the amount payable should be calculated according to the rate of exchange for sight drafts prevailing at the date of actual payment, irrespective of the fact that payment was made before, at or after maturity. Adherents to this view were divided on the question whether the holder who had suffered loss as a consequence of fluctuation in rates of exchange and of the default of the debtor should be entitled to claim damages.

94. Under another view, the rate of exchange according to which the amount payable should be calculated should be the rate ruling at the date of actual payment in all cases where payment was made before maturity. In all other cases, the rate should be that prevailing at the date of maturity. It was observed that such a principle would be consistent with the provisions of paragraph (2) (b). Any damages for loss sustained as a result of fluctuations in rates of exchange and caused by late payment should be left to the courts.⁵

95. Under a third view, the holder should be protected against any loss that he might suffer as a result of dishonour by non-acceptance or by non-payment. Therefore, the holder should be given the option of demanding that payment be made at either the rate of exchange ruling at the date of maturity, or at the date of dishonour or at the date of payment. In addition, if a rate of exchange was indicated on the instru-

⁵ The representative holding this view submitted the following draft paragraphs to replace paragraphs (2) (c) and (d) of the text set forth in paragraph 70 above:

"(c) Where such an instrument is dishonoured by non-acceptance or non-payment the amount payable shall be calculated according to the rate of exchange indicated on the instrument. Failing such an indication the amount payable shall be calculated according to the rate of exchange for sight drafts ruling at the place of payment

"(i) At the date of actual payment, if such payment is made before maturity;

"(ii) Otherwise at the date of maturity.

"(d) Nothing in this paragraph shall prevent a court from awarding damages for loss caused to the holder by reason of fluctuations in rates of exchange where such loss is caused by late payment."

ment, the holder should have the further option to demand payment at that rate.

96. One observer expressed the opinion that the rules to be adopted in respect of the situations envisaged by article 74 should take into account the interests of the holder and of the party liable on the instrument in each instance, so that if at any time one of them wished to delay the demand for payment or the actual payment in the hope that a change in the rate of exchange would better his position, the other would have the possibility to compel settlement at a rate favourable to himself. The purpose which the rule should seek to achieve was that neither the creditor nor the debtor should be allowed to profit by delay. In the case of dishonour by non-acceptance this could best be achieved by a rule providing that, if payment was made before maturity, the holder would have the option of demanding payment at the rate of exchange prevailing either at the date of dishonour or at the date of payment. If payment were demanded after maturity, the payor should have the option of paying the amount at the rate of exchange prevailing either at the date of dishonour or at the date of maturity, subject to a further rule that if payment was not made within a certain number of days following the demand for payment, the holder would have the option of demanding payment at the rate of exchange ruling at the date of actual payment.⁶

97. The Working Group was unable to reach consensus as to a rule governing payment of an instrument denominated in foreign currency but payable in another currency after it had been dishonoured by non-acceptance or by non-payment. The Group requested the Secretariat to draft three alternative texts based on the views expressed in paragraphs 90, 91 and 92 above.

Rate of exchange ruling at the "place of payment"

98. If the amount payable is to be calculated according to a rate of exchange prevailing at a given date, the question arises whether that rate should be the rate ruling at the place where the instrument must be presented for payment to the drawee, the acceptor or

⁶ The observer expressing the above opinion submitted the following draft paragraphs to replace paragraph (2) (c) of the text set forth in paragraph 70 above:

"(c) When such instrument is dishonoured by non-acceptance the amount payable shall be calculated according to the rate of exchange indicated on the instrument. Failing such an indication the amount payable shall be calculated in the following manner:

"Subject to the right of any party secondarily liable on the instrument, at any time prior to the demand on him by the holder for payment, to make tender, and if accepted to effect payment within [] days thereof, of the amount of the instrument calculated according to the rate of exchange on the date of dishonour.

"If the holder's demand for payment from a party secondarily liable on the instrument should precede that party's offer of tender and be made:

"(i) Before maturity, then at the option of the holder the rate of exchange shall be calculated as of the date of dishonour or the date of actual payment;

"(ii) After maturity, then at the option of the party upon whom demand is made; the rate of exchange shall be calculated as of the date of dishonour or the date of maturity of the instrument;

Provided that if payment is not effected within _____ days of the demand, the holder may require payment calculated according to the rate of exchange on the date of actual payment."

the maker (in accordance with art. 53 (f)) or the rate ruling at the place where payment is actually effected.

99. Opinions were divided on the question which "place of payment" should prevail. The Working Group decided to revert to this question at a future session and requested the Secretariat to draft two texts reflecting the above possibilities.

"Tender" of payment

100. The Working Group was agreed that, in cases where the amount payable must be calculated with reference to a rate of exchange, the debtor, on whom a demand was made for payment after the instrument had been dishonoured, should be able to rely on the protection afforded to him by article 75, i.e. by "tendering" payment.

Miscellaneous

101. It was pointed out that in some countries two rates of exchange obtained: a commercial rate and a rate for financial transactions. In such countries with a dual rate, the question could thus arise at which of the two rates the amount payable should be calculated.

102. It was noted that where an instrument had been paid by a party secondarily liable according to the rate of exchange applicable under article 74, the amount of the instrument payable to parties liable to such payor was to be paid in the currency in which the payor had paid and that in such a case conversion into another currency would not take place. Hence, questions of rates of exchange would no longer arise.

"TENDER" OF PAYMENT (ART. 75)

Article 75

"[(1) Where a party tenders payment of the amount due in accordance with articles 67 or 68 to the holder at or after maturity and the holder refuses to accept such payment

"(a) The party tendering payment shall not be liable for any interest or costs as from the day payment was offered; and

"(b) Any party who has a right of recourse against a party tendering payment shall not be liable for such interests or costs.

"(2) The provisions of paragraph (1) (b) shall also apply if the person tendering payment to the holder is the drawee.]"

103. The purpose of article 75 is to enable a party liable on the instrument to tender payment in order to protect himself against liability for interest or costs accruing after the date of the tender. As a consequence thereof, any party subsequent to the party tendering payment will be discharged of liability for interest and costs as from the date of the tender.

Paragraph (1)

Concept of "tender"

104. The Working Group considered what kinds of situation should be covered by article 75. The Group was of the view that it was necessary to clarify these situations since the concept of tender had no precise equivalent in the civil law systems. The Group was agreed that:

(a) In order for article 75 to apply a mere offer to pay was not sufficient;

(b) Where according to the law of the place of payment the deposit of the amount due with a competent authority constituted payment, the making of such deposit should not be covered by article 75, since it constituted payment and, consequently, was covered by article 70;

(c) Article 75 should, therefore, govern only those cases in which the holder refused to take payment, as where the party liable had placed the amount due at the exclusive disposal of the holder and the holder had not taken the amount.

The Group requested the Secretariat to redraft article 75 in the above sense without using the term "tender".

Legal effect

105. The Working Group considered what should be the legal effect of a refusal by the holder to take payment. The Group was agreed that such refusal would free the party who had placed the amount due at the exclusive disposal of the holder from liability for interest and costs. The Group decided to revert to the question whether, in such case, the party would be freed from liability as from the date of deposit, the date on which the holder is informed of the deposit, or the date of refusal.

106. The Working Group was unable to reach consensus as to the legal effect of the refusal by the holder to take payment on the liability of parties who had a right of recourse against the party who had made the deposit. Under one view, such refusal should wholly discharge any party who would have been discharged of liability if the holder had taken payment. Under another view, such refusal should only free the intermediate parties from liability for interest and costs, but should not result in a total discharge of liability. The Group decided to revert to this question at a future session and requested the Secretariat to draft alternative texts that would reflect both views.

Scope of article 75

107. The present wording of article 75 enables the party making the deposit to protect himself against the payment of interest and costs accruing after the date of deposit. The Working Group was agreed that such protection should be extended to cover also the risk of a change in the rate of exchange occurring after the instrument had been dishonoured.

108. The present wording of article 75 envisages refusal of payment by the holder only. The Working Group was of the opinion that the article should also cover the case where the amount due had been placed at the exclusive disposal of a party who had taken up and paid the instrument.

109. Under the present wording, article 75 applies only in cases where the deposit of the amount due had been made at or after maturity. The Working Group was agreed that the article should also cover the case of dishonour by non-acceptance where a party liable had made the deposit before maturity.

110. The Secretariat was requested to draft a suitable formulation which would take into account the

consensus reached by the Working Group as to the scope of article 75. Such formulation should also clarify that the article would apply only in cases where the deposit by the party liable was for the full amount specified in articles 67 and 68 and not in cases where the deposit was effected for a part of the amount due under these articles.

Paragraph (2)

111. The Working Group expressed agreement with paragraph (2) of article 75.

RENUNCIATION (ART. 76)

Article 76

"(1) A party is discharged of his liability on the instrument if the holder, at or after maturity, writes on the instrument an unconditional renunciation of his rights thereon against such party.

"(2) Such renunciation shall not affect the right to the instrument of the party who so renounced his rights thereon."

112. Article 76 provides that a party is discharged of liability on the instrument if the holder renounces unconditionally on the instrument, at or after maturity, his rights on the instrument against that party. Such renunciation, by a writing on the instrument, is not to be considered as a material alteration under article 29. Furthermore, a discharge under article 76 will have the effect, under article 78, that any party who has a right of recourse against the party discharged, shall also be discharged. Renunciation, whilst it affects the rights which the holder has against parties liable does not affect, according to paragraph (2), the title of the holder to the instrument.

Paragraph (1)

113. The Working Group was of the opinion that its decision to maintain or delete article 76 would, to a great extent, depend on whether renunciation by a writing on the instrument occurred frequently in practice. In addition, the Group was of the view that it should obtain information on the various ways by which such renunciation takes place, e.g. by striking through the signature or by writing next to the signature words signifying renunciation.

114. The Working Group requested the Secretariat to conduct an inquiry amongst banking and trade institutions designed to obtain such information.

115. The Working Group, after deliberation, concluded that, if it should decide, at a later stage, to retain article 76, the article should be modified so as to provide that renunciation is effective whether made before, at or after maturity.

Paragraph (2)

116. The Working Group considered the effect of the cancelling of an endorsement on the title of the holder, i.e. whether such cancellation would interrupt the series of special endorsements. For example: the payee endorses to A, A to B, and B to C; C, the holder, cancels the endorsement of B. The Working Group considered the following questions:

(i) Is C a legitimate holder?

(ii) Is C entitled to demand payment from the drawer or the acceptor?

- (iii) Does payment by the acceptor operate as a discharge?
- (iv) If C endorses the instrument to D, what are D's rights thereon? Will D qualify as a protected holder?
- (v) If C is not entitled to demand payment from the acceptor, which party is so entitled? And payment to which party will constitute a discharge?

117. The Working Group, after deliberation, was agreed that it should revert to these questions at a later stage when the inquiries that would be made to banking and trade institutions had given it the necessary information on the circumstances in which the signature of the endorser might be struck and on the frequency of such cases.

REACQUISITION OF THE INSTRUMENT BY A PRIOR PARTY (ART. 77)

Article 77

"A party liable who rightfully becomes the holder of the instrument shall be discharged of liability thereon to any party who had a right of recourse against him."

118. Article 77 deals with the case where a party who is liable on the instrument becomes, because of subsequent events, a holder. The article provides that in such case such party is discharged of his liability on the instrument to any party who has a right of recourse against him. Thus, if the instrument is endorsed by the payee to A and by A to the drawer, the drawer, according to article 77, is discharged of his liability to the payee and to A.

119. Under one view, article 77 was superfluous since cases of reacquisition by a prior party were relatively rare and since, in those cases, the result which the article sought to achieve would be achieved by resorting to general principles of law, such as the principle of *confusio*.

120. Under another view, article 77 served a useful purpose in that it provided that a party who reacquired the instrument was discharged of liability. This, in turn, would make operative the provision of article 78 under which the discharge of a party also discharged parties subsequent to him.

121. The Working Group did not reach consensus on whether to retain article 77 and decided that the article should be placed between square brackets for future consideration.

DISCHARGE OF A PRIOR PARTY (ART. 78)

Article 78

"(1) Where a party is discharged of liability on an instrument, any party who had a right of recourse against him shall also be discharged.

"(2) An agreement, not amounting to partial or total discharge, between the holder and a party liable on the instrument shall not affect the right and liabilities of other parties."

122. Under paragraph (1) of article 78, if a party is discharged of liability, whether by payment according to article 70 or as a result of renunciation or reac-

quisition under articles 76 and 77, any party having a right of recourse against him is also discharged. Thus, if the payee endorses the instrument to A, and A endorses to B, payment by the acceptor to B operates as a discharge of the drawer, the payee and A. Similarly, if B renounces on the instrument his rights against the payee, A is discharged. Lastly, if B endorses the instrument to the payee, A and B are discharged. Under paragraph (2), an agreement, not amounting to a discharge, between the holder and a party liable is personal to them and does not affect the rights and liabilities of other parties. Therefore, an agreement outside the instrument between the holder and the acceptors by which the holder extends the time for payment does not affect the rights and liabilities of other parties.

Paragraph (1)

123. The Working Group, after deliberation, was agreed that paragraph (1) of article 78 should be retained. In the view of the Group, the paragraph was a necessary corollary of articles 70 and 76.

124. The Working Group considered the following case: the payee endorses the instrument to A, A endorses to B, B to C, C to A, and A to X. The question was raised whether B and C were liable to X.

125. Under one view, B and C were not liable since:

(a) When A reacquired the instrument, his liability as an endorser was discharged (art. 77);

(b) As a result, the liability of B and C to A was discharged (art. 78);

(c) By endorsement of the instrument by A to X, X could not acquire more rights than A had (art. 24), except where X would be a protected holder. However, X did not qualify as a protected holder in respect of B and C since it was apparent on the face of the instrument that B and C were discharged.

126. Under another view, X had rights against B and C. The discharge of B and C under article 78 operated only in respect of A and not in respect of X.

127. The Working Group was unable to reach consensus as to what should be the proper rule. It was, however, of the opinion that a proper solution might be found within the framework of articles 24 and 25 of the uniform law.

Paragraph (2)

128. The Working Group considered the provisions of paragraph (2) in the context of the following example: at maturity the holder agrees with the acceptor, outside the instrument, to extend the date of payment. The following questions then arose:

(i) What are the effects of the agreement on the rights of the holder against the drawer and the endorsers?

(ii) When the holder endorses the instrument to D what are the rights of D against parties prior to the holder?

The Group was of the opinion that article 78 (2) should not deal with this question since it was covered by articles 24 and 25. The Group therefore decided to delete the paragraph.

129. The Working Group considered what would be the consequence of a modification on the instrument of the date of maturity, e.g. by writing a new date over the existing date. The Working Group was of the view that such a modification, in that it altered the liability of other parties, would constitute a material alteration and, as such, fell within article 29.

130. The Working Group considered what should be the solution under the uniform law when, instead of altering the maturity date on the instrument, the holder agreed with the acceptor to draw on the acceptor a new instrument for the same amount as that of the original instrument but with a new maturity date. The Group was of the view that this question raised the difficult issue of a renewal instrument which was not dealt with by the uniform law. It suggested that the Secretariat might undertake a study on the subject if it thought that a study would prove useful.

LIMITATION (PRESCRIPTION) (ART. 79)

Article 79

131. The Working Group held a preliminary discussion on the desirability of including in the uniform law provisions governing the limitation of legal proceedings and the prescription of rights arising in the context of an international instrument. It was observed that in respect of instruments that would be used for settling international payments and that were thus likely to circulate in more than one country, provisions regarding prescription (limitation) would be particularly relevant since national laws laid down different time-limits and different grounds for interruption and suspension. It was noted that as a result of these divergencies, it would, if the matter were left to national law, be possible that a right or action on one and the same instrument would be extinguished in one country and not in another.

132. The Working Group concluded that it should attempt to include a set of general rules governing limitation (prescription) and requested the Secretariat to prepare draft provisions on the subject together with a commentary setting forth the various issues involved. The Group was of the view that these provisions should be restrictive in scope and should cover the following two aspects:

- (i) The point of time from which the period starts to run, and
- (ii) The length of the period.

The Group was of the view that the provisions should probably not deal with the causes of interruption or suspension of prescription (limitation) nor with rights of recourse existing after prescription (limitation) which could best be left to national law.

133. Two representatives suggested that, in preparing the draft articles, the Secretariat should take into account the special interests which developing countries

had in this question. These interests called for the choice of a reasonable time-limit, in keeping with the technical and administrative capabilities of these countries, and for the prohibition against derogating from such time-limit by agreement between the parties at the time of the issue or the endorsement of the instrument.

UNIFORM RULES APPLICABLE TO INTERNATIONAL CHEQUES

134. In response to the view expressed by some representatives during the fifth session of the Commission that uniform rules should be drawn up also for other negotiable instruments used to settle international transactions, the Commission further requested the Working Group "to consider the desirability of preparing uniform rules applicable to international cheques and the question whether this can best be achieved by extending the application of the draft uniform law to international cheques or by drawing up a separate uniform law on international cheques, and to report its conclusions on these questions to the Commission at a future session".

135. The Working Group, at its first session, requested the Secretariat to conduct, in consultation with the UNCITRAL Study Group on International Payments, inquiries regarding the use of cheques in international payments and the problems presented, under current commercial and banking practices, by divergencies between the rules of the principal legal systems.

136. At the present session the Working Group had before it a note by the Secretariat setting forth the first results of such inquiries.* The Working Group took note of the view expressed by the Secretariat and the Study Group that further study and inquiries would be necessary before a more complete and definite view of the issues could be given. Accordingly, the Group requested the Secretariat and the Study Group to make further inquiries and to submit, at a future session, a report on the use of cheques for settling international payments and the legal problems arising in that connexion. In particular, the Secretariat was requested to obtain information regarding the impact, in the near future, of the increased use of telegraphic transfers and of the development of telecommunication systems between banks on the use of cheques for international payment.

FUTURE WORK

137. The Working Group gave consideration to the timing of its fourth session. The Group was of the opinion that, in view of the progress achieved at the present session, its fourth session should be held as soon as possible. Some representatives expressed the view that the fourth session should be held in the course of 1976. Others were of the opinion that consideration of the time and place for the fourth session should be left for decision by the Commission at its forthcoming session, which will convene on 1 April 1975.

* Reproduced in this volume, part two, II, 2.

2. Note by the Secretariat: desirability of preparing uniform rules applicable to international cheques (A/CN.9/WG.IV/CRP.5)*

1. The United Nations Commission on International Trade Law, at its fifth session 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. At its first session, the Working Group requested the Secretariat to make inquiries, in consultation with the UNCITRAL Study Group on International Payments, 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.

2. The Study Group considered these questions at its eighth and ninth meetings, held from 5 to 9 November 1973 and from 30 September to 4 October 1974.**

In order to ascertain the use of cheques for making and receiving international payment, the Study Group, at its eighth meeting, drew up a questionnaire and addressed it to commercial banks and banking institutions.

3. The answers received to the questionnaire and the discussions held in the Study Group, at its ninth meeting, between representatives of various banking and trade institutions indicate that:

- (i) The cheque is widely used for settling international commercial transactions, although the extent of such use may vary from country to country.
- (ii) In a number of countries the use of cheques for the above purpose is tending to increase. However, such use may well decline in the near future as a result of greater reliance on telegraphic transfers and the development of telecommunication systems between banks, such as SWIFT (Society for World Wide Interbank Financial Telecommunications).
- (iii) Cheques used for international payment are usually drawn by a bank on a bank in another country. In part this is due to the existence of exchange control regulations which, in some countries, prohibit nationals from holding a bank account abroad or from opening an account in foreign currency with a bank in their country or which may debar non-residents from

drawing cheques on accounts in foreign currency which they may hold in the country of the bank which opened the account. As a result, international payments are frequently made by cheque in cases where the cheque is drawn on a bank in the payee's country and is payable at that bank, by a drawer-bank abroad which has an account at the drawee-bank in the payee's country.

- (iv) Cheques used for international payment are mostly drawn in the currency of the account. Cheques drawn in a currency other than the currency of the account occur occasionally; unless there are exchange control regulations to the contrary, they are usually paid in the currency of drawing, and, with few exceptions, when there is an express stipulation to that effect on the cheque.
- (v) Cheques are always payable at sight. In the case of post-dated cheques, banks operating under the Geneva system will always pay on the day of presentment and will not incur liability; banks operating under the common law system, if they pay a cheque before its due date, will incur liability for damages suffered by the drawer as a consequence of earlier payment.
- (vi) Few legal problems arise in respect of cheques used for international payment. The most cited problems concern forgery, post-dated [cheques, loss and theft of cheques, stop payment] orders, mechanical endorsements (stamping) and exchange controls.

4. Replies received so far to the questionnaire show substantial support for the establishment of uniform rules applicable to international cheques. However, the Study Group was of the view that further studies and inquiries would be necessary before a more complete and definite view on the matter could be given.

5. The Study Group therefore concluded that an appropriate course of action would be for it to continue work in respect of cheques by making further inquiries into several aspects of the law and practice relating to cheques. This would enable the Working Group, upon termination of its present work in respect of international bills of exchange and international promissory notes, to report to the Commission on the question of international cheques in full knowledge of the problems and issues involved therein.

6. The Secretariat concurs with the views expressed by the UNCITRAL Study Group on International Payments. The Working Group may therefore wish to request the Study Group to make further inquiries regarding cheques used for international payment and to submit to it, at a future session, a report on the practice in this respect and the legal problems arising in that connexion.

* 22 October 1974.

** The following international organizations and banking and trade institutions were represented at these meetings: International Monetary Fund (IMF), Hague Conference on Private International Law, International Institute for the Unification of Private Law (UNIDROIT), International Bank for Economic Co-operation (IBEC), Bank for International Settlements, International Chamber of Commerce (ICC), Fédération bancaire des communautés européennes, and Federal Reserve Bank of New York.

3. Note by the Secretary-General: bankers' commercial credits and bank guarantees (A/CN.9/101)*

I. BANKERS' COMMERCIAL CREDITS

1. This subject is concerned with the revision by the International Chamber of Commerce (ICC) of "Uniform Customs and Practice for Documentary Credits", drawn up by ICC in 1933 and subsequently revised by it in 1951 and 1962. At previous sessions,¹ the Commission stressed the importance of commercial letters of credit in ensuring payment for international trade transactions and expressed the opinion that it would be in the interest of international trade if the views of countries not represented in ICC were 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 operations of "Uniform Customs and Practice for Documentary Credits", so that these observations could be taken into account by ICC. Forty-two replies from Governments and nine replies from banking and trade institutions were received and transmitted to ICC for consideration.

2. At its seventh session, the Commission invited ICC "to transmit to it the revised text of 'Uniform Customs and Practice for Documentary Credits' upon the adoption thereof by ICC".² By a letter dated 21 February 1975, the Secretary-General of ICC transmitted the revised text of "Uniform Customs" which was approved by the ICC Commission on Banking Technique and Practice on 14 October 1974 and adopted by the Executive Committee of ICC at its 102nd session on 3 December 1974.

3. The observations of ICC in respect of its work on "Uniform Customs" are set forth in annex I to this note. The text of "Uniform Customs and Practice for Documentary Credits (1974)" is set forth in annex II.³

4. By the decision taken at its seventh session, the Commission also requested the Secretary-General "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". The analysis of these observations is set forth in document A/CN.9/101/Add.1.**

* 28 February 1975.

** Reproduced in this volume, part two, II, 4.

¹ *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); *ibid.*, *Twenty-fourth Session, Supplement No. 18 (A/7618)*, paras. 90-95 (UNCITRAL Yearbook, vol. I: 1968-1970, part two, II); *ibid.*, *Twenty-fifth Session, Supplement No. 17 (A/8017)*, paras. 119-126 (UNCITRAL Yearbook, vol. I: 1968-1970, part two, III); *ibid.*, *Twenty-sixth Session, Supplement No. 17 (A/8417)*, paras. 36-43 (UNCITRAL Yearbook, vol. 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).

² Report of the United Nations Commission on International Trade Law on the work of its seventh session (1974), *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 17 (A/9617)*, para. 35. (UNCITRAL Yearbook, vol. V: 1974, part one, II, A).

³ The text of the "Uniform Customs" is reproduced only in the original versions, i.e. English and French.

II. BANK GUARANTEES

5. At its seventh session, the Commission took note of the progress made by ICC in respect of the preparation of uniform rules on contract guarantees and payment guarantees.⁴ The Commission also requested its Study Group on International Payments, composed of experts provided by interested international organizations and banking and trade institutions, to consider the work of ICC on bank guarantees with representatives of that organization, and to invite to the meetings convened for that purpose interested representatives on the Commission.

6. The Secretariat consulted with representatives of ICC on appropriate procedures and working methods that would allow for closer collaboration between, on the one hand, representatives of the Commission and the Commission's secretariat and, on the other hand, the competent commissions of ICC. It is expected that suitable working methods will be agreed upon shortly. In the course of these consultations, which took place at a meeting of the UNCITRAL Study Group on International Payments in October 1974, several other international organizations represented at that meeting expressed their interest in the subject of bank guarantees. An attempt will therefore be made to co-ordinate the work, now being carried out at various levels, in the UNCITRAL Study Group. A report on the progress made in this respect will in due course be submitted to the Commission.

7. The observations of ICC in respect of its work on contract guarantees and payment guarantees are set forth in annex I to this note.

ANNEX I

Note submitted by the International Chamber of Commerce at the eighth session of the United Nations Commission on International Trade Law (UNCITRAL)

In accordance with the wishes expressed by the United Nations Commission on International Trade Law at its seventh session, the International Chamber of Commerce is happy to be able to transmit to the Commission the revised text of "Uniform Customs and Practice for Documentary Credits" and to submit to it a progress report on its work on contract guarantees and payment guarantees.

I. REVISION OF "UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS"

1. The International Chamber of Commerce is now in a position to transmit to the United Nations Commission on International Trade Law (UNCITRAL) the revised text of its "Uniform Customs and Practice for Documentary Credits", which was adopted by its Executive Committee on 3 December 1974. As was stated in the note submitted by ICC at the seventh session of UNCITRAL, this revised text was prepared on the basis of comments not only from National Committees of ICC but also, through the United Nations, from countries not represented in ICC, and from chambers of commerce of socialist countries through the *Ad Hoc* "Banking Technique" Working Group of the ICC Committee for Liaison with Chambers of Commerce of Socialist Countries.

2. The revised text enclosed with this note will apply to documentary credits issued on or after 1 October 1975. The practical arrangements for putting it into effect are explained

⁴ *Ibid.*, para. 37.

in document No. 470/251, also enclosed, which is intended, in addition, to draw the attention of commercial parties to documentary credits to the changes introduced by the revised text as compared with the 1962 text.

3. These changes fall mainly into two categories. Some are intended to clear up certain misunderstandings arising from the interpretation of the 1962 text and are aimed at setting out already existing solutions or clarifying their scope. Others reflect the changes in banking, commercial and transport practices resulting from the introduction of containerization and other modern methods of moving goods and from the increasing use of computers in data transmission.

4. When ICC undertook its 1962 revision of "Uniform Customs and Practice for Documentary Credits", the latter were being applied by banks in 175 countries and territories. Co-operation from UNCITRAL enabled ICC to carry out this revision on a world-wide scale, and ICC wishes to express its warmest gratitude to UNCITRAL in that regard.

II. CONTRACT GUARANTEES AND PAYMENT GUARANTEES

1. As was mentioned in the note submitted by the International Chamber of Commerce at the seventh session of UNCITRAL (document No. 460/165-470/241), the draft uniform rules on contract guarantees that ICC is preparing are intended primarily to establish a just equilibrium between the interests of the parties involved in guarantees—namely the tenderer, the beneficiary and the guarantor—in accordance with the task entrusted to ICC by UNCITRAL. The need to ensure such a just equilibrium was emphasized at the seventh session of UNCITRAL (document A/CN.9/VII/CRP.1/Add.5, para. 7).^a

2. The ICC Commission on International Commercial Practice and Commission on Banking Technique and Practice, which set up a Joint Working Group to complete this draft, stressed, at a joint meeting on 29 March 1974, that the institution of procedures for implementing guarantees that were both fair and practical would be the step most conducive to the desired equilibrium. The guidelines laid down by the Commissions for their Joint Working Group were communicated to UNCITRAL in document No. 460/165-470/241. On that basis the Joint Working Group formulated two new proposals, which were considered by both Commissions in autumn 1974. However, neither of them could entirely agree with the proposals, and the work will therefore have to be continued.

3. ICC wishes to point out that in this field, as in that of documentary credits, it has had the benefit not only of comments from its National Committees, but also of a United Nations survey which acquainted it with the practice of countries not represented in ICC, as well as comments by chambers of commerce of socialist countries through the *Ad Hoc* "Banking Technique" Working Group of the ICC Liaison Committee. ICC attaches the greatest value to its continued collaboration with UNCITRAL regarding contract guarantees, particularly in order to obtain the views of those beneficiaries of guarantees who are not represented in ICC.

4. The limits within which a unification of payment guarantees might be undertaken was outlined in the note submitted by ICC at the seventh session of UNCITRAL (document No. 460/165-470/241), which emphasized that, apart from guarantees given in respect of payment against a documentary credit, the varied nature of guarantees given in respect of other liabilities would make any attempt at unification particularly difficult. However, the question merits careful study, and UNCITRAL collaboration in this respect will be most valuable to ICC.

CONCLUSIONS

The close co-operation relations between the International Chamber of Commerce and the United Nations Commission

on International Trade Law with regard to the standardization of commercial and banking practice has been most fruitful, as is borne out by the 1974 revision of "Uniform Customs and Practice for Documentary Credits". ICC reaffirms its interest in this co-operation and hopes that it will further increase, to the greater benefit of those involved in international trade.

ANNEX II

Uniform customs and practice for documentary credits (1974)

GENERAL PROVISIONS AND DEFINITIONS

(a) These provisions and definitions and the following articles apply to all documentary credits and are binding upon all parties thereto unless otherwise expressly agreed.

(b) For the purposes of such provisions, definitions and articles the expressions "documentary credit(s)" and "credit(s)" used therein mean any arrangement, however named or described, whereby a bank (the issuing bank), acting at the request and in accordance with the instructions of a customer (the applicant for the credit),

(i) Is to make payment to or to the order of a third party (the beneficiary), or is to pay, accept or negotiate bills of exchange (drafts) drawn by the beneficiary, or

(ii) Authorizes such payments to be made or such drafts to be paid, accepted or negotiated by another bank, against stipulated documents, provided that the terms and conditions of the credit are complied with.

(c) Credits, by their nature, are separate transactions from the sales or other contracts on which they may be based and banks are in no way concerned with or bound by such contracts.

(d) Credit instructions and the credits themselves must be complete and precise.

In order to guard against confusion and misunderstanding, issuing banks should discourage any attempt by the applicant for the credit to include excessive detail.

(e) The bank first entitled to exercise the option available under article 32 (b) shall be the bank authorized to pay, accept or negotiate under a credit. The decision of such bank shall bind all parties concerned.

A bank is authorized to pay or accept under a credit by being specifically nominated in the credit.

A bank is authorized to negotiate under a credit either

(i) By being specifically nominated in the credit, or

(ii) By the credit being freely negotiable by any bank.

(f) A beneficiary can in no case avail himself of the contractual relationships existing between banks or between the applicant for the credit and the issuing bank.

A. FORM AND NOTIFICATION OF CREDITS

Article 1

(a) Credits may be either

(i) Revocable, or

(ii) Irrevocable.

(b) All credits, therefore, should clearly indicate whether they are revocable or irrevocable.

(c) In the absence of such indication the credit shall be deemed to be revocable.

Article 2

A revocable credit may be amended or cancelled at any moment without prior notice to the beneficiary. However, the issuing bank is bound to reimburse a branch or other bank to which such a credit has been transmitted and made available for payment, acceptance or negotiation, for any payment, acceptance or negotiation complying with the terms and conditions of the credit and any amendments received up to the time of payment, acceptance or negotiation made by such

^a Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 17 (A/9617), para. 36 (UNCITRAL Yearbook, vol. V: 1974, part one, II, A).

branch or other bank prior to receipt by it of notice of amendment or of cancellation.

Article 3

(a) An irrevocable credit constitutes a definite undertaking of the issuing bank, provided that the terms and conditions of the credit are complied with:

- (i) To pay, or that payment will be made, if the credit provides for payment, whether against a draft or not;
- (ii) To accept drafts if the credit provides for acceptance by the issuing bank or to be responsible for their acceptance and payment at maturity if the credit provides for the acceptance of drafts drawn on the applicant for the credit or any other drawee specified in the credit;
- (iii) To purchase/negotiate, without recourse to drawers and/or *bona fide* holders, drafts drawn by the beneficiary, at sight or at a tenor, on the applicant for the credit or on any other drawee specified in the credit or to provide for purchase/negotiation by another bank, if the credit provides for purchase/negotiation.

(b) An irrevocable credit may be advised to a beneficiary through another bank (the advising bank) without engagement on the part of that bank, but when an issuing bank authorizes or requests another bank to confirm its irrevocable credit and the latter does so, such confirmation constitutes a definite undertaking of the confirming bank in addition to the undertaking of the issuing bank, provided that the terms and conditions of the credit are complied with:

- (i) To pay, if the credit is payable at its own counters, whether against a draft or not, or that payment will be made if the credit provides for payment elsewhere;
- (ii) To accept drafts if the credit provides for acceptance by the confirming bank, at its own counters, or to be responsible for their acceptance and payment at maturity if the credit provides for the acceptance of drafts drawn on the applicant for the credit or any other drawee specified in the credit;
- (iii) To purchase/negotiate, without recourse to drawers and/or *bona fide* holders, drafts drawn by the beneficiary, at sight or at a tenor, on the issuing bank, or on the applicant for the credit or on any other drawee specified in the credit, if the credit provides for purchase/negotiation.

(c) Such undertakings can neither be amended nor cancelled without the agreement of all parties thereto. Partial acceptance of amendments is not effective without the agreement of all parties thereto.

Article 4

(a) When an issuing bank instructs a bank by cable, telegram or telex to advise a credit, and intends the mail confirmation to be the operative credit instrument, the cable, telegram or telex must state that the credit will only be effective on receipt of such mail confirmation. In this event, the issuing bank must send the operative credit instrument (mail confirmation) and any subsequent amendments to the credit to the beneficiary through the advising bank.

(b) The issuing bank will be responsible for any consequences arising from its failure to follow the procedure set out in the preceding paragraph.

(c) Unless a cable, telegram or telex states "details to follow" (or words of similar effect), or states that the mail confirmation is to be the operative credit instrument, the cable, telegram or telex will be deemed to be the operative credit instrument and the issuing bank need not send the mail confirmation to the advising bank.

Article 5

When a bank is instructed by cable, telegram or telex to issue, confirm or advise a credit similar in terms to one previously established and which has been the subject of amend-

ments, it shall be understood that the details of the credit being issued, confirmed or advised will be transmitted to the beneficiary excluding the amendments, unless the instructions specify clearly any amendments which are to apply.

Article 6

If incomplete or unclear instructions are received to issue, confirm or advise a credit, the bank requested to act on such instructions may give preliminary notification of the credit to the beneficiary for information only and without responsibility; in this event the credit will be issued, confirmed or advised only when the necessary information has been received.

B. LIABILITIES AND RESPONSIBILITIES

Article 7

Banks must examine all documents with reasonable care to ascertain that they appear on their face to be in accordance with the terms and conditions of the credit. Documents which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in accordance with the terms and condition of the credit.

Article 8

(a) In documentary credit operations all parties concerned deal in documents and not in goods.

(b) Payment, acceptance or negotiation against documents which appear on their face to be in accordance with the terms and conditions of a credit by a bank authorized to do so, binds the party giving the authorization to take up the documents and reimburse the bank which has effected the payment, acceptance or negotiation.

(c) If, upon receipt of the documents, the issuing bank considers that they appear on their face not to be in accordance with the terms and conditions of the credit, that bank must determine, on the basis of the documents alone, whether to claim that payment, acceptance or negotiation was not effected in accordance with the terms and conditions of the credit.

(d) The issuing bank shall have a reasonable time to examine the documents and to determine as above whether to make such a claim.

(e) If such claim is to be made, notice to that effect, stating the reasons therefor, must, without delay, be given by cable or other expeditious means to the bank from which the documents have been received (the remitting bank) and such notice must state that the documents are being held at the disposal of such bank or are being returned thereto.

(f) If the issuing bank fails to hold the documents at the disposal of the remitting bank, or fails to return the documents to such bank, the issuing bank shall be precluded from claiming that the relative payment, acceptance or negotiation was not effected in accordance with the terms and conditions of the credit.

(g) If the remitting bank draws the attention of the issuing bank to any irregularities in the documents or advises such bank that it has paid, accepted or negotiated under reserve or against a guarantee in respect of such irregularities, the issuing bank shall not thereby be relieved from any of its obligations under this article. Such guarantee or reserve concerns only the relations between the remitting bank and the beneficiary.

Article 9

Banks assume no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any documents, or for the general and/or particular conditions stipulated in the documents or superimposed thereon; nor do they assume any liability or responsibility for the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods represented thereby, or for the good faith or acts and/or omissions, solvency, per-

formance or standing of the consignor, the carriers or the insurers of the goods or any other person whomsoever.

Article 10

Banks assume no liability or responsibility for the consequences arising out of delay and/or loss in transit of any messages, letters or documents, or for delay, mutilation or other errors arising in the transmission of cables, telegrams or telex. Banks assume no liability or responsibility for errors in translation or interpretation of technical terms, and reserve the right to transmit credit terms without translating them.

Article 11

Banks assume no liability or responsibility for consequences arising out of the interruption of their business by Acts of God, riots, civil commotions, insurrections, wars or any other causes beyond their control or by any strikes or lock-outs. Unless specifically authorized, banks will not effect payment, acceptance or negotiation after expiration under credits expiring during such interruption of business.

Article 12

(a) Banks utilizing the services of another bank for the purpose of giving effect to the instructions of the applicant for the credit do so for the account and at the risk of the latter.

(b) Banks assume no liability or responsibility should the instructions they transmit not be carried out, even if they have themselves taken the initiative in the choice of such other bank.

(c) The applicant for the credit shall be bound by and liable to indemnify the banks against all obligations and responsibilities imposed by foreign laws and usages.

Article 13

A paying or negotiating bank which has been authorized to claim reimbursement from a third bank nominated by the issuing bank and which has effected such payment or negotiation shall not be required to confirm to the third bank that it has done so in accordance with the terms and conditions of the credit.

C. DOCUMENTS

Article 14

(a) All instructions to issue, confirm or advise a credit must state precisely the documents against which payment, acceptance or negotiation is to be made.

(b) Terms such as "first class", "well known", "qualified" and the like shall not be used to describe the issuers of any documents called for under credits and if they are incorporated in the credit terms banks will accept documents as tendered.

C.1 DOCUMENTS EVIDENCING SHIPMENT OR DISPATCH OR TAKING IN CHARGE (SHIPPING DOCUMENTS)

Article 15

Except as stated in article 20, the date of the bill of lading, or the date of any other document evidencing shipment or dispatch or taking in charge, or the date indicated in the reception stamp or by notation on any such document, will be taken in each case to be the date of shipment or dispatch or taking in charge of the goods.

Article 16

(a) If words clearly indicating payment or prepayment of freight, however named or described, appear by stamp or otherwise on documents evidencing shipment or dispatch or taking in charge they will be accepted as constituting evidence of payment of freight.

(b) If the words "freight pre-payable" or "freight to be prepaid" or words of similar effect appear by stamp or otherwise on such documents they will not be accepted as constituting evidence of the payment of freight.

(c) Unless otherwise specified in the credit or inconsistent with any of the documents presented under the credit, banks will accept documents stating that freight or transportation charges are payable on delivery.

(d) Banks will accept shipping documents bearing reference by stamp or otherwise to costs additional to the freight charges, such as costs of, or disbursements incurred in connexion with, loading, unloading or similar operations, unless the conditions of the credit specifically prohibit such reference.

Article 17

Shipping documents which bear a clause on the face thereof such as "shipper's load and count" or "said by shipper to contain" or words of similar effect, will be accepted unless otherwise specified in the credit.

Article 18

(a) A clean shipping document is one which bears no superimposed clause or notation which expressly declares a defective condition of the goods and/or the packaging.

(b) Banks will refuse shipping documents bearing such clauses or notations unless the credit expressly states the clauses or notations which may be accepted.

C.1.1 MARINE BILLS OF LADING

Article 19

(a) Unless specifically authorized in the credit, bills of lading of the following nature will be rejected:

(i) Bills of lading issued by forwarding agents.

(ii) Bills of lading which are issued under and are subject to the conditions of a charter-party.

(iii) Bills of lading covering shipment by sailing vessels.

(b) However, subject to the above and unless otherwise specified in the credit, bills of lading of the following nature will be accepted:

(i) "Through" bills of lading issued by shipping companies or their agents even though they cover several modes of transport.

(ii) Short form bills of lading (i.e. bills of lading issued by shipping companies or their agents which indicate some or all of the conditions of carriage by reference to a source or document other than the bill of lading).

(iii) Bills of lading issued by shipping companies or their agents covering unitized cargoes, such as those on pallets or in containers.

Article 20

(a) Unless otherwise specified in the credit, bills of lading must show that the goods are loaded on board a named vessel or shipped on a named vessel.

(b) Loading on board a named vessel or shipment on a named vessel may be evidenced either by a bill of lading bearing wording indicating loading on board a named vessel or shipment on a named vessel, or by means of a notation to that effect on the bill of lading signed or initialled and dated by the carrier or his agent, and the date of this notation shall be regarded as the date of loading on board the named vessel or shipment on the named vessel.

Article 21

(a) Unless trans-shipment is prohibited by the terms of the credit, bills of lading will be accepted which indicate that the goods will be trans-shipped en route, provided the entire voyage is covered by one and the same bill of lading.

(b) Bills of lading incorporating printed clauses stating that the carriers have the right to trans-ship will be accepted notwithstanding the fact that the credit prohibits trans-shipment.

Article 22

(a) Banks will refuse a bill of lading stating that the goods are loaded on deck, unless specifically authorized in the credit.

(b) Banks will not refuse a bill of lading which contains a provision that the goods may be carried on deck, provided it does not specifically state that they are loaded on deck.

C.1.2. COMBINED TRANSPORT DOCUMENTS

Article 23

(a) If the credit calls for a combined transport document, i.e. one which provides for a combined transport by at least two different modes of transport, from a place at which the goods are taken in charge to a place designated for delivery, or if the credit provides for a combined transport, but in either case does not specify the form of document required and/or the issuer of such document, banks will accept such documents as tendered.

(b) If the combined transport includes transport by sea the document will be accepted although it does not indicate that the goods are on board a named vessel, and although it contains a provision that the goods, if packed in a container, may be carried on deck, provided it does not specifically state that they are loaded on deck.

C.1.3. OTHER SHIPPING DOCUMENTS, ETC.

Article 24

Banks will consider a Railway or Inland Waterway Bill of Lading or Consignment Note, Counterfoil Waybill, Postal Receipt, Certificate of Mailing, Air Mail Receipt, Air Waybill, Air Consignment Note or Air Receipt, Trucking Company Bill of Lading or any other similar document as regular when such document bears the reception stamp of the carrier or his agent, or when it bears a signature purporting to be that of the carrier or his agent.

Article 25

Where a credit calls for an attestation or certification of weight in the case of transport other than by sea, banks will accept a weight stamp or declaration of weight superimposed by the carrier on the shipping document unless the credit calls for a separate or independent certificate of weight.

C.2. INSURANCE DOCUMENTS

Article 26

(a) Insurance documents must be as specified in the credit, and must be issued and/or signed by insurance companies or their agents or by underwriters.

(b) Cover notes issued by brokers will not be accepted, unless specifically authorized in the credit.

Article 27

Unless otherwise specified in the credit, or unless the insurance documents presented establish that the cover is effective at the latest from the date of shipment or dispatch or, in the case of combined transport, the date of taking the goods in charge, banks will refuse insurance documents presented which bear a date later than the date of shipment or dispatch or, in the case of combined transport, the date of taking the goods in charge, as evidenced by the shipping documents.

Article 28

(a) Unless otherwise specified in the credit, the insurance document must be expressed in the same currency as the credit.

(b) The minimum amount for which insurance must be effected is the CIF value of the goods concerned. However, when the CIF value of the goods cannot be determined from the documents on their face, banks will accept as such minimum amount the amount of the drawing under the credit or the amount of the relative commercial invoice, whichever is the greater.

Article 29

(a) Credits should expressly state the type of insurance required and, if any, the additional risks which are to be

covered. Imprecise terms such as "usual risks" or "customary risks" should not be used; however, if such imprecise terms are used, banks will accept insurance documents as tendered.

(b) Failing specific instructions, banks will accept insurance cover as tendered.

Article 30

Where a credit stipulates "insurance against all risks", banks will accept an insurance document which contains any "all risks" notation or clause, and will assume no responsibility if any particular risk is not covered.

Article 31

Banks will accept an insurance document which indicates that the cover is subject to a franchise or an excess (deductible), unless it is specifically stated in the credit that the insurance must be issued irrespective of percentage.

C.3. COMMERCIAL INVOICES

Article 32

(a) Unless otherwise specified in the credit, commercial invoices must be made out in the name of the applicant for the credit.

(b) Unless otherwise specified in the credit, banks may refuse commercial invoices issued for amounts in excess of the amount permitted by the credit.

(c) The description of the goods in the commercial invoice must correspond with the description in the credit. In all other documents the goods may be described in general terms not inconsistent with the description of the goods in the credit.

C.4. OTHER DOCUMENTS

Article 33

When other documents are required, such as Warehouse Receipts, Delivery Orders, Consular Invoices, Certificates of Origin, of Weight, of Quality or of Analysis, etc. and when no further definition is given, banks will accept such documents as tendered.

D. MISCELLANEOUS PROVISIONS

QUANTITY AND AMOUNT

Article 34

(a) The words "about", "circa" or similar expressions used in connexion with the amount of the credit or the quantity or the unit price of the goods are to be construed as allowing a difference not to exceed 10 per cent more or 10 per cent less.

(b) Unless a credit stipulates that the quantity of the goods specified must not be exceeded or reduced a tolerance of 3 per cent more or 3 per cent less will be permissible, always provided that the total amount of the drawings does not exceed the amount of the credit. This tolerance does not apply when the credit specifies quantity in terms of a stated number of packing units or individual items.

PARTIAL SHIPMENTS

Article 35

(a) Partial shipments are allowed, unless the credit specifically states otherwise.

(b) Shipments made on the same ship and for the same voyage, even if the Bills of Lading evidencing shipment "on board" bear different dates and/or indicate different ports of shipment, will not be regarded as partial shipments.

Article 36

If shipment by instalments within given periods is stipulated and any instalment is not shipped within the period allowed for that instalment, the credit ceases to be available for that or any subsequent instalments, unless otherwise specified in the credit.

EXPIRY DATE

Article 37

All credits, whether revocable or irrevocable, must stipulate an expiry date for presentation of documents for payment,

acceptance or negotiation, notwithstanding the stipulation of a latest date for shipment.

Article 38

The words "too", "until", "till" and words of similar import applying to the stipulated expiry date for presentation of documents for payment, acceptance or negotiation, or to the stipulated latest date for shipment, will be understood to include the date mentioned.

Article 39

(a) When the stipulated expiry date falls on a day on which banks are closed for reasons other than those mentioned in article 11, the expiry date will be extended until the first following business day.

(b) The latest date for shipment shall not be extended by reason of the extension of the expiry date in accordance with this article. Where the credit stipulates a latest date for shipment, shipping documents dated later than such stipulated date will not be accepted. If no latest date for shipment is stipulated in the credit, shipping documents dated later than the expiry date stipulated in the credit or amendments thereto will not be accepted. Documents other than the shipping documents may, however, be dated up to and including the extended expiry date.

(c) Banks paying, accepting or negotiating on such extended expiry date must add to the documents their certification in the following wording:

"Presented for payment (or acceptance or negotiation as the case may be) within the expiry date extended in accordance with article 39 of the Uniform Customs".

SHIPMENT, LOADING OR DISPATCH

Article 40

(a) Unless the terms of the credit indicate otherwise, the words "departure", "dispatch", "loading" or "sailing" used in stipulating the latest date for shipment of the goods will be understood to be synonymous with "shipment".

(b) Expressions such as "prompt", "immediately", "as soon as possible", and the like should not be used. If they are used, banks will interpret them as a request for shipment within 30 days from the date on the advice of the credit to the beneficiary by the issuing bank or by an advising bank, as the case may be.

(c) The expression "on or about" and similar expressions will be interpreted as a request for shipment during the period from five days before to five days after the specified date, both end days included.

PRESENTATION

Article 41

Notwithstanding the requirement of article 37 that every credit must stipulate an expiry date for presentation of documents, credits must also stipulate a specified period of time after the date of issuance of the bills of lading or other shipping documents during which presentation of documents for payment, acceptance or negotiation must be made. If no such period of time is stipulated in the credit, banks will refuse documents presented to them later than 21 days after the date of issuance of the Bills of Lading or other shipping documents.

Article 42

Banks are under no obligation to accept presentation of documents outside their banking hours.

DATE TERMS

Article 43

The terms "first half", "second half" of a month shall be construed respectively as from the 1st to the 15th, and the 16th to the last day of each month, inclusive.

Article 44

The terms "beginning", "middle", or "end" of a month shall be construed respectively as from the 1st to the 10th, the 11th

to the 20th, and the 21st to the last day of each month, inclusive.

Article 45

When a bank issuing a credit instructs that the credit be confirmed or advise as available "for one month", "for six months" or the like, but does not specify the date for which the time is to run, the confirming or advising bank will confirm or advise the credit as expiring at the end of such indicated period from the date of its confirmation or advice.

E. TRANSFER

Article 46

(a) A transferable credit is a credit under which the beneficiary has the right to give instructions to the bank called upon to effect payment or acceptance or to any bank entitled to effect negotiation to make the credit available in whole or in part to one or more third parties (second beneficiaries).

(b) The bank requested to effect the transfer, whether it has confirmed the credit or not, shall be under no obligation to effect such transfer except to the extent and in the manner expressly consented to by such bank, and until such bank's charges in respect of transfer are paid.

(c) Bank charges in respect of transfers are payable by the first beneficiary unless otherwise specified.

(d) A credit can be transferred only if it is expressly designated as "transferable" by the issuing bank. Terms such as "divisible", "fractionable", "assignable", and "transmissible" add nothing to the meaning of the term "transferable" and shall not be used.

(e) A transferable credit can be transferred once only. Fractions of a transferable credit (not exceeding in the aggregate the amount of the credit) can be transferred separately, provided partial shipments are not prohibited, and the aggregate of such transfers will be considered as constituting only one transfer of the credit. The credit can be transferred only on the terms and conditions specified in the original credit, with the exception of the amount of the credit, of any unit prices stated therein, and of the period of validity or period for shipment, any or all of which may be reduced or curtailed. Additionally, the name of the first beneficiary can be substituted for that of the applicant for the credit, but if the name of the applicant for the credit is specifically required by the original credit to appear in any document other than the invoice, such requirement must be fulfilled.

(f) The first beneficiary has the right to substitute his own invoices for those of the second beneficiary, for amounts not in excess of the original amount stipulated in the credit and for the original prices if stipulated in the credit, and upon such substitution of invoices the first beneficiary can draw under the credit for the difference, if any, between his invoices and the second beneficiary's invoices. When a credit has been transferred and the first beneficiary is to supply his own invoices in exchange for the second beneficiary's invoices but fails to do so on first demand, the paying, accepting or negotiating bank has the right to deliver to the issuing bank the documents received under the credit, including the second beneficiary's invoices, without further responsibility to the first beneficiary.

(g) The first beneficiary of a transferable credit can transfer the credit to a second beneficiary in the same country or in another country unless the credit specifically states otherwise. The first beneficiary shall have the right to request that payment or negotiation be effected to the second beneficiary at the place to which the credit has been transferred, up to and including the expiry date of the original credit, and without prejudice to the first beneficiary's right subsequently to substitute his own invoices for those of the second beneficiary and to claim any difference due to him.

Article 47

The fact that a credit is not stated to be transferable shall not affect the beneficiary's rights to assign the proceeds of such credit in accordance with the provisions of the applicable law.

4. Report of the Secretary-General: analysis of the observations received in respect of "Uniform Customs and Practice for Documentary Credits (1962)" and its revision by the International Chamber of Commerce (A/CN.9/101/Add.1)*

INTRODUCTION

1. In 1933, the International Chamber of Commerce (ICC) drew up "Uniform Customs and Practice for Documentary Credits" and subsequently revised these rules in 1951 and 1962. ICC has now revised "Uniform Customs (1962)" and this 1974 version is reproduced in annex II to document A/CN.9/101.**

2. At the seventh session of the Commission, representatives were in general agreement 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".¹

3. At the same session, the Commission requested the Secretariat "to prepare an analysis of the observations received by the Secretary-General in respect to the 1962 version of 'Uniform Customs', with a view to examining whether the revised text reflected these observations".² This report was prepared in response to that request.

4. The greater part of the replies received by the Secretariat from Governments and banking and trade institutions indicated strong support for "Uniform Customs (1962)" and voiced the expectation that the revision by ICC of these rules would prove acceptable to the responding State and its banking institutions.

5. This analysis only deals with comments advocating substantive modifications of "Uniform Customs (1962)" and with suggestions concerning particular points as to which ICC presented draft revisions. For each of the general provisions and for each article, the analysis commences with the text of "Uniform Customs (1962)", followed by a short description of the substantive changes approved by ICC and an analysis of the comments on the provision.

ANALYSIS OF COMMENTS CONCERNING THE REVISION BY ICC OF UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1962)

GENERAL PROVISIONS AND DEFINITIONS, PARAGRAPH (a)

1. General provisions and definitions, paragraph (a) [1962]:

(a) These provisions and definitions and the following articles apply to all documentary credits and are binding upon all parties thereto unless otherwise expressly agreed.

2. This paragraph was not modified.

3. New Zealand noted that the words "apply to all documentary credits and are binding upon all parties thereto" were too narrow, since "Uniform Customs" was in practice incorporated not only in documentary credits, but also in contracts between the applicant for the credit and the issuing bank. The proposal by New Zealand to substitute a formulation such as "all interested parties" ("toutes les parties y intéressées") was not adopted.

GENERAL PROVISIONS AND DEFINITIONS, PARAGRAPH (b)

1. General provisions and definitions, paragraph (b) [1962]:

(b) For the purposes of such provisions, definitions and articles the expressions "documentary credit(s)" and "credit(s)" used therein mean any arrangement, however named or described, whereby a bank (the issuing bank), acting at the request and in accordance with the instructions of a customer (the applicant for the credit), is to make payment to or to the order of a third party (the beneficiary) or is to pay, accept or negotiate bills of exchange (drafts) drawn by the beneficiary, or authorize such payments to be made or such drafts to be paid, accepted or negotiated by another bank, against stipulated documents and compliance with stipulated terms and conditions.

2. This paragraph was reorganized so that the obligations assumed by the issuing bank now form two separate subparagraphs. In addition, the final phrase of this paragraph was changed from "documents and compliance with stipulated terms and conditions" to "documents, provided that the terms and conditions of the credit are complied with".

3. Several replies expressed support for the reorganization of this paragraph adopted by ICC. The following proposed modifications of this paragraph were not accepted by ICC, as it was of the view that its new arrangement was sufficient to dispel any doubts concerning the meaning of the term "negotiate" and to stress that the beneficiary must comply with the terms and conditions of the credit:

(a) Delete the words "or negotiate" from the words "to pay, accept or negotiate bills of exchange . . ." (Denmark);

(b) Limit the word "negotiate" to cases where a bank at its discretion buys drafts or documents at the invitation of the beneficiary and thus exclude cases where banks act directly or indirectly on behalf of the applicant for the credit (Hungary);

(c) Replace the phrase "authorizes such payments to be made" by the phrase "undertakes that such payments will be made", to clarify that the issuing bank remains responsible on its own credit even if its authorization given to another bank to pay is not acted on by that other bank (USSR);

(d) Expand the list of obligations of the issuing bank, now reading "to pay, accept or negotiate

* 14 March 1975.

** Reproduced in this Volume, part two, II, 3.

¹ Report of the United Nations Commission on International Trade Law on the work of its seventh session, *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 17 (A/9617)*, para. 34. (UNCITRAL Yearbook, vol. V: 1974, part one, II, A.)

² *Ibid.*

bills of exchange (drafts) drawn by the beneficiary" to include "endorsement or guarantee of the bill of exchange", in order to cover the *aval* (commercial endorsement) as a form of documentary credit (Mexico);

(e) Specify at the end of this paragraph that the terms and conditions of the credit are to be complied with within "the duration of its period of validity" (Mexico);

(f) Conclude this paragraph with the phrase "against stipulated documents and provided that those documents are in conformity with the stipulated terms and conditions" (National Bank of Czechoslovakia). In slightly different form, this suggestion was adopted by ICC.

GENERAL PROVISIONS AND DEFINITIONS, PARAGRAPH (c)

1. General provisions and definitions, paragraph (c) [1962]:

(c) Credits, by their nature, are separate transactions from the sales or other contracts on which they may be based and banks are in no way concerned with or bound by such contracts.

2. This paragraph was not modified by ICC.

3. Nigeria suggested an additional clause linking the payment obligation under the credit to "clean performance of the underlying contract" and laying down a penalty if it was discovered, subsequent to payment under the credit, that the terms of the credit and those mentioned in the documents varied from the goods that were actually delivered. It was explained that such a clause would be aimed at protecting buyers in developing countries.

GENERAL PROVISIONS AND DEFINITIONS, PARAGRAPH (d)

1. General provisions and definitions, paragraph (d) [1962]:

(d) Credit instructions and the credits themselves must be complete and precise and, in order to guard against confusion and misunderstanding, issuing banks should discourage any attempt by the applicant for the credit to include excessive detail.

2. This paragraph was divided into two sentences in the English text; the French text had already been so divided in the 1962 version.

3. The following suggestions, aimed at strengthening the effect of this paragraph in discouraging incomplete or excessively detailed credits and credit instructions, were not adopted by ICC:

(a) Redraft the concluding portion of the second sentence in this paragraph to read "... the banks should refrain from undertaking to carry out orders containing excessive details." (Hungary);

(b) Provide a standard for measuring whether credit instructions and credits are "complete and precise" (Philippines); New Zealand proposed that "excessive detail" be measured by the prevailing banking practice;

(c) Delete the second sentence, since it contains what is merely an exhortation (Nigeria);

(d) State the legal consequences if, contrary to this paragraph, excessive details are included in credit instructions or credits (National Bank of Czechoslovakia).

GENERAL PROVISIONS AND DEFINITIONS, PARAGRAPH (e)

1. General provisions and definitions, paragraph (e) [1962]:

(e) When the bank first entitled to avail itself of an option it enjoys under the following articles does so, its decision shall be binding upon all the parties concerned.

2. This paragraph was modified in order to make it more specific and to clarify some issues that caused difficulties previously. ("Uniform Customs (1962)" only contained a general rule to the effect that the exercise of an option by the bank first entitled to it shall bind all the parties concerned.)

(a) The paragraph now specifies that it is the bank authorized to pay, accept or negotiate under a credit which may first exercise the option under revised article 32 (b) (i.e., to refuse a commercial invoice for an amount exceeding the amount permitted by the credit), and that such a decision will bind all the parties concerned. (Thus, the bank first entitled to exercise the option is identified and the effect of the rule is limited to revised article 32 (b).)

(b) The paragraph now describes how a bank becomes authorized to pay or accept under a credit, or to negotiate under a credit.

3. The revision of this paragraph seems to incorporate the principle proposed by Australia that, rather than relying on the general rule contained in the 1962 formulation of this paragraph, in each article the bank having the option mentioned therein should be identified.

GENERAL PROVISIONS AND DEFINITIONS, PARAGRAPH (f)

1. General provisions and definitions, paragraph (f) [1962]:

(f) A beneficiary can in no case avail himself of the contractual relationships existing between banks or between the applicant for the credit and the issuing bank.

2. This paragraph was not modified by ICC.

3. The Secretariat received no comments concerning this paragraph.

Article 1 (old article 1)

1. Article 1 [1962]:

Credits may be either

(a) Revocable, or

(b) Irrevocable.

All credits, therefore, should clearly indicate whether they are revocable or irrevocable.

In the absence of such indication the credit shall be deemed to be revocable, even though an expiry date is stipulated.

2. The three sentences of this article are now arranged as paragraphs (a), (b) and (c); in addition, the end of the third sentence which had read "even though an expiry date is stipulated" was deleted.

3. (a) Two replies (German Democratic Republic, National Bank of Czechoslovakia) favoured retention of the basic rule that all credits are revocable unless they are expressly marked as irrevocable; this basic rule was retained by ICC when it revised article 1;

(b) The suggestion by New Zealand that credits should be deemed to be irrevocable when there was no indication whether they are revocable or irrevocable was not retained. On the other hand, ICC accepted the suggestion by New Zealand to delete the last seven words of the third sentence, since revised article 37 requires an expiry date to be given for both revocable and irrevocable credits.

Article 2 (old article 2)

1. Article 2 [1962]:

A revocable credit does not constitute a legally binding undertaking between the bank or banks concerned and the beneficiary because such a credit may be modified or cancelled at any moment without notice to the beneficiary.

When, however, a revocable credit has been transmitted to and made available at a branch or other bank, its modification or cancellation shall become effective only upon receipt of notice thereof by such branch or other bank and shall not affect the right of that branch or other bank to be reimbursed for any payment, acceptance or negotiation made by it prior to receipt of such notice.

2. This article has been reworded by ICC with the aim of simplifying its language and eliminating possible disputes. Thus revised article 2 states that a revocable credit may be modified or cancelled without prior notice to the beneficiary and that it is the issuing bank which is bound to reimburse a bank that paid, accepted or negotiated a revocable credit in compliance with its terms and conditions and any amendments received by that bank at the time of its action preceding notice to it of any other amendment or cancellation of the credit.

3. While the replies were generally agreed that the approach of ICC in revising article 2 was the proper one, the following proposals were made to augment the provisions of this article:

(a) Replace the word "notice" by the word "advice" wherever it appeared in this article (Denmark);

(b) Require notices of amendments or cancellations under this article to be sent by cable (Khmer Republic);

(c) Amend the second sentence to read "such a credit has been transmitted or made available for payment" instead of "and" (Mexico);

(d) Start the second sentence with the words "The cancellation or modification of a revocable credit is ineffective and the issuing bank is bound . . ." (New Zealand);

(e) Provide in article 2 that an issuing or advising bank that paid without reserve, accepted or negotiated a draft under a revocable credit may go against the beneficiary only in cases where he could do so after honouring an irrevocable credit (New Zealand).

4. The suggestion by the USSR that a paying, accepting or negotiating bank should be entitled to reimbursement if it acted in compliance with the terms and conditions of the credit as modified and of which it had notice at the time of its action, was in substance adopted by ICC.

Article 3 (old article 3)

1. Article 3 [1962]:

An irrevocable credit is a definite undertaking on the part of an issuing bank and constitutes the engagement of that bank to the beneficiary or, as the case may be, to the beneficiary and *bona fide* holders of drafts drawn and/or documents presented thereunder, that the provisions for payment, acceptance or negotiation contained in the credit will be duly fulfilled, provided that all the terms and conditions of the credit are complied with.

An irrevocable credit may be advised to a beneficiary through another bank without engagement on the part of that other bank (the advising bank), but when an issuing bank authorizes another bank to confirm its irrevocable credit and the latter does so such confirmation constitutes a definite undertaking on the part of the confirming bank either that the provisions for payment or acceptance will be duly fulfilled or, in the case of a credit available by negotiation of drafts, that the confirming bank will negotiate drafts without recourse to drawer.

Such undertakings can neither be modified nor cancelled without the agreement of all concerned.

2. This article was reorganized and modified in order to delineate more clearly the undertaking of a bank issuing an irrevocable credit, to stress that the undertaking of a bank confirming an irrevocable credit is separate and additional to the undertaking by the issuing bank, to delineate the undertaking of such confirming bank, and to note that partial acceptance of amendments is only effective with the agreement of all parties thereto.

3. In revising article 3, ICC adopted the substance of the following comments:

(a) To clarify that the undertaking of a bank issuing an irrevocable credit is separate and different from the undertaking of another bank that confirms this irrevocable credit (USSR); while the ICC decided not to deal specifically with the case where the bank issuing an irrevocable credit purports, in order to comply with a provision in the contract for an irrevocable confirmed credit, also to confirm it, paragraph (b) of revised article 3 describes confirmation as occurring "when an issuing bank authorizes or requests another bank to confirm its irrevocable credit and the latter does so";

(b) To clarify that partial acceptance of amendments of an irrevocable credit is effective only if all the parties agree to it (Egypt, Hungary); on the other hand, the reply of the German Democratic Republic

expressed the view that the Uniform Customs should not deal with partial acceptances of modifications of irrevocable credits;

(c) To delineate more clearly the precise undertaking by a bank issuing an irrevocable credit as to negotiation without recourse against either the drawer or a negotiating bank or holder in good faith of the beneficiary's draft (New Zealand), acceptance and payment by the drawee at maturity of the draft (Denmark), and acceptance and payment of drafts on the applicant for the credit, another bank or any other person (USSR);

(d) To delineate more clearly the precise undertaking by a bank confirming an irrevocable credit as to serving as a paying or accepting bank, or only as a negotiating bank (Federal Republic of Germany, Hungary), acceptance being accomplished by means of acceptance by the confirming bank (Lebanon), negotiation or acceptance involving the obligation to honour documents drawn on the applicant for the credit or another bank (Denmark, USSR) without recourse against a negotiating bank or holder in good faith of the beneficiary's draft (New Zealand).

4. The following suggestions were not adopted by ICC:

(a) To regulate the effect of silence by a beneficiary regarding a proposed modification of the credit of which he receives notice (Australia, Lebanon); according to Lebanon this should not be viewed as tacit acceptance and that therefore the preference of the beneficiary may be expressed as late as the time of the utilization of the credit;

(b) To consider "revolving credits" (Australia); on the other hand the comment by the German Democratic Republic stated that the Uniform Customs should not be expanded to deal with the special cases of "deferred" or "revolving" credits. (The USSR had suggested that the Uniform Customs should deal with "credits with partial deferment of payments" which are a special type of irrevocable credit used in the USSR.);

(c) To modify the language of article 3 by replacing, whenever they appeared, the phrase "whether against a draft or not" by the phrase "whether against a draft or without presentation of a draft", the word "advise" by the word "notify", and the word "undertaking" by the word "obligation" (Mexico);

(d) To provide that when an irrevocable credit is subject to a subsequent condition to be met by the applicant for the credit, the issuing bank will not be liable on its undertaking if the applicant for the credit fails to satisfy this condition subsequent (Lebanon);

(e) To add a paragraph to the effect that issuing banks and confirming banks may have recourse against the beneficiary of the credit only for fraud of the beneficiary (New Zealand);

(f) To provide that when an irrevocable or confirmed credit permits negotiation of drafts, the issuing or confirming bank's undertaking is deemed to go to the beneficiary and to negotiators and *bona fide* holders of his drafts (New Zealand);

(g) To provide that the credit terms may not require the presentation to the advising bank of a "sight draft

without recourse" drawn by the beneficiary (Federal Republic of Germany);

(h) To require that the advising bank notify the issuing bank within a reasonable time of the rejection by a party of an amendment of the credit, whether in part or in full (Egypt).

Article 4 (old article 4)

1. Article 4 [1962]:

When an issuing bank instructs a bank by cable, telegram or telex to notify a credit and the original letter of credit itself is to be the operative credit instrument, the issuing bank must send the original letter of credit, and any subsequent amendments thereto, to the beneficiary through the notifying bank.

The issuing bank will be responsible for any consequences arising from its failure to follow this procedure.

2. This article was modified to cover all cases where the issuing bank instructs another bank, by cable, telegram or telex, to advise a credit and the mail confirmation of these instructions is to serve as the operative credit instrument (previously it only covered those cases where the original letter of credit was to serve as the operative credit instrument) and to clarify the consequences if the cable, telegram or telex which contains the instructions to the advising bank does not say either "details to follow" or that the mail confirmation is to be the operative credit instrument.

3. The basic principle behind the revision of article 4 was not challenged in the comments, although the reply of the German Democratic Republic noted that it may force some banks to modify their practice.

4. The following suggested modifications of article 4 were not adopted by ICC:

(a) Addition of a provision dealing with the legal position of an advising bank which honours the credit without having received instructions from the issuing bank (USSR);

(b) Required inclusion in the mail confirmation of a statement that "this credit was pre-advised by cable, telegram or telex dated . . . and addressed to . . ." (Lebanon);

(c) Use of the term "ratification" instead of the term "confirmation" in this article (New Zealand).

Article 5 (old article 5)

1. Article 5 [1962]:

When a bank is instructed by cable, telegram or telex to issue, confirm or advise a credit similar in terms to one previously established and which has been the subject of amendments, it shall be understood that the details of the credit being issued, confirmed or advised will be transmitted to the beneficiary excluding the amendments, unless the instructions specify clearly any amendments which are to apply.

2. This article was not modified by ICC.

3. The Secretariat did not receive any comments dealing with this article.

*Article 6 (old article 6)*1. *Article 6 [1962]:*

If incomplete or unclear instructions are received to issue, confirm or advise a credit, the bank requested to act on such instructions may give preliminary notification of the credit to the beneficiary for information only and without responsibility; and in that case the credit will be issued, confirmed or advised only when the necessary information has been received.

2. This article was left substantially unaltered by ICC, with only minor drafting changes in both the English and the French text.

3. ICC did not adopt the proposal by Romania to add the following provision to article 6: "Credits pre-advised by telephone (*les accreditifs préavisés par fil*) and containing only certain details such as the applicant for the credit, credit amount and validity date (*ordonnateur, valeur, validité*) will be considered as informational, which are then only deemed to be opened or advised on receipt of all the necessary instructions." ICC was of the view that the revised text of article 4 met the concern of Romania regarding article 6.

*Article 7 (old article 7)*1. *Article 7 [1962]:*

Banks must examine all documents with reasonable care to ascertain that they appear on their face to be in accordance with the terms and conditions of the credit.

2. In order to define more precisely the obligation of banks to verify that all documents comply with the terms and conditions of the credit, the following second sentence was added by ICC to this article: "Documents which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in accordance with the terms and conditions of the credit."

3. The above addition to article 7 was supported by the German Democratic Republic and Luxembourg, and opposed by the National Bank of Czechoslovakia and the USSR.

*Article 8 (old article 8)*1. *Article 8 [1962]:*

In documentary credit operations all parties concerned deal in documents and not in goods.

Payment, acceptance or negotiation against documents which appear on their face to be in accordance with the terms and conditions of a credit by a bank authorized to do so, binds the party giving the authorization to take up the documents and reimburse the bank which has effected the payment, acceptance or negotiation.

If, upon receipt of the documents, the issuing bank considers that they appear on their face not to be in accordance with the terms and conditions of the credit, that bank must determine, on the basis of the documents alone, whether to claim that payment, acceptance or negotiation was not affected in accordance with the terms and conditions of the credit.

If such claim is to be made, notice to that effect, stating the reasons therefor, must be given by cable or other expeditious means to the bank from which the documents have been received and such notice must state that the documents are being held at the disposal of such bank or are being returned thereto. The issuing bank shall have a reasonable time to examine the documents.

2. This article was restructured with a view towards making the rules contained therein more precise and pertinent to the current practice of taking up documents "under a reserve or against a guarantee". The main substantive modifications of this article are the following:

(a) Article 8 is now arranged in seven paragraphs;

(b) Paragraph (d) contains the rule found in the 1962 version of article 8 that "the issuing bank shall have a reasonable time to examine the documents", and adds a rule to the effect that during this period the issuing bank must also decide whether to claim that payment, acceptance or negotiation was against documents that did not comply with the terms and conditions of the credit;

(c) Paragraph (e) retains the language of former paragraph 4 of the 1962 version except for the last sentence (which is now in paragraph (d)), and adds the requirement that notice of any claim by the issuing bank that the documents did not comply with the terms and conditions of the credit be transmitted to the remitting bank "without delay";

(d) Paragraph (f) contains a new provision to the effect that an issuing bank which does not return the documents or hold them at the disposal of the remitting bank shall be precluded from claiming that the documents do not comply with the terms and conditions of the credit;

(e) Paragraph (g) provides that payment, negotiation or acceptance by a remitting bank under reserve or against a guarantee (due to some irregularity in the documents presented) shall not relieve the issuing bank from its obligations under this article.

3. A number of comments, such as those of Hungary, Kenya, the Republic of Viet-Nam, South Africa and the USSR, suggested that the revised "Uniform Customs and Practice" should deal with the legal position of the parties where documents are negotiated by a transmitting bank under a reserve, guarantee or indemnity. The thrust of this suggestion was met by ICC by adding paragraph (g) to article 8.

4. An earlier draft version of paragraph (c) included a clause to the effect that if the issuing bank considered that the documents on their face were not in accordance with the terms of the credit, that bank had to decide, "if necessary after having consulted the applicant for the credit", whether to challenge as unauthorized a payment, acceptance or negotiation made under that credit. The comments of the National Bank of Czechoslovakia and Luxembourg opposed the addition to paragraph (c) of such a provision authorizing the issuing bank to consult with the applicant for the credit before deciding whether to reject the documents as not conforming to the credit, arguing that this would be a deviation from the general principle that in documentary credit operations all parties only dealt in docu-

ments. On the other hand, the German Democratic Republic expressly, the Association of Banks in Malaysia-Singapore and New Zealand by implication, favoured retention of the above-mentioned clause. ICC decided not to add to paragraph (c) the phrase "if necessary after having consulted the applicant for the credit."

5. With respect to the time available to an issuing bank for examination of the documents under paragraph (d), the Central Bank of Jordan (if period is at least three weeks), the Association of Banks in Malaysia-Singapore, Mexico (reply of 12 October 1970), New Zealand, the Philippines and South Africa favoured a definite, fixed period of a specified number of days. However, the German Democratic Republic, Japan, Kenya, Bank Negara of Malaysia, and Mexico (reply of 14 June 1973) supported maintenance of a time-limit identified in terms of "a reasonable time". ICC decided that paragraph (c) should provide that the issuing bank has "a reasonable time" to examine the documents.

6. Under an earlier formulation of paragraph (d), the issuing bank was required to notify the remitting bank "at once". After considering a proposal by Iraq that the notification by the issuing bank occur "within a reasonable time", ICC decided to require that such notification be given "without delay".

7. An early draft version of paragraph (g) included language within brackets to the effect that the issuing bank was not authorized to inform the applicant for the credit that the remitting bank paid, accepted or negotiated documents under reserve or against a guarantee. The comments of the National Bank of Czechoslovakia, the German Democratic Republic, the Central Bank of Jordan, Bank Negara of Malaysia, the Association of Banks in Malaysia-Singapore, New Zealand, and Mexico proposed the deletion of this bracketed language. In fact, Bank Negara of Malaysia favoured the addition of a clause expressly permitting banks at their discretion to inform the applicant for the credit of any reserve or guarantee, and Mexico expressed its support for a clause mandating such notification by the issuing bank to the applicant for the credit. The ICC decided to delete the bracketed language.

8. Based on comments by the National Bank of Czechoslovakia and Hungary concerning the legal effect of a reservation or guarantee by the transmitting bank due to its having observed some irregularity of the documents, ICC added the following explanatory sentence to paragraph (g): "Such guarantee or reserve concerns only the relations between the remitting bank and the beneficiary."

9. The following proposals concerning article 8 were not adopted by ICC:

(a) To add a reserve clause to paragraph (a) to the effect that the parties are not considered to be dealing only in documents in cases where it was discovered that, due to deceit, the goods actually delivered differed from those paid for on the basis of their description in documents under the credit (Nigeria);

(b) To deal with the disposition of the documents and the goods where the documents are rejected by the issuing bank, stressing that they are then charged to the remitting bank (Romania, as to the documents; Khmer Republic, Republic of Viet-Nam, as to the goods);

(c) To provide a time-limit for the conditional status of a payment, acceptance or negotiation under a reserve or guarantee (USSR);

(d) To distinguish cases where the remitting bank notifies the issuing bank of an irregularity in the documents from cases where the irregularity is only discovered by the issuing bank (Central Bank of Jordan);

(e) In paragraph (g), to use the term "indemnity" rather than "guarantee", and to add that if the issuing bank decides not to accept irregular documents which were paid, accepted or negotiated by a remitting bank, the issuing bank must notify that bank promptly (New Zealand; however, this seems to be covered already by the general rule in paragraph (e) as to notification of a remitting bank);

(f) To deal in paragraph (g) with the bank practice of making guarantees valid for a period of between 3 and 6 months (German Democratic Republic);

(g) To require that the issuing bank notify the remitting bank when it begins examining the documents and thus the period in paragraph (d) begins to run (Association of Banks in Malaysia-Singapore).

Article 9 (old article 9)

1. Article 9 [1962]:

Banks assume no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any documents, or for the general and/or particular conditions stipulated in the documents or superimposed thereon; nor do they assume any liability or responsibility for the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods represented thereby, or for the good faith or acts and/or omissions, solvency, performance or standing of the consignor, the carriers or the insurers of the goods or any other person whomsoever.

2. This article was not modified by ICC.

3. The proposal of the USSR that this article deal with notations on documents to the effect that unloading shall be at the expense of the purchaser or of the carrier was accepted by ICC; however, ICC believed that such a provision should be incorporated in revised article 16 rather than in article 9.

4. The following suggestions were not retained by ICC:

(a) To mention specifically that banks assume no responsibility for the acts or good faith of forwarding agents and/or combined transport operators (Hungary; this seems covered by the phrase in article 9 "or any other person whomsoever");

(b) At the end of the article, to replace the expression "any other person whomsoever" by the phrase "any [other] person who issued the respective documents" (National Bank of Czechoslovakia);

(c) To provide that the article did not apply "in cases where the bank is at fault" (Japan);

(d) To provide that the article did not apply if it was discovered that due to deceit the goods actually delivered differed from those that were paid for according to their description in documents under the credit (Nigeria).

*Article 10 (old article 10)*1. *Article 10* [1962]:

Banks assume no liability or responsibility for the consequences arising out of delay and/or loss in transit of any messages, letters or documents, or for delay, mutilation or other errors arising in the transmission of cables, telegrams or telex, or for errors in translation or interpretation of technical terms, and banks reserve the right to transmit credit terms without translating them.

2. ICC only made minor changes of a drafting nature in this article.

3. The following proposals were not adopted by ICC:

(a) To provide that the risk of delay or loss in transit of messages and documents, or of errors in the transmission of cables, shall be borne by the applicant for the credit (Hungary, USSR);

(b) To provide that a bank which was at fault will not be exempted from liability under this article (Japan);

(c) To consider a provision regarding the simultaneous transmission in one shipment of original and duplicate documents, as this increases the likelihood that no set of documents will arrive (Federal Republic of Germany).

*Article 11 (old article 11)*1. *Article 11* [1962]:

Banks assume no liability or responsibility for consequences arising out of the interruption of their business by strikes, lock-outs, riots, civil commotions, insurrections, wars, acts of God or any other causes beyond their control. Unless specifically authorized, banks will not effect payment, acceptance or negotiation after expiration under credits expiring during such interruption of business.

2. ICC adopted a new wording for this article, under which banks are also not responsible for consequences that stem from social conflicts within their respective places of business.

3. ICC did not retain the suggestion by Japan that a bank which was at fault should not be exempted from liability under this article.

*Article 12 (old article 12)*1. *Article 12* [1962]:

Banks utilizing the services of another bank for the purpose of giving effect to the instructions of the applicant for the credit do so for the account and at the risk of the latter.

They assume no liability or responsibility should the instructions they transmit not be carried out, even if they have themselves taken the initiative in the choice of such other bank.

The applicant for the credit shall be bound by and liable to indemnify the banks against all obligations and responsibilities imposed by foreign laws and usages.

2. ICC only made minor changes of a drafting nature in this article.

3. ICC did not adopt the proposal by Japan and Mexico that a bank utilizing the services of another bank should not be exempted from liability under this article, if there was fault or negligence in the selection of that other bank.

New article 13

1. ICC added this new article, clarifying that a paying or negotiating bank authorized to claim reimbursement from a third bank nominated by the issuing bank shall not be required to confirm to the third bank that payment or negotiation had been effected in accordance with the terms and conditions of the credit.

2. Originally proposed by ICC as a new paragraph (d) in article 12, the above proposal, while receiving some support (National Bank of Czechoslovakia, German Democratic Republic), was also opposed in a number of replies (Iraq, Jordan, Bank Negara of Malaysia) because it was feared that the provision would preclude the issuing bank from asking the paying or negotiating bank to confirm to the third bank that all the terms and conditions of the credit have been complied with. (It should be noted, however, that under paragraph (a) in the general provisions and definitions, the parties are free to agree on credit terms and conditions differing from those that would otherwise govern the credit under "Uniform Customs and Practice".)

*Article 14 (old article 13)*1. *Article 13* [1962]:

All instructions to issue, confirm or advise a credit must state precisely the documents against which payment, acceptance or negotiation is to be made.

Terms such as "first class", "well known", "qualified" and the like shall not be used to describe the issuers of any documents called for under credits and if they are incorporated in the credit terms banks will accept documents as presented without further responsibility on their part.

2. ICC only made minor changes of a drafting nature in paragraph (b) of this article. The words, at the end of paragraph 2 of article 13 of the 1962 version, "as presented without further responsibility on their part" were replaced by the words "as rendered".

3. The following suggestions concerning this article were not accepted by ICC:

(a) To settle whether documents bearing signatures by mechanical means may be accepted by banks (Federal Republic of Germany);

(b) To modify paragraph (b) so as to authorize a bank to accept such documents as tendered regarding the issuer, but to refuse them if their content in other respects deviated from the terms and conditions of the credit (Central Bank of Jordan).

*Article 15 (old article 14)*1. *Article 14* [1962]:

Except as stated in article 18, the date of the Bill of Lading, or date indicated in the reception stamp or by notation on any other document evidencing shipment or dispatch, will be taken in each case to be the date of shipment or dispatch of the goods.

2. This article was amended to extend to the date of taking charge of the goods indicated on a document evidencing such taking charge.

3. The above amendment followed a suggestion by the Federal Republic of Germany that this article be modified to prevent banks from demanding a notation that shipment has been effected when the credit only called for a document certifying that the goods have been taken over.

Article 16 (old article 15)

1. Article 15 [1962]:

If the words "freight paid" or "freight prepaid" appear by stamp or otherwise on documents evidencing shipment or dispatch they will be accepted as constituting evidence of the payment of freight.

If the words "freight prepayable" or "freight to be prepaid" or words of similar effect appear by stamp or otherwise on such documents they will not be accepted as constituting evidence of the payment of freight.

Unless otherwise specified in the credit or inconsistent with any of the documents presented under the credit, banks may honour documents stating that freight or transportation charges are payable on delivery.

2. ICC made the following substantive modifications in this article:

(a) Paragraph (a) was made more general by the replacement of the expression "if the words 'freight paid' or 'freight prepaid' appear . . ." by the phrase "if words clearly indicating payment or prepayment of freight, however named or described, appear . . .";

(b) Paragraph (c) was amended so that now banks "will accept" (rather than "may honour") documents stating that freight or transportation charges are payable on delivery under the conditions given in the paragraph;

(c) A new paragraph (d) was added to the effect that banks "will accept" shipping documents referring to expenses additional to the freight charges (e.g. loading, unloading) unless this is specifically prohibited by the credit terms. (This addition to article 16 was advocated in comments by the USSR and the Federal Republic of Germany, to prevent banks from rejecting or only accepting under reserved documents referring to such expenses.)

3. The thrust of a suggestion by Australia to cover in article 16 the words "basic service charge", often used to denote ocean freight, was met by ICC when it widened the scope of paragraph (a) of this article to extend to "words clearly indicating payment or prepayment of freight, however named or described".

New article 17

1. ICC added this new article in order to clarify that banks are to accept shipping documents claused "shipper's load and count" or "said by shipper to contain", unless otherwise specified in the credit.

2. This new article responds to the question posed by Lebanon and the Federal Republic of Germany whether a clause on the shipping document whereby

the carrier disclaims knowledge of the "contents, weight, measurements, quality or technical specifications of the goods", or a "said to contain" clause, renders a shipping document unclean, by stating that banks are to accept such a document unless the credit terms provide otherwise. (Such clauses are frequent and unavoidable when goods are carried in sealed containers packed by the shipper.)

Article 18 (old article 16)

1. Article 16 [1962]:

A clean shipping document is one which bears no superimposed clause or notation which expressly declares a defective condition of the goods and/or the packaging.

Banks will refuse shipping documents bearing such clauses or notations unless the credit expressly states clauses or notations which may be accepted.

2. ICC only made minor drafting changes in this article.

3. ICC did not adopt the following proposals:

(a) To state that clauses such as "vessel not responsible for condition of barrels, cases, other packages" or "vessel not responsible for insufficient packing" render a shipping document "unclean" (Lebanon);

(b) To note that a carrier cannot judge the condition of goods in sealed containers not packed by him (Sweden).

Article 19 (old article 17)

1. Article 17 [1962]:

Unless specifically authorized in the credit, Bills of Lading of the following nature will be rejected:

(a) Bills of Lading issued by forwarding agents.

(b) Bills of Lading which are issued under and are subject to the conditions of a Charter-Party.

(c) Bills of Lading covering shipment by sailing vessels.

However, unless otherwise specified in the credit, Bills of Lading of the following nature will be accepted:

(a) "Port" or "Custody" Bills of Lading for shipments of cotton from the United States of America.

(b) "Through" Bills of Lading issued by steamship companies or their agents even though they cover several modes of transport.

2. ICC made the following substantive modifications in this article:

(a) Clarified that if a particular bill of lading fell within both paragraphs (a) and (b) of this article, paragraph (a) would be held to govern so that such a bill of lading would be rejected unless specifically authorized in the credit;

(b) Eliminated the special rule regarding acceptability of "port" or "custody" bills of lading for cotton shipments from the United States;

(c) Added a new subparagraph (ii) to paragraph (b) of this article defining Short Form Bills of Lading

and stating that they were to be accepted unless otherwise specified in the credit;

(d) Added a new subparagraph (iii) to paragraph (b) of this article, which establishes that bills of lading issued by shipping companies covering unitized cargoes (e.g. in containers) were to be accepted unless otherwise specified in the credit.

3. The comments of Governments and banks were largely in favour of the changes made in this article:

(a) The German Democratic Republic, Lebanon and Luxembourg supported deletion of the special rule contained in "Uniform Customs (1962)" dealing with the rare cases of "port" or "custody" bills of lading for cotton shipments from the USA;

(b) The National Bank of Czechoslovakia, the German Democratic Republic and the Federal Republic of Germany favoured a general rule making standard Short Form Bills of Lading acceptable. On the other hand, Lebanon would have preferred a rule making such bills of lading unacceptable unless expressly authorized in the credit;

(c) Australia, the National Bank of Czechoslovakia, the Federal Republic of Germany, Japan, the Association of Banks in Malaysia-Singapore, the Bank of Mauritius, Singapore, Sweden and the USSR all favoured the addition of a provision dealing with bills of lading issued in connexion with the transport of goods in containers. It was suggested by the Association of Banks in Malaysia-Singapore that bills of lading issued by container operators, and by Sweden that those issued by forwarding agents functioning as combined transport operators, be acceptable; however, those suggestions were not adopted by ICC.

4. The following proposals to amend this article were not accepted by ICC:

(a) To make bills of lading issued by forwarding agents generally acceptable (proposed by Hungary, opposed by the Republic of Viet-Nam), or at least when they bore an on-board endorsement (Nigeria);

(b) To define more clearly what constitutes a "through" bill of lading (proposed by Australia, Hungary, opposed by the German Democratic Republic);

(c) To deal with the acceptability of "liner" bills of lading (proposed by Cyprus, opposed by the German Democratic Republic);

(d) To modify the rule stating that bills of lading subject to the terms of a charter party were generally not acceptable (Romania: limit the rule to deliveries under C and F, CIF terms; Finland: make bills of lading dealing with carriage of timber pursuant to charter parties acceptable); the German Democratic Republic favoured retention of this provision as it appeared in the 1962 Uniform Customs;

(e) To deal with the signature on bills of lading (proposed by Romania, opposed by the German Democratic Republic).

5. Costa Rica was of the view that there was no necessity to amend articles 19, 20 and 22, since each expressly permitted the parties to authorize specifically in the credit the acceptance of bills of lading different from those that would otherwise be required under these articles.

Article 20 (old article 18)

1. Article 18 [1962]:

Unless otherwise specified in the credit, Bills of Lading must show that the goods are loaded on board.

Loading on board may be evidenced by an on board Bill of Lading or by means of a notation to that effect dated and signed or initialled by the carrier or his agent, and the date of this notation shall be regarded as the date of loading on board and shipment.

2. ICC made the following substantive modifications in this article:

(a) The revised text clarifies that, unless specified differently in the credit, either "on-board" or "shipped" bills of lading are acceptable and stresses that the goods must be loaded on board or shipped "on a named vessel";

(b) The revised text also notes that loading on board or shipment on a named vessel may be evidenced either by some wording on a bill of lading indicating this fact or by a notation to this effect on the bill of lading.

3. A number of comments (the German Democratic Republic, Hungary, Lebanon, the Association of Banks in Malaysia-Singapore, Nigeria) supported an amendment of this article making it clear that a later clear notation "shipped on board X vessel" by the ocean carrier on a bill of lading originally issued inland, or by a forwarding agent, or as a "received-for-shipment" bill, makes such bill of lading fully acceptable under the revised "Uniform Customs" unless there is a specific provision to the contrary in the credit; the revision of this article by ICC incorporates amendments bringing about this result.

4. In response to comments by Lebanon and New Zealand, ICC did not retain language in an earlier draft revision of this article which had stated that loading on board or shipment on a named vessel could be evidenced on a Bill of Lading by "any wording customarily used to indicate" this (as it raised problems as to what is customary at what port and how a bank would know these customs); instead, ICC substituted the more general expression "wording indicating", thus omitting any reference to custom.

5. ICC did not accept the suggestion of the Federal Republic of Germany and Sweden that for purposes of this article a notation to the effect that the ocean carrier has taken over the goods (received-for-shipment) should be sufficient.

Article 21 (old article 19)

1. Article 19 [1962]:

Unless trans-shipment is prohibited by the terms of the credit, Bills of Lading will be accepted which indicate that the goods will be trans-shipped en route, provided the entire voyage is covered by one and the same Bill of Lading.

Bills of Lading incorporating printed clauses stating that the carriers have the right to trans-ship will be accepted notwithstanding the fact that the credit prohibits trans-shipment.

2. This article was not modified by ICC.

3. ICC did not adopt the following suggestions:

(a) A proposal by Cyprus to clarify that where a credit calls for "direct shipment" or "shipment without trans-shipment", it was not necessary for compliance that the bill of lading include a specific clause prohibiting trans-shipment;

(b) A proposal by Lebanon to add the following words at the end of paragraph (a) of this article "... provided the insurance in case of a C and F sale also covers all risks of unlimited trans-shipment", since this was already covered by revised article 7 requiring consistency of the documents.

(c) A proposal by Iraq that this article should state clearly that a bill of lading showing, other than by a printed trans-shipment clause, that there was or will be trans-shipment where this is prohibited by the credit, shall be unacceptable (article 21, paragraph (b) already seems to provide this result).

Article 22 (old article 20)

1. *Article 20 [1962]:*

Banks will refuse a Bill of Lading showing the stowage of goods on deck, unless specifically authorized in the credit.

2. ICC added a new paragraph (b) to this article (analogous to paragraph (b) of new article 21) to the effect that banks are to accept a bill of lading containing a clause permitting on-deck carriage, provided the bill does not state specifically that the goods are loaded on deck.

3. ICC did not adopt the suggestion made by Australia, the German Democratic Republic, the Federal Republic of Germany, the Association of Banks in Malaysia-Singapore, Nigeria and Sweden that this article include a special provision permitting the carriage on deck of goods packed in containers. Similarly, ICC did not accept the recommendation by Finland and the Association of Banks in Malaysia-Singapore that bills of lading evidencing the carriage on deck of bulk cargo customarily carried in that manner, such as timber, be acceptable under this article.

Deletion of old article 21

1. *Article 21 [1962]:*

Banks may require the name of the beneficiary to appear on the Bill of Lading as shipper or endorser, unless the terms of the credit provide otherwise.

2. ICC decided to delete old article 21 which had given banks the option of requiring, unless the credit terms provided otherwise, that the name of the beneficiary appear on the bill of lading as shipper or endorser.

3. All the comments received expressed dissatisfaction with the 1962 formulation of this article, which gave banks full discretion whether to accept bills of lading which did not include the name of the beneficiary. The National Bank of Czechoslovakia, the German Democratic Republic and the Federal Republic of Germany favoured deletion of this article, since, whenever desired, such a provision could be included in the terms of the credit. Australia and Leb-

anon proposed modification of the article to limit the option to the discretion of the negotiating bank only. New Zealand favoured retention of old article 21.

New article 23

1. ICC added this new article in order to deal with the acceptability of combined transport documents.

2. It had been suggested by Australia and the Federal Republic of Germany that the revision of "Uniform Customs" as to the acceptability of documents evidencing combined transport should await adoption of the Combined Transport Convention (TCM), and that then such transport be dealt with in separate provisions.

Article 24 (old article 22)

1. *Article 22 [1962]:*

Banks will consider a Railway or Inland Waterway Bill of Lading or Consignment Note, Counterfoil Waybill, Postal Receipt, Certificate of Mailing, Air Mail Receipt, Air Transportation Waybill, Air Consignment Note or Air Receipt, Trucking Company Bill of Lading or any other similar document as regular when such document bears the reception stamp of the carrier or issuer, or when it bears a signature.

2. Following a proposal by Japan, ICC modified this article by substituting the term "Air Waybill" for the term "Air Transportation Waybill" and clarifying that, in order to be considered as regular, the shipping documents mentioned in the article must bear either the stamp of the carrier or his agent or a signature purporting to be that of the carrier or his agent.

3. By limiting "regular" documents to those bearing the stamp of the carrier or his agent or purported to be signed by the carrier or his agent, ICC adopted the suggestion of the National Bank of Czechoslovakia (and made earlier by the USA) that documents issued by forwarders not be accepted.

4. The following proposals were not accepted by ICC:

(a) To consider requiring that reception stamps also be signed (National Bank of Czechoslovakia, Lebanon);

(b) To require an indication of the consignee (Federal Republic of Germany, Iraq);

(c) To state when banks may accept duplicates of documents (National Bank of Czechoslovakia);

(d) To add delivery orders and "documents from other modern modes of transport" to the documents listed in this article (Hungary).

Article 25 (old article 23)

1. *Article 23 [1962]:*

When a credit calls for an attestation or certification of weight in the case of transport other than by sea, banks will accept a weight stamp or any other official indication of weight on the shipping documents unless the credit calls for a separate or independent certificate of weight.

2. ICC amended this article, making it clear that where the credit terms require a certification of weight,

banks must accept a "declaration of weight superimposed by the carrier on the shipping document" (thus deleting the previous, vague standard of "any other official indication of weight on the shipping document"), unless the credit called for an independent certificate of weight.

3. None of the comments received dealt with this article.

Article 26 (old article 24)

1. Article 24 [1962]:

Insurance documents must be as specifically described in the credit, and must be issued and/or signed by insurance companies or their agents or by underwriters.

Cover notes issued by brokers will not be accepted, unless specifically authorized in the credit.

2. Under this article as revised, the insurance documents must be "as specified in the credit" (no longer "as specifically described in the credit"), in recognition of the fact that the credits do not always "specifically describe" the insurance documents. (This modification was favoured by the National Bank of Czechoslovakia and the German Democratic Republic.)

3. The following suggestions were not accepted by ICC:

(a) To consider the special problems of insuring goods carried in containers from the warehouse where the goods were packed in the container (Association of Banks in Malaysia-Singapore, Sweden);

(b) To clarify whether an insurance policy may be presented where the credit calls for an insurance certificate, and vice versa (Federal Republic of Germany, New Zealand);

(c) To consider whether to require that, for CIF deliveries, the insurance certificate be marked "premium paid" (Federal Republic of Germany).

Article 27 (old article 25)

1. Article 25 [1962]:

Unless otherwise specified in the credit, banks may refuse any insurance documents presented if they bear a date later than the date of shipment as evidenced by the shipping documents.

2. ICC made the following substantive changes in this article:

(a) Banks are now to accept insurance documents issued later than the date of shipment or dispatch if these documents establish that the cover is effective at the latest from the date of shipment or dispatch, (under the 1962 provision banks had an option whether or not to accept);

(b) The article now extends to insurance documents covering combined transport, but in that case it requires that the cover be effective as from "the date of taking the goods in charge".

3. The amendment of this article, requiring banks to accept all insurance documents that show that coverage is effective at the latest from the date of shipment, was supported in the comments of Australia, the National Bank of Czechoslovakia, the German Demo-

cratic Republic, the Federal Republic of Germany, Hungary, Kuwait, Lebanon and South Africa.

4. The comment of the National Bank of Czechoslovakia had suggested that special provision be made for the commencement of insurance cover for combined transport.

Article 28 (old article 26)

1. Article 26 [1962]:

Unless otherwise specified in the credit, the insurance document must be expressed in the same currency as the credit.

The minimum amount for which insurance must be effected is the CIF value of the goods concerned. However, when the CIF value of the goods cannot be determined from the documents on their face, banks will accept as such minimum amount the amount of the drawing under the credit or the amount of the relative commercial invoice, whichever is the greater.

2. ICC did not change the text of this article.

3. No comments were received dealing with this article.

Article 29 (old article 27)

1. Article 27 [1962]:

Credits must expressly state the type of insurance required and, if any, the additional risks which are to be covered. Imprecise terms such as "usual risks" or "customary risks" shall not be used.

Failing specific instructions, banks will accept insurance cover as tendered.

2. ICC modified this article by noting that credits "should" (instead of "must", as previously) state the type of insurance required and that certain imprecise terms "should not" (instead of "must not") be used. ICC also clarified that banks are to accept insurance documents even if they include such imprecise terms.

3. No comments were received dealing with this article.

Article 30 (old article 28)

1. Article 28 [1962]:

When a credit stipulates "insurance against all risks", banks will accept an insurance document which contains any "all risks" notation or clause, and will assume no responsibility if any particular risk is not covered.

2. Except for changing the first word from "when" to "where", ICC did not modify the language of this article.

3. No comments were received dealing with this article.

Article 31 (old article 29)

1. Article 29 [1962]:

Banks may accept an insurance document which indicates that the cover is subject to a franchise, unless it is specifically stated in the credit that the insurance must be issued irrespective of percentage.

2. ICC modified the provisions of this article in the following respects:

(a) Removed the option that banks had previously of accepting or not insurance documents falling within the purview of this article;

(b) Added that insurance cover subject to "an excess (deductible)" was to be accepted by banks.

3. The removal of the option banks had enjoyed under this article was supported by the National Bank of Czechoslovakia and the Federal Republic of Germany.

Article 32 (old article 30)

1. *Article 30 [1962]:*

Unless otherwise specified in the credit, commercial invoices must be made out in the name of the applicant for the credit.

Unless otherwise specified in the credit, banks may refuse invoices issued for amounts in excess of the amount permitted by the credit.

The description of the goods in the commercial invoice must correspond with the description in the credit. In the remaining documents the goods may be described in general terms.

2. ICC modified this article by noting that in documents other than the commercial invoice the goods may be described in general terms as long as those terms were not inconsistent with the description of the goods in the credit.

3. The concern expressed in the comments of the National Bank of Czechoslovakia and the USSR about the vagueness of the expression "general terms" in paragraph (c) was met by the addition of the proviso that the description of the goods "in general terms" in documents other than the commercial invoice had to be consistent with the description of the goods in the credit, and by the revision of article 7 which now requires that the documents presented not be inconsistent.

4. The following suggestions were not adopted by ICC:

(a) To require that the commercial invoice be made out in the currency of the credit (Lebanon);

(b) To require, rather than to permit, banks to refuse commercial invoices for amounts in excess of the credit amounts (National Bank of Czechoslovakia, Federal Republic of Germany);

(c) To clarify the legal position of banks where the credit only covers part of the purchase price and the documents are sent by the remitting bank with instructions not to release them to the buyer unless further conditions not mentioned in the credit are met (e.g. payment of the rest of the purchase price) (National Bank of Czechoslovakia);

(d) To amend paragraph (a) to require that the commercial invoice be made out in the name of the person for whose account the credit is issued (Federal Republic of Germany).

Article 33 (old article 31)

1. *Article 31 [1962]:*

When other documents are required, such as Warehouse Receipts, Delivery Orders, Consular In-

voices, Certificates of Origin, of Weight, of Quality or of Analysis, etc., without further definition, banks may accept such documents as tendered, without responsibility on their part.

2. ICC eliminated the option banks had previously as to whether to accept the documents mentioned in this article; under the article as revised "banks will accept such documents as tendered".

3. The following suggestions concerning this article were not adopted by ICC:

(a) To clarify that acceptability of the documents under this article did not require that they contain the same description of the goods as the one which appeared in the credit (Lebanon);

(b) To provide that these documents were to be accepted unless on their face they were not in accordance with the terms of the credit (National Bank of Czechoslovakia);

(c) To provide guidelines for certificates required by credits and assure that they serve some object (New Zealand);

(d) To clarify whether "Certificates of Origin" refer only to official documents (Federal Republic of Germany).

Article 34 (old article 32)

1. *Article 32 [1962]:*

The words "about", "circa" or similar expressions are to be construed as allowing a difference not to exceed 10 per cent more or 10 per cent less, applicable according to their place in the instructions, to the amount of the credit or to the quantity or unit price of the goods.

Unless a credit stipulates that the quantity of the goods specified must not be exceeded or reduced, a tolerance of 3 per cent more or 3 per cent less will be permissible, always provided that the total amount of the drawings does not exceed the amount of the credit. This tolerance does not apply when the credit specifies quantity in terms of packing units or containers or individual items.

2. ICC only made changes of a drafting nature in this article.

3. In its comment the USSR stated that it assumed that as soon as "Uniform Customs" incorporate a definition of "containerized transport", quantity specified in the credit in terms of containers would be added to those now listed in the second sentence of paragraph (b) as not permitting a 3 per cent tolerance.

4. A number of the comments were concerned with the case where the credit terms exclude partial shipments but do not specify the quantity of the goods and wanted to provide for such cases in article 34. In the view of Lebanon, the one shipment may be for any amount within the stated maximum value of the credit, while Kuwait favoured a rule that the one shipment should be for at least 90 per cent of the total amount of the credit and the Central Bank of Jordan that it be for at least 97 per cent.

Article 35 (old article 33)

1. *Article 33 [1962]:*

Partial shipments are allowed, unless the credit specifically states otherwise.

Shipments made on the same ship and for the same voyage, even if the Bills of Lading evidencing shipment "on board" bear different dates, will not be regarded as partial shipments.

2. ICC amended this article by adding a provision to the effect that shipments on the same ship and for the same voyage will not be deemed partial shipments even if the bills of lading indicate different ports of shipment.

3. The above amendment of article 35 was supported by the comments of the National Bank of Czechoslovakia, the German Democratic Republic and Hungary.

4. The following suggestions were not accepted by ICC:

(a) To provide that documents showing that goods under a credit only filled part of a container which then was filled by other consignments would be unacceptable (Association of Banks in Malaysia-Singapore, Nigeria);

(b) To extend paragraph (b) of this article to "received-for-shipment" bills of lading (Australia);

(c) To specify what documents other than bills of lading may cover only part of a shipment without causing the shipment to be deemed a number of partial shipments (Mexico);

(d) To require each transport document to indicate the name of the carrying vessel (Costa Rica);

(e) To provide that shipments on the same train, although under more than one waybill, are not deemed partial shipments (Romania);

(f) To deal with the effect of the various bills of lading covering one shipment showing different ports of destination (Federal Republic of Germany).

Article 36 (old article 34)

1. *Article 34 [1962]:*

If shipment by instalments within given periods is stipulated and any instalment is not shipped within the period allowed for that instalment, the credit ceases to be available for that or any subsequent instalment, unless otherwise specified in the credit.

2. ICC did not modify the text of this article.

3. ICC did not accept the proposal of Lebanon to provide in this article for the special case where the applicant for the credit accepts documents covering a partial shipment, although under the credit partial shipments are forbidden.

Article 37 (old article 35)

1. *Article 35 [1962]:*

All irrevocable credits must stipulate an expiry date for presentation of documents for payment, acceptance or negotiation, notwithstanding the indication of a latest date for shipment.

2. ICC decided to require in this article that "all credits, whether revocable or irrevocable, must stipulate an expiry date". ICC decided further that the general rule of revised article 6 (on incomplete or

unclear instructions) would apply to credits which did not stipulate an expiry date.

3. As a consequence of the above decisions, ICC did not adopt proposals by Lebanon and New Zealand that this article provide that in the absence of a stipulated expiry date, the latest date for shipment should determine the expiry date. Several comments (National Bank of Czechoslovakia, German Democratic Republic, Khmer Republic, Lebanon) supported the decisions taken by ICC regarding this article and the correlative deletion of old article 38 (which had dealt with the expiry date for revocable credits in the absence of an express stipulation).

4. The USSR noted that in practice the expiry date for credits concerns the presentation of the documents not to the paying, accepting or negotiating bank, but to the bank in the beneficiary's country as it is there that the beneficiary will be paid; it suggested that ICC consider this point.

Article 38 (old article 36)

1. *Article 36 [1962]:*

The words "to", "until", "till" and words of similar import applying to the expiry date for presentation of documents for payment, acceptance or negotiation, or to the stipulated latest date for shipment, will be understood to include the date mentioned.

2. ICC only made one minor change of a drafting nature in this article.

3. None of the comments received dealt with this article.

Article 39 (old article 37)

1. *Article 37 [1962]:*

When the stipulated expiry date falls on a day on which banks are closed for reasons other than those mentioned in article 11, the period of validity will be extended until the first following business day.

This does not apply to the date for shipment which, if stipulated, must be respected.

Banks paying, accepting or negotiating on such extended expiry date must add to the documents their certification in the following wording:

"Presented for payment (or acceptance or negotiation as the case may be) within the expiry date extended in accordance with article 37 of the Uniform Customs."

2. ICC amended this article in order to make it clear that the latest date for shipment could not be extended under this article and that shipping documents dated later than the latest date for shipment (whether stipulated or based on the expiry date of the credit) would not be accepted; however, documents other than shipping documents are to be accepted even if bearing the date of the extended expiry date provided under the terms of this article.

3. ICC did not adopt the proposal by Japan to provide that if the latest date for shipment fell on a holiday during which there were no services at the port, the latest date for shipment would be the next working day.

4. The National Bank of Czechoslovakia suggested that in this article "non-working days" should be defined in a positive manner.

Deletion of old article 38

1. *Article 38 [1962]:*

The validity of a revocable credit, if no date is stipulated, will be considered to have expired six months from the date of the notification sent to the beneficiary by the bank with which the credit is available.

2. This article was deleted by ICC, based on its decision to require in new article 37 that all credits bear an expiry date.

Deletion of old article 39

1. *Article 39 [1962]:*

Unless otherwise expressly stated, any extension of the stipulated latest date for shipment shall extend for an equal period the validity of the credit.

Where a credit stipulates a latest date for shipment, an extension of the period of validity shall not extend the period permitted for shipment unless otherwise expressly stated.

2. This article, dealing with the effect of an extension of the stipulated latest date for shipment on the expiry date of the credit and vice versa, was deleted by ICC.

3. A number of comments had noted the serious difficulties in practice that had arisen under this article (National Bank of Czechoslovakia, German Democratic Republic, Federal Republic of Germany, Hungary, Romania) and offered various suggestions for its clarification; however, no objection was raised when ICC proposed deletion of this article on the ground that in each case extension of either the latest date for shipment or the expiry date of the credit should be only according to instructions given specifically for this purpose by the applicant for the credit.

Article 40 (old article 40)

1. *Article 40 [1962]:*

Unless the terms of the credit indicate otherwise, the words "departure", "dispatch", "loading" or "sailing" used in stipulating the latest date for shipment of the goods will be understood to be synonymous with "shipment".

Expressions such as "prompt", "immediately", "as soon as possible" and the like should not be used. If they are used, banks will interpret them as a request for shipment within thirty days from the date on the advice of the credit to the beneficiary by the issuing bank or by an advising bank, as the case may be.

2. ICC added a paragraph (c) stating that expressions such as "on or about" will be interpreted as requests for shipment "during the period from five days before to five days after the specified date, both end days included".

Article 41 (old article 41)

1. *Article 41 [1962]:*

Documents must be presented within a reasonable time after issuance. Paying, accepting or negotiating

banks may refuse documents if, in their judgment, they are presented to them with undue delay.

2. As formulated in "Uniform Customs (1962)" banks had the option of refusing to accept documents presented, in their judgement, with undue delay (i.e. not within a reasonable time after issuance). In revising this article ICC decided to abandon the concept of "stale" documents presented with undue delay; instead, article 41, as revised, requires that credits stipulate a specified period of time after the date of issuance of the bills of lading or other shipping documents during which documents must be presented for payment, acceptance or negotiation. Revised article 41 provides further that in the absence of such stipulation in the credit, "banks will refuse documents presented to them later [than] 21 days after the date of issuance of the bills of lading or other shipping documents".

3. Most comments had criticized the vagueness and practical difficulties inherent in terms such as "within a reasonable time" and "without undue delay" found in the 1962 version of "Uniform Customs", and the option previously given to banks to refuse documents on this basis (Australia, National Bank of Czechoslovakia, Germany (Federal Republic of), Lebanon, Mexico, Nigeria, South Africa, USSR, United Kingdom). It was also stated that arrival of the goods prior to the presentation of the documents should not automatically be deemed to be undue delay (Australia, Nigeria, USSR). The United Kingdom and the Central Bank of Jordan had suggested that instead of "presentation within a reasonable time", credits should specify a latest date for the presentation of documents, or, in the absence of such stipulation, a definite cut-off date should be provided in "Uniform Customs".

4. Most of the comments received are reflected in the revised text of article 41. However, the Association of Banks in Malaysia-Singapore noted that it entailed a change of their current practice, and the German Democratic Republic was of the view that the change was too favourable to banks by freeing them from their joint responsibility for the timely presentation of documents.

5. The following suggestions were not accepted by ICC:

(a) To provide that for shipping documents bearing "on-board" endorsements, for the purposes of article 41 the dates of such endorsements shall be considered as the dates of issuance of the documents (Costa Rica, Association of Banks in Malaysia-Singapore, Nigeria);

(b) To adopt a special provision to govern container transport (Sweden);

(c) To provide that banks are not obliged to accept documents received after the credit has expired (New Zealand);

(d) To state that documents may be issued earlier than the date of issuance of the credit, unless the credit bars this expressly (Federal Republic of Germany);

(e) To provide that banks may not refuse documents as "stale" if the credit did not include a stipulation of the latest date for the presentation of documents (USSR).

*Article 42 (old article 42)*1. *Article 42 [1962]:*

Banks are under no obligation to accept presentation of documents outside their banking hours.

2. This article was not modified by ICC.

3. None of the comments received dealt with this article.

*Articles 43 and 44 (old articles 43 and 44)*1. *Article 43 [1962]:*

The terms "first half", "second half" of a month shall be construed respectively as from the 1st to the 15th, and the 16th to the last day of each month, inclusive.

Article 44 [1962]:

The terms "beginning", "middle" or "end" of a month shall be construed respectively as from the 1st to the 10th, the 11th to the 20th and the 21st to the last day of each month, inclusive.

2. These articles were not modified by ICC.

3. ICC did not adopt the suggestion made by the Federal Republic of Germany to define the meaning of the term "on/about" when followed by a specific date or one of the expressions mentioned in articles 43 and 44.

*Article 45 (old article 45)*1. *Article 45 [1962]:*

When a bank issuing a credit instructs that the credit be confirmed or advised as available "for one month", "for six months" or the like, but does not specify the date from which the time is to run, the confirming or advising bank will confirm or advise the credit as expiring at the end of such indicated period from the date of its confirmation or advice.

2. The text of this article was not modified by ICC.

3. No comments were received dealing with this article.

*Article 46 (old article 46)*1. *Article 46 [1962]:*

A transferable credit is a credit under which the beneficiary has the right to give instructions to the bank called upon to effect payment or acceptance or to any bank entitled to effect negotiation to make the credit available in whole or in part to one or more third parties (second beneficiaries).

A credit can be transferred only if it is expressly designated as "transferable" by the issuing bank. Terms such as "divisible", "fractionable", "assignable" and "transmissible" add nothing to the meaning of the term "transferable" and shall not be used.

A transferable credit can be transferred once only. Fractions of a transferable credit (not exceeding in the aggregate the amount of the credit) can be transferred separately, provided partial shipments are not prohibited, and the aggregate of such transfers will be considered as constituting only one transfer of the credit. The credit can be transferred only on the terms and conditions specified in the original

credit, with the exception of the amount of the credit, of any unit price stated therein, and of the period of validity or period for shipment, any or all of which may be reduced or curtailed. Additionally, the name of the first beneficiary can be substituted for that of the applicant for the credit, but if the name of the applicant for the credit is specifically required by the original credit to appear in any document other than the invoice, such requirement must be fulfilled.

The first beneficiary has the right to substitute his own invoices for those of the second beneficiary, for amounts not in excess of the original amount stipulated in the credit and for the original unit prices stipulated in the credit, and upon such substitution of invoices the first beneficiary can draw under the credit for the difference, if any, between his invoices and the second beneficiary's invoices. When a credit has been transferred and the first beneficiary is to supply his own invoices in exchange for the second beneficiary's invoices but fails to do so on demand, the paying, accepting or negotiating bank has the right to deliver to the issuing bank the documents received under the credit, including the second beneficiary's invoices, without further responsibility to the first beneficiary.

The first beneficiary of a transferable credit can transfer the credit to a second beneficiary in the same country, but if he is to be permitted to transfer the credit to a second beneficiary in another country, this must be expressly stated in the credit. The first beneficiary shall have the right to request that payment or negotiation be effected to the second beneficiary at the place to which the credit has been transferred, up to and including the expiry date of the original credit, and without prejudice to the first beneficiary's right subsequently to substitute his own invoices for those of the second beneficiary and to claim any difference due to him.

The bank requested to effect the transfer, whether it has confirmed the credit or not, shall be under no obligation to make such transfer except to the extent and in the manner expressly consented to by such bank, and until such bank's charges for transfer are paid.

Bank charges entailed by transfers are payable by the first beneficiary unless otherwise specified.

2. Aside from minor drafting changes, ICC modified this article as follows:

(a) Rearranged the sequence of the paragraphs so that the last two paragraphs in the 1962 version are now paragraphs (b) and (c);

(b) Under the second sentence of paragraph (f), the paying, accepting or negotiating bank can now be freed of responsibility to the first beneficiary if the latter fails to supply his own invoices "on first demand", rather than "on demand" as under the 1962 formulation;

(c) Adopted a new principle in paragraph (g), whereby "the first beneficiary of a transferable credit can transfer the credit to a second beneficiary in the same country or in another country unless the credit specifically states otherwise"; previously, transfer to a

second beneficiary in another country was only permitted if expressly authorized in the credit (supported by the Federal Republic of Germany; opposed by the National Bank of Czechoslovakia).

3. ICC did not accept the following proposals:

(a) To require that amendments of the credit be approved by the first beneficiary before their transmission to the second beneficiary (Egypt);

(b) To require notification of the issuing bank of the transfer of a credit (Federal Republic of Germany; opposed by the National Bank of Czechoslovakia);

(c) To make it possible to have transfers wherein the responsibility for payment is transferred to a new paying bank in the country of the second beneficiary (Hungary; opposed by the National Bank of Czechoslovakia);

(d) To clarify whether the first beneficiary can draw for the difference between the maximum credit amount and the amount drawn by the second beneficiary, pursuant to paragraphs (f) and (g) of this article, even after the expiry date of the credit (Lebanon);

(e) To limit transfers to a second beneficiary in another country, under paragraph (g), to "negotiation", instead of "payment or negotiation" (Lebanon);

(f) To clarify whether the first beneficiary may re-transfer the credit if it was returned without execution on it by the second beneficiary (Egypt);

(g) To permit transferable credits to be transferred more than once, unless specified otherwise in the credit (National Bank of Czechoslovakia);

(h) To specify in paragraph (d) that terms such as "divisible", "fractionable" etc. "shall be disregarded", instead of "shall not be used" (National Bank of Czechoslovakia);

(i) To merely provide in paragraph (b) that a bank may refuse to effect the transfer until its usual charges for transfer have been paid (New Zealand).

New article 47

1. ICC added this new article to "Uniform Customs" in order to make it clear that the fact of stating that a credit is non-transferable will not affect the rights of the beneficiary under the applicable law to assign the proceeds.

2. The United States had proposed the addition of a new article 47 regulating in detail the assignment of proceeds under a credit. This proposal was supported by Mexico, but opposed by the National Bank of

Czechoslovakia, the German Democratic Republic, the Federal Republic of Germany and New Zealand on the grounds that this matter should properly be left to national legislation. ICC adopted the suggestion of New Zealand to merely note that the non-transferability of a credit did not bar assignment of the proceeds by the beneficiary.

General observations

The comments received also included the following suggestions and proposals of a more general nature:

1. "Uniform Customs" should deal with "deferred-payment credits" (Federal Republic of Germany), and "credits with partial deferment of payment" (USSR).

2. There should be a provision that if the beneficiary does not pay the commission of an advising, confirming or paying bank, the commission will be charged to the applicant for the credit (Hungary).

3. "Uniform Customs" should provide that if any documents additional to those called for by the credit are presented, they will be accepted by the banks as tendered without any responsibility on their part (Mexico), or that banks may refuse to accept and forward such documents (Federal Republic of Germany).

4. There should be a rule that if the credit imposes some obligation on the beneficiary but does not require a specific document attesting the accomplishment of this obligation, negotiating banks will be able to rely on a declaration by the beneficiary which they will then transmit to the issuing bank (Lebanon).

5. To add as recommendations the following:

(a) Should avoid the terms CIF, FOB (Costa Rica);

(b) If a bank issues a credit in the currency of a third country, it should in the credit authorize the paying or negotiating bank to be automatically and directly reimbursed through a designated bank in such third country (Costa Rica).

6. To add a provision excusing the paying bank from the responsibility of controlling that export goods subject to complex, technical specifications in fact meet them; the paying bank should only require a statement by the exporter to the effect that the goods meet the specifications (Romania);

7. To add a provision that if the credit does not indicate its place of availability, such place shall be deemed to be the bank that should effect payment, acceptance or negotiation under the credit (National Bank of Czechoslovakia).

5. Report of the Secretary-General: security interests in goods (A/CN.9/102)*

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INTRODUCTION

1. At its third session the Commission requested the Secretary-General to make a study of the rules of security interests in goods under the principal legal systems and to make the information available to the Commission.¹ In pursuance of the Commission's request the Secretariat asked Professor Ulrich Drobnig of the Max Planck Institute for Foreign and Private International Law in Hamburg, to prepare a "Study on security interests" which has been published as document ST/LEG/11.

2. This report is in two parts. Part I summarizes Professor Drobnig's study. Part II contains the conclusions of the Secretariat in respect of the possible unification or harmonization of the law of security interests in the context of international trade and contains suggestions for future work on this subject.

I. SUMMARY OF THE STUDY ON SECURITY INTERESTS

A. *Scope of study*

3. The study on security interests, contained in document ST/LEG/11, deals almost exclusively with non-possessory security interests. This limitation is justified by the fact that under present-day conditions such a security is by far the most important, especially in international trade relations.² The primary source of information was legislative materials. However, where practicable, this material was checked for its practical application.³

B. *Contractual non-possessory security interests*

4. The study found a wide range of provisions in respect of contractual non-possessory security interests. The most liberal approach, adopted by some countries, facilitates the use of all goods for purposes of security. Under the least permissive approach the principle is maintained that security interests should be possessory in nature. Nevertheless, the need for credit to finance

the purchase of particular kinds of goods has led to the creation of special régimes of non-possessory security interests. In general these special régimes are restrictive in respect of the kinds of goods which can be used for security, the kinds of transactions, the persons who can be secured, and the extent to which the security agreement between the parties can cover advances to be made in the future or can subject to the security interest goods to be acquired in the future. They also tend to require more formalities for the creation of the security interest and for its enforcement than is true in countries which have adopted the more liberal approach.

5. The explanation for this dichotomy in approach appears to be "that in general a country's security rules tend to be more liberal, the more recently its legislation in this area has been enacted, and vice versa. This observation would indicate that the admission of a large number of, or potentially all, items as suitable objects of security is to a considerable degree a matter of technical modernization of this branch of the law."⁴

6. The study suggests that there are two main reasons which render non-possessory security interests suspect in some countries. "One is the novelty of the phenomenon and a consequent lack of legal experience in handling it. This, of course, is only a provisional stage of development which today has passed in general, but the traces of which are still lingering on."⁵ The study goes on to state that, "our present knowledge, especially the comparison with, and evaluation of, practical experience gained in many countries, enables legislation to be drafted which can satisfactorily solve all substantive and technical problems posed by non-possessory security interests".⁶

7. The second reason that non-possessory security interests are suspect in certain countries, is "the desire to protect unsecured creditors against secured creditors".⁷ This, the study concludes, is a valid concern but one which should be treated by means other than restrictions on the creation of security interests in goods.⁸

* 18 March 1975.

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

² International payments, study on security interests: note by the Secretariat, ST/LEG/11 (English only), p. 1.

³ *Ibid.*, p. 2.

⁴ *Ibid.*, p. 29.

⁵ *Ibid.*, p. 34.

⁶ *Ibid.*, p. 35.

⁷ *Ibid.*, p. 34.

⁸ *Ibid.*, pp. 35-36.

C. *Statutory non-possessory security interests in favour of unpaid sellers*

8. The study found that in addition to contractual non-possessory security interests many countries have enacted statutory non-possessory security interests in favour of unpaid sellers. Since such a security interest arises as of right, no contractual agreement or other formality is, as a rule, required for the creation of the interests.

"Wherever the legislator has created a protection of this nature in favour of sellers, the assumption obviously is that the voluntary extension of trade credit by sellers is a frequent and desirable phenomenon and that the credit-extending seller deserves special protection. This protection is particularly important in those countries which are, or at least were, reluctant to make contractual security interests available to sellers, such as France and many other Latin countries. The existence of a seller's statutory protection appears to be less called for in countries where sellers can easily create contractual security interests, especially by reservation of ownership."⁹

9. The study concludes that there are no special reasons which justify a general preference for unpaid sellers as against other creditors, as is granted by a statutory non-possessory security interest.

"This brings us to a necessary consequence of any abolition of a statutory interest in favour of the seller. Access to the contractual security interests must be facilitated, especially by doing away with any limitations as to the permissible parties and items of security and by eliminating burdensome formal requirements. The credit-extending seller must be enabled to provide easily for his own protection."¹⁰

D. *Current use of non-possessory security interests in international trade*

10. The study concludes that at the present time the conscious use of non-possessory security interests in international trade is not very frequent. A major reason is that the exporter "is confronted with a vast variety of widely differing national rules on security interests which may have little or no similarity to rules with which he is familiar."¹¹ On the other hand, the use of credit in international trade is substantial and constantly increasing.

11. As a result other institutions have been developed to provide security to the seller or to obviate its necessity. Among these the three most important are:

(a) Sales against documents, including the use of the letter of credit. This method secures the payment of the price to the seller. It does not provide the buyer with credit unless an additional agreement has been made with a bank or other financing institution;

(b) Guarantees, especially by banks, to secure payment of the buyer's indebtedness;

(c) The guaranteeing or insuring of the buyer's obligation to pay by a specialized institution in the seller's country. Such guarantees are usually provided within the framework of general export promotion.

⁹ *Ibid.*, p. 123.

¹⁰ *Ibid.*, p. 142.

¹¹ *Ibid.*, p. 189.

12. All three methods leave open the question of the security to the financing institution for the credit or payment guarantee it has made available. It would seem that these financing institutions, whether located in the buyer's country or in the seller's country, have turned increasingly to security interests in goods as the means of protecting themselves. In the second group which appears to use security interests frequently in international trade at the present time are exporters of plant and machinery where the size and duration of their trade credits often make the trouble and the costs of the necessary arrangements worth while.¹²

E. *Future use of non-possessory security interests in international trade*

13. The study concludes that:

"Since both the volume, and credit-demand in international trade are undoubtedly likely to increase, the need for security interests as a protective device will grow . . .

"The emphasis, as in the past, will be on security interests securing the purchase-price, either in favour directly of the seller or of a credit institution financing the seller (or buyer).

"Less certain is whether in the foreseeable future national credit institutions will grant more credit outside their territorial border to debtors in other countries, with a consequent increase in the use of security interests in goods located abroad. One can merely say that such a development is possible. It would also imply that the status of foreign-created security interests, which generally secure loan-credit, may, in future, assume relevance.

" . . .

"In the result, it can be said with confidence that the factual importance of security interests in international trade is likely to increase within the next 10 to 20 years."¹³

F. *Conclusions*

14. From this, the study concludes, it follows that the harmonization or unification of the law of security interests as it affects international trade would be useful.

Three major methods to harmonize or unify the law are discussed: a uniform law convention, a model law, and recommendations. The study concludes that the preferable method in respect of security interests is to frame the rules in the form of a model law or model rules. It also suggests that the advice and assistance of the international financial institutions should be sought, both for the elaboration and for the propagation of such rules.¹⁴

II. CONCLUSIONS AND FUTURE WORK

15. The Commission may wish to consider whether the preparatory work carried out at its direction is now sufficiently advanced to enable it to decide on the continuation of its work in respect of the harmonization or unification of the law of security interests.

¹² *Ibid.*, p. 190.

¹³ *Ibid.*, pp. 190-191.

¹⁴ *Ibid.*, p. 222.

16. The study on security interests shows that there are several grounds that would justify a conclusion that work in respect of security interests should continue. The study indicates the following:

(a) Sellers and financing institutions alike are bewildered by the difficulty of knowing

- (i) Whether there is a security interest they might use effectively in a foreign country in which they wish to extend trade credit;
- (ii) What rights they would have under such a security interest;
- (iii) How the security interest should be created so that it would be valid against third parties; and
- (iv) How it should be enforced.

(b) The differences in legal rules make it difficult for security interests created in one country to be recognized in other countries. Therefore, the buyer's country may not recognize a security interest if the agreement was made in seller's country or if the buyer first took possession of the encumbered goods in seller's country.

(c) Some countries have no law of security interests which is adequate to protect the seller or other creditor.

(d) The lack of unified rules on security interests probably reduces the amount of trade credit available to buyers. This is perhaps of particular importance to the developing countries.

17. At the same time there is reason to expect that an important need in international commerce would be filled if a security interest, that would be enforceable by the foreign creditor against the debtor and third parties in the country where the goods are situated, were made available, through uniform rules, to merchants and trade and financing institutions.

18. As to the feasibility of preparing uniform rules, although the subject is complex, particularly because of the interconnexion between such rules and the national laws on bankruptcy, the Commission may wish to consider this question at a later stage in the light of a

further study that would bring into focus the following issues:

(a) Should the uniform rules take as point of departure the existing national legislations on security interests in goods and merely define the circumstances under which a security interest, created before the goods encumbered thereby are brought into the country of the forum, would be recognized? Or

(b) Should the uniform rules establish a new international type of security interest and, if so, what aspects of the law on security interests would be susceptible to such international unification? In this connexion:

- (i) As to scope, should such rules be tied to the international sale of goods (in other words, should they create a "purchase money security interest")?
- (ii) What should be the scope of the rights of buyer and seller and the rights of third parties dealing with them?
- (iii) With regard to what sales and to what types of goods should the uniform rules apply?
- (iv) What formalities should be complied with by the seller, or other person financing the purchase price, and within what period of time following the arrival of the goods in the country of destination, in order for the security interest to be enforceable against the buyer and third parties?

19. It is suggested that these and other issues could be isolated, for consideration by the Commission, if the feasibility study on the possible scope and content of uniform rules on security interests in goods were to take the form of a preliminary draft of such uniform rules accompanied by a commentary in depth. If the Commission desires that the Secretary-General undertake such work, it may wish to request the Secretariat to place the study before it at its tenth session and to consult, for purposes of preparing the study, with interested international organizations and trade and financing institutions.

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

<i>Title and description</i>	<i>Document reference</i>
<i>Working Group on International Negotiable Instruments, third session</i>	
Draft uniform law on international bills of exchange and international promissory notes: revised text of articles 5 (9), 6 and 12-41 ...	A/CN.9/WG.IV/CRP.3
Views expressed by banking institutions on certain questions relating to the draft uniform law on international bills of exchange and international promissory notes: note by the Secretariat	A/CN.9/WG.IV/CRP.6
Draft uniform law on international bills of exchange and international promissory notes: revised text of article 7	A/CN.9/WG.IV/CRP.7
Provisional agenda	A/CN.9/WG.IV/WP.4

III. INTERNATIONAL COMMERCIAL ARBITRATION

1. Report of the Secretary-General: preliminary draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade (UNCITRAL Arbitration Rules) (A/CN.9/97)*

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INTRODUCTION

1. Terms of reference

The United Nations Commission on International Trade Law (UNCITRAL) at its sixth session (April 1973) requested the Secretary-General:

"In consultation with regional economic commissions of the United Nations and centres of international commercial arbitration, giving due consideration to the Arbitration Rules of the United Nations Economic Commission for Europe and the ECAFE Rules for International Commercial Arbitration, to prepare a draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade;"¹

* 4 November 1974.

¹ 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. 85, (UNCITRAL Yearbook, vol. IV: 1973, part one, II, A).

The initial version of such draft arbitration rules was prepared by the Secretariat in consultation with Professor Pieter Sanders of the Netherlands who served as a consultant to the Secretariat on the subject.² At the invitation of the Secretariat, the International Committee on Commercial Arbitration (formerly known as the International Organizing Committee) of the International Arbitration Congress, a body composed of representatives of centres of international commercial arbitration and of experts in this field, appointed a Consultative Group of four experts to consult with the Secretariat concerning the draft arbitration rules.³ The

² The Secretariat gratefully acknowledges the assistance given to it by Professor Pieter Sanders in the preparation of the present draft rules.

³ The Consultative Group was composed as follows:

(a) Dr. Carlos A. Dunshee de Abranches, Director-General of the Inter-American Commercial Arbitration Commission;

(b) Professor Tokusuke Kitagawa, Tokyo Metropolitan University;

(c) Mr. Donald B. Straus, President of the Research Institute of the American Arbitration Association;

(d) Professor Heinz Strohbach, Court of Arbitration of the Chamber of Commerce of the German Democratic Republic.

Consultative Group submitted comments on two earlier versions of the draft arbitration rules.

The present "Preliminary draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade" has been circulated for comments to the regional economic commissions of the United Nations and to centres of international commercial arbitration. The present draft rules will also be considered at the Fifth International Arbitration Congress that will be held at New Delhi, India, 7-10 January 1975. Any comments and observations regarding the preliminary draft set of arbitration rules received by the Secretariat will be placed before the Commission at its eighth session in a separate document (A/CN.9/97/Add.1).*

In drafting these rules, the following international conventions were taken into account:

New York 1958	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
Geneva 1961	European Convention on International Commercial Arbitration
Washington 1965	Convention on the Settlement of Investment Disputes between States and Nationals of Other States

The following existing arbitration rules were also given special consideration:

ECE Rules	Arbitration Rules of the United Nations Economic Commission for Europe, 1966
ECAFE Rules	Rules for International Commercial Arbitration of the United Nations Economic Commission for Asia and the Far East (now the United Nations Economic and Social Commission for Asia and the Pacific), 1966.

Attention has also been given to the provisions of various other arbitration rules; references to many of these appear in the commentary on individual draft articles.

2. Organization of the rules

The rules are divided into four sections:

- Section I Introductory rules (articles 1 to 4)
- Section II Appointment of arbitrators (articles 5 to 12)
- Section III Arbitral proceedings (articles 13 to 25)
- Section IV The award (articles 26 to 32)

Pursuant to the Commission's decision (quoted at paragraph 1 above), these draft rules are designed for arbitration where in accordance with the agreement of the parties a dispute is submitted for decision to a sole arbitrator or an arbitral tribunal established specifically (*ad hoc*) for settling the dispute in question.

* Reproduced in this volume, part two, III, 2.

3. Administered and non-administered arbitration

These rules may be used in arbitration that is administered by an arbitral institution or in non-administered arbitration (article 2). The parties are free to decide whether they prefer the assistance of an arbitral institution in the handling of an arbitration (administered arbitration) or whether they will do without such assistance (non-administered arbitration). The rules, however, apply to both types of arbitration.

Most provisions of the rules apply to both administered and non-administered arbitration. However, a few provisions required different wording to meet the particular circumstances of one of these situations. In some of these cases the provisions in the articles concerned are set forth in two columns, the left column dealing with non-administered arbitration and the right column with administered arbitration.

If the parties agree that the arbitration should be administered by a designated arbitral institution, that institution could perform the following functions: appoint the arbitrator(s) if the parties did not make the appointment(s) (articles 6 and 7); decide whether challenge of an arbitrator is justified (article 10); and collect the deposits for arbitration costs from the parties (article 32). The administering institution may also be asked to assist the arbitrators in other ways: e.g. by placing the facilities of the institution at the disposal of the arbitrators, arranging for the maintenance of stenographic records of hearings, and retaining qualified interpreters to service the hearings.

If the parties do not agree on administration by a designated arbitral institution, the rules provide procedures for dealing with the above matters; however, in some cases these procedures are necessarily more complex than they would be under administered arbitration.

4. The basic arbitration clause

Arbitrations are normally based upon an arbitration clause in a contract. Only in exceptional cases is an arbitration agreement concluded after a dispute has arisen. An arbitration clause or a separate arbitration agreement should be drafted carefully, since it serves as the legal basis for the arbitration. Arbitrators are incompetent to act beyond the scope of the arbitration clause or agreement.

The rules may be made applicable by a simple reference in a contract that all disputes that may arise out of the contract will be settled according to the UNCITRAL arbitration rules, but more careful wording of the arbitration clause is recommended. Taking into account the various model international arbitration clauses, the following wording is proposed:

"Any dispute, controversy or claim, arising out of or relating to this contract (or the breach thereof), shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules, which the parties declare to be known to them."

Under such an arbitration clause, the rules apply not only to disputes arising out of the contract, but also to those "relating to this contract (or the breach thereof)". Possible questions as to whether a dispute falls under the arbitration clause should be avoided; the

above language is designed to minimize the grounds giving rise to such questions.

5. Recommended additions to the arbitration clause

An arbitration clause may contain more than the basic model clause recommended in paragraph 4, which is merely an agreement by the parties to submit future disputes to arbitration under the UNCITRAL arbitration rules. In the course of an arbitration several problems may arise which the parties could have avoided by careful drafting of a more detailed arbitration clause. The parties may consider the following additions to the model clause in paragraph 4:

(a) Provision for administrator or appointing authority

Under paragraph 3 above, reference has been made to the usefulness of advance agreement on the choice of an arbitral institution to function as administrator of the arbitration. While the most important task of the administering arbitral institution is to function as an appointing authority (see articles 6(2), 7(3) and 7(6) herein), such an institution, as was noted in paragraph 3 above, may also be of assistance in other ways. The appointment of an administering arbitration institution may be achieved by adding the following to the basic model arbitration clause in paragraph 4 above:

"The parties also agree that

"(a) (i) The arbitration will be administered by (the name of the arbitral institution chosen by the parties)."

However, as an alternative, the parties may prefer to choose only an "appointing authority" whose task is confined to assisting the parties in the appointment of arbitrators. (The ECE model arbitration clause recommends the choice of an "appointing authority"). Any third party may be chosen as an appointing authority; the appointing authority may be a physical or a legal person, and, of course, may be an arbitral institution. If the parties prefer that the third party should act only as the appointing authority, the following may be added (as an alternative to clause (a)(i), above) to the model arbitration clause in paragraph 4:

"(a) (ii) The appointing authority will be (the name of the person or institution chosen by the parties)."

(b) Place of arbitration

Some model international arbitration clauses, such as the ECE model clause, also recommend that the parties agree on the place of arbitration. Under article 14 of the present rules, if the parties have not agreed on the place where the arbitration will be held, the place will be determined by the arbitrators. When the parties conclude the agreement to arbitrate, it may not be possible to choose the most suitable place for arbitration since they may not know the nature and particular circumstances of the dispute that will be submitted to arbitration. If the parties wish to decide in advance on the place of arbitration, their choice may be added to the arbitration clause. (See the note at the end of the model arbitration clause in paragraph 6 below.)

(c) Number of arbitrators

A question that necessarily arises at the beginning of the arbitral proceedings (unless solved beforehand) is whether the case will be dealt with by a sole arbitrator or by an arbitral tribunal composed of three arbitrators. If there is no advance agreement, the question is settled by article 5 of the rules. However, to facilitate the proceedings by encouraging advance agreement, the model arbitration clause includes the following provision:

"The parties also agree that

"(b) The number of arbitrators will be (specification of one or three)."

(d) Language

The language or languages to be used in the arbitral proceedings are governed by article 15 of the rules. Under that article, in the absence of an agreement by the parties on this issue, the arbitrators determine the language or languages to be so used. If the parties, by agreement, have resolved this question beforehand, their choice of language(s) may be taken into account in the appointment of the arbitrators, since the arbitrators should preferably have a working knowledge of the language(s) selected.

To facilitate advance agreement by the parties, the model arbitration clause provides:

"The parties also agree that

"(c) The language or languages used in the arbitration proceedings will be"

(e) *Ex aequo et bono* ("*amiables compositeurs*")

If the parties have not authorized the arbitrators to decide *ex aequo et bono* (as "*amiables compositeurs*"), the arbitrators will have to decide according to the rules of the law deemed applicable by the arbitrators, taking into account the terms of any contract between the parties and the usages of the trade (article 27). The parties should note that if they wish the arbitrators to decide *ex aequo et bono* (as "*amiables compositeurs*"), they must state this expressly. (See the note at the end of the model arbitration clause in paragraph 6 below.) The effectiveness of such agreement is subject to the arbitration law of the country where the award is rendered.

6. Model arbitration clause

In accordance with the above comments, the following wording is proposed for the UNCITRAL model arbitration clause:

Model clause

"Any dispute, controversy or claim, arising out of or relating to this contract (or the breach thereof), shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules, which the parties declare to be known to them."

"The parties also agree that

"(a) (i) The arbitration will be administered by (name of the arbitral institution)."

[To be filled in if only an appointing authority is named:

"(a) (ii) The appointing authority will be (name of the person or institution)."

"(b) The number of arbitrators will be"
(one or three).

"(c) The language or languages used in the arbitral proceedings will be"]

Note: If the parties wish to determine beforehand the place of arbitration or wish to authorize the arbitrators to decide *ex aequo et bono* (as "*amiables compositeurs*"), such agreements should be added here in further subparagraphs.

INTERNATIONAL COMMERCIAL ARBITRATION RULES AND COMMENTARY

Prepared by the Secretariat pursuant to the decision of the United Nations Commission on International Trade Law taken at the sixth session (A/9017, para. 85)* (UNCITRAL Arbitration Rules)

SECTION I. INTRODUCTORY RULES

SCOPE OF APPLICATION

Article I

1. Where parties have concluded an agreement in writing that a dispute existing between them, or disputes that may arise out of a contract concluded by them, shall be referred to arbitration under the UNCITRAL Rules, such disputes shall be settled according to these Rules, subject to any modifications that may be agreed upon by the parties.

2. "Parties" means physical or legal persons, including legal persons of public law.

3. "Agreement in writing" means an arbitration clause in a contract or a separate arbitration agreement, including an exchange of letters, signed by the parties, or contained in an exchange of telegrams or telexes.

Commentary

1. The purpose of the UNCITRAL arbitration rules is to facilitate arbitration in international trade. This object is made clear in the title: International Commercial Arbitration Rules. The rules, however, do not include a provision limiting their scope to international trade.

An attempt to limit the applicability of the rules to "international trade" by a binding provision in the rules would present difficult problems of definition and might open up new grounds for challenges to arbitration. It does not appear necessary to provide such a limiting provision, since the rules become applicable only when the parties have entered into a written agreement to this effect. The problem of scope is consequently quite different from the one presented by a uniform law or convention which is applicable in the absence of specific agreement by the parties.

For similar reasons, the rules do not require that the parties, when concluding their agreement, have their habitual places of residence or their principal places of business in different countries. Such a provision would also give rise to problems of interpretation and create additional grounds for challenges to arbitration.

These considerations have led to the conclusion to open a wide field for application of the rules. As a consequence of this choice, under article 1, the rules could also be applied in purely domestic cases. Even if this should occur, no harm would be done. The rules, however, are drafted for international cases, as appears, e.g., from the provision that a sole arbitrator or the presiding arbitrator shall be of a nationality other than the nationality of the parties.

2. Under paragraph 1 the rules become applicable by virtue of an agreement in writing which refers to the rules. This agreement may be concluded after a dispute has already arisen or—the normal case—long beforehand by an arbitration clause in a contract.

3. Paragraph 2 makes it clear that a Government, State agency or State organization may be party to an arbitration clause or agreement which refers to the UNCITRAL rules. Article 11 of the 1961 Geneva Convention also recognizes the right of legal persons, considered by the law applicable to them as "legal persons of public law", to conclude valid arbitration clauses or agreements.

4. Paragraph 3 is substantially based on article II, paragraph 2, of the 1958 New York Convention; however, in recognition of modern business practices, provision has been made for an exchange of telexes as a possible method of entering into an arbitration clause or arbitration agreement.

ADMINISTERED AND NON-ADMINISTERED ARBITRATION

Article 2

1. The parties may at any time select an arbitral institution to administer the arbitration or may choose non-administered arbitration.

2. If the parties reach no agreement regarding the choice of administered or non-administered arbitration, they shall be deemed to have selected non-administered arbitration.

3. If the arbitral institution selected by the parties is for any reason unable or unwilling to administer the arbitration, and if the parties do not select another arbitral institution, the parties shall be deemed to have selected non-administered arbitration.

Commentary

1. Although the parties may refer to the UNCITRAL arbitration rules without designating an arbitral institution to administer the arbitration, the assistance of an arbitral institution functioning as a central administrative body may be very helpful, especially in international cases.

"Administered arbitration" means arbitration administered by an arbitral institution. The choice of the arbitral institution is left entirely to the parties. It does not seem feasible or advisable to restrict the choice of the parties to certain arbitration institutions.

2. The present rules may be used in either administered or non-administered arbitration. Some provisions apply to both administered and non-administered arbitration. Other provisions needed slightly different wording to meet the particular circumstances of one of these situations. In these latter cases the provisions are set out in two columns; the left column

* UNCITRAL Yearbook, vol. IV: 1974, part one, II, A.

being applicable in the case of non-administered arbitration, and the right column in the case of administered arbitration.

3. Under paragraph 2, the parties are considered to have selected non-administered arbitration if they fail to exercise their option of choosing either administered or non-administered arbitration. This seemed the only possible solution, since there is no way of deciding which particular arbitral institution would have been chosen by the parties, had they agreed on administered arbitration.

4. Paragraph 3 takes account of the possibility that the arbitral institution selected by the parties might be unable or unwilling to administer the arbitration under the UNCITRAL arbitration rules instead of its own rules. In that case the arbitration automatically becomes non-administered arbitration unless the parties agree on another arbitral institution to serve as the substitute administrator.

It seemed advisable to state in paragraph 3 the consequence of the failure of a selected arbitral institution to administer the arbitration; otherwise disputes might arise whether such action on the part of the selected arbitral institution brings about the cancellation of the agreement to arbitrate.

NOTICE OF ARBITRATION

Article 3

1. The party initiating recourse to arbitration (hereinafter called the "claimant"), shall give to the other party (hereinafter called the "respondent"), notice that an arbitration clause or agreement concluded by the parties is invoked.

2. Such notice (hereinafter called "notice of arbitration") shall contain the following:

- (a) The names and addresses of the parties;
- (b) A reference to the arbitration clause or agreement that is invoked;
- (c) A reference to the contract out of which the dispute arises;
- (d) The general nature of the claim and an indication of the amount involved, if any;
- (e) The relief or remedy sought;
- (f) A reference to any agreement between the parties as to having one or three arbitrators, or, if the parties did not previously reach such agreement, the claimant's proposal as to their number (i.e. one or three).

3. In the case of administered arbitration, the notice of arbitration shall also be sent to the arbitral institution. The following shall also be attached to such notice:

- (a) A copy of the contract out of which the dispute arises;
- (b) A copy of the arbitration clause or agreement, if not contained in the contract annexed pursuant to subparagraph (a) of this paragraph.

Commentary

1. The notice of arbitration under article 3 serves to inform the respondent (and any administering arbitral institution) that arbitral proceedings have been started and that a particular claim will be submitted for arbitration. In addition, the notice contains information that will be useful in deciding on the number of arbitrators and in the selection of qualified arbitrators.

2. Paragraph 1 provides that arbitral proceedings shall commence with a "notice of arbitration" by the claimant to the respondent, informing the respondent that an arbitration clause or agreement is being invoked. This notice should not be confused with the "statement of claim" under article 16, which is to be submitted only after the arbitrators have been appointed.

3. Paragraph 2 sets forth the specific information that must be included in the notice of arbitration. The required information is sufficient to apprise the respondent of the general context of the claim that will be asserted against him and is useful in selecting qualified arbitrators.

At the time the notice of arbitration is sent, the parties may not have reached a decision as to having one or three arbitrators. (The model UNCITRAL arbitration clause at paragraph 6 in the introduction recommends that this question be decided at the time the arbitration clause or agreement is entered). If the issue is still open, the claimant is to express in the notice of arbitration his preference for having one or three arbitrators; this indication or preference by the claimant will aid the parties in resolving this question under the provisions of article 5.

4. Paragraph 3 provides that in the case of administered arbitration the notice of arbitration must also be sent by the claimant to the administering arbitral institution.

REPRESENTATION AND COMMUNICATIONS

Article 4

1. Any party may be represented by a counsel or agent upon the communication of the name and address of such person to the other party, and, in the case of administered arbitration, also to the arbitral institution. This communication is deemed to have been given where an arbitration is initiated by a counsel or agent or where a counsel or agent submits a statement of defence and counter-claim for the other party.

2. All communications between the parties, or between the parties and the arbitrators, or, in the case of administered arbitration, between the arbitral institution and the parties or arbitrators, shall be effective when received by the addressee.

3. It is presumed that a communication sent by telegram or telex has been received one day after it was sent, and a communication by registered air mail five days after it was sent.

Commentary

This article regulates two matters of a technical nature: representation of the parties and the way communications should be made.

1. Paragraph 1 provides that a party may be represented by a counsel or agent at any stage of the arbitral proceedings. (The only exception is that under article 13, paragraph 3, the arbitrators may refuse the request of only one party for oral arguments and such oral arguments would usually be made by counsel for each party.) Normally the parties will designate their representatives at an early stage.

2. Under paragraph 2, communications are deemed to be effective only when they are received by the addressee. Paragraph 3, however, establishes special rules regarding the presumed date of receipt of communications sent by telegram, telex, or registered air mail. Paragraph 3 provides that telegrams and telexes shall be considered as received one day after they were sent, and communications by registered air mail five days after they were sent. The special rules in paragraph 3 are based on the fact that the types of communications mentioned therein are or are rapidly becoming known throughout the world, and offer some guarantee regarding the forwarding and eventual receipt of such communications within the time spans indicated in that paragraph. The presumptions under paragraph 3 may be rebutted by evidence to the contrary.

One may expect that even in the absence of an express requirement in the Rules communications such as the notice of arbitration (article 3), the statement of claim (article 6), and the statement of defence and counter claim (article 17) would normally be sent by registered air mail.

SECTION II. APPOINTMENT OF ARBITRATORS

NUMBER OF ARBITRATORS

Article 5

If the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within [8] days from the date of receipt by the respondent of the claimant's notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed. In the case of administered arbitration, any such agreement by the parties regarding the number of arbitrators shall be communicated promptly to the arbitral institution.

Commentary

Under article 5 the parties have a relatively short period of time (8 days from the date of receipt by the respondent of the claimant's notice of arbitration) to reach agreement on having one or three arbitrators. This question will not arise if, as recommended in the model UNCITRAL arbitration clause, the parties have agreed beforehand on the number of arbitrators. If within the 8-day period provided in this article the parties do not agree that only one arbitrator be appointed, then three arbitrators shall be appointed. The 8-day period is believed sufficient to allow the parties to communicate and reach an agreement as to the desired number of arbitrators. In arbitrations concerning international trade matters usually three arbitrators are appointed and the appointment of a sole arbitrator may be regarded as exceptional.

APPOINTMENT OF SOLE ARBITRATOR

Article 6

1. If a sole arbitrator is to be appointed, such arbitrator shall be of a nationality other than the nationality of the parties.

Non-administered

2. The parties shall endeavour to reach agreement on the choice of the sole arbitrator. The claimant shall, by telegram or telex, propose to the respondent the names of one or more persons, one of whom would serve as the sole arbitrator.

If within 15 days of the receipt by the respondent of the claimant's proposal, the parties have not agreed on the choice of the sole arbitrator and if the parties have not previously agreed on an appointing authority, the claimant may, by telegram or telex, propose the names of one or more third parties, one of whom would serve as appointing authority.

If within 15 days of the receipt of the last-mentioned proposal the parties do not agree on the designation of an appointing authority, the claimant may apply to:

(a) An appointing authority designated pursuant to United Nations General Assembly resolution (.) by the Government of the country where the respondent has his principal place of business (*siège réel*) or habitual residence, or,

(b) An arbitral institution in the country where the respondent has his principal place of business or habitual residence, or a chamber of commerce in that country with experience in appointing arbitrators, or,

(c) The appointing authority designated by

Administered

2A. The arbitral institution shall invite the parties to agree on the choice of the sole arbitrator.

If within 15 days of the receipt of such invitation by both parties, the arbitral institution has not received a communication evidencing agreement by the parties on the choice of the sole arbitrator, the arbitral institution shall serve as appointing authority.

Non-administered

the Secretary-General of the Permanent Court of Arbitration at The Hague.

2 *bis*. If the appointing authority selected pursuant to paragraph 2 above agrees to function as such, the claimant shall send a copy of his notice of arbitration (article 3) to the appointing authority, together with a copy of the contract out of which the dispute arises and a copy of the arbitration agreement if it is not contained in that contract.

3. The appointing authority shall appoint the sole arbitrator according to the following list-procedure:

The appointing authority shall communicate to both parties an identical list containing at least three names;

Within 15 days after the receipt of this list, each party may indicate to the appointing authority his order of preference or objections regarding the names on the list;

After the expiration of the above period, the appointing authority shall appoint the sole arbitrator from among the names on the list transmitted to the parties, taking into account, as far as possible, any preference and objections that may have been stated by the parties.

Commentary

1. Paragraph 1 of article 6 states the requirement that the sole arbitrator be of a nationality other than the nationality of the parties. When there are three arbitrators, the same requirement is applicable to the presiding arbitrator (article 7, paragraph 2). This provision, designed to ensure the neutrality of the sole or presiding arbitrator, is applicable to both administered and non-administered arbitration. It corresponds with the practice of the International Chamber of Commerce when arbitrators are appointed for arbitration under the Rules of the ICC.

Administered

3A. The arbitral institution shall appoint the sole arbitrator according to the following list-procedure:

The arbitral institution shall communicate to both parties an identical list containing at least three names;

Within 15 days after the receipt of this list, each party may indicate to the arbitral institution his order of preference or objections regarding the names on the list;

After the expiration of the above period, the arbitral institution shall appoint the sole arbitrator from among the names on the list transmitted to the parties taking into account, as far as possible, any preferences and objections that may have been stated by the parties.

2. For non-administered arbitration, paragraph 2 expresses the principle that, if possible, the sole arbitrator should be the parties' own choice. If the parties cannot agree within 15 days, the assistance of a third person (called the "appointing authority") becomes necessary. A further 15 days are provided in order to permit the parties to agree on an appointing authority, and the appointing authority may be anyone acceptable to both parties.

Should the parties fail to agree on an appointing authority, one will be designated, upon request, by one of the authorities mentioned in paragraph 2 of article 6. However, the provisions concerning such possible appointing authorities are only provisional at this stage, since final adoption of these provisions would depend, *inter alia*, on a resolution by the United Nations General Assembly requesting Governments to designate such appointing authorities (as to subparagraph (a)), or on ascertaining the availability of the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority (as to subparagraph (c)).

13. For administered arbitration, the procedure set forth in paragraph 2A is much simpler. If the parties cannot agree on the choice of the sole arbitrator, the administrator (the arbitral institution designated as such by the parties) will serve as the appointing authority and appoint the sole arbitrator according to the list-procedure set out in paragraph 3A.

4. Paragraph 2 *bis* specifies the documents that the claimant shall send to the appointing authority in order to facilitate the task of that authority to appoint a competent sole arbitrator. This provision is applicable only to non-administered arbitration, since an arbitral institution that is administering the arbitration would have received this information at an earlier stage (article 3).

5. Paragraph 3 deals with the procedure to be followed by the appointing authority. Information which is useful to the appointing authority in proposing the names of possible arbitrators will be contained in the following documents: the notice of arbitration, the annexed copy of the contract out of which the dispute arises or the arbitration agreement if such agreement was not contained in that contract. The appointing authority will appoint the sole arbitrator pursuant to the list-procedure described in this paragraph.

The list-procedure in paragraph 3 is derived from the rules of the American Arbitration Association which has utilized this system with success for a number of years. This system has been adopted in the Inter-American Rules and has also been used in Europe, e.g. in the rules of the Netherlands Arbitration Institute. The advantage of the system is that it gives the parties, who failed to agree on the appointment of the arbitrator, some indirect influence over the appointment by permitting them to express their preferences and objections with regard to the names proposed by the appointing authority.

APPOINTMENT OF THREE ARBITRATORS

Article 7

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators

thus appointed shall choose the third arbitrator who will act as the president of the arbitral tribunal.

2. The presiding arbitrator shall be of a nationality other than the nationality of the parties.

Non-administered

3. If within 15 days after receipt of the claimant's notice appointing an arbitrator, the respondent has not, by telegram or telex, notified the claimant of the arbitrator he appoints, and if the parties have not previously agreed on an appointing authority, the claimant may propose, by telegram or telex, the names of one or more third persons, one of whom would serve as appointing authority.

If within 15 days after receipt of such proposal the parties agree on the designation of an appointing authority, that appointing authority will appoint the second arbitrator. The appointing authority may determine the method for appointing the second arbitrator.

4. If within the above 15 days the parties do not agree on the designation of the appointing authority, the claimant, in accordance with the provisions of article 6, para. 2 above, may apply to any of the appointing authorities mentioned in that article for the designation of the second arbitrator. The appointing authority may determine the method for designating the second arbitrator and its appointment of the second arbitrator is binding upon the parties.

5. If within 15 days after the appointment of the second arbitrator, the two arbitrators appointed in accordance with the foregoing procedures have not agreed on the choice of the presiding arbitrator, the parties shall endeavour to agree on the designation of the presiding arbitrator.

Non-administered

6. The claimant shall, by telegram or telex communicate to the re-

Administered

3A. The arbitral institution shall invite each party to appoint an arbitrator and to notify, by telegram or telex, both the other party and the arbitral institution of such appointment within 15 days after receipt of the invitation.

4A. If within the above 15 days the respondent has not notified the arbitral institution of the name of the arbitrator he appoints, the institution shall appoint the second arbitrator.

The arbitral institution may determine the method for designating the second arbitrator and its appointment of the second arbitrator is binding upon the parties.

Administered

6A. The claimant shall, by telegram or telex, communicate to the

Non-administered

spondent the names of one or more persons, one of whom would serve as the presiding arbitrator.

If, within 15 days after such communication, the parties have not agreed on the choice of the presiding arbitrator and if the parties have not previously agreed on an appointing authority, each of the parties may, by telegram or telex, propose the names of one or more third persons, one of whom would serve as the appointing authority.

7. If, within 15 days after receipt of such proposal, the parties agree on the designation of an appointing authority, that appointing authority will appoint the presiding arbitrator.

If, within the above 15 days, the parties do not reach agreement on the designation of an appointing authority, the claimant, in accordance with the provisions of article 6, para. 2 above, may apply to any of the appointing authorities mentioned in that article, for the designation of the presiding arbitrator. The appointing authority mentioned in this paragraph shall appoint the presiding arbitrator in accordance with the list-procedure in article 6, paragraph 3.

Commentary

1. This article regulates the normal situation where three arbitrators are to be appointed and follows, in paragraph 1, the usual procedure in international arbitration: each party has the right to appoint one arbitrator and the two arbitrators thus appointed choose the president of the arbitral tribunal.

2. Like article 6 for the sole arbitrator, paragraph 2 requires that the presiding arbitrator be of a different nationality than the parties. The reasons for this provision are stated in the commentary to article 6.

3. A problem that may arise in the appointment of an arbitral tribunal composed of three members, consists of the possibility that the respondent will fail to appoint his arbitrator. This complication has been

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respondent the names of one or more persons, one of whom would serve as the presiding arbitrator.

If, within 15 days after such communication, the parties have not agreed on the choice of the presiding arbitrator, the arbitral institution, on request by either party, shall appoint the presiding arbitrator.

7A. The arbitral institution shall appoint the presiding arbitrator in accordance with the list-procedure in article 6, paragraph 3.

dealt with in paragraphs 3 and 4 for non-administered arbitration and in paragraphs 3A and 4A for administered arbitration.

In view of the non-co-operative attitude of the respondent who failed to name his arbitrator, the appointing authority (which may be an arbitral institution) is left entirely free to determine the method for designating the second arbitrator. This authority may decide whether it will submit proposals for the designation of the second arbitrator to the party who failed to name an arbitrator or will proceed directly to the appointment of the second arbitrator.

4. Another difficulty may arise in connexion with the appointment of the presiding arbitrator. The procedure to be followed, if neither the parties nor the two arbitrators can agree on the choice of the president, has been regulated in paragraph 6. Paragraph 6 deals separately with non-administered and with administered arbitration, and the appointing authority (under paragraph 6A, the arbitral institution) shall appoint the presiding arbitrator according to a list-procedure: under this procedure both parties have an equal influence on the final appointment of the presiding arbitrator.

CHALLENGE OF ARBITRATORS (ARTICLES 8-10)

Article 8

1. Either party may challenge an arbitrator, including an arbitrator nominated directly by a party, if circumstances exist that give rise to justifiable doubts as to his impartiality or independence.

2. The circumstances mentioned in paragraph 1 include any financial or personal interest in the outcome of the arbitration or any family or commercial tie with either party or with a party's counsel or agent.

3. A prospective arbitrator shall disclose to those who approach him in connexion with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed, shall disclose any such circumstances to the parties and the arbitral institution unless they have already been informed by him of these circumstances.

Commentary

Articles 8 to 10 deal with the challenge of arbitrators. Challenge of an arbitrator is infrequent, but the subject needs careful regulation since the impartiality and independence of the arbitrators is an essential requirement for every arbitration.

1. Paragraph 1 applies the rule as to arbitrator impartiality and independence to every arbitrator, including the arbitrator appointed by a party when three arbitrators are to be appointed. Paragraph 1 corresponds to similar provisions in the ECE Rules (article 6) and ECAFE Rules (article III under 1). Under the Rules of the American Arbitration Association, (section 18), only persons appointed as neutral arbitrators, (i.e. sole or presiding arbitrators) may be subject to disqualification.

2. Paragraph 2 gives non-exclusive examples of possible partiality or dependence. Justifiable doubts as to impartiality or independence may exist when the arbitrator has any financial or personal interest in the outcome of the arbitration (cf. article II of the Inter-

American Rules and section 18 of the Commercial Arbitration Rules of the American Arbitration Association) or when he has any family or commercial tie with a party or party's counsel.

3. Paragraph 3, like section 17 of the Inter-American Rules and section 18 of the AAA Rules, requires that arbitrators disclose to the parties any circumstances that are likely to give rise to grounds for a challenge. No one knows better than the arbitrator himself whether such circumstances exist. The obligation to disclose these circumstances is extended to the pre-appointment stage. Notwithstanding such disclosure, the appointment may nevertheless be made. After appointment, therefore, these circumstances should also be disclosed to those parties who were not yet informed (this may be both parties if the appointment was made by an arbitral institution or appointing authority), or to the arbitral institution that administers the arbitration but may not have been involved in the appointment of the arbitrator.

Article 9

1. The challenge of an arbitrator shall be made within 15 days after his appointment has been communicated to the challenging party or, if the circumstances mentioned in article 8 became known to such party at a later time, within 15 days after such time.

2. The challenge shall be made by written notice to both the other party and the arbitrator and shall state the reasons for the challenge.

3. When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. In both cases a substitute arbitrator shall be appointed pursuant to the procedure that was applicable to the initial appointment.

Commentary

1. This article regulates certain procedural aspects of the challenge: paragraph 1 states the period within which the challenge shall be made; paragraph 2 regulates the form of the challenge.

2. After circumstances that would justify a challenge become known, a party may waive his right to challenge. A waiver takes place automatically when no challenge has been made within the 15 days mentioned in the first paragraph.

3. On the other hand, a challenge may be accepted either by the other party or by the arbitrator. Paragraph 3 provides that if a challenge was successful, the appointment of the substitute arbitrator shall be made pursuant to the procedure that was applicable to the initial appointment.

Article 10

1. If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the arbitral institution or appointing authority that made the initial appointment shall decide whether the challenge is justified.

2. If the initial appointment was not made by an arbitral institution or appointing authority, the decision on the challenge will be made:

Non-administered

by an appointing authority to be agreed upon by the parties, if they have not previously agreed on such an authority. If the parties do not promptly agree on an appointing authority, the challenging party in accordance with the provisions of article 6, para. 2, may request any one of the appointing authorities mentioned in that article, to decide on the challenge.

Administered

by the arbitral institution that administers the arbitration.

3. The decision of the arbitral institution or appointing authority concerning the challenge is final. If the decision sustains the challenge, a substitute arbitrator shall be appointed pursuant to the procedure that was applicable to the initial appointment.

Commentary

This article deals with the case where the challenge is *not* accepted (article 9, paragraph 3 deals with the case where the challenge is accepted). A decision on the challenge must then be made by the appropriate arbitral institution or appointing authority.

1. Paragraph 1 entrusts the decision concerning the challenge to the arbitral institution or appointing authority that made the initial appointment.

2. If the appointment was made by the parties or by the arbitrators (by choosing the presiding arbitrator), another solution had to be provided in paragraph 2. In the case of administered arbitration, this solution is simple; the arbitral institution takes the decision. In non-administered arbitration, it was necessary to provide for the choice or appointment of an appointing authority. This has been done by reference to article 6, paragraph 2, which sets forth alternative appointing authorities; the challenging party may apply to any one of these authorities to decide the challenge.

3. Challenge and appointment procedures are connected. If the challenge is sustained, a substitute arbitrator shall be appointed pursuant to the procedure applicable to the initial appointment (paragraph 3).

DEATH, INCAPACITY OR RESIGNATION

Article 11

1. In the event of the death, incapacity or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed pursuant to the procedures that were applicable to the initial appointment.

2. If the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated. If any other arbitrator is replaced, such prior hearings shall be repeated at the discretion of the arbitral tribunal.

Commentary

1. All arbitration rules regulate the replacement of arbitrators in the event of death, incapacity or resignation. The underlying idea for the procedure to be followed in these cases, as set forth in paragraph 1, is that the substitute arbitrator will be appointed in the

same way as his predecessor. The wording of this paragraph also provides for situations where the person or persons who appointed the predecessor fail to appoint the substitute: the "procedures" applicable are those according to which the initial appointment would have been made had the appointing authority failed to make the initial appointment.

2. Paragraph 2 requires that if the sole or presiding arbitrator is replaced, any hearings held prior to such replacement be repeated. However, if any other arbitrator is replaced, the arbitral tribunal is free to decide whether or not to order that hearings held previously be repeated.

EXTENSION OF TERMS FOR APPOINTMENT; PARTICULARS ON PROPOSED ARBITRATORS

Article 12

1. The time-limits set forth in section II for the appointment of arbitrators may at any time be extended by agreement of the parties. If the arbitration is administered by an arbitral institution, such time-limits may also be extended by that institution on its own initiative.

2. Where names for the appointment of arbitrators are proposed either by the parties or by an appointing authority, including an arbitral institution serving as appointing authority, full names and addresses shall be given, accompanied, as far as possible, by a description of their qualifications for appointment as arbitrators.

Commentary

1. This article concludes section II of the rules dealing with the appointment of arbitrators. It contains provisions that seem useful in connexion with the appointment procedure in general. Paragraph 1 permits extension by the parties of time-limits concerning the appointment of arbitrators (but not the challenge); paragraph 2 deals with personal data concerning persons who are proposed as arbitrators.

2. Article 12 applies to all appointments of arbitrators. In fact three methods of appointment may be distinguished under these rules:

Appointment by the parties;

Appointment by an arbitral institution where the parties agreed that their arbitration be administered by a particular arbitral institution;

Appointment by an appointing authority, agreed upon by the parties for the sole purpose of appointing arbitrators or selected for this sole purpose pursuant to article 6, paragraph 2. This appointing authority appears only in non-administered arbitration and only, as its name indicates, for the appointment of arbitrators. In administered arbitration, the administrator (the arbitral institution) is automatically available to serve as the appointing authority, although it may also assist the parties in other matters.

SECTION III. ARBITRAL PROCEEDINGS

GENERAL PROVISIONS

Article 13

1. Subject to these Rules, the arbitrators may conduct the arbitration in such a manner as they consider appropriate, provided that the parties are treated with absolute equality.

2. The arbitrators may decide that the proceedings shall be conducted solely on the basis of documents and other written materials, unless both parties agree that oral arguments shall be presented.

3. Oral hearings must be held if one of the parties offers to produce evidence by witnesses [unless the arbitrators unanimously decide that such proposed evidence is irrelevant].

4. All documents or information supplied to the arbitrators by one party shall be communicated by that party at the same time to the other party.

Commentary

1. Article 13 contains some general provisions concerning the conduct of arbitral proceedings. Paragraph 1 gives great freedom to the arbitrators in this respect, provided the parties are treated with absolute equality.

2. Paragraph 2 authorizes the arbitrators to decide that the arbitral proceedings shall be conducted solely on the basis of documentary evidence. Oral arguments must be permitted by the arbitrators if both parties agree that they or their counsel should plead their case orally before the arbitrators. However, the arbitrators may refuse a request by only one party for oral argument.

3. Under paragraph 3 oral hearings must be held if at least one of the parties wishes to introduce testimony by witnesses. [The bracketed language would permit the arbitrators to refuse to convoke an oral hearing at the request of only one party, when they consider that the evidence that the party intends to present at such a hearing would be irrelevant.]

It may be observed that the ECE and the ECAFE Rules employ different approaches to the question of oral hearings. Under the ECE Rules, oral hearings are the rule (article 22) and arbitrators may render an award based on solely documentary evidence only if the parties have so agreed (article 23). The ECAFE Rules (article VI, para. 5) provide that normally proceedings should be conducted on the basis of documents (in view of the large distances that usually separate the places of business of parties engaged in international trade).

4. Paragraph 4 introduces the same rule as that found in article VI, paragraph 2 of the ECAFE Rules: all documents or information supplied by one party to the arbitrators shall at the same time be communicated by that party to the other party. Equal treatment and equal opportunity for both parties are basic principles for arbitral proceedings. The principle of equal treatment has to be observed by both the parties and the arbitrators. Thus, the arbitrators may not base their award, *inter alia*, on a document submitted to them by one party but unknown to the other party.

PLACE OF ARBITRATION

Article 14

1. Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitrators.

2. If the parties have agreed upon the place of arbitration, the arbitrators may determine the locale of the arbitration within the country or city agreed upon by the parties.

3. The arbitrators may decide to hear witnesses, or to hold interim meetings for consultation among themselves, at any place they deem convenient.

4. The arbitrators may meet at any place they deem appropriate for the inspection of goods, other property, or documents. The parties shall be given sufficient notice to enable them to be present at such inspections.

Commentary

1. In conformity with article 14 of the ECE Rules, paragraph 1 provides that the place of arbitration shall be determined by arbitrators unless the parties have agreed upon such place.

2. Paragraphs 2, 3 and 4 preserve some freedom of movement for the arbitrators, even in cases where the parties have reached agreement on the place of arbitration.

LANGUAGE

Article 15

1. Subject to any provision that has been made by the parties in their agreement, the arbitrators, promptly upon their appointment, shall determine the language or languages to be used in the proceedings. This determination shall apply to any written notice or statement, and, if hearings should take place, to the language(s) to be used in such hearings.

2. Arbitrators may order that documents, delivered in their original language, shall be accompanied by a translation into the language(s) determined by the parties or the arbitrators.

Commentary

This article provides a solution for the language problems that may arise in international arbitrations by ensuring that the language or languages to be used in the arbitral proceedings are established at the commencement of such proceedings.

STATEMENT OF CLAIM

Article 16

1. Within a period to be determined by the arbitrators, the claimant shall send his written statement of claim to each of the arbitrators and to the respondent. All relevant documents, including a copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed thereto.

2. The statement of claim shall include the following particulars:

- (a) The names and addresses of the parties;
- (b) A full statement of the facts and a summary of the evidence supporting these facts;
- (c) The points at issue;
- (d) The relief or remedy sought.

3. During the course of the arbitral proceedings, the claim may, with the permission of the arbitrators, be supplemented or altered provided the respondent is given an opportunity to express his opinion concerning the change.

Commentary

1. The statement of claim should not be confused with the notice of arbitration, which is dealt with in article 3. The notice of arbitration serves to inform the

respondent (and, in the case of administered arbitration, also the arbitral institution) that the claimant resorts to arbitration, and indicates the general nature of the claim and the remedy sought. That notice also sets into motion the appointment machinery, beginning (if not already agreed upon beforehand) with the establishment of the number of arbitrators, and followed by the appointment of the sole arbitrator or the arbitral tribunal.

The arbitrators may have received a copy of the notice of arbitration on the occasion of their appointment. They may have asked for it before accepting their appointment or it may have been sent to them when they were invited to act as arbitrator. However, it did not seem necessary to require that the *notice of arbitration* be transmitted to the arbitrators since, for them, the first important document is the *statement of claim*, which is regulated by the present article 16.

2. Pursuant to paragraph 1, the arbitrators must first determine the period within which the claimant shall send his written statement of claim (together with a copy of the contract and of the arbitration agreement if not contained in the contract) to each of the arbitrators and to the respondent. When determining this period, the arbitrators shall take into account article 20, which states that as a rule the time limit for written communications should not exceed 30 days. The statement of claim shall be sent directly both to the arbitrators and to the respondent in order to avoid any unnecessary delays.

All relevant documents, including a copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed to the statement of claim. This provision is also found in article 15 of the ECE Rules. For the benefit of both the arbitrators and the respondent, the information should be as complete as possible at every stage of the proceedings.

3. This principle also underlies paragraph 2, which describes the required contents of the statement of claim. A full statement of the facts should be given together with a summary of the evidence supporting these facts. This requirement is also found, e.g., in the Rules (article 2) of the Foreign Trade Arbitration Commission in Moscow.

In addition, the remedy sought should be clearly defined. This, however, should not exclude the possibility that, during the course of the proceedings, the claim may be supplemented or altered.

4. Under paragraph 3, the statement of claim may be modified with the permission of the arbitrators. However, when such a modification is made, the respondent is given an opportunity to express his opinion concerning the change.

STATEMENT OF DEFENCE AND COUNTER-CLAIM

Article 17

1. Within a period to be determined by the arbitrators, the respondent shall communicate in writing, a statement of defence to each of the arbitrators and to the claimant.

2. In his statement of defence, the respondent may make a counter-claim arising out of the same contract. The provisions of article 16 with respect to the claim also apply to the counter-claim.

Commentary

1. The statement of defence is the second written pleading that is required in each case. The respondent must be given the same opportunity as the claimant to present his case in writing. In determining the period within which the statement of defence has to be presented, the arbitrators must take into account article 20 which provides that as a rule the period should not exceed 30 days.

2. Paragraph 2 provides that the respondent, in his statement of defence, may set forth a counter-claim if it arises out of the same contract. The requirements of article 16, paragraph 2, also apply to counter-claims: the respondent shall give a full statement of the facts on which the counter-claim is based and a summary of the evidence supporting those facts. Regarding changes in the counter-claim during the proceedings, paragraph 3 of article 16 applies. The claimant, in turn, will be given an opportunity to present a written reply to the counter-claim (article 19).

3. The statement of defence constitutes, for the respondent, the final opportunity to make a plea as to the arbitrator's jurisdiction. This important issue is dealt with separately in article 18.

PLEAS AS TO THE ARBITRATOR'S JURISDICTION

Article 18

1. The arbitrators shall be the judges of their own competence and shall rule on objections that the dispute is not within their jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

2. An objection to the competence of the arbitrators shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim. Where delay in raising a plea of incompetence is justified under the circumstances, the arbitrators may declare the plea admissible.

3. The arbitrators may rule on such an objection as a preliminary question or they may proceed with the arbitration and rule on such objection in their final award.

4. The arbitrators have jurisdiction to determine the existence or the validity of the contract of which an arbitration clause forms a part.

Commentary

1. Paragraph 1 and 3 are largely based on article 41 of the Convention on the Settlement of Investment Disputes (Washington 1965), which reads as follows:

"1. The tribunal shall be the judge of its own competence.

"2. Any objection by a party to the dispute that the dispute is not within the jurisdiction of the Centre, or for other reasons is not within the jurisdiction of the tribunal, shall be considered by the tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute."

Paragraph 1 of article 18 refers both to "the objections that the dispute is not within the jurisdiction of

the arbitrators", and also to "objections with respect to the existence or validity of the arbitration clause or agreement". The second clause might be deemed to be covered by the more general first clause concerning "objections that the dispute is not within the jurisdiction of the arbitrators". However, it does not seem advisable to leave any doubt on this point and, consequently, the second clause is added in the interest of clarity.

2. Paragraph 2 is based largely upon article 17 of the ECE Rules, which read as follows:

"The party which intends to raise a plea as to the arbitrator's jurisdiction based on the fact that the arbitration agreement was either non-existent or null and void or had lapsed *shall* do so not later than the delivery of its statement of claim or defence relating to the substance of the dispute; those based on the fact that arbitrators have exceeded their terms of reference shall be raised as soon as the question on which the arbitrators are alleged to have no jurisdiction is raised. Where the delay in raising the claim is due to a cause which the arbitrators deem justified, the arbitrators shall declare the plea admissible."

However, it did not seem necessary for the present rules to deal with objections that the arbitrators have exceeded their terms of reference.

3. Paragraph 4 has been added in order to dispel any possible doubt as to the competence of the arbitrators to determine the existence or validity of a contract of which the arbitration clause forms a part. This paragraph gives effect to the view that the arbitration clause is "separate" from the contract, as has been decided, *inter alia*, by the Supreme Court of the United States of America in 1967 in the case of *Prima Paint Corporation v. Flood and Conklin Manufacturing Co.* (388 U.S. 395). This view may also be considered to conform with the underlying intention of the parties when they entered into a written contract containing an arbitration clause. Consequently, a decision by the arbitrators that a contract is null and void will not affect the validity of the arbitration clause in that contract and will not undermine the competence of the arbitrators to make that decision.

FURTHER WRITTEN STATEMENTS; FURTHER DOCUMENTARY EVIDENCE

Article 19

1. Arbitrators shall decide what further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them, and shall fix the periods for presenting such statements. However, if the parties agree on a further exchange of written statements, the arbitrators shall receive such statements.

2. If a counter-claim is raised in the statement of defence, the arbitrators shall afford the claimant an opportunity to present a written reply to this claim.

3. At any time during the arbitral proceedings the arbitrators may require the parties to produce supplementary documents or exhibits within such a period as they shall determine.

Commentary

1. The rules provide that arbitrations shall commence with an exchange of written statements. In every case the claimant must deliver his statement of claim and the respondent shall have an opportunity to reply to this statement in his statement of defence.

The arbitrators are free to decide whether any further exchange of written statements (rejoinder and reply to the rejoinder) should be required. Under several arbitration systems, and especially in civil law countries, a second statement by the claimant (in French: *réplique*) and an answer to this by the respondent (*duplicque*) is quite customary. It has therefore been provided that even when the arbitrators would deem that the information already received by them in writing is sufficient, the parties may agree on a further exchange of statements and clarifications.

2. Paragraph 2 provides that the claimant shall have an opportunity to reply if the respondent, in his statement of defence, has raised a counter-claim.

3. Paragraph 3 repeats a provision found in article 24 of the ECE Rules. This provision is not strictly necessary because of the general rule already expressed in article 13, paragraph 1, to the effect that the arbitrators may conduct the arbitration in such a manner as they consider appropriate.

TIME-LIMITS

Article 20

1. The periods of time allowed by the arbitrators for the communication of written statements should, as a rule, not exceed 30 days.

2. The parties may agree to extend the various time-limits laid down in section III of the Rules. In the absence of such agreement, the arbitrators shall be entitled to extend the time-limits if they conclude that an extension is justified.

Commentary

1. This article is designed to underline the principle that disputes should be settled as quickly as possible. The rules cannot prescribe fixed time-limits, as this is hardly possible in domestic arbitrations and would be even more difficult in international cases. The 30 days mentioned in paragraph 1 may, however, serve as a useful guideline, particularly for the claimant who can commence the preparation of his statement of claim long before the arbitrators are even appointed.

2. Paragraph 2 permits extension of the time-limits for the communication of written statements and for other acts required from the parties. In connexion with the appointment of arbitrators, the possibility of extending time-limits has been introduced in article 12; paragraph 2 of the present article contains a similar provision in respect of section III. Such a provision is contained in article 25 of the ECE Rules.

HEARINGS, EVIDENCE

Article 21

1. In the event of an oral hearing, the arbitrators shall give the parties adequate advance notice thereof.

2. If witnesses are to be heard, at least 15 days before the hearing each party shall communicate to

the arbitrators and to the other party the names and addresses of the witnesses he intends to call and the language in which such witnesses will give their testimony.

3. The arbitrators shall make arrangements for interpretation of oral statements made at a hearing and for a stenographic record of the hearing if either is deemed necessary by the arbitrators under the circumstances of the case or if the parties have agreed thereto and have notified the arbitrators of such agreement at least 15 days before the hearing.

4. Hearings shall be held *in camera* unless the parties agree otherwise. The arbitrators may decide whether persons other than the parties and their counsel or agent may be present at the hearing. The arbitrators may require the retirement of any witness or witnesses during the testimony of other witnesses. Arbitrators are free to determine the manner in which witnesses are interrogated.

5. Arbitrators shall determine the relevancy and materiality of the evidence offered. Conformity to legal rules of evidence shall not be necessary.

Commentary

1. This article contains some general provisions deemed useful for the regulation of hearings. Pursuant to paragraph 1 adequate advance notice of each hearing must be given to the parties.

2. If witnesses are to be heard, information concerning them must be communicated to the arbitrators and to the other party at least 15 days before the hearing (para. 2). The hearing of witnesses may require preparation for which some time might be needed.

3. Paragraph 3 deals with preparatory measures for hearings. In case of administered arbitration, arbitrators may call on the arbitral institution for assistance.

4. Pursuant to paragraph 4, hearings shall generally be *in camera*. This is in conformity with the principle of privacy that is customary in arbitration. The manner in which witnesses will be interrogated is left to the arbitrators. Thus, the arbitrators may decide whether to permit cross-examination of witnesses: this technique is not customary in many areas of the world and cannot therefore be prescribed for international arbitration. The only adequate solution is to leave the arbitrators free to decide on the manner in which witnesses are to be examined. If both parties or their counsel are accustomed to the technique of cross-examining witnesses, there would be no objection to permitting cross-examination. On the other hand, if one or both parties are unacquainted with this technique, the arbitrators may find it inappropriate to impose it on the parties.

5. Paragraph 5 is modelled after the Inter-American Commercial Arbitration Rules (article 29). In making rulings on the evidence, arbitrators should enjoy the greatest possible freedom and they are therefore freed from having to observe the strict legal rules of evidence.

INTERIM MEASURES OF PROTECTION

Article 22

The arbitrators may take any interim measures they deem necessary in respect of the subject-matter of the

dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

Commentary

This article is derived from a combination of article VI, paragraph 6 of the ECAFE Rules ("Arbitrators shall be entitled to take any interim measures of protection which they deem necessary in respect of the subject-matter of the dispute") and the more specific provision contained in article 27 of the ECE Rules.

EXPERTS

Article 23

1. The arbitrators may appoint one or more experts to report to them, in writing, on specific issues to be determined by the arbitrators. A copy of the expert's terms of reference, established by the arbitrators, shall be communicated to the parties.

2. The parties shall give the expert any relevant information he may require of them. Any dispute between a party and such expert as to the relevance of any required information shall be referred to the arbitrators for decision.

3. Upon receipt of the expert's report, the arbitrators shall transmit a copy of the report to the parties who shall be given an opportunity to express, in writing, their opinion of the report.

4. On request of either party the expert, after delivery of the report, may be heard in a hearing where the parties and their counsel or agent are present and may interrogate the expert. At this hearing either party may bring expert witnesses in order to testify on the points at issue. The provisions of article 21 are applicable to such proceedings.

Commentary

Especially in cases of a technical nature the arbitrators may wish to have the benefit of expert advice. Experts may also be appointed on matters such as the existence of particular commercial usages or questions of law.

The rules of arbitral institutions generally contain a simpler provision, stating merely that arbitrators may request the opinion of experts "to elucidate questions requiring special knowledge, which arise during the examination of the case, including questions as to the existence of particular commercial usages" (article 23 of the Rules of the Foreign Trade Arbitration Commission in Moscow) or "to report on technical or legal issues, provided that their terms of reference are laid down in advance" (article 20 of the Rules of Arbitration of the International Chamber of Commerce, Paris). However, it seems advisable to cover more fully in the present rules the possible use of experts appointed by the arbitrators.

ABSENCE OF A PARTY

Article 24

1. If the respondent, after having been duly notified, fails to submit his statement of defence, or if either party fails to appear at a hearing properly called under these Rules, without showing sufficient cause

for such failure, the arbitrators may proceed with the arbitration and may render an award as if all parties were present.

2. If either party, after having been duly notified, fails, without sufficient cause, to submit documentary evidence when an award is to be rendered on the basis of such evidence without an oral hearing, then the arbitrators may render their award on the evidence before them.

Commentary

1. For every arbitration the rules provide for an exchange of at least two written statements: the statement of claim (article 16) and the statement of defence (article 17).

Paragraph 1 deals first of all with the case where the respondent does not present his statement of defence. This should not be a possible means of frustrating the proceedings, and notwithstanding the failure of the respondent to submit his statement of defence, the arbitrators may proceed with the arbitration.

A similar situation arises when either party fails to appear at a hearing properly convoked. Paragraph 1 provides, following a similar provision in article 31 of the ECE Rules, that the arbitrators may proceed with the arbitration. Paragraph 1 adds, "and render an award as if all parties were present", following the example of the ICC Rules (article 21, para. 3).

2. Where the respondent does not reply to the statement of claim, the arbitrators may nevertheless order a hearing and inquire further into the merits of the case. If the arbitrators order a hearing, the respondent shall again be given adequate advance notice thereof. This result follows from the previous articles (articles 13, paras. 1 and 2, and article 21); therefore, these provisions need not be repeated in the present article.

It did not seem necessary to include an express provision dealing with the hypothetical case where the claimant does not present his statement of claim. What should happen under these circumstances may be left to the discretion of the arbitrators, pursuant to article 13.

3. Paragraph 2 has been adopted from article 31, paragraph 2, of the ECE Rules.

WAIVER OF RULES

Article 25

Any party who knows or should know that any provision or requirement of these Rules has not been complied with and proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object.

Commentary

This provision follows similar rules set forth in article 37 of the Commercial Arbitration Rules of the American Arbitration Association and article 37 of the Inter-American Commercial Arbitration Rules.

SECTION IV. THE AWARD

FORM AND EFFECT OF THE AWARD

Article 26

1. The award shall be binding upon the parties. The award shall be made in writing and shall contain

reasons, unless both parties have expressly agreed that no reasons are to be given.

2. The award by an arbitral tribunal shall be determined by a majority of arbitrators.

3. The award shall be signed by the arbitrators. Where there are three arbitrators, the failure of one arbitrator to sign the award shall not impair the enforceability of the award. The award shall state the reason for the absence of an arbitrator's signature, but shall not include any dissenting opinion.

4. The award may only be published with the consent of both parties.

5. Copies of the award duly signed by the arbitrators shall be transmitted to the parties by the arbitrators. If the arbitration is administered by an arbitral institution (article 2), a signed copy of the award shall also be transmitted to the arbitral institution.

6. If the arbitration law of the country where the award is rendered requires that the award be filed or registered, the arbitrators shall comply with this requirement within the time required by law.

Commentary

1. Paragraph 1, in stating that the award shall contain reasons unless both parties have expressly declared that no reasons are to be given, corresponds with article 40 of the ECE Rules. The Convention on the Settlement of Investment Disputes (Washington 1965) and the European Convention for a Uniform Arbitration Law (Strasbourg 1964) do not contain an exception permitting the parties to agree that no reasons are to be given. On the other hand, the European Convention of 1961 and the ECE Rules contain such an exception.

2. Paragraph 2 requires that an award rendered by an arbitral tribunal be determined by a majority of the arbitrators. The ECE Rules provide, in addition that failing a majority, the presiding arbitrator alone shall render the award. Under such a provision the position of the presiding arbitrator is considerably strengthened; without such a provision the arbitral tribunal would decide in conformity with Court practice at the place of arbitration, which generally requires that judges (and in this case, the arbitrators) continue their deliberations until they arrive at a majority decision.

3. If one arbitrator fails to sign the award (where there are three arbitrators), under paragraph 3 the award shall state the reason for the absence of his signature, but shall not contain any dissenting opinion. Dissenting opinions are generally unknown in arbitration practice outside the socialist countries. If the award is published (permitted under paragraph 4 only if both parties agree to it), it will not contain any dissenting opinion. When publication of an award does take place, the names of the parties are usually omitted and other measures are taken to avoid the disclosure of their identity.

4. The scope of application of article 26 is not limited to final, definitive awards. Although it has not been deemed necessary to define in these rules the term "award" (as has been done in the ECE and ECAFE Rules), here also "award" is meant to include interim, interlocutory or partial awards, as well as final

awards. Under these rules the arbitrators are free to make any such interim awards before arriving at their final award.

APPLICABLE LAW

Article 27

1. The arbitrators shall apply the law expressly designated by the parties as applicable to their contract.

2. Failing such designation by the parties, the arbitrators shall apply the law determined by the conflict of laws rules that the arbitrators deem applicable.

3. The arbitrators shall decide *ex aequo et bono* (as "amiables compositeurs") if the parties have authorized the arbitrators to do so and the arbitration law of the country where the award is rendered permits such arbitration.

4. In any case, the arbitrators shall take into account the terms of the contract and the usages of the trade.

Commentary

1. This article is largely based on articles 38 and 39 of the ECE Rules which, in turn, are based on article VII of the Geneva Convention of 1961. For the sake of comparison these articles are quoted below:

(Geneva Convention)

"Article VII. Applicable Law"

"1. The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable. In both cases the arbitrators shall take account of the terms of the contract and trade usages.

"2. The arbitrators shall act as 'amiables compositeurs' if the parties so decide and if they may do so under the law applicable to the arbitration."

(ECE Rules)

"Article 38"

"Subject to the provisions of article 39, the arbitrator's award shall be based upon the law as determined by the parties of the dispute. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable. In both cases the arbitrators shall take account of the terms of the contract and the trade usages."

"Article 39"

"The arbitrators shall act as 'amiables compositeurs' if the parties so decide and if they may do so under the law applicable to the arbitration."

2. Paragraphs 1 and 2 of the present article are concerned with arbitral proceedings that are subject to the rules of some applicable law. Such law may have been designated by the parties expressly in a contract; otherwise, the arbitrators must determine the applicable substantive law according to the conflict of laws rules that they deem applicable in the light of the particular circumstances of the case.

3. Paragraph 3 deals with arbitrators acting *ex aequo et bono* (as "amiables compositeurs"). In arbitration rules intended for world-wide use, this type of arbitration cannot be neglected. It is used in many countries of Western Europe, Africa, Asia and Latin America. The formula in paragraph 3 gives arbitrators acting as "amiables compositeurs" great freedom in arriving at their award, although it is generally accepted that such arbitrators are bound by rules of public order (*ordre public*), if not by "*jus cogens*" in general.

4. Paragraph 4 provides that "in any case", whether the arbitrators are to decide according to the rules of law or as "amiables compositeurs", they shall take into account the terms of the contract and the usages of the trade. This gives arbitrators wide latitude, divorced from any specific system of municipal law. In the international commercial arbitrations for which these rules are designed, this approach corresponds with the intention of the parties.

SETTLEMENT

Article 28

1. If, before the award is rendered, the parties agree on a settlement of the dispute, the arbitrators shall either issue an order for the discontinuance of the arbitral proceedings or, if requested by both parties and accepted by the arbitrators, record the settlement in the form of an arbitral award on agreed terms. The arbitrators are not obliged to give reasons for such an award.

2. The arbitrators shall, in the order for the discontinuance of the arbitral proceedings or in the arbitral award on agreed terms, fix the costs of the arbitration as specified under article 31. Unless otherwise agreed to by the parties, these costs shall be borne equally by both parties.

3. Copies of the order for discontinuance of the arbitral proceedings or of the arbitral award on agreed terms, duly signed by the arbitrators, shall be transmitted by the arbitrators to the parties and, if the arbitration is administered by an arbitral institution, to that institution.

Commentary

1. The ECAFE Rules, the Inter-American Rules, as well as the ICSID Arbitration Rules⁴ all regulate the case where the parties agree to a settlement of the dispute during the arbitration proceedings. The Investment Rules distinguish between an "order of discontinuance" and a "settlement in the form of an arbitral award" (rule 43); the Inter-American Rules and the ECAFE Rules mention only the latter possibility. The advantage of a settlement in the form of an award lies in the fact that such a settlement acquires the legal force of an award.

2. Paragraph 1 follows the patterns of the Investment Rules in distinguishing between a discontinuance of the arbitral proceedings and a settlement in the

⁴ Rules of Procedure for Arbitration Proceedings of the International Centre for Settlement of Investment Disputes as adopted by the Administrative Council of the Centre pursuant to article 6 (1) (c) of the Convention on the Settlement of Investment Disputes.

form of an arbitral award on agreed terms. The present article does not require the parties to transmit to the arbitrators the full and signed text of a settlement that may be embodied in an award. In practice, a settlement may be reached during a hearing, often with the assistance of the arbitrators, provided the parties request and the arbitrators are willing to render such assistance. The arbitrators may also draft the award on agreed terms, embodying the settlement orally arrived at by the parties during a hearing. It was considered preferable not to require that arbitrators embody in an award any settlement reached by the parties. Under paragraph 1 the arbitrators may refuse to "record the settlement in the form of an arbitral award on agreed terms"; they may do so at their discretion, e.g. if the settlement would be against public policy. In such a case the arbitrators would confine themselves to issuing an order for the discontinuance of the arbitral proceedings.

3. Paragraphs 2 and 3 have been added to settle certain practical points. It is believed that paragraph 2 recognizes the spirit of the settlement when it divides the costs of arbitration equally between the parties unless the parties have agreed otherwise.

INTERPRETATION OF THE AWARD

Article 29

1. Within 30 days after the communication of the award to the parties, either party, with notice to the other party, may request that the arbitrators give an official interpretation of the award, which will be binding upon the parties.

2. Such an interpretation shall be given in writing and duly signed by the arbitrators within 45 days after receipt of the request and shall be transmitted by the arbitrators to both parties and, if the arbitration is administered by an arbitral institution, to that institution.

Commentary

After the award has been rendered, one or both parties may wish that the arbitrators provide an official interpretation of the meaning or scope of the award. The present article follows the example of article VIII, paragraph 2, of the ECAFE Rules. Article 50 of the Convention on the Settlement of Investment Disputes contains a similar provision.

CORRECTION OF THE AWARD

Article 30

1. Within 30 days after the communication of the award to the parties, the arbitrators, on their own initiative or on request of a party, may correct any error in computation, any clerical or typographical error, or any error of similar nature in the award.

2. Any such correction, in writing and duly signed by the arbitrators, shall be communicated by the arbitrators to the parties and, if the arbitration is administered by an arbitral institution, to that institution.

[3. Within 15 days of the communication of the award to the parties, a party may request the arbitrators to render an additional award as to claims presented in the arbitral proceedings but omitted from the award. A copy of such request shall be sent to the

other party. If the arbitrators consider the request justified, they shall complete their award within 60 days of receipt of the request. The additional award shall comply with the provisions of article 26.]

Commentary

1. Paragraphs 1 and 2 contain provisions similar to those contained in article VIII, paragraph 3 of the ECAFE Rules.

[2. Paragraph 3 is designed to prevent the invalidation of awards on the ground of an omission or failure to decide upon one or more claims presented in the arbitral proceedings. National arbitration laws generally consider the failure or omission of arbitrators to deal with points at issue as grounds for setting aside an award. Thus, under article 25(e) of the Uniform Law annexed to the 1966 European Convention Providing a Uniform Law on Arbitration, "an arbitral award may be set aside by a court if the arbitral tribunal has omitted to make an award in respect of one or more points of the dispute and if the points omitted cannot be separated from the points in respect of which an award has been made".

By adopting the UNCITRAL Arbitration Rules, the parties agree to an augmentation of the power of the arbitrators, authorizing the arbitrators not only to correct any clerical or typographical errors (para. 1) but also to complete their award (para. 3). The authority thus given to the arbitrators under paragraph 3 to complete an award by removing an omission presents issues quite distinct from national rules of law dealing with awards where an omission *has not been corrected*, or where the arbitration rules agreed to by the parties do not authorize such action by the arbitrators. It may be noted that under this paragraph the arbitrators may complete the award only as to points at issue that were presented in the arbitral proceedings. Consequently, the rule in paragraph 3 would apply, e.g. to an inadvertent failure to fix or apportion the costs of arbitration or to rule on a claim for interest. The rule could also apply to a case in which a counterclaim was asserted without substantial evidence in its support, but as to which the arbitrators failed to express their opinion in the award. In the absence of a provision like paragraph 3 in these Rules, a lengthy and costly arbitration might be totally invalidated; permitting completion of the award on points at issue that had been presented in the arbitral proceedings would be in the interest of an efficient and effective disposition of the dispute between the parties.]

COSTS

Article 31

1. The arbitrators shall fix the costs of arbitration in their award. The term "costs" includes:

Non-administered

(a) The fee of arbitrators, to be stated separately and to be fixed by the arbitrators themselves;

Administered

A(a)(i) The fee of arbitrators, to be stated separately and to be fixed by the arbitrators themselves after consultation with the arbitral institution which may make any comment it

Administered

deems appropriate concerning the fee suggested by the arbitrators;

(ii) The costs of administration as declared by the arbitral institution;

(b) The travel and other expenses incurred by the arbitrators;

(c) The costs of expert advice and of other assistance required by the arbitrators;

(d) The travel expenses of witnesses, to the extent such expenses are approved by the arbitrators;

(e) The compensation for legal assistance of the successful party, if the arbitrators deem that legal assistance was necessary under the circumstances of the case and if such compensation was claimed during the arbitral proceedings, and only to the extent that the compensation is deemed reasonable and appropriate by the arbitrators.

2. The costs of arbitration shall, in general, be borne by the unsuccessful party. The arbitrators may, however, apportion the costs between the parties.

Commentary

1. Paragraph 1 gives a non-exhaustive enumeration of items that may be considered as included in the costs of arbitration. Concerning the fee of arbitrators, the general rule is that the fee is fixed by the arbitrators themselves. In the case of administered arbitration, however, the arbitrators must consult the arbitral institution concerning the amount of their fee and the arbitral institution may comment on the size of the fee proposed by the arbitrators.

It should be noted that the fee of the arbitrators must be stated separately in the award. All other costs of arbitration may be combined in one figure.

2. A provision similar to paragraph 2 may be found in article 43 of the ECE Rules and in article VII, paragraph 7, of the ECAFE Rules.

DEPOSIT OF COSTS

*Article 32**Non-administered*

1. Arbitrators, on their appointment, may require each party to de-

Administered

1A. The arbitral institution may require, after consultation with

2. Report of the Secretary-General (addendum): observations on the preliminary draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade (UNCITRAL Arbitration Rules) (A/CN.9/97/Add.1)*

NOTE BY THE SECRETARIAT

1. As was stated in the introductory part of the report of the Secretary-General setting forth a preliminary draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade (A/CN.9/97, hereinafter referred to as the "preliminary draft"), any comments and observations regarding the preliminary draft received by the Secretariat would be placed before the Commission at its eighth session in a separate document.

* 6 March 1975.

Non-administered

posit an equal amount as an advance for the costs of arbitration.

2. During the course of the arbitral proceedings the arbitrators may require supplementary deposits from the parties.

3. If the required deposits are not paid in full within 30 days the arbitrators shall notify the parties of the default and give an opportunity to either party to make the required payment.

4. The arbitrators shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

Commentary

1. Requirement of a deposit for costs is customary. Pursuant to paragraph 1, each party shall pay one half of the advance payment. During the course of the arbitral proceedings and, in the light of the development of the proceedings, further deposits may be required (paragraph 2). If any of the required deposits, i.e. either the initial or a supplementary deposit, is not paid in full, both parties are notified and each has an opportunity to make the required payment (paragraph 3). This solution is a practical one since a party who has fulfilled his own obligations may have a strong interest that the arbitration proceed to a conclusion and may therefore be willing to make the payment required of the other party.

2. One advantage of administered arbitration is that the arbitral institution takes care of requiring and collecting the deposits for the costs of arbitration.

Administered

the arbitrators, that each party deposit an equal amount as an advance for the costs of arbitration.

2A. During the course of the arbitral proceedings the arbitral institution may require supplementary deposits from the parties if requested to do so by the arbitrators.

3A. If the required deposits are not paid in full within 30 days the arbitral institution shall notify both the arbitrators and the parties of the default and give an opportunity to either party to make the required payment.

4A. The arbitral institution shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

2. In accordance with the decision taken by the Commission at its sixth session, the preliminary draft was circulated to the regional economic commissions of the United Nations and to some 75 centres of Com-

mercial arbitration for observations. Owing to the fact that most of these centres were represented at the Fifth International Arbitration Congress (New Delhi, 7-10 January 1975), at which the preliminary draft was considered, and that they submitted their observations directly to the two working parties established by the Congress, few replies have been received by the Secretariat. The modifications in the preliminary draft resulting from the comments made at the New Delhi Congress are set forth in document A/CN.9/97/Add.2.*

3. The annexes to this note set forth the observations submitted by the Economic Commission for Europe, the International Chamber of Commerce and the Argentine Chamber of Commerce, and the text of the resolution on the draft UNCITRAL arbitration rules adopted by the Fifth International Arbitration Congress.

ANNEX I

Observations of the Economic Commission for Europe

[Original: French]

In your letter of 31 October 1974, you requested me to transmit to you, by 31 December 1974, any observations on the preliminary draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade (UNCITRAL arbitration rules) (A/CN.9/97).

I note first of all that the preliminary draft largely takes into account prior international work in this field, including the Arbitration Rules of the Economic Commission for Europe. I therefore have no observations to make on the provisions of the preliminary draft relating to arbitration procedure proper.

I wonder, however, whether the procedure for the appointment of arbitrators in *ad hoc* arbitration, in the event of disagreement between the parties on this question, might not be facilitated by being more closely linked to the United Nations system. That would mean firstly that, in order to determine the appointing authority in cases where the agreement between the parties determines neither the appointing authority nor the place of arbitration, the claimant could address himself either to the appointing authority of the country in which the respondent has his habitual residence or place of business, or to the authorities designated by the rules for the purpose of appointing the arbitrators or administering the procedure. However, the function of "authority of last resort" could probably best be assumed by the Secretary-General of the United Nations, either directly or through a representative.

I should be very pleased to learn what you think of this idea and beg you to accept, Sir, etc.

(Signed) Janez STANOVNIK
Executive Secretary

Economic Commission for Europe

ANNEX II

Observations of the International Chamber of Commerce

[Original: French]

1. The International Chamber of Commerce wishes first of all to express its warmest thanks to the Legal Counsel of the United Nations for having invited it to comment on the preliminary draft arbitration rules of UNCITRAL (A/CN.9/97). This approach can only strengthen the co-operation between UNCITRAL and ICC, which is already particularly close in the field of international payments.

2. In view of its delay in expressing its initial reaction to a draft whose importance it recognizes, the International Chamber of Commerce wishes to confine its comments to the question of the appropriateness of the draft, so that UNCITRAL at its eighth session may have material which it can use to form an opinion on the conditions in which further action could be taken on the preliminary draft.

With regard to the question of appropriateness, ICC considers that a strict distinction should be drawn between *ad hoc* arbitration, which was the only type of arbitration considered by UNCITRAL at its sixth session, and administered arbitration, which is now covered by the preliminary draft.

(a) The difficulties to which *ad hoc* arbitration gives rise at the international level, *inter alia*, because of the inadaptability of national rules of civil procedure that are applicable in the absence of or in opposition to special stipulations by the parties, make particularly appropriate the adoption of international rules as precise as they are complete. Accordingly, ICC stands ready to co-operate with UNCITRAL in a detailed study of the content of such rules.

(b) The appropriateness of establishing international rules for arbitration administered by an institution deserves more careful study. The existence of arbitral institutions which have adopted rules of their choice and whose satisfactory operation proves that they are able to meet a requirement of international trade, prevents any assertion that there is a gap to be filled in this area, as there is in the sphere of *ad hoc* arbitration.

3. In any event, in the case of both *ad hoc* arbitration and administered arbitration, it is the views of the economic circles which are the real users of arbitration which must be of decisive importance in the final analysis. In this regard, the International Chamber of Commerce suggests that subsequent work should be carried out in close co-operation with arbitration centres which have a thorough practical experience of international arbitration and with organizations representing the economic circles which use arbitration. Such co-operation is essential for a careful study of the conditions and consequences of the establishment of rules applicable to international arbitration, i.e. both *ad hoc* arbitration and arbitration administered by an institution. To this end, ICC expresses the wish that a study group, similar in structure to the UNCITRAL study group on international payments, should be set up; ICC stands ready to participate fully in the work of such a study group.

ANNEX III

Observations of the Argentine Chamber of Commerce

[Original: Spanish]

We refer to your note of 31 October 1974, requesting our views on the draft rules for commercial arbitration, to be considered by UNCITRAL at its eighth session in April 1975.

With the advice of a specialist, Mr. Jaime Malamud, President of our Advisory Council, Co-ordinator of the Trade Law Committee of that Council, and a member of our Arbitration Tribunal, we have studied with great interest the preliminary draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade, together with the comments explaining the idea behind the drafting and practical application of those rules.

In view of the short time at our disposal (your note was received by the Argentine Chamber of Commerce on 9 December, and it was requested that a reply should reach the United Nations before the end of the year), we shall not comment on each individual article. Moreover, such comments are unnecessary for the simple reason that the text as a whole seems to us adequate and of great value for the promotion of commercial arbitration.

The precedents considered and the undisputed ability of the drafters have produced clear and specific rules to ensure that the arbitration procedure provides the maximum safeguard for

* Reproduced in this volume, part two, III, 3.

the parties concerned. Nothing has been overlooked—from the arbitration clause and its scope to the award, its interpretation, where necessary, and its possible correction, and finally the costs and their deposit by the parties.

We feel that this draft, which is practical and will be well received and utilized in the business world, should be adopted by UNCITRAL at its eighth session.

(Signed) Arnaldo MUSICH
Vice-President

(Signed) Alfredo CERVI
Executive Secretary

ANNEX IV

Resolution on the draft UNCITRAL arbitration rules adopted by the Fifth International Arbitration Congress (New Delhi, 7-10 January 1975)

[Original: English]

WHEREAS

The United Nations Commission on International Trade Law (UNCITRAL) requested its secretariat to prepare draft rules for optional use in *ad hoc* arbitration relating to international trade and to submit such rules for the Commission's eighth session (April 1975); and

The Commission requested that such rules be prepared in consultation (*inter alia*) with centres of international com-

mercial arbitration, and consequently its secretariat invited the International Council for Commercial Arbitration (ICCA) to establish a representative group for consultation in the preparation of the rules; and

Following extensive consultation with the above group, a preliminary draft of such rules was issued by the Secretary-General on 4 November 1974, and was made available for consultation at this Congress; and

Views expressed in the further consultation during this Congress will be communicated to the Commission and will be given consideration in the further elaboration of the proposed rules:

BE IT RESOLVED THAT THE CONGRESS

Believes that the preparation by UNCITRAL of such rules is a valuable project that will facilitate arbitration and thereby will aid world trade;

Appreciates the opportunity for consultation in the preparation of the rules, and supports UNCITRAL's current programme for widespread consultation, with special reference to the views of parties who will make use of arbitration in all countries, including both developing and developed;

Endorses the principles of the preliminary draft of the rules and encourages UNCITRAL, in the light of comments made on this draft, to finalize the rules and make them available for use at the earliest possible date.

3. Report of the Secretary-General (addendum): suggested modifications to the preliminary draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade (UNCITRAL Arbitration Rules) (A/CN.9/97/Add.2)*

INTRODUCTION

1. In November 1974 a report of the Secretary-General set forth a preliminary draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade (A/CN.9/97,** hereinafter referred to as the "preliminary draft").

2. As was explained in the introduction to the above document, this preliminary draft was prepared pursuant to a decision taken by the United Nations Commission on International Trade Law (UNCITRAL) at its sixth session. Under this decision, the Secretary-General was requested to prepare such a draft set of arbitration rules "in consultation with regional economic commissions of the United Nations and centres of international commercial arbitration". Accordingly, the preliminary draft of November 1974 has been given widespread circulation and been transmitted, with a request for comments, to the above-mentioned regional economic commissions and to over 70 centres of commercial arbitration. In addition, as part of such consultation, the preliminary draft was made available for consideration at the Fifth International Arbitration Congress (New Delhi, India, 7-10 January 1975) and was the subject of intensive consideration by the First and Second Working Parties of that Congress.¹

3. Written comments that have so far been re-

ceived in response to the above-mentioned circulation of the preliminary draft are set forth separately in a note by the Secretary-General (A/CN.9/97, Add.1).† That note also sets forth the full text of a resolution adopted by acclamation at the above-mentioned Fifth International Arbitration Congress and which states that the Congress "Endorses the principles of the preliminary draft of the rules and encourages UNCITRAL, in the light of the comments made on this draft, to finalize the rules and make them available for use at the earliest possible date".

4. The discussions at the Congress, while giving general approval to the preliminary draft, also provided valuable suggestions as to points in regard to which the draft should be modified or clarified in the light of experience and practice with international commercial arbitration. These modifications and clarifications are indicated in this report. The discussions at the Congress also included various suggestions of a stylistic nature and other suggestions that did not receive widespread support. Such suggestions are not dealt with in this report, but have been noted by the Secretariat for further consideration together with comments which will be received in the future in response to the transmittal of November 1974 and in the light of any comments or decision by the Commission at its eighth session.

MODIFICATIONS IN THE PRELIMINARY DRAFT

A. Agreement by the parties as to the seat of arbitration

5. The introduction to the preliminary draft sets forth a model arbitration clause which recommends

* 6 March 1975.

** Reproduced in this Yearbook, part two, III, 1.

¹ The First Working Party of the Congress devoted all of its meetings, held on 7, 8 and 9 January, to a review of the preliminary draft. The Second Working Party included consideration of relevant portions of the preliminary draft within its topic dealing with the presentation of evidence in international commercial arbitration.

† Reproduced in this Yearbook, part two, III, 2.

that the parties reach advance agreement on specific points; with respect to these points specific clauses are set forth with blanks to be completed by the parties. These clauses include provision for the designation of an administering institution or appointing authority, the number of arbitrators, and the language or languages to be used in the proceedings. The model clause also notes that, if the parties wish to determine beforehand the place of arbitration, their choice should also be added.²

6. The discussions at the New Delhi Congress disclosed a widespread body of experience and opinion to the effect that it was important for the parties to agree in advance on the seat of arbitration. On points not covered by the arbitration rules, the procedural law of the seat of arbitration may be applicable. In addition, the award would be rendered at the seat of arbitration; the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards in article V attaches special significance to the rules and law of the country in which the award is made. In view of these factors, there was general support that the parties should be encouraged to agree in advance on the seat of arbitration. Consequently, the model clause should include the following:

"(d) The seat of the arbitration shall be . . ."

7. In these discussions it was understood that if the parties, in spite of this recommendation, did not agree on the seat of arbitration, the provision of article 14, paragraph 1, would be applicable; under this article the seat of arbitration would then be determined by the arbitrators. It was generally agreed that, for reasons outlined above, this determination should be made as early as possible. It seems advisable to draw attention to this in the commentary to article 14.

8. In these discussions it was also recognized that, by specifying the seat of arbitration, the parties would not require that all of the hearings or other aspects of the arbitration occur at the specified place; article 14 so provides (paras. 3 and 4).

B. Time limits

9. The discussions at the New Delhi Congress included consideration of the time-limits set forth in the preliminary draft. The objective of the draft rules to promote prompt disposition of arbitral proceedings met with general approval; but the discussions disclosed the view that the specific time-limits, throughout the rules, should be re-examined. Thus, it was felt that some of these time-limits (e.g., the 15-day period mentioned in article 7, para. 5), seemed to be too short and needed further consideration.

10. It was recognized that pursuant to article 20 the parties (or the arbitrators in the absence of agreement by the parties) may extend the time-limits mentioned in section III (arbitral proceedings); a similar provision is to be found in article 12 concerning the time-limits in section II (appointment of arbitrators).

² The full text of the model clause appears in the introduction to the preliminary draft at point 6.

Here, where the arbitrators are not as yet appointed, the extension may be given by the parties or by the arbitral institution designated by the parties. It was also recognized that the failure by one party to observe a given time-limit has, according to article 25, no consequences in case the other party does not promptly state his objection to such non-compliance.

11. One suggestion for speeding up the proceedings, together with more ample time-limits, was a combination of the notice of arbitration, provided for in article 3, with the statement of claim (art. 16). It was argued that, when starting arbitral proceedings, the claimant already has full knowledge of the points at issue and of the relief or remedy sought. The statement of claim could therefore readily be combined with the notice of arbitration in which the latter have also to be mentioned. This combination would save time. Arbitrators, once appointed, would then already have at their disposal the full statement of claim. This would then also apply to the respondent, who could start with the preparation of his statement of defence during the period necessary for the appointment of the arbitrators.

12. It therefore seems advisable, in redrafting the rules, to give effect to this suggestion.

C. Oral hearings for the presentation of evidence or argument

13. The preliminary draft draws a distinction between the obligation to hold oral hearings for the presentation of evidence and oral hearings for the presentation of argument. Thus article 13 provides in paragraph 3 that oral hearings must be held if one of the parties offers to produce evidence by witnesses.³

14. On the other hand, paragraph 2 provides that, unless both parties agree that oral arguments shall be presented, the arbitrators would have the authority to decide that the proceedings would be conducted solely on the basis of documents and other written materials. This latter provision contemplates that even if only one party desired an oral hearing for the presentation of argument, the arbitrators could be expected to provide for such an oral hearing in every case where there was real need therefor; on the other hand, it was thought desirable to permit the arbitrators to dispense with an oral hearing in cases where it was requested by only one party and where the hearing would be conducive to unnecessary delay and expense.

15. The consultations at the New Delhi Congress disclosed a preponderant opinion that the presentation of oral argument was a right generally available in legal proceedings which should also be available in arbitral proceedings at the request of either party. It was also noted that costs resulting from a demand for an unnecessary hearing might be assessed to the party making this demand.

³ The preliminary draft added this bracketed language: "unless the arbitrators unanimously decide that such proposed evidence is irrelevant". It was generally concluded that the bracketed language was not necessary.

16. On reconsideration of the matter in the light of this consultation, it seems advisable to replace paragraphs 2 and 3 of article 13 with the following single paragraph:

"If either party so requests, the arbitrators shall hold hearings for the presentation of evidence by witnesses or for oral argument. In the absence of such a request, the arbitrators may decide whether the proceedings shall be conducted solely on the basis of documents and other written materials".

D. Affidavit

17. In connexion with the hearing (art. 21), the suggestion was made that special reference should be made to the possibility of presenting evidence by witnesses in the form of written statements. Under some circumstances this method could save considerable time and expense connected with the arrangement of a hearing in international cases as envisaged by the draft rules.

18. This written statement could take the form of an affidavit, sworn to by the person who gives such evidence; it could also be a written statement simply signed by him. The rules need not regulate the form of the written statement. This choice may initially be left to the party offering the written statement, subject to a possible ruling by the arbitrators that might include a request for oral testimony by the person who made the statement.

4. Report of the Secretary-General (addendum): observations on the preliminary draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade (UNCITRAL Arbitration Rules) (A/CN.9/97/Add.3)*

NOTE BY THE SECRETARIAT

The annexes to this note set forth the observations submitted by the Government of Norway, the Hungarian Chamber of Commerce, the Inter-American Commercial Arbitration Commission and the Inter-American Development Bank.

ANNEX I

Observations by Norway

[Original: English]

From a Norwegian point of view there are no major objections to the preliminary draft of the UNCITRAL Arbitration Rules, contained in document A/CN.9/97.** The draft rules seem to provide a good basis for further discussions.

The Norwegian Government will make the following observations to some of the draft articles:

Article 1

The scope of the Rules (para. 1) should be extended to all disputes which may arise out of any contract, any commercial transaction or another specific (defined) commercial relationship between the parties.

Paragraph 3 should follow more closely the pattern of Article II, paragraph 2 of the 1958 New York Convention and read:

3. "Agreement in writing" means an arbitration clause in a contract or a separate arbitration agreement, signed by

19. Therefore it seems advisable to supplement article 21 with the following paragraph that might follow the present paragraph 4:

"Evidence of witnesses may also be presented in the form of written statements".

E. Interim measures

20. In connexion with article 22 a question was raised as to the form in which the measures envisaged in this article should be established. It was generally agreed that the article should be clarified by adding the following:

"Such interim measures may be established in the form of an interim award".

CONCLUSION

21. In addition to the modifications and clarifications indicated in this report, other suggestions were received at the New Delhi Congress; as has been noted (para. 4 above), these will be considered in connexion with the preparation of a revised version of the present draft.

22. In addition, the modifications and clarifications of the preliminary draft set forth in this report call for certain adjustments in the commentary. This revision will also be made in the course of preparing a revised version of the rules.

the parties or contained in an exchange of letters, telegrams or telexes.

Article 4

In paragraph 3 the period of five days seems to be rather short in inter-continental air mail services and may perhaps be extended to seven days.

Article 11

In case of replacement of an arbitrator during the course of the arbitral proceedings, the hearings held previously should be repeated, unless the arbitral tribunal decides otherwise with the consent of the party having appointed the replaced arbitrator. The provisions in paragraph 2 should be altered to comply with this.

Article 13

The provision in paragraph 1 that the parties be treated with absolute equality ought to be more precise, as it seems insufficient to prevent real inequality between the parties. Such inequality may occur if the parties meet with problems of different kinds during the arbitral proceedings which are treated separately and in different ways by the arbitrators. It is not sufficient that the same formal rules be applied to both parties.

It seems doubtful whether paragraph 3 would mean that oral hearings other than the rendering of evidence will take place in these cases. It seems recommendable that the arbitrators be competent to refuse evidence that they deem irrelevant, as suggested in the bracketed language.

* 1 April 1975.

** Reproduced in this volume, part two, III, 1.

Article 17

In paragraph 2 the word "contract" should be substituted or doubled by "transaction".

Article 18

The rules of preclusion in paragraph 2 should be made clearly applicable also to the cases provided in paragraphs 1 and 4.

Article 22

The parties should have a right to be heard before the arbitrators take interim measures as laid down in article 22, except in urgent matters. The provision contained in paragraph 4 of article 13 may give some help in this respect.

Article 27

In paragraph 1 delete the three words after "applicable".

ANNEX II

Observations by the Hungarian Chamber of Commerce

[Original: English]

Upon studying the draft of the *ad hoc* arbitration rules of procedure foreseen to be adopted in international trade (UNCITRAL Arbitration Rules) we came to the conclusion that it contains acceptable and appropriate solutions for the methods of settlement of the discussions between the parties, consequently we agree in general with the draft.

Besides our understanding in general we naturally deem it necessary that its specific rules should be discussed in detail by the experts. The discussion of the specific rules seems to be useful as the right ideas could be—in our opinion—further polished by which the rules could be simplified but on the other hand some of the problems of the practice could be partly eliminated. With this point in view we would suggest the consideration of some questions as indicated hereunder. Our suggestions and remarks are attached to certain articles of the draft rules.

Article 3

In connexion with the arbitration proceedings it would be expedient to state also the date when the legal effects (e.g. interruption of limitation) begin; either the date when the arbitration procedure has been invoked by one party giving notice about his standpoint to the other, or should it begin when the sole arbitrator undertook the office, or when the three-member arbitration council's establishment has been declared. In our opinion the legal effects must be counted from the written notice of the initiative party. This point of view corresponds also with the practice known by us.

Article 4

We think that paragraph 1 of the draft should be modified in a way—as rightly stated in the commentary part—that the parties participate in the procedure through their representatives unrestrictedly chosen. Although the planned rules are not in contradiction with the above, I would deem it more expedient if the optional representation of the parties could be clearly stated in the text.

Article 5

To keep to an 8 days' delivery date in international trade poses difficulties. This is why we stipulate this period of 30 days, or at least a minimum of 15 days.

Article 6

For a non-administered procedure we find that of paragraph 2 far too difficult, thus we propose to omit statements under

points "a" and "c". We consider the suggestion of point "b" quite sufficient and appropriate. We deem that the commercial chambers playing a significant role in international trade, may act satisfactorily as "appointing authority" for courts of arbitration and in accordance with the requirements of business life, they would not refuse to fulfil such requirements.

Article 7

As to the nomination of the third arbitrator acting as president, in case of non-administered procedure our suggestion corresponds to our notes to article 6. In connexion with paragraph 5 of article 7 we would only add that it would be proper to make independent from the parties the appointment of the third arbitrator acting as chairman. Otherwise the election of the third arbitrator would rather postpone the establishing of the arbitration court.

Article 10

Our standpoint concerning the challenge of the arbitrator in case of a non-administered procedure is connected with our notes made for article 6.

Article 13

The general regulations consider an oral hearing practically as a question of secondary importance. The relevant commentary even emphasizes that the arbitrators may refuse the demand of one of the parties for an oral hearing. It is obvious that the court of arbitration must come to a decision on the basis of the written reports, evidence and of the respective provision of applicable law. The facts of the case serving as a basis for the dispute at law may of course be very different and the real facts are known actually first of all by the parties. Therefore, in knowledge of the facts of the case, if any of the parties requires oral hearing, this wish cannot be refused according to our opinion. Starting from that principle the rule of procedure setting limits in the possibilities to submit documents, would rarely be accepted by the parties. Since the rules of procedure in question aim, on the contrary, at satisfying the demands of economic life, we think that this solution—meaning a restriction—ought to be abolished in the draft. In our opinion, if any of the parties wishes that the arbitration court should hold verbal proceedings, this must be granted. Besides, it has to be mentioned that the agreements between the parties come to conclusion in general by verbal proceedings directed by the court of arbitration. Should such proceedings be realized only depending on the decision of the arbitration court, a number of agreements which mean the better solution, could not be concluded.

Article 28

According to paragraph 2 in case the parties have not agreed concerning payment of the arbitration court's fees, these fees are to be borne in equal proportion. This planned provision needs, in our opinion, an amendment according to the practice. The *ad hoc* arbitration procedure—even if it is realized on the basis of a previous agreement of the parties—is, in the last analysis, a court procedure destined to decide in a dispute between the parties. Considering furthermore that every court procedure, thus the arbitration procedure too, involves risks, the right solution corresponding to practice would be, if—like in the case of civil legal proceedings—the fees of the arbitration proceedings would charge the parties according to the proportion of the failure of the lawsuit. This solution is supported also by the rules of proceedings of the administered arbitration courts.

We would ask you kindly to take into consideration our remarks when studying and discussing the draft.

ANNEX III

Observations by the Inter-American Commercial Arbitration Commission

[Original: Spanish]

I should like to inform you of the results of the Fifth Conference of the Inter-American Commercial Arbitration Com-

mission, held at Bogotá, Colombia, from 4 to 6 December 1974, with particular reference to the draft rules prepared for UNCITRAL on *ad hoc* arbitration relating to international trade.

First, our Executive Committee decided that, in principle, the UNCITRAL rules should be adopted as its own, just as if the draft had been approved by the United Nations. In the meantime, the draft that was forwarded to us has been distributed to the National Sections and to the Commission for information.

A formal resolution in line with the views of the Executive Committee was submitted to, and adopted by, the Conference. A copy of this resolution is annexed hereto.

We are convinced that this draft contains the best rules which have been elaborated for international commercial arbitration. We therefore wish to express to you and to UNCITRAL our congratulations on your initiative, and we hope that both UNCITRAL and the United Nations will take appropriate action to adopt the draft as soon as possible.

ANNEX IV

Observations by the Inter-American Development Bank

[Original: English]

I refer to your letter of 21 November 1974 with which you forwarded document A/CN.9/97 containing a preliminary draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade.

We have reviewed these UNCITRAL Arbitration Rules which take into account important international conventions held in 1958, 1961 and 1965, and also are based on Rules of the Economic Commission for Europe and of the Economic Commission for Asia and the Far East.

These proposed Rules seem to be well-organized and demonstrate a solid foundation in the commercial law field. I do not believe that we can make any improvements, and I therefore wish merely to offer my congratulations to your office for its useful work in this field.

5. Report of the Secretary-General (addendum): observations on the preliminary draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade (UNCITRAL Arbitration Rules) (A/CN.9/97/Add.4)*

NOTE BY THE SECRETARIAT

The annex to this note contains the observations received from the Commission of the European Communities.

ANNEX I

Observations by the Commission of the European Communities

You were kind enough to transmit to the Commission of the European Communities, by letter dated 18 November 1974, the English text of the UNCITRAL arbitration rules (A/CN.9/97 of 4 November 1974), and some days ago you sent us the French version of the same draft rules.

I thank you for sending these documents, on which we have tried to obtain the opinions of member States and the observations of interested circles.

Unfortunately, it has not been possible to obtain all the information requested within the time-limit specified and on the basis of the English text only. In view of the importance of the draft and its undoubted value for business relations, it is highly desirable that the adoption of the UNCITRAL arbitration rules should be preceded by extensive consultation not only of centres

of international commercial arbitration, but also of organizations representing the enterprises involved. Such a wish was also expressed by the Fifth International Arbitration Congress (see resolution No. IV). In order to ensure the success of these consultations, it would seem that more time should be allowed.

Two main considerations emerge from the positive reactions we have thus far received. The first relates to the optional nature of the uniform rules, and the second to the need to limit the application of these rules to non-administered arbitration. It has, in fact been highly appreciated that, in principle, the proposed rules leave the parties free to choose the rules governing the organization of the arbitration procedure. On the other hand, it was observed that the proposed rules should enable the parties to know, with the maximum possible certainty, all the rules to which the arbitral proceedings would be subject. However, the reference simultaneously both to the UNCITRAL arbitration rules and to an international arbitral institution might give rise to some confusion, in that an institution of this kind normally applies its own rules. The rules of the institution and the manner in which they are applied might not be known to the parties and might not be in keeping with the spirit of the proposed UNCITRAL rules.

Until the current consultations have been completed, these observations can be considered only as provisional. I nevertheless wished to communicate them to you before the opening of the eighth session of UNCITRAL on 1 April.

* 7 April 1975.

IV. INTERNATIONAL LEGISLATION ON SHIPPING

1. Report of the Working Group on International Legislation on Shipping on the work of its seventh session (Geneva, 30 September - 11 October 1974) (A/CN.9/96)*

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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 (1971).¹ The Working Group consists of the following 21 members of the Commission: Argentina, Australia, Belgium, Brazil, Chile, Egypt, France, Germany (Federal Republic of), 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.

2. In defining the task of the Working Group, the Commission, at its fourth session, 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 appro-

* 18 November 1974.

¹ Report of the United Nations Commission on International Trade Law on the work of its fourth session (1971), *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17* (A/8417), para. 19; (UNCITRAL Yearbook, vol. II: 1971, part one, II, A).

⁸ All members of the Working Group were represented at the session with the exception of Zaire.

9. The Working Group used the report of the Secretary-General entitled "Fourth report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading" (hereinafter referred to as the fourth report of the Secretary-General) (A/CN.9/WG.III/WP.17) as its working document for the topics examined therein. In that report the Secretary-General examined the following topics: contents and legal effect of issuance of bills of lading or other documents evidencing the contract of carriage (part one); validity and effect of letters of guarantee (part two); definition of contract of carriage and legal position of the consignee (part three).⁹

I. CONTENTS AND LEGAL EFFECT OF DOCUMENTS EVIDENCING THE CONTRACT OF CARRIAGE

A. INTRODUCTION

10. Part one of the fourth report of the Secretary-General dealt with the contents and legal effect of documents evidencing the contract for carriage of goods by sea.¹⁰

11. The Working Group at its sixth session approved the following rule to define the scope of application of the Convention: "The provisions of this Convention shall be applicable to *all contracts for the carriage of goods by sea*."¹¹ By virtue of this provision the scope of application of the Convention is not confined to contracts of carriage evidenced by a bill of lading, but extends to contracts evidenced by simpler documents or by no documents at all. The Working Group decided at its sixth session that, as regards the topic of the "contents of the contract of carriage", the report of the Secretary-General to be prepared for the seventh session of the Working Group should focus "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."¹²

12. In accordance with the suggestion of the Working Group, in part one of the fourth report of the Secretary-General separate consideration was given to two types of documents: bills of lading were considered in chapter I (paras. 3-67) and other types of documents were considered in chapter II (paras. 68-74).

B. BILLS OF LADING

(1) Provisions of existing conventions

13. The Brussels Convention of 1924¹³ sets forth

⁹ The fourth report of the Secretary-General is annexed to the present report as an addendum (A/CN.9/96/Add.1; reproduced in this volume, part two, IV, 2 below).

¹⁰ A/CN.9/96/Add.1, part one, paras. 1-74, reproduced in this volume part 2, IV, 2 below.

¹¹ Working Group, report on sixth session (A/CN.9/88), para. 48 (a). (UNCITRAL Yearbook, vol. V: 1974, part two, III, 1.) This provision appears in the revised compilation of draft provisions on carrier responsibility, hereinafter cited as "Revised compilation" (A/CN.9/WG.III/WP.16), as article I-A (1).

¹² A/CN.9/88, para. 152 (UNCITRAL Yearbook, vol. V: 1974, part two, III, 1).

¹³ Hereinafter referred to as the "Brussels Convention". League of Nations, *Treaty Series*, vol. CXX, No. 2764, p. 157; *Register of Texts of Conventions and other Instruments Concerning International Trade Law*, vol. II, p. 130 (United Nations publication, Sales No. E.73.V.3) (hereinafter cited as *Register of Texts*).

in article 3 provisions on the contents and legal effect of bills of lading. Article 3 was supplemented by article 1 (1) of the Brussels Protocol of 1968 dealing with the rights of third persons.¹⁴ These provisions are set forth below; the provision added by the Brussels Protocol of 1968, which comprises the second sentence of paragraph 4 of article 3, is indicated by under-scoring.

...

3. After receiving the goods into his charge, the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or covering in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage;

(b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper;

(c) The apparent order and condition of the goods.

Provided that no carrier, master, or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable grounds for suspecting not accurately to represent the goods actually received or which he has had no reasonable means of checking.

4. Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b) and (c). *However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith.*

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

...

7. After the goods are loaded, the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill

¹⁴ 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, 23 February 1968; *Register of Texts*, p. 180.

of lading. At the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted, if it shows the particulars mentioned in paragraph 3 of article 3, it shall for the purpose of this article be deemed to constitute a "shipped" bill of lading.

(2) Definition of "bill of lading"

(a) Introduction

14. Since the report of the Secretary-General proposed the establishment of special rules to govern the contents and legal effect of "bills of lading", it was considered advisable to define the term "bill of lading". The report of the Secretary-General proceeded on the assumption that the Convention's rules with respect to "bills of lading" need not involve issues concerning the allocation of rights between successive holders when a bill of lading is in fact transferred or negotiated. Rather, the report approached the definition solely in the context of the rights between the shipper or consignee (or other holder of the bill of lading) and the carrier.¹⁵

15. The report pointed out that the terms that are often used to describe bills of lading (e.g. "negotiable"; "document of title") have connotations which vary from country to country, and hence are unsatisfactory for use in the definition of the document for which special rules as to contents and legal effect would be established.¹⁶ The report noted that bills of lading did have one special and identifiable characteristic: they must be surrendered to the carrier in exchange for the goods. It is this characteristic that makes the bill of lading a safe and effective device for the sale and purchase of goods while they are in transit, and necessitates special provisions to protect third persons who purchase bills of lading in reliance on the statements contained therein. The report of the Secretary-General therefore suggested that the definition of "bill of lading" be based on the above-mentioned characteristic.

16. The report also noted that replies to a questionnaire circulated by the Secretary-General showed that "negotiable" bills of lading normally stated that the goods were to be delivered to the "order" of a designated person, and in some instances to "bearer"; some of the replies suggested that only documents that included such a statement should be considered as "bills of lading".¹⁷ In considering this suggestion the report noted that such a rule would serve the interest of uniformity and set forth a draft definition to reflect this viewpoint (draft provision A-2, part one, at para. 12). However, the report also noted that such a

requirement for specific wording might prevent commonly used terms with similar meanings (such as documents calling for delivery "to order or assigns" or "to assigns") from coming within the scope of the definition, and could also create difficulties when bills of lading are issued in languages other than those in which the Convention would be drafted.¹⁸ The report therefore set forth an alternative definition of "bill of lading" (draft provision A-1, at para. 10), in which the basic requirement that the carrier undertake to deliver the goods only to a person in possession of the document is supplemented by the rule that a provision in the document that the goods are to be delivered to the order of a named person, or to bearer, constitutes such an undertaking. By virtue of this latter provision, documents which used the "order" or "bearer" language would clearly be "bills of lading" under the Convention, although the use of this specific terminology was not required.

(b) Discussion by the Working Group

17. There was general agreement within the Working Group that a definition of the term "bill of lading" would be useful. Most representatives who spoke on the subject favoured the approach taken by the Secretary-General's report toward the definition of "bills of lading".¹⁹ Two representatives stated their preference for a definition that simply incorporated references to relevant operative provisions in the Convention.

18. Several representatives expressed the view that the definition should state clearly that a document was a bill of lading only if it had to be surrendered in exchange for the goods. Some representatives drew attention to the special problems that arose when a bill of lading was lost, or the goods to which it pertained were subject to a court order. One representative observed that in some countries goods must be delivered by the captain to the customs officials at the port of destination rather than to the holder of the bill of lading.

19. At the conclusion of the discussion by the Working Group, the subject of a definition of "bills of lading" was referred to a drafting party.²⁰

(3) Contents of the bill of lading

(a) Introduction

20. The report of the Secretary-General discussed the provisions of article 3 (3) of the Brussels Convention of 1924, which deal with the required contents of bills of lading.²¹ The report drew attention to ambiguities that had arisen with respect to certain of the items required to be included under subparagraphs 3 (a)-(c) of the above article. One of these ambiguities concerns the effect of stating on the bill of lading more than one of the characteristics listed in subparagraph 3 (b), or fewer such characteristics than were furnished

¹⁵ A/CN.9/96/Add.1, part one, paras. 5-7 (reproduced in this volume, part two, IV, 2 below).

¹⁶ A/CN.9/96/Add.1, part one, paras. 59-65 (reproduced in this volume, part two, IV, 2 below) (draft provision J). The problem of the scope of the term "bill of lading" has been discussed more fully in the third report of the Secretary-General on responsibility of ocean carriers for cargo (A/CN.9/88/Add.1), part three, section B, paras. 4-13 (UNCITRAL Yearbook, vol. V: 1974, part two, III, 2).

¹⁷ See A/CN.9/96/Add.1, part one, para. 7 (reproduced in this volume, part two, IV, 2 below).

¹⁸ See A/CN.9/96/Add.1, part one, para. 11 (reproduced in this volume, part two, IV, 2 below).

¹⁹ A/CN.9/96/Add.1, part one, paras. 10 (draft provision A-1) and 12 (draft provision A-2) (reproduced in this volume, part two, IV, 2 below).

²⁰ For the establishment of the Drafting Party, see para. 60 of this report.

²¹ A/CN.9/96/Add.1, part one, paras. 14-56 (reproduced in this volume, part two, below).

by the shipper to the carrier. A second problem relates to the fact that subparagraph (c) of article 3 (3) requires the carrier to show the apparent order and condition "of the goods", whereas notations in this regard more often relate to the packaging; one draft provision in the report was addressed specifically to this problem in subparagraph 3 (c), while an alternative draft provision was designed to avoid any doubt that the term "goods" included crates, containers and other packaging furnished by the shipper.²² The report also considered possible additions to the required contents of bills of lading.²³

(b) *Discussion by the Working Group*

(i) *Revision of contents required under 1924 Convention*

21. The Working Group decided to retain article 3 (3) (a) of the 1924 Brussels Convention. Its text, however, was submitted to the Drafting Party for consideration of a possible simplification of the language.

22. Concerning article 3 (3) (b), most representatives expressed support for draft provision B in the report,²⁴ which would require the carrier to include in the bill of lading both "the number of packages or pieces, and the quantity or weight", provided both were furnished by the shipper. The Working Group approved this modification of article 3 (3) (b).

23. Several representatives stated that bills of lading should include a brief statement of the nature of the goods. The Working Group approved this suggestion, but several representatives noted that any such statement had to be very general, particularly in cases where the goods were in packages or containers.

24. Concerning article 3 (3) (c) of the 1924 Brussels Convention, most representatives favoured the addition of the phrase "including their packaging", as suggested in draft provision C in the Secretary-General's report (part one, at para. 28). They reasoned that the apparent condition of the packaging was often indicative of the condition of the goods within such packaging. Furthermore, since carriers were not expected to open up sealed packages or containers, they were in most cases in a position to examine only the apparent condition of the packaging and not of the goods themselves. Several representatives opposed draft provision C on the ground that the reference to packaging only in this one instance would lead to misinterpretation at other places in the Convention where the term "goods" was used and that carriers would be encouraged by such a provision to enter unnecessary qualifications when describing the condition of packaging.

25. Several representatives supported draft provision D in the Secretary-General's report (part one, at para. 29), which called for the addition of the phrase "and crates, containers and other packaging furnished by the shipper" to the definition of "goods" approved previously by the Working Group (revised compilation, article I-C(2)). It was argued in support of draft provision D that it would clarify not only that the carrier was obligated to note the apparent condition of the packaging on the bill of lading, which was a good indication of the condition of the enclosed goods, but also that the provisions in the revised Convention regarding goods, in particular those concerned with liability for damage to goods, were applicable to the packaging of the goods. Several other representatives opposed draft provision D on the ground that it would create a new liability of carriers for damage to packaging even when there was no damage to the goods contained therein and would reopen the issue of carrier liability and unit limitations on liability. Several representatives supported inclusion of both draft provisions C and D. Several other representatives preferred retention of article 3(3)(c) of the 1924 Convention without any amendment of the definition of "goods" previously adopted by the Working Group.

(ii) *Possible additions to required contents of bills of lading*

26. Some representatives stated that the required contents of bills of lading should be kept to a minimum and expressed their opposition to any addition to the contents requirement established under article 3(3) of the 1924 Brussels Convention. They held the view that if any additions were desired to the contents of bills of lading, it should be done by giving shippers the option to request their inclusion.

27. At the suggestion of several representatives, the Working Group decided to require that bills of lading contain a brief statement of the general nature of the goods as supplied by the shipper, but left it to the Drafting Party to find an appropriate place for this provision in the revised Convention.

28. The Working Group approved draft provision F in the Secretary-General's report (part one, at para. 46), which would require carriers to include in bills of lading "the name and principal place of business of the contracting carrier". The suggestion of one representative to delete from draft provision F the word "contracting" in light of the definition of "carrier" previously adopted by the Working Group (revised compilation, article I-C(1)), was referred to the Drafting Party. The proposal of one representative to add the phrase "or his agent at the port of discharge" to draft provision F was not adopted by the Working Group.

29. One representative, supported by several others, proposed that the required contents of bills of lading should include the place of issuance of the bill of lading and the date on which the carrier took over the goods at the port of loading. It was stated in support that the place of issuance was important in determining the geographic scope of application of the Convention, while the date on which the carrier took over the goods at the port of loading established the

²² Draft provisions C and D on these issues appear at paras. 28 and 29 of part one of the report of the Secretary-General. As was noted in the report (foot-note 29, at para. 29), under a prior decision of the Working Group, containers had been taken into account in the formulation of the limits on carrier liability. See revised compilation (A/CN.9/WG.III/WP.16), at article II-B.

²³ A/CN.9/96/Add.1, part one, paras. 42-52 (reproduced in this volume, part two, IV, 2 below).

²⁴ A/CN.9/96/Add.1, part one, para. 24 (reproduced in this volume, part two, IV, 2 below).

commencement of the period of the carrier's responsibility. The Working Group decided to add both the place of issuance of the bill of lading and the date on which the carrier took over the goods at the port of loading to the required contents of bills of lading.

30. Most representatives agreed that the following items of information should be added to the required contents of bills of lading: the ports of loading and discharge under the contract of carriage; the name of the vessel on which the goods are loaded; the number of originals of the bill of lading; and the name of the shipper. There was general opposition to requiring that bills of lading contain detailed provisions as to negotiability.

31. Most representatives favoured a requirement that the signature of the carrier appear on the bill of lading. Some representatives noted that the rule should be wide enough to authorize signature by mechanical reproduction, printing or stamping, since this was in accord with commercial practice. One representative favoured a clarification to the effect that the signature requirement could be met by an agent of the carrier.

32. Most representatives expressed their support for requiring the inclusion, in some form, of the freight charges on the shipment, at least in cases where freight was collectable at the place of destination. Several representatives favoured a mandatory notation on the bill of lading whenever freight had been prepaid.

33. Most representatives were of the view that it would be useful if bills of lading showed the name of the consignee. However, several representatives pointed out that the consignee would not be definitely known where the bill of lading was made out to the order of a named person or to bearer.

34. One representative proposed the addition of the following contents requirement to the bills of lading: "The time used for loading if it exceeded the time provided for in the contract of carriage." It was explained that the provision was intended to prevent the carrier from attempting to collect from the consignee for demurrage that had occurred at the port of loading.

35. Several representatives observed the need for a careful examination of the sanctions that would be attached if one or more of the expanded list of required items of information were omitted from the bill of lading. There was agreement that such an omission should not invalidate the bill of lading. One representative suggested that the issue of sanctions should be left to national courts.

36. Concerning "shipped" bills of lading, the Working Group approved in substance the modification of article 3 (7) of the 1924 Convention proposed in draft provision H in the Secretary-General's report (part one, at para. 55). Draft provision H was designed to clarify article 3 (7) without, however, changing its substance. The Working Group decided to add to draft provision H the bracketed sentence found in paragraph 56 of the report of the Secretary-General.

(4) *Information supplied by the shipper which is inaccurate or which the carrier has no reasonable means of checking; reservations by the carrier*

(a) *Introduction*

37. The Brussels Convention of 1924, after stating the required contents of the bill of lading, added the following as a general proviso to article 3 (3):

"Provided that no carrier, master, or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable grounds for suspecting not accurately to represent the goods actually received or which he has had no reasonable means of checking."

38. The report of the Secretary-General noted that the above provision merely authorized the carrier to omit certain matters from the bill of lading, whereas commercial practice called for the inclusion of such matters, subject to an appropriate notation or reservation by the carrier. The report set forth a draft provision designed to reflect this commercial practice.²⁵

(b) *Discussion by the Working Group*

39. One representative, supported by several others, favoured taking as a starting point draft provision E in the Secretary-General's report (part one, at paragraph 35), which would require the carrier to insert in bills of lading statements concerning the description, marks, number, quantity or weight of the goods as furnished by the shipper, but would permit the carrier to specifically note his reservation if he doubted the accuracy of the shipper's statement or had no reasonable means of checking it. It was proposed, however, that draft provision E should be supplemented by a provision stating that, as against third parties acting in good faith, the carrier could only invoke a reservation that made specific reference to the suspected inaccuracy if the carrier knew or should have known of the inaccuracy. Several representatives stated in support of draft provision E, as modified above, that it corresponded to current commercial practice. Some representatives and observers noted that a third party would bear a heavy burden under a rule where he had to show that "the carrier knew or should have known of the inaccuracy".

40. Several other representatives favoured a rule whereby the carrier could refuse to enter on the bill of lading information concerning the goods as furnished by the shipper, provided the carrier gave specific reasons for such refusal.

41. The Working Group decided to refer the question of reservations to the Drafting Party with instructions that it should develop a draft text based on the following principles:

1. The carrier shall be obliged to include in the bill of lading all statements furnished by the shipper concerning the general nature, marks, number, quantity and weight of the goods;

²⁵ A/CN.9/96/Add.1, part one, paras. 31-37 (reproduced in this volume, part two, IV, 2 below). Draft provision E dealing with the matter appears at para. 35.

2. The carrier may add his reservations to the statements furnished by the shipper, giving specific reasons for his reservations;

3. There is no need to develop a special rule dealing with the legal effect, as to questions of proof, of reservations entered by the carrier on the bill of lading.

42. The Working Group decided that the general rule on reservations by the carrier should also apply to shipments of bulk cargo and of containerized cargo, and that there was no necessity for developing special rules that would only apply to these particular types of carriage. However, one representative and one observer noted the relationship of containerization to the unit limitation of liability previously approved by the Working Group (revised compilation, article II-C); under that provision a container constitutes one shipping unit, but if the contents of the container are described the goods in the container may be considered in some countries as several shipping units.

(5) *Contents of the bill of lading as evidence against the carrier*

(a) *Introduction*

43. Article 3, paragraph 4 of the Brussels Convention of 1924, as supplemented by the Protocol of 1968, reads as follows;

4. Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b) and (c). *However proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith.*²⁶

44. The report of the Secretary-General (part one, at paras. 57-61) noted that the phrase "as therein described in accordance with paragraph 3 (a), (b) and (c)" presented problems of interpretation, since the shipper often supplied information (including a description of the goods) which the carrier had no means of checking. Under such circumstances it was important to regard the information furnished by the shipper as qualified by the reservations noted by the carrier on the bill of lading. On the other hand, carriers sometimes noted reservations as to matters which they had reasonable means of checking. In addition, reservations entered by carriers on bills of lading were sometimes so general or vague that they failed to give adequate notice to persons relying on the contents of the bill of lading. The report set forth a draft provision (J-1) designed to express more clearly that *prima facie* and conclusive evidentiary effects attached to all statements in the bill of lading, subject only to such reservations noted on the bill of lading as were permitted under the revised Convention.²⁷

45. The report also noted that the conclusive evidence rule added by the 1968 Protocol applied to a "third party acting in good faith". This provision

clearly protected a person to whom the consignee transferred the bill of lading, and usually was construed to include the consignee. However, in some legal systems the position of the consignee was not clear, since it was possible to regard him as an *immediate* party to the contract of carriage rather than as a "third" party. It was suggested that the question should not be left in doubt, since the consignee (or a bank acting for the consignee) often relied on the bill of lading in paying for the goods. A draft provision was proposed to avoid any doubt as to whether the protection afforded transferees extended, in appropriate cases, to the consignee.²⁸

(b) *Discussion by the Working Group*

46. The discussion commenced with a consideration of draft provision J-1 in the Secretary-General's report (part one, at paras. 59 and 60). Several representatives made suggestions for drafting changes in draft provision J-1. A number of representatives stated that the phrase "third party acting in good faith" in the second sentence of draft provision J-1 was sufficiently clear and, consequently there was no need to add "including a consignee". Other representatives were willing to accept the addition of "including the consignee", if it was qualified so as to exclude a consignee who was also the shipper.

47. Most representatives emphasized the need to distinguish between cases where the bill of lading contained no reservations by the carrier and cases where the carrier had validly expressed reservations permitted under the Convention. Several of these representatives introduced draft proposals designed to accomplish this aim. It was pointed out that, in the absence of reservations, the bill of lading should be *prima facie* evidence of the goods as therein described, and that as against third parties acting in good faith the carrier should not be permitted to offer evidence that would contradict the description of the goods appearing in the bill of lading. However, where the carrier entered valid reservations under the Convention, to the extent that such reservations were permitted, the particulars to which the reservations applied should not have the effect of presumptions against the carrier.

48. One representative, supported by some others, proposed that the carrier should be permitted to offer evidence to disprove information contained in the bill of lading unless a third party in good faith relied to his detriment on some description or statement in the bill of lading. One representative stated that the rule on the evidentiary effect of the bill of lading should provide expressly that the bill of lading shall be *prima facie* evidence only for the shipper as against the carrier; otherwise the wording now found in article 3 (4) of the 1924 Convention might give rise to needless disputes and divergent interpretations, and would unjustifiably provide this benefit to a person who gained possession of the bill of lading in bad faith.

49. The Working Group decided to refer to the Drafting Party draft provision J-1 together with the proposals made by members of the Working Group during the discussions.

²⁸ A/CN.9/96/Add.1, part one, para. 60 (reproduced in this volume, part two, IV, 2 below).

²⁶ The second sentence in italics in this quotation, would be added pursuant to the Brussels Protocol of 1968.

²⁷ A/CN.9/96/Add.1, part one, paras. 57-61 (reproduced in this volume, part two, IV, 2 below). Draft provision J-1 appears at paras. 59 and 60. With respect to consideration of permissible reservations, see paras. 37-42 above.

(6) *Effect of omitting required information from bills of lading*

(a) *Introduction*

50. The report of the Secretary-General observed that while the Brussels Convention of 1924 required the carrier to state certain information in the bill of lading (e.g., the apparent order and condition of the goods), the Convention did not specify the consequences of the carrier's omission of such information. To clarify the matter, the report set forth a draft provision (J-2) whereby, if the carrier fails to note on the bill of lading the apparent order and condition of the goods, he is deemed to have noted that the goods were in apparent good order and condition.²⁹ Draft provision J-2 also provides that if the bill of lading does not note that freight charges are due on arrival of the shipment, the carrier is deemed to have noted that no freight charges will be due on its arrival.³⁰

(b) *Discussion by the Working Group*

51. The discussion in the Working Group was based on draft provision J-2 in the Secretary-General's report (part one, at para. 63). All representatives who spoke on the subject expressed support for the rule in draft provision J-2, whereby if a carrier fails to include a notation on the bill of lading as to the apparent condition of the goods, he is deemed to have noted on the bill of lading that the goods were in apparent good condition. It was agreed that such a presumption would underscore the duty of the carrier to make a reasonable effort to check on the condition of the goods and to disclose any damage or defect in the goods that he is aware of. It was further agreed that such a rule would provide needed protection for transferees of the bill of lading.

52. Most representatives opposed the provision in draft provision J-2 dealing with freight. Under this provision, if the bill of lading does not state that freight will be due on arrival of the shipment, it is presumed that no freight charges are collectable from the consignee. Several representatives considered that such a rule was needed to protect third persons (including consignees), whereas other representatives considered that such a rule was not necessary since third parties could reasonably expect that the carrier would make an appropriate notation on the bill of lading if freight charges were due at the port of destination. Some representatives favoured a rule that would state that the carrier could not collect any freight from a consignee if the bill of lading included a notation that freight was prepaid.

53. Draft provision J-2 was referred to the Drafting Party for further consideration in the light of the discussion in the Working Group.

²⁹ A/CN.9/96/Add.1, part one, paras. 62-65, (reproduced in this volume, part two, IV, 2 below) (draft provision J-2 appears at para. 63).

³⁰ In the setting of the complete structure of draft provisions, which appears in the annex to the report of the Secretary-General (A/CN.9/96/Add.1), such presumed notations are only *prima facie* evidence subject to rebuttal, unless the bill of lading was transferred to a third person acting in good faith. See draft provision J-1, discussed at paras. 43-45, above.

C. DOCUMENTS OTHER THAN BILLS OF LADING EVIDENCING THE CONTRACT OF CARRIAGE

(1) *Introduction*

54. The question of documents other than bills of lading that may be issued as evidence of a contract for carriage of goods by sea was discussed at paragraphs 68-74 in part one of the Secretary-General's report (A/CN.9/96/Add.1). The report pointed out that at its sixth session the Working Group had decided that the revised Convention would be applicable to all contracts for the carriage of goods by sea (revised compilation, article I-A). Although the carrier, on demand of the shipper, must issue a bill of lading (revised compilation, article IV-A), there will be cases where a shipper will not make such a demand and, consequently, where no bill of lading will be issued.

55. Draft alternative A (part one, at para. 71) in the report would leave the parties completely free to agree on the contents of a document other than a bill of lading that they wished to have issued; however, it would lay down the rule that any such document would be *prima facie* evidence of the carrier's receipt of the goods as therein described. Under draft alternative B (part one, at para. 74 of the report), the shipper could demand that such informal document contain one or more of the items of information required to appear on bills of lading and the contents of the informal document would then serve as *prima facie* evidence against the carrier.

(2) *Discussion by the Working Group*

56. Most representatives expressed support for draft alternative A in the Secretary-General's report (part one, at para. 71), since they wished to preserve flexibility in the use of documents other than bills of lading. These representatives pointed out that the Convention's rules on the liability of the carrier would apply to all contracts for the carriage of goods by sea, regardless of whether a bill of lading was or was not issued. They stated that it seemed preferable to have the contents of informal documents governed by commercial practice and the desire of the parties to the contract of carriage, and to provide simply that the contents of any informal documents would be *prima facie* evidence of the taking over by the carrier of the goods as therein described.

57. One representative, supported by another and by an observer, proposed an addition to draft alternative A which would grant to the consignee all the rights, presumptions and privileges that he would have enjoyed if a bill of lading had been issued. This representative explained that his proposal was intended to safeguard the interest of the consignee and would prevent diminution of the consignee's rights by special agreements between shippers and carriers or by the refusal of carriers to issue bills of lading. Several representatives who opposed this proposal stated that it was not necessary since the Convention applied to all contracts for the carriage of goods by sea, regardless of the type of document, if any, evidencing the contract of carriage. It was further stated in opposition to the proposal to modify draft alternative A that serious practical problems would arise from the

presumptive creation of a negotiable document at the wish of a consignee where in fact no such document had been issued.

58. One representative expressed his concern that the protection accorded to consignees under draft alternative A was inadequate and supported draft alternative B, whereby a shipper could demand that the informal document evidencing the contract of carriage contain certain specified items of information from among those required to appear on bills of lading.

59. Two representatives stated that at the second reading consideration should be given to whether the distinctions between negotiable and non-negotiable documents could be made clearer, e.g., by requiring that all documents indicate expressly whether they are negotiable or non-negotiable.

D. REPORT OF THE DRAFTING PARTY

60. At the conclusion of the discussion concerning the contents and legal effect of bill of lading as well as of documents of a more simple type, the Working Group decided to establish a Drafting Party to consider these matters and any others that may be referred to it during the course of the seventh session of the Working Group.³¹ The report of the Drafting Party concerning the contents and legal effect of bills of lading and of documents other than bills of lading evidencing the contract of carriage, with some amendments made by the Working Group,³² reads as follows:

PART I OF THE REPORT OF THE DRAFTING PARTY

Definition, contents and legal effects of the bill of lading

(a) The Drafting Party formulated a definition of the term "bill of lading". It also considered provisions regarding the contents and legal effect of bills of lading and of other

³¹ The Drafting Party was composed of the representatives of the following countries: Argentina, Belgium, France, Ghana, India, Japan, Nigeria, Norway, Poland, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America and the Union of Soviet Socialist Republics. The Drafting Party elected as its chairman Mr. E. Chr. Selvig (Norway).

³² The amendments adopted by the Working Group were the following: (a) the enumeration of the required contents of bills of lading was combined into one paragraph by the Working Group; the Drafting Party had proposed that the first two subparagraphs be contained in a paragraph 1 and the other 9 subparagraphs in paragraph 2; (b) the phrase introducing the list of required contents of bills of lading was changed from "The bill of lading shall set forth" to "The bill of lading shall set forth among other things the following particulars"; (c) in the French text the words "*ainsi que*" were added before the words "*le poids des marchandises*" in subparagraph 1 (a) of the article on the contents of bills of lading; (d) the phrase "or other indication that freight is payable by him" was added at the end of subparagraph 1 (k) of the article on the contents of bills of lading; (e) in the English version of the article on the bill of lading: reservations and evidentiary effect, in paragraph 1 the word "general" was added between the words "particulars concerning the" and "nature, leading marks"; and in paragraph 3 the phrase "and to the extent that" was changed to "and to the extent to which"; (f) in paragraph 4 of the article on bill of lading: reservation and evidentiary effect, the phrase "set forth the freight" was moved from following the words "bill of lading does not" to following the phrase "subparagraph (k) of article ()"; (g) in the article on the contents of documents other than bills of lading the word "receipt" was replaced by the phrase "taking over"; and (h) note (k) was added to the report of the Drafting Party.

documents evidencing the contract of carriage, based on the views expressed by the members of the Working Group. The Drafting Party recommended the following draft texts on these topics:

Definition of Bill of lading

"Bill of lading" means a document which evidences a contract for the carriage of goods by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to bearer, constitutes such an undertaking.

Contents of Bill of lading

1. The bill of lading shall set forth among other things the following particulars:

(a) The general nature of the goods, the leading marks necessary for identification of the goods, the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper;

(b) The apparent condition of the goods including their packaging;

(c) The name and principal place of business of the carrier;

(d) The name of the shipper;

(e) The consignee if named by the shipper;

(f) The port of loading under the contract of carriage and the date on which the goods were taken over by the carrier at the port of loading;

(g) The port of discharge under the contract of carriage;

(h) The number of originals of the bill of lading;

(i) The place of issuance of the bill of lading;

(j) The signature of the carrier or a person acting on his behalf; the signature may be printed or stamped if the law of the country where the bill of lading is issued so permits; and

(k) The freight to the extent payable by the consignee or other indication that freight is payable by him.

2. After the goods are loaded on board, if the shipper so demands, the carrier shall issue to the shipper a "shipped" bill of lading which, in addition to the particulars required under paragraph 1 shall state that the goods are on board a named ship or ships, and the date or dates of loading. If the carrier has previously issued to the shipper a bill of lading or other document of title with respect to any of such goods, on request of the carrier the shipper shall surrender such document in exchange for the "shipped" bill of lading. The carrier may amend any previously issued document in order to meet the shipper's demand for a "shipped" bill of lading if, as amended, such document includes all the information required to be contained in a "shipped" bill of lading.

3. The absence in the bill of lading of one or more particulars referred to in this article shall not affect the validity of the bill of lading.

Bills of lading; reservations and evidentiary effect

1. If the bill of lading contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the carrier has reasonable grounds for suspecting not accurately to represent the goods actually taken over or, where a "shipped" bill of lading is issued, loaded, or if he had no reasonable means of checking such particulars, the carrier shall make special note of these grounds or inaccuracies, or of the absence of reasonable means of checking.

2. When the carrier fails to note on the bill of lading the apparent condition of the goods, including their packaging, he is deemed to have noted on the bill of lading that the goods, including their packaging, were in apparent good condition.

3. Except for particulars in respect of which and to the extent to which the carrier has entered a reservation permitted under paragraph 1 of this article:

(a) The bill of lading shall be *prima facie* evidence of the taking over or, where a "shipped" bill of lading is issued, loading, by the carrier of the goods as described in the bill of lading; and

(b) Proof to the contrary by the carrier shall not be admissible when the bill of lading has been transferred to a third party, including any consignee, who in good faith has acted in reliance on the description of the goods therein.

4. If the bill of lading does not, as provided in paragraph 1, subparagraph (k) of article [],³³ set forth the freight or otherwise indicate that freight shall be payable by the consignee, it shall be presumed that no freight is payable by him. However, proof to the contrary by the carrier shall not be admissible when the bill of lading has been transferred to a third party, including any consignee, who in good faith has acted in reliance on the absence in the bill of lading of any such indication.

Contents of documents other than bills of lading

When a carrier issues a document other than a bill of lading to evidence a contract of carriage, such a document shall be *prima facie* evidence of the taking over by the carrier of the goods as therein described.

Notes on the proposed draft provisions

(b) With respect to the definition of the term "bill of lading", the Drafting Party decided not to deal with all the various questions relating to the negotiability of the bill of lading.

(c) With respect to paragraph 1 (a) of the article on contents of the bill of lading, one representative was of the opinion that the text should read, "... the number of packages or pieces, or the weight of the goods or their quantity...".

(d) Concerning paragraph 1 (b) of the article on contents of the bill of lading, several representatives stated that if reference is made to "goods including their packaging" only in this provision but not elsewhere in the Convention where goods are mentioned (e.g. in relation to the carrier's liability for the goods), *a contrario* conclusions may be drawn as to the scope of the term "goods". As a result, the packaging of goods would not be covered by the term "goods" except in paragraph 1 (b). These representatives were of the opinion that this difficulty could be remedied by a revision of the definition of the term "goods", for which the following text could be used as a basis:

"'Goods' includes goods, wares, merchandise and articles of every kind whatsoever, including live animals and crates, containers and other packaging furnished by the shipper."

However, several representatives stated that the text of paragraph 1 (b) proposed by the Drafting Party did not necessitate any modification of the definition of the term "goods". One representative was of the view that in order to reflect that a sizeable minority in the Working Group opposed the addition of the words "including their packaging" to the text of paragraph 1 (b), that phrase should be placed within brackets in that subparagraph.

(e) Some representatives were of the opinion that it would be desirable to add the following to the list of required particulars in paragraph 1 of the article on contents of the bill of lading:

"The time used for loading where it was excessive in respect of time allowed which was provided for in the contract of carriage."

(f) One representative favoured inclusion of "the date of the issuance of the bill of lading" as a separate requirement

under paragraph 1 of the article on the contents of the bill of lading.

(g) With reference to the phrase "goods including their packaging" appearing in paragraph 2 of the article on bills of lading, reservations and evidentiary effect, attention was drawn to the opinions expressed above in paragraph (d) of these notes.

(h) One representative was of the opinion that paragraph 3 (a) of the article on bills of lading, reservations and evidentiary effect, should start: "The bill of lading shall be *prima facie* evidence for the shipper or his agent as against the carrier of the taking over...".

(i) With respect to paragraph 3 (b) of the same article, some representatives stated that the provision should start: "Proof to the contrary shall not be admissible...". One representative stated that the words "including any consignee" in paragraph 3 (b) should be deleted, because in cases where a consignee was named, the bill of lading served as a transport document similar to those governed by the CMR (road) and CIM (rail) Conventions.

(j) One representative reserved his position with respect to paragraph 4 of the article on bills of lading: reservations and evidentiary effect.

(k) Two representatives opposed the addition of any information not required by article 3 (3) of the Hague Rules to the list of mandatory contents of the bill of lading.

E. CONSIDERATION OF THE REPORT OF THE DRAFTING PARTY (PART I)

61. The Working Group considered the above part of the report of the Drafting Party and approved the report, including the proposed draft provisions.³⁴

62. Some representatives were opposed to adding the words "among other things the following particulars" to paragraph 1 of the article on contents of the bill of lading.

63. It was agreed by the Working Group that the Secretariat would be asked to make the changes that were necessary as a consequence of combining into one paragraph the list of the required contents of bills of lading.

64. Several representatives and observers expressed reservations concerning subparagraph 1 (k) of the article on the contents of bills of lading as it had been approved by the Drafting Party. (The text as approved by the Drafting Party had read "the freight to the extent payable by the consignee".) Several other representatives were opposed to any modification of the text as contained in the original report of the Drafting Party. The Working Group decided to reconsider the issue of the form in which freight charges should be reflected in bills of lading. Several representatives noted that in many cases the freight charges would not be known at the time the bill of lading was issued and subparagraph 1 (k) as drafted by the Drafting Party seemed to call for the exact amount of freight payable by the consignee. As a compromise the Working Group approved the following text for subparagraph 1 (k) of the article on the contents of bills of lading: "(k) the freight to the extent payable by the consignee or other indication that freight is payable by him".

65. Several representatives stated that they were opposed to the text of subparagraph 1 (k) of the

³³ The reference is to para. 1 (k) of the article above on the contents of bill of lading.

³⁴ See foot-note 32 above.

article on contents of bills of lading as modified by the Working Group, and expressed their strong preference for the language of subparagraph (k) originally approved by the Drafting Party.

66. Some representatives noted that they favoured a modification of subparagraph 1 (k) of the article on contents of bills of lading so as to require that the amount of freight be included in bills of lading.

67. One representative favoured deletion of paragraph 4 of the article on bills of lading, reservations and evidentiary effect.

68. With reference to the definition of "goods" in the notes on the proposed draft provisions (note (d) in part I of the report of the Drafting Party above), one representative proposed that the definition should read:

"'Goods' means any kind of goods, including live animals; where the goods are packed or consolidated in a container, pallet or similar article of transport supplied by the shipper, 'goods' includes such packaging or article of transport."

II. VALIDITY AND EFFECT OF LETTERS OF GUARANTEE

A. INTRODUCTION

69. The problems regarding the validity and effect of letters of guarantee were considered in part two of the fourth report of the Secretary-General. The type of letter of guarantee to which the report was addressed is an undertaking by a shipper, or someone acting for the shipper, to indemnify a carrier for the liability the latter might incur toward a consignee or other party as a result of inaccurate information in the bill of lading regarding matters such as the weight, quantity and condition of the goods.

70. The Brussels Convention of 1924 does not contain any provision addressed specifically to letters of guarantee. Under the Brussels Convention of 1924, as supplemented by the Protocol of 1968, the carrier must issue a bill of lading containing certain particulars (article 3 (3)). The bill of lading is *prima facie* evidence (and in some instances conclusive evidence)³⁵ of the goods as therein described, and the carrier has a right to indemnification from the shipper for damages resulting from the inaccuracy of information regarding the marks, number, quantity and weight of the goods that was set forth in the bill of lading, as furnished by the shipper to the carrier (article 3 (5) of the 1924 Convention). The provision for indemnification under article 3 (5) does not extend to inaccuracies in the description of the apparent "condition" of the goods.

71. The report of the Secretary-General indicated that shippers sometimes request carriers not to make notations on bills of lading which would make such bills "unclean" and would therefore interfere with the acceptance of the bill of lading by a consignee or a bank. Carriers sometimes accede to such a request in exchange for a letter of guarantee which promises to

indemnify the carrier against liability resulting from the absence of the specified notation.

72. The circumstances in which a letter of guarantee may be issued vary. The letter may be issued when the parties genuinely disagree as to the quantity, the weight, or the adequacy of packing of the goods. On the other hand, the letter of guarantee may be issued in cases where both parties recognize that the bill of lading contains inaccuracies. It was noted in the report that in the latter situation the letter of guarantee would be void in some national legal systems because of its use to mislead third parties. The report concluded, however, that no clear rule with respect to letters of guarantee appeared to emerge from national practice.

73. Alternative approaches regarding the validity and effect of letters of guarantee were examined in the report. One approach to the problem is to encourage greater flexibility in documentary credit transactions; under this approach no provision regarding letters of guarantee would be needed in the revised Convention. A second approach was directed to the invalidity of letters of guarantee. Two draft proposals were made along these lines: the first proposal (draft proposal A, part two of the report, at para. 21) would invalidate all letters of guarantee; the second proposal (draft proposal B, part two of the report, at para. 23) would invalidate any letter of guarantee relating to a statement in the bill of lading or the omission of information required under the Convention if the carrier knew or should reasonably have known that such a statement was incorrect or that the conclusion of such information was required. A third draft proposal (draft proposal C, part two of the report, at para. 27) provided that a carrier, who knowingly states inaccurate information in the bill of lading or omits any information required by the Convention to be included in the bill of lading, shall be liable to the consignee or other transferee of the bill of lading for damages incurred because of such a statement or omission, and shall not have the benefit of the Convention limitation on carrier liability.

74. Part one of the fourth report of the Secretary-General, at paragraphs 66 and 67, examined article 3 (5) of the Brussels Convention which reads as follows:

"The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper".

The report stated that article 3 (5) was intended to hold the shipper responsible for the accuracy of the information he furnishes to the carrier for inclusion in the bill of lading. A draft proposal (draft provision K, part one of the report, at para. 67) was formulated in the report with the aim of modifying article 3 (5) of the Brussels Convention so as to make clear that the responsibility of the shipper to the carrier under article 3 (5) remained even though the bill of lading may have been transferred to a third party.

³⁵ Article 1 (1) of the 1968 Brussels Protocol adds to article 3 (3) of the 1924 Convention that "proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith".

B. DISCUSSION BY THE WORKING GROUP

75. The Working Group decided that it would be appropriate to consider proposals regarding the liability of the shipper for inaccurate particulars in the bill of lading in conjunction with the consideration of the validity and effect of letters of guarantee. In the light of this decision, the Working Group examined article 3 (5) of the 1924 Brussels Convention. Most representatives who spoke on the subject favoured the modification of article 3 (5) of the 1924 Brussels Convention contained in draft provision K of the Secretary-General's report, mentioned above, which aimed at clarifying the language of article 3 (5) without altering its substance. The effect of draft provision K would be to ensure that the shipper's warranty to the carrier continued even after he had transferred the bill of lading to a third party. The Working Group approved draft provision K in substance and referred it to the Drafting Party.

76. The Working Group then discussed the desirability of including a provision on the validity and legal effect of letters of guarantee. Many representatives favoured the inclusion of such a provision in the Convention. It was stated that the practice of shippers to issue letters of guarantee was open to abuse and that in many cases the current practice perpetuated fraud and bad faith; a third party holder of a bill of lading often knew very little about the goods and had to rely on the information stated in the bill of lading. It was essential that the bill of lading be accurate since third parties, including banks and credit institutions, relied on its contents. However, divergent opinions were expressed as to the most effective method to protect third parties from being misled by information stated in the bill of lading or by the omission from the bill of lading of certain information, including appropriate reservations, which under the Convention should have been noted on the bill of lading.

77. On the other hand, some representatives and observers were of the view that there was no need for a provision specifically approving or disapproving letters of guarantee. It was argued that to invalidate letters of guarantee was to absolve the shipper from liability, although it was usually the shipper who requested a clean bill of lading which did not accurately describe the goods and who profited from its issuance. It was indicated that national law was adequate to deal with fraudulent letters of guarantee. It was also noted that it would be extremely difficult to frame a sufficiently flexible rule which would only invalidate those letters of guarantee that had been issued in bad faith; this complex matter had been satisfactorily solved in practice and a rule in the Convention would inevitably be inflexible and would have a negative effect on international commerce. One representative added that it would be desirable to harmonize the Working Group's work in this field with that of the International Chamber of Commerce, as the latter was currently engaged in a revision of its regulations concerning documentary letters of credit.

78. The greater part of the discussion by the Working Group was concerned with finding the most appropriate means for curbing the fraudulent use of the letter

of guarantee so as to protect consignees and other third parties.

79. It was generally agreed that the letter of guarantee should have no effect on the rights of the consignee against the carrier. Several representatives considered that this principle should be stated in the Convention. One of these representatives observed that the principle of the invalidity of the letter of guarantee with respect to the consignee was based on the generally accepted legal principle that an agreement between two parties cannot injure the rights of third parties. Some representatives were opposed to the inclusion of a provision declaring letters of guarantee invalid with regard to consignees and other third parties. It was the opinion of these representatives that, since the letter of guarantee would bind only those who were parties to it, the letter of guarantee had no relevance to the relationship between the shipper or the carrier and the consignee, and that the inclusion of a statement dealing with this extraneous matter could lead to misinterpretation.

80. The Working Group examined the desirability of a Convention rule invalidating letters of guarantee as between the carrier and the shipper. Several representatives and some observers stated their opposition to any Convention rule invalidating letters of guarantee. It was stated that letters of guarantee served a valuable purpose in facilitating international trade and that their continued use should be favoured; the protection of third parties against fraud could be assured by other means. Most members of the Working Group were of the opinion that the Convention should include a provision on the invalidity of letters of guarantee since such a provision would serve to deter carriers from accepting letters of guarantee. Two approaches were put forward. The first approach, favoured by some representatives, was to provide, along the lines of draft proposal A (part two of the report, at para. 21) for the invalidity of all letters of guarantee. However, most representatives preferred the approach of draft proposal B (part two of the report, at para. 23) under which letters of guarantee were null and void only where the carrier knew, at the time he accepted the letter of guarantee, that the bill of lading did not accurately describe the goods. It was noted that in such cases the carrier was acting in concert with the shipper to mislead the consignee or other third party. It was stated in support of this second approach that it would not invalidate letters of guarantee in cases where there was a bona fide dispute concerning the description of the goods. However, some representatives expressed the opinion that it would not be possible to draft a rule that would only invalidate letters of guarantee in those circumstances where the carrier knew of the inaccuracy in the bill of lading and thus acted fraudulently. It was stated in this connexion that, since in all cases where a letter of guarantee was issued the carrier knew of the inaccuracy of the bill of lading, letters of guarantee would always be invalid under such an approach; this result was deemed unsatisfactory.

81. Some representatives suggested that in cases where a letter of guarantee would be invalid as against the shipper, it should follow that the carrier should not be entitled to recover under the implied guarantee

provided for in draft provision K in the report of the Secretary-General (A/CN.9/96/Add.1, part one, at para. 67, reproduced in this volume, part two, IV, 2 below).

82. Many representatives expressed the view that in cases where it could be shown that the carrier knew of the inaccuracy of the description of the goods in the bill of lading and thereby had misled the consignee or other third party, the carrier should be liable for the loss, damage or expense incurred by the consignee, without benefit of the limitation on carrier liability provided in the Convention. Such a rule, which was embodied in draft proposal C (part two of the report, at para. 27) was supported both by representatives who favoured a general rule invalidating all letters of guarantee and by representatives who were opposed to such a general rule. It was observed that the removal of the limitation on carrier liability would not only bring about full recovery by the consignee for the loss, damage and expense resulting from his having been misled, but would also deter the carrier from acting to mislead the consignee. One representative, who opposed the inclusion of a special rule as to the limitation of carrier liability in the context of letters of guarantee, stated that the Working Group had already adopted a provision on wilful misconduct (Revised compilation, article II - E); this provision on wilful misconduct would deprive a carrier, who knowingly acted to mislead the consignee, of the benefit of the Convention limitation on carrier liability.

83. Some representatives were of the view that an article in the Convention relating to letters of guarantee should include a provision giving the consignee or other third party a direct right of action against the shipper whenever the shipper has issued a letter of guarantee. Most representatives were opposed to a Convention rule on direct action by the consignee against the shipper. In this connexion it was observed that the relationship between the shipper and the consignee was adequately regulated by the sales contract.

84. After detailed discussion by the Working Group, the Drafting Party was requested to prepare a provision reflecting the discussion in the Working Group.

C. REPORT OF THE DRAFTING PARTY

85. 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 Group³⁶, reads as follows:

PART II OF THE REPORT OF THE DRAFTING PARTY

The validity and effect of letters of guarantee

(a) On the basis of the opinions expressed by members of the Working Group, the Drafting Party formulated draft provisions on letters of guarantee, together with a provision concerning the liability of the shipper for furnishing inaccurate particulars for inclusion in the bill of lading. The Drafting Party recommended the following draft provisions:

- (1) The shipper shall be deemed to have guaranteed to the carrier the accuracy of particulars relating to the

general nature of the goods, their marks, number, weight and quantity as furnished by him for insertion in the bill of lading. The shipper shall indemnify the carrier against all loss, damage or expense resulting from inaccuracies of such particulars. The shipper shall remain liable even if the bill of lading has been transferred by him. The right of the carrier to such indemnity shall in no way limit his liability under the contract of carriage to any person other than the shipper.

- (2) Any letter of guarantee or agreement by which the shipper undertakes to indemnify the carrier against loss, damage or expense resulting from the issuance of the bill of lading by the carrier, or a person acting on his behalf, without entering a reservation relating to particulars furnished by the shipper for insertion in the bill of lading, or to the apparent condition of the goods including their packaging, shall be void and of no effect as against any third party, including any consignee, to whom the bill of lading has been transferred.
- (3) Such letter of guarantee or agreement shall be void and of no effect as against the shipper if the carrier or the person acting on his behalf, by omitting the reservation referred to in paragraph 2 of this article, intends to defraud a third party, including any consignee, who acts in reliance on the description of the goods in the bill of lading. If in such a case, the reservation omitted relates to particulars furnished by the shipper for insertion in the bill of lading, the carrier shall have no right of indemnity from the shipper pursuant to paragraph 1 of this article.
- (4) In the case referred to in paragraph 3 of this article the carrier shall be liable, without the benefit of the limitation of liability provided for in this Convention, for any loss, damage or expense incurred by a third party, including any consignee, who has acted in reliance on the description of the goods in the bill of lading issued.

Notes on the proposed draft provisions

(b) Several representatives were of the view that the first sentence of paragraph 3 should be placed within brackets. Some of these representatives were against the inclusion of any provision along the lines of this paragraph. The Drafting Party was equally divided as to whether the first sentence of paragraph 3 should be placed in square brackets and recommended that the question be considered by the Working Group. One representative was of the opinion that the following language should be added to the first sentence of paragraph 3 after the phrase "in paragraph 2 of this article": "concerning the grave discrepancies in the particulars or the apparent defective condition which seriously affect the commercial value of the goods as a whole".

D. CONSIDERATION OF THE REPORT OF THE DRAFTING PARTY (PART II)

86. The Working Group considered the above part of the report of the Drafting Party and approved the report, including the proposed draft provisions.³⁷

87. With respect to paragraph 1, one representative was of the opinion that the wording of the last sentence should be aligned with the 1924 Convention and should read in relevant part "such indemnity shall in no way limit his responsibility and liability".

88. With respect to paragraph 2, one representative favoured the addition of the following sentence at

³⁶ The amendments adopted by the Working Group were the following: (a) in para. 1, first sentence, the word "general" was added before the word "nature"; (b) in para. 1, first sentence, the word "numbers" was changed to "number".

³⁷ See foot-note 36 above.

the end of the paragraph: "However he may rely on it as against the shipper".

89. With respect to paragraph 3, most representatives stated that they supported this paragraph on the ground that it would discourage the issuance of inaccurate and misleading bills of lading and would help to unify the rules on this subject. Other representatives who favoured this paragraph referred to the comments they had made during the earlier discussion of the topic by the Working Group.

90. Several representatives noted their reservations regarding the inclusion in the Convention of a provision along the lines of paragraph 3. These representatives also reserved their position as to the reference to paragraph 3 in paragraph 4. In the view of one of the representatives, paragraph 3 would entail a modification of national laws concerning the validity of letters of guarantee as between shippers and carriers. In the absence of such a provision, national laws would continue to be applicable, with the modification agreed to by the Working Group that letters of guarantee were null and void in respect of third parties. That was, in the view of this representative, the meaning of paragraph 2 of the draft text on letters of guarantee that had been approved by the Working Group. At the least, this provision could be enlarged so as to enable the injured third party to have recourse against the shipper.

91. Finally, in the view of several representatives, if paragraph 3 were deleted, it would be desirable to modify paragraph 4 in order to specify that the carrier would be liable if he omitted a reservation referred to in paragraph 2 although he knew that the indications furnished by the shipper regarding the apparent state of the goods were incorrect. A modified text which would reflect this view could read as follows:

"Where the carrier intentionally does not insert the reservation referred to in paragraph 2 although he knew of the inaccuracy of the particulars furnished by the shipper, or of the apparent condition of the goods, the carrier guarantees ...".

92. With respect to paragraph 4, one representative opposed inclusion of such a provision.

III. DEFINITION OF CONTRACT OF CARRIAGE AND OF CONSIGNEE

A. INTRODUCTION

93. Part three of the fourth report of the Secretary-General responded to a request by the Working Group that possible definitions of contract of carriage and consignee should be examined.

94. With respect to the definition of contract of carriage, it was stated in the report that under article 1 (b) of the Brussels Convention of 1924 the term "contract of carriage" was applicable "only to contract of carriage covered by a bill of lading or any similar document or title, in so far as such document relates to the carriage of goods by sea". It was also noted in the report that other transport conventions did not specifically define contracts of carriage, although in delineating the scope of application of these Conventions the

expression "contract of carriage" was used in a setting which indicated the meaning of the term.

95. The report of the Secretary-General set forth alternative approaches on the subject of the definition of contract of carriage. Under one approach, no definition of the term "contract of carriage" would be necessary in view of the fact that the revised Convention identified contracts covered as "all contracts for the carriage of goods by sea" (Revised compilation, article I-A) and that geographic scope was determined in terms of "every contract for the carriage of goods by sea between ports in two different States" (Revised compilation, article I-B, para. 1). Another approach would add the words "for reward" or "in exchange for payment of freight" to the provision on contracts covered by the Convention (draft provision A; part three of the report, at para. 6). A third alternative called for a separate definition of the term "contract of carriage" along the lines proposed by France in response to an inquiry by the Secretariat to members of the Working Group (A/CN.9/WG.III/WP.18). Draft provision B, set forth in the report of the Secretary-General (part three, at para. 7) read as follows: "contract of carriage" means a contract whereby a carrier promises a shipper [in exchange for payment of freight] [for reward], to move specified goods from one port to another.

96. Part three of the report of the Secretary-General was also concerned with the definition of consignee and the feasibility of including in the revised convention a provision on the legal position of the consignee. The report noted that, unlike the Brussels Convention of 1924, other transport conventions clearly delineated the legal position of the consignee. An approach was considered whereby the revised Convention would contain a definition of "consignee" and would give explicit recognition to the rights enjoyed by the consignee or other third party under the contract of carriage. On the subject of the rights to be enjoyed by the consignee, draft provision C (part three of the report, at para. 12) stated: "the consignee shall have the rights of the shipper and, in addition, any rights conferred on him under article [3 (4)]".

B. DISCUSSION BY THE WORKING GROUP

(1) "Consignee"

97. Most members of the Working Group supported the inclusion of a definition of the term "consignee" along the lines proposed in draft provision C (part three of the report, at para. 12), which provided: "Consignee" means the person entitled to take delivery of the goods under the contract of carriage". Some representatives were in favour of deleting the reference to "contract of carriage" in the definition, while some other representatives preferred the substitution of "bill of lading" for that term. Other representatives favoured the retention of the definition as it appeared in draft provision C. It was also proposed that the words "in accordance with this Convention" be added at the end of the definition of "consignee".

98. The Working Group considered the desirability of including a general provision on the legal position of the consignee. Some representatives observed that

formulating such a provision was difficult, since the legal position of the consignee would vary according to whether or not a bill of lading was issued. It was noted that specific aspects of the position of the consignee were set forth in rules already approved by the Working Group and that a general provision on this question was not necessary. One representative noted that it was important to state the rights of the consignee in the absence of a bill of lading. The Working Group decided not to include a general provision on the legal position of the consignee.

(2) "Contract of carriage"

99. The Working Group considered the issue of a possible definition of the term "contract of carriage". Some representatives stated that such a definition was necessary since the Working Group had decided to make the revised Convention applicable whenever there was a contract for the carriage of goods by sea, and not to make the application of the Convention dependent on the issuance of a bill of lading. It was also noted that a definition of the term was desirable since its meaning might be unclear in some legal or linguistic settings. One representative was of the view that since the Working Group had decided at its sixth session not to define the term "charter-party", it should not now define "contract of carriage". On the other hand, other representatives stated that the lack of a definition of "charter-party" made it important to include a definition of "contract of carriage" in order to clarify the distinction between these terms. In reference to this point, one representative noted that the reference to the agreement to move "specific goods" in the proposed definition would be useful in distinguishing contracts of carriage from charter-parties. Some other representatives stated that the term "contract of carriage" was well known, much utilized in practice, and it was difficult to imagine that it would be given any meaning other than the obvious one.

100. Some of the representatives favouring the inclusion of a definition of "contract of carriage" in the Convention noted that the definition should include a reference to the carrier's obligation to deliver the goods. In this regard it was noted by one representative that if a definition was to be included in the Convention, it would have to be a comprehensive one covering every aspect of the carrier's responsibilities.

101. Some representatives expressed concern about the proposed phrase "from one port to another", since what constitutes a port is uncertain. One representative was of the view that use of this phrase was too narrow since the goods could suffer damage in the course of their delivery to the consignee, which would be later than the time the goods had reached the port of destination.

102. One representative was of the opinion that adoption of either the French proposal or of draft provision B in the report of the Secretary-General would create difficulties in those jurisdictions which considered the consignee to be a party to the contract of carriage.

103. The Working Group decided to include a definition of "contract of carriage" in the Convention,

along the lines of either the proposal made by France in its additional reply to the UNCITRAL questionnaire (A/CN.9/WG.III/WP.18) or draft proposal B in the report of the Secretary-General (part three of the report, at para. 12).

C. REPORT OF THE DRAFTING PARTY

104. Following the discussion by the Working Group, this subject was referred to the Drafting Party. The report of the Drafting Party read as follows:

PART III OF THE REPORT OF THE DRAFTING PARTY

Definitions of "consignee" and "contract of carriage"

(a) The Drafting Party formulated draft texts to reflect the views expressed during the Working Group's discussion on definitions of "consignee" and "contract of carriage". The Drafting Party recommended the following definitions:

- (1) "Consignee" means the persons entitled to take delivery of the goods.
- (2) "Contract of carriage" means a contract whereby the carrier agrees with the shipper to carry by sea, against payment of freight, specified goods from one port to another where delivery is to take place.

Note on the proposed draft definitions

(b) With respect to the definition of "consignee", some representatives favoured the addition of the words "... under the contract of carriage" at the end of the definition.

D. CONSIDERATION OF THE REPORT OF THE DRAFTING PARTY (PART III)

105. The Working Group considered and approved the above part of the report of the Drafting Party, including the draft definitions proposed therein. The following reservations and comments were made with regard to the report of the Drafting Party:

(a) One representative reserved his position with respect to the definition of "consignee", since the word consignee appeared in different contexts in the draft provisions already approved by the Working Group. As a result, the definition could lead to confusion and inconsistency.

(b) A number of representatives expressed the view that the words "under the contract of carriage" should be added to the definition of "consignee".

(c) Several representatives were of the opinion that the definition of "consignee" should be completed by a provision which would define the legal relationship between the carrier and the person entitled to take delivery of the goods. Such a provision was not needed in the 1924 Brussels Convention since that Convention applied only to carriage under bills of lading. However, in the context of the draft provisions prepared by the Working Group, such a provision was necessary in order to cover cases where no bill of lading had been issued. In national legislations there did not exist any legal mechanism which would permit the consignee to exercise the rights of the shipper who concluded the contract of transport.

(d) One representative suggested that a definition of "shipper" be added to the revised Convention.

IV. FUTURE WORK

106. Under the terms of reference set forth by the Commission at its fifth session, the Working Group was requested, *inter alia*, to "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".³⁸ Accordingly, the Working Group considered whether the provisions prepared by it in respect of the responsibility of ocean carriers for cargo should be incorporated in a second protocol to the 1924 Brussels Convention or should, instead, form the subject-matter of a new convention.

107. Some representatives were of the opinion that, in view of the possible economic implications of the new rules and the interrelationship between those rules and the 1924 Brussels Convention and 1968 Brussels Protocol, a decision on this point should be deferred. However, most representatives took the view that the scope of the draft provisions approved by the Working Group would make it difficult to link them, by way of a protocol, to the 1924 Brussels Convention and that to do so would create confusion. The Working Group therefore decided that its future work in respect of carrier responsibility should be carried out with a view to establishing a new convention. Accordingly, it requested the Secretariat to structure the draft provisions approved by the Working Group in the form of a convention and to submit a draft of such a convention to its eighth session for a second reading. It was noted that the revised compilation of draft provisions on carrier responsibility (A/CN.9/WG.III/WP.16) could be used as a basis for the preparation of such draft convention.

108. Since time was not available to permit full consideration of all the topics indicated in the provisional agenda and annotations (A/CN.9/WG.III/L.3), it was agreed to take up the topics not yet considered at the eighth session of the Working Group. These topics are the following:

- General rule on liability of the shipper
- Dangerous goods

³⁸ 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.

Notice of loss

General average

Relationship of convention with other maritime conventions.

In order to facilitate the preparation of the documentation for the Working Group's eighth session, the Secretariat suggested, and the Working Group was agreed, that any comments and observations regarding these topics and other relevant matters from members of the Working Group and observers should reach the Secretariat before 1 December 1974.³⁹

109. The observer of UNIDROIT submitted and introduced to the Working Group a document entitled "First results of the UNIDROIT enquiry on gold clauses in international conventions", prepared by that organization. The Working Group took note with appreciation of this document.

110. The Working Group noted that under the schedule of meetings envisaged by the Commission at its seventh session, the Working Group would hold its eighth session at United Nations Headquarters in New York from 27 January to 7 February 1975.⁴⁰ Several representatives observed that the fourth session of the UNCTAD Working Group on International Shipping Legislation was scheduled to take place at Geneva at the same time. Since several representatives serving on the UNCITRAL Working Group also served on the UNCTAD Working Group, the Secretariat was requested to arrange, if possible, for the rescheduling of the eighth session of the UNCITRAL Working Group.

³⁹ For consideration by the Working Group at its eighth session, one representative introduced a proposal dealing with the situation where the consignee or holder of a bill of lading fails to collect the goods within a reasonable period after their arrival at the port of discharge. Another representative introduced a proposal, also for consideration at the next session, defining the relationship between the revised Convention and the rules of other conventions and of national law dealing with liability for damage caused by a nuclear incident. One observer introduced the observations of his organization regarding the draft texts approved by the Working Group at its previous sessions and reproduced in the revised compilation (A/CN.9/WG.III/WP.16); the Working Group decided to consider these observations during the second reading of the revised Convention at its forthcoming eighth session.

⁴⁰ Report of the United Nations Commission on International Trade Law on the work of its seventh session, *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 17 (A/9617)*, para. 85 (d); UNCITRAL Yearbook, vol. V: 1974, part one, II, A.

2. Fourth report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading (A/CN.9/96/Add.1).

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GENERAL INTRODUCTION

1. The present study is the fourth 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:

¹ 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 prepared to assist the Working Group on International Legislation on Shipping (hereinafter "Working Group") at its third and fourth (special) sessions. That report 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;

"The rules and practices concerning bills of lading, including those rules contained in the Interna-

and approaches to basic 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; UNCITRAL Yearbook, vol. IV: 1973, part two, IV, 4) was prepared to assist the Working Group at its fifth session. The second report covered these subjects: unit limitation of liability; transshipment; deviation; the period of limitation; definitions under article 1 of the Convention; and elimination of invalid clauses in bills of lading. The third report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading (A/CN.9/88/Add.1; UNCITRAL Yearbook, vol. V: 1974, part two, III, 2) was prepared to assist the Working Group at its sixth session. The third report examined the following matters: delay; geographic scope of application; documentary scope of application; and invalid clauses in bills of lading.

² *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17 (A/8717, para. 19; UNCITRAL Yearbook, vol. II: 1971, part one, II, A).*

tional 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

2. At its sixth session the Working Group decided that at its seventh session it would consider, *inter alia*, the following topics: the contents of the contract for carriage of goods by sea, the validity and effect of letters of guarantee, and the protection of good faith purchasers of bills of lading.⁴ At that session the Working Group requested the Secretary-General to prepare a report dealing with these matters and, also to consider in the report "a possible definition of

³ *Ibid.* The Commission decided at its seventh session that the Working Group should "continue its work under the terms of reference set forth by the Commission at its [the Commission's] fourth session". (Report of the United Nations Commission on International Trade Law on the work of its seventh session 13-17 May 1974), *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 17 (A/9617, para. 53; UNCITRAL Yearbook, vol. V: 1974, part one, II, A)*.

⁴ Report of the Working Group on the work of its sixth session, Geneva, 4-20 February (hereinafter cited as Working Group report on sixth session) (A/CN.9/88, paras. 148-149; UNCITRAL Yearbook, vol. V: 1974, part two, III, 1). Draft provisions approved by the Working Group at its first six sessions may be found in document A/CN.9/WG.III/WP.16 (Revised compilation of draft provisions on carrier responsibility: note by the Secretariat).

'contract of carriage' and the position, with respect to the carrier, of the person entitled to take delivery of the goods".⁵

3. This report is presented in response to the request of the Working Group referred to at paragraph 2 above. Part one deals with the topic of the contents and legal effect of documents evidencing the contract of carriage; part two examines the validity and effect of letters of guarantee; part three considers possible definitions of the terms "contract of carriage" and "consignee" and discusses the legal position with respect to the carrier of the person entitled to take delivery of the goods.

4. The Secretary-General circulated a questionnaire to Governments and interested international organizations on the topics of the contents of documents evidencing the contract of carriage, the validity and effect of letters of guarantee, and the protection of good faith purchasers of bills of lading. The replies received by the Secretariat, as well as a copy of the questionnaire, were made available to the Working Group as documents A/CN.9/WG.III/L.2 and A/CN.9/WG.III/L.2/Add.1 and Add.2. In addition, in response to a supplementary questionnaire, the Secretariat has received a reply dealing with a possible definition of the term "contract of carriage" and with the legal relationship between the carrier and the person entitled to take delivery of the goods; this reply is reproduced as document A/CN.9/WG.III/WP.18. The comments and replies received by the Secretariat are referred to at relevant points in the present report.

⁵ Working Group report on sixth session, para. 151.

PART ONE: CONTENTS AND LEGAL EFFECT OF ISSUANCE OF BILLS OF LADING OR OTHER DOCUMENTS EVIDENCING THE CONTRACT OF CARRIAGE

INTRODUCTION

1. The Working Group at its sixth session decided that at the seventh session it would consider, among other topics, the contents of the contract for carriage of goods by sea and the protection accorded to a good faith purchaser of a bill of lading,¹ and requested the Secretary-General to prepare a report dealing, *inter alia*, with these topics.² The Working Group further decided that this 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."³

2. The subject-matter under discussion encompasses two distinct problems: first, the contents and legal effect of the document known as "bill of lading"; second, the development of rules on the contents and

legal effect of other, less formal documents evidencing the contract of carriage. Chapter I of this report will examine the rules applicable to bills of lading. Chapter II of the report will examine the possible development of rules governing the contents and legal effect of any documents other than "bills of lading" that may be issued evidencing the contract of carriage.

CHAPTER I. BILLS OF LADING

A. PROVISIONS IN THE BRUSSELS CONVENTION OF 1924 AND THE BRUSSELS PROTOCOL OF 1968 CONCERNING CONTENTS AND LEGAL EFFECT OF BILLS OF LADING

3. The provisions quoted below are from the Brussels Convention of 1924,⁴ with the exception of the underscored language at the end of article 3 (4) which would be added pursuant to article 1 (1) of the 1968 Brussels Protocol.⁵

⁴ Hereinafter referred to as "the Brussels Convention". League of Nations, *Treaty Series*, vol. CXX, No. 2764, p. 157; *Register of Texts of Conventions and other Instruments Concerning International Trade Law*, vol. II, p. 130 (United Nations publication, Sales No. E.73.V.3) (hereinafter cited as *Register of Texts*).

⁵ 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*, p. 180.

¹ Report of the Working Group on International Legislation on Shipping on the work of its sixth session, Geneva, 4 to 20 February 1974 (A/CN.9/88; UNCITRAL Yearbook, vol. V: 1974, part two, III, 1, hereinafter cited as "Working Group report on sixth session"), paras. 148-149.

² *Ibid.*, para. 151.

³ *Ibid.*, para. 152.

Article 3

3. After receiving the goods into his charge, the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or covering in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage;

(b) Either the number of packages of pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods.

Provided that no carrier, master, or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable grounds for suspecting not accurately to represent the goods actually received or which he has had no reasonable means of checking.

4. Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b) and (c). However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith.

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

7. After the goods are loaded, the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading. At the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted, if it shows the particulars mentioned in paragraph 3 of article 3, it shall for the purpose of this article be deemed to constitute a "shipped" bill of lading.

B. AMBIGUITIES IN THE PRESENT RULES AND SUGGESTED CLARIFICATIONS

(1) Meaning of the term "bill of lading"

4. The term "bill of lading" is not defined either in the Brussels Convention of 1924 or in the 1968 Protocol thereto. While the phrase "bill of lading" appears repeatedly,⁶ the only provision resembling a definition may be found in article 1 (b) of the 1924 Convention, where "contract of carriage" is defined as applicable only to "contracts of carriage covered by a bill of lading or any similar document of title".

5. The terms "bill of lading" and "document of title" are given different meanings in various legal and commercial settings. As was noted in the third report of the Secretary-General, in some settings "bill of lading" may include a non-negotiable (or "straight") bill of lading; similarly, the term "document of title" is also given varying interpretations.⁷ Consequently, a more precise definition of the term "bill of lading" may be useful, particularly if the Working Group should decide to establish rules as to the contents and legal effect of "bills of lading" that differ from the rules applicable to other, less formal documents evidencing the contract of carriage.

6. At its sixth session the Working Group approved, for the purpose of its deliberations, the following provisional definition: "bill of lading means a bill of lading or any similar document of title".⁸ It will be noted that the above provision does not define the term "bill of lading" except by repeating that term and by adding the phrase "or any similar document of title", which is likewise subject to the ambiguities outlined above.

7. The replies of a number of States, focusing on the negotiable character of bills of lading, proposed that the required contents of "negotiable" bills of lading be expanded and made more definite by including provisions as to the person to whom the bill of lading could be made out, the method for transferring bills of lading and the person to whom the carrier must deliver the goods covered by a bill of lading.⁹ One reply suggested that the revised convention

⁶ See articles 1 (b), 3 (3), 3 (4), 3 (6), 3 (7), 4 (5), 5, 6, 10 of the Brussels Convention of 1924, and articles 1 (1), 2 (a), 2 (c), 2 (f), 2 (h), 5, 6 of the 1968 Protocol.

⁷ See third report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading, part three, section B, paras. 4-13 (A/CN.9/88/Add.1; UNCITRAL Yearbook, vol. V: 1974, part two, III, 2).

⁸ Working Group report on sixth session, para. 48 (b) (ii).

⁹ See Sweden (A/CN.9/WG.III/WP.10/Add.1, pp. 126-127), Norway (A/CN.9/WG.III/WP.10/Add.1, pp. 19-20), Australia (A/CN.9/WG.III/L.2, pp. 7-8), Czechoslovakia (A/CN.9/WG.III/L.2, p. 14), Ethiopia (A/CN.9/WG.III/L.2, p. 16), France (A/CN.9/WG.III/L.2, p. 19), Italy (A/CN.9/WG.III/L.2, p. 25), Pakistan (A/CN.9/WG.III/L.2, pp. 36-37, 41), Secretariat of the Asian-African Legal Consultative Committee (A/CN.9/WG.III/L.2, pp. 54-56, 60), International Union of Marine Insurance (A/CN.9/WG.III/L.2, p. 67). The third UNCITRAL questionnaire on bills of lading dealt, *inter alia*, with the contents and legal effect of documents evidencing the contract of carriage. The replies to that questionnaire may be found in replies to the third questionnaire on bills of lading submitted by governments and international organizations for consideration by the Working Group (hereinafter referred to as replies to third UNCITRAL questionnaire) (A/CN.9/WG.III/L.2 and Add.1 and Add.2 thereto).

should give "a definition of bill of lading as negotiable document".¹⁰ It should be noted that definition of the term "bill of lading" need not involve issues concerning the allocation of rights between successive holders of the bill of lading when a bill of lading is in fact transferred or negotiated. It is presumed that the Working Group would wish the definition cast in the setting of rules that involve only the rights between the consignee (or other holder of the bill of lading) and the carrier.¹¹

8. It has been proposed that the revised convention include a provision to the effect that a "bill of lading" under the Convention must be issued either to "the order" of a designated person or to "bearer".¹² In considering this proposal the Working Group will wish to reconcile two conflicting interests: (1) the interest in uniformity and definiteness, and (2) the interest in flexibility and adaptability to the varying forms of expression used in different commercial and language settings.

9. Limiting the phrase "bill of lading" to documents bearing the precise "to order" or "bearer" language responds to the first interest mentioned in the preceding paragraph. On the other hand, the interest in flexibility and adaptability would be served by formulating the required designation of the consignee in more general terms. The essential consequence of providing in the bill of lading that the goods are to be delivered only "to order" of a designated person or to "bearer" is that the carrier, to be safe, may only deliver the goods to the possessor of the document.¹³ It is this result that makes such a document a safe and effective device for controlling the right to delivery of the goods while they are in the possession of the carrier. Recognition of the fact that this document will often be utilized for transactions involving transfer of "title" to the goods provided the reason for the provision added by the 1968 Brussels Protocol to article 3 (4) giving protection to the consignee or

other third person who took the bill of lading in good faith.

10. Draft provision A-1, which follows, reflects an attempt to reconcile the interest in uniformity with the desire to preserve flexibility:

Draft provision A-1

"Bill of lading" means a document which evidences [the receipt of goods and] a contract for [their] carriage and by which a carrier undertakes to deliver the goods only to a person in possession of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to bearer, constitutes such an undertaking.

11. The first sentence of draft provision A-1 states as a general rule that under a bill of lading "a carrier undertakes to deliver the goods only to a person in possession of the document". Thus a document could qualify as a bill of lading by employing provisions which achieve this result, even if the words "to order" or "bearer" do not appear in the document. This flexibility may be desirable in view of the reference in some documents "to order or assigns" or "to assigns" of the document,¹⁴ and in view of the problems that could arise under a more rigid rule when the document is issued in various languages which arguably deviate in form, but not in substance, from the terminology ("order" or "bearer") specified in the Convention. In the interest of clarification, the second sentence of the draft provision adds that "a provision in the document that the goods are to be delivered to the order of a named person, or to bearer" constitutes the undertaking described in general terms in the first sentence; as a consequence there could be no doubt that documents employing the specified terminology would be "bills of lading" under the convention.

12. Should the Working Group prefer to emphasize uniformity in the terminology employed in bills of lading, it may wish to consider the following draft provision A-2:

Draft provision A-2

"Bill of lading" means a document which evidences [the receipt of goods and] a contract for [their] carriage and by which a carrier undertakes to deliver the goods to the order [or assigns] of a named person, or to bearer.

13. Both draft provisions A-1 and A-2 would define "bills of lading" in a manner that is consistent with commercial practice, i.e., as documents controlling delivery of the goods, while avoiding complications which would arise from utilization of the concepts of "negotiability" and "document of title" which carry varying connotations under different national legal systems.¹⁵

(2) *Introductory provision of article 3 (3)*

14. The introductory provision of article 3 (3) of the 1924 Brussels Convention reads as follows: "3. After receiving the goods into his charge, the carrier or the master or agent of the carrier shall, on demand

¹⁰ Czechoslovakia (A/CN.9/WG.III/L.2, p. 14).

¹¹ Several replies observed that rules on the negotiability of ocean transport documents with respect to the rights of successive holders needed to be related to national laws concerning documentary credits and their negotiability, and expressed the view that the revised convention should not be extended to cover such questions traditionally resolved by legislation dealing specifically with negotiable instruments. See Belgium (A/CN.9/WG.III/L.2, p. 12), Khmer Republic (A/CN.9/WG.III/L.2, p. 28), Netherlands (A/CN.9/WG.III/L.2, p. 29), United Kingdom of Great Britain and Northern Ireland (however, without any objection in principle) (A/CN.9/WG.III/L.2, p. 46), International Chamber of Commerce (A/CN.9/WG.III/L.2, p. 65), Canada (A/CN.9/WG.III/L.2/Add.1). The reply of the Comité Maritime International noted that "such a regulation may very well be too ambitious, particularly considering the diminished use of bills of lading in modern carriage of goods by sea" (A/CN.9/WG.III/L.2, p. 64).

¹² See foot-note 9, above.

¹³ A further implication of such a provision, generally recognized in national law and reinforced by specific clauses to this effect in bills of lading, is that the person to whose "order" the bill of lading was issued must make an appropriate endorsement when transferring the bill of lading to a third person. In addition, bills of lading are often issued in a specified number of originals and state that the goods may be delivered to the possessor of one of the originals. Although bills of lading are rarely issued to "bearer", there seems no reason for excluding such a document from the definition of the term "bill of lading".

¹⁴ See T. G. Carver, *Carriage by Sea*, vol. II, 12th ed., London, 1971, pp. 1048-1049.

¹⁵ See paragraphs 5 and 7, above.

of the shipper, issue to the shipper a bill of lading showing among other things."

15. Under this provision the carrier is only obligated to issue a bill of lading containing the information required by article 3 (3) of the 1924 Convention if the shipper makes a demand on the carrier to issue a bill of lading.¹⁶ Commercial flexibility is preserved by giving the shipper the option of deciding whether or not he wishes that the goods be covered by a bill of lading. The information that must be included in the bill of lading, once the shipper has made a demand for its issuance, is set forth in article 3 (3) of the 1924 Brussels Convention. Three types of required information are specified in article 3 (3), under subparagraphs (a), (b) and (c). This report will first consider each of these subparagraphs separately, and will then examine the general proviso at the end of article 3 (3) since that proviso relates to the whole of article 3 (3).

(3) Article 3 (3) (a)

16. Under article 3 (3) (a) of the Brussels Convention of 1924 the bill of lading shall show:

"(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage."

17. According to the terms of article 3 (3) (a), the carrier must note on the bill of lading "the leading marks necessary for identification of the goods" as furnished by the shipper, provided such marks appear clearly "in such a manner as should ordinarily remain legible until the end of the voyage." This subparagraph (a) has not been the subject of comment in the replies to the Secretariat inquiry,¹⁷ and it appears that this provision may be retained without substantial change. The Working Group may wish to consider deletion of the phrase "before the loading of such goods starts", since in cases where bills of lading are to be issued only after the loading process has commenced, there seems no reason to require that the shipper's statement as to the marks be furnished prior to the commencement of the loading process.¹⁸

(4) Article 3 (3) (b)

18. Under article 3 (3) (b) of the 1924 Brussels Convention the bill of lading shall show:

¹⁶ According to Carver, "the carrier is not bound by this rule to deliver any bill of lading at all, or a bill of lading complying with the rule, unless the shipper demands it. If the shipper is issued with a bill of lading which does not comply with the rule, and makes no complaint, the rights of the indorsees of the bill will be governed by its actual terms." T. G. Carver, *Carriage by Sea*, vol. I, p. 237. See also P. Manca, *International Maritime Law*, vol. II, Antwerp, 1970, p. 176.

¹⁷ A/CN.9/WG.III/L.2 and Add.1 and Add.2.

¹⁸ The general proviso to article 3 (3) as a whole is believed sufficient to protect the carrier in cases where he suspects that the information as to marks furnished by the shipper is inaccurate or where the carrier lacks reasonable means for checking the marks. (For discussion of the proviso see paragraphs 31-37 below).

"(b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper;"

19. Article 3 (3) (b) requires the carrier to show on the bill of lading only those items that are "furnished in writing by the shipper". In addition, subparagraph (b), like subparagraph (a), is subject to the general proviso at the end of article 3 (3) of the 1924 Convention whereby the carrier need not show on the bill of lading such items furnished by the shipper which the carrier "has reasonable grounds for suspecting not accurately to represent the goods actually received or which he has had no reasonable means of checking".

20. Under subparagraph (b), problems of construction have arisen which may be illustrated by the following case. The shipper furnishes in writing the following information: "25 bags; weight 2,500 kilos." Since subparagraph (b) provides that the carrier shall state "the number of packages or pieces, or the quantity or weight", may the carrier in the above example choose to state in the bill of lading either "25 bags" or "2,500 kilos", at his discretion?

21. A second problem of construction arises if the carrier in the above example states in the bill of lading both "25 bags" and "2,500 kilos". In this event, do the rules of article 3 (4) of the 1924 Brussels Convention, binding the carrier to statements made in the bill of lading, apply to both statements?¹⁹ Or, is the carrier's responsibility under article 3 (4) satisfied if only one of the statements is correct (i.e., 25 bags, weighing, however, only 10 pounds each)? The latter interpretation has been urged on the following ground: article 3 (4) gives effect to bills of lading "as therein described in accordance with paragraphs (a), (b) and (c)", and only the quantity or the weight was such a description (not both), since only one was required under subparagraph (b); therefore, the carrier is given the benefit of the alternative provided in subparagraph (b) even if he lists both quantity and weight.²⁰ Such a result has considerable practical importance because it seems to be common practice to state in bills of lading both the number of packages and the quantity or weight of the goods.²¹

22. On the other hand, it has been held in some jurisdictions that, if the carrier lists both the number of packages and the quantity or weight of the goods and fails to note on the bill of lading any appropriate reservation to the shipper's statements, under article 3 (4) the carrier is bound by both statements appearing on the bill of lading.²² This approach is supported by the view that the phrase "in accordance with paragraphs 3 (a), (b) and (c)" in article 3 (4) is designed to limit the carrier's responsibility to the types

¹⁹ For the purpose of the illustration it is assumed that the general proviso to article 3 (3) is inapplicable, and that the carrier did not note on the bill of lading any reservation as to such statements.

²⁰ See S. Dor, *Bill of Lading Clauses and the Brussels International Convention of 1924 (Hague Rules)*, 2nd ed., London, 1960, p. 88; W. E. Astle, *Shipowner's Cargo Liabilities and Immunities*, 3rd ed., London, 1967, p. 96.

²¹ Dor, *Bill of Lading Clauses and the Brussels International Convention of 1924 (Hague Rules)*, p. 87.

²² *Ibid.*, pp. 88-89; also W. Tetley, *Marine Cargo Claims*, London, 1965, p. 60.

of statements embraced within those three subparagraphs, but does not relieve the carrier of responsibility for statements of this type when he notes them on the bill of lading.

23. The legislative history of the 1921 Hague Rules, which formed the basis for the 1924 Brussels Convention, supports the position that when the carrier lists on the bill of lading both the number of packages and the quantity or weight of the goods, he should be responsible for both statements under article 3 (4). In their original draft form the 1921 Hague Rules required the carrier to list: "(1) the number of packages or pieces and; (2) as the case may be, the weight, quantity or measure." During the 1921 Hague Conference these requirements were combined into one subparagraph as a drafting matter; apparently there was no intention to alter the substance of the provision.²³

24. The ambiguities that have developed under article 3 (3) (b) of the 1924 Convention could be resolved by the following draft provision, which closely follows the original version of the 1921 Hague Rules:

Draft provision B

(b) The number of packages or pieces, and the quantity or weight, as the case may be, as furnished in writing by the shipper;

25. It will be noted that under draft provision B the carrier would not be required to show on the bill of lading both the quantity and weight of the goods, even if both are furnished by the shipper; in such a case the carrier would have to note only the number of packages or pieces and either the quantity or the weight of the goods. This approach is proposed in view of the added burden on the carrier, and possible delay in loading, that would occur if the carrier needed to verify the accuracy of the shipper's statement both as to quantity and as to weight.²⁴

(5) Article 3 (3) (c)

26. Under article 3 (3) (c) of the 1924 Brussels Convention, the bill of lading shall show:

"(c) the apparent order and condition of the goods".

27. Under this subparagraph, unlike subparagraphs 3 (a) and (b), the inclusion of the required statement in the bill of lading does not depend on the shipper's furnishing of a written statement. However, the obligation of the carrier is limited by the fact that he need only show the "apparent" order and condition of the goods.

28. The present language of subparagraph (c) is perhaps somewhat misleading in requiring that the carrier note the apparent order and condition of the "goods". In most situations the carrier can only exam-

ine the exterior of the shipment and thus is in a position to observe and describe only the condition of the packaging of the goods. Consequently, writers interpreting subparagraph (c) have assumed that it permits the carrier to note the apparent order and condition of unpackaged goods or the apparent condition of the packaging of goods received by the carrier in sealed crates, packages or containers; the carrier is not normally expected to open packages to ascertain the condition of their contents.²⁵ It may be noted that under article 8 (1) (b) of the 1956 CMR (road) Convention²⁶ and under article 12 (3) of the 1970 CIM (rail) Convention,²⁷ the carrier is to note on the transport document the apparent condition of the packaging of the goods. The Working Group may wish to consider the following draft provision designed to avoid possible future difficulty:

Draft provision C

(c) The apparent order and condition of the goods including their packaging;

29. There is, however, a further and more fundamental problem concerning the packaging of goods. The basic rules on responsibility of the carrier, approved by the Working Group at its sixth session,²⁸ make the carrier liable for damage "resulting from loss of or damage to the goods, as well as from delay in delivery". If read literally, the above provision would arguably free the carrier from responsibility for loss of or damage to the crates, containers or packaging within which the goods are enclosed.²⁹ To avoid possible misunderstanding on this score, the Working Group may wish to consider enlarging the definition of "goods"³⁰ to include crates, containers or other packaging of the goods if such were furnished by the shipper. This result could be achieved by amending the definition of "goods" in the following manner:

Draft provision D

2. "Goods" includes goods, wares, merchandise and articles of every kind whatsoever, including live animals and crates, containers and other packaging furnished by the shipper.

²³ R. Rodière, *Traité Général de Droit Maritime*, Vol. II, Paris, 1970, para. 453; M. Pourcelot, *Le transport maritime sous connaissement*, Montreal, 1972, p. 24. The reply of France shows that in some jurisdictions at least, the carrier is already required to note any inadequacy in packing since it affects the "apparent order and condition of the goods".

²⁴ 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 (hereinafter cited as "CMR Convention").

²⁵ International Convention Concerning the Carriage of Goods by Rail, signed at Berne, 25 October 1952; United Nations, *Treaty Series*, vol. 241, p. 336, as amended in 1961 and 1970. Although the 1970 revision is not yet in force, that version, hereinafter cited as "1970 CIM Convention", is cited throughout this report since it is expected to come into force during 1975.

²⁶ Working Group report on sixth session, para. 26 (a); revised compilation of draft provisions on carrier responsibility (hereinafter referred to as "revised compilation") (A/CN.9/WG.III/WP.16), article II-B.

²⁷ On the other hand, containers were specifically taken into account in the formulation of the limits on carrier liability. See article II-C, paragraph 2, in the revised compilation.

²⁸ Revised compilation, article I-C (2).

²³ See foot-note 22, above.

²⁴ If the Working Group is of the view that it would not unduly burden the carrier to require him to note on the bill of lading both the quantity and weight of the goods when both are furnished by the shipper, the Working Group may wish to consider the following draft provision as an alternative for draft provision B: "(b) The number of packages or pieces, the quantity and the weight, as the case may be, as furnished in writing by the shipper;"

30. The Working Group may decide that adoption of draft provision D would make draft provision C unnecessary, since draft provision D would make it clear that the term "goods" included any packaging furnished by the shipper. Therefore, when describing "the apparent order and condition of the goods", in the case of containerized or packaged goods the carrier would have the obligation to describe the condition of those "goods" that he is in a position to evaluate, i.e., the container or packaging.

(6) *General proviso to article 3 (3)*

31. The general proviso to article 3 (3) of the 1924 Brussels Convention reads as follows:

"Provided that no carrier, master, or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable grounds for suspecting not accurately to represent the goods actually received or which he has had no reasonable means of checking."

32. The present general proviso to article 3 (3), if read literally, merely authorizes the carrier to omit from the bill of lading certain types of statements supplied by the shipper. However, it is common commercial practice for the carrier to include in the bill of lading suspect or unverified information, furnished by the shipper according to 3 (3) (a) and (b), together with the carrier's reservations as to its accuracy.³¹ While most courts have recognized such reservations by the carrier as effective if stated on the bill of lading,³² some other courts have refused to do so on the theory that the carrier should not have inserted the unverifiable or suspect information in the bill of lading.³³

33. The shipper and the carrier may also find it useful to include in the bill of lading, albeit with certain reservations, statements by the shipper falling outside the purview of article 3 (3) (a) and (b) and recognized to be unverifiable by the carrier.³⁴ An example of such information is a statement by the shipper describing goods that he is shipping in a sealed container and as to which the carrier would note "said to contain".

34. The Working Group may wish to consider an approach whereby the carrier would be obligated to include in the bill of lading any written statements furnished by the shipper that fall within the scope of

3 (3) (a) and (b), subject to the carrier's privilege to note his reservations in the circumstances described in the present proviso to article 3 (3). In addition, the carrier would be free under this approach to include in the bill of lading descriptions of the goods falling outside of article 3 (3) (a) and (b), coupled with appropriate reservations.

35. A draft provision, designed to reflect commercial practice as to the entry of reservations in the bill of lading,³⁵ could read as follows:

Draft provision E

"3.³⁶ If a bill of lading contains particulars concerning the description, marks, number, quantity or weight of the goods, which the carrier has reasonable grounds for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking, the carrier shall [state] [specify] such reservation in the bill of lading."

36. The bracketed phrases at the end of draft provision E indicate alternative ways of expressing the degree of specificity required of such reservations. Some jurisdictions have held that, in order to avoid responsibility for statements shown on the bill of lading, a carrier's reservation to such statements noted on the bill of lading must be sufficiently specific to advise the consignee or other third party of the relevant facts giving rise to the reservation. These jurisdictions have not accepted vague or general reservations and some have insisted that, to be given effect, a reservation must disclose the grounds for the carrier's suspicion that the shipper's information is inaccurate or why the carrier lacks reasonable means for verifying the information.³⁷ In other jurisdictions, a reservation noted on the bill of lading will be given effect even though it does not set forth the grounds for the reservation.³⁸

37. Draft provision E does not state that the carrier must state the "grounds" or "reasons" for a reservation since these concepts seem to present difficulties of clarity and of practicality in application. It seems that either one of the alternative bracketed phrases at the end of draft provision E would indicate sufficiently that a reservation may not be so general that it would fail to communicate the essential facts to the consignee or other third person.³⁹

³⁵ Based on reply of Norway to the third UNCITRAL questionnaire (A/CN.9/WG.III/L.2), p. 32.

³⁶ See article IV-B: contents of bills of lading, in the "proposed structure of draft articles on contents and legal effect of documents evidencing the contract of carriage", annexed to part one of this report.

³⁷ France, Lebanon and Syria by statute, and Belgium, the Federal Republic of Germany, the German Democratic Republic and Yugoslavia by judicial decision, require that carriers note on the bill of lading the reasons for their reservations. The reply of France suggests that the 1924 Convention be modified to bring about this result expressly. The reply of Dahomey proposes that general reservations concerning the condition, quality or quantity of the goods should not be given effect.

³⁸ According to Dor, Bill of Lading Clauses and the Brussels International Convention of 1924, p. 93, this is the case in the United Kingdom and in the United States.

³⁹ The draft provision to amend article 3 (4) of the 1924 Convention, at paragraph 59 below, would make it clear that under the Convention only a reservation that is valid under draft proposal E would be given legal effect.

³¹ e.g., "Weight, quantity and number of packages unknown" and "said to weigh." See Dor, Bill of Lading Clauses and the Brussels International Convention of 1924, pp. 91-93; Temperley, Carriage of Goods by Sea Act, 1924, 4th ed., London, 1932, pp. 33-35; reply of Norway to the third UNCITRAL questionnaire.

³² See Dor, Bill of Lading Clauses and the Brussels International Convention of 1924, pp. 91-93; Manca, International Maritime Law, Vol. II, p. 182.

³³ See Tetley, Marine Cargo Claims, pp. 61-63. Under such decisions the information in the bill of lading becomes *prima facie* or conclusive evidence of the goods as received by the carrier, with the carrier's reservation being disregarded.

³⁴ cf. Knauth, Ocean Bills of Lading, 4th ed., Baltimore, 1953, p. 181, stating "While...the bill of lading need state only the number of packages or the quantity or the weight of the cargo, it is often desirable or necessary to state all of the facts and also statements of invoice values, for purposes of export permits, customs-house entries, etc."

(7) Bulk cargo

38. In some countries the national legislation giving effect to the 1924 Brussels Convention includes a specific provision dealing with bulk cargoes.⁴⁰ The Working Group may wish to consider a similar provision to the effect that where by trade custom the weight of bulk cargo is ascertained by a person other than the shipper or carrier and is so stated in the bill of lading, then the statement of weight is not *prima facie* evidence against the carrier under article 3 (4).

39. On the other hand, the Working Group may conclude that draft provision E (para. 35, above) is sufficiently broad and flexible to deal with statements of the weight of bulk cargo. The carrier may enter his reservation as to the weight of bulk cargo simply by stating something along the lines of "bulk cargo, weight furnished by X". Draft provision E would give effect to this reservation in the usual case where the carrier lacks commercially reasonable means for verifying the weight of the bulk cargo.

(8) Containerized cargo

40. It has been suggested that the recent growth of carriage of goods in sealed containers packed by the shipper presents a special situation and necessitates adoption of a special rule under article 3 (3) of the 1924 Convention.⁴¹ Such a rule would provide that in the case of containerized cargo, the carrier's obligation to state on the bill of lading the description, marks, number, quantity and weight of the goods applied only to the sealed containers themselves and not to the cargo within the containers.

41. Draft provisions C (para. 28, above) and E (para. 35, above) may be held to cover sufficiently the problems posed by carriage of goods in sealed containers packed by the shipper. These problems are not novel; carriers shipping crated or packaged goods have rarely if ever been expected to open up crates or carefully packaged goods received from the shipper in order to check their marks, quantity, weight or apparent condition. Under draft provision C the carrier is only obligated to note on the bill of lading the "apparent order and condition of the goods, including their packaging"; thus for sealed containers the carrier would only have to describe the apparent condition of the containers. As to marks, number, quantity or weight of the goods, draft provision E permits the carrier to note his reasonable reservations on the bill of lading, such as "received 2 sealed containers in apparent good order and condition, each said to contain 50 bicycles".

(9) Possible additions to list of required contents of bills of lading

42. A number of replies have suggested that the information required to be listed on a bill of lading be

⁴⁰ United Kingdom, The Carriage of Goods by Sea Act, 1924, section 5; Canada, Water Carriage of Goods Act, 1936, section 6; United States, Carriage of Goods by Sea Act, 1936, section 11.

⁴¹ See the replies of Australia, Pakistan and the Asian-African Legal Consultative Committee to the third UNCITRAL questionnaire. See also, M. J. Mustill, "Carriage of Goods by Sea Act, 1971" (Arkiv for Sjørett, Bd. 11 - Hefte 4-5), Oslo, 1972, p. 705.

expanded from what is currently required under article 3 (3) of the 1924 Convention.⁴² In practice bills of lading generally contain a great deal of information which is not required, such as the name of the carrier, shipper, consignee and vessel, the ports of loading and discharge, a description of the goods, the number of original bills of lading issued, the freight and whether it was paid, date and place of issuance of the bill of lading, adequacy of the packaging of the goods, invoice values, and various information needed for customs and for obtaining export and import permits.⁴³ Pursuant to the opening provision of article 3 (3) of the 1924 Convention ("bill of lading showing among other things"), carriers may insert in bills of lading information which they are not required under the Convention to show on bills of lading; the only question is whether the carrier should be obligated to show on the bill of lading certain additional types of information, either automatically or on specific demand by the shipper.

43. It may be noted that the contract of carriage evidenced by the bill of lading forms only a part of the normal documentation generated by the underlying sales transactions; the bill of lading will generally be accompanied by other documents providing information about the goods, such as customs documents, export and import documents, marine insurance policies and invoices.⁴⁴

(a) Name of the contracting carrier

44. Several replies indicated that it would be useful to require that all bills of lading contain the name and address of the carrier.⁴⁵ Article 6 (1) (c) of the 1956 CMR Convention requires that the transport document include "the name and address of the carrier", and a similar requirement appeared in article 8 of the Warsaw Convention prior to its revision in 1955.

45. When a "received-for-shipment bill of lading"⁴⁶ is issued, the identity of the contracting carrier will of course be known, but the identity of the actual carrier may not yet be known in some cases. Under draft provisions previously approved by the Working Group, the contracting carrier remains responsible for the

⁴² See the replies of Australia, Austria, Czechoslovakia, Ethiopia, Finland, France, Iraq, Italy, Pakistan, Romania, the USSR, the Asian-African Legal Consultative Committee, Comité Maritime International to the third UNCITRAL questionnaire, and of Norway and Sweden to the second UNCITRAL questionnaire.

⁴³ See e.g. Liner bill of lading (Liner terms approved by the Baltic and International Maritime Conference), amended 1 January 1950 and 1 August 1952 (CONLINE bill of lading), and the P and I model bill of lading, reprinted in annex III of "Bills of lading", report by the secretariat of UNCTAD TD/B/C.4/ISL/6/Rev.1, pp. 66 and 69. See also foot-note 34, above.

⁴⁴ The invoice generally will list the names and addresses of the seller and the buyer, the date, the reference number of the buyer's order, a description of the goods sold, details of the packaging, and marks and numbers appearing on the package, the terms of sale, invoice price, and the details of the shipping. C. M. Schmitthoff, *The Export Trade* (4th ed., London, 1962), p. 56. See also *Gilmore and Black, the Law of Admiralty* (Brooklyn, 1957), p. 100.

⁴⁵ See the replies of Greece, Iraq, Pakistan, the USSR and the Asian-African Legal Consultative Committee.

⁴⁶ "Received-for-shipment bills of lading" have been recognized by article 3 (3) of the 1924 Convention and will presumably remain acceptable under the revised convention.

entire carriage while the actual carrier is only responsible for the segment of the carriage performed by him.⁴⁷ Thus in many cases the person with the right to assert claims against a carrier for loss or damage to the goods will prefer to sue the contracting carrier since, often, one cannot determine the particular segment of carriage during which the goods were lost or damaged. The only exception to the contracting carrier's liability for the entire carriage by sea is contained in the draft provision on "through bill of lading" considered by the Working Group.⁴⁸ Under that provision the contracting carrier is freed from liability for loss or damage to the goods if such loss or damage was caused by events occurring while the goods were in the charge of an actual carrier and that actual carrier performed the part of the carriage designated in the contract of carriage as to be performed by a person other than the contracting carrier.

46. The Working Group may wish to consider the following draft proposal:

Draft provision F

"1. (d)⁴⁹ The name and principal place of business of the contracting carrier;"

47. Proposed draft provision F calls for the principal place of business of the contracting carrier since, under article V-C in the revised compilation, that link provides an independent basis for jurisdiction over a carrier.⁵⁰ Consideration has been given to a provision requiring the statement of the name and principal place of business of an "actual carrier" to be employed in performing the contract of carriage. However, such a provision has not been included in the above draft since the "actual carrier" may not be known at the time of the execution of the contract of carriage. To state that the name and principal place of business of the "actual carrier" shall be inserted in the bill of lading if those facts are known by the contracting carrier would present difficult practical problems of application and enforcement.

(b) *Place and date of issuance of bill of lading*

48. A number of replies have suggested that one or both these items of information be required to appear on bills of lading.⁵¹ The 1970 CIM Convention and the 1956 CMR Convention both require that the transport document show the date of issuance, but such a requirement was deleted during the 1955 revision.

⁴⁷ Revised compilation, article II-G.

⁴⁸ Revised compilation, article II-H. (The provision was placed within brackets by the Working Group; as to the degree of approval, see foot-note 32 in the revised compilation.)

⁴⁹ See article IV-B: contents of bills of lading, in the "proposed structure of draft articles on contents and legal effect of documents evidencing the contract of carriage", annexed to part one of this report.

⁵⁰ The second part of article V-C, part A (1) (a) "or in the absence thereof, the ordinary residence of the defendant" is somewhat incongruous since it only seems to be relevant if the defendant is an individual (corporations do not have "ordinary residences"). At the second reading, the Working Group may wish to consider deleting this phrase from article V-C.

⁵¹ See the replies of France, Iraq, Pakistan, Romania, the USSR and the Asian-African Legal Consultative Committee to the third UNCITRAL questionnaire.

sion of the Warsaw Convention.⁵² This information is almost always included in bills of lading, and it is useful as a general indication of the approximate time when the carrier's responsibility for the goods commenced.⁵³ While the date the carrier first took charge of the goods at the port of loading would be more helpful in establishing the carrier's period of responsibility and in determining whether the carriage involved delay in delivery, insistence on the former date might slow down the issuance of the bill of lading; the carrier's clerk or agent issuing the bill of lading would be required to make inquiries to ascertain the date the carrier first took charge of the goods at the port of loading. Thus, the date of issuance of the bill of lading is a useful and significant item of information which, if required to be included in bills of lading, would not cause administrative problems or slow down the loading process.

49. Today only the CMR Convention requires inclusion of the place of issuance of the transport document.⁵⁴ However, under article 10 of the 1924 Brussels Convention, article 5 of the 1968 Protocol, as well as under the draft article on geographic scope approved by the Working Group,⁵⁵ the place of issuance of the bill of lading may determine the applicability of the Convention. There are no administrative problems involved in including this information and bills of lading almost always specify their places of issuance in any event. On the other hand, it might be concluded that the practice of indicating on bills of lading the date and place of issuance is so general that the matter does not require regulation.

50. If the Working Group considers that there should be a formal requirement that bills of lading include the date and place of their issuance, it may wish to add the following:

Draft provision G

1. (e)⁵⁶ The place and date of its issuance;

(c) *Other possible required information*

51. Various replies have proposed that carriers be obligated to include in bills of lading one or more types of information in addition to the requirements already discussed in this report, such as the following:

(i) The ports of loading and discharge under the contract of carriage;⁵⁷

⁵² The CIM Convention requires the "date of acceptance" of the consignment note by the carrier (article 8 (1)), and the CMR Convention the "date of the consignment note" (article 6 (1)). Before being amended in 1955, the Warsaw Convention called for the date of "execution" of the consignment note (article 8 (a)).

⁵³ The exact time for the commencement of the carrier's responsibility, under article II-A in the revised compilation, is the moment when the carrier is first in charge of the goods at the port of loading.

⁵⁴ Such a requirement was deleted from the Warsaw Convention in 1955 and from the CIM Convention in 1970.

⁵⁵ Revised compilation, article I-B.

⁵⁶ See article IV-B: contents of bills of lading, in the "possible structure of draft articles on contents and legal effect of documents evidencing the contract of carriage", which is annexed to part one of this report.

⁵⁷ See replies of Finland, Greece, Iraq, Pakistan, the USSR and the Asian-African Legal Consultative Committee to the third UNCITRAL questionnaire. One may note that the actual port of loading might not yet be known when a "received-for-shipment" bill of lading, proper under article 3 (3), is being issued. In addition, shippers are unlikely to accept bills of

- (ii) The name of the vessel on which the goods are loaded;⁵⁸
- (iii) Description of the nature of the goods covered by the bill of lading;⁵⁹
- (iv) The signature of the carrier;⁶⁰
- (v) The freight charges on the shipment;⁶¹
- (vi) The number of originals of the bill of lading;⁶²
- (vii) The name of the shipper;⁶³
- (viii) The name of the consignee;⁶⁴
- (ix) Detailed provisions as to negotiability.⁶⁵

52. It would appear that if a shipper desires that any of the above information be inserted in a bill of lading, the carrier would not normally have any objection to the inclusion of such information. Consequently, it is doubtful whether the inclusion of such items requires regulation in the Convention.

(10) *"Shipped" bills of lading—article 3 (7)*

53. Article 3 (7) of the 1924 Brussels Convention reads as follows:

"After the goods are loaded, the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading. At the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when

lading omitting the port of discharge (as such bills would not be transferable or negotiable) and therefore there may be no need to require insertion of this information.

⁵⁸ See the replies of Greece, Iraq, Romania and the USSR to the third UNCITRAL questionnaire. However, the name of the vessel on which the goods are loaded is available only when a "shipped" bill of lading is issued. (See the discussion of article 3 (7) of the 1924 Convention at paragraphs 53-56, below.)

⁵⁹ In their replies to the third UNCITRAL questionnaire, Austria favoured and the International Union of Marine Insurance opposed such a provision.

⁶⁰ See the replies of France, Iraq, Romania and the USSR to the third UNCITRAL questionnaire. It may be noted that the carrier's signature is required under article 6 (3) of the Warsaw Convention, article 5 (1) of the CMR Convention and article 8 (1) of the CIM Convention.

⁶¹ See the replies of Pakistan, the USSR and the Asian-African Legal Consultative Committee to the third UNCITRAL questionnaire. It is believed that the thrust of these proposals has been met by the proposed revision of article 3 (4) of the 1924 Convention, at paragraph 63, below.

⁶² See the replies of Australia, France, Norway and the USSR to the third UNCITRAL questionnaire, and of Sweden to the second UNCITRAL questionnaire.

⁶³ See the replies of Iraq, Pakistan, Romania, the USSR and the Asian-African Legal Consultative Committee. Such a requirement is contained in article 6 of the Warsaw Convention, article 6 (1) (b) of the CMR Convention and article 6 (5) (g) of the CIM Convention.

⁶⁴ See the replies of Greece, Iraq, Pakistan, Romania, the USSR, and the Asian-African Legal Consultative Committee to the third UNCITRAL questionnaire.

⁶⁵ See discussion of definition of "bill of lading", at paragraphs 4-13, above.

so noted, if it shows the particulars mentioned in paragraph 3 of article 3, it shall for the purpose of this article be deemed to constitute a "shipped" bill of lading."

54. Article 3 (7) grants a shipper the right to demand a "shipped" bill of lading from the carrier once his goods have been loaded on board. Under this provision, the carrier may transform a previously issued document of title, such as a "received-for-shipment" bill of lading, into a "shipped" bill of lading by making an appropriate notation on the earlier document as to the loading of the goods.

55. As it currently reads, article 3 (7) of the 1924 Convention sets forth the necessary contents of a "shipped" bill of lading only in the specialized situation where a document of title containing less information had been issued previously. The Working Group may wish to consider the following draft proposal which would more closely define "shipped" bills of lading and would also reduce some of the complexity of the present article:

Draft provision H

2.⁶⁶ After the goods are loaded on board, if the shipper so demands, the carrier, [master or agent of the carrier] shall issue to the shipper a "shipped" bill of lading which, in addition to the particulars required under paragraph 1, shall state that the goods are on board a named ship or ships, the date or dates of loading, and the port of loading. If the carrier has previously issued to the shipper a bill of lading or other document of title with respect to any of such goods, on request of the carrier the shipper shall surrender such document in exchange for the "shipped" bill of lading."

56. It does not seem necessary to state explicitly in the revised convention that a "shipped" bill of lading may be created by adding the appropriate notation to an existing document such as a "received-for-shipment" bill of lading. However, if for reasons of clarity such a statement seems advisable, the Working Group may consider adding the following language at the end of draft provision H: "[The carrier may amend any previously issued document in order to meet the shipper's demand for a 'shipped' bill of lading if, as amended, such document includes all the information required to be contained in a 'shipped' bill of lading.]"

(11) *Contents of bill of lading as evidence against the carrier—article 3 (4)*

(a) *Current law*

57. Article 3 (4) of the 1924 Brussels Convention reads as follows:

"Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b) and (c)."

58. Article 1 (1) of the 1968 Brussels Protocol would add the following language to article 3 (4):

⁶⁶ See article IV-B: contents of bills of lading, in the "possible structure of draft articles on contents and legal effect of documents evidencing the contract of carriage", annexed to part one of this report.

"However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith."

(b) *Revision of article 3 (4) of 1924 Convention*

59. The three other transport conventions all provide that the contents of the transport document are *prima facie* evidence of the quantity of the goods, as well as of the apparent condition of the goods and of their packaging.⁶⁷ Virtually all the replies expressed satisfaction with the basic rule of article 3 (4). However, in light of the possible expansion of the list of required contents of bills of lading following the Working Group's revision of article 3 (3) of the 1924 Convention, and to ensure that the carrier gets the benefit of any reservation that he is entitled to make and does make, the Working Group may wish to consider this modification:

Draft provision J-1

1. A bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described, subject to the reservations permitted under paragraph 3 of article [IV-B].

The reference at the end of the above draft provision is to draft provision E, (para. 35, above). The draft provisions proposed in part one of this report have been set forth in organized form in an annex.⁶⁸

(c) *Revision of article 1 (1) of 1968 Protocol*

60. Article 1 (1) of the 1968 Brussels Protocol, amending article 3 (4) of the 1924 Convention, protects "a third party acting in good faith," to whom a bill of lading was transferred. Its current wording, however, leaves doubt as to whether a consignee to whose order a bill of lading was issued falls within the class of persons accorded protection under this provision. Such a consignee, or a bank that issued a letter of credit on behalf of the consignee, should be protected as a "third party" under this provision, since the consignee or his bank will often pay for the goods in reliance upon the statements and descriptions appearing in the bill of lading. The commercial function of the bill of lading in promoting the security of transactions would be fully served only if a consignee acting in good

faith to whom a bill of lading is transferred would be held to be protected by this provision.⁶⁹ In order to avoid any doubt that a consignee other than the shipper will be protected by this provision, the Working Group may wish to consider the following draft provision:

Draft provision J-1 (continued)

1.⁷⁰ . . . However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith, *including a consignee*.

61. It has been suggested that the revised convention should contain a definition of the term "contract of carriage" and that such definition include the following provision: "Under this contract (of carriage) the person having the right to take delivery of the goods shall be entitled to the rights of the shipper and will assume his obligations."⁷¹ Since draft provision J-1 is designed to give third parties acting in good faith, including consignees, rights superior to those enjoyed by the shipper, draft provision J-1 would specifically have to be noted as an exception to the general rule proposed above which equates the position of the consignees or third party holders of bills of lading with the position of the shipper.⁷²

(d) *Effect of omitting required information from bills of lading*

62. The 1924 Convention and the 1968 Protocol do not clearly state the effect of omitting entirely from the bill of lading some item of required information. If read literally, the present rules give rise to an evidentiary presumption against the carrier only in cases where information was in some manner noted on the bill of lading and not in cases where the information was omitted entirely.

63. The Working Group may wish to consider a draft provision dealing specifically with the evidentiary value of statements on bills of lading, and with the legal effect of the omission of required information from bills of lading or of the inclusion knowingly of inaccurate information:

Draft provision J-2

"2.⁷³ When the carrier fails to note on the bill of lading the apparent order and condition of the goods [including their packaging] or that freight charges are due on [arrival of] the shipment, for the purpose of paragraph 1 he is deemed to have noted on the bill of lading that the goods [including their packaging] were in apparent good order and condition and that no freight charges would be due on [arrival of] the shipment."

⁶⁷ The Warsaw Convention specifies in article 11 (2) that the air consignment note is *prima facie* evidence as to weight, number, dimensions, packaging, and apparent condition of the goods. The CMR Convention under its article 9 (2) provides in effect that the consignment note is *prima facie* ("shall be presumed") evidence of the number of packages, their marks and number, and the apparent good condition of the goods and packaging (unless reservations are inserted). It has been claimed that under article 8 (4) of the CIM Convention the carrier is responsible for the weight and number of packages mentioned in the consignment note when the loading has been performed by the carrier. J. Ramberg, *The Law of Carriage of Goods—Attempts at Harmonization*, Scandinavian Studies in Law, 1973, p. 234.

⁶⁸ In "Possible structure of draft provisions on contents and legal effect of documents evidencing the contract of carriage" annexed to part one of this report, the following scheme is envisaged:

Article IV-B: contents of bills of lading.

Article IV-C: legal effect of bills of lading (draft provision J-1 would constitute paragraph 1 of that article).

Article IV-D: documents other than bills of lading.

⁶⁹ There is no need to provide such protection to a consignee who is also the shipper, since he will not be relying on any statements in the bill of lading concerning the goods. As the shipper-consignee is not a person to whom "the bill of lading has been transferred", he is clearly not protected by article 1 (1) of the 1968 Protocol and he will not be protected by draft provision J-1.

⁷⁰ See foot-note 68, above. The reply of Finland to the third UNCITRAL questionnaire criticized the "fiction" inherent in such a rule of irrebuttable presumption.

⁷¹ See the supplementary reply of France (A/CN.9/WG.III/WP.18, and part three of this report).

⁷² The proposed definition of "contract of carriage" is considered in detail in part three of this report.

⁷³ See foot-note 68 above.

64. Draft provision J-2 is designed to eliminate the possibility that a carrier could diminish his responsibility by omitting some item of required information from the bill of lading.

65. Draft provision J-2 does not deal with the broader question of possible sanctions against the carrier for inserting in a bill of lading information known by him to be inaccurate or misleading, or for his knowing omission of any information required by the convention to be shown on bills of lading. It may be noted under draft proposal C in part two of this report dealing with letters of guarantee,⁷⁴ a carrier would be held responsible for all loss, damage or expense suffered by the consignee or other third party acting in good faith as a consequence of such an inaccuracy or omission in the bill of lading.⁷⁵

(12) *Indemnity of the shipper—article 3 (5)*

66. Article 3 (5) of the Brussels Convention of 1924 reads as follows:

"The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper."

67. Article 3 (5) is intended to hold the shipper responsible for the accuracy of the information he furnishes to the carrier for inclusion in the bill of lading. It has been suggested that the provision be clarified to assure that the responsibility of the shipper under article 3 (5) remains with him even though the bill of lading may have been transferred to a third party.⁷⁶ Accordingly, the Working Group may wish to consider the following modification of article 3 (5):

Draft provision K

3.⁷⁷ The shipper shall be deemed to have guaranteed to the carrier the accuracy, at the time the carrier took charge of the goods according to article [II-A] of the marks, number, quantity, and weight, as furnished by him, and the shipper shall indemnify

⁷⁴ See discussion at paragraphs 24-26, and draft proposal C at paragraph 27 of part two of this report: validity and effect of letters of guarantee.

⁷⁵ The replies of Finland and Norway to the third UNCITRAL questionnaire favour this approach. Under draft proposal C (part two of this report, at paragraph 27) the carrier is made liable for all the damage suffered by the consignee or other third party acting in good faith when that person relied on the contents of the bill of lading, and not merely for loss, damage or expense due to loss, damage or delay of the goods; furthermore, under that draft provision the carrier would not be able to invoke the convention provisions on the limitation of carrier liability.

⁷⁶ See the reply of France to the third UNCITRAL questionnaire. Commentators agree that it is not clear under the present wording of article 3 (5) whether the shipper's guarantee to the carrier continues to operate when the bill of lading has been transferred to a third party. See Scrutton, *Charter-parties and Bills of Lading*, 17th ed., London, 1964, p. 415; Carver, *Carriage by Sea*, Vol. I, p. 239.

⁷⁷ See foot-note 68, above.

the carrier against all loss, damage or expense resulting from inaccuracies in such information. *The shipper shall remain responsible under such guarantee even if the bill of lading has been transferred to a third party.* The right of the carrier to such indemnity shall in no way limit his responsibility under the contract of carriage to any person other than the shipper.

CHAPTER II. DOCUMENTS OTHER THAN BILLS OF LADING EVIDENCING THE CONTRACT OF CARRIAGE

A. CURRENT LAW

68. Neither the 1924 Brussels Convention nor the 1968 Protocol thereto contains provisions requiring the issuance of any document evidencing the contract of carriage other than a bill of lading. Similarly, the contents and legal effect of documents other than bills of lading are not governed by these conventions.

69. Under other transport conventions, the normal transport document is a non-negotiable document designed chiefly to record the shipment and to furnish information to the immediate parties (consignor and consignee) concerning the underlying contract of carriage and the apparent condition of the goods when received by the carrier. The Warsaw Convention provides that the "consignor" (shipper) shall prepare an "air consignment note" (article 5) which is signed by the carrier before the goods are loaded on board (article 6 (3)); the air waybill or air consignment note shall indicate the places of departure and destination (article 8)⁷⁸; the contents of the air consignment note are, generally, *prima facie* evidence against the carrier (article 11), and if the carrier permits loading of goods without prior issuance of an air waybill, he loses the benefits of the provision on limitation of carrier liability (article 9). Under the CMR Convention, the "consignment note" shall be signed by the sender and the carrier (article 5) and shall contain particulars such as date and place of issuance, name and address of sender, carrier and consignee, description of the nature of the goods and of the packing method, the number, marks, weight or quantity of the goods, the charges relating to the carriage, whether transshipment is allowed, and whether any charges are to be paid by the sender (article 6); the contents of the consignment note are considered *prima facie* evidence (article 9). Under the CIM Convention, as revised in 1970, the sender must present a "consignment note" which shall include, among other things, the name and address of the sender and the consignee, the destination station, description of the goods and of the packing, weight, number of packages (article 6); the sender is responsible for the correctness of his statements contained in the consignment note (article 7), but if the consignment note fails to note inadequacy of packing, the burden of establish-

⁷⁸ Prior to its 1955 revision, the Warsaw Convention contained a detailed list of required particulars to be inserted in such documents, including, among others, the name and address of the first carrier, and of the consignee, place and date of execution, the agreed stopping places, nature of the goods, the number, marks, weight, quantity of the goods, the apparent condition of the goods and of the packing, the freight and who is to pay it.

ing that the goods were inadequately packaged will rest on the railway (article 12).

B. ALTERNATIVE APPROACHES

70. Opinion was divided among the replies as to whether it was desirable to expand the scope of article 3 (3) of the 1924 Convention beyond bills of lading to include consignment notes, receipts, and other informal documents evidencing the contract of carriage. It may be recalled that at its sixth session the Working Group approved a draft provision which would expand the contracts covered by the revised Convention to "all contracts for the carriage of goods by sea".⁷⁰ Consequently, the revised Convention will apply to a considerable number of contracts of carriage which will not be evidenced by a bill of lading.

71. The Working Group may conclude that the revised Convention should not contain any rules concerning the contents of documents other than bills of lading which may be issued evidencing contracts of carriage. Thus, in cases where the shipper does not demand a bill of lading, the parties would be free to agree on the form, nature and contents of any documents that may be issued in connexion with their contract of carriage. This approach would give the parties complete flexibility to follow the varying practices of different trades as to documentation; it could, however, be accompanied by a rule outlining the legal consequences if informal documents are in fact issued, whether by agreement of the parties or by unilateral decision of a carrier:

Draft alternative A

When a carrier issues a document other than a bill of lading to evidence a contract of carriage, such a document shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described.

72. Another possible approach would be to require the same contents for all documents that may be issued, on demand of the shipper, by the carrier in evidence of the contract of carriage. This would provide the greatest protection to consignees and other third parties, but would curtail flexibility and possible special arrangements between the shipper and the carrier as to the contents of documents. The practical result would be whenever a document was issued to evidence a contract of carriage pursuant to a demand by the shipper, it would in effect have to be a bill of lading. Alternatively, the Working Group may wish to consider an approach whereby the shipper could demand a "quasi-formal" document other than a bill of lading which is to contain, at the shipper's option, one or more of the items of information required to appear on bills of lading.

73. A number of replies, while favouring the extension of some or all of the rules on the required content of bills of lading to other documents evidencing the contract of carriage, expressed the view that the contents of documents other than bills of lading should only be *prima facie* evidence against the carrier. They reasoned that under documents other than bills of lading, the carrier would have to deliver the goods to the consignee named in the contract of carriage, as in most

countries such documents were not considered "documents of title" and therefore were not "negotiable"; hence there would be no good faith purchasers of these documents who needed special protection.

74. The Working Group may wish to consider the following draft provision which includes as alternatives the two approaches mentioned in paragraph 72, above, and which would make the contents of all documents evidencing contracts of carriage other than bills of lading only *prima facie* evidence against the carrier:

Draft alternative B

1. If no bill of lading has been issued or demanded concerning the carriage of certain goods, after receiving the goods into his charge the carrier shall issue, on demand of the shipper, a document other than a bill of lading to evidence the contract of carriage. Such document shall show [any item of information specifically requested by the shipper which is] [the information] required under article [IV-B].

2. When [despite specific request of the shipper] the carrier fails to note on the document, issued pursuant to paragraph 1 of this article, the apparent order and condition of the goods [including their packaging] or that freight charges are due on [arrival of] the shipment, the carrier is deemed to have noted on such document that the goods [including their packaging] were in apparent good order and condition [when received by him] and that no freight charges would be due on [arrival of] the shipment.

3. A document evidencing the contract of carriage other than a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described, subject to paragraph 2 of this article and to the reservations permitted under paragraph 3 of article [IV-B].

ANNEX

(1) New definitions proposed in part one

Article I-C: definitions^a

Paragraph 2. Goods

"Goods" includes goods, wares, merchandise and articles of every kind whatsoever, including live animals and crates, containers and other packaging furnished by the shipper. (Draft provision D; see para. 29 above.)

Paragraph 3. Bill of lading

"Bill of lading" means a document which evidences [the receipt of goods and] a contract for [their] carriage and by which a carrier undertakes to deliver the goods only to a person in possession of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to bearer, constitutes such an undertaking. (Draft provision A-1, above, para. 10.)^b

^a The reference is to article I-C in the revised compilation.

^b See in part one above, para. 12, the following draft provision A-2 set forth as an alternative:

"Bill of lading" means a document which evidences [the receipt of goods and] a contract for [their] carriage and by which a carrier undertakes to deliver the goods to the order [or assigns] of a named person, or to bearer.

⁷⁰ Revised compilation, article I-A.

(2) Proposed structure of draft articles on contents and legal effect of documents evidencing the contract of carriage

Article IV-B: contents of bills of lading

1. After receiving the goods into his charge, the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage; (same as 1924 Convention, article 3 (3) (a)).

(b) The number of packages or pieces, and the quantity or weight, as the case may be, as furnished in writing by the shipper; (draft provision B; see above, para. 24).

(c) The apparent order and condition of the goods, including their packaging; (draft provision C; see above, para. 28).

(d) The name and principal place of business of the contracting carrier; (draft provision F; see above, para. 46).

(e) The place and date of its issuance; (draft provision G; see above, para. 50).

2. After the goods are loaded on board, if the shipper so demands, the carrier, [master or agent of the carrier] shall issue to the shipper a "shipped" bill of lading which, in addition to the particulars required under paragraph 1, shall state that the goods are on board a named ship or ships, the date or dates of loading, and the port of loading. If the carrier has previously issued to the shipper a bill of lading or other document of title with respect to any of such goods, on request of the carrier the shipper shall surrender such document in exchange for the "shipped" bill of lading. (Draft provision H; see above para. 55.)

3. If a bill of lading contains particulars concerning the description, marks, number, quantity or weight of the goods, which the carrier has reasonable grounds for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking, the carrier shall [state] [specify] such reservation in the bill of lading. (Draft provision E; see above, para. 35.)

Article IV-C: legal effect of bills of lading

1. A bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described, subject to the reservations permitted under paragraph 3 of article [IV-B]. However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party

acting in good faith, including a consignee. (Draft provision J-1; see above, paras. 59 and 60.)

2. When the carrier fails to note on the bill of lading the apparent order and condition of the goods [including their packaging] or that freight charges are due on [arrival of] the shipment, for the purpose of paragraph 1 he is deemed to have noted on the bill of lading that the goods [including their packaging] were in apparent good order and condition and that no freight charges would be due on [arrival of] the shipment. (Draft provision J-2; see above, para. 63.)

3. The shipper shall be deemed to have guaranteed to the carrier the accuracy, at the time the carrier took charge of the goods according to article [II-A] of the marks, number, quantity, and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damage or expense resulting from inaccuracies in such information. The shipper shall remain responsible under such guarantee even if the bill of lading has been transferred to a third party. The right of the carrier to such indemnity shall in no way limit his responsibility under the contract of carriage to any person other than the shipper. (Draft provision K; see above, para. 67.)

Article IV-D: documents other than bills of lading

Draft alternative A

When a carrier issues a document other than a bill of lading to evidence a contract of carriage, such a document shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described. (See above, para. 71.)

Draft alternative B

1. If no bill of lading has been issued or demanded concerning the carriage of certain goods, after receiving the goods into his charge the carrier shall issue, on demand of the shipper, a document other than a bill of lading to evidence the contract of carriage. Such document shall show [any item of information specifically requested by the shipper which is] [the information] required under article [IV-B].

2. When [despite specific request of the shipper] the carrier fails to note on the document, issued pursuant to paragraph 1 of this article, the apparent order and condition of the goods [including their packaging] or that freight charges are due on [arrival of] the shipment, the carrier is deemed to have noted on such document that the goods [including their packaging] were in apparent good order and condition [when received by him] and that no freight charges would be due on [arrival of] the shipment.

3. A document evidencing the contract of carriage other than a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described, subject to paragraph 2 of this article and to the reservations permitted under paragraph 3 of article [IV-B]. (See above, para. 74.)

PART TWO. VALIDITY AND EFFECT OF LETTERS OF GUARANTEE

A. INTRODUCTION

1. The Working Group at its sixth session decided that at the seventh session it would consider, among other topics, the validity and effect of letters of guarantee.¹ Neither the International Convention for the Unification of Certain Rules Relating to Bills of Lading (Brussels Convention of 1924)² nor the Protocol to

¹ Working Group, report on sixth session (A/CN.9/88; UNCITRAL Yearbook, vol. V: 1974, part two, III, 1).

² League of Nations, *Treaty Series*, vol. CXX, No. 2764, p. 157; *Register of Texts of Conventions and other Instruments Concerning International Trade Law*, vol. II, p. 130 (United Nations Publication, Sales No. E.73.V.3) (hereinafter cited as *Register of Texts*).

amend that Convention (1968 Brussels Protocol)³ sets forth rules concerning the validity or effect of letters of guarantee provided by the shipper to a carrier.⁴

B. CURRENT LAW AND PRACTICE

(1) Why letters of guarantee are issued

2. The type of letter of guarantee to which this report is addressed is an undertaking by a shipper, or

³ 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*, p. 180.

⁴ These letters are also referred to as letters of indemnity.

someone acting for the shipper, to indemnify a carrier for any liability the latter might incur toward the consignee or other third party as a result of inaccuracy of the information set forth in a bill of lading regarding the marks, weight, and quantity of the goods and the apparent condition of the goods.

3. Under article 3 (3) of the Brussels Convention of 1924 the carrier is obligated, on demand of the shipper, to issue a bill of lading containing the information provided for in that paragraph. Article 3 (4) of the Convention provides that "such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b) and (c)". Article 3 (4) is supplemented by language in the 1968 Brussels Protocol which states: "However, proof to the contrary shall not be admissible when the Bill of Lading has been transferred to a third party acting in good faith" (article 1 (1)).

4. The Convention gives the carrier a right to indemnity from the shipper for loss, damage or expense resulting from the inaccuracy of certain of the information set forth on the bill of lading. Article 3 (5) states:

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

The last sentence of article 3 (5) makes it clear that the carrier remains liable to the consignee or other third person to whom the bill of lading has been transferred; only after incurring loss, damage or expense can the carrier expect indemnification from the shipper and then only regarding inaccuracies in statements by the shipper as to marks, number, weight and quantity. Since a claim against the shipper involves delay, risk and expense, it would be expected that the carrier would note on the bill of lading all inaccuracies for which he may be responsible to third parties; this is particularly true with respect to apparent defects in the order and condition of the goods since with respect to this type of information the Convention provides for no recourse by the carrier against the shipper.⁵ By making such notations the carrier would protect himself against claims by any transferee of the bill of lading based on the description of the goods in the bill of lading.

5. Sometimes, in practice, however, arrangements are made between shippers and carriers which prevent the making of those notations on the bill of lading which would interfere with the acceptance of the bill of lading by the consignee or a bank. The usual prerequisite for arranging payment through a bank is that the bill of lading be "clean". The problem faced by the carrier may be illustrated as follows. Pursuant to

a sales contract between a seller and a buyer, a bank acting on behalf of the buyer issues to the seller a documentary letter of credit whereby the bank engages to pay a draft for a specified sum (reflecting the price for the goods) on the presentation of certain documents, including a "clean" bill of lading which evidences shipment of the goods. At the time of loading the carrier proposes to note on the bill of lading: "cartons torn" or "barrels leaking". Such a notation would render the bill of lading unacceptable under the letter of credit requirement of a "clean" bill of lading. The shipper then proposes that the carrier issue the bill of lading without this notation in return for a letter of guarantee stating: "Upon receipt by you of the captioned shipment, your personnel noted the following exceptions and/or clauses concerning the conditions of the below-listed cargo: 'cartons torn'. In consideration of the issuance of this bill of lading without the above-noted exceptions and/or clauses being shown thereon we hereby agree, in the event that exceptions and/or clauses are made by consignees or their representatives against the cargo herein referred to, and which are attributable to the above-noted exceptions and/or clauses, you are authorized to arrange for evaluation and payment of the loss or damage involved, and the full amount of such loss, damage and/or expense will be paid to you by us upon demand."

6. The circumstances in which a letter of guarantee is issued may vary. For example, the letter may be issued in cases where the shipper and carrier disagree about the quantity of the goods to be carried or about the adequacy of the packing. On the other hand, a letter of guarantee may be issued although both the shipper and the carrier recognize that the goods are not in apparent good order and condition. In any event, neither the consignee nor any other third party, such as a bank or insurer, will know of the discrepancy between the actual condition of the goods when received by the carrier and their description in the bill of lading. In reliance on the "clean" bill of lading: (1) the bank will pay the sum specified in the letter of credit; (2) the bill of lading may be transferred to third parties acting in good faith and (3) an insurer may indemnify the carrier for liability⁶ or may reimburse the cargo owner for damage in transit, when the damage resulted prior to transit.

7. Under the circumstances set forth above, the consignee, bank or other third party will have been misled by the absence of any notation on the "clean" bill of lading.⁷ In those cases where the absence of a notation is due to an honest disagreement as to, e.g., the quantity or weight of the goods, one cannot conclude that the shipper and carrier were guilty of wilful misconduct amounting to fraud. In other cases such wilful misconduct may be said to have taken place if the existence of the defect was clear and the carrier refrained from noting it on the bill of lading in order to enable his

⁶ Reply of France to the third UNCITRAL questionnaire. The questionnaire and the replies are set forth in a Secretariat working document entitled: Replies to the third questionnaire on bills of lading submitted by Governments and international organizations for consideration by the Working Group (A/CN.9/WG.III/L.2, and Add.1 thereto).

⁷ See Pourcelet, *Le transport maritime sous connaissement*, p. 33 (1972).

⁵ In some instances, payment by the carrier to a consignee or other third person would constitute a performance by the carrier of the shipper's duty; in this event the carrier might be entitled to restitution from the shipper outside the Convention.

customer (the shipper) to secure payment for the goods, or their sale, under circumstances where this would have been impossible had the defect been stated on the bill of lading.

(2) *Legal effect of letters of guarantee*

8. There appears to be general agreement that a letter of guarantee given by the consignor does not impair the rights of the consignee or other third parties against the carrier. This view is expressed in the statutes and case law of a number of States.⁸

9. With respect to the enforceability of the letter of guarantee by the carrier against the shipper or other person who issued it, a distinction seems to be made by some national courts between cases where the carrier intended to mislead third parties and cases in which there was no such intention. Such a distinction was drawn in a leading English case, *Brown, Jenkinson and Co. Ltd. v. Percy Dalton (London) Ltd.*⁹ a suit by a carrier to recover from the shipper on a letter of guarantee. The opinion by Lord Pearce described the type of letter of guarantee that might be enforced: "In the last twenty years it has become customary, in the short-sea trade in particular, for shipowners to give a clean bill of lading against an indemnity from the shippers in certain cases where there is a bona fide dispute as to the condition or packing of the goods. This avoids the necessity of rearranging any letter of credit, a matter which can create difficulty when time is short. . . . In trivial matters and in cases of bona fide disputes where the difficulty of ascertaining the correct state of affairs is out of proportion to its importance, no doubt the practice is useful." The Tribunal de Commerce de la Seine (France) has held: "The practice of issuing a letter of indemnity is only justified when by reason of the speed of the operations necessary for the normal exploitation of regular oceanlines, it is impossible for the master to verify with rigorous precision the information furnished by the shipper before shipment."¹⁰

10. Where the carrier issuing a clean bill of lading knew that a claused bill should have been issued, it has been held, for example in *Brown v. Percy Dalton Ltd.*, cited above, that the letter of guarantee was unenforceable. In that case the Court of Appeal found that on the facts which were not in dispute "the position was, therefore, that at the request of the defendants [shipper] the plaintiffs [carrier] made a representation which they knew to be false and which they intended should be relied on by persons who received the bill of lading, including any banker who might be concerned. . . . The premise on which the plaintiffs rely is, in effect, this: if you will make a false representation which will deceive indorsees or bankers, we will indemnify you against any loss that may result to you. I cannot think that a court should lend its aid to enforce such a bargain" (p. 853). The Court of Appeal also pointed out

⁸ e.g., French law No. 66-420 of 18 June 1966, article 20; article 1212, Québec Civil Code; *Continex v. SS Flying Independent* (1952) AMC 1499 (US District Court, S.D.N.Y.); *Brown, Jenkinson and Co. Ltd. v. Percy Dalton (London) Ltd.* [1957] 2 All. E.R. 844. The replies from Dahomey, Italy, France and Romania suggested that letters of guarantee be declared to have no effect against third parties.

⁹ *Brown, Jenkinson and Co. Ltd. v. Percy Dalton (London) Ltd.* [1957] 2 All. E.R. 844, 857.

¹⁰ *Thésée*, 10 March 1958 as reported in Tetley, *Marine Cargo Claims* 223 (1965).

that "each case must depend on its circumstances" (*ibid.*). No clear view with respect to the enforcement of letters of guarantee by the carrier against the shipper, however, appears to emerge from national practice.¹¹

C. POSSIBLE APPROACHES REGARDING THE VALIDITY AND EFFECT OF LETTERS OF GUARANTEE

11. Various possible approaches regarding the validity and effect of letters of guarantee are examined below. Three draft proposals are set forth. The first two draft proposals (draft proposals A and B) are alternative proposals. On the other hand, draft proposal C is not incompatible with draft proposal A or B; it would be possible for the Working Group to consider the adoption of either draft proposal A or B together with draft proposal C.

(1) *No provision in the Convention on the subject of letters of guarantee*

12. It has been suggested that the solution to the problem posed by letters of guarantee is not to declare such letters null or void but instead to achieve greater flexibility in bank credit transactions. The reply of South Africa to the Secretariat questionnaire suggested "that the relationship between bills of lading and letters of credit should be examined in the course of the current revision of the Uniform Customs and Practices for Documentary Credits". In a similar vein the Australian reply suggested an examination of the basic reason for maintaining the requirement for the "clean" bill of lading.

13. Netherlands stated in its reply that it "has no sound reason to assume that there is a tendency to abuse clean bills of lading covered by a letter of indemnity. Generally speaking, the purpose of these documents is to facilitate international trade in cases where shipowners intend to clause a bill of lading with some remark that is not essential for the condition or the quantities of the goods." The Netherlands reply then referred to "the suggestion made by the International Chamber of Commerce some years ago, i.e., by registering clauses containing remarks of no essential importance to the condition or the qualities of the goods, as having no consequence as to the validity and negotiability of bills of lading".

14. The reply of the International Chamber of Commerce stated that a convention provision declaring letters of guarantee null and void was at best a partial solution.¹² The ICC did not condone the use of such letters when given for fraudulent purposes. "The problem for the shipper, however, is that he often finds that certain clauses which a carrier might place on a bill of lading, thus rendering it unclean, bear no relation to the conditions of the contract of sale. He is nevertheless subject to difficulties in documentary credit financing." The ICC reply suggested that "to the extent that the

¹¹ See Tetley, *Marine Cargo Claims*, at p. 222, who cites cases in which the courts permitted the carrier to sue the shipper on the letter of guarantee. See also Pourcelet, *Le transport maritime sous connaissement*, pp. 34-35 (1972).

¹² For a general treatment of the problem of "clean" bills of lading, reservations on bills of lading, and letters of indemnity, see International Chamber of Commerce Brochure No. 223, "The Problem of Clean Bills of Lading" (1963).

practice of issuing a guarantee in favour of the carrier remains necessary, in certain cases, for practical reasons, a broad approach to the problem might be along the following lines:

"Greater care by shippers to reduce the occasion for adverse comment by carriers on the bill of lading,

"A more reasonable attitude by carriers as to the recognition of the practices of certain trades on the suitability of modern forms of packaging and the discontinuance of stereotyped clauses,

"Agreement between buyer and seller as to the acceptability of bills of lading which are not 'clean' in the strict sense but which may be safely deemed for the purpose of the contract of sale to be 'in order'."¹³

15. Other replies to the third UNCITRAL questionnaire indicated that adding a provision to the Convention was not necessary.¹⁴ Thus the United States reply states: "The desirable goal is protection of the consignee from fraud, and it is doubted whether international legislation is necessary to achieve that goal unless the work of UNCITRAL is to be extended to documentary credits."

(2) Invalidity of letters of guarantee

16. The purpose of any remedial action with respect to the letter of guarantee is to discourage the inclusion of false statements in bills of lading which would mislead the consignee or other third party. In this connexion, it was pointed out by Lord Pearce in *Brown Ltd. v. Percy Dalton Ltd.*, cited above, that "it is not enough that the banks or the purchasers who have been misled by clean bills of lading may have recourse at law against the shipping owner. They are intending to buy goods, not law suits. Moreover, instances have been given in argument where their legal rights may be defeated or they may not recoup their loss. Trust is the foundation of trade; and bills of lading are important documents. If purchasers and banks felt that they could no longer trust bills of lading, the disadvantages to the commercial community would far outweigh any conveniences provided by the giving of clean bills of lading against indemnities" (p. 857).

17. The effect of the invalidity of the letter of guarantee is to free the shipper from his undertaking to indemnify the carrier for the sum paid by the carrier to the consignee or other third party based on the discrepancy between the goods as described in the bill of lading and as they actually were when received by the carrier. The carrier would be faced with the choice of noting the defects on the bill of lading or of accommodating the shipper by not inserting the relevant notations and thereby assuming liability to third parties for the discrepancies without having a contractual recourse against the shipper. The purpose of the invalidation approach is to induce the carrier to make the appropriate notation in the bill of lading. The shipper, who is the

real beneficiary of the practice of issuing letters of guarantee in return for "clean" bills of lading, would no longer be able to provide indemnity to the carrier except for the statutory indemnity under article 3 (5) of the 1924 Brussels Convention. It will be recalled that article 3 (5) provides indemnification by the shipper to the carrier for inaccuracies in statements furnished by the shipper regarding marks, quantity and weight, but not for omissions or incorrect statements as to the order or condition of the goods.

18. Opponents of a provision invalidating letters of guarantee argue that such a provision would benefit the shipper, although he, as the party who induced the carrier not to disclose the defect in the goods, was the greater offender against the consignee or other third party.¹⁵

19. Among supporters of a Convention provision invalidating letters of guarantee, two views appear to emerge regarding the desirable scope of such a provision. One approach is to invalidate all letters of guarantee issued by the shipper to the carrier. The other approach is to invalidate only those letters of guarantee that were issued by a shipper to a carrier who knew or should have known of the inaccuracy or the defect but who still failed to make the appropriate notation on the bill of lading.

(a) Convention provision invalidating all letters of guarantee by shipper to carrier

20. Certain replies to the Secretariat questionnaire favoured an approach invalidating all letters of guarantee issued to the carrier by the shipper.¹⁶ One of the reasons given was that, in all cases, letters of guarantee have an effect on the information that is included or omitted from the bill of lading; thus whether or not the carrier intended to mislead the consignee, the result for the consignee will be the same.¹⁷ Another reason for the broader approach of invalidating all letters of guarantee is the difficulty of distinguishing between letters of guarantee issued in cases of genuine disagreement between the shipper and the carrier (e.g. as to quantity or weight) and letters issued in cases where the carrier knew or should have known of the defects in the goods, their packaging or the inaccuracy of the information given by the shipper.

21. A draft provision reflecting this broad approach to invalidating letters of guarantee is as follows:

Draft proposal A

Any promise or agreement made by or on behalf of the shipper to indemnify the carrier with respect to any statement made in the bill of lading, or the omission of a statement required under article [3 (3)], shall be void and of no effect.

(b) Convention provision invalidating letters of guarantee issued in return for incorrect statement or omission of information on the bill of lading

22. A second view would invalidate letters of guarantee only when the carrier has knowledge of the inac-

¹³ The ICC reply also suggested that in fact the seller who has been issued an unclean bill of lading may obtain payment of the credit by providing a guarantee to the bank which has issued the documentary credit, "thus avoiding any prejudice to the buyer who remains free to contest payment made against such a document."

¹⁴ Replies of the Netherlands and the United States.

¹⁵ See replies of the Baltic and International Maritime Conference (BIMCO) and the International Maritime Committee (IMC).

¹⁶ See replies of Pakistan, Hungary, Turkey.

¹⁷ See reply of Pakistan.

curacy of the information given by the shipper or of the apparent defects in the goods. Supporters of this approach state that letters of guarantee are useful to expedite commercial relations in cases of genuine disagreement between the shipper and the carrier as to the quantity of the goods and minor questions concerning the condition of the goods or of their packaging. This view is also supported by current practice, as stated above at paragraphs 9-10.

23. A draft provision which would embody this narrower approach to the invalidity of letters of guarantee would read as follows:

Draft proposal B

Any promise or agreement made by or on behalf of the shipper to indemnify the carrier with respect to any statement made in the bill of lading, or the omission of information required under article [3 (3)], shall be void and of no effect if the carrier knew [or should reasonably have known on the basis of facts apparent to him] that such a statement was incorrect or that the inclusion of such information was required.

(3) *Full responsibility of the carrier to third persons for knowing mis-statements or omissions*

24. As has been noted (para. 16, above), the central objective of any remedial action in this area is to discourage the inclusion in bills of lading of false statements which may mislead the consignee and other third persons. Draft proposals A and B approach this objective by invalidating all, or some of the letters of indemnity that may be used to induce such false statements. Another approach would be to strengthen the responsibility of carriers to third persons who are misled by such false statements.

25. Article 3 (4) of the Brussels Convention of 1924, as supplemented by article 1 (1) of the Brussels Protocol, provides a basis for responsibility of the carrier for statements in the bill of lading (see para. 3, above). However, any responsibility based on these provisions would presumably be subject to the general limits on the carrier's liability.¹⁸ In view of the serious consequences of false statements in bills of lading, consideration might be given to removing the limits on the liability of the carrier in the situations where the carrier knows that a statement in the bill of lading is false, or where the carrier knows that a required statement is omitted.

26. A similar approach is employed in French and Norwegian legislation, and is recommended in some of the replies to the third UNCITRAL questionnaire.¹⁹

27. A draft provision implementing this approach is as follows:

Draft proposal C

When the carrier knowingly states inaccurate information in the bill of lading or omits any information required to be included under [revised article 3 (3) and 3 (7)] he shall be responsible to the consignee or other third party to whom the bill of lading has been transferred, for any loss, damage or expense incurred in good faith by such third person as a result of such statement or omission without the benefit of the limitation on carrier liability provided for in this Convention.

¹⁸ See Revised Compilation, arts. II-C, II-D and II-E.

¹⁹ See the replies of Finland, France, Norway and Pakistan. Under this approach even if letters of indemnity by the shipper are valid, the increased direct liability of the carrier, and the increased indirect liability of the shipper under the indemnity, would tend to discourage the offering of such letters by the shipper and the acceptance by the carrier.

PART THREE: DEFINITION OF CONTRACT OF CARRIAGE AND LEGAL POSITION OF THE CONSIGNEE

A. INTRODUCTION

1. At its sixth session the Working Group noted that it might be desirable to formulate in the revised convention a definition of the term "contract of carriage".¹ This part of the fourth report of the Secretary-General responds to the request made by the Working Group that this report also examine "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."²

2. The Secretariat has received one substantive reply to an inquiry dealing with these issues; that reply has been circulated as one of the working documents for the seventh session of the Working Group (document A/CN.9/WG.III/WP.18).

B. DEFINITION OF "CONTRACT OF CARRIAGE"

3. Although the Working Group has not yet considered a definition of the term "contract of carriage",

that term has been utilized a number of times in the draft provisions approved by the Working Group. Thus, the contracts covered by the revised convention have been identified as "all contracts for the carriage of goods by sea",³ and the geographic scope is examined in terms of "every contract for carriage of goods by sea between ports in two different States".⁴ Similarly, "carrier" or "contracting carrier" is defined as "any person who in his own name enters into a contract for carriage of goods by sea with a shipper"⁵ and references to the "contract of carriage" may also be found in the draft provisions on liability of the carrier in tort,⁶ on deck cargo,⁷ on the through bill of lading,⁸ on jurisdiction,⁹ on arbitration¹⁰ and on contract stipulations derogating from the convention.¹¹

³ Revised Compilation, art. I-A, para. 1.

⁴ *Ibid.*, art. I-B, para. 1.

⁵ *Ibid.*, art. I-C (1), para. 1.

⁶ *Ibid.*, art. II-D, para. 1.

⁷ *Ibid.*, art. II-F, para. 2 (in the reference to "bill of lading or other document evidencing the contract of carriage").

⁸ *Ibid.*, art. II-H, para. 1.

⁹ *Ibid.*, art. V-C, A (1), B and D.

¹⁰ *Ibid.*, art. V-D, paras. 1 and 5.

¹¹ *Ibid.*, art. VI-A, paras. 1 and 3.

¹ Working Group, report on sixth session (A/CN.9/88, UNCITRAL Yearbook, vol. V: 1974, part two, III, 1).

² *Ibid.*, para. 151.

4. Under article 1 (b) of the Brussels Convention of 1924, the term "contract of carriage" was described as applicable "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". The other transport conventions do not contain definitions of "contract of carriage" as such; however, in delineating the scope of application of the convention they each use "contract of carriage" in a setting which indicates the meaning of the term:

1956 CMR (road) Convention—article 1 (1)

"1. This Convention shall apply to every contract for the carriage of goods by road in vehicles for reward..."

1929 Warsaw (air) Convention—article 1 (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."¹²

1970 CIM (rail) Convention—article 1 (1)

"1. This Convention shall apply... to the carriage of goods consigned under a through consignment note made out for carriage over the territories of at least two of the contracting States..."

5. The Working Group may decide that the identification of "contract of carriage" in the draft provisions on the scope of the revised convention (para. 3 above) is sufficient to show the meaning of the term, and that no definition of the term "contract of carriage" is necessary.

6. Alternatively, the Working Group may find it useful to add to the draft provision in article 1-A the words "for reward" or "in exchange for payment of freight".¹³

Draft provision A

(Article I-A: contracts covered)

1. The provisions of this Convention shall be applicable to all contracts for the carriage of goods by sea [for reward] [in exchange for payment of freight].

7. As a third alternative the Working Group may wish to consider adoption of a separate definition of the term "contract of carriage", along the lines proposed by France in response to an inquiry by the Secretariat to members of the Working Group.¹⁴ Such a definition could read as follows:

Draft provision B

"Contract of carriage" means a contract whereby a carrier promises a shipper, [in exchange for payment of freight] [for reward], to move specified goods from one port to another.

¹² Since the 1955 revision, the first sentence of article 1 (1) reads as follows: "This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward."

¹³ It may be noted that both the CMR and the Warsaw Convention employ the expression "for reward".

¹⁴ See A/CN.9/WG.III/WP.18.

8. As pointed out in document A/CN.9/WG.III/WP.18, article 15 of the French law of 18 June 1966 contains a similar provision. It might be concluded that draft provision B is unnecessary since it expresses the commonly accepted meaning of the term "contract of carriage" for the transport of goods by sea; on the other hand, the Working Group may deem it useful to adopt a definition of this basic term to express the basic obligation assumed by the carrier under his contract with the shipper to carry goods from one port to another¹⁵ and the basic obligation of the shipper to pay the freight charges agreed upon.

C. LEGAL RELATIONSHIP OF CARRIER AND THE PERSON ENTITLED TO TAKE DELIVERY OF THE GOODS

9. In the draft provisions already approved by the Working Group there are references to the "consignee",¹⁶ to the "person entitled to make a claim for the loss of goods" (*l'ayant-droit*),¹⁷ to "the claimant"¹⁸ and to the "claimant in respect of the goods".¹⁹

10. Under the Brussels Convention of 1924 the person entitled to take delivery of the goods is only referred to in article 3 (6) (the provision on notice of loss or damage); this provision refers at one point to "the person entitled to delivery thereof [of the goods] under the contract of carriage" and at another point to "the receiver". Under the other transport conventions, the legal position of the "consignee" is clearly delineated. Thus articles 12 and 13 of the CMR Convention, articles 16, 21 and 22 of the 1970 CIM Convention, and articles 12 and 13 of the Warsaw Convention, as amended in 1955, deal specifically with the rights of the consignee.

11. The Working Group may wish to consider an approach whereby the revised convention would give explicit recognition to the derivative rights enjoyed by the consignee or other third person against the carrier whether under the contract of carriage directly or pursuant to a transfer of the bill of lading. Such a provision would in no way affect any direct contractual relationship (e.g., under a sales contract) between the consignee and the shipper.

12. In order to give recognition to the rights of the "consignee", the Working Group might adopt a definition of "consignee" and then consider a separate provision outlining the legal position of the consignee.

Draft provision C

1. *Definition of "consignee"*: "Consignee" means the person entitled to take delivery of the goods under the contract of carriage.

2. *Legal position of the consignee*: The consignee shall have the rights of the shipper and, in addition, any rights conferred on him under article [3 (4)].

13. When, under draft provision C, paragraph 2, the consignee enjoys "the rights of the shipper", the con-

¹⁵ See Revised Compilation, art. I-B, para. 1 ("ports of two different States").

¹⁶ See Revised Compilation, art. I-B, para. 2; art. II-A, paras. 2 and 3; art. VI-A, para. 3.

¹⁷ See Revised Compilation, art. II-B, para. 2.

¹⁸ See Revised Compilation, art. II-B, para. 3; art. II-C, alternative B, para. 1 (b); art. V-C, parts A (2) (a) and D; art. VI-A, para. 4.

¹⁹ See Revised Compilation, art. VI-A, para. 4.

signee will only have the rights that the shipper would have enjoyed under the circumstances. Thus the consignee will still be bound by any limitations imposed by the convention on the rights of the shipper, such as the time limitation for giving the required notice of the loss or damage to the carrier (Revised Compilation, art. 5-A) or the statute of limitation (prescription) period for bringing actions against the carrier (Revised Compilation, art. 5-B). Furthermore, the provision that the consignee "shall have the rights of the shipper" would not impose on the consignee the obligations of

the shipper to the carrier, since these obligations (such as the shipper's liability for shipping dangerous goods under art. 4 (6) of the 1924 Convention) seem peculiarly to be the shipper's own.

14. The draft proposal concerning the legal position of consignees makes special reference to article 3 (4), because under that article consignees (and other third parties in good faith to whom a bill of lading has been transferred) are intended to enjoy greater rights against the carrier than those which the shipper would have enjoyed.

3. Report of the Working Group on International Legislation on Shipping on the work of its eighth session (New York, 10-21 February 1975) (A/CN.9/105)*

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* 18 March 1975.

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 (1971).¹ The Working Group consists of the following 21 members of the Commission: Argentina, Australia, Belgium, Brazil, Chile, Egypt, France, Germany (Federal Republic of), 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.

2. In defining the task of the Working Group, the Commission, at its fourth session, 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) shall 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

3. In addition, the Commission specified a number of topics that among others should be considered. The Working Group at earlier sessions has taken action with respect to the following topics: (a) the period of carrier responsibility; (b) responsibility for deck cargo and live animals; (c) choice of forum clauses in bills of lading;³ (d) the basic rules governing the responsibility of the carrier; (e) arbitration clauses in bills of lading;⁴ (f) unit limitation of liability; (g) trans-shipment;

(h) deviation; (i) the period of limitation;⁵ (j) liability of the carrier for delay; (k) scope of application of the Convention; (l) elimination of invalid clauses; (m) deck cargo and live animals; (n) definitions under article 1 of the Brussels Convention;⁶ (o) contents and legal effect of documents evidencing the contract of carriage; (p) validity and effect of letters of guarantee; and (q) definition of contract of carriage and of consignee.⁷

4. At its seventh session the Working Group decided that its future work in respect of carrier responsibility should be carried out with a view to drawing up a new convention. Accordingly, it requested the Secretariat to structure the draft provisions approved by the Working Group in the form of a convention and to submit the draft of such a convention to its eighth session for a second reading.⁸ The Working Group also decided to take up the following topics at its eighth session: (i) general rule of liability of the shipper; (ii) dangerous goods; (iii) notice of loss; (iv) general average; and (v) relationship of the convention with other maritime conventions.⁹

5. The Working Group held its eighth session at New York from 10-21 February 1975.

6. All members of the Working Group were represented at the session with the exception of the United Republic of Tanzania and Zaire.

7. The session was attended by the following member of the Commission as observer: Philippines; by the following State not member of the Commission as observer: Canada; and by observers from the following international, intergovernmental and non-governmental organizations: United Nations Conference on Trade and Development (UNCTAD), International Maritime Committee (IMC), International Chamber of Commerce (ICC), International Shipowners Association (INSA), International Union of Marine Insurance (IUMI), International Chamber of Shipping (ICS),

¹ Report of the United Nations Commission on International Trade Law on the work of its fourth session (1971), *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17 (A/8417)*, para. 19 (UNCITRAL Yearbook, vol. II: 1971, part one, II, A).

² *Ibid.* The Commission decided at its seventh session that the Working Group should "continue its work under the terms of reference set forth by the Commission at its fourth session and complete the work expeditiously". Report of the United Nations Commission on International Trade Law on the work of its seventh session (13-17 May 1974), *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 17 (A/9617)*, para. 53 (UNCITRAL Yearbook, vol. V: 1974, part one, II, A).

³ Working Group report on third session (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) was used by the Working Group as its working document.

⁴ Working Group report on fourth (special) session, (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 (A/CN.9/63/Add.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; 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).

⁵ Working Group report on fifth session (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 ocean carriers for cargo: bill of lading (A/CN.9/76/Add.1; UNCITRAL Yearbook, vol. IV: 1973, part two, IV, 4).

⁶ Working Group report on sixth session (A/CN.9/88; UNCITRAL Yearbook, vol. V: 1974, part two, III, 1). The Working Group used as its working documents the third report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading (A/CN.9/88/Add.1; UNCITRAL Yearbook, vol. V: 1974, part two, III, 2), part five of the 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), 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.11, UNCITRAL Yearbook, vol. V: 1974, part two, III, 3) and a working paper by the Secretariat on the topic of deck cargo (A/CN.9/WG.III/WP.14).

⁷ Working Group report on seventh session, (A/CN.9/96, reproduced in this volume, part two, IV, 1). The Working Group used as its working documents the fourth report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading (A/CN.9/96/Add.1, reproduced in this volume, part two, IV, 2).

⁸ Working Group report on seventh session (A/CN.9/96; reproduced in this volume, part two, IV, 1), para. 107.

⁹ *Ibid.*, para. 108.

and the Central Office for International Railway Transport, Berne (OCTI).

8. The Working Group unanimously elected the following officers:

Chairman Mr. Mohsen Chafik (Egypt)

Vice-Chairmen . . . Mr. Stanislaw Suchorzewski
(Poland)

Mr. Nehemias Gueiros (Brazil)

Rapporteur Mr. P. V. Swarlu (India)

Mr. Suchorzewski was elected to serve as Acting Chairman in the absence of the Chairman, during the first five meetings of the Working Group.

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

1. Provisional agenda and annotations (A/CN.9/WG.III/L.4/Rev.1);
2. Liability of the shipper: draft article proposed by Japan (A/CN.9/WG.III(VIII)/CRP.1);
3. Liability for damage caused by a nuclear incident: draft article proposed by Norway (A/CN.9/WG.III(VIII)/CRP.7);
4. Matters not resolved at the seventh session: comment by the United Kingdom of Great Britain and Northern Ireland (A/CN.9/WG.III(VIII)/CRP.3);
5. Note concerning certain texts proposed by the Working Group at its seventh session, submitted by the Central Office for International Railway Transport, Berne (A/CN.9/WG.III(VIII)/CRP.2);
6. Observations by the Central Office for International Railway Transport, Berne (A/CN.9/WG.III(VII)/CRP.1);
7. Preliminary version of a draft convention on the liability of carriers of goods by sea: note by the Secretariat (A/CN.9/WG.III/WP.19);
8. Observations by International Maritime Committee (IMC) (A/CN.9/WG.III(VIII)/CRP.4).

10. The Working Group adopted the following agenda:

- (i) Opening of the session
- (ii) Election of officers
- (iii) Adoption of the agenda
- (iv) Consideration of the topics not yet dealt with by the Working Group
- (v) Second reading of the preliminary version of the draft convention
- (vi) Future work
- (vii) Adoption of the report.

A. Consideration of the topics not yet dealt with by the Working Group

1. BASIC RULE ON THE EXONERATION OF THE SHIPPER FROM LIABILITY

(a) Provisions of the Brussels Convention of 1924

1. Article 4 (3) of the 1924 Brussels Convention deals with the topic of the exoneration of the shipper from liability, and reads as follows:

"The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants."

(b) Discussion by the Working Group

2. There was general agreement within the Working Group that the revised Convention should contain a provision dealing with the subject-matter of article 4 (3) of the 1924 Convention.

3. Some representatives expressed the view that such a provision should commence with a detailed listing of the shipper's responsibilities and obligations, and should then state that the shipper would be liable for any loss or damage sustained by the carrier resulting from the failure of the shipper to meet such responsibilities and obligations. It was argued that such a provision would be a proper counterpart of article 5 in the preliminary version of the draft convention, which delineates the responsibilities of the carrier. Most representatives, however, objected to the inclusion of a list of the shipper's obligations. It was pointed out that the present rule in article 4 (3) of the Convention had not given rise to difficulties in practice. Some representatives also pointed out that the enumeration of the carrier's obligations in article 3 (1) and 3 (2) of the Convention had not been included in the new draft Convention.

4. Several representatives supported the retention of the substance of article 4 (3) of the 1924 Brussels Convention, but favoured its recasting in a positive formulation. Most representatives, however, expressed their preference for the negative formulation of this rule, as found in article 4 (3) of the 1924 Convention. These representatives emphasized that the substance of article 4 (3) of the 1924 Convention should be read in the light of the mandatory character of the Convention. The rule, therefore, served a useful purpose, since it prevented carriers from inserting in bills of lading clauses that would impose on the shipper a standard of liability stricter than one limited to fault or neglect by the shipper.

5. There was general agreement that the word "act" in article 4 (3) of the 1924 Convention was ambiguous and seemed to serve no useful purpose and that, therefore, it should be deleted in the revised text. It was further agreed that the revised article should cover "loss or damage sustained by the carrier, the actual carrier or the ship" and that it should bear some heading other than "General rule on the liability of the shipper".

6. The Working Group considered, but did not adopt, the proposal of one representative that the revised rule based on article 4 (3) of the 1924 Convention should exonerate the shipper from liability in cases where the loss or damage sustained by the carrier or the ship did not arise directly from the fault or neglect of the shipper.

Proposed new article

7. The Working Group considered the question whether the revised Convention should contain an article dealing with the respective rights and obligations of the shipper, carrier and consignee as to taking delivery of the goods, and the legal consequences of the carrier's inability to effect delivery of the goods in the prescribed manner.

8. Under one formulation of such an article, the consignee would be obliged to take delivery of the

goods within a reasonable period after the notice of their arrival; if the consignee failed to take delivery, upon notice from the carrier the shipper would have to designate some other person to take delivery; failing such action by the consignee or shipper, the carrier could sell or dispose of the goods for the account of the person entitled to the goods, in order to recover his expenses, or to avoid disproportionate storage costs or deterioration of the goods; the consignee or shipper, as the case may be, would remain liable for any loss or expense by the carrier that could not be recovered from the sales proceeds. The representative introducing this proposal explained that it was not intended to cover a shipper who is an "FOB" seller.

9. Another formulation stated that, if the goods were not claimed or if there was a dispute as to the person entitled to take delivery, or the payment of freight, the captain could, on the basis of a court order, sell the goods or hold them at the expense of the consignee; the shipper would remain liable for freight or the costs incurred by the carrier to the extent they could not be recovered from the sales proceeds. The representative introducing this proposal explained that it was designed to safeguard the interests of shippers and consignees and to prevent arbitrary action by carriers.

10. A third formulation provided that if the consignee did not take delivery of the goods within a reasonable time or if several persons claimed the goods, the carrier could entrust the goods to a third party for the account of the consignee; the carrier was then entitled to sell the goods if they were perishable, or if there would be disproportionate storage charges. The representative introducing this proposal stated that such a provision would be less harsh on shippers and consignees than the first formulation (referred to in para. 8, above), while having the advantage of avoiding judicial intervention.

11. Many representatives opposed the addition of a new article to the draft Convention based on one of the above formulations on the ground that the provisions of article 4 (2) (b) in the preliminary version of the draft convention, together with the national law applicable at the port of discharge, were sufficient to protect the interests of carriers in cases where they were unable to effect delivery of the goods. Several representatives also stated that each of the proposed formulations presented special problems, such as the defining of the expression "reasonable period" for taking delivery, and of forcing the shipper to arrange for the taking over of the goods at the port of discharge.

12. It was agreed that the revised Convention should not contain a separate provision dealing with cases where the carrier was unable to effect delivery.

13. The task of drafting a suitable text of a basic rule on the exoneration of the shipper from liability was referred to the Drafting Party for consideration, taking into account the above discussion by the Working Group.¹⁰

REPORT OF THE DRAFTING PARTY

[Article 12. Basic rule on the exoneration of the shipper from liability]

The Drafting Party considered this topic, and recommended the following text for the consideration of the Working Group:

"The shipper shall not be liable for loss or damage sustained by the carrier, the actual carrier, or the ship unless such loss or damage was caused by the fault or neglect of the shipper, his servants or agents."

CONSIDERATION OF THE REPORT OF THE DRAFTING PARTY

14. The Working Group adopted the text recommended by the Drafting Party, and accepted certain suggestions which were made with a view to bringing into harmony the various language versions.

2. DANGEROUS GOODS

(a) Provisions of the Brussels Convention of 1924

1. Article 4 (6) of the Brussels Convention deals with the carriage of dangerous goods and reads as follows:

"Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master, or agent of the carrier has not consented with knowledge of their nature and character may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any."

(b) Discussion by the Working Group

2. The view was expressed that article 4 (6) had worked well in practice, and that therefore its substance should be retained subject to clarifying amendments in regard to language.

3. However, the view was also expressed that amendments of substance to that article might be required. One suggestion was that a limitation should be placed on the seemingly unrestricted discretion presently given under article 4 (6) to land the goods, destroy them, or render them innocuous. It was proposed

it during the course of the eighth session of the Working Group. The Drafting Party was composed of the representatives of the following countries: Argentina, Belgium, Chile, France, Ghana, India, Japan, Nigeria, Norway, Poland, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America and the Union of Soviet Socialist Republics. The Drafting Party elected as its Chairman Mr. E. Chr. Selvig (Norway).

¹⁰ The Working Group established a drafting party to consider this topic and any other matters that may be referred to

that the action to be taken by the carrier should be commensurate with the danger involved. It was argued, on the other hand, that a balancing of this kind may be impracticable at a time when the threat of danger arises, and that to protect his reputation the carrier would in any event act in a reasonable manner.

4. It was proposed that, while the rights given to the carrier under the present article of the Brussels Convention to deal with the goods should be retained in substance, a new text should be drafted containing additional provisions imposing an obligation on the shipper to inform the carrier of the dangerous character of the goods, and of indicating by suitable marking that the goods were dangerous. Further, the proposed new text would expressly preserve the rights of the carrier to freight notwithstanding the exercise of his rights to dispose of the dangerous goods.

5. In regard to the additional obligations sought to be imposed on the shipper by the proposal mentioned in paragraph 4 above, the view was expressed that provisions to this effect would constitute an improvement on the present article 4 (6) of the Brussels Convention. However, some representatives felt it would be sufficient only to impose an obligation to give information as to the dangerous character of the goods, since there might for practical reasons be difficulty in marking certain types of goods. Most representatives opposed any reference to freight in the article on dangerous goods.

6. Another proposal adapted the language and technique used in the provision on the carriage of live animals (article 5 (5) of the preliminary version of the draft convention) to the carriage of dangerous goods, while preserving the rights of the carrier under the present article 4 (6) of the Brussels Convention. However, most representatives were of the view that the carriage of dangerous goods posed unique problems that would not be resolved by a provision analogous to the one on the carriage of live animals.

7. It was also suggested that the definition of dangerous goods contained in article 4 (6) of the Brussels Convention was not a model of clarity. It was therefore suggested that the question whether goods were dangerous should be decided by reference either to the law of the flag of the vessel, or to the law of the port of loading, or to international agreements. Most representatives, however, felt that while the scheme of article 4 (6) may not be wholly satisfactory, it had caused no serious difficulties in practice. It was also pointed out that goods had been held to be dangerous if their carriage or discharge was prohibited by the rules in force in the port of discharge and would result in the detention of the vessel, and that provision might be made for such cases.

8. It was decided that article 4 (6) of the Brussels Convention, together with the proposals made in the Working Group, should be remitted to the Drafting Party for consideration in the light of the above discussion with a view to the drafting of an appropriate text.

REPORT OF THE DRAFTING PARTY

The Drafting Party considered the topic of dangerous goods. The text of a draft provision on this topic, as amended by the Working Group,¹¹ is as follows:

[Article 13. Dangerous goods]

1. When the shipper hands dangerous goods to the carrier, he shall inform the carrier of the nature of the goods and indicate, if necessary, the character of the danger and the precautions to be taken. The shipper shall, whenever possible, mark or label in a suitable manner such goods as dangerous.

2. Dangerous goods may at any time be unloaded, destroyed or rendered innocuous by the carrier, as the circumstances may require, without payment of compensation by him where they have been taken in charge by him without knowledge of their nature and character. Where dangerous goods are shipped without such knowledge, the shipper shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.

3. Nevertheless, if such dangerous goods, shipped with knowledge of their nature and character, become a danger to the ship or cargo, they may in like manner be unloaded, destroyed or rendered innocuous by the carrier, as the circumstances may require, without payment of compensation by him except with respect to general average, if any.

CONSIDERATION OF THE REPORT OF THE DRAFTING PARTY

9. The Working Group considered the above-quoted report of the Drafting Party. The Working Group adopted the report of the Drafting Party, subject to the amendments to the text noted above.¹²

The following comments were made with respect to the draft provisions recommended by the Drafting Party.

(a) In relation to the first paragraph, the view was expressed that the duty imposed on the shipper always to inform the carrier of the nature of the danger may be too stringent. In many cases, such as successive shipments of identical dangerous goods, the carrier would know, or should ascertain through the exercise of reasonable diligence, the nature of the danger. Most representatives felt that it would be sufficient to impose on the shipper an obligation to inform the carrier in every case of the nature of the goods, and that the

¹¹ The amendments made by the Working Group are the following:

(a) In the first sentence of paragraph 1, the words "the goods and indicate, if necessary, the character of the danger and the precautions to be taken", commencing after the words "nature of", were substituted for the words "the danger, and indicate if necessary, the precautions to be taken".

(b) In the second sentence of paragraph 2, the opening words "Where dangerous goods are shipped without such knowledge, the shipper . . ." were substituted for the words "The shipper of such goods . . .".

¹² See foot-note 11.

obligation to give information on the character of the danger and the precautions to be taken ought to apply only in cases where the carrier could not be expected to have such knowledge.

(b) It was also stated in relation to the first paragraph that the proper precautions to be taken during the carriage against the danger would normally be within the knowledge of the carrier. It was suggested that the present formulation appeared to cast a burden on the shipper of indicating precautions, for the discharge of which he may not have the necessary knowledge. On the other hand, it was observed that the words "if necessary" introduced a qualification which mitigated possible hardship in this regard to the shipper.

(c) Concerning the liability of the shipper for damages arising from the shipment of dangerous goods which is imposed by the second sentence of the second paragraph, the view was expressed that the text should state clearly that such liability will only arise in relation to dangerous goods taken in charge by the carrier without knowledge of their dangerous nature and character, and the text was amended accordingly.

(d) A proposal in regard to the liability of the shipper set forth in the second sentence of the second paragraph, to the effect that the carrier should have no right to claim damages or expenses unless he proved that he had acted reasonably in making a choice between landing, destroying and rendering the goods innocuous, was considered but not adopted by the Working Group.

3. NOTICE OF LOSS, DAMAGE OR DELAY

(a) Provisions in the Brussels Convention of 1924

1. Provisions as to notice of loss or damage are contained in article 3 (6) of the Brussels Convention, which reads as follows:

"6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading.

"If the loss or damage is not apparent, the notice must be given within three days of the delivery.

"The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

"In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

"In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all

reasonable facilities to each other for inspecting and tallying the goods."¹³

(b) Discussion by the Working Group

2. The view was expressed by some representatives that the first subparagraph of article 3 (6) of the Brussels Convention had no real legal effect. Failure to give notice as specified therein did not have the effect of barring a claim; it was therefore immaterial in that context whether or not notice was given. For this reason it was suggested that the deletion of this subparagraph might be considered.

3. Other representatives were of the view that the first subparagraph of article 3 (6) could have some practical effect in legal proceedings. A court would be more inclined to accept evidence offered by a claimant who had given the required notice. It was also observed that a requirement that notice be given to the carrier was an incentive to claimants to take prompt decisions on possible claims. Such notice also served to inform the carrier of the evidence he needed to preserve in order to refute claims arising out of the particular carriage to which the notice pertained.

4. There was general agreement that the principle that notice of loss or damage must be given to the carrier should be preserved, and that the failure to give notice should not bar claims against the carrier.

5. With regard to the period of three days specified in the second subparagraph of article 3 (6) for giving notice when the loss or damage to the goods was not apparent, there was general agreement that this period was too short. Such a period did not give a claimant a reasonable opportunity to discover the type of loss or damage, attribute it to the carriage by sea, and give notice thereof. One suggestion was that a flexible time-limit, such as "within a reasonable period" should be substituted. Representatives opposed to this suggestion pointed out that the practical needs of international commerce demanded the greater degree of certainty provided by a fixed time-limit for giving the required notice.

6. It was also noted that article 3 (6) did not deal with certain problems which might arise in calculating the period. Under many legal systems, holidays or non-working days were excluded from the calculation. There was support for the suggestion that any such period should be specified in terms of "working days".

7. One representative pointed out that where there was non-delivery of a part of the goods, it would not be immediately clear whether such goods were in fact lost, or merely delayed. It might therefore be impossible to give notice of "loss". It was suggested that language should be added to deal expressly with this case.

8. It was also pointed out that, under article 5 (1) of the preliminary version of the draft Convention, liability had been imposed on the carrier for delay. It

¹³ Subparagraph 4 of art. 3 (6) deals with the limitation of actions. This subject was considered at the fifth session of the Working Group, and the provisions adopted are reproduced as art. 20 in the preliminary version of the draft Convention (A/CN.9/WG.III/WP.19). The subject is now dealt with in article 20 of the draft convention on the carriage of goods by sea.

was therefore suggested that an additional provision as to notice would be needed to deal with the case of delay. It was suggested that such a provision might take the form of requiring notice within a specified period after the delayed delivery was effected. Provisions to this effect were to be found in other transport conventions, e.g. the Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air, 1929, and the Convention on the Contract for the International Carriage of Goods by Road, 1956 (CMR). However, the view was also expressed that no special notice provision was needed for delay, and that even if such a provision were introduced, failure to give notice should not be a bar to a subsequent action.

9. Attention was also drawn to certain defects in article 3 (6) of the Brussels Convention. Article 3 (6) only referred to the "carrier", while the preliminary version of the draft Convention as a general rule imposed liability on the contracting carrier also in relation to carriage the performance of which he had entrusted to an actual carrier. It was noted that in certain circumstances notice may for practical reasons have to be given to the "actual carrier" rather than to the carrier who entered into the contract of carriage; such a notice ought to take effect also in relation to the contracting carrier as if it had been given to him directly. It was also noted that the text of article 3 (6) used different terminology in its various subparagraphs to describe the transfer of the goods from the carrier to the person entitled to take delivery of the goods, and that a uniform terminology might be desirable.

REPORTS OF THE DRAFTING PARTY

10. The task of preparing a draft text, taking into consideration the discussion by the Working Group, was then referred to the Drafting Party.

(i) *Report of the drafting party on notice of loss or damage*

The Drafting Party considered the topic of notice of loss or damage. The text of a draft provision on this topic proposed by the Drafting Party, as amended by the Working Group,¹⁴ is as follows:

[Article 19. Notice of loss or damage]

1. Unless notice of loss or damage, specifying the general nature of such loss or damage, be given in writing by the consignee to the carrier not later than at the time the goods are handed over to the consignee, such handing over shall be *prima facie* evidence of the delivery of the goods by the carrier in good condition and as described in [the document of transport,] if any.

¹⁴ The amendments made by the Working Group are as follows:

(a) In paragraph 2, the words "the notice in writing must be given within ten days after the completion of delivery, excluding that day" were substituted after the word "apparent", for the words "the notice must be given within 10 consecutive days of the delivery".

(b) In paragraph 5, the words "under this article", which were absent in the draft text recommended by the Drafting Party, were inserted between the words "given" and "to".

2. Where the loss or damage is not apparent, the notice in writing must be given within 10 days after the completion of delivery, excluding that day.

3. The notice in writing need not be given if the state of the goods has at the time of their delivery been the subject of joint survey or inspection.

4. In the case of any actual or apprehended loss or damage the carrier and the consignee shall give all reasonable facilities to each other for inspecting and tallying the goods.

5. If the goods have been delivered by an actual carrier, any notice given under this article to the actual carrier shall have the same effect as if it had been given to the contracting carrier.

(ii) *Report of the Drafting Party on notice of delay*

(a) The question of the possible inclusion in the Convention of a provision under which notice must be given by a consignee if he claims compensation from the carrier for delay in delivery was briefly considered by the Working Group and was then referred to the Drafting Party. The Drafting Party was of the view that the question of principle as to whether such a provision was desirable should be decided by the Working Group, but it nevertheless believed that the Working Group might find it useful to have a draft text before it when reconsidering this matter. Accordingly, the draft provision below was presented only with the aim of facilitating the discussion in the Working Group:

[Notice by consignee that he will claim compensation for delay in delivery]

"No compensation shall be payable for delay in delivery unless a notice has been sent in writing to the carrier within twenty-one days from the time that the goods were handed over to the consignee."

Notes on the report of the Drafting Party

(b) If the Working Group should decide to include in the revised Convention a provision dealing with notice regarding claims by the consignee for compensation for delay in delivery, it would also have to decide on the placing of such a provision. The Drafting Party was of the view that such a provision could form paragraph 5 of the draft article on notice of loss or damage (article 19), with the paragraph on the effect of notice that was given to the actual carrier then becoming paragraph 6 of that same article.

CONSIDERATION OF THE REPORTS OF THE DRAFTING PARTY

(i) *Notice of loss or damage*

11. (a) Divergent views were expressed with regard to the use of the term "document of transport" in paragraph 1, as that term had not been defined in the draft convention. This question was referred back by the Working Group to the Drafting Party for consideration.

(b) In relation to the period of 10 days specified in paragraph 2, the issue was raised as to whether holidays and non-working days were to be excluded

or included in the calculation of this period. The view was expressed that the intention behind the use of the term "consecutive days" in the draft text was that holidays and non-working days should be included in the calculation of the period, and that the extension of the period of three days given in paragraph 2 of article 3 (6) of the Brussels Convention to 10 days was made to alleviate possible hardship to the consignee arising from this method of calculation. On the other hand, it was observed that the use of the word "consecutive" to achieve this result was unnecessary.

(c) The Drafting Party was also requested to consider the question of bringing into harmony the various language versions of the text of article 19.

(ii) *Notice of delay*

12. On the request of one representative the Working Group agreed to postpone consideration of the report until the second reading of the draft Convention in relation to article 19.

4. RELATIONSHIP OF THE DRAFT CONVENTION WITH OTHER CONVENTIONS

1. The Working Group considered the relationship of the draft convention on carriage of goods by sea with (a) conventions regulating liability for damage caused by a nuclear incident, and (b) other maritime conventions.

(a) *The relationship with Conventions regulating liability for damage caused by a nuclear incident*

(i) *Provisions in the 1968 Brussels Protocol*

2. Article 4 of the 1968 Brussels Protocol to the Brussels Convention of 1924 reads as follows:

"This Convention shall not affect the provisions of any international convention or national law governing liability for nuclear damage."

(ii) *Discussion by the Working Group*

3. Under a proposed new article, whenever that article was applicable, liability for damage caused by a nuclear incident would not be regulated by the draft convention on the carriage of goods by sea. It was argued in support of the new article that it would enable States parties to the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy as amended by its Additional Protocol of 1964, or the 1963 Vienna Convention on Civil Liability for Nuclear Damage, to become parties also to the convention on the carriage of goods by sea. It was further pointed out that it would be desirable to harmonize the rule relating to nuclear damage with the Brussels Convention relating to Civil Liability in the field of Maritime Carriage of Nuclear Material, 1971, and the corresponding rule in article 20 of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974.

4. There was general support for the proposed new article, although the view was also expressed that article 4 of the Brussels Protocol of 1968 was equally acceptable. It was also suggested that the proposed new article should also provide for the case of States which

at present did not have a specific national law governing liability for such damage, but based such liability on the general principles of civil liability. The proposed new article, together with the suggestion for its amendment, was referred to the Drafting Party.

(b) *The relationship with other maritime conventions*

(i) *Provisions in other conventions*

5. Article 8 of the Brussels Convention of 1924 reads as follows:

"The provisions of this Convention shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of seagoing vessels."

(ii) *Discussion by the Working Group*

6. It was stated that, while the substance of article 8 in the 1924 Brussels Convention was acceptable, its wording was ambiguous in that the phrase "for the time being in force" suggested that only statutes in force at the conclusion of that Convention were within the ambit of the provision. It was also stated that reference should be made to limitation of liability under international conventions.

7. The view was also expressed that the provisions of article 19 of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, might form an appropriate basis for a suitable text. This article reads as follows:

"This Convention shall not modify the rights or duties of the carrier, the performing carrier, and their servants or agents provided for in international conventions relating to the limitation of liability of owners of seagoing ships."

However, it was suggested that while the text of article 19 of the 1974 Athens Convention could be used as a model, it would be necessary in this context to refer also to the limitation of liability of owners of seagoing vessels provided for in national law.

8. The question of the relationship of the draft convention with other conventions was then remitted to the Drafting Party for the formulation of a draft text in the light of the above discussion.

REPORT OF THE DRAFTING PARTY

(a) The Drafting Party considered provisions dealing with the relationship of the revised Convention with other conventions, and then recommended the following draft text on this topic:

[Relationship of the revised Convention with other conventions]

[part VII]

1. This Convention shall not modify the rights or duties of the carrier, the actual carrier and their servants and agents, provided for in international conventions or national law relating to the limitation of liability of owners of seagoing ships.

2. No liability shall arise under the provisions of this Convention for damage caused by a nuclear

incident if the operator of a nuclear installation is liable for such damage:

(a) Under either the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy as amended by its Additional Protocol of 28 January 1964 or the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, or

(b) By virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either the Paris or Vienna Convention.

Notes on the proposed draft provisions

(b) One representative expressed the view that paragraph 1 of the draft text set forth above should not contain any reference to "national law" and reserved his position on this point.

CONSIDERATION OF THE REPORT OF THE DRAFTING PARTY

9. The Working Group considered the above-quoted report of the Drafting Party. This report, including the proposed draft provisions, was approved by the Working Group. However, the Working Group referred back to the Drafting Party the question of harmonizing the various language versions of this article.

5. GENERAL AVERAGE

(a) Provisions in existing conventions

1. Article 5, paragraph 2, of the 1924 Brussels Convention states:

"Nothing in these Rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average."

(b) Discussion in the Working Group

2. The discussion in the Working Group was based on the above provision, and the texts of proposals submitted by two representatives.

3. After repeating the above provision contained in the Brussels Convention, the first proposal stated that no person having an interest in the goods shall be required to contribute in general average unless the carrier proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence giving rise to the general average.

4. After similarly repeating the above provision contained in the Brussels Convention, the second proposal stated that claims in respect of general average shall be governed by applicable provisions of the draft convention, and that any provision inconsistent with the convention was to be null and void to the extent that it derogated therefrom.

5. It was stated that the first proposal was intended to grapple with the situation which arose as regards general average from the impact of the terms of article 5 (1) of the preliminary draft convention dealing with the basic rule as to carrier liability on the rules of

general average. Under rule D of the York-Antwerp Rules, the right to contribute in general average was not affected though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure. However, this did not prejudice any remedies which may be open against that party for that fault. If in terms of this rule a contribution in general average was made by the cargo owner to the carrier, and he sought to recover such contribution on the basis that the general average loss was due to the carrier's fault, his action may fail since it might not be an action for loss, damage or expense resulting from loss of or damage to the goods within the meaning of article 5 (1). To avoid this result, the first proposal negated the carrier's right to contribution unless he disproved fault on his part. In commenting on this proposal, however, the view was expressed that this placed too heavy a burden on the carrier, and limited too sharply his right to contribution. Another suggestion was that a better way of reaching the desired result was not to negate the right to contribute, but to grant a right of reimbursement in respect of contribution unless the carrier proved absence of fault. It was accordingly agreed that the right of cargo owners to counter-claim in respect of general average contribution should be governed by the provisions of the convention as if such counter-claim were a claim arising from loss of or damage to the goods. However, one representative pointed out that if all the provisions of the convention were applied to such counter-claims there was a possibility that the cargo owners' position would be prejudiced in some jurisdictions because of the application of the time bar in article 20. In view of this difficulty this representative said that if a provision was adopted in this form a reservation on this point might have to be made.

6. In support of the second proposal it was stated that the rights of the parties to a contract of carriage in regard to general average were now generally embodied in the clauses of bills of lading. It was therefore important to ensure that such clauses did not contravene the provisions of the convention. In regard to this proposal the comment was made that it was superfluous in that article 23 already invalidated all clauses derogating from the draft convention.

7. Some representatives also stated that clarification was desirable as to what was meant by the reference to "lawful" provisions regarding general average in the text of article 5, paragraph 2 of the Brussels Convention. It was observed that provisions which were not lawful would in any event be ineffective, and that these words may therefore be superfluous.

8. It was resolved that the present text of article 5, paragraph 2 of the Brussels Convention, together with the suggested drafting changes to it, should be considered by the Drafting Party with a view to drafting a suitable text.

REPORT OF THE DRAFTING PARTY

The Drafting Party considered this topic, and recommended the following provision for consideration by the Working Group.

[Article 24. General average]

1. Nothing in this Convention shall prevent the application of provisions in the contract of carriage or national law regarding general average.

2. However, the rules of this Convention relating to the liability of the carrier for loss of or damage to the goods shall govern the liability of the carrier to indemnify the consignee in respect of any contribution to general average.

CONSIDERATION OF THE REPORT OF THE
DRAFTING PARTY

9. The Working Group considered the above-quoted report of the Drafting Party. This report, including the proposed draft provisions, was adopted by the Working Group.

The following comments and reservations were made with respect to the draft provisions:

(a) One delegation reserved the right, when enacting domestic legislation giving effect to the draft convention, to add a provision preserving the rights given under paragraph 2 in regard to general average from the impact of a possible expiry of the limitation period under article 20 of the draft convention.

(b) Two delegations reserved their positions in regard to paragraph 2.

(c) The Drafting Party was requested to consider the question of bringing the various language versions of the text of article 24 into harmony.

B. Second reading by the Working Group of the preliminary version of a draft convention on the liability of carriers of goods by sea

Discussion by the Working Group

1. The Working Group examined in second reading the draft provisions approved by it at the third to seventh sessions.¹⁵

Title of the convention

2. The Working Group, after deliberation, decided to modify the title of the draft convention as follows: "Draft Convention on the Carriage of Goods by Sea".

Headings

3. The Working Group decided to refer to the Drafting Party the examination of the headings set forth in the preliminary version of the draft convention.

PRELIMINARY VERSION OF A DRAFT CONVENTION ON THE LIABILITY OF CARRIERS OF GOODS BY SEA

PART I. SCOPE OF APPLICATION

Article 1. [Contracts covered]

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.]

Paragraph 1

4. The Working Group adopted this provision as set out above.

Paragraph 2

5. The Working Group considered the question of retaining or deleting paragraph 2. It was stated in support of the provision that it would be to the advantage of shippers that in certain circumstances there should be the option of agreeing that the convention would not be applicable. Most representatives, however, favoured deletion of this paragraph, since the provision might enable carriers to circumvent the protection provided by this convention to shippers and consignees. The Working Group therefore decided to delete paragraph 2 of this article.

Paragraph 3

6. The Working Group adopted this paragraph as set out above. In this context the representative of the Federal Republic of Germany, in his capacity as chairman of the UNCTAD Working Group on International Shipping Legislation, informed the Group that the UNCTAD Working Group at its session held earlier this year had not yet taken a final decision on legislative or other actions eventually to be taken with regard to charter-parties. This decision was deferred to 1978. He set out in brief the main reasons for this decision.

Paragraph 4

7. Most representatives were of the view that the language of this paragraph, in excluding from the ambit of the convention "contracts for the carriage of a certain quantity of goods over a certain period of time", was too wide as it would have the effect of excluding from the protection of the convention a large number of contracts of carriage. In response to these comments one representative proposed the following new text for paragraph 4:

"The provisions of this Convention shall not be applicable to contracts for successive shipments of goods as bulk cargo in full shiploads. However, where a bill of lading is issued pursuant to such a contract, the provisions of the Convention shall ap-

¹⁵ See document A/CN.9/WG.III/WP.19. In the account that follows of the consideration of the draft convention by the Working Group at the second reading, the articles are set forth as they appeared in A/CN.9/WG.III/WP.19, and not as finally adopted at this session.

ply to such a bill of lading when it governs the relation between the carrier and the holder of the bill of lading."

The representative who introduced the above proposal explained that such long-term contracts for successive shipload shipments of large quantities of bulk commodities were common in many trades, and that parties to such long-term contracts were usually in an equal bargaining position. The contract usually fixed the freight rates on a long-term basis and provided *inter alia* for the type of charter-party to be used for each shipment under the contract, and thus it possessed the character of a "frame-contract" for future shipments. That these contracts should be excluded from the convention could, therefore, be seen also as a consequence of the agreed exclusion of charter-parties from the convention. Another representative suggested the addition of the words "if the parties so agree" at the end of the first sentence of the draft proposal set out above, in order to make non-applicability of the convention to such contracts dependent upon a specific agreement of the parties. Several representatives expressed support for the draft proposal as modified. The representative who had proposed the new text for paragraph 4 then withdrew his proposal, explaining that with such an amendment the rule proposed would be inconsistent with the provision on charter-parties already adopted by the Working Group. The Working Group then decided to delete paragraph 4 of this article.

Paragraph 4 bis

8. The Working Group agreed to add a new paragraph, based on article 7 of the Convention on the Limitation Period in the International Sale of Goods, which reads as follows:

"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 Drafting Party was requested to consider where in the draft convention the provision could most suitably be placed.

Article 2. [Geographic scope]

1. The provisions of this Convention shall, subject to article [1], 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

(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.

Paragraph 1

1. The Working Group retained the provisions in this paragraph. The Group did not adopt a proposal by one representative to delete the words "as provided for in the contract of carriage" in subparagraphs (a) and (b); this proposal was motivated by the wish to have the principles of the Convention apply in the case where the goods covered by a bill of lading which was not issued in a Contracting State, are in fact (un)loaded in a port of a Contracting State when the contract of carriage foresaw a part of un/loading) not located in a Contracting State. This proposal was not adopted since this would prevent the parties from knowing in advance with certainty whether the Convention would apply or not.

Paragraph 2

2. The Working Group adopted the provision as set out above.

Paragraph 3

3. The Working Group considered the question whether this paragraph should be deleted. Many representatives considered this paragraph to be superfluous since the principle contained therein was part of international law. Under another view, the provision was useful in that it would prevent possible differences with respect to the implementation of the convention in national legislation, as had been the case with the implementation of the 1924 Brussels Convention. The Working Group, after deliberation, decided to delete paragraph 3.

Paragraph 4

4. It was suggested that this paragraph should be deleted in view of the fact that a State in any event had the right to apply the rules of the convention to domestic carriage and that an express provision to this effect would intrude upon the principle of sovereignty of States. One representative, however, stated that a provision along the lines of paragraph 4 was desirable under the constitutional system of his country. The Working Group therefore decided that the provision

should be retained in the convention and referred paragraph 4 to the Drafting Party for a suitable formulation.

Article 3. [Definitions]

[In this Convention:]

1. "Carrier" or "contracting carrier" means any person who in his own name enters into a contract for carriage of goods by sea with the 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.

3. "Goods" includes goods, wares, merchandise and articles of every kind whatsoever including live animals.

4. "Contract of carriage" means a contract whereby the carrier agrees with the shipper to carry by sea against payment of freight, specified goods from one port to another where delivery is to take place.

[5. "Ship" means any vessel used for the carriage of goods by sea.]

6. "Bill of lading" means a document which evidences a contract for the carriage of goods by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to bearer, constitutes such an undertaking.

7. "Consignee" means the person entitled to take delivery of the goods.

1. The Working Group was of the view that the convention should open with an article on definitions and therefore decided that this article should become article 1. One representative was opposed to this view on the ground that a convention should first define the scope of its application. This representative expressed himself in favour of the order of articles set forth in the preliminary version of the draft convention (A/CN.9/WG.III/WP.19).

Paragraphs 1 and 2

2. The Working Group decided to request the Drafting Party to consider the reformulation of paragraphs 1 and 2 in the light of the definitions of "carrier" and "performing carrier" given in the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974. These definitions are as follows:

"(a) 'Carrier' means a person by or on behalf of whom a contract of carriage has been concluded, whether the carriage is actually performed by him or by a performing carrier;

"(b) 'Performing carrier' means a person other than the carrier, being the owner, charterer or operator of a ship, who actually performs the whole or a part of the carriage."

One representative suggested that identical terminology between the Athens Convention of 1974 and the new convention was unnecessary in view of the dissimilarity

ties between problems of passenger carriage and cargo carriage. In addition, it seemed to that representative that in view of the unacceptability of the Athens Convention to some States it would be unfortunate to incorporate provisions of that Convention in the Working Group's draft.

Paragraph 3

3. One representative proposed the following new formulation for the definition of "goods": "'Goods' means any kind of goods, including live animals; where the goods are packed or consolidated in a container, pallet or similar article of transport, 'goods' includes such packaging or article of transport supplied by the shipper."

4. It was explained that the intention was thereby to include all types of packaging within the definition of "goods". It was argued in opposition to this proposal that it would encourage claims for damage to packaging even in cases where the goods themselves were not damaged. It was also suggested that the carrier should only be liable for damage to valuable packaging, such as containers. The substance of the proposal quoted above was adopted by the Working Group and the Drafting Party was asked to formulate a new definition of the term "goods" using it as the basis.

Paragraph 4

5. The Working Group referred to the Drafting Party the suggestion by a representative to delete the words "where delivery is to take place".

Paragraph 5

6. The Working Group decided to delete the definition of "ship", as it was of the view that such a definition was not needed.

Paragraph 6

7. In order to make it clear that the term "bill of lading" encompassed, in addition to documents made out "to the order of a named person, or to bearer", also documents made out "to order", the Working Group decided on the proposal of one representative to insert in the second sentence of the definition of the term "bill of lading" suitable language to achieve this result.

8. One representative suggested deletion of the reference to loading of the goods in the first sentence of the definition of the term "bill of lading", since "loading" was merely one form of "taking over the goods". The Working Group, however, did not adopt this suggestion, since "shipped" bills of lading stating expressly that the goods had been loaded on board a named vessel were generally required by banks making payments against surrender of documents.

9. One representative suggested that the term "contract for the carriage of goods by sea" be replaced by the words "contract of carriage" on the ground that paragraph 4 of article 3 set forth a definition of the latter term. The Working Group decided to refer this suggestion to the Drafting Party.

Paragraph 7

10. One representative proposed that the definition of "consignee" be replaced by the following:

"'Rightful owner' means the person entitled to take delivery of the goods. He is empowered to exercise the rights of the shipper."

In the original French text of the proposal the term *payant-droit* was used to indicate the object defined.

11. This representative was of the view that in French the term *destinataire* only covered a named consignee and that, therefore, a different term such as *payant-droit* was necessary. However, there was general agreement that the term "consignee" was the proper one to be used in the English text, and that the closest equivalent to that term in French was *destinataire*. For this reason, the term *destinataire* was retained in the French text of the article. In regard to the second sentence in the above proposal, most representatives were of the view that it should not be adopted since the legal positions of shippers and consignees were not necessarily the same.

12. The Working Group adopted the text of paragraph 7 as set out above.

13. One representative suggested that the sequence of the definitions set forth in article 3 should be rearranged to the effect that the definition of "consignee" should follow the definition of "actual carrier". The Working Group requested the Drafting Party to consider the desirability of rearranging the article as proposed.

PART II. LIABILITY OF THE CARRIER

SECTION 1. GENERAL PROVISIONS

Article 4. [Period of liability of the carrier]

1. "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.

2. For the purpose of paragraph 1, 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.

3. In the provisions of paragraphs 1 and 2, 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.

Paragraph 1

1. The Working Group approved this provision as set out above.

Paragraph 2

2. The suggestion was made that the word "usage" in subparagraph (b) should be replaced by the words "common usage of the particular trade in question" or words to similar effect.

3. The Working Group referred this suggestion to the Drafting Party and, subject to a suitable formulation on the lines suggested, adopted the provisions of paragraph 2.

Paragraph 3

4. The Working Group approved this provision as set out above.

Article 5. [Basic rules on the liability of the carrier]

1. 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 [4], 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. 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.

3. 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 [4] within [sixty] days following the expiry of the time for delivery according to paragraph [2] of [this] article.

4. 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.

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 risks 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.

6. 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.

7. 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.

Paragraph 1

1. The Working Group considered but did not adopt a proposal by a representative that paragraph 1 should read, for the reasons stated in document A/CN.9/WG.III(VII)/CRP.1 presented by OCTI, as follows:

"1. The carrier shall be liable for loss of or damage to the goods if the loss or damage took place while the goods were in his charge; he shall also be liable for loss, damage or expense resulting from delay in delivery.

"The carrier shall be exonerated from this liability if he proves that he or his servants or agents took all measures that could reasonably be required to avoid loss of or damage to the goods or loss, damage or expense resulting from delay in delivery."

2. The Working Group considered but did not approve the proposal of another representative to add at the end of paragraph 1 the words "measures to make the ship seaworthy shall be deemed to be measures that are reasonably required to be taken by the carrier, his servants or agents".

3. Four representatives proposed a new paragraph 1 *bis* which read as follows:

"Notwithstanding the provisions of paragraph 1 of this article, the carrier shall not be responsible for loss, damage, expense or delay resulting from any neglect or default in the navigation of the ship or from fire unless it is proved that the occurrence giving rise to such loss, damage, expense or delay has been caused by the fault of the carrier."

In support of this proposal it was stated that:

(a) Sea voyages continued to involve high risks;

(b) The shipowner did not have continuous effective control over the captain, the crew, pilots, or conditions at the ports of loading and discharge;

(c) The elimination of the exception relating to "errors in navigation" would result in considerably higher liability insurance premiums for carriers without a corresponding decrease in cargo insurance rates. The increased liability insurance premiums would be reflected in higher freight rates;

(d) Neither shippers nor carriers favoured the elimination of the exception for "errors in navigation";

(e) The real economic effect of the elimination of this exception was at the present time unknown and incalculable; and

(f) The elimination of the exception relating to navigational error would have serious adverse effects on practices regarding general average. The Working Group should therefore not take any action prejudicial

to that subject, which was due to be discussed in 1979 by the UNCTAD Working Group on International Shipping Legislation.

Representatives opposing the addition of this proposed paragraph 1 *bis* advanced the following reasons:

(a) Due to advances in technology the risks involved in sea voyages had been greatly reduced;

(b) Owing to advances in communications, the shipowner today was able to be in continuous contact with the vessel and its officers;

(c) There was insufficient data to conclude that the total insurance costs involved would rise as a consequence of the elimination of the exception;

(d) Shippers favoured elimination of the exception;

(e) Retention of the exception for "errors in navigation" would constitute a serious deviation from the basic general legal principles of liability for fault and vicarious liability and would run counter to the principles established in other transportation conventions;

(f) The present text of article 5, paragraph 1 represented a carefully worked out compromise that should be retained.

4. The Working Group, after deliberation, decided not to adopt the proposed paragraph 1 *bis*.

5. Another proposal for a new paragraph 1 *bis* read as follows:

"The carrier shall, however, not be liable to pay compensation 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."

6. The view was expressed that the above provision, limiting the carrier's liability to pay compensation for damages that were foreseeable, was unnecessary, and that this issue could be left to be resolved by national law.

7. The Working Group decided not to adopt this proposal.

Paragraph 2

8. On the proposal of one representative, the Working Group decided to add the words "at the port of discharge provided for in the contract of carriage" after the words "have not been delivered" in paragraph 2 of article 5.

Paragraph 3

9. The Working Group decided to approve this provision as set out above.

Paragraph 4

10. The following text was proposed by two representatives as a new paragraph 4 to replace the existing provision.

"In case of fire the carrier shall be liable unless he proves that he had adequate means to avert the

fire and that he, his servants and agents, took all reasonable measures to avoid it and limit its consequences except where the claimant proves the fault or negligence of the carrier or his agents or servants caused or contributed to the fire."

11. In support of this proposal, the view was expressed that the present formulation of paragraph 4 placed a burden of proof on the claimant which was excessively hard for him to discharge, and that the proposed new formulation was more equitable. Many representatives, however, expressed the view that the present formulation was justifiable, since most fires on ships were caused by spontaneous combustion originating in the cargo. It was observed that the proposal would in substance lead to the same result as would the application of the rule contained in paragraph 1 of article 5. It was also noted that the present formulation of paragraph 4 of article 5 was part of the carefully worked out compromise which was embodied in paragraph 1 of article 5.

12. The Working Group decided not to adopt the proposed text.

Paragraph 5

13. The Working Group considered but did not adopt the proposal of one representative that paragraph 5 be deleted.

Paragraph 6

14. The Working Group considered but did not adopt the proposal of one representative that the immunity of the carrier from liability for loss or damage resulting from measures to save life at sea should be limited to measures which are reasonable.

Paragraph 7

15. The Working Group decided to adopt this provision as set out above.

SECTION 2. LIMITS ON THE LIABILITY OF CARRIERS

Article 6. [Computation of the limits]

[Alternative A: single method for the limitation of the carrier's liability:

1. The liability of the carrier according to the provisions of article [5] 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 the carrier's 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.

(b) In case of delay in delivery, if the claimant proves loss, damage or expense other than as re-

ferred to in subparagraph (a) above, the liability of the carrier shall not exceed:

Variation x: [double] the freight.

Variation y: 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.

(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.]

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 milligrams of gold of millesimal fineness 900.

4. The amount referred to in paragraph 1 of this article shall be converted into the national currency of the State of the court or arbitration tribunal seized of the case on the basis of the official value of that currency by reference to the unit defined in paragraph 3 of this article on the date of the judgement or arbitration award. If there is no such official value, the competent authority of the State concerned shall determine what shall be considered as the official value for the purposes of this Convention.

Paragraphs 1 and 2

1. One representative proposed that the following text should replace paragraphs 1 and 2 of article 6:

"The liability of the carrier according to the provisions of article [5] shall be limited to an amount equivalent to () francs per kilo of gross weight of the goods lost, damaged or delayed."

In support of the proposal, this representative pointed out that the limitation per package or unit contained in the 1924 Brussels Convention had given rise to ambiguities and uncertainties. Courts in different countries had reached varying conclusions as to its interpretation. Although some clarifications had been made through the adoption of the so-called container clause in the 1968 Brussels Protocol and the substitution of a concept of "shipping unit" for "unit" in the new draft convention, considerable difficulties would still exist as to the correct interpretation of what would be considered as a "package" or "shipping unit". This representative also pointed out that the international

conventions relating to transport by air, road and rail only used a concept of limitation based on weight.

2. A majority of the representatives were of the view that the above proposal would lead to considerable simplification of the existing text. However, some of these representatives stated that they could accept the above proposal provided that a separate limitation rule in terms of freight charges was established for delay in delivery. The view was also expressed that the present formulation may lead to an unduly low quantum of compensation when the cargo affected was of low weight but high value.

3. The Working Group then decided to include in the draft convention the following alternatives regarding the limitation on the liability of carriers:

- (a) A general rule in terms of gross weight;
- (b) A general rule in terms of gross weight, coupled with a special rule as to delay in delivery;
- (c) A general rule in terms of gross weight or package or other shipping unit;
- (d) A general rule in terms of gross weight or package or other shipping unit, with a special rule as to delay in delivery;
- (e) The alternative mentioned under point (d), coupled with another special rule as to containers.

4. The Working Group agreed not to adopt a rule based on any of the above alternatives on the ground that it was desirable to maintain the several alternatives. Several representatives expressed the view that Governments would not be in a position to choose among these alternatives until the amounts to be fixed as the ceiling of liability per kilo of gross weight or package or shipping unit were agreed upon. The Working Group requested the Drafting Party to draft alternative texts in the light of the discussions.

Paragraphs 3 and 4

5. The Working Group adopted paragraphs 3 and 4 of article 6 as set forth above.

Article 7. [Applicability of the limits of liability: torts; servants and agents]

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.

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.

The Working Group adopted the text of article 7 as set out above.

Article 8. [Effect of wilful misconduct]

The carrier shall not be entitled to a benefit of the limitation of liability provided for in paragraph 1 of article [6] if it is proved that the damage was caused by wilful misconduct of the carrier, or of any of his servants or agents acting within the scope of their employment. Nor shall any of the servants or agents of the carrier be entitled to the benefit of such limitation of liability with respect to damage caused by wilful misconduct on his part.

1. On the proposal of one representative the Working Group agreed to replace the term "wilful misconduct" by the corresponding formulation in article 13 of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974.¹⁶

2. The Working Group considered the proposal made by one representative to delete from the first sentence of article 8 the words "or of any of his servants or agents acting within the scope of their employment". It was argued in support of this proposal that the limitation on the liability of carriers should only be removed in those cases where there was serious personal wrongdoing on the part of the carrier himself. As against this it was argued that carriers normally acted through servants or agents, and that therefore the amendment suggested would reduce greatly the special protection to shippers and consignees provided by this article.

3. The Working Group was almost equally divided on the suggested amendment. Several representatives were of the view that these words should be retained. However, the prevailing view was that the words "or of any of his servants or agents acting within the scope of their employment" in the first sentence of article 8 should be deleted.

4. One representative reserved his position on article 8 in view of the interrelationship of this article with article 6.

SECTION 3. DECK CARGO

Article 9. [Deck cargo]

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 or regulations.

2. If the carrier and the shipper have agreed that the goods shall or may be carried on deck, the

¹⁶ Article 13 of that Convention reads as follows:

Article 13

Loss of right to limit liability

1. The carrier shall not be entitled to the benefit of the limits of liability prescribed in articles 7 and 8 and paragraph 1 of article 10, if it is proved that the damage resulted from an act or omission of the carrier done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

2. The servant or agent of the carrier or of the performing carrier shall not be entitled to the benefit of those limits if it is proved that the damage resulted from an act or omission of that servant or agent done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

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 providing 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 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 [6 and 7]. 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 [8].

Paragraph 1

1. The Working Group considered but did not adopt the proposal made by one representative to add either the words "obtaining in the port of loading" or the words "obtaining in the port of unloading" at the end of this paragraph.

2. The Working Group decided to retain the text of this paragraph as set out above, while deleting on the proposal of one representative, supported by several others, the brackets around the words "with the common usage of the particular trade".

Paragraph 2

3. One observer proposed that the option given to carriers by this paragraph to carry goods on deck should only apply to "carriage on deck in containers on specially equipped container vessels". The Working Group took note of this proposal.

Paragraph 3

4. The Working Group adopted the text of this paragraph as set out above, but changed the reference at the end of the first sentence from "articles 6 and 7" to "articles 6 and 8".

Paragraph 4

5. The Working Group decided to retain the substance of this paragraph, but to replace the term "wilful misconduct" by a term based on the formulation used in article 13 of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 (see also para. 1 under art. 8 above).

6. One representative reserved his position on the provision limiting the liability of the carrier in the event of an unauthorized deck carriage.

SECTION 4. LIABILITY OF CONTRACTING CARRIER AND ACTUAL CARRIER

Article 10. [Carriage by an actual carrier]

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.

The Working Group considered the proposal by two representatives to replace article 10 as set out above by a new formulation that would take into account the approach regarding this problem taken by article 4 of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974. During the discussion of this proposal, it was suggested that the two representatives should attempt to formulate a compromise between the approach adopted in article 10 set forth above, and that taken in article 4 of the Athens Convention. The two representatives thereafter submitted a proposal in the form of a draft text. One representative suggested that paragraph 3 of the new proposal was unacceptable because its vagueness could permit major derogations from the convention. The Working Group, after deliberation, adopted this proposal, and remitted the text to the Drafting Party.

Article 11. [Through bill of lading]

[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 [10].

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.]

Paragraph 1

1. One representative stated that the words "designated part" in this paragraph gave rise to a lack of clarity as to the scope of the paragraph, and therefore proposed that the following words be substituted for the first phrase therein:

"Where the contract of carriage provides that the contracting carrier shall perform only part of the carriage covered by the contract, and that the rest of the contract shall be performed by a person other than the carrier (through bill of lading), . . .".

2. The Working Group considered and adopted this proposal.

Paragraph 2

3. One representative proposed that paragraph 2 be deleted. In support of this proposal, he stated that the provision derogated from the principle that a contracting carrier should be liable for loss, damage or delay occurring during the entire course of the carriage. Other representatives, however, were of the view that the deletion of this paragraph might lead carriers to desist from issuing through bills of lading, and might give rise to the practice of each successive carrier issuing a bill of lading covering only the part of the carriage performed by him. However, the availability for presentation of a single bill of lading was necessary for certain commercial transactions utilizing such documents. The Working Group considered the question, and decided to retain the paragraph, as set out above.

4. The Working Group decided to substitute the words "delay in delivery" for the word "delay" in this paragraph, and to remove the brackets presently around the word "delay".

Paragraphs 1 and 2 considered together

5. One representative proposed that both paragraphs 1 and 2 be deleted, and a text substituted to the effect that where the contract of carriage is performed by more than one carrier, the first carrier shall be responsible to the owner of the goods for performance of the contract of carriage. Any intermediate carrier was to be responsible for performance of the part of the contract of carriage undertaken by him.

6. The arguments for and against this proposal were substantially similar to those noted above in relation to the proposal in regard to the deletion of paragraph 2. The proposal was not adopted by the Working Group.

7. One representative suggested that both paragraphs 1 and 2 should be retained, and that the brackets around them be deleted. It was stated in support of this proposal that this would result in the continuance of the present advantages arising from the issue of through bills of lading. The Working Group adopted this proposal.

8. A suggestion that language should be introduced making it clear that the article only applied when the entire carriage was to be by sea was not adopted. The view was expressed that this was sufficiently clear from the definition of "contract of carriage".

PART III. LIABILITY OF THE SHIPPER

Article 12. [General rule]

The consideration of this article by the Working Group, and the decisions taken thereon, are contained in section A of this report, under the heading "Basic rule on the exoneration of the shipper from liability".

Article 13. [Dangerous goods]

The consideration of this article by the Working Group, and the decisions taken thereon, are contained in section A of this report, under the heading "Dangerous goods".

PART IV. TRANSPORT DOCUMENTS

SECTION 1. BILLS OF LADING

Article 14. [Duty to issue 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 [15].

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.

Paragraphs 1 and 2

1. The Working Group adopted the texts of paragraphs 1 and 2 as set out above.

New paragraph 3

2. One representative proposed the addition of the following paragraph as a new paragraph 3:

"3. Where a bill of lading is issued by the charterer of a ship under a charter-party, such charterer only shall be the contracting carrier for the purpose of this article, 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."

It was stated in support of this proposal that there was some uncertainty as to who was the contracting carrier when a bill of lading was issued by a charterer, particularly when such bill of lading was signed by the master of the ship without any indication as to the person on whose behalf he was signing. As against this, it was observed that the existing paragraph 2 of this article resolved this difficulty by providing that in such circumstances the bill of lading was deemed to have been signed on behalf of the contracting carrier. It was also observed that there may be several charters operating simultaneously in respect of the same ship, and that in those circumstances the proposed paragraph could lead to difficulty. The Working Group decided not to adopt this proposal.

Article 15. [Contents of bill of lading]

1. The bill of lading shall set forth among other things the following particulars:

(a) The general nature of the goods, the leading marks necessary for identification of the goods, the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper;

(b) The apparent condition of the goods including their packaging;

(c) The name and principal place of business of the carrier;

(d) The name of the shipper;

(e) The consignee if named by the shipper;

(f) The port of loading under the contract of carriage and the date on which the goods were taken over by the carrier at the port of loading;

(g) The port of discharge under the contract of carriage;

(h) The number of originals of the bill of lading;

(i) The place of issuance of the bill of lading;

(j) The signature of the carrier or a person acting on his behalf; the signature may be printed or stamped if the law of the country where the bill of lading is issued so permits; and

(k) The freight to the extent payable by the consignee or other indication that freight is payable by him.

2. After the goods are loaded on board, if the shipper so demands, the carrier shall issue to the shipper a "shipped" bill of lading which, in addition to the particulars required under paragraph 1 shall state that the goods are on board a named ship or ships, and the date or dates of loading. If the carrier has previously issued to the shipper a bill of lading or other document of title with respect to any of such goods, on request of the carrier the shipper shall surrender such document in exchange for the "shipped" bill of lading. The carrier may amend any previously issued document in order to meet the shipper's demand for a "shipped" bill of lading if, as amended, such document includes all the information required to be contained in a "shipped" bill of lading.

3. The absence in the bill of lading of one or more particulars referred to in this article shall not affect the validity of the bill of lading.

1. The Working Group considered the question whether the required contents of bills of lading as set forth in paragraph 1 of this article should or should not be mandatory. Under one view, making the required information mandatory would serve to protect third parties acquiring bills of lading; if a document did not contain the required information it would not be a bill of lading but would still be a document evidencing the contract of carriage. Representatives who were opposed to this view considered that the sanction of making a document, lacking one or more of the items listed, a document which was not a bill of lading would have the effect of denying to holders of such documents the protection of the convention; it was stated that regardless of any omissions a document should be considered a bill of lading if it met the requirements set out in the definition of the term "bill of lading".

2. The Working Group took no decision on this issue.

Paragraphs 1 and 1 (a)

3. The Working Group adopted the text of these provisions as set out above.

Paragraph 1 (b)

4. The Working Group adopted the proposal made by one representative to delete from this subparagraph the words "including their packaging", since packaging was specifically included in the definition of the term "goods".

Paragraphs 1 (c)-1 (i)

5. The Working Group adopted the text of these provisions as set out above.

Paragraph 1 (j)

6. Some representatives proposed that this subparagraph be deleted since it did not cover a number of the ways in which signatures can be affixed to documents. Furthermore, in the case of information extracted by means of electronic data processing, there may be no signature at all. For these reasons, the Working Group, while retaining subparagraph (j), decided to expand the list of permissible methods for affixing signatures on bills of lading contained in that subparagraph as follows:

"The signature may be in handwriting, printed in facsimile, perforated, stamped, or by any other mechanical or electronic means, if the law of the country where the bill of lading is issued so permits;"

Paragraph 1 (k)

7. The Working Group considered but did not adopt the proposal made by one representative to delete this subparagraph.

Paragraph 1 (l)

8. The Working Group decided to add a new paragraph 1 (l), reading as follows:

"The statement referred to in paragraph 3 of article 23."

New paragraph 1 bis

9. One representative proposed the addition of a new paragraph 1 bis to article 15 reading as follows:

"Any other means which would preserve a record of the particulars set forth in paragraph 1 may, with the consent of the shipper, serve as a bill of lading."

10. This representative drew attention to electronic data processing used in connexion with transport documents. The draft convention should not operate as a bar to such modern developments since these reduced or eliminated traditional documentation. This representative therefore proposed additional language providing that any other means which would preserve a record of the particulars set forth in article 15, paragraph 1, could serve as a bill of lading, with the consent of the shipper. No representative expressed the opinion that the new convention was not amenable to electronic or automatic data processing, but some believed that an amendment was not needed to accomplish the desired result. It was also observed that, in relation to bills of lading, a document would in any event be required since, according to the agreed definition of "bill of lading" the goods could be delivered to the consignee only against surrender of the document. The Working Group did not adopt this proposal.

Paragraphs 2 and 3

11. The Working Group adopted the text of these provisions as set out above.

Article 16. [Bills of lading; reservations and evidentiary effect]

1. If the bill of lading contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the carrier has reasonable grounds for suspecting not accurately to represent the goods actually taken over or, where a "shipped" bill of lading is issued, loaded, or if he had no reasonable means of checking such particulars, the carrier shall make special note of these grounds or inaccuracies, or of the absence of reasonable means of checking.

2. When the carrier fails to note on the bill of lading the apparent condition of the goods, including their packaging, he is deemed to have noted on the bill of lading that the goods, including their packaging, were in apparent good condition.

3. Except for particulars in respect of which and to the extent to which the carrier has entered a reservation permitted under paragraph 1 of this article:

(a) The bill of lading shall be *prima facie* evidence of the taking over or, where a "shipped" bill of lading is issued, loading, by the carrier of the goods as described in the bill of lading; and

(b) Proof to the contrary by the carrier shall not be admissible when the bill of lading has been transferred to a third party, including any consignee, who in good faith has acted in reliance on the description of the goods therein.

4. If the bill of lading does not, as provided in paragraph 1, subparagraph (k) of article [15], set forth the freight or otherwise indicate that freight shall be payable by the consignee, it shall be presumed that no freight is payable by him. However, proof to the contrary by the carrier shall not be admissible when the bill of lading has been transferred to a third party, including any consignee, who in good faith has acted in reliance on the absence in the bill of lading of any such indication.

Paragraph 1

1. The Working Group considered but did not adopt the proposal by an observer to modify this paragraph so as to make it optional for the carrier to note his reservations on a bill of lading.

2. The Working Group decided to adopt the suggestion to add the words "knows or" preceding the words "has reasonable grounds", to make it clear that the paragraph was also applicable in cases where the carrier actually knew that the description of the goods in the bill of lading was inaccurate.

3. The Working Group did not adopt the proposal of one representative to replace the words "make special note of these grounds or inaccuracies, or of the absence of reasonable means of checking" by the words "make special note of this on the bill of lading". The proposal was motivated by practical considerations. The speed with which goods are handled does not permit the noting with the desired precision of the observation made.

4. The Drafting Party was requested to examine the language of this paragraph in the light of various drafting suggestions that were made by representatives.

Paragraph 2

5. The Working Group adopted the text of paragraph 2 as set out above, subject to the deletion of the words "including their packaging" which resulted from the decision taken in this regard by the Working Group concerning article 15 (1) (b).

Paragraph 3

6. One representative proposed the deletion of the words "including any consignee" which appear in paragraph 3 (b). In support of this proposal it was argued that these words were unnecessary since a consignee, except a shipper who was also the consignee, was always a third party as far as the contract of carriage was concerned. As against this, it was noted that the words "including any consignee" were necessary since in some national legal systems the consignee was considered to be a party to the contract of carriage. The Working Group, for that reason, decided to retain the words "including any consignee" in the text of subparagraph (b). The Working Group referred to the Drafting Party the suggestion by one representative that the expression "shall be presumed" in article 16 (4) and the expression "shall be *prima facie* evidence" in articles 16 (3) (a), 18 and 19 should be harmonized.

Paragraph 4

7. The Working Group considered but did not adopt the proposal of one representative to delete this paragraph.

Article 17. [Guarantees]

1. The shipper shall be deemed to have guaranteed to the carrier the accuracy of particulars relating to the general nature of the goods, their marks, number, weight and quantity as furnished by him for insertion in the bill of lading. The shipper shall indemnify the carrier against all loss, damage or expense resulting from inaccuracies of such particulars. The shipper shall remain liable even if the bill of lading has been transferred by him. The right of the carrier to such indemnity shall in no way limit his liability under the contract of carriage to any person other than the shipper.

2. Any letter of guarantee or agreement by which the shipper undertakes to indemnify the carrier against loss, damage or expense resulting from the issuance of the bill of lading by the carrier, or a person acting on his behalf, without entering a reservation relating to particulars furnished by the shipper for insertion in the bill of lading, or to the apparent condition of the goods including their packaging, shall be void and of no effect as against any third party, including any consignee, to whom the bill of lading has been transferred.

3. Such letter of guarantee or agreement shall be void and of no effect as against the shipper if the carrier or the person acting on his behalf, by omitting the reservation referred to in paragraph 2 of

this article, intends to defraud a third party, including any consignee, who acts in reliance on the description of the goods in the bill of lading. If in such a case, the reservation omitted relates to particulars furnished by the shipper for insertion in the bill of lading, the carrier shall have no right of indemnity from the shipper pursuant to paragraph 1 of this article.

4. In the case referred to in paragraph 3 of this article the carrier shall be liable, without the benefit of the limitation of liability provided for in this Convention, for any loss, damage or expense incurred by a third party, including any consignee, who has acted in reliance on the description of the goods in the bill of lading issued.

Paragraph 1

1. It was proposed that this paragraph should be deleted from this article, and inserted as paragraph 5 of article 16, since it had a closer relation to the provisions of the latter article. Divergent views were expressed on this issue, and the Working Group decided to retain the paragraph within the present article.

Paragraph 2

2. A proposal was made to the effect that this paragraph should be deleted. It was argued in support of this proposal that the paragraph was unnecessary, in that in any event a letter of guarantee or agreement between the carrier and shipper would have no effect in relation to a third party. However, several representatives were of the view that the paragraph served a useful purpose in clearly deciding this issue, and thereby protecting third parties. The Working Group decided to retain this paragraph.

Paragraph 3

3. A proposal was made to the effect that this paragraph should be deleted, since such a provision in the convention was not a proper vehicle for preventing fraud of the type envisaged therein. As against this, it was pointed out that fraud of this type caused serious prejudice to third parties, and that such a provision was needed to counteract these fraudulent practices.

4. A proposal to the effect that the first sentence of this paragraph should be amended to read "Such letter of guarantee or agreement shall be valid as against the shipper unless the carrier or the person acting in his behalf, . . ." was adopted by the Working Group. The Drafting Party was requested to amend the text accordingly, and to make any consequential amendments that might be necessary in the text of the article.¹⁷

¹⁷ The texts of paragraphs 3 and 4 of article 17, as finally adopted by the Working Group, and incorporating the amendment noted above to the first sentence of paragraph 3, reads as follows:

3. Such letter of guarantee or agreement shall be valid as against the shipper unless the carrier or the person acting on his behalf, by omitting the reservation referred to in paragraph 2 of this article, intends to defraud a third party, including any consignee, who acts in reliance on the description of the goods in the bill of lading. If in such a case, the reservation omitted relates to particulars furnished by the shipper for insertion in the bill of lading, the carrier shall have no right of indemnity from the shipper pursuant to paragraph 1 of this article.

Paragraph 4

5. The Working Group adopted this provision as set forth above.

Paragraphs 2, 3 and 4 considered together

6. One representative, supported by a number of observers, proposed deletion of the three paragraphs as a whole because they represented an unacceptable endorsement of fraudulent practices. However, as indicated above, the Working Group considered the paragraphs separately and decided to retain them.

SECTION 2. DOCUMENTS OTHER THAN BILLS OF LADING

Article 18. [Evidentiary effect of documents other than bills of lading]

When a carrier issues a document other than a bill of lading to evidence a contract of carriage, such a document shall be *prima facie* evidence of the taking over by the carrier of the goods as therein described.

The Working Group adopted the provisions of this article as set forth above.

PART V. CLAIMS AND ACTIONS

Article 19. [Notice of loss or damage]¹⁸

The Working Group decided to add to the provisions of this article earlier adopted by it at the present session the following special notice requirement applicable to claims for damages from delay in delivery:

"No compensation shall be payable for delay in delivery unless a notice has been sent in writing to the carrier within twenty-one days from the time that the goods were handed over to the consignee."

Article 20. [Limitation period]

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;

4. In the case referred to in paragraph 3 of this article the carrier shall be liable, without the benefit of the limitation of liability provided for in this Convention, for any loss, damage or expense incurred by a third party, including any consignee, who has acted in reliance on the description of the goods in the bill of lading issued.

It may be considered that consequential drafting changes are necessary in regard to the phrases "If in such a case, . . ." occurring in the second sentence of paragraph 3, and "In the case referred to in paragraph 3 of this article . . ." in paragraph 4, in order to make it clear that the case referred to in these phrases is the case of the omission of a reservation with intent to defraud mentioned in the first sentence of paragraph 3 as set forth above.

¹⁸ For the initial consideration of this article, see the heading "Notice of loss, damage or delay" in section A of the general introduction to this report.

(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 [90 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.

Paragraph 1

1. The Working Group was evenly divided on the question whether the limitation period should be one year or two years. The Group, therefore, decided that the paragraph should set forth both periods as alternatives, in order to enable either the Commission or the diplomatic conference to decide this point.

Paragraph 2

2. The Working Group adopted this provision as set forth above.

Paragraph 3

3. The Working Group adopted this provision as set forth above.

New paragraph 3 bis

4. The Working Group adopted this proposal made by one representative to add the following new paragraph 3 bis to article 20, in order to make it clear that the rules on the limitation period also applied to the actual carrier, his servants and agents:

"The provisions of paragraphs 1, 2 and 3 shall apply correspondingly to any liability of the actual carrier or of any servants or agents of the carrier or the actual carrier."

Paragraph 4

5. The Working Group adopted this provision as set forth above.

Article 21. [Choice of forum]

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 busi-

ness, 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 1 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.

3. No legal proceedings arising out of the contract of carriage may be brought in a place not specified in paragraphs 1 and 2 above. The provisions which precede do not constitute an obstacle to the jurisdiction of the contracting States for provisional or protective measures.

4. (a) Where an action has been brought before a court competent under paragraphs 1 and 2 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;

(b) 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;

(c) 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.

5. 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.

Paragraphs 1 and 1 (a)

1. The Working Group adopted the text of these provisions as set out above.

Paragraph 1 (b)

2. The Working Group considered the proposal of one representative to delete from this subparagraph the words "branch or agency". It was stated in support of this proposal that it would eliminate the possibility of the carrier being sued at an inconvenient, insubstantial "branch or agency" situated inland; the fear was ex-

pressed that a single commercial agent may be construed as an "agency" for purposes of jurisdiction. Several representatives, however, were opposed to the above proposal on the grounds that the terms "branch" and "agency" would not cause difficulties of interpretation and that it was important for the consignee to be able to sue the carrier at any place where the carrier was engaged in business to a substantial extent. Accordingly, the Working Group decided to retain the words "branch or agency" in the text of this subparagraph.

Paragraphs 1 (c)-1 (e)

3. The Working Group adopted the text of these provisions as set out above.

Paragraph 2 (a)

4. Some representatives noted that the second sentence of this subparagraph might possibly conflict with article 7 of the 1952 Brussels Convention for the Unification of Certain Rules relating to the Arrest of Seagoing Ships and reserved their rights to present to the Commission draft proposals intended to resolve this difficulty for States parties to that Convention.

Paragraphs 2 to 5

5. The Working Group adopted the text of these paragraphs as set out above.

6. Some representatives were of the view that article 21 restricted the autonomy of the parties to a contract of carriage to submit a dispute to the judicial forum of their choice, and were therefore opposed to the article as adopted by the Working Group.

Article 22. [Arbitration]

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 arbitra-

tion 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.

1. One representative proposed deletion of the article on the ground that more detailed provisions would be required in order to resolve the problems that could arise during arbitral proceedings. In support of the present provision it was stated that the article was a necessary counterpart to article 21 dealing with the choice of judicial fora in that it prevented carriers from inserting in the contracts of transport clauses providing for exclusive arbitration fora. Such clauses could be harmful to claimants in that they circumvented the protection provided by article 21.

2. The Working Group, after deliberation, decided to retain article 22. Most representatives observed that, like article 21, it was necessary in order to safeguard the availability of a convenient forum for the plaintiff. Some representatives expressed the view that the Convention should not restrict the autonomy of the parties in choosing an arbitral forum, and were therefore opposed to the retention of the article.

Paragraph 1

3. The Working Group adopted the proposal of one representative to replace paragraph 1 by the following new text:

"Subject to the rules of this article parties may provide by agreement that any dispute that may arise under a contract of carriage shall be referred to arbitration."

Paragraph 2

4. Following the decision taken by the Working Group concerning the proposal by one representative to delete in article 21 (1) (b) the words "branch or agency", this representative withdrew an analogous proposal relating to paragraph 2 (a) (iii). The Working Group then adopted the paragraph as set out above.

Paragraph 3

5. The Working Group adopted the paragraph as set out above.

Paragraph 4

6. One representative was of the view that the provisions of this paragraph might conflict with provisions in international conventions dealing with international commercial arbitration. However, the Working Group decided to retain this paragraph as set out above.

Paragraph 5

7. The Working Group adopted this paragraph as set out above.

PART VI. CONTRACT STIPULATIONS DEROGATING FROM THE CONVENTION

Article 23. [General rule]

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.

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.

Paragraphs 1 and 2

1. The Working Group adopted these paragraphs as set out above.

Paragraph 3

2. One representative proposed that this paragraph should be deleted, as the requirement contained therein that the document evidencing the contract of carriage shall contain the statement described in the paragraph would obstruct the simplification of the contents of such documents. On the other hand, it was argued that such a provision was necessary to alert the shipper to the rights conferred on him by the Convention.

3. The Working Group decided to retain this paragraph.

Paragraph 4

4. The Working Group adopted this paragraph as set out above.

Article 24. [General average]

The consideration of this article by the Working Group, and the decisions taken thereon, are contained

in section A of the general introduction to this report, under the heading "General average".

PART VII. RELATIONSHIP OF THE CONVENTION WITH OTHER MARITIME CONVENTIONS

The consideration of this Part of the draft Convention, and decisions taken thereon, are contained in section A of the general introduction, under the heading "Relationship of the draft Convention with other conventions".

PART VIII. IMPLEMENTATION

PART IX. DECLARATIONS AND RESERVATIONS

PART X. FINAL CLAUSES

The Working Group did not consider draft provisions concerning implementation, declarations and reservations, or final clauses for the draft Convention. It requested the Secretariat to prepare draft articles dealing with these topics for consideration by the Commission at its ninth session.

C. Final decisions by the Working Group

1. After the completion of the second reading of the draft convention on the carriage of goods by sea, the Working Group referred the texts considered by it to the Drafting Party for review, with specific reference to amendments and suggestions for improvement to those texts adopted in the course of its discussions.

2. The Drafting Party, after deliberation, presented to the Working Group its report containing these texts as reviewed by it, and, where necessary, amended.

3. The Working Group considered the report of the Drafting Party, and adopted the texts contained therein, with certain amendments, as the text of the draft convention on the carriage of goods by sea.

4. The Working Group took note of the following observations by the Drafting Party:

To article 4. The Drafting Party noted that the Commission might wish to consider the harmonization of paragraph 1 of this article with paragraph 1 of article 5 and with the definition of the term "contract of carriage" in article 1.

To article 6. Some representatives expressed the view that in alternative D, variation Y should retain the formula "(x-y)" in stating the equivalent to francs per kilo and francs per package. These representatives stated that an explanatory foot-note should then be added along the lines of foot-note 23 of A/CN.9/WG.III/WP.19 which states: "It is assumed that (x-y) will represent lower limitations on liability than those established under subparagraph 1 (a)."

To article 13. Some representatives pointed out that paragraph 1 of article 13 imposed upon the shipper who hands dangerous goods to the carrier the obligation not only to inform the carrier of the nature

of the goods and the character of the danger but also of the precautions to be taken. However, paragraph 2 of article 13 omitted any reference to "precautions to be taken". In the view of these representatives the second sentence of paragraph 2 should therefore be modified along the following lines: "Where dangerous goods are shipped without the carrier having knowledge of their nature or dangerous character or

of the precautions to be taken, the shipper shall be liable . . .".

5. The Working Group was agreed that the text of the draft convention on the carriage of goods by sea, as set forth in the annex, should be presented for detailed consideration to the ninth session of the Commission in 1976, following its circulation to Governments and interested international organizations.

4. Draft convention on the carriage of goods by sea (A/CN.9/105, annex)*

PART I. GENERAL PROVISIONS

Article 1. Definitions

In this Convention:

1. "Carrier" or "contracting carrier" means any person by whom or in whose name a contract for carriage of goods by sea has been concluded with the 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.

3. "Consignee" means the person entitled to take delivery of the goods.

4. "Goods" means any kind of goods, including live animals; where the goods are consolidated in a container, pallet or similar article of transport or where they are packed, "goods" includes such article of transport or packaging if supplied by the shipper.

5. "Contract of carriage" means a contract whereby the carrier agrees with the shipper to carry by sea against payment of freight, specified goods from one port to another where the goods are to be delivered.

6. "Bill of lading" means a document which evidences a contract for the carriage of goods by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.

Article 2. Scope of application

1. The provisions of this Convention shall be applicable to all contracts 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

(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 of this article are applicable without regard to the nationality of the ship, the carrier, the shipper, the consignee or any other interested person.

3. A Contracting State may also apply, by its national legislation, the rules of this Convention to domestic carriage.

4. The provisions of this Convention shall not be applicable to charter-parties. However, where a bill of lading is issued 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.

Article 3. Interpretation of the Convention

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.

PART II. LIABILITY OF THE CARRIER

Article 4. Period of responsibility

1. "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.

2. For the purpose of paragraph 1 of this article, 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 the law or with the usage of the particular trade, 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.

3. In the provisions of paragraphs 1 and 2 of this article, reference to the carrier or to the consignee shall mean, in addition to the carrier or the consignee, the

* 18 March 1975.

servants, the agents or other persons acting pursuant to the instructions, respectively, of the carrier or the consignee.

Article 5. General rules

1. 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 4, 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. Delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage within the time expressly agreed upon in writing or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case.

3. 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 4 within 60 days following the expiry of the time for delivery according to paragraph 2 of this article.

4. 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.

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 risks 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.

6. The carrier shall not be liable for loss, damage or delay in delivery resulting from measures to save life and from reasonable measures to save property at sea.

7. Where fault or negligence on the part of the carrier, his servants or agents, concurs with another cause to produce loss, damage or delay in delivery the carrier shall be liable only for that portion of the loss, damage or delay in delivery attributable to such fault or negligence, provided that the carrier bears the burden of proving the amount of loss, damage or delay in delivery not attributable thereto.

Article 6. Limits of liability

Alternative A:

1. The liability of the carrier according to the provisions of article 5 shall be limited to an amount equivalent to (...) francs per kilo of gross weight of the goods lost, damaged or delayed.

Alternative B:

1. (a) The liability of the carrier for loss of or damage to goods according to the provisions of article 5 shall be limited to an amount equivalent to (...) francs per kilo of gross weight of the goods lost or damaged.

(b) The liability of the carrier for delay in delivery according to the provisions of article 5 shall not exceed [double] the freight.

(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.

Alternative C:

1. The liability of the carrier according to the provisions of article 5 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.

2. For the purpose of calculating which amount is the higher in accordance with paragraph 1 of this article, 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.

Alternative D:

1. (a) The liability of the carrier for loss of or damage to goods according to the provisions of article 5 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.

(b) The liability of the carrier for delay in delivery according to the provisions of article 5 shall not exceed:

variation X: [double] the freight;

variation Y: an amount equivalent to $(x-y)^a$ francs per package or other shipping unit or $(x-y)$ francs per kilo of gross weight of the goods delayed, whichever is the higher.

(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

^a It is assumed that the $(x-y)$ will represent lower limitations on liability than those established under subparagraph 1 (a).

total loss of the goods with respect to which such liability was incurred.

2. For the purpose of calculating which amount is the higher in accordance with paragraph 1 of this article, 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.

Alternative E:

1. (a) The liability of the carrier for loss of or damage to goods according to the provisions of article 5 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.

(b) The liability of the carrier for delay in delivery according to the provisions of article 5 shall not exceed [double] the freight.

(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.

2. Where a container, pallet or similar article of transport is used to consolidate goods, limitation based on the package or other shipping unit shall not be applicable.

The following paragraphs apply to all alternatives:

A franc means a unit consisting of 65.5 milligrams of gold of millesimal fineness 900.

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 the preceding paragraph of this article on the date of the judgement or arbitration award. If there is no such official value, the competent authority of the State concerned shall determine what shall be considered as the official value for the purposes of this Convention.

Article 7. Actions in tort

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.

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 8. Loss of right to limit liability

The carrier shall not be entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the damage resulted from an act or omission of the carrier, done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result. 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 resulting from an act or omission of such servants or agents, done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

Article 9. Deck cargo

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 usage of the particular trade or with statutory rules or 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 provisions of paragraph 1 of this article, 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 6 and 8. 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 an act or omission of the carrier within the meaning of article 8.

Article 10. Liability of contracting carrier and actual carrier

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. The contracting carrier shall, in relation to the carriage performed by the

actual carrier, be responsible for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment.

2. The actual carrier also shall be responsible, according to the provisions of this Convention, for the carriage performed by him. The provisions of paragraphs 2 and 3 of article 7 and of the second sentence of article 8 shall apply if an action is brought against a servant or agent of the actual carrier.

3. Any special agreement under which the contracting carrier assumes obligations not imposed by this Convention or any waiver of rights conferred by this Convention shall affect the actual carrier only if agreed by him expressly and in writing.

4. Where and to the extent that both the contracting carrier and the actual carrier are liable, their liability shall be joint and several.

5. The aggregate of the amounts recoverable from the contracting carrier, the actual carrier and their servants and agents shall not exceed the limits provided for in this Convention.

6. Nothing in this article shall prejudice any right of recourse as between the contracting carrier and the actual carrier.

Article 11. Through carriage

1. Where a contract of carriage provides that the contracting carrier shall perform only part of the carriage covered by the contract, and that the rest of the carriage shall be performed by a person other than the contracting carrier, the responsibility of the contracting carrier and of the actual carrier shall be determined in accordance with the provisions of article 10.

2. However, the contracting carrier may exonerate himself from liability for loss, damage or delay in delivery 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 in delivery was so caused shall rest upon the contracting carrier.

PART III. LIABILITY OF THE SHIPPER

Article 12. General rule

The shipper shall not be liable for loss or damage sustained by the carrier, the actual carrier or by the ship unless such loss or damage was caused by the fault or neglect of the shipper, his servants or agents.

Article 13. Special rules on dangerous goods

1. When the shipper hands dangerous goods to the carrier, he shall inform the carrier of the nature of the goods and indicate, if necessary, the character of the danger and the precautions to be taken. The shipper shall, whenever possible, mark or label in a suitable manner such goods as dangerous.

2. Dangerous goods may at any time be unloaded, destroyed or rendered innocuous by the carrier, as the circumstances may require, without payment of compensation by him where they have been taken in charge by him without knowledge of their nature and character. Where dangerous goods are shipped without the

carrier having knowledge of their nature or character, the shipper shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.

3. Nevertheless, if such dangerous goods, shipped with knowledge of their nature and character, become a danger to the ship or cargo, they may in like manner be unloaded, destroyed or rendered innocuous by the carrier, as the circumstances may require, without payment of compensation by him except with respect to general average, if any.

PART IV. TRANSPORT DOCUMENTS

Article 14. Issue 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 15.

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.

Article 15. Contents of bill of lading

1. The bill of lading shall set forth among other things the following particulars:

(a) The general nature of the goods, the leading marks necessary for identification of the goods, the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper;

(b) The apparent condition of the goods;

(c) The name and principal place of business of the carrier;

(d) The name of the shipper;

(e) The consignee if named by the shipper;

(f) The port of loading under the contract of carriage and the date on which the goods were taken over by the carrier at the port of loading;

(g) The port of discharge under the contract of carriage;

(h) The number of originals of the bill of lading;

(i) The place of issuance of the bill of lading;

(j) The signature of the carrier or a person acting on his behalf; the signature may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if the law of the country where the bill of lading is issued so permits;

(k) The freight to the extent payable by the consignee or other indication that freight is payable by him; and

(l) The statement referred to in paragraph 3 of article 23.

2. After the goods are loaded on board, if the shipper so demands, the carrier shall issue to the ship-

per a "shipped" bill of lading which, in addition to the particulars required under paragraph 1 of this article shall state that the goods are on board a named ship or ships, and the date or dates of loading. If the carrier has previously issued to the shipper a bill of lading or other document of title with respect to any of such goods, on request of the carrier, the shipper shall surrender such document in exchange for the "shipped" bill of lading. The carrier may amend any previously issued document in order to meet the shipper's demand for a "shipped" bill of lading if, as amended, such document includes all the information required to be contained in a "shipped" bill of lading.

3. The absence in the bill of lading of one or more particulars referred to in this article shall not affect the validity of the bill of lading.

Article 16. Bills of lading: reservations and evidentiary effect

1. If the bill of lading contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the carrier or other person issuing the bill of lading on his behalf knows or has reasonable grounds to suspect do not accurately represent the goods actually taken over or, where a "shipped" bill of lading is issued, loaded, or if he had no reasonable means of checking such particulars, the carrier or such other person shall make special note of these grounds or inaccuracies, or of the absence of reasonable means of checking.

2. When the carrier or other person issuing the bill of lading on his behalf fails to note on the bill of lading the apparent condition of the goods, he is deemed to have noted on the bill of lading that the goods were in apparent good condition.

3. Except for particulars in respect of which and to the extent to which a reservation permitted under paragraph 1 of this article has been entered:

(a) The bill of lading shall be *prima facie* evidence of the taking over or, where a "shipped" bill of lading is issued, loading, by the carrier of the goods as described in the bill of lading; and

(b) Proof to the contrary by the carrier shall not be admissible when the bill of lading has been transferred to a third party, including any consignee, who in good faith has acted in reliance on the description of the goods therein.

4. A bill of lading which does not, as provided in paragraph 1, subparagraph (k) of article 15, set forth the freight or otherwise indicate that freight shall be payable by the consignee, shall be *prima facie* evidence that no freight is payable by the consignee. However, proof to the contrary by the carrier shall not be admissible when the bill of lading has been transferred to a third party, including any consignee, who in good faith has acted in reliance on the absence in the bill of lading of any such indication.

Article 17. Guarantees by the shipper

1. The shipper shall be deemed to have guaranteed to the carrier the accuracy of particulars relating to the

general nature of the goods, their marks, number, weight and quantity as furnished by him for insertion in the bill of lading. The shipper shall indemnify the carrier against all loss, damage or expense resulting from inaccuracies of such particulars. The shipper shall remain liable even if the bill of lading has been transferred by him. The right of the carrier to such indemnity shall in no way limit his liability under the contract of carriage to any person other than the shipper.

2. Any letter of guarantee or agreement by which the shipper undertakes to indemnify the carrier against loss, damage or expense resulting from the issuance of the bill of lading by the carrier, or a person acting on his behalf, without entering a reservation relating to particulars furnished by the shipper for insertion in the bill of lading, or to the apparent condition of the goods, shall be void and of no effect as against any third party, including any consignee, to whom the bill of lading has been transferred.

3. Such letter of guarantee or agreement shall be valid as against the shipper unless the carrier or the person acting on his behalf, by omitting the reservation referred to in paragraph 2 of this article, intends to defraud a third party, including any consignee, who acts in reliance on the description of the goods in the bill of lading. If in such a case, the reservation omitted relates to particulars furnished by the shipper for insertion in the bill of lading, the carrier shall have no right of indemnity from the shipper pursuant to paragraph 1 of this article.

4. In the case referred to in paragraph 3 of this article the carrier shall be liable, without the benefit of the limitation of liability provided for in this Convention, for any loss, damage or expense incurred by a third party, including a consignee, who has acted in reliance on the description of the goods in the bill of lading issued.^b

Article 18. Documents other than bills of lading

When a carrier issues a document other than a bill of lading to evidence a contract of carriage, such a document shall be *prima facie* evidence of the taking over by the carrier of the goods as therein described.

PART V. CLAIMS AND ACTIONS

Article 19. Notice of loss, damage or delay

1. Unless notice of loss or damage, specifying the general nature of such loss or damage, be given in writing by the consignee to the carrier not later than at the time the goods are handed over to the consignee, such handing over shall be *prima facie* evidence of the delivery of the goods by the carrier in good condition and as described in the document of transport, if any.

2. Where the loss or damage is not apparent, the notice in writing must be given within 10 days after the completion of delivery, excluding that day.

3. The notice in writing need not be given if the state of the goods has at the time of their delivery been the subject of joint survey or inspection.

^b In regard to drafting changes that may be necessary, see section B of the report, foot-note 17.

4. In the case of any actual or apprehended loss or damage the carrier and the consignee shall give all reasonable facilities to each other for inspecting and tallying the goods.

5. No compensation shall be payable for delay in delivery unless a notice has been given in writing to the carrier within 21 days from the time that the goods were handed over to the consignee.

6. If the goods have been delivered by an actual carrier, any notice given under this article to the actual carrier shall have the same effect as if it had been given to the contracting carrier.

Article 20. Limitation of actions

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. The provisions of paragraphs 1, 2 and 3 of this article shall apply correspondingly to any liability of the actual carrier or of any servants or agents of the carrier or the actual carrier.

5. 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.

Article 21. Jurisdiction

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 1 of this article 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.

3. No legal proceedings arising out of the contract of carriage may be brought in a place not specified in paragraphs 1 and 2 of this article. The provisions which precede do not constitute an obstacle to the jurisdiction of the contracting States for provisional or protective measures.

4. (a) Where an action has been brought before a court competent under paragraphs 1 and 2 of this article 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;

(b) 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;

(c) For the purpose of this article the removal of an action to a different court within the same country shall not be considered as the starting of a new action.

5. 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.

Article 22. Arbitration

1. Subject to the rules of this article, parties may provide by agreement that any dispute that may arise under a contract of carriage shall be referred to arbitration.

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 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.

PART VI. DEROGATIONS FROM THE CONVENTION

Article 23. Contractual stipulations

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.

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.

Article 24. General average

Nothing in this Convention shall prevent the application of provisions in the contract of carriage or national law regarding general average. However, the rules of this Convention relating to the liability of the carrier for loss of or damage to the goods shall govern the liability of the carrier to indemnify the consignee in respect of any contribution to general average.

Article 25. Other conventions

1. This Convention shall not modify the rights or duties of the carrier, the actual carrier and their servants and agents, provided for in international conventions or national law relating to the limitation of liability of owners of seagoing ships.

2. No liability shall arise under the provisions of this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) Under either the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy as amended by the Additional Protocol of 28 January 1964 or the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, or

(b) By virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either the Paris or Vienna Conventions.

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

Working Group on International Legislation on Shipping, seventh session

Replies to third questionnaire on bills of lading submitted by Governments and international organizations for consideration	A/CN.9/WG.III/L.2 and Add.1 and 2
Provisional agenda and annotations	A/CN.9/WG.III/L.3
Memorandum submitted by Norway concerning the structure of a possible new convention on the carriage of goods by sea	A/CN.9/WG.III/WP.15
Revised compilation of draft provisions on carrier responsibility	A/CN.9/WG.III/WP.16
Observations by the Central Office for International Railway Transport, Berne	A/CN.9/WG.III(VII)/CRP.1
Proposal by the delegation of France: definition of bills of lading	A/CN.9/WG.III(VII)/CRP.2

Proposal by the Federal Republic of Germany: article IV-B (1(c))	A/CN.9/WG.III(VII)/CRP.3
Proposal by the delegation of France: letters of guarantee	A/CN.9/WG.III(VII)/CRP.4
Proposal by the delegation of Norway: amalgamation of draft provision K in vol. I, and draft proposals B and C in vol. II	A/CN.9/WG.III(VII)/CRP.6
Proposal by the delegation of Norway: nuclear incidents; new article	A/CN.9/WG.III(VII)/CRP.7
Report of Drafting Party	A/CN.9/WG.III(VII)/CRP.8 and Add.1 to 3
<i>Working Group on International Legislation on Shipping, eighth session</i>	
Provisional agenda	A/CN.9/WG.III/L.4/Rev.1
Preliminary version of a draft convention on the liability of carriers of goods by sea: note by the Secretariat	A/CN.9/WG.III/WP.19
Proposal for a draft provision (article 111-A) submitted by the delegation of Japan	A/CN.9/WG.III(VIII)/CRP.1
Note concerning certain texts prepared by the Working Group at its seventh session and submitted by the Central Office for International Railway Transport	A/CN.9/WG.III(VIII)/CRP.2
Comments on matters not resolved at the seventh session submitted by the Delegation of the United Kingdom	A/CN.9/WG.III(VIII)/CRP.3
Observations by the International Maritime Committee on article 5 of the preliminary version of the draft convention	A/CN.9/WG.III(VIII)/CRP.4
Proposal by the representative of India	A/CN.9/WG.III(VIII)/CRP.5
Proposal by the representative of Norway	A/CN.9/WG.III(VIII)/CRP.6
Proposal by the representative of France	A/CN.9/WG.III(VIII)/CRP.7
Dangerous goods: proposal by the representative of Poland	A/CN.9/WG.III(VIII)/CRP.8
Draft provisions concerning the liability of the shipper submitted by the representative of Poland	A/CN.9/WG.III(VIII)/CRP.9
Draft article 12 <i>bis</i> submitted by the representative of France	A/CN.9/WG.III(VIII)/CRP.10
Article 12 <i>bis</i> : proposal submitted by the Federal Republic of Germany	A/CN.9/WG.III(VIII)/CRP.11
Article 12 <i>bis</i> : proposal submitted by the delegation of Japan	A/CN.9/WG.III(VIII)/CRP.12
Provisions respecting dangerous goods: proposal submitted by the representative of the United States of America	A/CN.9/WG.III(VIII)/CRP.13
General average (article 24): proposal submitted by the representative of the United Kingdom	A/CN.9/WG.III(VIII)/CRP.14
General average (article 24): proposal submitted by the representative of the United States of America	A/CN.9/WG.III(VIII)/CRP.15
Draft article 5(6) proposed by the representative of France	A/CN.9/WG.III(VIII)/CRP.16
Proposals submitted by Norway on questions of substance for second reading	A/CN.9/WG.III(VIII)/CRP.17
Articles 1, 5 and 20: proposals by the representative of India for the second reading ..	A/CN.9/WG.III(VIII)/CRP.18

Comments and proposals of the Belgian delegation in connexion with the second reading	A/CN.9/WG.III(VIII)/CRP.19
Points submitted by the representative of the United States of America for the second reading	A/CN.9/WG.III(VIII)/CRP.20
Provisions as to dangerous goods: proposal by the representative of India for the second reading	A/CN.9/WG.III(VIII)/CRP.21 and Corr.1
Comments submitted by the representative of France for the second reading	A/CN.9/WG.III(VIII)/CRP.22
Proposals submitted by the representative of Australia for the second reading	A/CN.9/WG.III(VIII)/CRP.23
Points to be raised by the representative of the United Kingdom during the second reading	A/CN.9/WG.III(VIII)/CRP.24
Amendments proposed by the Federal Republic of Germany for the second reading	A/CN.9/WG.III(VIII)/CRP.25
Note by the representative of Poland for the second reading	A/CN.9/WG.III(VIII)/CRP.26
Proposals submitted by the representative of Japan for the second reading	A/CN.9/WG.III(VIII)/CRP.27
Part I of the report of the Drafting Party	A/CN.9/WG.III(VIII)/CRP.28
Proposal submitted by the representatives of Belgium, Japan, Poland and the USSR on the questions of "error in navigation" and "fire" for the second reading	A/CN.9/WG.III(VIII)/CRP.29
Part II of the report of the Drafting Party	A/CN.9/WG.III(VIII)/CRP.30
Part III of the report of the Drafting Party	A/CN.9/WG.III(VIII)/CRP.31
Proposals by the representative of India for the second reading of article 16(1)	A/CN.9/WG.III(VIII)/CRP.32
Observations by the International Union of Marine Insurance on article 5 of the preliminary version of the draft convention	A/CN.9/WG.III(VIII)/CRP.33
Article 3(3): proposal by the representative of the United Kingdom for the drafting group	A/CN.9/WG.III(VIII)/CRP.34
Article 3(3): text proposed by the representative of France for the drafting group	A/CN.9/WG.III(VIII)/CRP.35
Note by the Secretariat on articles 1-3 of draft convention on the carriage of goods by sea as revised by the Working Group	A/CN.9/WG.III(VIII)/CRP.36 and Add.1 to 3
Note by the Secretariat: consideration by the Working Group of the report of the Drafting Party (CRP.28 and 31)	A/CN.9/WG.III(VIII)/CRP.37
Report of the Drafting Party	A/CN.9/WG.III(VIII)/CRP.39

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

Report of the Secretary-General (A/CN.9/103)*

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INTRODUCTION

1. At its twenty-eighth session the General Assembly 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.¹ 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."

2. The Commission at its seventh session had before it a note by the Secretary-General² on this subject which set forth certain background information pertaining to that resolution, and suggested possible action by the Commission in response thereto.

3. The subject was discussed by the Commission at its seventh session, and the following decision was unanimously adopted:

"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."*³

4. This report is submitted in response to that request. The report is divided into three parts as follows: part I, survey of the work of other organizations in respect of civil liability for damage caused by products; part II, study of the main problems that may

* 6 March 1975.

¹ *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 17 (A/9017)*, para. 75 (UNCITRAL Yearbook, vol. IV: 1973, part one, II, A).

² A/CN.9/93.

³ Report of the United Nations Commission on International Trade Law on the work of its seventh session, *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 17 (A/9617)*, para. 81 (UNCITRAL Yearbook, vol. V: 1974, part one, II, A).

arise in this area; part III, suggestions as to the Commission's future course of action.

PART I. A SURVEY OF THE WORK OF OTHER ORGANIZATIONS IN RESPECT OF CIVIL LIABILITY FOR DAMAGE CAUSED BY PRODUCTS

(a) *The Hague Conference on Private International Law*⁴

5. During the first Special Commission of the Conference on Torts, convened in October 1967, it was decided to put the topic of products liability in the conflict of laws in the category of matters for immediate treatment. The Special Commission also decided that the subject was ripe for regulation in an international convention. The Permanent Bureau thereafter prepared a questionnaire and explanatory memorandum on the domestic law of member States concerning products liability, and replies were received thereto. After the eleventh session of the Conference (October 1968) had recommended that the subject be given a place of priority on the agenda, the Permanent Bureau drafted a report dealing only with the conflict of laws aspects of products liability, together with a questionnaire on this topic which was addressed to member States. The subject was thereafter considered by a Special Commission on Products Liability. The conclusions of its initial meeting held in September 1970 were set out in a memorandum. It was concluded, *inter alia*, that "it will not be impossible to draft a convention which meets with the agreement of the large majority of the Experts. The embryonic state of the subject-matter will facilitate flexibility, and for once in the history of the Hague Conference, an attempt is being made to create new law rather than to find a compromise between existing solutions."⁵ The Special Commission held a second meeting in March-April 1971, and adopted a draft text of a Convention which was thereupon submitted to member States for their observations. This draft text, together with the observations of member States thereon, was considered by the First Commission at the twelfth session of the Conference in October 1972. A definitive Convention was then prepared, and this was approved by the twelfth session of the Conference.⁶

6. The object of the Convention is to determine the law applicable to the liability of manufacturers and certain other specified persons for damage caused by a product.⁷ The applicable law is to be determined by certain rules set out in articles 4, 5 and 6. This law is to determine, in particular, the following issues:⁸

1. The basis and extent of liability;
2. The grounds for exemption from liability, any limitation of liability and any division of liability;

⁴ This account is derived from "Actes et documents de la douzième session (1972), tome III, Responsabilité du fait des produits" published by the Permanent Bureau of the Conference.

⁵ *Ibid.*, p. 100.

⁶ For the text of the Final Act of the twelfth session, see *ibid.*, tome III, p. 246.

⁷ Article 1 of the Convention.

⁸ Article 8.

3. The kinds of damage for which compensation may be due;
4. The form of compensation and its extent;
5. The question whether a right to damages may be assigned or inherited;
6. The persons who may claim damages in their own right;
7. The liability of a principal for the acts of his agent or of an employer for the acts of his employee;
8. The burden of proof in so far as the rules of the applicable law in respect thereof pertain to the law of liability;
9. Rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation, and the interruption and suspension of this period.

The scope of application of the Convention is delimited in various ways. Thus, there are definitions of the words "product"⁹ and "damage",¹⁰ and an enumeration of the categories of persons in regard to whose liability alone the Convention is to apply.¹¹ Where the property in, or the right to use, the product was transferred to the person suffering damage by the person claimed to be liable, the Convention does not apply to their liability *inter se*.¹² The Convention does not deal with judicial jurisdiction or with the recognition or enforcement of foreign judgements rendered in a products liability case.

(b) *The Institute for the Unification of Private Law (UNIDROIT)*¹³

7. A Committee of Experts on the Liability of Producers was set up in 1970 by the Committee of Ministers of the Council of Europe, at the proposal of the Councils of the European Committee on Legal Cooperation (CCJ).¹⁴ The terms of reference of the Committee of Experts are to propose to the CCJ measures for harmonizing the substantive law of member States of the Council of Europe in respect of the liability of producers.

8. In order to assist the Committee of Experts, and at the request of the CCJ, UNIDROIT prepared two studies. The first was a study in three volumes¹⁵ of the law on products liability in the member States of the Council of Europe, and of the United States of America, Canada and Japan. Volume I states the law of the following States: Austria, Belgium, Cyprus, France, Germany (Federal Republic of), Ireland, Italy, Luxembourg, Malta, and the Netherlands. Volume II states the law in the Scandinavian States, Switzerland, Turkey, England and Wales, and contains a note on the reparation for damage caused by the defects in the

⁹ Article 2 (a).

¹⁰ Article 2 (b).

¹¹ Article 3.

¹² Article 1, para. 2.

¹³ The information contained herein is derived from a communication received from the Institute, and from documents EXP/Resp. Prod. 71 (I), vols. I-III, and EXP/Resp. Prod. 72 (I).

¹⁴ CM/Del. Concl. (70) 192, item VI.

¹⁵ EXP/Resp. Prod. 71 (I), vols. I-III.

goods sold, as provided by the Uniform Law on the International Sale of Goods. Volume III relates to the law of Canada, the United States of America, and Japan. The second study was a memorandum on problems raised by the harmonization of laws governing the liability of producers.¹⁸

(c) *The Council of Europe*¹⁷

9. The Committee of Experts on the Liability of Producers referred to in section (b) above held seven meetings between November 1972 and March 1975, and formulated the Draft European Convention on Products Liability, together with a draft Explanatory Report containing a commentary on the provisions of the convention.

10. The Committee of Experts has requested the European Committee on Legal Co-operation to recommend to the Committee of Ministers:

(a) That the draft Convention be approved;

(b) That the Convention be opened to the signature of member States of the Council of Europe, if possible during the Tenth Conference of European Ministers of Justice at Brussels in June 1976;

(c) That publication of the Explanatory Report be authorized.

11. The draft Convention contains 17 articles, which deal with all important issues arising in the field of products liability. It deals, *inter alia*, with definitions of "product"¹⁸ and "producer"¹⁹ the basis of liability,²⁰ defences open to a producer,²¹ and applicable periods of limitation.²² One of its main features is the establishment of a set of rules governing liability without reference to the existence of a contract between the person liable and the person suffering the damage. The principle adopted as the basis of liability by the Committee is as follows. The producer must pay compensation for damages resulting in death or personal injuries caused by a defect in the product. A product is stated in article 2 (c) to have a defect when it does not provide the safety which a person is entitled to expect, having regard to all the circumstances including the presentation of the product. The injured person must prove the damage, the defect and the causal link between the defect and the damage. If these facts are proved, it is a defence to the producer if he proves that the defect did not exist when the product was put

into circulation or that the defect arose after the product was put into circulation. He can also exculpate himself by proving that the product was not put into circulation by him.

12. The Committee of Experts felt that the case of damage caused by products to property could usefully be dealt with in a separate instrument, such as a Protocol. The Committee thought that it was necessary, under the Convention, to make insurance compulsory in order to make producers insure their civil liability. However, the draft Convention does not at present contain provisions on this issue.

(d) *Commission of the European Communities*²³

13. The Commission of the European Communities is engaged on a project for the approximation of the laws of member States relating to products liability. A Working Group has been established for this purpose. The work has been prompted by the divergencies which exist in this field in the national laws of member States. The result of these divergencies is that the legal position of a person who has suffered damage as a result of a defective product differs in the various member States. It has been observed in the memorandum on the approximation of the laws of member States that the following consequences of these divergencies may in particular need to be corrected in the context of the Common Market:

- (i) Protection of the consumer, in particular the protection of his health, safety and his right to compensation for loss or damage suffered, varies considerably. To a large extent such protection does not even exist.²⁴
- (ii) The differences in the laws governing the liability of the manufacturer and the dealer also adversely affect competition within the Common Market by imposing unequal burdens on the industry and trade of certain member States in comparison with competitors in other member States.²⁵
- (iii) These same differences also adversely affect the unimpeded movement of goods across frontiers within the Common Market.²⁶

14. It has been suggested that these undesirable features may be eliminated by means of a directive which approximates the differences between the laws of member States, and which would result in the laying down of rules which protect the interests of consumers, remove distortions of competition within the Community, and eliminate obstacles to the free movement of goods.

¹⁸ EXP/Resp. Prod. 72 (1). This was produced in co-operation with the Directorate of Legal Affairs of the Council of Europe.

¹⁷ The information contained herein is derived from a communication from the Directorate of Legal Affairs of the Council of Europe, and from the draft report of the Committee of Experts on the Liability of Producers containing the Draft European Convention on Products Liability and the Draft Explanatory Report as revised by the Drafting Committee. The text of the Draft Convention hereinafter cited is the text as set out in Council of Europe Document EXP/Resp. Prod. (75) 2 dated 24 January 1975.

¹⁸ Article 2 (a).

¹⁹ Article 2 (b), and article 3 (2) and 3 (3).

²⁰ Article 3 (1).

²¹ Articles 4 and 5 (1). It is noted below that it is a defence to the producer to prove that the product had not been put into circulation by him. The phrase "put into circulation" is defined in article 2 (d).

²² Articles 6 and 7.

²³ The information contained herein has been obtained from document XI/332/74-E, Working Document No. 1 for the attention of the working group on "products liability" (memorandum on the approximation of the laws of member States relating to product liability) and Document XI/332/74-E, Working Document No. 2 for the attention of the working group on "products liability" (first preliminary draft directive concerning the approximation of the laws of member States relating to products liability, with commentary).

²⁴ Document XI/332/74-E, sect. II, para. 1 (a).

²⁵ *Ibid.*, para. 2.

²⁶ *Ibid.*, para. 3 (a).

15. A Working Group entrusted with the work in this field has produced a first preliminary draft directive. The draft directive consists of nine articles dealing with, and providing solutions for, the major problems arising in products liability, and its objective is sought to be achieved by imposing an obligation on member States to amend their laws in so far as they are inconsistent with the provisions contained in the articles. The articles deal, i.a. with the basis of liability,²⁷ the definition of producer,²⁸ the definition of "defect" for which liability is imposed,²⁹ the kinds of damage for which recovery is permissible,³⁰ a ceiling on the quantum of compensation recoverable,³¹ limitation of actions,³² and the mandatory nature of the liability.³³

PART II. THE MAIN PROBLEMS THAT MAY ARISE IN THE AREA OF PRODUCTS LIABILITY

Introduction

16. Civil liability for damage caused by products cannot be counted as a new legal development. Such liability has always existed under certain branches of the law of civil liability. However, some developments in the recent past have led to an increased interest in the subject. Modern technological progress has resulted in products, and particularly manufactured products, being commonly used in the day-to-day life of most people living in developed countries. Many of these products have also the potential for causing serious harm to person or property, and in fact the incidence of such damage caused by products has increased. This has focused attention on the balance which the law should strike in, on the one hand, protecting the user of these products by giving him a right to recover compensation from the manufacturer or dealer, and, on the other, in not imposing so heavy a liability on manufacturer or dealer that their respective enterprises are financially crippled, or their incentive towards the development of new products stifled. In the nineteenth century the balance was probably tilted in favour of the manufacturer, since it was believed to be important to encourage the growth of industrial enterprises. The tendency was to regard it as fair that, as part of the cost of technological advance, the user of a product should bear any loss suffered by him which he could not prove was due to the negligence of the manufacturer. In recent years there has emerged a tendency towards granting more protection to the consumer. But the exact balance struck between producer and user varies from country to country.

17. The subject may also be thought to have acquired a special importance in relation to international trade by reason of the great increase in recent years of the international sale of products. In most countries products liability is subsumed under the general rules of civil liability. These general rules often diverge on important aspects of liability, and are sometimes not very clear. These features cause difficulties in that persons are left uncertain of their rights and

obligations. Further, the presence of one or more foreign elements in trade transactions involving products may cause difficulties when an injured party wishes to sue a manufacturer or dealer. Thus the place of commission of the alleged wrongful act, the place where the product was purchased, the place where the damage occurred, the place of residence of the manufacturer, and the place of residence of the injured party, may not all be located in one State. If in such a case a delict (tort) or a breach of contract is alleged, it is necessary to resort to the conflict of laws to determine the applicable law to resolve various issues which may arise. It was the prevalent uncertainty in the choice of law rules which led the Hague Conference on Private International Law to draft a Convention on the Law applicable to Products Liability.

18. The decision taken at its seventh session by the Commission⁸⁴ was that a study be undertaken of the "main" problems in this area. The decision as to whether a problem is a main one or a subsidiary one is often subjective. Thus the problem of the possible vicarious liability of the producer for the wrongful acts of his employees or of independent contractors employed by him, is omitted, although the view may be taken that this is a main problem.

19. The problems dealt with are the following:

- (i) The definition of the term "product"
- (ii) The persons incurring liability
- (iii) The persons in whose favour liability is imposed
- (iv) The kinds of damage for which compensation is recoverable
- (v) The requirement that the uniform rules only apply where the goods are the subject of international trade
- (vi) Limitations on the recovery of compensation
- (vii) Defences available to the persons incurring liability
- (viii) The basis of liability
- (ix) The relationship of the uniform rules to existing rules of civil liability
- (x) The period of limitation.

20. Each problem is dealt with in turn, and for the purpose of information the way in which it is treated in the Hague Convention or other texts drafted by international organizations is set out at the end of each section.

(1) *Definition of the term "product"*

21. The definition given to the term "product" would have a significant effect on the scope of legal liability. Standing by itself, the term can have a wide meaning. Thus it has been defined as "anything produced, as by generation, growth, labour, thought or

²⁷ Article 1.

²⁸ Article 2.

²⁹ Article 3.

³⁰ Article 4.

³¹ Article 5.

³² Article 6.

³³ Article 8.

⁸⁴ Report of the United Nations Commission on International Trade Law on the work of its seventh session, *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 17, (A/9617)*, para. 81 (UNCITRAL Yearbook, vol. V: 1974, part one, II, A).

by the operation of involuntary causes . . .".⁸⁵ However, since the object of the rules is to delimit the liability of the *producer*, it is clear that only things which have been produced as the result of human activity are intended to be included and not those produced, for example, by natural process or involuntary causes. But in view of the wide range of human activity, it may be thought that a closer definition is required.

22. One approach may be to focus on the type of human activity the application of which can result in products in relation to which liability is to be imposed. The aim would be to single out those types of activity which result in products which it is desired to bring within the scope of liability. Thus the activity may be specified in terms of a mechanical or industrial processing or packaging. However, it seems difficult to eliminate at least two types of border-line cases. The first is where the product is the result both of human activity and the operation of natural forces. The most important illustration would be crops, vegetable produce, and livestock. Thus in the case of crops, it may be argued that the primary generating force is that of nature. However, their growth may have been significantly influenced by the application of fertilizers and insecticides. The second occurs because general words used to describe a process or activity always have an area of indeterminate meaning. Thus if a phrase such as "mechanical assembling" or "industrial processing" is used, doubts will always arise in some cases whether these terms are applicable.

23. Another approach to the definition of product may be to focus on the description of the product in its finished form, and to include or exclude products by that description. Thus decisions as to inclusion or exclusion would be taken with reference to such categories as "agricultural" products, or "manufactured" products, without regard to anterior processing. Thus the fact that a mechanical process was associated with the making of the agricultural product would be irrelevant.

24. A further approach would be to seek to control the scope of liability not so much through the definition of the term "product", but through the definition of the person liable. Under this approach, it would be possible to have a very wide definition of product (e.g. as indicating "all movables, natural or industrial, whether raw or manufactured") and a narrow definition of the person liable (e.g. as indicating "manufacturers of finished products or of component parts and the producers of natural products").

25. It is suggested that in deciding on a definition of "product", the following aspects may need to be considered:

- (i) What types of goods cause frequent or extensive damage, and therefore call for proper consumer protection?
- (ii) Is the damage caused by certain types of goods (e.g. nuclear material, transport vehicles) already regulated by other international legislation?

- (iii) Are there any types of goods, the establishment of liability in regard to which poses special problems under existing law? (e.g., manufactured goods, where the methods of manufacture are only known to the manufacturer).
- (iv) The type of damage for which liability is to be imposed. Thus if liability is only to be imposed for personal injury or death, it may be thought that products which cannot cause such damage may be excluded from the definition.
- (v) The need to have a clear definition minimizing litigation on the scope of liability.
- (vi) The feasibility of procuring liability insurance in respect of a product by the producer, or accident insurance by a potential victim.

26. While products which are the subject of international trade would in most cases be legally classified as "movable", such trade in immovables (such as buildings) is possible. It may be thought that trade in immovables contains many distinctive features (such as the high value of the product, the relative infrequency of such transactions, and the consequent decrease in the urgency of the need for consumer protection, and the relative rarity of loss or damage being caused by such products), which may justify the exclusion of such products from the scope of liability. If a decision is made to exclude such products, a case which may nevertheless need to be considered is the incorporation or attachment of a movable product to an immovable in such a way that it ceases to qualify as a movable and becomes part of the immovable. It may be suggested that, as long as the product retains its physical identity, liability may be imposed in respect of damage caused by it. On the other hand, liability for damage caused by immovables is in some systems governed by rules based on special considerations, and it may be felt that these rules should be left undisturbed.

Relevant provisions in the Hague Convention and other texts

27. The Convention on the Law Applicable to Products Liability of the Hague Conference on Private International Law contains the following:

"For the purposes of this Convention—

"The word 'product' shall include natural and industrial products, whether raw or manufactured and whether movable or immovable; . . ."⁸⁶

28. Article 1 of the first preliminary draft directive of the EEC concerning the approximation of the laws of member States relating to products⁸⁷ states:

"The producer of an article manufactured by industrial methods or of an agricultural product shall be liable even without fault to any person who

⁸⁶ Article 2a. However, article 16 states that "any Contracting State may, at the time of signature, acceptance, approval or accession, reserve the right—(2) not to apply this Convention to any agricultural products".

⁸⁷ EEC document XI/334/74-E.

suffers damage as a result of defects in such article."³⁸

The commentary on this article states the following: "Production by industrial method" means large quantity production. Manufacture of individual items is excluded. Since such manufacture requires special care, the principle of liability with fault is sufficient. Agricultural products are on a par with products manufactured by industrial methods. The concept 'agricultural product' is to be interpreted broadly. Animal products also count as agricultural products manufactured by a producer."

29. Article 2 (a) of the Draft European Convention on Products Liability is as follows:

Art. 2 (a). "The expression 'product' indicates all movables, natural or industrial, whether raw or manufactured, even though incorporated into another movable or into an immovable;"

(2) *The persons incurring liability*

30. One important factor which would affect the scope of liability is the delimitation of the persons on whom liability is imposed. In this connexion, the resolution of the General Assembly referred to above uses the word "producer". It would appear that this term has a wider meaning than "manufacturer". Thus one who grows agricultural crops or raises livestock would not normally be called a manufacturer, but may be called a producer.

31. In relation to the term "product", it was observed above that the description of the method of production could be used as a way of delimiting the meaning of that term. Correspondingly, this technique could be used to delimit the meaning of "producer". Thus, if products were defined as goods which resulted from an industrial process, the producer could be defined as the one who applied that process. However, this "linked" approach to definition is not a necessary one nor (as will appear from the discussion below) does it solve some of the problems involved. It is suggested that an approach which seeks to describe in the abstract the various meanings which the term "producer" can bear may not be useful. Rather, the meaning to be given to the term could depend on the objectives sought to be achieved in relation to the incidence of liability.

32. A broad distinction which may be relevant in this context is that between the chain of production and the chain of distribution. The chain of production may be thought to commence from the time that raw materials were first processed with a view to their use in the finished product up to the time that the finished product emerged in the condition in which it was marketed. While it is possible that the processing throughout this period is in the hands of only one person or legal entity, it is more likely in the context of modern industry that there will be several persons or legal entities involved standing in different relations one to the other. It is often difficult to describe one of these persons as being the producer, or the chief producer.

Similarly, the product would normally travel through several hands in the chain of distribution before reaching the ultimate user. While there would be no dispute that liability should be imposed on one or more persons in the chain of production, a basic question would be whether any persons in the chain of distribution should also be liable.

33. Arguments can be adduced both in favour of and against the imposition of such liability. If the basis of liability were to be fault or negligence,³⁹ a restriction of liability to the chain of production may be justified by the consideration that such fault or negligence giving rise to a defect arises in most cases at the stage of production. Even if the basis were strict liability, some of the rationales supporting such liability appear to suggest that liability is best attached to those concerned with production. Thus it has been suggested that strict liability will serve as a deterrent to defective manufacture. But this is most effectively achieved by imposing liability on those concerned with production. It has also been suggested that the imposition of strict liability will secure the desirable objective that the person injured is almost always compensated. Such liability can be insured against, and the cost of insurance distributed among all users by increasing the price of the product. But it is the producer who can take out insurance most easily, as it is he who knows the percentage of defective products which are inevitable in production. Further, if persons in the distribution chain were also to be subjected to liability, difficult questions may arise with regard to determining which of these persons are to be so subjected—the chain of distribution may include wholesalers, retailers, warehousemen, transporters, and lessors. It may also be thought that the term "producers" as used in resolution 3108 (XXVIII) would not normally catch up those in the chain of distribution.

34. As against these considerations, the view may be taken that subjecting selected persons in the chain of distribution to liability in addition to those in the chain of production could entail no serious disadvantages, and may result in some benefits. Thus the person injured and the producer would in most cases involving international trade have their residences in different States, and jurisdiction in an action for compensation could more easily be obtained over someone in the chain of distribution residing in the same country as the person injured. Even if jurisdiction over the producer is secured, the satisfaction of a judgement obtained may require its enforcement abroad, where alone the producer's assets may be situated: such enforcement may entail expense and difficulties. Again, one of the persons to whom the user would naturally look in relation to defects in the product would be the distributor from whom he obtained it, or the importer of the product. If the liability of the distributor or importer were excluded, it may be thought to confer insufficient consumer protection. Further, cases may occur where the product became defective as a result of handling or treatment during distribution. There may also be cases where the manufacturer or producer is unknown, and the person injured has no means of discovering his identity.

³⁸ Emphasis added.

³⁹ The basis of liability is discussed below.

35. Whether or not it is decided to exclude persons in the chain of distribution from liability, the question would remain of determining the categories of persons in the chain of production on whom liability is to be imposed. Thus A, B and C may supply the components of a product, these may be assembled by D, and the assembled entity processed by E to obtain the finished product. A, B and C may in turn have obtained primary products (such as glass, sheet metal, or insulating material) from X, Y and Z for the purpose of manufacturing the components. Perhaps the primary consideration which would be relevant in determining the range of liability would be the extent to which it is considered desirable to protect injured parties. In one view it may be thought fair that anyone who contributes skill or labour or material which is utilized in the making of the finished product should be potentially liable. The finished product is in different degrees the result of the conduct of such persons, and if the conduct of any one of them falls below the prescribed standard and causes loss, it may be thought that he should compensate the injured party. There is likely to be general agreement that the manufacturer of components and the assembler should be potentially liable. There may be room for disagreement about persons who do not make a profit out of the sale of the product or the components, such as the employees of the component manufacturer and assembler. Such persons may not have the financial capacity to bear the potential liability, and may also not be covered by liability insurance.

36. It is clear, however, that in a concrete case not everyone who may fall within the scope of liability will be held liable. For actual liability will depend on the circumstances and the basis of liability adopted. Thus, if the basis of liability is negligence, and a component is negligently manufactured, in many cases only the component manufacturer will be held liable. The assembler often neither has the means or opportunity of testing components, and failure by him to test may not constitute negligence. The widening of the categories of potential defendants does not therefore necessarily imply that a large number of persons will all be actually liable in concrete cases.

37. If it is decided to impose liability on selected persons within the chain of distribution as well, two questions may need consideration. Firstly, is liability to be imposed only on those engaged in distribution as part of a commercial transaction, or is it to be imposed also on non-commercial distributors? Examples of the latter class would be a school which distributed toys among its pupils, a host who distributed food products among his guests, or a charitable foundation which distributed clothing among the needy. From the fact that the proposed regulation of liability is intended to facilitate international trade, and to govern liability in respect of products "intended" for or involved in international sale or distribution, it is possible to conclude that the scope of liability should not extend beyond the realm of commercial transactions. In this view non-commercial distributors should not be liable, but commercial distributors anterior in the chain of distribution would remain liable.

38. Assuming that liability is only to be imposed on those engaged in distribution as part of a commercial

transaction, it would, secondly, be necessary to identify which of the many categories of persons involved in the chain of distribution are to be made liable. It may be suggested that, as in the case of the chain of production, each case may need to be considered on its merits. Thus a carrier may be one link in this chain. But imposing liability on the carrier may cause conflicts with the several conventions regulating carrier responsibility, and may therefore be thought to be better avoided.

Relevant provisions in the Hague Convention and other texts

39. Article 3 of the Convention on the Law Applicable to Products Liability of the Hague Conference on Private International Law is as follows:

"This Convention shall apply to the liability of the following persons:

"1. Manufacturers of a finished product or of a component part;

"2. Producers of a natural product;

"3. Suppliers of a product;

"4. Other persons, including repairers and warehousemen, in the commercial chain of preparation or distribution of a product.

It shall also apply to the liability of the agents or employees of the persons specified above."

40. Article 2 of the EEC Preliminary Draft Directive concerning the approximation of the laws of member States relating to products liability defines "producer" in the following terms:

"'Producer' means any person by whom the defective article is manufactured and put into circulation in the form in which it is intended to be used."

41. Articles 2 (b), 3 (2), 3 (3), and 3 (4) of the Draft European Convention on Products Liability are as follows:

Art. 2 (b). "The expression 'producer' indicates the manufacturers of finished products or of component parts and the producers of natural products."

Art. 3 (2). "The importer of a product and any person who has presented a product as his product by causing his name, trade-mark or other distinguishing feature to appear on the product, shall be deemed to be producers for the purpose of this Convention and shall be liable as such."

Art. 3 (3). "When the product does not indicate the identity of any of the persons liable under paragraphs 1 and 2 of this article, each supplier shall be deemed to be a producer for the purpose of this Convention and liable as such, unless he discloses, within a reasonable time, at the request of the claimant, the identity of the producer or of the person who supplied him with the product."

Art. 3 (4). "In the case of damage caused by a defect of a product incorporated into another product, the producer of each product shall be liable."

(3) *The persons in whose favour liability is imposed*

42. A question which may need consideration is the definition of the categories of persons to whom the producer is to be liable. The absence of such a definition may lead to uncertainty as to the scope of liability.

43. A possible solution may be to specify that, given an act entailing liability, the producer is to be liable to every person to whom loss results, provided that the loss is of a kind for which compensation is recoverable. The fact that the occurrence of loss to a particular person is not reasonably foreseeable would be irrelevant. This may be illustrated by the following.

44. "The standard of conduct required of the producer is the absence of negligence. A, a tyre manufacturer, negligently manufactures a tyre which is defective and likely to burst. Harm to the automobile to which it is fixed, the occupants of the automobile, and bystanders within a certain radius of a burst, is reasonably foreseeable. The tyre bursts, and the noise of the explosion is heard by B, a pregnant woman, in a house some distance from the highway, and she suffers a miscarriage in consequence. A is liable to B."

45. This result may be justified by the reflection that, as between A and B, A has fallen below a prescribed standard of conduct, while B is completely innocent. The loss should therefore fall on A.

46. An opposing view may be that liability of this nature is too extensive and imposes a burden on the producer which is so heavy that it may cripple his enterprise. Further, the obtaining of insurance cover becomes more difficult when liability is imposed for risks which are incalculable. It may therefore be thought that the producer should only be liable, for example, to particular categories of persons, or to persons to whom he stands in a defined relationship. A technique used in the common law in this connexion is to state that the producer is only liable in negligence to those to whom he owes a duty, and that he only owes a duty to those standing in a certain relationship to him, i.e., those whom he can reasonably foresee would be injured by his act.

47. An example of a solution in terms of categories of persons would be the restriction of liability only to the *user* or *consumer*. For instance, the American Restatement Second, Torts, section 402A, imposes strict liability on "one who sells any product in a defective condition unreasonably dangerous to the user or consumer" only in favour of the user or consumer.⁴⁰ This would exclude, for instance, bystanders at an accident and workers employed by the producer. A refinement of this would be to restrict liability to a *lawful* user or consumer. This would, e.g., exclude liability to a thief in the case of a defective automobile, or to one driving it without a certificate of competence. A possible solution in terms of relationship to the producer would be to impose liability only in favour of those who can be said to fall within the risk of harm created by his wrongful act. On the basis of liability

only to the user or consumer, in the illustration given above A would not be liable, while on the basis of liability only to persons falling within the risk of harm it is unlikely but possible that he would be held liable. A refinement of this second basis of liability would be to make the producer liable to a person only for the particular kind of damage the risk of which is created by his wrongful act. Thus if the act creates a risk of personal injury to a particular person, and damage to the property of that person results, the producer would not be liable.

48. It may be noted that the exclusion of liability to particular persons is sometimes also reached, not by rules marking out persons in whose favour alone liability is imposed, but through rules relating to limitations on the recovery for remote consequences of an act entailing liability. Thus in the illustration given above it may be possible to say that A is not liable because the loss suffered by B was too remote a consequence of the negligence, or not a direct consequence of the negligence.

49. A special problem arises where the product causes injury which results in the death of a person. Under some systems of law the right of action is personal to the party injured and is extinguished by his death. Under other systems of law the right of action which accrued to the deceased during his lifetime passes either to his heirs or to his personal representatives. It is believed that this is a desirable result, and it may be thought that special provision may have to be made to preserve it. Many legal systems also make a wrongdoer liable to persons standing in close relation to the deceased for certain kinds of loss suffered by them, e.g., loss of support suffered by dependants, injury to feelings suffered by the next of kin. The question whether the producer should be liable to such persons may need consideration.

Relevant provisions in the Draft European Convention and other texts

50. Article 1 of the EEC Preliminary Draft Directive concerning the approximation of the laws of member States relating to product liability states:

"The producer of an article manufactured by industrial methods or of an agricultural product shall be liable even without fault to any person who suffers damage as the result of defects in such article."

51. Article 3 (1) of the Draft European Convention on Products Liability is as follows: "The producer shall be liable to pay compensation for death or personal injuries caused by a defect in his product." The restriction of the kinds of damage for which liability is imposed has the indirect consequence of limiting the persons in whose favour liability is imposed.

(4) *The kinds of damage for which compensation is recoverable*

52. A product can cause very different kinds of damage. Certainty as to the scope of liability may require the delimitation of the kinds of damage for which compensation is to be recoverable from the

⁴⁰ In a caveat, it is stated that the American Law Institute expresses no opinion as to whether the rule stated may not apply to harm to persons other than users or consumers: Restatements, Second, Torts, section 402A, Caveat, p. 348.

producer. The possible kinds of damage may be broadly categorized as (a) bodily injury, (b) injury to the mind, (c) damage to tangible property, and (d) financial loss. In most cases where damage is caused at least two of these types will coexist.

(a) *Bodily injury*

53. Freedom from bodily injury is almost universally regarded as an interest deserving protection. It is believed that there will be no dispute that compensation should be recoverable for this kind of damage. It is also likely that there will be agreement that a limited right of recovery should be available where death results. Apart from the unique event of the death itself, the other types of resulting damage can be brought under one or other of the heads mentioned above. The question of the transmissibility of the causes of action accruing to the deceased before his death, and the question of the categories of persons to whom independent causes of action may arise, has been mentioned in section (3) above.

(b) *Injury to the mind*

54. Mental injury can be of various types, e.g., a nervous shock, or feelings of humiliation or inferiority. Some types of it are often difficult to clearly distinguish from bodily injury. Thus some types of injuries to the nervous system may be regarded as falling into either category. There are other kinds of injury, such as loss of expectation of life, which are difficult to categorize, but which are perhaps most easily fitted in here. One possibility would be to require that compensation is to be payable for every type of mental injury. The main reason advanced against permitting any recovery for mental injury appears to be that it is often difficult to determine the existence or the degree of injury. However, this may not be regarded as a sufficient reason for excluding compensation altogether, as many cases occur where the fact and extent of mental injury can be clearly established. It may also be thought that peace of mind is an interest as deserving of protection as bodily security. Another possibility is to require compensation only where mental injury results from bodily injury. Determination of the truth of the claim in regard to mental injury and the extent of the injury may be easier in such a case.

(c) *Damage to tangible property*

55. The safety of tangible property in which a person has a legal right is almost universally regarded as an interest deserving protection. A requirement that compensation should be recoverable in such cases is likely to command wide acceptance.

56. A case which has provoked some discussion in the context of establishing a special régime on products liability is the case where the product is defective and does not function properly, but has not caused injury or damage to a person or object external to itself. It has been suggested that such a case should be excluded from the scope of any such régime since the injured party is given a sufficient remedy under the contract by which he acquired the product. The view may be taken, however, that a different result

should obtain where the defect causes damage both to the product itself and to something external to it, e.g., where defective wiring causes a fire which burns the product itself and other property. If damage to the product itself is always excluded from the scope of the régime, the result in the latter type of case would be that the liability for the defect in the product, and for external damage caused by it, would be subject to two different legal régimes. The desirability of this result may need consideration.

(d) *Financial loss*

57. Such loss can occur as a result of the types of damage previously noted, or independently. Examples of the first case would be where bodily or mental injury caused by the product results in medical expenses or loss of earnings, or where damage to tangible property caused by the product results in the incurring of repair costs. Examples of the second would be where a dealer selling a defective product suffers loss of custom, or where the defective product is itself a business asset which cannot be used and results in a loss of profits. One approach may be to exclude all cases of financial loss from the ambit of recovery. This may be justified by the argument that the magnitude of such loss can be very great, and that to impose liability for such loss on the producer is to impose on him an unfair burden. Another supporting argument might be that such loss is often speculative and hard to prove, and that to permit recovery will involve the courts in cases which are difficult to decide. However, these arguments may be met by the response that the imposition of an unfair burden can be prevented by appropriate rules of limitation on the quantum of recovery, and that difficulties in the establishment of facts are not unusual in litigation. A middle ground between allowing recovery in all cases of financial loss, and disallowing it in all cases, would be to allow recovery when financial loss results from any of the other types of injury. Determination of the existence and extent of loss is likely to be easier in such cases.

Relevant provisions in the Hague Convention and other texts

58. It may be noted that article 2 (b) of the Convention on the Law Applicable to Products Liability of the Hague Conference on Private International Law provides that

"For the purposes of this Convention . . .

"(b) The word 'damage' shall mean injury to the persons or damage to property as well as economic loss; however, damage to the product itself and the consequential economic loss shall be excluded unless associated with other damages."

59. Article 4 of the EEC preliminary draft directive concerning the approximation of the laws of member States on products liability:

"Damage shall not include the defective article. Contractual claims of the purchaser of the article shall remain unaffected. Compensation of non-recurring damage shall be excluded."

The explanatory notes to the article state that

"Liability for the defective article itself is excluded from the rules and remains a matter for the contractual relations between the parties. Such liability should continue to be governed by the law of purchase and sale. Financial loss suffered by the purchaser of a defective article through his having paid an excessive price can be compensated according to traditional rules."

The commentary on the article also states that the inclusion of non-pecuniary damage would unduly broaden the extent of liability.

60. Article 3 (1) of the Draft European Convention on Products Liability is as follows:

"The producer shall be liable to pay compensation for death or personal injuries caused by a defect in his product."

The explanatory report on the draft convention states that damage to goods was excluded from the scope of the convention both because of a lack of time in which to make a thorough study of the problems which might arise if the scope was widened to include such damage, and because certain experts felt that a system of strict liability could be more easily ratified by States if it was limited only to damage causing death or personal injuries.

(5) *The requirement that liability should be imposed only where the products are the subject of international trade*

61. Liability is, under the wording of General Assembly resolution 3108 (XXVIII), to be restricted to damage caused by products "intended for or involved in international sale or distribution". It is likely that this wording was not intended to be final and definitive, but only to lay down a guideline as to the possible ambit of liability. Nevertheless it is believed that an analysis of the wording as it stands may be helpful both towards indicating its exact meaning, and also in deciding on the advisability of any restriction or extension.

62. It is clear that goods may be intended for international sale or distribution without ever becoming actually involved in such sale or distribution, and vice versa. Further, the criteria of intention and involvement are clearly separate. One would depend on the state of mind of the producer or distributor prior to manufacture or sale, while the other would depend on the fact of sale or distribution outside the state of manufacture. It is clear, however, that the intended objective of the unification of liability is the removal of certain obstacles to international trade presently existing by reason of divergencies in national laws. This objective would not be advanced by unifying liability in respect of products merely intended for international trade, but not involved in it. It would appear, therefore, that what is envisaged is the creation of a special régime of liability for products which are actually the subject of international trade transactions. The result of such a course of action would be the existence of two régimes for products liability: that of unified liability where the products are the subject of an international

trade transaction, and that of national law in other cases.

63. In this context two matters may be usefully examined:

(a) The requirement that there be an international trade transaction.

(b) Difficulties created by this requirement.

(a) *The requirement that there be an international trade transaction*

64. There are two elements to the requirement that there be an international trade transaction: first, the identification of what marks out a trade transaction as "international"; and secondly, what is meant by a "trade transaction". Perhaps the most important international trade transaction, and the one specifically mentioned in the resolution, is the international sale. The United Nations Convention on the Limitation Period in the International Sale of Goods provides that "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" (art. 2 (a)). The criterion that, to make a sale international, the buyer and seller must have their places of business in different States, is also used in the revised Convention on the International Sale of Goods as it has been approved by the Working Group on International Sales at its first six sessions (art. 1 (1); see A/CN.9/100, annex 1). A question which would need consideration is whether this criterion is appropriate to all trade transactions, or whether other criteria have to be specified for other types of transactions. There are various types of transactions in goods which may be considered to be "trade transactions". In addition to the sale, the hire and pledge of goods may be considered to be a "trade transaction". However, there may be other transactions which do not fall neatly under specific heads, and the goods may relate to such transactions in various ways. In these cases the connexion between the transaction and the products sufficient to attract liability may require closer definition than the use of such general words as "the subject of" or "involved in" the transaction.

65. The term "international distribution" used in the resolution may be better regarded, not as a trade transaction, but as a state of affairs resulting from either trade or non-mercantile transactions. The question whether distribution which does not result from a trade transaction should attract liability has been considered in section (2) above.

(b) *Difficulties created by this requirement*

66. The difficulty created by this requirement is that products may be the subject of several successive trade transactions, only one of which may be an international trade transaction. This may be illustrated by the following example. A, the manufacturer, residing in State X, sells products to an exporter, B, in the same State. B sells them to a foreign importer C, residing in State Y. C sells them to D, a wholesaler resident in State Y, who sells them to a retailer E, also resident in the same State, who in turn sells them to a user F resident in State Y who is injured by the

products. The products were only involved in international trade at the stage of the sale from B to C. Should liability be imposed on A, and (assuming that liability is also to be imposed on persons in the chain of distribution) on B, C and D? One view may be that the fact that goods have been the subject of international trade at some point should be sufficient to attract liability. This view may not result in the imposition of liability contrary to the normal expectations of commercial circles if the persons on whom liability is imposed fall within a narrow category (e.g. the "manufacturer"). If, however, liability is also imposed on persons in the chain of distribution, the result would be the applicability of the uniform rules in the above example to C and D. This may be contrary to their reasonable expectations, since they were engaged in purely domestic transactions, and would only contemplate the application to these transactions of domestic law. It may be observed that neither the United Nations Convention on the Limitation Period in the International Sale of Goods, or the revised Convention on the International Sale of Goods as it has been approved by the Working Group on International Sales at its first six sessions⁴¹ would apply to the transactions between A and B, C and D, D and E, and E and F.

67. A possible response to this difficulty may be, in addition to the requirement that the products be the subject of an international trade transaction, to also impose one or more further preconditions to the imposition of liability which would make such imposition not unreasonable.

Such further preconditions may be:

(a) That the person sued knew, or could reasonably foresee, that the products would be, or had been, the subject of an international trade transaction.

(b) That the person sued and the person injured were resident in different States.

68. A more radical response to the difficulty may be the abandonment of the requirement that one element delimiting the scope of liability should be the involvement of the products in international trade. At present, whether or not the products in question are the subject of international trade, under any legal system the applicable law which would be chosen by a court to decide a question of products liability would be a national law. If a foreign element is involved in the case, the applicable national law would be chosen by the choice of law rules of the court. A unification of national laws on products liability would automatically result in a unification of laws applicable where the products were the subject of international trade. This approach would have the merit of simplicity in that it envisages only one legal régime for products liability, whether the products are the subject of domestic trade or international trade. However, in the light of differences of view which still exist in different States as to the desirable solutions to major issues involved (such as the basis of liability, and the kinds of damage for which compensation is to be recoverable), it may be thought that this approach is too ambitious.

(6) *Limitations on recovery of compensation*

69. The damage caused by a product can consist not only of immediate results, but of results of a lesser or greater degree of remoteness. These may be predictable consequences of a defect, or wholly unpredictable. From the point of view of the user who has suffered loss it may be argued that he should by the payment of compensation be placed in exactly the same position as if the incident causing damage had not occurred. This may be supported by the view that as between an innocent party (the user) and a blameworthy party (the producer) it is fair that all losses should fall on the latter. From the point of view of the producer, it may be argued that to impose liability in those terms would have a crippling effect on his enterprise. It may therefore be suggested, for instance, that fairness demands that his liability should be confined to consequences which are likely to fall within the particular risk he has created. Thus if his wrongful act in relation to the product has created a risk of personal injury, he should not be held liable if damage to property ensues. All legal systems have rules for drawing the limits at which the recovery of compensation is halted. To attain this objective, use is made of concepts such as causation, and "remoteness" of damage. The following are some of the ways in which they may be used.

70. (a) As the results of a wrongful act spread further and further away in time and sequence from the act itself, it may be possible to argue that a particular item of resulting damage was not "caused by" the wrongful act. This argument will become increasingly attractive as other forces (e.g., acts of other persons, natural forces) exert a concurrent influence on the results. Liability can in this way be limited. The theories of causation employed by different legal systems appear to diverge, and all appear to be complex, but they all seek the objective of containing liability within limits regarded as desirable.

(b) Another approach taken is to introduce an independent rule that damage which is caused cannot be the subject of compensation if it is too remote. This requires the statement of rules defining remoteness of damage. Here again different tests are used, and these also are often complex. A test that is often used is whether the damage was reasonably foreseeable by the defendant at the time of the wrongful act. Difficulties have been experienced with this test in certain situations, e.g., where a particular item of some damage of a particular kind (personal injury to the head) is foreseeable, and another unforeseeable item of damage of the same kind (injury to the leg) results; or where damage of a particular kind (personal injury) is foreseeable, and damage of another kind (damage to property) results; or where damage of a particular kind to one person is foreseeable, and damage of the same kind results to another.

71. A question which may need consideration is whether it is desirable that provisions should be formulated seeking to resolve these issues. It has been noted that the limits of recovery are based on considerations of policy as to which person should bear a particular item of loss, and views on such considerations can vary in different States. This reflection may

⁴¹ A/CN.9/100, annex 1 (reproduced in this volume, part two, I, 2).

lead to the conclusion that these matters may be left to be regulated by national law, since unification may not be practicable. Alternatively, it may be thought that a test based on reasonable foreseeability could gain wide acceptance.

72. The basis of liability adopted may also be relevant in deciding on the limits of recovery. Thus if a general rule of strict liability was adopted, it might be thought that fairness to the producer demands that the limits of recovery should be narrow, since he would be held liable in a larger number of cases than if the basis was negligence. Conversely, if a general rule of liability based on negligence was adopted, it might be thought that the limits of recovery might be wider.

73. The imposition of a monetary ceiling on recovery may also deserve consideration. Such a ceiling may lessen the attention which would be given to elements such as causation and remoteness. It would also enable producers to assess exactly the extent of potential liability, and this would facilitate the taking out of liability assurance.

Relevant provisions in the draft European convention and other texts

74. Article 5 of the EEC preliminary draft directive concerning the approximation of the laws of member States relating to products liability is as follows:

"The producers liability for payment of damages shall be limited to:

"... units of account in the case of physical damage;

"... units of account in other cases.

"Every loss shall be a separate ground of liability for payment of damages."

The explanatory notes to this article state that "Both the extent and duration of the producer's liability for payment of damages should be limited in order that it may be made calculable and thus insurable. . . . Since, in the field of consumer protection, adverse effects to health are more serious than pecuniary losses, liability for payment of damages in respect of physical damage should be fixed at a higher level than that for material damage."

75. The Draft European Convention on Products Liability leaves these questions to be decided by national law. It may be noted in this context that the Convention only imposes liability where a product causes death or personal injury.

(7) Defences which may be available to the person sought to be made liable

76. Under all national rules relating to delict (tort) a person sought to be made liable has available to him certain defences which exclude or reduce liability. While many such defences are common to most systems, the exact scope of the defence can vary with each system. It may be thought that any scheme of liability needed to specify such a set of defences. Justice to the producer seems to demand that they be admitted in many cases, and the interest in reaching uniformity of liability would seem to require that their nature and extent be indicated as clearly as possible.

77. The following defences may need consideration:

- (a) Assumption of risk;
- (b) Contributory negligence;
- (c) Negligence of a third person;
- (d) *Force majeure*.

(a) *Assumption of risk*

78. This defence arises in a situation where a person, with knowledge of a risk, nevertheless voluntarily decides to submit to it. Such a situation may arise in the field of products liability when a user of a product, after being informed of or having discovered a defect, voluntarily decides to use it, or continue to use it. The defence is admitted on the theory that in such circumstances the person who has created the risk is absolved from a duty to take care, or cannot be called a wrongdoer if damage occurred.

79. One view may be that this defence should be admissible. A practical justification of the defence is that in the circumstances in which it operates the person injured cannot fairly complain of the damage caused to him. Another view may be, however, that since one of the objects of the imposition of liability is to deter producers from falling below desired standards of conduct, action of the kind described above on the part of the person injured should not be a defence. Again, if the basis of liability is strict, it may be thought that to admit the defence would be to mitigate the strictness unduly.

(b) *Contributory, or comparative, negligence*

80. This defence arises when the negligence of the party injured is a contributory cause of the damage suffered. Where the basis of liability is negligence, the modern solution is to reduce the compensation payable to the party injured in proportion to his responsibility for his own loss. If the basis of liability is strict, the admissibility of the defence may be open to debate. One view is that the contributory negligence of the injured party may not displace some of the reasons which led to the imposition of such responsibility. Thus strict liability may be imposed in relation to products because the producer is best able to absorb and distribute the losses caused. This reason would be unaffected by the contributory negligence of the injured party. But another view may be that the fact that the injured party did not take reasonable care for his own safety is a valid reason for reducing the amount payable to such party, since such reduction would operate as an incentive for users and consumers to take due care, which in turn would lead to a reduction in the incidence of loss or damage.

(c) *Negligence of a third person*

81. Where the negligence of a third person has contributed to the damage concurrently with the act of the producer, there would appear to be no reason to exculpate the latter from liability. However, the question may arise as to whether he should be liable for the full damage caused, or whether it should be diminished to accord with the degree to which his act caused the damage.

(d) Force majeure

82. Where the alleged wrongful act has been the result of forces outside the control of the actor which he could not prevent by the exercise of reasonable care, under most legal systems there is no civil liability for such act. It is believed that there would be general agreement that this state of affairs should be a defence, although circumstances giving rise to its operation may be rare in the field of products liability. Express provision for such a defence may even be thought to be superfluous, since most legal systems would not regard and act compelled by *force majeure* as the effective cause of the damage.

Relevant provisions in the Draft European Convention

83. Articles 4 and 5 (2) of the draft European convention on products liability are as follows:

Art. 4 (1). "If the injured person or the person suffering damage has by his own fault contributed to the damage, the compensation may be reduced or disallowed having regard to all the circumstances."

Art. 4 (2). "The same shall apply if an employee of the injured person or of the person suffering damage has, in the scope of his employment, contributed to the damage by his fault."

Art. 5 (2). "The liability of a producer shall not be reduced when the damage is caused both by a defect in the product and by the act or omission of a third party."

84. The explanatory notes on article 4 state that the words "having regard to all the circumstances" in subparagraph 1 above were included to enable the judge to assess the relative importance of the fault in relation to the defect shown by the product.

(8) *The basis of liability*

85. The basis on which liability is to attach for damage caused by products is an important issue. Under most existing national laws liability in delict (tort) for such damage is either based on intentional wrongdoing, or on negligence, or is strict, i.e., arises independently of negligence or wrongful intention.⁴² All three forms of liability can coexist within the same legal system. In regard to contractual liability, under the common law system liability would arise on a breach of an express or implied contractual term relating to the product. Under many civil law systems, in addition to this form of liability, the sale of a product could result in liability falling on the seller on the basis of a guarantee against hidden defects. If the product contained a hidden defect, and the seller was unaware of it at the time of sale, he could be compelled to return the price against return of the product, and to reimburse the buyer for expenses occasioned by the sale. Alternatively he could be compelled to reduce the price. If he was aware of it, he would be liable in damages for losses sustained by the buyer. This system of contractual liability is designed to operate only as between parties in contractual relationship. Thus where

A, a manufacturer has sold a product containing a hidden defect to B, a wholesaler, who in turn sells to C, a retailer, who sells to D, the user, D could not sue A for breach of a contractual term as there is no contract between them.⁴³ Nor can he return the product to A and demand a return of the price as he never dealt with A. Since it is possible that liability need not be restricted to cases where the person sought to be made liable and the claimant are in a contractual relationship, it may be more useful to consider the suitability of the bases of liability in delict (tort).

(a) *Intentional wrongdoing*

86. Where a product is made or modified by a person with the intention of thereby causing damage to another, and damage consequently ensues, almost all legal systems would hold the person so acting liable. But this basis of liability may be regarded as relatively unimportant because such conduct would be extremely rare, and liability only on that basis would confer protection in very few instances.

(b) *Negligence*

87. A producer would be liable under almost all systems of national law on this basis if damage caused by a product was the result of negligent conduct on his part in relation to the product. Negligent conduct may be defined as conduct which falls below the standard to be expected of a reasonable man in the circumstances. Definition in these terms makes for flexibility, and allows various factors to be taken into account in fixing the standard, such as the available state of knowledge in relation to the product, the magnitude of possible harm from the product, and the behaviour to be normally expected of the user.

88. It is probably the case that liability for negligent conduct exists under most legal systems, although the limits of liability may vary. Even legal systems which impose strict liability appear to have concurrent liability based on negligence. Liability for negligent conduct in relation to products would merely be a specific application of this general principle of liability. The imposition of liability on this basis would therefore have the advantage that it would harmonize with existing legal rules and concepts. It has also been suggested that the standard of reasonable care strikes the right balance between the producer and the person injured in that it results in the loss caused by the producer's negligent conduct falling on him, and the loss falling on the party injured if the conduct was not negligent. This suggestion has been supported in the following ways. A person should not be held liable for his actions unless they fall below a standard recognized by the law as desirable. If his conduct does not fall below that standard, he is not blameworthy; and as between two persons, neither of whom are blameworthy, the loss should lie where it falls. In the special case where the manufacture of the product was the

⁴² The degree of strictness can vary with the defences permitted to the defendant, e.g., contributory negligence, assumption of risk of the person injured, or *force majeure*.

⁴³ Under certain legal systems, D may have a "direct action" against A (or indeed B or C), on the basis that each buyer who makes a subsale transfers with the goods any potential rights of action he may have against a third person. But in most legal systems there is no such action. Further a valid exemption clause will prevent the "direct action" lying against the party in whose favour such clause operates.

result of utilizing recent scientific or technological advance, it has also been argued that, if the loss fell on the manufacturer in the absence of negligence, he would be deterred from making valuable experiments and innovations in relation to his products. Making the loss fall on the party injured in such a case could be regarded as making him bear the legitimate cost of such experiments and innovations which will ultimately benefit the community.

89. Under most legal systems, the burden of proving negligence in the manufacture of the product lies on the injured party. This burden may be difficult to discharge, since he may not have evidence relating to the details of the manufacturing process. In response to this difficulty, some legal systems have imposed on manufacturers the burden of disproving negligence, where the injured party establishes that the defect causing damage was present when the product left the hands of the manufacturer. This solution has the merit of, in theory, not interfering with the well-established basis of liability for negligence, while at the same time preventing the imposition of an unfair burden of proof on the injured party.

(c) *Strict liability*

90. This may be described as liability imposed despite the absence of wrongful intent or negligence. The main arguments in favour of the imposition of such liability in this field appear to be the following:

- (i) It is suggested that the rules of liability based on negligence sometimes operate unfairly against the party injured when they require him to prove negligence. Where the process of manufacture is complex or distributed over a wide area, the person injured will often be unable to prove negligence even where it is present because he has no access to evidence relating to the manufacture.
- (ii) Many manufactured products are a source of danger to human life and safety, and it is felt that the public interest demands maximum protection for those likely to be injured. Strict liability would act as an incentive to the manufacturer to take the greatest possible care in the course of manufacture.
- (iii) The person who markets a product, by doing so, represents to the public that it is suitable and safe for use. By advertising it, he often attempts to strengthen this belief, and by selling it he makes a profit. When loss is caused through the use of the product, it may seem unfair to allow him to escape the payment of compensation by pleading that he was not negligent.
- (iv) In many cases the immediate supplier to the injured party will be held strictly liable for damage caused on the basis of the breach of an express or implied condition as to the fitness of the goods. This supplier can in turn hold his supplier liable on a similar basis and so on backwards up the chain of supply until the manufacturer is ultimately reached. This is an expensive and time-consuming

process, which can be obviated if the manufacturer is held strictly liable directly to the injured party. It may be noted, however, that it is not always the case that the last supplier or other persons anterior to the last supplier in the chain of supply, are strictly liable in contract. For the contracts entered into by those persons may contain clauses excluding such liability.

- (v) Where liability is based on negligence, the person injured alone bears the loss where injury is caused by a product in relation to which the manufacturer has not been negligent. The loss may well be of considerable magnitude, and one which that person can ill afford to bear. If in such cases the manufacturer is held strictly liable, he can insure against such liability, and add the cost of insurance to the cost of the product. By this means the costs of compensating injured parties are spread over the whole consumer public.
- (vi) It is sometimes suggested that the manufacturer or supplier rather than the injured party should bear the risk of loss caused without negligence because they are better equipped financially to stand the loss. But while this may be the case with large-scale manufacturers or suppliers, it may not be so with others.

91. All proponents of strict liability, however, do not appear to advocate that liability should be imposed merely by reason of the fact that damage has been caused by a product. Thus, in relation to the law of the United States one authority takes the view that strict liability should only be imposed on the seller where a product is sold "in a defective condition unreasonably dangerous to the user or consumer or to his property".⁴⁴ One reason for this additional requirement is that very few products can be so manufactured that they are not a source of danger under abnormal use. Another reason is that there are some products, such as vaccines, whose use is unavoidable in certain circumstances but which carry with them certain known dangers. It is intended by this formulation to restrict liability to the case of a product which is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge, common to the community, of its characteristics. Other conditions which are imposed by this authority are that the seller should be engaged in the business of selling the product, and that it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. It may be suggested however that the marketing of a product which is dangerous to the extent indicated may constitute negligence, and that on this formulation the two bases of liability may not be far apart. The difficulty of determining when a product is "unreasonably dangerous" may also be thought to introduce an undesirable degree of uncertainty.

⁴⁴ Section 402A, Restatement of the Law, Second, p. 347 (emphasis added).

92. It may be noted that strict liability, as does negligence, may present to the injured party the difficulty of proving which one in a line of persons handling the product was responsible for the act entailing liability (i.e. the act of marketing a defective product in an unreasonably dangerous condition). One suggestion in this connexion has been that the party injured should only bear the onus of proving the existence of a defect, and that the defect caused the loss, leaving it to the producer to prove that he was not responsible for the defect.

93. The previous account of negligence and strict liability has proceeded on the basis that one or the other basis alone is to apply to the totality of possible cases where damage is caused by a product. However, it has been suggested that fairer results may be achieved by distinguishing different types of cases where damage is caused by a product, and applying different bases of liability depending on the nature of the case. The types of case which are sought to be distinguished are the following:

- (i) Where the defect in a product which results in damage has occurred because of a design which is faulty by accepted standards existing at the date of design, e.g. brakes in an automobile which are badly designed.
- (ii) Where the defect which results in damage has occurred by reason of faulty production of a single article, the design being proper, e.g. where the brakes are properly designed, but inferior metal is used in their production in one car.
- (iii) Where the product conforms to existing standards of design and production, but has dangerous qualities, e.g. glue which is satisfactory as glue, but is highly inflammable.
- (iv) Where the product conforms to existing standards of design and production, and is sufficiently tested at the time of production, but where during use it proves defective and causes damage.

In regard to (i) above, it is suggested that negligence is an adequate basis of liability, since negligence in designing is not difficult to prove. In regard to (ii), negligence may not exist by reason of the fact that a certain percentage of error in quality control and inspection is inevitable. It is suggested that the loss caused by such error should fall on the manufacturer, and that this result can be achieved through strict liability. Further, even if there has been negligence in such a case, the evidence of it would exist within the manufacturer's factory and be inaccessible to the injured party. In regard to (iii), it is suggested that the relevant question is whether the manufacturer has given adequate warning of the dangerous qualities. If he has, it is suggested that he should not be liable. Failure to do so would constitute negligence, and this is thought to be an adequate basis for liability. In regard to (iv) it is suggested that different views are possible depending on the balance regarded as desirable in the protection of the interest involved. If liability is imposed only where there has been negligence, the protection of person and property from injury would give way at

a point (i.e. at the point where there is an absence of negligence by reason of conformity with existing standards of manufacture) to the interest in technical experiment and innovation and the progress which may thereby be achieved.

94. It is possible to envisage variations in the basis of liability depending on other factors. Thus it may be felt that some interests (such as personal safety) demand greater protection, and strict liability may be imposed only where products cause personal injury.

Relevant provisions in the Draft European Convention and other texts

95. It may be noted that article 1 of the EEC Preliminary Draft Directive concerning the approximation of the laws of member States relating to products liability states:

"The producer of an article manufactured by industrial methods or of an agricultural product shall be liable *even without fault* to any person who suffers damage as a result of defects in such article." (emphasis added)

96. Article 3 of the Draft European Convention on Products Liability states: "The producer shall be liable to pay compensation for death or personal injuries caused by a defect in his product." The explanatory report on the draft convention states that: "in view of the changes in doctrine and practice that had already become manifest in certain States, the Committee declared itself in favour of a system of 'strict' (i.e. proof of the producer's fault or absence of fault is not required) liability, to which, however, certain contours would be established."

(9) Relationship of a unified scheme of liability to existing rules of civil liability

97. A subject which may need consideration is the possible relationship of a hypothetical unified scheme of liability to the existing rules for the civil liability of producers. Products liability appears to be presently regulated by different national laws under the following categories:

- (a) Delict (tort)
- (b) Contract.

However, under some legal systems, liability is not imposed on a basis which is clearly identified as either contract or delict. It should also be noted that under most legal systems an action can be based alternatively in delict or contract between two parties in respect of the same act where the state of facts can justify an action on either basis. Under others, if the state of facts is sufficient to found an action in contract, the action in delict is excluded.

98. The relation between a unified scheme of liability and the existing law may take one of four possible forms:

- (a) It can entirely replace the existing law of delictual and contractual liability.
- (b) It can replace the law of delictual liability alone.
- (c) It can replace the law of contractual liability alone.

(d) It can coexist with existing liability under national law, leaving the latter undisturbed to the extent it does not derogate from the former.

99. Since the object of a unified scheme of liability is the elimination as far as possible of the diversities presently existing under different national laws, this would be realized to the greatest extent by the adoption of the course of action described in (a) above. In so far as this involves the replacement of both the law of delict and the law of contract, the merit of these courses of action can be discussed together. In so far as the replacement of the laws of delict is concerned, there appears to be no serious objection to this course. The liability to be imposed under the hypothetical scheme of liability would correspond to that existing under the law of delict in that its imposition would be largely independent of the will of the parties.

100. The replacement of contractual liability, however, may be thought to create difficulties. The nature of contractual obligations is largely determined by the agreement of parties. The nature and extent of liability may also be similarly determined. A possible view is that this large measure of freedom to determine the nature and extent of liability should be preserved in the area under discussion, since different situations may require the creation of different obligations and liabilities in different transactions. Thus a manufacturer whose quality control mechanism has broken down in respect of the production of a certain lot of goods may sell these with notice of that fact at a lower price with an express exemption clause exonerating him from liability for negligence. Again, under certain trading conditions a manufacturer may choose to assume a stricter liability than that imposed by the uniform rules. On this view, it may be suggested that where the liability of a producer is regulated by contract, such liability should not be disturbed. In effect, therefore, parties in contractual relationship would be free to derogate from the standards of conduct and degrees of liability set by the hypothetical scheme of liability.

101. Another view, however, may be that it would be desirable to enforce the degree of liability prescribed in such a scheme as a minimum standard irrespective of whether parties have agreed that a different degree should apply. On this view such liability would coexist with contractual liability, and the injured party could enforce the former if he chose to do so. Disclaimers seeking to reduce or eliminate that standard would be of no effect. This view could be supported by the argument that it would prevent producers, who are sometimes in a superior bargaining position in relation to users, from inserting contractual provisions which unfairly reduce their liability. A counter-argument to this would be that under many legal systems provisions of law exist which strike out clauses which are unconscionable, or contrary to good faith in that they unduly favour one party. It does not follow, therefore, that the unified scheme of liability does not apply means that unfair contractual provisions will always be enforced.

102. The relationship between the hypothetical scheme of liability and the existing law described in (d) above results in that scheme of liability establishing minimum standards, while national laws are free to

grant additional rights to the persons injured. If the minimum standards so established are fixed at the highest common factor of acceptance among States in relation to the issues involved, they would stand a good chance of wide acceptance. States wishing to confer additional consumer protection would be free to do so. The objection to this course of action may be that the achievement of the objectives of uniformity and simplicity sought to be achieved would to some extent be adversely affected. Producers and their insurers would continue to have to ascertain the national law of each State, which may be complex or unclear.

Relevant provisions in the Hague Convention and other texts

103. Article 1 of the Convention on the Law Applicable to Products Liability of the Hague Conference on Private International Law states:

"Where the property in, or the right to use, the product was transferred to the person suffering damage by the person claimed to be liable, the Convention shall not apply to their liability *inter se*".

Thus cases where the two parties are in a contractual relationship would be excluded from the scope of the Convention.

104. Article 1 of the EEC Preliminary Draft Directive concerning the approximation of the laws of member States relating to products liability is as follows:

"The producer of an article manufactured by industrial methods or of an agricultural product shall be liable even without fault to any person who suffers damage as a result of defects in such article."

The explanatory note to this article states that "the producer shall be liable to any injured party. This liability, which may be qualified as tortious, is given without any consideration of contractual relations which may exist between the manufacturer and the injured party." (emphasis added)

Article 8 states:

"Liability as defined in article 1 shall be mandatory. It may not be excluded or restricted by contract.

"Claims of the injured party against the producer or the seller based on other legal grounds shall remain unaffected."

The explanatory note to this article states that "In order to protect the consumer, whose position is relatively weak by comparison with that of the producer, article 8 provides that the liability defined in article 1 is binding, i.e. it may neither be excluded or restricted. . . . Paragraph 2 makes it clear that claims in respect of product liability do not exclude other claims. Where the injured party is able to enforce claims for damages pursuant to other individual national laws this should continue to be so."

105. Articles 11 and 11 *bis* of the Draft European Convention on Products Liability are as follows:

Article 11. "This Convention shall not affect any rights which a person suffering damage may have

according to the general rules of the law of contractual and extra-contractual liability."

Alternative 11 bis. Alternative 1. "No derogation by national law from the provisions of this Convention shall be allowed."

Alternative 2. "This Convention shall not prevent Contracting States from making rules more favourable to persons suffering damage."

Alternative 3. "Each Contracting State shall have the right to make rules more favourable to persons suffering damage, with regard to one or more limited classes of products."

It has been observed in the explanatory notes to the article that the object of this article is to make it clear that the Convention leaves undisturbed both contractual and extra-contractual rights available to an injured party under national law.⁴⁵

(10) *The period of limitation*

106. The imposition in the uniform rules of a limitation period after the expiry of which claims could not be brought against the producer would be necessary to prevent the bringing of state claims and to achieve finality in business affairs. The creation of a body of rules on this subject raises many difficult issues. Among these are the length of the limitation period, the point of time at which it commences, under what circumstances the running of time may be interrupted, under what circumstances the period may be extended, the consequences of the expiry of the period, and the method of its calculation. These and other relevant issues have been extensively discussed during the preparatory work for the United Nations Convention on the Limitation Period in the International Sale of Goods,⁴⁶ and the techniques adopted in that Convention may in many cases be appropriate for a scheme of products liability. However, decisions on certain issues (such as the length of the limitation period) will have to be made afresh in the new context.

Provisions in the Draft European Convention and other texts

107. Article 6 of the EEC Preliminary Draft Directive concerning the approximation of the laws of member States relating to products liability is as follows:

"Claims for damage must be brought within a reasonable period. This period shall commence when the article is first used.

"Notwithstanding such period, claims may no longer be brought after... years from the date on which the article is put into circulation by the producer."

The explanatory notes to this article state that "a rigid period could hardly do justice to the wide range of cases. The question of the period to be regarded as reasonable in a particular case should be left to the courts."

108. Articles 6 and 7 of the Draft European Convention on Products Liability are as follows:

Article 6. "Proceedings for the recovery of the damages shall be subject to a limitation period of three years from the day the claimant became aware or should reasonably have been aware of the damage, the defect and the identity of the producer."

Article 7. "The right to compensation under this Convention against a producer shall be extinguished if an action is not brought within ten years from the date on which the producer put into circulation the individual product which caused the damage."

PART III. SUGGESTIONS AS TO THE COMMISSION'S FUTURE COURSE OF ACTION

109. It would appear that, in deciding whether work on products liability should continue, the Commission should consider the possible impact on international trade of unified rules on liability. In addition, the Commission may also wish to consider the extent to which considerations relating to consumer protection should be taken into account in such further work.

(a) *Possible impact on international trade of a unification of the rules of liability*

110. As to the possible impact of a unification of liability on international trade, it may be noted that in the course of the preparatory work of the Commission of the European Communities towards the approximation of the laws of member States within the Common Market relating to products liability, it has been argued that differences in the extent of liability imposed on producers may adversely affect fair competition between them. It has been suggested, for instance, that if the loss caused to a consumer by a product is always transferred back to the producer through the imposition on him of strict liability, his position in relation to the costing of his products may have to be different from that of a producer who is only liable if he has been at fault. For the cost of the products of the former must be higher to absorb cases of liability which are not imposed on the latter. It has accordingly been argued that a unification of the basis of liability will result in an equalization of their respective competitive positions and that this in turn may lead to greater uniformity in the prices of products. It may be argued that the elimination of other legal differences in the extent of liability may have similar economic consequences. It does not appear that questions of this nature can be resolved on the basis of legal analysis.

(b) *Consumer protection*

111. The need for adequate consumer protection in the context of the increasing frequency of damage caused by products, and the increased potential for causing damage inherent in such products, has formed an element in the discussions on products liability both at a national and international level. The Commission may wish to consider whether this element is one which needs to be taken into account in future work.

(c) *Main issues of a legal nature*

112. If the Commission decided that work on this subject should be carried forward, various issues of a legal nature would have to be determined. These have

⁴⁵ Document EXP/Resp. Prod. 75 (2), para. 69.

⁴⁶ A/CONF.63/15.

already been set forth in part II above. The central issue involved would appear to be the delimitation of the scope of liability. This scope would depend, *inter alia*, on decisions taken with regard to the types of products in regard to which liability may be imposed, the classes of persons on whom, and in whose favour, liability may be imposed, the kinds of damage for which compensation may be recoverable, and the kind of transaction falling within the scope of liability. Such decisions must to some extent be based on considerations of policy.

(d) *Future work*

113. On the assumption that work in respect of products liability is to be carried forward, the Commission may wish to request the Secretariat to undertake further preparatory work designed to enable it to decide at a later stage whether unification of rules in respect of liability is desirable and feasible. Such preparatory work might relate to some or all of the issues referred to in paragraph 112 above, and also the extent to which different legal systems in fact reach broadly similar solutions to such issues.

VI. MULTINATIONAL ENTERPRISES

Report of the Secretary-General (A/CN.9/104)*

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GENERAL INTRODUCTION

1. 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 the 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".

2. In response to the above invitation by the General Assembly, the Commission, at its sixth session, requested the Secretary-General:

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

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

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

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

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

"3. To place his report before the Commission at a future session, with the timing of submission dependent on the time at which the replies to the questionnaire reach the Secretariat and the studies mentioned above are available, and to submit a progress report at the seventh session."¹

3. In implementation of this decision the following questionnaire was sent to Governments and interested international organizations:

"(1) In your country have problems arisen with respect to multinational enterprises for which a solution should be sought through the development of legal rules? If so, what is the nature of these problems?"²

"(2) What objectives should be sought through the development of legal rules?

"(3) Is a national law or regulation in force, or under consideration, in your country which is intended to promote those objectives? If so, what are the provisions of that law or regulation?"³

"(4) In your opinion should the objectives mentioned in your reply to question (2) be promoted through the development of international legal rules? If so, which of the following approaches should be used:

"A. A uniform law to be adopted by an international convention, or

¹ 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. 116 (UNCITRAL Yearbook, vol. IV: 1973, part one, II, A).

² In the questionnaire addressed to international organizations this question was worded as follows: "Has your organization become aware of problems with respect to multinational enterprises for which a solution should be sought through the development of legal rules? If so, what is the nature of these problems?"

³ In the questionnaire addressed to international organizations this question was omitted.

* 21 March 1975.

"B. Model rules that might be employed, or adopted, in national legislation without the obligation of uniformity, or

"C. Other possible approaches to the development of international legal rules?"

"(5) Do you have other information or suggestions bearing on the future course of action by the United Nations Commission on International Trade Law in this particular area?"

4. A progress report was submitted to the seventh session of the Commission.⁴

5. The present report is in three parts. Part I describes the studies and activities which have taken place within the United Nations system in respect of multinational enterprises. Part II contains an analysis of legal problems presented by multinational enterprises based on an analysis of the replies to the questionnaire received from Governments and interested organizations and on an analysis of studies within the United Nations system. Part III contains the conclusions of those responding to the questionnaire as to the approaches which might be taken in the development of rules in respect of multinational enterprises, and the role of UNCITRAL in that effort, and contains suggestions for future work.

I. STUDIES AND ACTIVITIES WITHIN THE UNITED NATIONS SYSTEM

6. A detailed report of the activities of the United Nations system closely related to the subject of multinational enterprises was recently prepared for the Economic and Social Council by the Department of Economic and Social Affairs of the United Nations Secretariat.⁵ That report shows that, with few exceptions, most of the previous studies within the United Nations system have focused on the economic, social or political implications of multinational enterprises rather than on legal problems which such enterprises may present.

7. The United Nations Conference on Trade and Development (UNCTAD) has launched a programme of work on transfer of technology which encompasses a study of the role of patents.⁶ UNCTAD has also set out a comprehensive work programme in the field of restrictive business practices.⁷ Work on tax treaties and tax problems has been carried out since 1968 by an expert group assisted by the Department of Economic and Social Affairs.⁸ The International Labour Organisation has launched a programme of studies about the role of multinational enterprises in areas of interest to the organization, such as employment, working conditions, labour relations, collective bargaining and development of human resources⁹ which may eventually lead to recommendations of a legal nature.

⁴ A/CN.9/90.

⁵ The impact of transnational corporations on the development process and on international relations; activities of the United Nations system closely related to the subject of transnational corporations: report of the Secretary-General, E/5592. This report will be made available at the eighth session of the Commission.

⁶ *Ibid.*, para. 19. This programme is a continuation of earlier activities of the Economic and Social Council.

⁷ *Ibid.*, para. 38.

⁸ *Ibid.*, paras. 20-22.

⁹ *Ibid.*, paras. 48-50.

8. The first comprehensive study of multinational enterprises by the United Nations was launched only recently as a result of the adoption of resolution 1721 (LIII) by the Economic and Social Council in 1972. The resolution requested the Secretary-General to appoint a group of eminent persons to study the impact of multinational enterprises on development and on international relations. The report of the Group of Eminent Persons,¹⁰ as well as the preparatory report of the Department of Economic and Social Affairs,¹¹ discussed briefly a number of legal problems which are presented by multinational enterprises.

9. In its recommendations the Group of Eminent Persons suggested that prime subjects for future action are the creation of a code of conduct which would be addressed both to multinational enterprises and to Governments, the harmonization of anti-trust policies, and the harmonization of taxation, including the rules on transfer pricing.¹² In addition, the Group "noted... the serious lack of both financial and non-financial information, in usable form, and the desirability of working out agreed international reporting standards in this connexion". It suggested the convening of an expert group on international accounting standards "to identify the information needed, determine how and in what form it should be collected, and decide how it could best be used by all concerned".¹³

10. In addition, the Group of Eminent Persons recommended that a subsidiary body of the Economic and Social Council be established as a permanent forum for the discussion of multinational enterprises and that an information centre be created. In response to these recommendations the Economic and Social Council created a Commission on Transnational Corporations¹⁴ and, subsidiary to it, an Information and Research Centre on Transnational Corporations.¹⁵

11. The Commission is charged, i.e., with

"Undertaking work which may assist the Economic and Social Council in evolving a set of recommendations which, taken together, would represent the basis for a code of conduct dealing with transnational corporations;

"Undertaking work which may assist the Economic and Social Council in considering possible arrangements or agreements on specific aspects relating to transnational corporations with a view to studying the feasibility of formulating a general agreement and, on the basis of a decision of the Council, to consolidating them into a general agreement at a future date."¹⁶

Under paragraph 7 of resolution 1913 (LVII), the Commission on Transnational Corporations is requested to submit to the Economic and Social Council at its sixtieth session (spring 1976):

¹⁰ The impact of multinational corporations on development and on international relations, E/5500/Rev.1, ST/ESA/6 (1974) (United Nations publication, Sales No. E.74.II.A.5) (hereinafter cited as Eminent Persons).

¹¹ Multinational Corporations in World Development, ST/ECA/190 (1973) (United Nations publication, Sales No. E.73.II.A.11) (hereinafter cited as Multinational Corporations).

¹² Eminent Persons, pp. 54-57.

¹³ *Ibid.*, p. 55.

¹⁴ Resolution 1913 (LVII) of 11 December 1974.

¹⁵ Resolution 1908 (LVII) of 2 August 1974.

¹⁶ Resolution 1913 (LVII), paras. 3 (e) and (f).

"A detailed draft programme of work on the full range of issues relating to transnational corporations, including a statement of its proposed priorities within the framework of the following guidelines: the development of a comprehensive information system; preliminary work with the objective of formulating a code of conduct; the undertaking of studies, especially case studies, on the political, economic and social impact of the operations and practices of transnational corporations which seem most urgent; and the definition of transnational corporations;...".

12. The functions of the Centre are: (a) to provide necessary support to the Commission and the Economic and Social Council on matters related to transnational corporations; (b) to develop a comprehensive information system by gathering, analysing and disseminating information; (c) to organize and co-ordinate, at the request of Governments, programmes of technical co-operation in matters related to transnational corporations; and (d) to conduct research on various political, legal, economic and social aspects relating to transnational corporations, including work which might be useful for the elaboration of a code of conduct and specific arrangements and agreements.

13. The Commission on Transnational Corporations held its first session from 17 to 28 March 1975 at which time it considered a draft programme of work for submission to the sixtieth session of the Economic and Social Council in 1976. The resolution by which the Commission was created provides that "the draft programme should be without prejudice to the work undertaken within the United Nations system in related fields".¹⁷

II. ANALYSIS OF LEGAL PROBLEMS PRESENTED BY MULTINATIONAL ENTERPRISES

14. Relatively few replies have been received to the questionnaire on legal problems presented by multinational enterprises.¹⁸ This, and the fact that a number of replies mention issues that are of non-legal character, may explain why no clear pattern of legal issues can be said to emerge from the survey of replies. Hence, the reference to such issues in the paragraphs that follow should not be understood as reflecting a consensus among respondents as to what should be the course of

action of the Commission in the area of multinational enterprises.

15. This report leaves aside issues, mentioned in several replies, that have no direct bearing on international trade law, such as social problems that may result from the operations of multinational enterprises, labour-management relations and environmental issues.

16. In order to present a more comprehensive analysis of legal issues, this report includes material from the report of the Group of Eminent Persons¹⁹ and the report by the Department of Economic and Social Affairs.²⁰

A. General comments

17. The replies of Governments and interested international organizations show a wide divergence in their attitude towards the extent to which problems have arisen with respect to multinational enterprises for which a solution should be sought through the development and harmonization of legal rules. Some replies suggest that the primary problems are economic, social and political and that there are few legal measures which could be taken at the level of the United Nations at the present time. These replies often refer to the other studies in progress in the United Nations system and suggest that UNCITRAL should await the completion of those studies before deciding on its course of action. Other replies suggest that it is important to proceed carefully so as not to affect adversely the beneficial aspects of the current patterns of international trade and investment. Still other replies, submitted largely by host States of the developing and developed world, suggest that foreign investment in general, and multinational enterprises in particular, cause certain economic, social and political problems, the solution for some of which should be sought through the development and harmonization of legal rules.

B. Problems raised by multinational enterprises

18. The replies indicate that many host countries see the multinational enterprise as a source of distortion of the local economy because of such factors as drains on the local capital market, the hiring of scarce trained personnel and the creation of new and sometimes inappropriate patterns of consumption. Moreover, it is believed that multinational enterprises are less responsive to local economic and social priorities than are local enterprises. It is also believed that the desire to maximize the profits of the entire enterprise measured on a world-wide basis and not to maximize either the profits, and therefore the taxes, or the contribution to economic development which any given component in the enterprise might make, increases the danger that a multinational enterprise will act in ways which are harmful to a host country.²¹ Many replies expressed the view that it was necessary to reduce this danger by appropriate State action.

19. Various replies suggested that appropriate State action might include such measures as requiring closer

¹⁷ *Ibid.*, para. 7.

¹⁸ At the time of writing this report, replies to the questionnaire had been received from the Governments of the following countries: Austria, Barbados, Belgium, Canada, Colombia, Costa Rica, Czechoslovakia, Dahomey, Denmark, Ecuador, Fiji, Finland, Germany (Federal Republic of), Indonesia, Italy, Luxembourg, Mexico, Netherlands, Nigeria, Norway, Qatar, Tunisia, United Kingdom, United States of America, and Zaire. Replies have also been received from the following United Nations organizations and agencies, and international and national organizations: United Nations Economic Commission for Europe, United Nations Economic Commission for Latin America, Food and Agriculture Organization of the United Nations, European Communities, Council for Mutual Economic Assistance, Council for Europe, Organization for Economic Co-operation and Development, Organization of American States, International Monetary Fund, Bank for International Settlements, African Development Bank, World Intellectual Property Organization, International Chamber of Commerce, International Maritime Committee, Institut du Droit International, International Union of Maritime Insurance, Intergovernmental Maritime Consultative Organization and American Arbitration Association.

¹⁹ Note 10 *supra*.

²⁰ Note 11 *supra*.

²¹ These concerns are discussed in somewhat greater detail in: Eminent Persons, pp. 34-36, and Multinational Corporations, pp. 43-48.

adherence to a national plan of economic development, limitations on the transfer of profits from the host country, stricter control of suspected evasions of monetary controls and of taxation, enactment and enforcement of stricter anti-trust rules, and a requirement of greater job security for local personnel.

20. However, it has been observed that no one State has jurisdiction over all the activities of a multinational enterprise,²² or even over all the activities of the enterprise which affect the economy of a given State. A decision whether or not to make further investments, the determination of hiring policies, the establishment of the price of supplies purchased from or sold to an affiliated company, all these may have been made in another country and be effectively free from control by the country most concerned.

21. Moreover, the fractionalization of jurisdiction may also mean that a given State has no means of acquiring from the parent company or from subsidiaries of the enterprise in other countries some of the information directly relevant to activities of the enterprise in that State. Furthermore, the information it does receive may have been prepared on the basis of accounting and statistical principles different from those generally in use in that State, thereby making the information difficult to analyse.

C. Multilateral actions to meet the problems

22. In order to reduce the consequences which follow from the fractionalization of jurisdiction and the inadequacy of information, many replies called for the harmonization of governmental policies towards multinational enterprises and increased co-operation between States, particularly in respect of the exchange of information. Among the specific measures recommended by the Group of Eminent Persons are the following:

(a) Home and host countries should explore, with the help of the appropriate United Nations body, the possibility of concluding an international agreement regulating the issue of extraterritoriality of jurisdiction.²³

(b) Home and host countries, preferably through an international agreement, should prohibit the market allocation of exports by multinational corporations, unless it can be shown that such allocations are necessary to secure other benefits to the countries concerned.²⁴

(c) Home and host countries should introduce provisions into bilateral tax treaties for the exchange of available information, and should consider the feasibility of an international agreement on the rules concerning transfer pricing for purposes of taxation.²⁵

(d) Bilateral tax treaties should be as uniform as possible so as to prepare the way for an international tax agreement. Developed countries should, without delay, embark on a policy of entering into such treaties with developing countries.²⁶

(e) An expert group on international accounting standards should be convened, under the auspices of

the Commission on Transnational Corporations, to develop international standards of disclosure, accounting and reporting.²⁷

III. EXISTING NATIONAL LEGISLATION

23. One item in the questionnaire addressed to Governments was whether a national law or regulation was in force or under consideration in the respondent country which was intended to promote solutions to the problems raised by multinational enterprises. From an analysis of the replies it appears that legislation specifically directed at multinational enterprises is in force or under consideration in only a few countries. In addition, a regional approach is being attempted by the States of the Andean Group.²⁸

24. A number of States have enacted investment laws, some of which govern all investment within the State, both domestic and foreign, others of which govern only foreign investment. An analysis of the investment laws of 26 States is to be found in the annex. A key factor in all these statutes is the requirement that the foreign investor divulge extensive information prior to authorization of the original investment and, frequently, during the course of performance.²⁹

25. Some States have enacted disinvestment laws by which the foreign investor is required to transfer all or a specified part of the ownership of the local subsidiary to local owners over a period of time.

26. Several countries have attempted to control the prices of goods and services which are transferred between related companies in different countries by enacting statutes authorizing extensive audits of the corporate books and prescribing accounting standards for the determination of the transfer price.

27. In addition, in every country there are many laws which, without being specifically directed at foreign investment or multinational enterprises, are significant for the operation of such enterprises. Such statutes include the laws governing the organization and structure of corporations, the transfer of shares, takeover bids, the organization of labour unions and the right of labour to information about corporate plans and operations or to participate in management decisions. In a broader sense all commercial and economic legislation is of significance to the operations of multinational enterprises.

28. One Government indicates in its reply that many of its laws have been drafted without consideration of the impact of foreign investment or of multinational enterprises and that these laws are at times inadequate for the new situation. The example given is that local subsidiaries of multinational enterprises are usually organized in the corporate form intended for family-owned and other closely held corporations. Consequently, there is no requirement for a yearly deposit of a balance-sheet and profit and loss statement in a public registry, as other corporations whose shares are more widely held are required to do. Therefore, this potential source of information about the performance of multinational enterprises in that State is not available.

²² Multinational corporations, pp. 43-44.

²³ Eminent Persons, p. 50.

²⁴ *Ibid.*, p. 85.

²⁵ *Ibid.*, p. 89.

²⁶ *Ibid.*, p. 92.

²⁷ *Ibid.*, p. 95.

²⁸ A short description of the measures taken by the Andean Group can be found in the annex, paras. 30-33.

²⁹ See annex, paras. 7-10, 20-22.

IV. CONCLUSIONS AND FUTURE WORK

A. *Approaches to the development of rules of law*

29. The responding Governments and interested organizations expressed a range of views whether one approach to the development of international legal rules in respect of multinational enterprises was preferable to any other approach. Some replies noted that it would be premature to adopt a specific position until the substance of the intended rules was better known. However, the most widely stated position is that the primary need is the development of appropriate rules of national law. There was also general agreement that those rules should be harmonized between the home and host countries.

30. Many of the replies suggested that if UNCITRAL were to undertake the development and harmonization of legal rules affecting multinational enterprises, it should be by means of model rules without obligation of uniformity so as to preserve maximum flexibility. Other replies suggested that uniform rules would be more favourable in principle, but some of them expressed a doubt whether uniformity was attainable in this area.

31. A number of replies suggest that international agreements are the best means of unifying aspects of certain subjects such as competition, taxation, conflict of laws, and disclosure of information.

B. *Role of UNCITRAL*

32. Many of the replies express doubt that UNCITRAL is an appropriate body to consider multinational enterprises. These replies point out that the problems are primarily economic, social and political rather than legal. The view is expressed that most of the legal problems which do exist are far removed from the subjects of commercial law with which UNCITRAL has, so far, primarily concerned itself.

33. Another view expressed is that UNCITRAL should not undertake any further work in respect of multinational enterprises until the studies now in progress in international organizations and the conclusions therefrom are available. Since the submission of the replies, the Commission on Transnational Corporations and the Information and Research Centre on Transnational Corporations have been created by the Economic and Social Council in conformity with the recommendations of the Group of Eminent Persons.³⁰ It would be consistent with the view expressed above to await the studies which these bodies will undertake.

34. Yet another view is that UNCITRAL might proceed to study the existing national rules in some area of the law as they pertain to multinational enterprises. The most common suggestions made are in respect of company law and the disclosure of information.

35. One particular suggestion was that it may be possible to arrive at a fair degree of uniformity in accounting. It is pointed out that the basis of accounting principles varies from jurisdiction to jurisdiction, a situation which makes it difficult for persons in any single jurisdiction to understand the significance of the

financial statements of some multinational enterprises or to compare their financial statements with those of local corporations in the same industry.

C. *Commission on Transnational Corporations*

36. Both the Commission on Transnational Corporations and the Information and Research Centre on Transnational Corporations may generate a more detailed analysis of the problems relating to multinational enterprises than is presently available and their conclusions may facilitate the identification of the fields in which the most effective work could be undertaken by UNCITRAL.

37. However, both the new Commission and the Research Centre will need a period of time before they are organized and able to reach any conclusions. In the meantime UNCITRAL could commence its own studies of any problems which appear susceptible to the development or harmonization of legal rules.

D. *Future work*

38. The Commission may wish to consider the following courses of action with respect to its work in the field of multinational enterprises:

(a) In view of the complex nature of the subject, involving not only legal issues but also issues of an economic, social and political character which may have a bearing on the formulation of legal rules, the Commission may wish to follow closely the work of the newly created Commission on Transnational Corporations and the studies of the Information and Research Centre on Transnational Corporations. The Commission may wish to defer a decision on its own programme of work in this field until the Commission on Transnational Corporations has identified specific legal issues that would be susceptible of action by the Commission. If the Commission were to take this course of action, it may wish to inform the Commission on Transnational Corporations of its decisions and of its readiness to consider favourably any request which the Commission on Transnational Corporations might address to it.

It may be noted that the above course of action was advocated by a number of representatives during the debate in the Sixth Committee of the General Assembly on the report of the Commission on the work of its seventh session. An identical suggestion was also made in the replies of several Governments to the questionnaire on multinational enterprises.³¹

(b) Among the suggestions made in respect of a programme of work of the Commission in the field of multinational enterprises, the following matters would seem to be relevant, directly or indirectly, in the context of international trade:

(i) The development of model rules which States could embody in their national legislation with a view to exercising a greater degree of control over the activities of multinational enterprises. In this respect, the Commission may wish to request the Secretariat to prepare a comparative study of legislative rules in company laws,

³⁰ Para. 10, *supra*.

³¹ See para. 33 *supra*.

investment laws, etc. that are designed to elicit information about such activities.

- (ii) The development of an information system. In this respect, several replies mentioned the need for standardized accounting procedures and statistical systems for specific data reporting. Some replies suggested that an international convention should be formulated on the exchange of information, on disclosure, and on consultation and conciliation.

39. Finally, it may be noted that the report of the Secretary-General on the draft programme of work on the full range of issues relating to transnational corporations submitted to the first session of the Commission

on Transnational Corporations envisages that research on political, legal, economic and social aspects of transnational corporations could be undertaken by the Information and Research Centre on Transnational Corporations "in collaboration, as appropriate, with other departments, organizations and agencies of the United Nations system or with the assistance of *ad hoc* expert bodies."²

ANNEX

Note on investment laws

[The annex is not reproduced in the present volume]

² E/C.10/2, para. 16.

VII. TRAINING AND ASSISTANCE

Note by the Secretary-General on training and assistance in the field of international trade law (A/CN.9/107)*

I. THE COMMISSION'S DECISION AND ACTION IN THE GENERAL ASSEMBLY

1. The United Nations Commission on International Trade Law (UNCITRAL) adopted at its sixth session the following decision on the subject of training and assistance:

"The United Nations Commission on International Trade Law

1. *Expresses its appreciation* to those Governments which have made voluntary contributions for the implementation of its programme of training and assistance in the field of international trade law;

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

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

4. *Requests the Secretary-General:*

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

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

(c) To explore the possibility of the United Nations Institute for Training and Research arranging seminars in developing countries on international trade law."¹

2. After considering the report of the Commission on the work of its sixth session, the Sixth Committee reported to the General Assembly that representatives who spoke on the subject "particularly welcomed the request for the organization of an international symposium on the role of universities and research centres in that field [of international trade law] 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."²

3. On the recommendation of the Sixth Committee, the General Assembly adopted resolution 3108 (XXVIII) in which the General Assembly stated, *inter alia*, that it:

"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;

"...

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

"...

"(c) 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;"

4. At its seventh session the Commission had before it a note by the Secretary-General (A/CN.9/92), setting forth the steps taken to implement the decisions of the Commission at its sixth session concerning training and assistance in the field of international trade law. Paragraphs 9-19 and the annex to document A/CN.9/92 contained an outline of the plans made by the secretariat of the Commission for the holding of an international symposium on the teaching of international trade law pursuant to a decision of the Commission taken at its sixth session,³ together with a report on the voluntary contributions pledged by Governments in response to a request by the Secretary-General to cover the cost of travel and subsistence of participants from developing countries. In the Commission, "there was general agreement with the plans

² Report of the Sixth Committee on the 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, Annexes*, agenda item 92, document A/9408, para. 39 (UNCITRAL Yearbook, vol. V: 1974, part one, I, A).

³ See para. 1 above.

* 27 March 1975.

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. 107) (UNCITRAL Yearbook, vol. IV: 1973, part one, II, A).

for the symposium as proposed in the note by the Secretary-General.⁴

5. The Sixth Committee, after considering the report of the Commission on the work of its seventh session, reported the following to the General Assembly:

"All representatives who spoke on the subject stressed the importance of the Commission's programme of training and assistance in the field of international trade law. They particularly welcomed the Commission's decision to organize a symposium on the teaching of international trade law, which would be held at Geneva in April 1975, in connexion with the Commission's eighth session.

"Several representatives expressed their appreciation to those Governments that had pledged voluntary contributions to meet the travel and subsistence expenses of participants from developing countries in the symposium, and expressed the hope that further voluntary contributions would be forthcoming.

"Several representatives expressed their gratitude to the Governments that had offered scholarships to young lawyers and government officials from developing countries for the study of or practical training in international trade law."⁵

II. IMPLEMENTATION OF THE COMMISSION'S DECISIONS

Internships for lawyers and government officials from developing countries

6. Based on a suggestion made at the fifth session of the Commission, the Secretary-General, by a note verbale, urged the Governments of developed countries to ascertain whether commercial and financial institutions within their respective countries would be willing to receive internes from developing countries.⁶

7. In 1974 the Creditanstalt-Bankverein, the largest commercial bank in Austria, awarded two fellowships enabling the recipients to spend six months in the bank's legal office as internes.⁷ These fellowships were awarded to Mr. Walid Ibrahim Al-Shaikh Ahmed (Iraq) and to Mr. Raul Plata Cepeda (Colombia).

8. The Creditanstalt-Bankverein will consider the possible continuation of the programme only after the present fellowship holders have completed their internships, in view of the difficulty of locating suitable candidates from developing countries who possess a working knowledge of the German language.

9. In 1974 the Government of Belgium awarded two fellowships for academic and practical training of six months' duration, organized jointly by the Govern-

ment and the University of Louvain.⁸ These fellowships were awarded to Miss Pétronille Ramilihaingoarinavana (Madagascar) and to Mr. Jorge Alberto Huerta Vazquez (Mexico).

10. Applications for two similar Belgian fellowships in 1975 have been received by the Secretariat and forwarded to the Government of Belgium for consideration, in accordance with the procedure agreed upon when these fellowships were first awarded in 1974.

11. During the past year, two internes received training at the International Trade Law Branch of the United Nations Office of Legal Affairs at New York, one under the United Nations Office of Public Information Interne Programme and the other under the Cornell University/Institute for World Order Fellowship Programme.

Symposium on the role of universities and research centres with respect to international trade law

12. It may be recalled that at its sixth session the Commission decided to request the Secretary-General to organize, in connexion with the eighth session of the Commission in Geneva, 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 to cover the cost of travel and subsistence of participants from developing countries.⁹

13. Voluntary contributions for this purpose were received from the following Governments, in the amounts indicated: Austria, \$US 1,500 [pledged]; (Federal Republic of) Germany, \$US 10,000; Norway, \$US 8,000; Sweden, \$US 1,157.

14. The number of applications for the limited number of fellowships for participants in the symposium from developing countries, financed by the voluntary contributions from Governments noted at paragraph 13, greatly exceeded the funds available. For this reason the Secretariat arranged for the establishment of a selection committee which was given the task of examining the completed applications received within a specified period of time and of awarding the fellowships.

15. At its meeting on 20 February 1975, the Selection Committee awarded fellowships, covering the costs of travel and subsistence, to the following participants in the symposium:

Dr. T. I. Cabezas Castillo (Ecuador), Professor of Commercial Law, Catholic University of Quito, Ecuador; Mr. M. K. Fazelly (Afghanistan), Professor of Law, Kabul University, Afghanistan; Mr. S. Gabi (Papua New Guinea), Tutor in Law, University of Papua New Guinea, Port Moresby; Miss M. I. Jalles (Portugal), Assistant, Faculty of Law, University of Coimbra, Portugal; Dr. O. K. Mutungi (Kenya), Senior Lecturer and Acting Dean, Faculty of Law, University of Nairobi, Kenya; Mr. W. D. Nabudere (Tanzania), Senior Lecturer in Law, University of Dar-es-Salaam, Tanzania; Mr. A. J. Mar-

⁴ Report of the United Nations Commission on International Trade Law on the work of its seventh session (1974), *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 17 (A/9617)*, para. 68 (UNCITRAL Yearbook, vol. V: 1974, part one, II, A).

⁵ Report of the Sixth Committee on the report of the United Nations Commission on International Trade Law on the work of its seventh session (1974), document A/9920, paras. 30-32 (reproduced in this volume, part one, I, B).

⁶ The initial responses of Governments of developed countries are described in A/CN.9/92, paras. 4-8.

⁷ For particulars concerning the two Austrian fellowships, see *ibid.* at para. 5.

⁸ For particulars concerning the two Belgian fellowships offered in 1974, see *ibid.* at para. 6; however, the monthly stipend paid to the fellow was increased from 10,000 to 14,000 Belgian francs.

⁹ See para. 1 above.

ques Neto (Brazil), Legal Assistant, Chamber of Commerce of Bahia, Brazil; Mr. P. Pillai (Singapore), Lecturer in Law, University of Singapore; Mr. M. Quinones (Guatemala), Dean, Faculty of Law, Rafael Landivar University, Guatemala City; Mr. M. Seing-Jimenez (Costa Rica), Professor of Commercial Law, University of Costa Rica; Dr. M. J. Smart (Sierra Leone), Senior Lecturer in Law, Fourah Bay College, University of Sierra Leone; Mr. F. Ssempebwa (Uganda), Senior Lecturer in Law, Makerere University, Kampala, Uganda; Mr. V. R. Sumulong (Philippines), Graduate Student, College of Law, University of the Philippines, Quezon City.

16. Invitations to attend and participate in the symposium were extended to a number of other qualified persons from both developing and developed countries without, however, any financial assistance being provided by the United Nations to facilitate their participation.

17. An outline of the scheduled programme of the symposium may be found in document A/CN.9/VIII/CRP.2.

VIII. 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.9/106)*

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), at the sixth session in 1973 (A/CN.9/82), and at the seventh session in 1974 (A/CN.9/94 and Add.1-2). The present report, prepared for the eighth session (1975), 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)

General conditions of sale, standard contracts and standard trade terms

(a) *ECE General Conditions of Sale, established before 1970*

3. At its sixth session in 1973 the Group of Experts on International Contract Practices in Industry was

informed of the decision taken by UNCITRAL to concentrate its work on the study of uniform general conditions and to defer final action on the promotion of the general conditions of sale drawn up under the auspices of ECE.

4. In the course of the discussion in the Group of Experts the view was expressed that, while the preparation of uniform general conditions might certainly be useful, such conditions serve a different purpose from that of the ECE general conditions, which are adapted to the requirements of special products or groups of products, e.g. plant and machinery. It was therefore decided that an attempt should be made to promote the use of the general conditions in regions other than Europe. It was suggested that this could be carried out in stages, beginning in Asia and the Far East where the UNCITRAL investigation had indicated that there was an interest in certain States. The Executive Secretary of ECE was asked to draw the attention of the Executive Secretary of the Economic and Social Commission for Asia and the Pacific (ESCAP) to this problem. The Executive Secretaries of the other regional commissions have also been informed about the views expressed by the Group of Experts and will be kept continuously informed about the action taken in other regions.

5. Furthermore, the ECE Group of Experts has been informed that the Asian-African Legal Consultative Committee is reviewing the ECE General Conditions with a view to a later discussion and comparison of all relevant texts at a joint meeting convened by the Asian-African Legal Committee, in which experts from the ECE region would participate, to be held late in 1975 or early in 1976.

Documentation:

Report of the Group of Experts on International Contract Practices in Industry on the sixth session, TRADE/GE.1/25.

Idem, report on the seventh session, TRADE/GE.1/27.

Measures to make the ECE General Conditions in the 188/574 series better known and more widely accepted; note by the secretariat, TRADE/GE.1/R.7.

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).

* 1 April 1975.

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 at the fourth UNCITRAL session (A/CN.9/59), the fifth session (A/CN.9/71), the sixth session (A/CN.9/82; UNCITRAL Yearbook, vol. IV: 1973, part two, II, V) and the seventh session (A/CN.9/94 and Add.1-2; UNCITRAL Yearbook, vol. V: 1974, part two, II, V) and in the following: *Digest of legal activities of international organizations and other international institutions*, published by the International Institute 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.

(b) *ECE General Conditions of Sale, established after 1970 (fruit and vegetables)*

6. UNCITRAL has been kept regularly informed about progress in the work on the general conditions of sale for international dealings in certain fruits and vegetables, and the rules of survey (valuation) pertaining thereto, that has been undertaken by the Group of Experts on International Trade Practices relating to Agricultural Products. Seven different texts have now been agreed since the work started in 1969 and have been put at the disposal of European traders and trade organizations dealing in the relevant products. They are as follows:

General Conditions for International Dealings in Fresh Fruit and Vegetables AGRI/WP.1/GE.7/35

Rules of Survey (Valuation) in Fresh Fruit and Vegetables AGRI/WP.1/GE.7/35/Add.1

Special Provisions Applicable to Citrus Fruit AGRI/WP.1/GE.7/35/Add.2

General Conditions for International Dealing in Potatoes AGRI/WP.1/GE.7/42

Rules of Valuation for Potatoes AGRI/WP.1/GE.7/42/Add.1

General Conditions for International Dealings in Dry Fruit (Shelled and Unshelled) AGRI/WP.1/GE.7/53

Rules of Survey for Dry and Dried Fruit AGRI/WP.1/GE.7/53/Add.1.

7. The Group of Experts is presently working on draft United Nations/ECE arbitration rules for international dealings in the products mentioned above. At a meeting in 1976 the seven texts that have been agreed will be studied with a view to harmonizing certain parts that are common to all of them.

(c) *Guide for drawing up contracts on industrial co-operation*

8. In 1974 the Group of Experts on International Contract Practices in Industry continued its work on a draft guide for drawing up contracts on industrial co-operation.

(d) *Standard trade terms*

9. After consultations with the International Chamber of Commerce the ECE Working Party on Facilitation of International Trade Procedures⁴ adopted a Recommendation in October 1974 on standard abbreviations of "INCOTERMS 1953" to be used temporarily also for coding purposes (document TRADE/WP.4/INF.34).

International commercial arbitration

10. See paragraph 7 above.

Projects in related areas of international trade law

11. The Working Party on Facilitation of International Trade Procedures also agreed on a questionnaire, sent to ECE Governments in January 1975, on

⁴ The Working Party is a subsidiary body of the Committee on the Development of Trade which is a principal subsidiary body of the Commission.

signatures in external trade documents and transmission or production of signatures by automated means (document TRADE/WP.4/GE.2/R.28). On the basis of the replies received the Working Party's Group of Experts on Data Requirements and Documentation will initiate work on the item of the Working Party's work programme entitled: "Purpose and modalities of signature in international trade documents".

12. Many international governmental and non-governmental organizations participate in the work of the Working Party and its two groups of experts. At its third session in October 1974 the following international bodies were represented:

Inter-Governmental Maritime Consultative Organization (IMCO), General Agreement on Tariffs and Trade (GATT), Central Office for International Railway Transport (OCTI), International Chamber of Commerce (ICC), International Air Transport Association (IATA), International Organization for Standardization (ISO), International Union of Railways (UIC), International Chamber of Shipping (ICS), International Federation of Forwarding Agents Associations (FIATA). Staff officials of the Council for Mutual Economic Assistance (CMEA), European Communities (EC) and the European Free Trade Association (EFTA) also took part at the invitation of the secretariat.

The method of "Reference to standards"

13. The ECE secretariat also draws UNCITRAL's attention to a recommendation which does not relate directly to a project of international trade law, but is a new method of harmonizing certain parts of national legislation. This is the method of making reference in national regulations to standards, the text of which has been agreed multilaterally, i.e. international standards adopted by governmental or non-governmental international organizations. The recommendation was adopted by the Third Meeting of Government Officials Responsible for Standardization Policies in June 1974 (document ECE/STAND/14, annex II). The fourth meeting is expected to take place in 1976. A Group of Experts on Standardization Policies prepares the meetings at sessions held once or twice a year.

14. The method of "reference to standards" has been defined as: "a method of drafting a regulation in such a way that a detailed statement of technical specifications is replaced in the text by referring to one or more standards". The term "regulation" used in the present context means a binding document which contains legislative, regulatory or administrative rules and which is adopted and published by an authority legally vested with the necessary power".

B. UNITED NATIONS ECONOMIC COMMISSION FOR LATIN AMERICA (ECLA)

International land transport in South America

15. The Economic Commission for Latin America has recently completed a project undertaken jointly with the Institute for Latin American Integration (INTAL) of the Interamerican Development Bank to analyse the problems and possibilities of establishing regular and efficient land transport services between the southern

Andean countries (Bolivia, Chile and Peru) and the River Plate countries (Argentina, Brazil, Paraguay, and Uruguay). Special attention was given to legal requirements and administrative procedures which affect railway and highway cargo movements between the two subregions, including those applied by transit countries. The project report includes an analysis of the two multinational highway transport conventions in South America: that applied to transport among Argentina, Brazil, Chile, Paraguay, and Uruguay and that embodied in Decision 56 of the Commission of the Agreement of Cartagena for application among Bolivia, Chile, Colombia, Ecuador, Peru, and Venezuela.

16. The preliminary version of the report of the joint project was published in September 1974 with the title, *Servicios de transporte terrestre internacional en los corredores Lima-Buenos Aires y Lima-Sao Paulo* (E/CN.12/L.107).

17. As a complement to its work on the joint project, ECLA has collaborated closely with the Latin American Railways Association (ALAF) on the preparation of a draft convention for multinational railway transport in South America which should be finalized during 1975.

18. ECLA is presently beginning work on a new project, similar to that carried out in collaboration with INTAL, which would analyse land transport problems in the Andean corridor from Chile to Venezuela.

International intermodal transport

19. The Economic Commission for Latin America has been active in advising the Latin American countries on the preparation of a Convention on International Intermodal Transport. The Commission has carried out a number of interrelated activities, including attending national and subregional seminars and meetings affecting the majority of Latin American countries, providing documentation and advice to the national intersectorial working groups on international intermodal transport, soliciting and publishing articles on specific technical aspects of the problems by Latin American experts in commercial and transport law. These activities have been set out by the Latin American Group of the Intergovernmental Preparatory Group on a Convention on International Intermodal Transport (Geneva, October 1973 and November, 1974), and by the First Meeting of Latin American Governments on the preparation of a Convention on International Intermodal Transport (Mar del Plata, Argentina, October 1974). At the present time, the focus of attention of the region is on the liability and insurance aspects of intermodal transport and on the preparation of a standardized intermodal document consistent in format with international norms and in content with the social and economic objectives of the region. A second meeting of Latin American Governments will be held to consider the results of the work of the Commission on these subjects and to prepare more definite proposals regarding the Convention.

The pertinent documents prepared by the Commission include the following:

Economic and institutional implications of the new transport technologies in Latin America, E/CEPAL/L.113, 17 September 1974

Institutional aspects of international intermodal transport, E/CEPAL/L.111, 17 September 1974

Liability and insurance in international intermodal transport, E/CEPAL/L.112, 17 September 1974

Documentation forms relevant to international intermodal transport, E/CEPAL/L.114, 4 October 1974

Intermodal transport in the Caribbean region, 1973, ECLA/POS 74/75, 27 May 1974

Informe del Relator, Reunion regional de expertos en seguros de transporte (Mexico, 28-31 January 1975).

Transnational enterprises

20. The ECLA secretariat has initiated a study on transnational enterprises in some Latin American industries (bauxite, bananas and manufactures). This study will be carried out in a number of countries representative of the region with the co-operation of official bodies and will deal with the subsidiaries of transnational enterprises. Its main object will be to assess the impact of the activities of such enterprises on the economic development of the countries concerned, with particular reference to effects of major importance for the policies of Latin American countries, such as effects on employment, labour productivity, consumption, distribution of income, utilization of local resources and balance of trade. Working assumptions and methods have been formulated for this study, which for certain countries is to be completed in the course of 1975 so as to enable the first report to be submitted by the end of this year.

21. The ECLA secretariat is also preparing a preliminary report on the activities of transnational enterprises in Latin American manufacturing industries during the 1960s; the report will deal with principal investor and beneficiary countries, distribution of capital by sector and other important aspects.

C. INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO)

Revision of the Warsaw Convention of 1929 as amended by the Hague Protocol of 1955: documentation; carrier's liability

22. The early stages of ICAO 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, para. 6).*

23. The Legal Committee of ICAO, at its 21st session held at Montreal 3-22 October 1974, approved draft articles on documentation related to cargo and to the system of the carrier's liability (document 9122; LC/172). The Council of ICAO decided to convene a diplomatic conference, to be held at Montreal next September, to consider these draft articles with a view towards adoption of a further protocol to the Warsaw Convention of 1929.

* UNCITRAL Yearbook, vol. IV; 1973, part one, II, B.

D. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD)

Activities in the field of international shipping legislation

(a) *International intermodal transport*

24. The 58-member Intergovernmental Preparatory Group on a Convention on International Intermodal Transport held its second session at the Palais des Nations, Geneva, from 11 to 24 November 1974.

25. The Intergovernmental Preparatory Group was established by the Trade and Development Board on 10 May 1973 in Board decision 96 (XII), in response to the request by the Economic and Social Council, paragraph 2 of its resolution 1734 (LIV) of 10 January 1973.

26. During the first session of the Intergovernmental Preparatory Group held in Geneva from 29 October to 2 November 1973, the UNCTAD secretariat was requested to prepare reports on certain aspects of international intermodal transport, namely: institutional aspects; documentary; insurance and liability; customs; the scope of application of the rules on international intermodal transport; and other related legal aspects. The reports are contained in documents TD/B/AC.15/7 and TD/B/AC.15/7/Add.1-7; TD/B/AC.15/L.9 and TD/B/AC.15/L.11.

27. These reports were discussed at the second session and it was decided that further in-depth studies by the UNCTAD secretariat on the technical, economic, legal and institutional implications of intermodal transport operations were necessary before the Group could adopt firm decisions on the issues before them. It was contemplated that in some areas drafting might commence at the third session, and that a fourth session in the latter part of 1976 would be required (document TD/B/533 dated 31 December 1974 contains the report of the second session of the Group).

(b) *Charter-parties*

28. The Working Group on International Shipping Legislation held its fourth session at the Palais des Nations, Geneva, from 27 January to 7 February 1975. For its discussion, the Working Group had before it the UNCTAD report entitled "Charter-parties" (TD/B/C.4/ISL/13).

29. The main discussion by the Working Group focused on the UNCTAD secretariat recommendations: (a) that with respect to the most important clauses in charter-parties a review should be made with a view to standardization, harmonization and improvement; (b) that the basic responsibility of the carrier under a charter-party to provide a seaworthy ship, his responsibility for loss, damage or delay of goods should be subject to the same international mandatory legislation as was applicable to liner trade carriers.

30. The Working Group felt that the task of identification and selection of clauses for standardization, harmonization or improvement required further study. It therefore considered that if it were to make significant progress on charter-parties within the framework of its programme of work, it would have to seek further

assistance from the UNCTAD secretariat. The Working Group requested the UNCTAD secretariat to carry out two major studies: (a) a comparative analysis of clauses based on three main time charter contracts and (b) a similar comparative analysis of clauses in voyage charter contracts.

31. Based on these studies the UNCTAD secretariat would prepare and submit additional material which would assist the Working Group to identify which of the main clauses on time and voyage charter-parties are susceptible to standardization, harmonization and improvement and to select areas in chartering activities that may be suitable for international legislative action.

(c) *Co-operation with UNCITRAL*

32. Members of the UNCTAD Shipping Legislation Section assisted the UNCITRAL secretariat in servicing the seventh session of the UNCITRAL Working Group on International Legislation on Shipping.

33. The Chief of the UNCTAD Shipping Legislation Section attended the seventh and eighth sessions of the UNCITRAL Working Group on International Legislation on Shipping.

(d) *Attendance at conferences*

34. The Lebanese National Committee of the International Chamber of Commerce invited a member of the UNCTAD Shipping Branch to participate in a round table discussion on transport by containers and combined transport. The subject of combined transport, sometimes referred to as intermodal transport, is of interest to UNCTAD since it is under the auspices of UNCTAD that the convention on international intermodal transport is being elaborated.

(e) *Technical assistance*

35. The UNCTAD secretariat, as part of its programme of technical assistance and in co-operation with other bodies in the United Nations systems, participated in various programmes to assist developing countries in legal matters connected with maritime transport.

E. UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION (UNIDO)

Multinational enterprises

36. UNIDO initiated at the end of 1974, with the help of consultants, a study entitled "The evaluation of multinational projects". The objective of this study is to investigate methods for measuring the distribution of costs and benefits of industries or groups of industries established for regional co-operation purposes.

Contract planning

37. UNIDO published in 1974 a manual entitled "Contract planning and organization" (United Nations publication, Sales No. E.74.II.B.4). UNIDO is currently working on the preparation of "Guidelines for the formulation of contractual agreements for industrial projects".

F. INTERNATIONAL MONETARY FUND (IMF)

International negotiable instruments

38. Members of the staff of the Fund have been participating in the UNCITRAL project to develop a negotiable instrument to be governed by uniform rules for use in international transactions.

39. A preliminary draft uniform law on international bills of exchange (A/CN.9/67) was prepared and submitted to the fifth UNCITRAL session. Thereafter, it was revised to include international promissory notes (A/CN.9/WG.IV/WP.2) and, pursuant to the request of UNCITRAL, was submitted to the Working Group on International Negotiable Instruments for the preparation of a final draft.

Fund staff members have attended meetings held under UNCITRAL auspices concerned with the preparation of questionnaires, the analysis of responses, and the consideration and drafting of provisions of the draft uniform law. Members of the Fund's staff will continue to assist in the preparation by UNCITRAL of a final draft uniform law on international bills of exchange and promissory notes.

G. WORLD BANK (INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT-IBRD)

Procurement training courses

40. In the past few years the International Bank for Reconstruction and Development has taken an active interest in procurement training courses and the curricula and contents thereof for officials in developing countries.

II. INTERGOVERNMENTAL ORGANIZATIONS

A. ASIAN DEVELOPMENT BANK

Credit and security research project

41. For the past four years, the Asian Development Bank has been associated with the Law Association for Asia and the Western Pacific (LAWASIA) in 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.

B. BANK FOR INTERNATIONAL SETTLEMENTS

Co-operation with UNCITRAL

42. Through its Legal Advisers, the Bank for International Settlements has participated in various consultative meetings that have been held in connexion with the work on a draft uniform law on international bills of exchange and promissory notes undertaken by the UNCITRAL Working Group on Negotiable Instruments.

43. The Bank for International Settlements has participated in the preliminary work undertaken by UNCITRAL with regard to multinational enterprises. The Bank is also following closely the work of UNCITRAL and other developments in the field of international commercial arbitration.

C. COUNCIL OF EUROPE

Recognition and enforcement of foreign judgements in private and commercial matters

44. The text of a practical guide on this subject has been finalized and is to be published in July 1975.

Liability of producers

45. At its meeting in March 1975, the Committee of Experts was to draw up a draft Convention on civil liability for products. The draft convention is then to be submitted to Governments and to the Legal Affairs Committee of the Consultative Assembly for comments, before being transmitted to the European Committee on Legal Co-operation and the Committee of Ministers for final approval and opening for signature.

Penalty clauses in civil law

46. The Committee of Ministers has set up a Committee of Experts to study the various aspects of the subject and to draw up an international instrument which might take the form of a convention on uniform legislation designed to harmonize the domestic law of member States in this field.

D. COUNCIL FOR MUTUAL ECONOMIC ASSISTANCE (CMEA)

Convention on the application of standards of the Council for Mutual Economic Assistance

47. The Convention was elaborated by the CMEA Standing Commission on Standardization, was approved at the twenty-eighth session of CMEA, and on the recommendation of the session on 21 June 1974 was signed by the CMEA member countries concerned (Bulgaria, Cuba, Czechoslovakia, German Democratic Republic, Hungary, Mongolia, Poland and USSR).

48. The Convention provides, *inter alia*, that member countries shall ensure the compulsory and rigorous application of CMEA standards, elaborated and confirmed by CMEA, through references to those standards in the multilateral and bilateral agreements, treaties and contracts concluded by States parties to the Convention and by their economic organizations on questions of specialization and co-operation in production, reciprocal deliveries and other questions which arise in the process of economic, scientific and technical co-operation between States parties to the Convention.

49. As at 1 February 1975 the Convention had been ratified by Bulgaria, Hungary, the German Democratic Republic, Mongolia, Poland and the USSR, and in accordance with article III the Convention will enter into force on 27 March 1975.

Agreement on general conditions of international carriage of goods by road

50. The Agreement was elaborated by the CMEA Standing Commission on Transport, and on this Commission's recommendation on 29 June 1974 it was signed by the CMEA member countries concerned (Bulgaria, Czechoslovakia, German Democratic Republic, Hungary, Mongolia, Poland and USSR).

51. The Agreement provides that international carriage of goods by road between States parties to the

Agreement shall be performed in accordance with the "General conditions of international carriage of goods by road", which form part of the above-mentioned Agreement. The general conditions regulate, *inter alia*, the procedure for the conclusion and performance of the contract of carriage, the liability of the carrier, questions of claims and actions, carriage performed by successive carriers, the basic principles of a system of international road freight rates, and other matters.

General conditions of delivery of goods between organizations of the member countries of CMEA

52. The Legal Conference of representatives of CMEA member countries worked out proposals for revising the section of the "General conditions of delivery of goods between organizations of the member countries of CMEA" concerning the material responsibility of economic organizations for non-performance or unsatisfactory performance of mutual obligations. In October 1974, these proposals were approved by the CMEA Executive Committee, which entrusted the CMEA Standing Commission on Foreign Trade with the task of making appropriate changes and additions to the CMEA General Conditions of Delivery, 1968, so that the revised General Conditions could enter into force by 1 January 1976.

53. The incorporation in the 1968 General Conditions of the changes and additions approved by the Executive Committee of CMEA will make it possible to broaden the sphere of operation of the unified legal regulation of relations between economic organizations of CMEA member countries in the delivery of goods.

Model licence agreements

54. The Legal Conference worked out a model licence agreement of a general nature, a model licence agreement on the transfer of "know-how", a model licence agreement on the free transfer of scientific and technical findings and a model licence agreement on trade marks. The model agreements cover a wide range of questions concerning the concession of rights to the utilization of certificates of invention, patents and "know-how" needed for the production, utilization and sale of goods under licence, rights to the utilization of trade marks, and also questions concerning the free transfer of scientific and technical findings.

55. These model agreements were approved by the Legal Conference with a view to their utilization by the appropriate organs and organizations of the CMEA member countries at their discretion.

General conditions of specialization and co-operation in production

56. In 1973, the Executive Committee of CMEA approved a report on legal questions connected with the conclusion and implementation of agreements on specialization and co-operation in production.

57. In accordance with a resolution of the Executive Committee, the Legal Conference, on the basis of the provisions of the above-mentioned report and of current practice, is preparing a draft for the uniform regulation of questions concerning the conclusion and implementation of agreements on specialization and co-operation in production. The draft is being prepared in

the form of general conditions concerning agreements for international specialization and co-operation in production.

Uniform legal regulation of organizational and legal questions involved in the establishment and operation of international economic organizations

58. In 1973, the Executive Committee of CMEA approved model provisions on conditions for the establishment and operation of international economic organizations in member countries of CMEA.

59. In accordance with a resolution of the Executive Committee, the Legal Conference, taking into account the above-mentioned "model provisions" and past experience, is preparing a draft for the uniform legal regulation of organizational and legal questions involved in the establishment and operation of international economic organizations in CMEA member countries. It is envisaged that the draft will contain uniform norms on such subjects as the establishment and membership of international economic organizations, property, the organizational structure of associations and joint enterprises, the establishment and operation of international economic associations, and the legal status of workers employed in international economic organizations.

E. COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITIES (EEC)

Abusive clauses

60. The problem of abusive clauses in contracts of adhesion is now the subject of reform projects in several States. In order to prevent further divergencies in the legislation on this matter and to strengthen legal safeguards within the Common Market, the Commission of the European Communities believes that it would be desirable, considering the work that has been done by other international organizations, to issue a directive defining the clauses whose inclusion in contracts and more particularly in general conditions of sale, specifications to be met or any similar regulatory terms would be prohibited or rendered null and void. The achievement of this objective will primarily serve the economically weaker party. It is, moreover, for this reason that the elimination of abusive clauses figures in the preliminary draft programme of the European Communities for consumer protection and information.

Security interests in movables

61. As part of the unification of the rules of conflict in the matter of real rights, the services of the Commission, in co-operation with governmental experts, are preparing uniform rules to allow recognition of security interests in goods moving within the Community. These rules will specify all the movables concerned, the conditions for recognition of preferential rights and security interests, their publicity, their effects and their status in the country of destination in which they are to be enforced.

62. The services of the Commission are also considering the desirability of introducing "European-type" security interests, i.e., of creating equivalent security interests through the legislative processes of the member States.

Law of suretyship

63. With a view to harmonizing the law on contracts of suretyship and contracts of guarantee, work is in progress on the drafting of a directive to change certain provisions in the legislation of the various member States.

64. The draft directive lays down mandatory rules concerning, *inter alia*, the right to stand surety, the form of the commitment of the surety, while respecting commercial usage and current business practices, and the conditions for release from surety.

65. The rules of conflict of laws are being prepared in conjunction with the work being done on private international law.

Multinational enterprises

66. The Commission has not submitted to the Council and is not preparing any directive or other legal instrument on the subject of multinational enterprises. However, many of the Commission's proposals in the field of company law are of direct interest to multinational enterprises and have as one of their aims the creation of a legal framework for the European multinational enterprises. (The problems of these enterprises have been illustrated by the Commission in the communication "Multinational undertakings and community regulations" of 7 November 1973.)

(a) Amended proposal for a fourth Council directive for co-ordination of national legislation regarding the annual accounts of limited liability companies, submitted to the Council on 21 February 1974 (Bulletin of the European Communities, Supplement 6/74).

(b) Proposal for a fifth Council directive for co-ordination of national legislation as regards the structure of public limited liability companies and the powers and obligations of their organs, submitted to the Council on 27 September 1972 (OJ No. C 131, 13 December 1972).

(c) The Commission will during the first part of 1975 submit to the Council an amended proposal for a Statute for the European Company.

(d) The Commission is preparing a proposal for a Council directive on take-over bids.

(e) The Commission is preparing a proposal for a Council directive on consolidated accounts.

(f) The Commission is preparing a proposal for a Council directive on groups of companies.

Products liability

67. The Commission of the European Communities has resumed the work, started in 1968 and interrupted in 1970 because of negotiations for entry, for the approximation of laws relating to "products liability". It established a working group of national experts which held its first meeting from 7 to 9 January 1975. The purpose of the work is to prepare a proposed directive which the Commission would submit to the Council as soon as possible.

68. What makes the approximation of laws in this field of particular importance for the establishment and operation of the Common Market is the fact that such

divergencies between national laws impede the free movement of goods, distort the conditions of competition in the Community, and render consumer protection, which varies in the different member States, almost always inadequate.

F. INTERNATIONAL BANK FOR ECONOMIC CO-OPERATION (IBEC)

Payments in transferable roubles

69. In 1974, the International Bank for Economic Co-operation continued to study matters related to improving the system of payments in transferable roubles for its member countries (the bank has not undertaken any new project relating to the unified rules on matters which might be of interest to UNCITRAL).

70. The most important event in the activities of the bank in 1974 was the accession of the Republic of Cuba to the agreement on multilateral payments in transferable roubles and Cuba's joining of the International Bank for Economic Co-operation as a member. The membership of the Republic of Cuba in the bank was formalized by a decision at the extraordinary 37th meeting of the Bank Council on 22 January 1974 in Moscow.

G. ORGANIZATION OF AMERICAN STATES (OAS)

Inter-American Specialized Conference on Private International Law

71. The Inter-American Specialized Conference on Private International Law, held at Panama City, Republic of Panama, from 14 to 30 January 1975, approved the following three conventions on matters that have been under consideration by UNCITRAL:

(a) Inter-American Convention on Conflict of Laws Concerning Bills of Exchange, Promissory Notes, and Invoices;

(b) Inter-American Convention on Conflict of Laws Concerning Cheques; and

(c) Inter-American Convention on International Commercial Arbitration.

72. The said Conference also approved the following three conventions dealing with questions of international procedural law:

(a) Inter-American Convention on Letters Rogatory;

(b) Inter-American Convention on the Taking of Evidence Abroad; and

(c) Inter-American Convention on the Legal Régime of Powers of Attorney to be Used Abroad.

H. INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT)

Progressive codification of the general part of the law of contracts

73. Following the preparation by the secretariat of UNIDROIT of a comparative law study on non-performance of contracts (UDP 1973, Etudes: L-Droit des obligations, document 4), the Governing Council

at its 52nd session in 1973 authorized the continuation of the work in this field and decided to set up a restricted committee of experts with special knowledge of the different common law systems, of the civil law system and of those of the socialist States and, moreover, directly interested in the problems of international trade.

74. This Committee met in Rome on 8 and 9 February 1974 on which occasion it gave particular consideration to two documents prepared by the secretariat, namely a comparative chart showing provisions in existence in some uniform laws and codes on the formation, validity, interpretation, performance and non-performance of contracts (Etudes: L-Document 5, UNIDROIT 1973) and a note concerning the future work of the Committee on unification of the general part of the law of contract within the larger framework of a progressive codification of international trade law (Etudes: L-Document 6, UNIDROIT 1974).

75. The Committee decided that its work should begin with the question of formation and that the first step to be taken should be for the secretariat to circulate to qualified institutions and personalities a revised version of the draft concerning the formation of contracts, based on the uniform law of UNIDROIT, with some adaptations proposed by Professor Popescu, in the framework of a Draft Uniform International Commercial Code (UDP 1972, Etudes: L-Document 3) together with a questionnaire prepared by the secretariat, designed to discover to what extent the above-mentioned draft could prove acceptable as a future uniform law governing the formation of international contracts in general and to elicit suggestions for modifying or completing it.

Draft convention providing a uniform law on the acquisition in good faith of corporeal movables

76. At its third meeting, held in June 1974, a Committee of Government Experts approved the text of a draft uniform law on the acquisition in good faith of corporeal movables. The text of the draft uniform law and the accompanying draft convention (Study XLV, document 56, UNIDROIT 1974) and an explanatory report, prepared by the Rapporteur to the Committee, Professor J. G. Sauveplanne (Study XLV, document 57, UNIDROIT 1974) have been circulated to the member Governments of UNIDROIT and it is hoped that the draft convention will be submitted for the approval of Governments at a diplomatic conference for its adoption in the near future.

Agency

77. The draft Convention providing a uniform law on agency of an international character (Etude XIX, document 55, UDP 1973) should be submitted 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 goods and persons—Study of the gold clause in international conventions in connexion with transport

78. In the framework of the general theme, included with priority status in the work programme of UNIDROIT by the Governing Council at its 53rd 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 national currencies (Etudes: LVII, document 1/Rev. and document 2, UDP 1973). The first results of the enquiry are to be found in an interim report prepared by the secretariat of UNIDROIT (Study LVII, document 3, UNIDROIT 1974).

The legal status of air-cushion vehicles (especially sea-going vehicles e.g. hovercraft and naviplanes)

79. A committee of governmental experts has completed its first reading of a preliminary draft Convention on the Registration and Nationality of Air-Cushion Vehicles. This draft, together with an explanatory report prepared by the secretariat of UNIDROIT (Study LII, document 7, UNIDROIT 1974) has been circulated to the member Governments of UNIDROIT for observations with a view to the second reading at the second session of the Committee of Governmental Experts, to be held in Rome from 3 to 8 March 1975. The Committee will, on that occasion, also begin work on the question of liability in tort for damage caused by air-cushion vehicles to third parties, on the basis of a report prepared by the secretariat (Study LII, document 8, UNIDROIT 1975).

Carriage by inland waterway

80. The Draft Convention on the Contract for the Carriage of Goods by Inland Waterway (CMN), drawn up on the basis of a UNIDROIT draft by the Economic Commission for Europe, and which had not been opened to the signature of Governments in 1960, is, at the request of the ECE, currently under revision by the Committee of Governmental Experts convened by UNIDROIT. At its third meeting, held in Rome from 13 to 17 January 1975, the Committee completed its first reading of the draft Convention and a revised text will be prepared by Mr. R. Loewe, member of the Governing Council of UNIDROIT.

Hotelkeeper's contract

81. On the basis of a draft prepared by the secretariat of UNIDROIT, a Working Committee of the Institute has approved the text of a preliminary draft Convention on the Hotelkeeper's Contract which, together with an explanatory report prepared by the secretariat (Study XII, document 12, UNIDROIT 1975), will be submitted to the next session of the Governing Council of UNIDROIT with a view to the convening of a committee of governmental experts.

III. INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS

A. INTERNATIONAL CHAMBER OF COMMERCE (ICC)

International sale of goods

(a) *Uniform rules governing the international sale of goods*

82. ICC is continuing to contribute to the activities of the UNCITRAL Working Group in the ways described in previous years.

(b) Standardization of trade terms

83. The Working Party on Trade Terms is continuing its work in the following fields:

(i) The definition of a trade term which can be used in the matter of air transport is still under consideration, and a questionnaire has been circulated to the ICC national committees in order to obtain additional information on the most widely followed practices. The need for such information arose from the fact that some of the observations regarding the draft term known as "free airport" questioned the advisability of formulating an air-freight equivalent to the trade term "FOB" used in shipping.

(ii) A set of three-letter abbreviations for each of the INCOTERMS 1953 has been brought to the attention of the United Nations Economic Commission for Europe, which has recommended that the abbreviations in question should be used, subject to one minor amendment (the replacement of "C & F" by "CFR").*

(iii) The Working Party is continuing its work on the definition of trade terms in the fields of combined and containerized transport.

*International payments***(a) International bills of exchange**

84. ICC is co-operating with UNCITRAL in its work on this subject within the framework of the Commission's Study Group on International Payments (UNSGIP).

(b) Bankers' commercial credits (documentary letters of credit and bank guarantees (contract and payment guarantees))

85. ICC's activities in this field are described in document A/CN.9/101.

International commercial arbitration

86. On the initiative of its Court of Arbitration, ICC is revising its Rules of Conciliation and Arbitration. The object of the revision is to provide the Court with up-to-date Rules which will enable it to cope with the increasing number of cases brought before it (approximately 200 per year). The Executive Committee of the International Chamber of Commerce will be invited to adopt the revised text at its session of 18 March 1975.

87. The Secretary-General of ICC has submitted observations to UNCITRAL concerning the Commission's preliminary draft set of arbitration rules and in particular its suitability for optional use in *ad hoc* arbitration relating to international trade.

*International legislation on shipping***(a) Revision of the Hague Rules**

88. ICC has participated regularly in the meetings of the UNCITRAL Working Group on International Legislation on Shipping dealing with the revision of the Hague Rules. Whenever necessary, ICC has submitted observations on various aspects of the revision exercise. Prior to the eight session of the UNCITRAL Working

Group, ICC arranged an informal meeting of the various parties and non-governmental organizations concerned with the aim of exchanging views and determining the points on which trade circles could present a joint position.

(b) Uniform Rules for a combined transport document (ICC Brochure No. 273)

89. ICC is currently revising its Uniform Rules in order to ensure that they are more widely used by combined-transport operators. The basic purpose of the revision is to bring liability for delay under the "network" system. The revised text is to be published in July 1975.

Multinational enterprises

90. At the July 1974 session of the United Nations Economic and Social Council, the International Chamber of Commerce submitted comments on the report of the Group of Eminent Persons on multinational corporations.

Liability of producers

91. ICC participated as an observer in the work of the Committee of Experts of the Council of Europe set up to prepare a Convention on products liability. It is also following the work of the European Communities on the harmonization of member States' laws on this subject.

B. INTERNATIONAL LAW ASSOCIATION (ILA)*International payments*

92. At the 1974 New Delhi Conference of the International Law Association, its Committee on International Monetary Law considered the question of "value clauses" in international contracting practice and the legal régime applicable to them.

International commercial arbitration

93. At the above Conference, the ILA Committee on International Commercial Arbitration between Government-Controlled Bodies and Foreign-Owned Business Firms continued its work on commercial disputes "in which governments, their departments and agencies or government-controlled organizations are involved".

C. INTERNATIONAL MARITIME COMMITTEE (CMI)*Conversion of gold units into national currencies*

94. In a number of international maritime law conventions initiated by the CMI the problem of the conversion of gold units into national currencies has arisen in view of the fact that, strictly speaking, there is no longer any official monetary value of gold. Since this is a general problem in transportation law it is also studied within UNIDROIT. A certain preference has been expressed in favour of replacing the gold unit by a system of weighted average of currencies (the so-called "SDR" basket) presently under consideration within the IMF. No solution has been adopted as yet and the study continues.

Hague Rules

95. The CMI has constituted an International Subcommittee for the purpose of considering the present

* See paragraph 9 above.

revision work with respect to the 1924 International Convention for the unification of certain rules of law relating to bills of lading and the 1968 Protocol thereto presently pending within the UNCITRAL Working Group on International Legislation on Shipping. The CMI takes part in the sessions of the Working Group as an observer and seeks to ascertain that the contemplated solutions are acceptable to the shipping community (shippers, carriers and insurers) so as to ensure the future success of the pending project.

96. At its 1974 Hamburg Conference the CMI adopted the resolutions known as the "Hague Rules Recommendations". First, the CMI recommended the immediate ratification of the 1968 Protocol stressing the urgent need of international commerce, and in particular shippers, to obtain the benefit of the rules embodied therein. However, at the same time the CMI considered that further amendments to the Hague Rules beyond those included in the 1968 Protocol were needed and expressed its opinion on some of the basic issues, such as the period of the carrier's responsibility, the basis of carrier liability, liability for delay in delivery, limitation of liability and the limitation (prescription) period for bringing claims.

Limitation of liability of owners of sea-going vessels

97. A revision of the 1957 International Convention relating to the limitation of the liability of owners of sea-going ships is presently pending within IMCO. The CMI was requested by IMCO to prepare a draft amending the said convention. This subject was dealt with at the 1974 Hamburg Conference resulting in two drafts, one in the form of a new draft convention, the other in the form of a Protocol to the present convention. Further IMCO invited the CMI to provide it with figures which might be considered on the basis of the principles contained in the draft articles prepared by the CMI and, in particular, to investigate into the commercial insurability of the liability to claimants. A report has been made by the chairman of the CMI International Sub-Committee, Mr. Alex Rein (Norway), and the subject will be further discussed in the meeting of the IMCO Legal Committee, 16-20 June 1975.

Carriage of passengers and their luggage by sea

98. The CMI, at its 1969 Tokyo Conference, suggested an amalgamation of the 1961 and 1967 International Conventions dealing with carriage of passengers and their luggage by sea respectively. The CMI draft has subsequently been discussed within IMCO and a diplomatic conference at Athens in December 1974 has adopted a new international convention on the subject.

General average

99. The CMI, at its 1974 Hamburg Conference, adopted a new version of the 1950 York/Antwerp Rules. The new "1974 York/Antwerp Rules" are implemented by way of contractual reference in bills of lading and charter-parties as from 1 July 1974.

Combined transports

100. The CMI, at its 1969 Tokyo Conference, adopted a draft convention relating to combined transports known as the "Tokyo Rules". This draft has been further studied together with UNIDROIT resulting in

the so-called TCM (for Transport Combiné de Marchandises) draft convention, which has subsequently been considered within IMCO and UNCTAD. The CMI "Tokyo Rules" have been embodied in the current combined transport documents (e.g. the FIATA Combined Transport Bill of Lading and the Combiconbill, the latter accepted by the Baltic and International Maritime Conference). They have also been accepted by the International Chamber of Commerce in its "Uniform rules for a combined transport document" (brochure 273, Paris 1973). The CMI has appointed an International Sub-Committee under the chairmanship of Professor Kurt Grönfors (Sweden) to follow further developments.

Study on economic implications of re-allocation of risks

101. The CMI and the International Chamber of Commerce have initiated a joint study on the above subject. The research is presently concentrated on the effect of the change of the carrier's liability presently contemplated in the draft convention to a new international convention on the carriage of goods by sea suggested by the UNCITRAL Working Group on International Legislation on Shipping.

International commercial arbitration in maritime affairs

102. The CMI presently considers the possibility to render assistance in connexion with the appointment of arbitrators in maritime law disputes as well as the elaboration of rules on maritime arbitration. The work proceeds in an International Sub-Committee under the chairmanship of Mr. Jean Warot (France).

Shipbuilding contracts

103. A study on shipbuilding contracts has been initiated within the CMI in 1973 in order to, at a first stage, investigate the legal problems arising in connexion with shipbuilding contracts and to compare the common standard forms bearing in mind the possibility, at a latter stage, to draft model clauses for such contracts. The work proceeds in an International Sub-Committee under the chairmanship of Professor Francesco Berlingieri (Italy).

Collisions at sea

104. The CMI has initiated together with the International Law Association a study of legal problems arising in connexion with collisions at sea and appointed Professor Nicholas J. Healy chairman of the CMI Working Group. The purpose of the study is to explore the possibility to achieve international consensus on the applicable law, particularly with respect to collisions on the high seas, and to obtain a broader acceptance of the 1910 International Convention for the unification of certain rules of law with respect to collision between vessels.

Liability of sea terminals

105. The CMI has initiated a study on the liability of sea terminals for the purpose of ascertaining the present position in some of the major ports. The study is inter-related to the extension of the period of the sea carrier's liability proposed in the draft convention on the carriage of goods by sea by the UNCITRAL Working Group on International Legislation on Shipping. The

subject is also studied from a more general viewpoint within UNIDROIT.

D. INTERNATIONAL UNION OF MARINE INSURANCE
(IUMI)

International legislation on shipping

106. The International Union of Marine Insurance has followed with interest the work of the UNCITRAL Working Group on International Legislation on Shipping and representatives of IUMI have attended as

observers the seventh and eighth sessions of that Working Group.

International sale of goods

107. IUMI is also following closely developments in connexion with the international sale of goods and continues its consultation with the International Chamber of Commerce regarding possible modifications of the latter's brochure 273, "Uniform Rules for a Combined Transport Document".

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B. Check list of UNCITRAL documents**Documents of the eighth session of the Commission***Title or description**Document reference***A. GENERAL SERIES**

- International legislation on shipping: report of the Working Group on the work of its seventh session (Geneva, 30 September-11 October 1974) A/CN.9/96 and Add.1
- Preliminary draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade (UNCITRAL Arbitration Rules) A/CN.9/97 and Add.1-4
- General conditions of sale and standard contracts: report of the Secretary-General ... A/CN.9/98
- International payments; negotiable instruments: report of the Working Group on International Negotiable Instruments on the work of its third session (Geneva, 6-17 January 1975) A/CN.9/99
- Report of the Working Group on the International Sale of Goods on the work of its sixth session (New York, 27 January-7 February 1975) A/CN.9/100
- International payments; bankers' commercial credits, bank guarantees: note by the Secretary-General A/CN.9/101 and Add.1
- International payments; security interests in goods: report of the Secretary-General A/CN.9/102
- Liability for damage caused by products intended for or involved in international trade: report of the Secretary-General A/CN.9/103
- Multinational enterprises: report of the Secretary-General A/CN.9/104
- International legislation on shipping: report of the Working Group on the work of its eighth session (New York, 10-21 February 1975) A/CN.9/105
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- Training and assistance in the field of international trade law: note by the Secretary-General A/CN.9/107
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B. LIMITED SERIES

- International payments; study on security interests: note by the Secretariat ST/LEG/11*

C. RESTRICTED SERIES

- Symposium on international trade law A/CN.9/VIII/CRP.2
- Future work; legal interest rate for bills of exchange, promissory notes and for cheques: note by the Austrian delegation A/CN.9/VIII/CRP.3

* English only

<i>Title or description</i>	<i>Document reference</i>
Draft letter from the Chairman of UNCITRAL to the Chairman of the Commission on Transnational Corporations	A/CN.9/VIII/CRP.4
D. INFORMATION SERIES	
List of participants	A/CN.9/INF.7 and Add.1
Working Group on the International Sale of Goods, sixth session	
A. WORKING PAPERS	
Comments and proposals of representatives on the revised text of the Uniform Law on the International Sale of Goods as approved or deferred for further consideration by the Working Group at its first five sessions	A/CN.9/WG.2/WP.20
Report of the Secretary-General and addenda: pending questions with respect to the revised text of a Uniform Law on the International Sale of Goods	A/CN.9/WG.2/WP.21 and Add.1-2
B. RESTRICTED SERIES	
List of participants	A/CN.9/WG.2/VI/INF.1
Provisional agenda	A/CN.9/WG.2/L.2
France: proposal to replace article 10 of revised ULIS	A/CN.9/WG.2/VI/CRP.1
International Chamber of Commerce (ICC): proposal to replace article 10 of revised ULIS	A/CN.9/WG.2/VI/CRP.2
Proposal by Drafting Party II: article 2(1)(a) of revised ULIS	A/CN.9/WG.2/VI/CRP.3
ICC: observations	A/CN.9/WG.2/VI/CRP.4
Norway: proposal to revise article 42(3) and article 71(2) of revised ULIS	A/CN.9/WG.2/VI/CRP.5
Proposal by Drafting Party III: revision of article 9 of revised ULIS	A/CN.9/WG.2/VI/CRP.6
Proposal by Drafting Party VII: revision of article 42(2) of revised ULIS	A/CN.9/WG.2/VI/CRP.7
Proposal by Drafting Party I: modifications to revised ULIS to be made as a result of the adoption of an integrated Convention	A/CN.9/WG.2/VI/CRP.8
Proposal by Drafting Party IV: replacement of article 10 of revised ULIS	A/CN.9/WG.2/VI/CRP.9
Proposal by Drafting Party VI: revision of article 39 of revised ULIS	A/CN.9/WG.2/VI/CRP.10
Proposal by Drafting Party V: replacement of article 20 of revised ULIS	A/CN.9/WG.2/VI/CRP.11
Norway: Proposal to replace article 2(1) of revised ULIS	A/CN.9/WG.2/VI/CRP.12
Proposal by Drafting Party VIII: revision of articles 44, 44 <i>bis</i> and 72 <i>ter</i> of revised ULIS	A/CN.9/WG.2/VI/CRP.13

Working Group on International Negotiable Instruments, third session

A. WORKING PAPERS

Provisional agenda	A/CN.9/WG.IV/WP.4
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*Title or description**Document reference***B. RESTRICTED SERIES**

- Draft Uniform Law on International Bills of Exchange and International Promissory Notes, revised text of articles 5 (9), 6 and 12-41 A/CN.9/WG.IV/CRP.3
- Views expressed by banking institutions on certain questions relating to the draft Uniform Law on International Bills of Exchange and International Promissory Notes: note by the Secretariat A/CN.9/WG.IV/CRP.6
- Draft Uniform Law on International Bills of Exchange and International Promissory Notes: revised text of article 7 A/CN.9/WG.IV/CRP.7

Working Group on International Legislation on Shipping, seventh and eighth sessions**A. WORKING PAPERS****SEVENTH SESSION**

- Replies to third questionnaire on bills of lading submitted by Governments and international organizations for consideration A/CN.9/WG.III/L.2 and Add.1-2
- Provisional agenda and annotations A/CN.9/WG.III/L.3
- Memorandum submitted by Norway concerning the structure of a possible new convention on the carriage of goods by sea A/CN.9/WG.III/WP.15
- Revised compilation of draft provisions on carrier responsibility A/CN.9/WG.III/WP.16
- Fourth report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading A/CN.9/WG.III/WP.17, vol. I and Corr.1, and vol. II

EIGHTH SESSION

- Provisional agenda A/CN.9/WG.III/L.4/Rev.1
- Preliminary version of a draft convention on the liability of carriers of goods by sea: note by the Secretariat A/CN.9/WG.III/WP.19

B. RESTRICTED SERIES**SEVENTH SESSION**

- Observations by the Central Office for International Railway Transport, Berne A/CN.9/WG.III(VII)/CRP.1
- Proposal by the delegation of France: definition of bills of lading A/CN.9/WG.III(VII)/CRP.2
- Proposal by the Federal Republic of Germany: article IV-B (1(c)) A/CN.9/WG.III(VII)/CRP.3
- Proposal by the delegation of France: letters of guarantee A/CN.9/WG.III(VII)/CRP.4
- Proposal by the delegation of Norway: amalgamation of draft provision K in vol. I, and draft proposals B and C in vol. II A/CN.9/WG.III(VII)/CRP.6
- Proposal by the delegation of Norway: nuclear incidents: new article A/CN.9/WG.III(VII)/CRP.7
- Report of Drafting Party A/CN.9/WG.III(VII)/CRP.8 and Add.1 to 3

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Proposal for a draft provision (article 111-A) submitted by the delegation of Japan	A/CN.9/WG.III(VIII)/CRP.1
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Proposal by the representative of Norway	A/CN.9/WG.III(VIII)/CRP.6
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Dangerous goods: proposal by the representative of Poland	A/CN.9/WG.III(VIII)/CRP.8
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Article 12 <i>bis</i> : proposal submitted by the delegation of Japan	A/CN.9/WG.III(VIII)/CRP.12
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Draft article 5(6) proposed by the representative of France	A/CN.9/WG.III(VIII)/CRP.16
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Proposals submitted by the representative of Australia for the second reading	A/CN.9/WG.III(VIII)/CRP.23
Points to be raised by the representative of the United Kingdom during the second reading	A/CN.9/WG.III(VIII)/CRP.24

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Amendments proposed by the Federal Republic of Germany for the second reading	A/CN.9/WG.III(VIII)/CRP.25
Note by the representative of Poland for the second reading	A/CN.9/WG.III(VIII)/CRP.26
Proposals submitted by the representative of Japan for the second reading	A/CN.9/WG.III(VIII)/CRP.27
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Proposal submitted by the representatives of Belgium, Japan, Poland and the USSR on the questions of "error in navigation" and "fire" for the second reading	A/CN.9/WG.III(VIII)/CRP.29
Part II of the report of the Drafting Party . . .	A/CN.9/WG.III(VIII)/CRP.30
Part III of the report of the Drafting Party . . .	A/CN.9/WG.III(VIII)/CRP.31
Proposals by the representative of India for the second reading of article 16(1)	A/CN.9/WG.III(VIII)/CRP.32
Observations by the International Union of Marine Insurance on article 5 of the preliminary version of the draft convention	A/CN.9/WG.III(VIII)/CRP.33
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Note by the Secretariat on articles 1-3 of draft convention on the carriage of goods by sea as revised by the Working Group	A/CN.9/WG.III(VIII)/CRP.36 and Add.1 to 3
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