

**United Nations
Commission on
International
Trade Law**

YEARBOOK

Volume X : 1979



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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 tenth volume in the series of Yearbooks of the United Nations Commission on International Trade Law (UNCITRAL).¹ This volume covers the period from July 1978 to the end of the Commission's twelfth session in June 1979.

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 eleventh session by including material (such as action by the General Assembly) which was not available when the manuscript of the ninth volume was prepared. Part One also contains the Commission's report on the work of its twelfth session which was held in Vienna from 18 to 29 June 1979.

Part Two reproduces most of the documents considered at the twelfth session of the Commission.

Part Three contains a commentary on the Convention on the Limitation Period in the International Sale of Goods, which was adopted by the United Nations Conference on Prescription (Limitation) in the International Sale of Goods (New York, 20 May-14 June 1974). In addition, Part Three contains a bibliography of recent writings related to the work of UNCITRAL and a check list of UNCITRAL documents.

¹To date the following volumes of the *Yearbook of the United Nations Commission on International Trade Law* [abbreviated herein as *Yearbook* ... (year)] have been published:

<i>Volume</i>	<i>Years covered</i>	<i>United Nations Publication, Sales No.</i>
I	1968-1970	E.71.V.1
II	1971	E.72.V.4
III	1972	E.73.V.6
IV	1973	E.74.V.3
V	1974	E.75.V.2
VI	1975	E.76.V.5
VII	1976	E.77.V.1
VIII	1977	E.78.V.7
IX	1978	E.80.V.8

I. THE ELEVENTH SESSION (1978); 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 (eighteenth session)*

"B. *Progressive development of the law of international trade: eleventh annual report of the United Nations Commission on International Trade Law (agenda item 6 (b))*

"476. At its 509th meeting, on 15 September 1978, the Board took note of the report of UNCITRAL on the work of its eleventh session (A/33/17),³² which had been circulated under cover of TD/B/720.

³² For the printed text, see *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17 (A/33/17)*."

* *Official Records of the General Assembly, Thirty-third Session, Supplement No. 15 (A/33/15)*, vol. II, chapter V: Other particular matters in the field of trade and development.

B. General Assembly: report of the Sixth Committee (A/33/349)*

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INTRODUCTION

1. At its 4th and 5th plenary meetings, on 22 September 1978, the General Assembly decided to include in the agenda of its thirty-third session the item entitled "Report of the United Nations Commission on International Trade Law on the work of its eleventh session" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered this item at its 4th to 13th meetings, from 26 September to 6 October 1978, at its 22nd and 23rd meetings, on 17 and 18 October 1978, and at its 61st and 62nd meetings, on 1 and 4 December 1978.

3. At the 4th meeting, on 26 September, Mr. S. K. Date-Bah (Ghana), Chairman of the United Nations Commission on International Trade Law at its eleventh session, introduced the Commission's report on the work

of that session (A/33/17).¹ The Sixth Committee also had before it a report of the Secretary-General on the financing of symposia on international trade law (A/33/177), a note by the Secretary-General concerning the United Nations Conference on the Carriage of Goods By Sea, held at Hamburg from 6 to 31 March 1978 (A/C.6/33/L.2) and the comments on the Commission's report by the Trade and Development Board of the United Nations Conference on Trade and Development (A/C.6/33/L.3).

4. During the debate in the Sixth Committee on agenda item 115, two further documents were placed before the Committee: a letter from the Permanent Representative of Austria concerning the venue of the United Nations Conference on Contracts for the Inter-

* 8 December 1978. *Official Records of the General Assembly, Thirty-third Session, Annexes*, agenda item 115.

¹ [Yearbook ... 1978, part one, II, A.] The presentation of the report 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 [Yearbook ... 1968-1970, part two, I, B, 2]).

national Sale of Goods (A/C.6/33/4) and a note by the United Nations Secretariat on the question of transfer to Vienna of the secretariat of the Commission (A/C.6/33/CRP.1).

5. At the 62nd meeting, on 4 December, the Rapporteur of the Sixth Committee raised the question whether the Committee wished to include in its report to the General Assembly on this item a summary of the main trends that emerged during the debate on the Commission's report. After referring to General Assembly resolution 2292 (XXII) of 8 December 1967 concerning publications and documentation of the United Nations, the Rapporteur informed the Sixth Committee of the financial implications of the question. At the same meeting, the Sixth Committee decided that, in view of the nature of the subject-matter, the report on agenda item 115 should include a summary of the main trends of opinion that were expressed during the debate.

PROPOSALS

6. At the 61st meeting of the Sixth Committee, on 1 December, two draft resolutions (A/C.6/33/L.11 and Corr.2 and A/C.6/33/L.12 and Corr.1) were introduced by the representative of Turkey on behalf of the respective sponsoring delegations. The sponsors of draft resolution A/C.6/33/L.11 and Corr.2 were: Argentina, Austria, Bangladesh, Brazil, Bulgaria, Canada, Colombia, Congo, Czechoslovakia, Egypt, Finland, German Democratic Republic, Ghana, Hungary, Iran, Italy, Ivory Coast, Jamaica, Kenya, Morocco, Nigeria, Panama, Philippines, Poland, Romania, Singapore, Somalia, Spain, Sweden, Togo, Tunisia, Turkey and Yugoslavia, later joined by Chile, France, Greece, Guyana, Mongolia, Rwanda, Zaire and Zambia (*for the text of the draft resolution, see para. 41 below, draft resolution I*). The sponsors of draft resolution A/C.6/33/L.12 and Corr.1 were: Argentina, Austria, Bangladesh, Bulgaria, Canada, Colombia, Congo, Czechoslovakia, Egypt, Finland, German Democratic Republic, Ghana, Hungary, India, Indonesia, Iran, Italy, Ivory Coast, Jamaica, Kenya, Malaysia, Morocco, Nigeria, Norway, Pakistan, Panama, Philippines, Poland, Romania, Singapore, Somalia, Spain, Sweden, Tunisia, Turkey and Yugoslavia, later joined by Chile, Greece, Guyana, Mongolia, Rwanda, Uruguay, Zaire and Zambia (*for the text of the draft resolution, see para. 41 below, draft resolution II*).

7. For its consideration of draft resolution A/C.6/33/L.12 and Corr.1, the Sixth Committee had before it a statement submitted by the Secretary-General in accordance with rule 153 of the rules of procedure of the General Assembly, on the administrative and financial implications of the draft resolution (A/C.6/33/L.13).

DEBATE

8. The main trends of opinion expressed in the Sixth Committee on the report of UNCITRAL on the work of its eleventh session are summarized in sections A to G below. Sections A and B deal with general observations on the role and functions of the Commission and on its working methods, while the remaining sections are devoted to the Committee's deliberations on the specific

topics considered by the Commission at its eleventh session, as follows: international sale of goods (section C); international payments (section D); programme of work of the Commission (section E); training and assistance in the field of international trade law (section F); and other business (section G).

A. General observations

9. Representatives stressed the importance of the Commission's work. The view was generally shared that the work of the Commission which was directed towards the unification, harmonization and progressive development of the law relating to international trade helped to remove obstacles to the growth of such trade on equitable terms and encouraged the development of trade policies that took into account the interests of all States. The legal rules prepared by the Commission were acceptable to States with different economic, social and legal systems and at different stages of economic development. It was also noted that facilitation of international trade relations served to promote friendly relations among States, thus fostering international understanding and co-operation.

10. Representatives expressed their satisfaction with the progress thus far by the Commission, its working groups and its secretariat in carrying out the Commission's work programme, as shown by the number of highly significant legal texts which the Commission had completed since its establishment. The draft Convention on Contracts for the International Sale of Goods which the Commission had placed before the General Assembly at its current session (A/33/17, para. 28) was a further important example of the progress achieved by the Commission.

11. It was noted with satisfaction that, based on preparatory work by the Commission, the United Nations Convention on the Carriage of Goods by Sea had been adopted at Hamburg on 31 March 1978. The hope was expressed that the new Convention would find wide acceptance within a short period of time. Some representatives stated that their Governments were now studying the provisions of the Convention with a view to ratification or accession.

12. Many representatives urged the Commission to place particular emphasis in its work on the special needs of developing countries and on the implementation of the goals of the new international economic order as outlined in the resolutions of the General Assembly on that subject. Those representatives expressed their full support of the Commission's decision to include in its new programme of work the item entitled "Legal implications of the new international economic order". One representative expressed some reservations regarding that decision.

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

13. Representatives expressed continued approval of the working methods employed by the Commission

and its working groups. It was noted that to a substantial extent the progress achieved by the Commission was attributable to the efficiency of such working methods. The importance of preparatory studies and research by the secretariat of the Commission was also noted.

14. There was general agreement that the Commission had a mandate to co-ordinate the work of organizations engaged in the unification of one or more areas of international trade law, and that the mandate extended to organizations both within and outside the United Nations system. Representatives stressed the need for the Commission to strengthen its efforts, mainly through its secretariat, aimed at co-ordinating the work of other organizations, in order to avoid costly duplication of work and for the sake of increased efficiency.

C. International sale of goods

15. Noting the central position occupied by the law of sale in international trade law, representatives were unanimous in commending the Commission for the successful completion of its work on a draft Convention on Contracts for the International Sale of Goods. There was general agreement that the draft Convention constituted an excellent basis for the adoption of a convention on the subject.

16. Representatives agreed with the recommendation of the Commission that the General Assembly should convene, as early as practicable, a conference of plenipotentiaries to conclude, on the basis of the draft Convention approved by the Commission, a Convention on Contracts for the International Sale of Goods. Representatives were also agreed that the conference should be authorized to consider the desirability of preparing a protocol to the 1974 Convention on Prescription (Limitation) in the International Sale of Goods, which would harmonize its provisions with those in the Convention on Contracts for the International Sale of Goods as it may be adopted by the conference.

17. Representatives were unanimous in their support for the Commission's decision to integrate the draft Convention on the International Sale of Goods adopted at the Commission's tenth session with the Draft Convention on the Formation of Contracts adopted at the Commission's eleventh session, into a single text to be entitled "Draft Convention on Contracts for the International Sale of Goods".

18. Many representatives supported the Commission's recommendation that the conference considering the draft Convention on Contracts for the International Sale of Goods should be convened for a period of five weeks, with the possibility of extending it for a further week if necessary. The view was also expressed that the conference should be convened for a definite period of four or five weeks, without provision for a possible extension, and that the conference should complete its work at one session. It was suggested that the conference should be held in 1980. Representatives observed that all documentation for the conference should be sent to Governments and interested international organizations for

comments well in advance of the date to be set for the conference. The representative of Austria stated that his Government would welcome it if the conference were held in Vienna in view of the fact that the transfer of the International Trade Law Branch to Vienna should be completed by that time (see A/C.6/33/4).

19. Most representatives spoke in favour of the Commission's decision to request the Secretary-General to prepare draft provisions concerning implementation, reservations and other final clauses for the draft Convention on Contracts for the International Sale of Goods. The view, however, was also expressed that such provisions should be drafted by the States participating in the conference and not by the Secretary-General.

20. Most representatives who spoke on the point supported the Commission's decision that the final clauses prepared by the Secretary-General for the draft Convention on Contracts for the International Sale of Goods should allow Contracting States to ratify or accede to part I of the draft Convention (dealing with the sphere of application and general provisions), together with either part II (dealing with rules as to the formation of contracts) or part III (containing the rules governing the obligations of buyers and sellers), if they were not ready to accept both part II and part III of the draft Convention. However, the view was also expressed that permitting ratification of parts of the draft Convention did not serve the interest of harmonizing the law governing international sales and would create uncertainty. It was stated that the final clauses should include a provision to the effect that, where both parties to the contract had their places of business in States that were parties to regional conventions that dealt with the matters covered in the draft Convention, the provisions of such regional conventions could be applied to that contract.

21. All the representatives found the text of the draft Convention on Contracts for the International Sale of Goods generally acceptable. A number of representatives made preliminary observations regarding the provisions of the draft Convention, while other representatives reserved the substantive comments of their Governments until the diplomatic conference.

22. Representatives noted favourably that the draft Convention avoided the use of legal concepts known only in certain systems and, in that respect, was therefore acceptable to all legal systems. It was also noted that the text of the draft Convention was adapted to the current practical requirements of international trade, that it reduced the number of cases that had to be settled by the national law of one of the parties, and represented an equitable balance between the interests of sellers and buyers. However, the view was also expressed that the draft Convention should take greater account of the particular interests of developing countries.

23. A number of representatives stated that the text of the draft Convention contained on some points ambiguous and unclear provisions which should be modified at the diplomatic conference. Thus, regarding the scope of the draft Convention, both the view that it might

be too restrictive and the view that it might be too broad, were expressed. Questions were also raised concerning the inclusion in article 6 of the concept of "good faith"; a number of representatives stated that the concept was unclear and that an internationally acceptable definition of the term was lacking. Several representatives suggested that the principle of "fair dealing" be incorporated in article 6.

24. Concern was also expressed with respect to the recognition in article 8 of existing trade usages as this introduced an element of uncertainty into contractual relations and was unduly favourable to the industrialized countries which had developed those usages and were more familiar with them. Representatives also noted their reservations with regard to the compromise embodied in article 12, paragraph 1, which provided that the contract quantity and price could be fixed "implicitly"; they stated that price was one of the most important aspects of a contract and that, at the least, the cases where price could be set "implicitly" should be restricted and clarified.

D. International payments

25. Many representatives noted the continuing progress of the work by the Commission's Working Group on International Negotiable Instruments in its preparation of a draft Convention on International Bills of Exchange and International Promissory Notes. The hope was expressed that the Working Group would complete its work on the draft in the near future.

26. Several representatives stated their support for the Commission's decision that the uniform provisions governing international bills of exchange and international promissory notes should be set forth in the form of a convention rather than in the form of a uniform law.

E. Programme of work of the Commission

27. Most representatives commented favourably on the new programme of work of the Commission and many of them noted with particular satisfaction the inclusion therein of the item "Legal implications of the new international economic order". These representatives noted that the implementation of the new international economic order was of great importance to the developing countries, that work on its legal aspects had to be undertaken expeditiously, and that the Commission was the best equipped body to do this work. Several representatives noted that the Asian-African Legal Consultative Committee had suggested that the item be included in the work programme of the Commission. However, the view was also expressed that the Commission was a technical body dealing with legal issues only and that questions connected with the new international economic order were still highly political, controversial and in the process of evolution.

28. Several representatives expressed support for the decision of the Commission to establish a Working Group which would consider, based on preliminary studies by the Secretariat, possible issues connected with

the new international economic order that the Commission might take up. Some representatives, however, expressed the view that it had been premature to establish a Working Group, in light of the Commission's practice of referring subjects to working groups only after preparatory studies by the Secretariat and a Commission decision that the subject was suitable and the preparatory work was sufficiently advanced. One representative stated that, since a decision had already been taken, his Government would reserve further comment on the creation of the Working Group until the issuance of the preliminary studies by the Secretariat.

29. The view was expressed that the Commission's success in meeting the objectives of its first work programme was, to a large extent, due to the fact that the work was directed to specific, concrete topics and that the Commission was concerned solely with the legal aspects of those topics. It was stated further that the Commission should continue to function as a strictly legal body focusing on specific, technical subjects which could be completed within a reasonable period of time.

30. During the debate in the Sixth Committee a number of subjects were suggested by one or more representatives for possible inclusion in the new work programme of the Commission. The suggested topics included: legal rules for the protection of developing countries in the context of the operations of transnational corporations; elimination of discrimination in trade relations; questions of international public trade law; preparation of a code of international trade law; transfer of technology and a general system of preferences for developing countries. Suggestions were also made regarding the priority to be given to the subjects included in the Commission's new work programme; several representatives stated that priority should be given to work related to the new international economic order. The view was expressed that international payments and arbitration were suitable high priority topics. There was also support for giving priority to the work on international trade contracts.

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

31. Representatives stressed the importance which their respective States attached to the training and assistance activities of the Commission and noted the necessity that technical expertise in international trade law should become available world-wide. Representatives were agreed that symposia on international trade law organized by the Commission were very useful in giving specialized training to jurists, particularly from developing countries, and should therefore be continued. It was regretted that the second symposium, which the Commission intended to hold in connexion with its tenth session, had to be cancelled due to insufficiency of the voluntary contributions received from Governments to defray its costs.

32. A majority of the representatives expressed support for the funding of symposia organized by the Com-

mission from the regular budget of the United Nations to the extent that voluntary contributions did not prove to be adequate to ensure attendance by the requisite minimum of participants so as to make the symposia worthwhile. The representatives of the Federal Republic of Germany and Sweden stated that their respective Governments would make voluntary contributions to meet the expenses of future symposia. The representative of the Federal Republic of Germany indicated that the contribution of his Government would be conditional upon the making of contributions by Governments of other industrialized States.

33. The view was also expressed that Commission symposia on international trade law should be financed exclusively from voluntary contributions. It was further suggested that voluntary contributions to the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law could be used for this purpose.

34. A number of representatives noted with appreciation the offers by Belgium and Poland of fellowships in international trade law for academic and practical studies in their respective countries. It was stated that other countries should consider offering similar fellowships for young jurists from developing countries.

G. Other business

35. Representatives were agreed that the venue of the Commission's sessions should continue to be rotated annually between New York and Geneva. Once the Commission's secretariat was established in Vienna, the venue of the Commission sessions held in Europe might be changed from Geneva to Vienna.

36. Concerning the question of transfer from New York to Vienna of the Commission's secretariat, the International Trade Law Branch in the Office of Legal Affairs, some representatives expressed the view that the General Assembly had already decided the question by virtue of its resolution 31/194 of 22 December 1976 and that the decision of the Assembly should not be reconsidered by the Sixth Committee. Other representatives noted, however, the Commission's concern that the question of transfer should not have a harmful effect on the quality of its work and were of the opinion that the question was a proper one for consideration by the Sixth Committee.

37. Many representatives noted that the preparatory studies and research carried out by the Commission's secretariat were highly important for the Commission's work and that the Commission's success to date was to a considerable extent attributable to the high quality of the preparatory work by its secretariat. Those representatives considered it essential that the Commission's secretariat have at its disposal adequate research materials, facilities and documentation in Vienna as of the time of its transfer, and that in particular a

proper legal reference library would have to be established for the use of the Commission's secretariat. The view was expressed that the timing of the transfer be reconsidered so that it would take place when the needed legal reference library and adequate research facilities were completed and available for use by the International Trade Law Branch in Vienna.

38. The representative of Austria announced that his Government would contribute \$150,000 for the acquisition of books and other materials by the legal reference library to be established in Vienna for the International Trade Law Branch. He also stated that a United Nations expert would supervise that acquisition and would ensure that the facilities would be available at the time of the transfer. His Government would ensure that research material already existing in Austrian institutions would be made available to the Commission's secretariat. The Under-Secretary-General for Administration and Management outlined the steps that the Secretary-General was planning in order to facilitate the transfer. He noted in particular that the Secretary-General intended to seek the concurrence of the Advisory Committee on Administrative and Budgetary Questions in reallocating, from appropriations already voted, up to \$100,000 to supplement the Austrian Government's contribution and that the Secretary-General was also seeking authority for the establishment of a post of law librarian, with necessary clerical-secretarial support, to be in charge of the establishment and assembly of the reference library and of its management thereafter. Several representatives commented favourably on the statements by the representative of Austria and the Under-Secretary-General for Administration and Management.

DECISIONS

39. At its 62nd meeting, the Sixth Committee adopted by consensus draft resolutions A/C.6/33/L.11 and Corr.2 and A/C.6/33/L.12 and Corr.1.

40. With reference to draft resolution A/C.6/33/L.11 and Corr.2, an explanation of vote after the vote was made by the representative of Israel. In connexion with draft resolution A/C.6/33/L.12 and Corr.1, an explanation of vote before the vote was made by the representative of China, and explanations of vote after the vote by the representatives of Belgium, France, the Federal Republic of Germany, Israel, the Netherlands, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

RECOMMENDATIONS OF THE SIXTH COMMITTEE

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

[Texts not reproduced in this section. The draft resolutions were adopted without change as General Assembly resolutions 33/92 and 33/93. See section C below.]

II. THE TWELFTH SESSION (1979)

A. Report of the United Nations Commission on International Trade Law on the work of its twelfth session (Vienna, 18-29 June 1979) (A/34/17)*

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INTRODUCTION

1. The present report of the United Nations Commission on International Trade Law covers the Commission's twelfth session, held at Vienna from 18 to 29 June 1979.

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.

* Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17.

CHAPTER I. ORGANIZATION OF THE SESSION

A. Opening

3. The United Nations Commission on International Trade Law (UNCITRAL) commenced its twelfth session on 18 June 1979. The session was opened on behalf of the Secretary-General by Mr. Erik Suy, the Legal Counsel.

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 December 1973 and 15 December 1976, are the following States:¹ Argentina,* Australia,** Austria,** Barbados,* Belgium,* Brazil,* Bulgaria,* Burundi,** Chile,** Colombia,** Cyprus,* Czechoslovakia,* Egypt,** Finland,** France,** Gabon,* German Democratic Republic,** Germany, Federal Republic of,* Ghana,** Greece,* Hungary,* India,* Indonesia,** Japan,** Kenya,* Mexico,* Nigeria,** Philippines,* Sierra Leone,* Singapore,** 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 Barbados, Bulgaria, Burundi, Colombia, Gabon, Sierra Leone, the Syrian Arab Republic, the United Republic of Tanzania and Zaire, all members of the Commission were represented at the session.

6. The session was also attended by observers from the following States Members of the United Nations: Algeria, Burma, Canada, Cuba, Ecuador, Iraq, Ireland, Italy, Luxembourg, Nicaragua, Oman, Poland, Portugal, Romania, Spain, Thailand, Trinidad and Tobago, Tunisia, Turkey, Uruguay, Venezuela and Yugoslavia.

7. The following specialized agency intergovernmental organizations and international non-governmental organizations were represented by observers:

(a) *Specialized agency*

World Bank (International Centre for the Settlement of Investment Disputes).

(b) *Intergovernmental organizations*

Asian-African Legal Consultative Committee, Bank for International Settlements, Commission of the European

Communities, Council of Europe, Council for Mutual Economic Assistance, European Free Trade Association, Hague Conference on Private International Law and International Institute for the Unification of Private Law.

(c) *International non-governmental organizations*

Baltic and International Maritime Conference, International Bar Association, International Chamber of Commerce and International Law Association.

C. *Election of officers*

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

Chairman Mr. L. Kopač (Czechoslovakia)
Vice-Chairmen . . Mr. G. Barrera-Graf (Mexico)
Mr. R. Herber (Federal Republic of Germany)
Mr. H. Nimpuno (Indonesia)
Rapporteur Mr. P. K. Mathanjuki (Kenya)

D. *Agenda*

9. The agenda of the session as adopted by the Commission at its 210th meeting, on 18 June 1979, was as follows:

1. Opening of the session
2. Election of officers
3. Adoption of the agenda; tentative schedule of meetings
4. International trade contracts
5. International payments
6. International arbitration
7. New international economic order
8. Transport law
9. Training and assistance in the field of international trade law
10. Ratification of the 1978 United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules)
11. Future work
12. Other business
13. Date and place of the thirteenth session
14. Adoption of the report of the Commission.

E. *Decisions of the Commission*

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

F. *Adoption of the report*

11. The Commission adopted the present report at its 226th meeting, on 29 June 1979.

² The election took place at the 210th and 211th meetings, on 18 June, and at the 212th meeting, on 19 June 1979; summary records of these meetings are contained in A/CN.9/SR.210 to 212. 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), sect. II, para. 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 (Yearbook . . . 1968-1970, part two, I, para. 14)).

* Term of office expires on the day before the opening of the regular annual session of the Commission in 1980.

** Term of office expires on the day before the opening of the regular annual session of the Commission in 1983.

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 31 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 selected seven additional members. Of these additional members, the term of three members, selected by the President of the Assembly by drawing lots, would expire at the end of three years (31 December 1976) and the term of four members would expire at the end of six years (31 December 1979). To fill the vacancies on the Commission which would occur on 31 December 1976, the General Assembly, at its thirty-first session, on 15 December 1976, elected (or re-elected) 17 members to the Commission. Pursuant to resolution 31/99 of 15 December 1976, the new members took office on the first day of the regular annual session of the Commission immediately following their election (23 May 1977) and their term will expire on the last day prior to the opening of the seventh regular annual session of the Commission following their election (in 1983). In addition, the term of office of those members whose term would expire on 31 December 1979 was by the same resolution extended till the last day prior to the beginning of the regular annual session of the Commission in 1980.

CHAPTER II. INTERNATIONAL TRADE CONTRACTS³

A. Introduction

12. The Commission, at its eleventh session, decided to commence a study of international contract practices with special reference to "hardship" clauses, *force majeure* clauses, liquidated damages and penalty clauses, and clauses protecting parties against the effects of fluctuations in the value of currency.⁴ The Commission requested the Secretariat to undertake preliminary studies in respect of those and other clauses used in international trade contracts.

13. At the present session, the Commission had before it a note by the Secretary-General containing information on the establishment of a collection of international trade contracts, general conditions and various clauses (A/CN.9/160).*

14. In the course of the general discussion, the view was expressed that model clauses would not necessarily reflect consistent commercial practice and that their interpretation would probably vary according to the law applicable to the contract of which a clause forms part and according to the context in which a clause was placed. However, there was general agreement that the Secretariat should proceed with its study of contemporary international contract practices. Such a study might reveal whether generally acceptable clauses could indeed be identified or whether guidelines should be prepared and issued on the matters which might be covered in different types of contract.

15. It was also noted that although the collection of clauses in international contracts on various commodities was an extensive one it did not yet reflect the commercial practices of all regions. Accordingly, the Commission requested its Secretariat to make every effort to render that collection more representative and, to this end, appealed to its members to facilitate the work of the Secretariat by transmitting to it copies of such clauses.

16. The Commission considered separately and in turn the report of the Secretary-General on international barter or exchange, liquidated damages and penalty clauses, and clauses protecting parties against the effects of currency fluctuations.

B. Barter or exchange⁵

Introduction

17. The Commission, at its eleventh session, retained the subject of barter or exchange in international trade in its programme of work and requested a further

study of the subject by the Secretariat.⁶ At the present session, the Commission had before it a report of the Secretary-General entitled "Barter or exchange in international trade" (A/CN.9/159).*

18. The report states that inquiries have indicated that the conclusion of a true barter contract, in which the parties exchange goods for goods, remains a rare event in international trade. The report suggests, therefore, that the Commission may wish to conclude that it would not be useful to undertake the unification of the law relating to barter in the strict legal sense of the term.

19. In respect of barter-like transactions in which the parties exchange goods, services or other items of economic value with the intention that no more than a minimum amount of money ultimately be transferred from one party to the other, the report notes that such transactions as used in international trade tend to be complex and involve several separate agreements. The report further notes that such several separate agreements are, for the most part, ordinary contracts of licence of industrial property, sale of goods, services or construction of plant with the usual terms found in such contracts.

20. The report suggests, however, that there are at least two sets of provisions which differ from those to be found in the ordinary contract in order to effectuate the barter-like nature of the transaction: payment terms and the remedies for non-performance. The report suggests that, in the context of its future work on international contract practices, the Commission may wish to consider whether standard clauses should be prepared dealing with those two subjects.

Discussion at the session

21. During the discussion of the report, there was general agreement that, although the incidence of true barter contracts wherein goods are exchanged for goods was relatively infrequent, barter-like transactions (often called compensation contracts) were a significant factor in international trade. It was also agreed that their use created various kinds of legal problems which the Commission might consider.

22. Although there was some support for the preparation of either a convention or a model law to unify the law in respect of barter-like transactions, the view was widely held that such transactions took too many different forms to admit of regulation by means of uniform rules. On the other hand it was agreed that, within the context of its work on contract practices, the Commission might attempt to prepare model clauses for use by parties in such transactions.

23. The Commission, after deliberation, decided to request its Secretariat to include, in the studies being conducted in respect of contract practices, consideration of clauses of particular importance in barter-like transactions. The Commission also requested the Secretariat to approach other organizations within the United Na-

* Reproduced in this volume, part two, I, B.

³ The Commission considered this subject at its 211th meeting, on 18 June 1979, and at its 212th and 213th meetings, on 19 June 1979; summary records of these meetings are contained in A/CN.9/SR.211 to 213.

⁴ *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17 (A/33/17)*, paras. 47, 67 (c) (i) b (Yearbook... 1978, part one, II, A).

⁵ The Commission considered this subject at its 211th meeting, on 18 June 1979; a summary record of this meeting is contained in A/CN.9/SR.211.

* Reproduced in this volume, part two, I, A.

⁶ *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17 (A/33/17)*, paras. 67-69.

tions, such as the Economic Commission for Europe, which are engaged in studies on such transactions, and to report to it on the work being undertaken by these organizations.

C. *International contract practices*

1. *Liquidated damages and penalty clauses*⁷

Introduction

24. At its tenth session, the Commission requested the Secretary-General to consider, as part of the study on the future long-term programme of work of the Commission to be presented to its eleventh session, the feasibility and desirability of establishing a uniform régime governing liquidated damages clauses in international contracts.⁸ In response to that request, the study on the long-term programme of work presented to the eleventh session included a note by the Secretary-General (A/CN.9/149/Add.1)* examining the desirability and feasibility of unifying the rules on liquidated damages and penalty clauses in relation to a wide range of international commercial contracts. At its eleventh session, after considering this note, the Commission included liquidated damages and penalty clauses as a priority topic in its new programme of work⁹ and requested the secretariat to undertake a preliminary study of the subject. At the present session the Commission had before it a report of the Secretary-General entitled "Liquidated damages and penalty clauses" (A/CN.9/161).**

25. The report first describes the purposes sought to be achieved by liquidated damages and penalty clauses, and then attempts to distinguish such clauses from other clauses which may sometimes serve the same purposes. Thereafter, the report focuses on two main issues: first, the treatment of liquidated damages and penalty clauses under different legal systems and, secondly, the use of such clauses in international trade contracts and general conditions. On the first issue, the report describes both common features and differences in the regulation by different legal systems of liquidated damages and penalty clauses. In particular, the report analyzes the different approaches of the civil law and the common law to such clauses, and the circumstances under which such clauses may be declared invalid under different legal systems. On the second issue, the report examines the way in which liquidated damages and penalty clauses are used in sample international trade contracts and general conditions. It also examines the use of such clauses in the CMEA General Conditions of Delivery, 1968-1975.

26. In conclusion, the report considers the difficulties that stand in the way of formulating uniform rules

regulating the different aspects of liquidated damages and penalty clauses, including their validity, and the circumstances in which valid clauses may be useful to contracting parties.

Discussion at the session

27. During the discussion of the report, there was wide agreement on the utility of continuing work in this field. The Commission noted that liquidated damages and penalty clauses served useful purposes, and were therefore widely used in international trade contracts. However, there was often uncertainty as to their validity or effect owing to different treatment of such clauses by the various legal systems, combined with the fact that there was often doubt as to what would be the applicable law. Uniform rules which would eliminate or reduce these uncertainties would therefore be useful.

28. The view was expressed that future work should be restricted to liquidated damages clauses whose purpose was to pre-estimate the compensation payable on breach of contract. Punitive clauses should be excluded, as they were undesirable and should be discouraged. The prevailing view, however, was that the work should include both types of clauses. In support of the latter view, it was noted that most legal systems empowered the judge to mitigate harsh punitive clauses, and that there was no great difference in over-all result between clauses pre-estimating compensation payable and punitive clauses which had been mitigated.

29. As to the possible scope of uniform rules which might be formulated regulating these clauses, the suggestion was made that they might be restricted to apply to contracts for the international sale of goods, as these clauses appeared to be inserted most often in such contracts. There was, however, general agreement that it would be more useful to attempt to formulate uniform rules applicable to a wide range of international trade contracts. It was also observed that any uniform rules formulated must contain safeguards protecting contracting parties in a weaker bargaining position from the imposition of unfair clauses.

30. As to the desirable method of unification to be adopted, support was expressed for three different approaches: the formulation of model clauses, the drafting of a model law, and the drafting of a convention. It was observed that the formulation of model clauses would not result in unification, as the model clauses would be modified by different applicable laws of a mandatory character. It was generally agreed that it was unnecessary at the present stage to decide whether the uniform rules should take the form of a model law or a convention, it being recognized that each of these forms had its advantages and disadvantages. Further work should be entrusted to a working group which would report back to the Commission.

Decision of the Commission

31. At its 212th meeting, on 19 June 1979, the Commission adopted the following decision:

* Yearbook ... 1978, part two, IV, A, annex I.

** Reproduced in this volume, part two, I, C.

⁷ The Commission considered this subject at its 211th meeting, on 18 June 1979, and at its 212th meeting, on 19 June 1979; summary records of these meetings are contained in A/CN.9/SR.211 and 212.

⁸ Official Records of the General Assembly, Thirty-second Session, Supplement No. 17 (A/32/17), para. 18, and annex I, para. 513 (Yearbook ... 1977, part one, II, A).

⁹ Ibid., Thirty-third Session, Supplement No. 17 (A/33/17), para. 67 (c) (i) b (Yearbook ... 1978, part one, II, A).

The United Nations Commission on International Trade Law

1. *Decides* that work should be undertaken directed to the formulation of uniform rules regulating liquidated damages and penalty clauses;
 2. *Further decides* that the work be entrusted to the Working Group on International Contract Practices;
 3. *Requests* the Working Group to consider the feasibility of formulating uniform rules on liquidated damages and penalty clauses applicable to a wide range of international trade contracts.
2. *Clauses protecting parties against the effects of currency fluctuations*¹⁰

Introduction

32. The Commission, at its eleventh session, decided that, as part of the general study of international contract practices, special consideration should be given to clauses in international trade contracts by which parties seek to protect themselves against the effects of currency fluctuations.¹¹

33. At the present session the Commission had before it a report of the Secretary-General entitled "Clauses protecting parties against the effects of currency fluctuations" (A/CN.9/164).*

34. The report describes the commercial reasons for clauses designed to protect creditors against changes of the value of a currency in relation to other currencies or by which creditors seek to maintain the purchasing value of the monetary obligation under such contracts. The report analyses two broad categories of clauses used in international trade contracts, according to the kind of monetary risk: pure monetary clauses and purchasing value maintenance clauses.

35. Under the first category are examined compensatory interest rate clauses, stipulation of exchange rate clauses, clauses that denominate the debt in the currency of either the creditor or the debtor or in a currency other than that of the creditor or the debtor, optional currency clauses, combination of currencies devices, reference-to-gold clauses, and the composite unit of account or "basket of currencies" method. Under the second category are examined index clauses, quantity adjustment clauses and hardship clauses.

36. The report considers the legal and policy framework in which such clauses operate in a selected number of countries. It suggests that the Commission may wish to request the Secretariat to carry out further studies and to refer the item to the Working Group on International Negotiable Instruments.

Discussion at the session

37. There was wide agreement that the development of clauses of the type described in the report would bene-

* Reproduced in this volume, part two, I, D.

¹⁰ The Commission considered this subject at its 213th meeting, on 19 June 1979; a summary record of this meeting is contained in A/CN.9/SR.213.

¹¹ *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17 (A/33/17), para. 67 (c) (i) b.*

fit international trade. The subject was of great current interest in view of the floating of major trade currencies. Monetary obligations, particularly under long-term contracts, were subject to changes in value and there was thus a need for value-protection devices. In this connexion, the view was expressed that it was the task of the Commission to prepare model clauses that provided a check on the possible abuses of such clauses by economically strong creditors to the detriment of economically weak debtors.

38. Some doubts were expressed as to the effectiveness of value maintenance clauses as a safeguard against currency fluctuations. It was therefore suggested that, before taking a decision on whether to refer the matter to a Working Group, the Secretariat should undertake further studies.

39. The view was also expressed that it was doubtful whether it was possible for the Commission to regulate, on a world-wide basis, the content of clauses that sought to eliminate most or all of the risks involved in long-term contracts. There was an obvious connexion with monetary policy which, in many States, was a matter of public policy. Hence, it was important that further studies should be made and that, as suggested by the Secretariat, a questionnaire should be circulated to Governments and banking and trade circles. It might well be that in the long term the only possibility would be for the Commission to prepare a document explaining to what extent particular types of clauses were enforceable in the legal systems of different countries.

Decision of the Commission

40. At its 213th meeting, on 19 June 1979, the Commission, after deliberation, adopted the following decision:

The United Nations Commission on International Trade Law

Requests the Secretariat to carry out further studies in respect of clauses protecting parties against the effects of currency fluctuations, in consultation with the Study Group on International Payments, including the circulation of a questionnaire to Governments and interested international organizations and trade and banking circles, and, after consultation with the Working Group on International Negotiable Instruments, with specific reference to the desirability and feasibility of work by the Commission on this topic, to submit a report on its findings to the Commission with appropriate recommendations.

CHAPTER III. INTERNATIONAL PAYMENTS

A. *Draft Convention on International Bills of Exchange and International Promissory Notes*¹²

41. The Commission had before it the report of the Working Group on International Negotiable Instruments on the work of its seventh session, held in New

¹² The Commission considered this subject at its 213th meeting, on 19 June 1979; a summary record of this meeting is contained in A/CN.9/SR.213.

York from 3 to 12 January 1979 (A/CN.9/157).^{*} The report sets forth the progress so far made by the Working Group in its work on the preparation of a draft convention on international bills of exchange and international promissory notes. The proposed convention would establish uniform rules applicable to an international negotiable instrument (bill of exchange or promissory note) for optional use in international payments.

42. As indicated in its report, the Working Group at its seventh session continued its consideration of the revised text of the draft convention on international bills of exchange and international promissory notes, prepared by the Secretariat on the basis of the deliberations and decisions of the Working Group at its six previous sessions relative to the draft uniform law first prepared by the Secretary-General in response to a decision of the Commission¹³ and referred by the Commission to the Working Group.¹⁴ The report indicates that the Working Group at this session completed consideration of articles 54 to 68, and 70.

43. The report sets forth the deliberations and conclusions of the Working Group with respect to the provisions of the draft uniform law regarding presentment for payment, recourse and payment. The report also notes that the Working Group is nearing completion of its work on the draft convention, but that at least one more session is required in order to accomplish this. The Secretariat informed the Commission that it would be possible to hold such a meeting within the budgetary appropriations for the year 1979.

Decision of the Commission

44. At its 213th meeting, on 19 June 1979, the Commission adopted 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 seventh session;

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

3. *Agrees* with the request of the Working Group that it should hold a further session in the course of 1979;

4. *Recalls* its request addressed to the Working Group at the fifth session of the Commission that it 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 convention to international

cheques or by drawing up separate draft rules on international cheques;

5. *Authorizes* the Working Group, if it is of the view that the formulation of uniform rules for international cheques is desirable because of the use of the cheque for settling international payments and that the application of the draft convention can be extended to include international cheques, to proceed accordingly;

6. *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. Stand-by letters of credit¹⁵

45. At its eleventh session, the Commission included, as a priority topic in its new programme of work, the item entitled "Stand-by letters of credit" and requested the Secretariat to study this topic in conjunction with the International Chamber of Commerce (ICC). The Commission further requested the Secretariat to undertake a preliminary study of the topic.¹⁶ At the current session the Commission had before it a report of the Secretary-General entitled "Stand-by letters of credit" (A/CN.9/163).^{*}

46. The report notes that the parties to a contract (referred to in this connexion as "the underlying contract") may agree that, in the event of non-performance or defective performance by the obligor (referred to in this connexion as "the account party"), a specified sum was to be payable to the obligee (referred to in this connexion as "the beneficiary") under a letter of credit (the "stand-by letter of credit") to be opened by a bank in favour of the beneficiary at the instance of the account party. Difficulties sometimes arose when, under the terms of the stand-by letter of credit, the non-performance or defective performance by the account party was proved solely by the certification by the beneficiary to the bank of such default. Such certification was sometimes challenged by the account party as being fraudulent. The report considers methods of reducing claims which are fraudulent or not made in good faith.

47. The report considers the existing protection given to an account party against fraudulent claims, and other possible means of protection against fraud, including certification of default by a third party, determination of default by the bank, or compulsory arbitration between the parties as to the validity of the claim of the

^{*}Reproduced in this volume, part two, II, A.

¹³ *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17* (A/8417), para. 35 (Yearbook ... 1971, part one, II, A).

¹⁴ *Ibid.*, *Twenty-seventh Session, Supplement No. 17* (A/8717), para. 6 (Yearbook ... 1972, part one, II, A).

^{*}Reproduced in this volume, part two, II, B.

¹⁵ The Commission considered this subject at its 213th meeting, on 19 June 1979; a summary record of this meeting is contained in A/CN.9/SR.213.

¹⁶ *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17* (A/33/17), para. 67 (c) (ii) a, and (d).

account party. The report also notes that, in view of the frequent use of stand-by letters of credit in international trade transactions, work directed to eliminating the abuse noted above would be useful. The report states that a joint Working Party of ICC and the secretariat of the Commission has been constituted to carry forward the work, and recommends that ICC be encouraged to continue this work in collaboration with the Secretariat, subject to a review of the results by the Commission.

Discussion at the session

48. It was observed that the suggestions contained in the report as to possible means of protecting the account party against fraud needed further examination. The Commission noted that the work of ICC in respect of documentary letters of credit and contract guarantees had a direct bearing on work in respect of stand-by letters of credit. For this reason, there was general agreement that ICC should be encouraged to continue its work on stand-by letters of credit in co-operation with the Commission's Secretariat and should be requested to consider the possible means of protection against fraud that had already been developed by the UNCITRAL Study Group on International Payments. The Secretariat was requested to report on the progress of work to the Commission. The Commission also requested ICC to submit to it the results of its work before final adoption by its competent organs.

C. Security interests in goods¹⁷

Introduction

49. At its tenth session, the Commission had before it three reports¹⁸ submitted by the Secretary-General in compliance with a request made by the Commission at its eighth session.¹⁹ After considering these reports the Commission requested the Secretary-General to submit to it at its twelfth session a further report on the feasibility of uniform rules on security interests and on their possible content.²⁰

50. At the present session the Commission had before it a report of the Secretary-General entitled "Security interests: feasibility of uniform rules to be used in the financing of trade". The report examines the role of security interests in a credit system, whether that role is fulfilled under the rules obtaining in national legal systems, and whether action by the Commission could be useful to improve the situation. The report advances two arguments in favour of action by the Commission: (a) there is a demonstrable need for modernization of the law of security interests in most parts of the world, and countries which might wish to make their laws more receptive to present-day requirements might welcome

the aid which the Commission could give by furnishing them with a model text; and (b) as long as the law of security interests differs significantly in different countries, the legal problems which arise when goods subject to a non-possessory security interest are moved from one State to another are difficult to solve satisfactorily.

51. The report suggests that, in the present state of development of the law, it would not be feasible to try to achieve unification by means of a uniform law in the form of a convention but that, instead, a model law could be formulated with suggested alternatives for provisions which present particular difficulties.

Discussion at the session

52. The discussion in the Commission revealed two currents of opinion. According to one view, the subject of security interests was strongly rooted in particular legal concepts of the various legal systems and could not satisfactorily be dealt with unless other branches of law, in particular that of bankruptcy, were unified. Moreover, the law of security interests was strongly affected by public policy determinations and required a system of registration or publicity which it would be difficult to establish on a world-wide basis. Hence, the preparation of uniform rules would be an arduous task and, in view of the greater importance of other items on the Commission's work programme, should be given a low priority or deleted from the programme of work altogether. Proponents of this view suggested that a better approach might be the preparation of conflict rules and that the attention of the Hague Conference on Private International Law should be drawn to the desirability of undertaking the unification of the rules of conflict of laws in this matter.

53. According to another view, the very fact of the important differences in the law of security interests in different legal systems was a cogent reason for undertaking the unification or harmonization of the substantive law. Those differences interfered with the financing of international trade. Moreover, it was pointed out that in many countries the law in respect of security interests was not adequate for the purposes of commercial credit. It was agreed by those who held this view that unification of the law by means of a convention would not be feasible. However, it was suggested that the preparation of a model law could be useful for those legal systems which wished to modernize their law of security interests and, over a period of time, it could be expected that the existence of a model law might have the effect of reducing the differences in the law which currently exist. Moreover, one representative proposed the consideration of whether such a model law should provide for a specific type of security interest to be introduced into all national legislations in addition to the existing security interests under domestic legal systems.

Decision of the Commission

54. At its 225th meeting, on 27 June 1979, the Commission decided to request the Secretariat to prepare a report setting out the issues to be considered in the preparation of uniform rules on security interests

¹⁷ The Commission considered this subject at its 213th meeting, on 20 June 1979; a summary record of this meeting is contained in A/CN.9/SR.213.

¹⁸ A/CN.9/130, A/CN.9/131 and A/CN.9/132. For documents A/CN.9/131 and A/CN.9/132, see Yearbook... 1977, part two, II, A and B.

¹⁹ Official Records of the General Assembly, Thirtieth Session, Supplement No. 17 (A/10017), para. 63 (Yearbook... 1975, part one, II, A).

²⁰ Ibid., Thirty-second Session, Supplement No. 17 (A/32/17), para. 37 (Yearbook... 1977, part one, II, A).

and to propose the manner in which those issues might be decided.

D. Other matters

55. The Commission took note of a statement by its Secretary on the work at present being carried out within the UNCITRAL Study Group on International Payments, a consultative body composed of representatives of banking and trade institutions. The Study Group, at its meetings in September 1978 and April 1979, had continued its consideration of legal problems of electronic funds transfer (a topic included in the work programme of the Commission with a low priority) and had commenced work on the determination of a universal unit of account for international conventions (included in the Commission's programme of work at the suggestion of France).

56. The Commission, recognizing the complex technical aspects of these topics, requested the Secretariat to continue the preparatory work within the framework of the Study Group and to present progress reports to it at a future session.

CHAPTER IV. INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION

A. UNCITRAL Arbitration Rules

Introduction

57. The Commission had before it a note by the Secretariat setting forth certain "Issues relevant in the context of the UNCITRAL Arbitration Rules" (A/CN.9/170).^{*} The issues brought to the attention of the Commission relate to the use of the Rules in administered arbitration and to the designation of an appointing authority.

58. The first issue concerns the fact that existing arbitral institutions have approached the UNCITRAL Arbitration Rules in the context of administered arbitration in different ways and that regional arbitration centres are, or soon will be, established for which this question of approach is of particular importance. The note sets forth certain suggestions for consideration by the Commission.

59. The second issue relates to the fact that the assistance of an appointing authority may be an essential element in the arbitral process under the UNCITRAL Arbitration Rules. In order to further the availability of such assistance, the Commission was invited to consider the desirability of issuing a list of arbitral institutions that have declared their willingness, if so requested, to serve as appointing authorities under the UNCITRAL Arbitration Rules.

*Discussion on the use of the UNCITRAL Arbitration Rules in administered arbitration*²¹

60. The Commission considered certain questions relating to the use of the UNCITRAL Arbitration Rules

in administered arbitration brought to its attention by the above-mentioned note by the Secretariat (A/CN.9/170). It was noted with satisfaction that the UNCITRAL Arbitration Rules had proved to be successful in that they were widely applied in practice. It was also noted that various arbitral institutions had declared their willingness to serve as administrative bodies in connexion with these Rules, or had adopted them as their own.

61. It was recalled in that context that the Rules, when first submitted in preliminary draft form, had provided for "administered" and "non-administered" arbitration but that the prevailing view in the Commission at its eighth session had been "to exclude, for the time being, administered arbitration from the scope of the Rules" (see A/CN.9/170, paras. 2 and 3). Consequently, the final version of the Rules had been drafted and adopted for *ad hoc* arbitration, but the Rules were sufficiently flexible to permit parties or arbitrators to arrange for administrative assistance in order to facilitate the conduct of cases. It was reported that such arrangements had been made in various contexts.

62. The basic question considered by the Commission at its present session was whether it should take any steps to facilitate the use of the Rules in administered arbitration and seek to prevent disparity in their use by various existing or future arbitral institutions. There was considerable support for the proposal that, if a list of arbitral institutions were prepared (see discussion in paras. 67 to 69 below), it should also indicate whether the institution in question had declared its willingness to provide administrative services for arbitral proceedings under the UNCITRAL Arbitration Rules. The question of the preparation of administrative model rules or guidelines on administrative services was also discussed, in particular such model rules or guidelines which might be of assistance to new arbitral centres. It was suggested that such preparation might be done in collaboration with existing arbitration institutions and interested bodies.

63. According to one view, the promulgation of such rules or guidelines would be inadvisable on the following grounds. There was no real need for administrative rules because the established institutions had their own rules or because the recent use of the UNCITRAL Arbitration Rules by arbitral institutions had apparently not caused any problem. Also, the Rules should remain exclusively designed for *ad hoc* arbitration. Furthermore, the preparation of rules or guidelines on administrative services would face insurmountable problems in view of the different local conditions and organizational structures of the various institutions, and such an undertaking would probably fall outside the competence and mandate of the Commission.

64. According to another view, the Commission should facilitate the use of the Rules in administered arbitration. Under one proposal, the model arbitration clause could be modified so as to provide parties with the option of entrusting the appointing authority with administrative functions. Such an approach would not, in substance, modify the Rules. Such rules or guidelines would not be detailed procedural rules. They would not

^{*} Reproduced in this volume, part two, III, E.

²¹ The Commission considered this subject at its 218th and 219th meetings, on 22 June 1979; summary records of these meetings are contained in A/CN.9/SR.218 and 219.

be binding on parties or institutions, but would provide a check list of the various administrative services, largely of a secretariat nature, which the parties or the arbitrators might wish to request and which institutions would be free to state whether they were willing to perform. The decision taken at the eighth session that the UNCITRAL Arbitration Rules should not deal with administered arbitration should be reconsidered in the light of the recent developments, i.e., the use of the Rules by arbitral institutions in divergent ways.

65. The view was also expressed that it was premature to take any firm decision at the present stage. Further studies should be undertaken by the Secretariat including, but not limited to, inquiries among arbitral institutions and other interested bodies to determine the feasibility of such rules or guidelines, the extent of their acceptability by various arbitral institutions, and, in the light of such studies, to suggest to the Commission any such rules or guidelines as might be appropriate.

66. After extensive discussion, the prevailing view in the Commission was that it was desirable that the UNCITRAL Arbitration Rules be applied without change, even where arbitral institutions administer arbitration under the UNCITRAL Arbitration Rules. Where modification was required to adjust the UNCITRAL Arbitration Rules to administered arbitration, that could be achieved if the parties agreed to have their arbitration conducted under the administrative rules of the arbitral institution. While each arbitral institution was in no way bound to adhere to the UNCITRAL Arbitration Rules, the preparation by the Commission of guidelines or a check list of issues relevant to administrative services would have two results: first, it would assist arbitral institutions to formulate their administrative rules for the administration of arbitration under the UNCITRAL Arbitration Rules; secondly, it would encourage arbitral institutions to utilize the UNCITRAL Arbitration Rules unchanged. In this connexion, it was noted that the arbitration centres which had been recently established by the Asian-African Legal Consultative Committee would welcome an initiative by the Commission in preparing such guidelines for administrative rules.

Discussion on the designation of an appointing authority²²

67. The Commission considered the desirability and feasibility of issuing a list of arbitral and other institutions that have declared their willingness to serve if so requested as appointing authorities under the UNCITRAL Arbitration Rules. No agreement was reached on whether or not such a list should be issued.

68. There was support for the view that a carefully prepared list would be of great assistance to parties and that its practical value would outweigh any possible short-comings or undesirable implications. However, concern was expressed about the potential difficulties and negative effects of such an undertaking. Neither the Commission nor the Secretariat was in a position to

judge whether the institutions which applied for inclusion in the list were genuine and qualified. This aspect was particularly crucial in view of the fact that inclusion in a list published by the United Nations might be interpreted as carrying with it a stamp of approval or recommendation.

69. There was, however, general agreement that the Secretariat should be asked to carry out further inquiries and studies in consultation with arbitral organizations concerning the feasibility and possible methods of compiling such a list. The Secretariat should also study the experience gained by other bodies, in particular, with the list of arbitral institutions published by the Economic Commission for Europe in connexion with the 1961 European Convention on International Commercial Arbitration and the Arbitration Rules of that Commission of 1966.

70. There was wide agreement on the continuing need to promote and facilitate the use of the UNCITRAL Arbitration Rules. In this connexion it was suggested that States and arbitral institutions should make every effort to ensure the widest possible publication and distribution of the Rules. It was recalled that, in its resolution 31/98 of 15 December 1976, the General Assembly requested the Secretary-General to arrange for the widest possible distribution of the Rules. It was suggested that this could be facilitated by the Secretary-General contacting arbitral institutions and chambers of commerce in various States and regions, as well as regional commissions, requesting them to make available to interested parties copies of the Rules and information concerning their use. Such activities were reported to have been undertaken in several parts of the world. It was also suggested by some representatives that the Secretary-General might convene periodic meetings of institutions which are willing to perform such functions in order to share experiences and further develop methods for promoting the Rules. Such meetings might be conveniently held in conjunction with meetings of the International Council for Commercial Arbitration.

Decision of the Commission on both issues

71. The Commission, at its 219th meeting, on 22 June 1979, adopted the following decision:

The United Nations Commission on International Trade Law

1. Takes note of the note by the Secretariat entitled "Issues relevant in the context of the UNCITRAL Arbitration Rules";²³

2. Requests the Secretary-General:

(a) To prepare for the next session, if possible in consultation with interested international organizations, guidelines for administering arbitration under the UNCITRAL Arbitration Rules, or a check list of issues which may arise when the UNCITRAL Arbitration Rules are used in administered arbitration;

(b) To consider further, in consultation with interested international organizations, including the

²² The Commission considered this subject at its 219th meeting, on 22 June 1979; a summary record of this meeting is contained in A/CN.9/SR.219.

²³ A/CN.9/170.

International Council for Commercial Arbitration, the advantages and disadvantages in the preparation of a list of arbitral and other institutions that have declared their willingness to act as appointing authorities under the UNCITRAL Arbitration Rules, and to submit its report to the Commission at a future session;

(c) To consider methods to promote and facilitate use of the UNCITRAL Arbitration Rules.

B. Recommendations addressed to the Commission by the Asian-African Legal Consultative Committee

Introduction

72. The Commission, at its tenth session, considered certain recommendations of the Asian-African Legal Consultative Committee (AALCC) relating to international commercial arbitration.²⁴ These recommendations were aimed at ensuring the autonomy of parties to agree on arbitration rules irrespective of any contrary provision of the law applicable to the arbitration, at safeguarding fairness in arbitral proceedings, and at excluding reliance on sovereign immunity in international commercial arbitration.²⁵ It was suggested by AALCC that these issues could possibly be clarified in a protocol to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

73. In the decision taken at its tenth session, the Commission requested the Secretary-General to consult with AALCC and other interested international organizations and to prepare studies on the matters raised by AALCC.²⁶ Pursuant to that decision, the Secretariat had consultations with representatives of the secretariat of AALCC, members of the International Council for Commercial Arbitration and of the International Chamber of Commerce at Paris in September 1978, and with representatives of member States of AALCC at that organization's twentieth and twenty-first sessions in 1978 and 1979.

74. The Commission, at its present session, had before it two studies. One was a report of the Secretary-General entitled "Study on the application and interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)" (A/CN.9/168).^{*} This report contains an analytical survey of over a hundred court decisions concerning the application and interpretation of the 1958 New York Convention. It identifies ambiguities, divergencies and problems encountered in the application of the Convention and ascertains the practical value of the Convention for the promotion of international commercial arbitration. The report concludes that the Convention, despite some minor deficiencies, has satisfactorily met the general purpose for which it was adopted and that it

would therefore be inadvisable to amend its provisions or prepare a protocol, at least for the time being.

75. The second was a note by the Secretariat entitled "Further work in respect of international commercial arbitration" (A/CN.9/169),^{*} which discusses the need for greater uniformity of national laws on arbitral procedure and the desirability of establishing standards for modern and fair arbitration procedures. The note suggests that the Commission commences work on a model law on arbitral procedure which could help to overcome most of the problems identified in the above survey and meet the concerns expressed in the recommendations of AALCC.

Discussion at the session²⁷

76. The Commission considered the issues raised in the recommendations of AALCC in the light of the report on the interpretation and application of the 1958 New York Convention (A/CN.9/168) and the note on further work in respect of international commercial arbitration (A/CN.9/169). The discussion in the Commission focused on the question whether there was a need to modify or amend the 1958 Convention, possibly by way of a protocol, and whether the Commission should attempt to elaborate a model law on arbitral procedure which could, to a large extent, meet the concerns expressed by AALCC.

77. It was generally agreed that there was no need to alter or amend, by way of revision or protocol, the 1958 Convention. In support of that view it was noted that the Convention worked well in practice, despite some minor divergencies in its application and interpretation; it was also stressed that any modification or amendment might have a harmful effect in that it could cause confusion and impede further accessions to or ratification of the Convention. In this connexion, it was suggested that the attention of the General Assembly of the United Nations should be drawn to the need for wider adherence to the Convention and that States which had not yet done so should be invited to accede to, or ratify, the Convention.

78. As to the suggestion that a model law on arbitral procedure be prepared, there was wide agreement in the Commission to request the Secretariat to undertake the necessary preliminary studies and to prepare a preliminary draft of such a law. A model law could assist States in reforming and modernizing their law on arbitration procedure and would thus help to reduce the divergences encountered in the interpretation of the 1958 Convention. A model law would also meet in large measure the concerns expressed by AALCC in its recommendations in that a model law, if accepted by States, would minimize the possible conflicts between national laws and arbitration rules. The view was expressed that in developing a model law, the Commission would be helping to bring about fairness and equality in business relation-

^{*} Reproduced in this volume, part two, III, C.

²⁴ *Official Records of the General Assembly, Thirty-second Session, Supplement No. 17 (A/32/17)*, annex II, paras. 27-37 (Yearbook... 1977, part one, II, A, annex II).

²⁵ The recommendations of AALCC are contained in the annex to document A/CN.9/127 (Yearbook... 1977, part two, III).

²⁶ *Official Records of the General Assembly, Thirty-second Session, Supplement No. 17 (A/32/17)*, annex II, para. 39.

^{*} Reproduced in this volume, part two, III, D.

²⁷ The Commission considered this subject at its 220th meeting, on 25 June 1979; a summary record of this meeting is contained in A/CN.9/SR.220.

ships, and that this was therefore relevant to the Commission's consideration of the legal aspects of a new international economic order.

79. As to the scope of application of such model law, it was generally agreed that it should be restricted to international commercial arbitration in view of the specific features inherent in the settlement of international disputes. This would, however, not prevent States which were willing to do so from adopting the model provisions also for domestic arbitrations.

80. It was further agreed that it would be useful to prepare an analytical compilation of provisions of national laws pertaining to arbitration procedure, setting forth the major differences between such provisions as well as possible conflicts between national laws and the UNCITRAL Arbitration Rules. It was suggested that this compilation should also include instances of divergences in the interpretation of the 1958 Convention which were due to certain provisions of national law.

Decision of the Commission

81. The Commission, at its 220th meeting, on 25 June 1979, adopted the following decision:

The United Nations Commission on International Trade Law

1. Takes note of the report on the interpretation and application of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards²⁸ and the note on further work in respect of international commercial arbitration;²⁹

2. Requests the Secretary-General:

(a) To prepare an analytical compilation of provisions of national laws pertaining to arbitration procedure, including a comparison of such laws with the UNCITRAL Arbitration Rules and the 1958 Convention;

(b) To prepare, in consultation with interested international organizations, in particular the Asian-African Legal Consultative Committee and the International Council for Commercial Arbitration, a preliminary draft of a model law on arbitral procedure, taking into account the conclusions reached by the Commission, and in particular:

- (i) That the scope of application of the draft uniform rules should be restricted to international commercial arbitration;
- (ii) That the draft uniform law should take into account the provisions of the 1958 Convention and of the UNCITRAL Arbitration Rules;

(c) To submit this compilation and the draft to the Commission at a future session;

3. Draws the attention of the General Assembly to the desirability of achieving world-wide adherence to the 1958 New York Convention and of inviting

States, which have not yet done so, to ratify, or accede to, that Convention.

C. UNCITRAL Conciliation Rules

Introduction

82. Among the priority items included in the Commission's new programme of work adopted at its eleventh session³⁰ was "Conciliation of international trade disputes and its relation to arbitration and to the UNCITRAL Arbitration Rules".³¹ Pursuant to that decision, the Secretariat held consultations with representatives of the International Council for Commercial Arbitration (ICCA) and the International Chamber of Commerce (ICC) in September 1978 and February 1979.

83. At the present session the Commission had before it the text of a preliminary draft of the UNCITRAL Conciliation Rules (A/CN.9/166)* and a report of the Secretary-General entitled "Conciliation of international trade disputes" (A/CN.9/167).³² The report, in chapter I, deals with the nature and characteristics of conciliation as distinguished from other methods of dispute settlement and discusses the purpose and potential advantages of conciliation. Chapter II of the report contains a commentary on the preliminary draft UNCITRAL Conciliation Rules.

Discussion at the session on the desirability and general principles of conciliation rules³³

84. The Commission had a full discussion, before considering the draft UNCITRAL Conciliation Rules in detail, on the desirability of elaborating a set of conciliation rules and on the general principles and features of conciliation. The Commission, though divided on the question of whether there was a world-wide need for UNCITRAL Conciliation Rules, reached a consensus that it should have an exchange of views on the draft set of rules in detail in the light of certain principles agreed upon by it.

85. Doubts were expressed about the practical value of conciliation rules: conciliation, if unsuccessful, could lead to additional costs and time to be spent by parties; there was a certain similarity between conciliation proceedings and party negotiations; and parties might well be reluctant to have recourse to conciliation for fear of later risks in adversary proceedings. According to another view, however, there was a growing tendency in many countries to settle disputes by conciliation; conciliation as an amicable settlement method was in many respects a viable alternative to arbitration and court proceedings; conciliation had been found useful in regions

* Reproduced in this volume, part two, III, A.

** Reproduced in this volume, part two, III, B.

³⁰ *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17 (A/33/17)*, para. 69 (Yearbook ... 1978, part one, II, A).

³¹ *Ibid.*, para. 67 (c) (iv).

³² Professor Pieter Sanders (Netherlands) who had acted as a consultant to the Secretariat in the drafting of the UNCITRAL Arbitration Rules also acted as a consultant in the preparation of the draft UNCITRAL Conciliation Rules.

³³ The Commission considered this subject at its 221st meeting, on 25 June 1979; a summary record of this meeting is contained in A/CN.9/SR.221.

²⁸ A/CN.9/168.

²⁹ A/CN.9/169.

and countries where it was well known and frequently used, and sometimes was a necessary prerequisite to the institution of arbitral or judicial proceedings.

86. While, under one view, conciliation was regarded as closely linked to arbitration and, as it were, its first stage, under another view conciliation should be conceived as a distinct, independent, and basically different method of settlement. There was wide agreement in the Commission that the procedure envisaged in the conciliation rules should be simple, flexible, and expeditious; that the parties should be free to modify the rules and to terminate the proceedings at any time; that the conciliator should play an active role and have wide discretion in the conduct of the proceedings; and that the conciliation rules should contain clear provisions so that arbitrators would not be influenced by what had occurred in the conciliation.

Discussion of the draft UNCITRAL Conciliation Rules⁸⁴

87. The Commission considered the preliminary draft UNCITRAL Conciliation Rules contained in A/CN.9/166 article by article. It was understood that this discussion was a preliminary exchange of views which should be taken into account by the Secretariat in its further studies and in revising the draft Rules. A summary of this discussion is set forth in annex I to the present report.

Decision of the Commission

88. After deliberation, the Commission, at its 225th meeting, on 27 June 1979, adopted the following decision:

The United Nations Commission on International Trade Law

1. Takes note of the preliminary draft UNCITRAL Conciliation Rules⁸⁵ and the report of the Secretary-General entitled "Conciliation of international trade disputes";⁸⁶

2. Requests the Secretary-General:

(a) To prepare, in consultation with interested international organizations and arbitral institutions, including the International Council for Commercial Arbitration, a revised draft of the UNCITRAL Conciliation Rules, taking into account the views expressed during the discussions at the present session;

(b) To transmit the revised draft Rules, together with a commentary, to Governments and interested international organizations and institutions for their observations;

(c) To submit to the Commission at the thirteenth session the revised draft Rules and commentary together with the observations received.

⁸⁴ The Commission considered the draft UNCITRAL Conciliation Rules at its 222nd and 223rd meetings, on 26 June 1979, and at its 224th and 225th meetings, on 27 June 1979; summary records of these meetings are contained in A/CN.9/SR.222 to 225.

⁸⁵ A/CN.9/166.

⁸⁶ A/CN.9/167.

CHAPTER V. NEW INTERNATIONAL ECONOMIC ORDER⁸⁷

Introduction

89. At its eleventh session, the Commission decided to include in its work programme a topic entitled "The legal implications of the new international economic order" and to accord priority to the consideration of this subject. The Commission on that occasion also established a Working Group, but deferred the designation of the States members of that Group until the present session, and requested the Secretary-General to prepare a report setting forth subject-matters that are relevant in the context of the development of a new international economic order and that would be suitable for consideration by the Commission.⁸⁸

90. At the present session, the Commission had before it a report of the Secretary-General entitled "New international economic order: possible work programme of the Commission" (A/CN.9/171).*

91. The report reflects the views expressed and the proposals submitted at the eleventh session of the Commission, during the discussions in the Sixth Committee of the General Assembly on the Commission's report on the work of its eleventh session, and in the replies of Governments to a note verbale of the Secretary-General, dated 6 October 1978. The report also draws upon the Declaration on the Establishment of a New International Economic Order,³⁹ the Programme of Action on the Establishment of a New International Economic Order⁴⁰ and the Charter of Economic Rights and Duties of States.⁴¹

92. The report reviews subject-matters of possible relevance to international trade under the following headings: general principles of international economic development, commodities, trade, monetary system, industrialization, transfer of technology, transnational corporations, and permanent sovereignty of States over natural resources. The report then examines certain issues relevant to the work of the Commission: the scope of international trade law and co-ordination and co-operation.

Discussion at the session

93. The Commission recalled that the Working Group on the New International Economic Order, established at its eleventh session, had been given the mandate to examine the report of the Secretary-General in order to make recommendations as to specific topics which could appropriately form part of the programme of work of the Commission. Therefore, the Commission focused its discussion on the two issues set out in the second part of the Secretary-General's report—scope

* Reproduced in this volume, part two, IV.

⁸⁷ The Commission considered this subject at its 214th and 215th meetings, on 20 June 1979; summary records of these meetings are contained in A/CN.9/SR.214 and 215.

⁸⁸ Official Records of the General Assembly, Thirty-third Session, Supplement No. 17 (A/33/17), para. 71 (2) (a) (Yearbook . . . 1978, part one, II, A).

³⁹ General Assembly resolution 3201 (S-VI).

⁴⁰ General Assembly resolution 3202 (S-VI).

⁴¹ General Assembly resolution 3281 (XXIX).

of international trade law and co-ordination of work—in order to provide the Working Group with certain guidelines for its work. The general view was that the Working Group should interpret its mandate in a flexible manner and that it was free, for instance, to consider items that were not mentioned in the report of the Secretary-General. One representative reaffirmed the opposition of his Government to work by the Commission pertaining to the new international economic order and the establishment of a special working group. However, he recognized certain changes in world trade and the possible usefulness of studying problems which such changes entailed. Consequently, his Government would be ready to work in or with the Working Group.

94. Some representatives expressed the view that it would be useful if the consideration of subject-matters by the Working Group include the legal basis of the relations between States where such relationships were connected with international trade, and in particular should include the principle of non-discrimination, the principle of most-favoured-nation treatment, and the democratic and equitable basis of such relationships in the context of international trade. On the other hand, some representatives recalled decisions of the Commission from the beginning which, in their view, led to the inescapable conclusion that the Commission would concentrate on private law matters relating to trade practice and not deal with trade policies. These representatives favoured the continuation of this approach which they regarded as the most prudent. The view was expressed that no progress could be made in the Commission on such matters as non-discrimination and most-favoured-nation clauses.

95. There was general agreement on the need for effective co-ordination of work between international organizations and bodies engaged in the unification of international trade law within and outside the United Nations system. Co-ordination of work became especially important in the context of the new international economic order.

96. Various suggestions were made in respect of the ways and means of co-ordination. According to one view, the Secretariat should continue with, and strengthen, its traditional policy of information and consultation. Useful results had been obtained, through periodic contacts at high secretariat level, between the secretariats of UNCITRAL, the International Institute for the Unification of Private Law (UNIDROIT), the Hague Conference on Private International Law, the Asian-African Legal Consultative Committee and the International Chamber of Commerce. According to another view, adequate co-ordination at the secretariat level would not always lead to satisfactory results. Notably, the degree of co-ordination of work within the United Nations system left much to be desired. Where such was the case, action by Governments and their representatives in various United Nations bodies would be required to allocate different types of work to the bodies most competent to deal with them, and thereby prevent overlapping of functions.

97. The view was also held that the responsibility for co-ordination rested with the Commission itself and not with its secretariat.

98. Many representatives were of the view that the General Assembly should be asked to stress the importance of co-ordination of work in respect of the legal regulation of international trade, in particular where the new international economic order was concerned. It was most important that the legal texts prepared by various organs and bodies in the field of international trade law reflect a common approach and constitute a coherent system. Co-ordination would also mitigate the danger of duplication of efforts and of the adoption of legal texts that were in conflict with each other or reflected divergent policies.

99. The view was also expressed that what mattered was not only the co-ordination of work in the sense of a division of labour between various international organizations but also, and perhaps more important, the identification of those legal problems which cut across the various issues dealt with in different bodies. In this respect it was felt that it was not only necessary to continue to exchange information between the organizations concerned, and for the Secretariat to continue to provide surveys of the legal activities of those organizations, but also to analyse and identify the general legal issues, and to prepare recommendations for the Commission as to the action to be taken.

Decision by the Commission

100. At its 226th meeting, on 29 June 1979, the Commission unanimously adopted the following decision:

The United Nations Commission on International Trade Law,

Recalling the decision taken at its eleventh session on the establishment of a Working Group on the New International Economic Order and the mandate conferred upon the Working Group,

1. *Decides* that the Working Group on the New International Economic Order should be composed of 17 members of the Commission, as follows:

Argentina, Australia, Chile, Czechoslovakia, France, German Democratic Republic, Germany, Federal Republic of, Ghana, India, Indonesia, Japan, Kenya, Mexico, Nigeria, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and United States of America;

2. *Requests* the Secretary-General to invite Member States of the United Nations and the specialized agencies and interested international organizations to attend meetings of the Working Group as observers;

3. *Requests* the Working Group to examine the report of the Secretary-General on the new international economic order⁴² and to take into account the discussions on this subject by the Commission at its twelfth session in order to make recommendations as to specific topics which could appropriately form part of the programme of work of the Commission and to report to the Commission at its thirteenth session;

⁴² A/CN.9/171.

4. *Further requests* the Working Group to bear in mind the need for co-ordination in the field of international trade law as set out in the decision adopted by the Commission at its 225th meeting, on 27 June 1979,⁴³ and to make recommendations in respect of the steps that could usefully be taken by the Commission.

CHAPTER VI. TRANSPORT LAW⁴⁴

Introduction

101. At its eleventh session, the Commission decided to include the topic of transportation in its future work programme, and to accord priority to the consideration of this subject.⁴⁵ The Commission also requested the Secretariat to prepare a study setting forth the work accomplished so far by international organizations in the field of multimodal transport, charter-parties, marine insurance, transport by container and the forwarding of goods.⁴⁶

102. At the present session, the Commission had before it a report of the Secretary-General (A/CN.9/172)* containing a survey of the work of international organizations in the field of transport law. This report mentions in brief the major resolutions in the field of transport that have been adopted by the General Assembly, the Economic and Social Council and the United Nations Conference on Trade and Development (UNCTAD). The report then considers the work of international organizations in the five areas of transportation law, as requested by the Commission.

103. The report notes that within the United Nations primary responsibility concerning multimodal transport and containerized transport has been entrusted to UNCTAD. The report then states that the topics of charter-parties and marine insurance have received some preliminary consideration by UNCTAD bodies and suggests that the Commission may wish to consult UNCTAD as to the desirability of preparing an international agreement or uniform rules on either or both topics. The report also notes that the Commission may wish to consider whether there is justification for the drafting of rules concerning the legal status of freight forwarders in respect of which UNIDROIT has carried out preparatory work.

Discussion at the session

104. There was no support in the Commission for work on either multimodal transport or transport by container, it being noted that a draft Convention on International Multimodal Transport had been completed by an UNCTAD Intergovernmental Group. Furthermore, it was agreed that the Commission should not undertake work on the regulation of contracts for the forwarding of goods, because the need for uniform rules was not clearly established and the proposed convention on International Multimodal Transport might resolve some of the difficulties which were currently experienced. It was also agreed that the Commission should not commence work on charter-parties or marine insurance, as these subjects were under consideration by the UNCTAD Working Group on International Shipping Legislation. However, there was agreement that the UNCTAD Working Group should be informed of the willingness of the Commission to undertake work of a legal character on these subjects if the UNCTAD Working Group determined that work directed to unification in these subjects was desirable.

105. Suggestions were made that the Commission might undertake work on the following subjects: the liability of port authorities for damage caused in the storing or handling of goods; regulation of the warehousing contract; and liability for the transport of dangerous goods. The Commission did not adopt these suggestions.

Decision of the Commission

106. At its 217th meeting, on 21 June 1979, the Commission unanimously adopted the following decision:

The United Nations Commission on International Trade Law

1. *Takes note* of the survey of the work of international organizations in the field of transport;⁴⁷

2. *Decides:*

(a) To request the Secretariat to continue to follow such work and to report the developments in this field to the Commission;

(b) To inform the UNCTAD Working Group on International Shipping Legislation, by a letter of the Chairman of the Commission, of the willingness of the Commission to undertake work of a legal character in the fields of charter-parties and marine insurance, if the UNCTAD Working Group determines that work directed to unification in these subjects is desirable.

CHAPTER VII. TRAINING AND ASSISTANCE IN THE FIELD OF INTERNATIONAL TRADE LAW⁴⁸

Introduction

107. In regard to the programme of work of the Commission in this field, the Commission had before it a note by the Secretary-General (A/CN.9/173) dealing with the UNCITRAL symposia on international trade law, and fellowship and internship arrangements.

UNCITRAL symposia

108. In regard to the UNCITRAL symposia, the note recalls that, at its tenth session, consequent upon the cancellation for lack of funds of the second

* Reproduced in this volume, part two, V, A.

⁴³ For this decision, see chapter IX, paragraph 131 below.

⁴⁴ The Commission considered this subject at its 217th meeting, on 21 June 1979; a summary record of this meeting is contained in A/CN.9/SR.217.

⁴⁵ *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17 (A/33/17)*, paras. 67 (c) (vii), 68 and 69.

⁴⁶ *Ibid.*, paras. 67 (c) (vii) and 68.

⁴⁷ A/CN.9/172.

⁴⁸ The Commission considered this subject at its 217th meeting, on 21 June 1979; a summary record of this meeting is contained in A/CN.9/SR.217.

UNCITRAL symposium on international trade law planned in connexion with that session, the Commission recommended to the General Assembly that it "should consider the possibility of providing for the funding of the Commission's symposia on international trade law, in whole or in part, out of the regular budget of the United Nations".⁴⁹ In response to this recommendation, the General Assembly requested the Secretary-General to study the problem of financing the symposia. Accordingly, the Secretary-General submitted to the Assembly at its thirty-third session a report (A/33/177) containing suggestions in this regard.

109. After considering this report, the General Assembly, at its thirty-third session: (a) expressed the view that the United Nations Commission on International Trade Law should continue to hold symposia on international trade law; and (b) appealed to all Governments and to organizations, institutions and individuals to consider making financial and other contributions that would make possible the holding of a symposium on international trade law during 1980, as envisaged by the United Nations Commission on International Trade Law, and authorized the Secretary-General to apply towards the cost of the United Nations Commission on International Trade Law symposia, in whole or in part, as may be necessary to finance up to 15 fellowships for participants in the said symposia, voluntary contributions to the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law not specifically earmarked by the contributors to some other activity within the Programme.

110. The note by the Secretary-General (A/CN.9/173) further states that the funds available both by way of contributions specifically made to the UNCITRAL symposia, and by way of contributions to the above Programme of Assistance, are inadequate for financing a symposium in 1980, and that in any event, by reason of other items occurring in the programme of work, the earliest date for which the next UNCITRAL symposium could be scheduled is 1981.

Discussion at the session

111. There was general agreement that the UNCITRAL symposia were very useful, and should be continued. The representatives of Austria, Canada, the Federal Republic of Germany and Finland expressed the willingness of their Governments to pledge monies for a symposium, disbursements to be made, however, only provided that other developed States in turn undertook to make contributions.

112. After deliberation, the Commission decided to place on the agenda of its thirteenth session the financing of the symposia, with a view to organizing a symposium in 1981.

⁴⁹ Official Records of the General Assembly, Thirty-second Session, Supplement No. 17 (A/32/17), para. 45 (Yearbook ... 1977, part one, II, A).

Fellowship and internship arrangements

113. The Commission noted with appreciation that the Government of Belgium, as it had in the past few years, had again in 1979 offered two fellowships to candidates from developing countries for academic and practical training in international law, and that the Government of Poland had also indicated a willingness to award three similar fellowships for English-speaking candidates for study in Poland. The representative of Austria expressed the readiness of his Government to award a similar fellowship for study in Austria to a candidate from a developing country, and the Commission took note with appreciation of this offer.

CHAPTER VIII. STATE OF SIGNATURES AND RATIFICATIONS OF THE UNITED NATIONS CONVENTION ON THE CARRIAGE OF GOODS BY SEA⁵⁰

Introduction

114. The Commission, at its seventh session, decided to maintain on its agenda the question of the ratification of conventions concluded on the basis of texts prepared by it.⁵¹

115. At the present session, the Commission had before it a note by the Secretary-General concerning the state of signatures and ratifications of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules) (A/CN.9/174).

116. This Convention was opened for signature on 31 March 1978 and remained open for signature until 30 April 1979. The Convention is subject to ratification by the signatory States and since 30 April 1979 is open for accession by all States which are not signatory States.

Discussion at the session

117. The Commission noted with appreciation that as at 30 April 1979 the United Nations Convention on the Carriage of Goods by Sea had been signed by the following 27 States: Austria, Brazil, Czechoslovakia, Chile, Denmark, Ecuador, Egypt, Finland, France, Germany, Federal Republic of, Ghana, Holy See, Hungary, Madagascar, Mexico, Norway, Pakistan, Panama, Philippines, Portugal, Senegal, Sierra Leone, Singapore, Sweden, United States of America, Venezuela and Zaire.

118. The Commission also noted with appreciation that the Convention had been ratified by Egypt on 23 April 1979.

119. The hope was expressed that the Convention would receive wide acceptance at an early date. In this connexion, some representatives indicated the intention of their Governments to initiate the ratification process in respect of the Convention in the near future.

⁵⁰ The Commission considered this subject at its 217th meeting, on 21 June 1979; a summary record of this meeting is contained in A/CN.9/SR.217.

⁵¹ Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 17 (A/9617), para. 64 (Yearbook ... 1974, part one, II, A).

120. The Commission requested the Secretariat to submit information, at each of its sessions, in respect of the state of signatures, accessions and ratifications relating to conventions concluded on the basis of texts prepared by the Commission.

CHAPTER IX. FUTURE WORK AND OTHER BUSINESS⁵²

A. *Venue of sessions of the Commission and its Working Groups*

121. The Commission was informed by the Secretariat that, although the normal rule was that all meetings of the United Nations body and its subsidiary organs should be held at the place where the secretariat of that body was located, the Committee on Conferences had decided that sessions of the Commission and its Working Groups which had alternated between New York and Geneva should now alternate between New York and Vienna. In this connexion, the view was expressed that representatives of some developing countries found it easier to attend meetings in New York or Geneva rather than in Vienna. Under another view, however, the interests of efficiency and economy required that sessions when held in Europe be held at the location of the Commission's secretariat.

122. After deliberation, the Commission was agreed that sessions of the Commission and its Working Groups should, as a general rule, alternate between New York and Vienna.

B. *Date and place of the thirteenth session of the Commission*

123. It was decided that the thirteenth session of the Commission would be held from 9 to 20 June 1980 in New York.

C. *Constitution and sessions of Working Groups*

124. It was decided that the future sessions of the Working Group on International Negotiable Instruments would be held as follows:

- (a) Eighth session, from 3 to 14 September 1979, at Geneva.
- (b) If a further session were required, ninth session, from 2 to 11 January 1980 in New York.

125. It was decided that the Working Group on the New International Economic Order would meet from 14 to 25 January 1980 in New York.

126. It was decided that the name of the Working Group on the International Sale of Goods should be changed to the Working Group on International Contract Practices. This Working Group would meet from 24 to 28 September 1979 in Vienna.

D. *General Assembly resolution on the report of the Commission on the work of its eleventh session*

127. The Commission took note of General Assembly resolution 33/92 of 16 December 1978 on the

report of the United Nations Commission on International Trade Law on the work of its eleventh session.

E. *General Assembly resolution on the United Nations Conference on Contracts for the International Sale of Goods*

128. The Commission took note of General Assembly resolution 33/93 of 16 December 1978 convening the United Nations Conference on Contracts for the International Sale of Goods. It was noted that the Conference would take place at Vienna from 10 March to 11 April 1980, with a possible extension of one week to 18 April 1980.

F. *Current activities of international organizations related to the harmonization and unification of international trade law*

129. The Commission took note of a report of the Secretary-General on the current activities of international organizations related to the harmonization and unification of international trade law (A/CN.9/175).*

130. The Commission recalled that during its discussion on the new international economic order (see paras. 95 and 98 above) there was general agreement on the need for greater co-ordination among bodies engaged in the harmonization and unification of international trade law, and that many representatives were of the view that the General Assembly should be asked to stress the importance of co-ordination of work in respect of the legal regulation of international trade. The Commission had before it a draft resolution of the General Assembly submitted by Algeria, Egypt, Ghana, India, Indonesia, Kenya, Nigeria and Yugoslavia intended to reaffirm both the need for greater co-ordination and the mandate of the Commission in the co-ordination process, which the Commission should propose for adoption by the General Assembly.

131. After deliberation at its 225th meeting, on 27 June 1979, the Commission decided to recommend to the General Assembly the adoption of the following draft resolution:

CO-ORDINATION IN THE FIELD OF INTERNATIONAL TRADE LAW

The General Assembly,

Noting that the significant increase in economic and trade relations between States and their peoples has given rise to increased activities of a legislative nature by international bodies and organs both within and without the United Nations system,

Being of the view that such activities should not result in duplication of work or establishment of conflicting rules, resulting in non-ratification by States or non-application by the courts,

Recalling that the General Assembly, in resolution 2205 (XXI) of 17 December 1966 by which it established the United Nations Commission on International Trade Law, conferred upon that Commission

⁵² The Commission considered this subject at its 225th meeting, on 27 June 1979; a summary record of this meeting is contained in A/CN.9/SR.225.

* Reproduced in this volume, part two, VI.

the mandate of furthering the progressive harmonization and unification of the law of international trade by, *inter alia*, co-ordinating the work of organizations active in this field and encouraging co-operation among them,

Considering that, by virtue of the mandate conferred upon it by the General Assembly, it is among the tasks of the Commission to ensure that legal texts prepared by various international organizations in the field of international trade law contribute to a coherent and generally acceptable system of international law,

Bearing in mind the establishment of that Commission's Working Group on the new international economic order and its mandate, as well as the work programmes of the other Working Groups of the Commission,

Reaffirming General Assembly resolution 33/92 of 16 December 1978,

1. Reaffirms the mandate of the United Nations Commission on International Trade Law in co-ordinating legal activities in the field of international trade law;

2. Calls the attention of all organs and bodies within the United Nations system to this mandate of the Commission;

3. Invites all organs and organizations concerned to co-operate with the Commission by providing it with relevant information on their activities and by consulting with it;

4. Calls upon all Governments to bear in mind the importance of improved co-ordination of activities related to the participation in the various international organizations concerned with international trade law;

5. Requests the Secretary-General:

(a) To take effective steps to secure a close co-ordination especially between those parts of the Secretariat which are serving the United Nations Commission on International Trade Law, the International Law Commission, the United Nations Conference on Trade and Development, the United Nations Industrial Development Organization and the Commission on Transnational Corporations;

(b) To place before the United Nations Commission on International Trade Law, at each of its sessions, a report on the legal activities of the international organs, bodies and organizations concerned, together with recommendations as to steps to be taken by the Commission.

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

132. The view was expressed that, in addition to the Commission noting at each session the state of ratification of or adherence to conventions concerning international trade law based on drafts prepared by the Commission, the members of the Commission should also exchange views on the prospects for, and possible

impediments to, ratification of or adherence to such conventions in particular with regard to the intentions of their Governments. There was general agreement that such a discussion would be useful, and that the agenda of future sessions of the Commission should include as an item such an exchange of views.

H. Transfer of the International Trade Law Branch to Vienna

133. There was some support for the view that the Commission should request the General Assembly to defer the transfer of the Branch, now scheduled for September 1979, by one year, as such a deferment would help the International Trade Law Branch to handle the heavy work programme which it faced in the period between the current session and the thirteenth session of the Commission. The prevailing view, however, was that on balance it would be preferable that no request should be addressed to the General Assembly in this regard.

ANNEX I

Summary of discussion in the Commission of the draft UNCITRAL Conciliation Rules^a

Scope of application

Article 1

(1) These Rules shall apply when the parties to a contract have agreed in writing that disputes in relation to that contract shall be referred to conciliation under the UNCITRAL Conciliation Rules.

(2) The parties may also agree to refer to conciliation under these Rules disputes arising out of legal relationships that are not contractual.

(3) The parties may agree in writing to any modification of these Rules.

1. There was general support for the substance of paragraph (1). It was observed that the present wording may not make sufficiently clear that the agreement to refer a dispute to conciliation can be contained either in a contract as a conciliation clause, or in a separate conciliation agreement. Although the availability of both alternatives clearly appeared from the provisions of article 4, paragraph (1) (c), it was suggested that the provision be redrafted.

2. It was further observed that the present wording of paragraph (1), and the model conciliation clause suggested in A/CN.9/167,* paragraph 26, could be construed as imposing on the parties who had agreed to conciliation an obligation to have recourse to conciliation once a dispute had arisen. It was felt that this issue of interpretation was basic to the nature and concept of conciliation. It was also felt that this issue was closely connected with the provisions on the commencement of conciliation proceedings (art. 3), which were based on the idea that conciliation could usefully take place only if both parties, in the event of a dispute, were still willing to seek an amicable solution to their differences.

3. It was the general view that conciliation could be a pre-condition to arbitration or court proceedings. The prevailing view was that the concept of conciliation embodied in the UNCITRAL Conciliation Rules should stress the voluntary non-binding nature of conciliation and any commitment

* Reproduced in this volume, part two, III, B.

^a The report of the Secretary-General entitled "Conciliation of international trade disputes" (A/CN.9/167) contains a commentary on each article of the draft UNCITRAL Conciliation Rules. The summary of the discussion set forth below on each article is preceded by the text of the article.

thereto, as the norm, but should be sufficiently flexible to permit parties to agree that some amount of conciliation must occur as a pre-condition to arbitration and court proceedings where permitted by the applicable law. There was also general support for the view that paragraph (1) should more clearly reflect that concept, for example, by omitting the word "shall" in that provision. It was further stated that this concept was also related to the question whether and when parties could resort to arbitration or court proceedings (cf. the discussion on art. 22).

4. Since the question as to whether conciliation was, in a sense, mandatory depended on the specific terms of the conciliation clause or the separate conciliation agreement, it was suggested that parties be provided with two different model clauses, one giving the parties complete freedom to have recourse to conciliation or to refuse conciliation and the second implying a kind of binding obligation, for example, to commence conciliation proceedings or, at least, to request the other party to consent to the commencement. The Commission requested the Secretariat to study this matter and prepare model clauses.

5. It was the general view that paragraphs (2) and (3) of article 1 were generally acceptable in their present form.

Number of conciliators

Article 2

There shall be one conciliator unless the parties have agreed that there shall be three conciliators.

6. The Commission noted that article 2 envisaged conciliation by a sole conciliator or, if parties preferred this, by three conciliators. The policy underlying the Rules was that the necessary impartiality and independence of a conciliator was best secured if the sole conciliator and, where there are three conciliators, the third conciliator, were not appointed by the parties. Under the policy of the Rules, it was this aspect of impartiality and independence of the sole conciliator, or the "presiding" conciliator, which should distinguish conciliation from the basically different procedure of negotiations between the parties through their counsel.

7. The Commission was of the view that the approach taken by article 2 was not acceptable. In particular, the possibility of having two conciliators should also be taken into account. There was no valid reason for envisaging only an uneven number of conciliators. In this connexion, it was stated that a panel of two conciliators was not uncommon in international conciliation procedures. The notion that party-appointed conciliators were not sufficiently impartial and independent could not be retained. It was also pointed out that an uneven number of conciliators, while facilitating the internal decision-making process, was not necessary in conciliation since it was the task of conciliators to make recommendations for a settlement and not to render decisions.

8. According to one view, the Rules should not indicate a preferred number of conciliators, but should leave that entirely to the parties. The prevailing view, however, was that the Rules should indicate the number of conciliators without thereby precluding parties from choosing a different number of conciliators. This solution was preferred on the ground that it provided guidance to the parties and that certain subsequent provisions of the Rules, for example, those relating to appointment, conduct of proceedings and costs, could then be more precisely formulated.

9. After deliberation, it was generally felt that the UNCITRAL Conciliation Rules should contemplate conciliations with one, two or three conciliators and set out the specific implications of such alternatives. As to the number of conciliators to be specified in article 2, one view was to formulate the article along the following lines: "There shall be one conciliator unless the parties have agreed that there shall be two or three conciliators". Under another view, the article should be formulated along the following lines: "There shall be one conciliator unless the parties have agreed that there shall be more than one conciliator".

Commencement of conciliation proceedings

Article 3

(1) The party initiating recourse to conciliation shall give to the other party a written notice of conciliation.

(2) The other party shall within 30 days after receipt of the notice of conciliation reply to the party having given notice.

(3) (a) If in his reply the other party consents to conciliation, the conciliation proceedings shall commence on the date on which such reply is received by the party having given notice;

(b) If in his reply the other party refuses conciliation or if he does not reply within 30 days, there shall be no conciliation proceedings.

10. The Commission considered whether the notice of the party requesting conciliation should, as suggested in article 3, paragraph (1), be in written form. According to one view, the written form should not be required because it was too formal and inflexible, and because there was no sanction for its non-observance. It was suggested that it was sufficient if the notice was given orally, since all that was required was to ascertain whether the other party was willing to conciliate. The written form should only be required in respect of a detailed statement of the points at issue after both parties had decided to commence the conciliation proceedings.

11. However, the prevailing view was that the written form should be required for the notice of conciliation. This would facilitate proof, and provide certainty to the parties; it would also facilitate determining the 30-day period mentioned in paragraphs (2) and (3). The written form also seemed preferable because of the possible contents of the notice set forth in article 4 and because of the fact that the notice would later be forwarded to the conciliator or, possibly, the appointing authority (cf. arts. 6 and 9).

12. It was suggested that the term "notice" be replaced by a less formal term, such as "invitation" or "request".

13. The Commission considered paragraphs (2) and (3) of article 3 which deal with the reply of the party to whom a notice of conciliation was given. According to one view, paragraph (2) was not acceptable because it was superfluous in view of paragraph (3) (b), and because there was no sanction for not replying as required under that provision. It was suggested that these paragraphs be restructured by stating that the other party in his reply may accept or refuse the invitation to conciliation, and by regulating the consequences of possible silence. Under another view, however, the policy underlying the draft article was acceptable because it clearly called on the other party to reply and would not unduly emphasize the implied option of refusal.

14. Opinions differed in respect of the period of 30 days laid down in paragraphs (2) and (3) (b). According to one view this period of time was appropriate in that it was designed as a maximum period which seemed reasonable in the context of international relationships. Account should also be had of the possible contents of the reply referred to in article 4, paragraph (3). Another view was that a shorter period, for example, 15 days, would be preferable since this would speed up the procedure. Yet another view was that there was no need for a fixed time-limit and that it would suffice to use a general, flexible term, such as "without undue delay" or "as soon as possible".

15. Concern was expressed about the provision of paragraph (3) (b) that there shall be no conciliation proceedings if the other party does not reply within a period of 30 days. While it was the general view that, according to article 22, both parties were free to resort to arbitration or court proceedings until the commencement of the conciliation proceedings, it was suggested that the expiry of the period should not be construed as a definite cut-off date. Thus, conciliation should still be possible even if the other party did not reply within that period. On the other hand, it was suggested that the initiating party should be permitted to assume that, in case of silence of the other party, that other party was rejecting recourse to conciliation.

*Notice of conciliation**Article 4*

- (1) The notice of conciliation shall include:
 - (a) An invitation that the dispute be referred to conciliation;
 - (b) The names and addresses of the parties;
 - (c) A reference to the conciliation clause or the separate conciliation agreement that is invoked;
 - (d) A reference to the contract the legal relationship out of or in relation to which the dispute arises;
 - (e) A brief description of the general nature of the dispute;
 - (f) A brief description of the points at issue.
- (2) The notice of conciliation may also include:
 - (a) If no agreement has previously been reached on the number of conciliators, a proposal that there shall be one conciliator or three conciliators;
 - (b) (i) In conciliation proceedings with one conciliator, a proposal as to the name of the conciliator;
 - (ii) In conciliation proceedings with three conciliators, the name of the conciliator appointed by the party giving notice of conciliation.
- (3) The party consenting to conciliation may in his reply give his own description of the general nature of the dispute and the points at issue. He may also indicate in his reply his agreement or disagreement with the proposals made by the other party under paragraph (2) (a) and (b) (i) of this article and, in conciliation proceedings with three conciliators, indicate the name of the conciliator appointed by him.

16. It was noted that, in line with the principle that conciliation procedures should be flexible, it was inadvisable that paragraph (1) of this article should require the inclusion in the notice of conciliation of the items of information listed in subparagraphs (a) to (f). The inclusion of such detailed information was more appropriate to adversary procedures. Furthermore, there was no sanction if the required items were not included. The contrary view was expressed that, since the information in the notice of conciliation and the reply was of assistance to the parties as well as to appointing authorities in selecting suitable conciliators (art. 6 (1)) and to the conciliators appointed (art. 9), the inclusion of full information in the notice of conciliation was desirable.

17. After deliberation it was the general view that an effort should be made in redrafting the provision to consider elements which might be omitted at this stage of the conciliation and postponed to a later stage. Further thought should be given to the question as to what information should be required at the different stages of the conciliation.

*Appointment of conciliator(s)**Article 5*

- (1) If a sole conciliator is to be appointed, and if within 15 days after the commencement of the conciliation proceedings the parties have not agreed on the name of the conciliator, either party may apply to the appointing authority agreed upon by the parties to make the appointment according to the procedure laid down in article 7 of these Rules.
- (2) If three conciliators are to be appointed, each party shall appoint one conciliator. The two conciliators thus appointed shall choose the third conciliator who will act as presiding conciliator. If within 15 days upon their appointment the conciliators appointed by the parties have not agreed on the name of the third conciliator, either party may apply to the appointing authority agreed upon by the parties to make the appointment according to the procedure laid down in article 7 of these Rules.
- (3) If no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses

to act or fails to appoint the conciliator within 60 days of the receipt of a party's request therefor, either party may request X to designate an appointing authority. The request shall be accompanied by a copy of the notice of conciliation and of the reply given thereto.

18. It was the general view that article 5 and subsequent provisions on the appointment of conciliators should be revised so as to correspond with the earlier agreed numbers of conciliators, in particular, the added option of having two conciliators (see discussion on art. 2). Divergent views were expressed on whether the Rules should provide for an appointing authority as suggested in the draft.

19. According to one view, the Rules should provide for resort to an appointing authority. This was considered as a useful mechanism for securing appointment of the sole or the third conciliator. In this connexion, it was stressed that the appointing authority would act only after the commencement of conciliation proceedings initiated because both parties wanted it. Therefore, it was regarded as a helpful procedure which would assist the parties to implement their previous agreement.

20. Under another view, however, a rule which may lead to an imposed appointment upon the request of only one party would be contrary to the voluntary, "non-mandatory" spirit of conciliation which, in the general view, should be stressed. It was argued that the conciliation proceedings should be considered terminated if no agreement on the sole or third conciliator could be reached. It was understood that a party was free to seek non-binding assistance of an institution or individual, and advice or information on qualified candidates. Also, a binding appointment by an appointing authority could be envisaged, but only if both parties made a request to that effect, or included in their agreement to conciliate a provision for appointment to be made by an appointing authority.

21. The view was expressed that article 5 should include provisions that all conciliators should be independent and impartial persons.

22. The Commission requested the Secretariat to take these possibilities into account when revising the draft and preparing model clauses.

*Application to appointing authority**Article 6*

- (1) The application to the appointing authority shall be accompanied by a copy of the notice of conciliation and of the reply given thereto and may suggest the professional qualifications of the sole or the presiding conciliator.
- (2) The party applying to the appointing authority shall send a copy of the application to the other party. The other party may within 15 days after the receipt of the copy of the application send to the appointing authority such suggestions as he may wish to make on the professional qualifications of the sole or the presiding conciliator.
23. It was noted that this procedural provision related to article 5 and the revised version would depend on the answer that would be given to the question whether the Rules should provide for an appointing authority.

*Appointment of conciliator by appointing authority**Article 7*

- (1) The appointing authority shall, by telegram or telex, confirm to the parties the receipt of the application.
- (2) The appointing authority shall proceed with the appointment of the sole or presiding conciliator without undue delay, using the following list-procedure:
 - (a) The appointing authority shall communicate to the parties an identical list containing at least three names;
 - (b) Within 15 days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which he objects and numbered the remaining names on the list in the order of his preference;

(c) After the expiration of the above period of time, the appointing authority shall appoint the sole or the presiding conciliator from among the names approved on the lists returned to it in accordance with the order of preference indicated by the parties;

(d) If for any reason the appointment cannot be made according to this procedure, the appointing authority shall exercise its discretion in appointing the sole or the presiding conciliator.

(3) In making the appointment, the appointing authority shall have regard to the suggestions of the parties as to the qualifications of the sole or the presiding conciliator and to such considerations as are likely to secure the appointment of an independent and impartial person. It shall also take into account the advisability of appointing a sole or a presiding conciliator of a nationality other than the nationalities of the parties.

24. It was noted that, like article 6, this provision related to article 5, and that the revised version would depend on whether the Rules will make provision for an appointing authority.

25. The view was expressed that the functions of the appointing authority could be set out in a model clause providing for recourse to an appointing authority. According to another view, it was preferable to have procedural provisions in both the Rules themselves and the model clause. It was also the view of some that the procedure envisaged in draft article 7 was too complex and time-consuming.

Notification of appointment of conciliator

Article 8

The appointing authority, upon making the appointment, shall forthwith notify the parties of the name and address of the conciliator.*

* This and all following articles, in which the expression "conciliator" is used without qualification, apply to either a sole conciliator or to three conciliators, as the case may be.

26. As this provision sets out another duty of the appointing authority, it was noted that the considerations concerning article 7 apply also to this article.

Forwarding of notice and reply to conciliator

Article 9

A copy of the notice of conciliation and of the reply thereto shall be given to the conciliator promptly after his appointment. This shall be done by the parties if they made the appointment, or by the appointing authority if it made the appointment.

27. No specific comments were made on this article.

Representation and assistance

Article 10

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons must be communicated in writing to the other party and to the conciliator; such communication must specify whether the appointment is being made for purposes of representation or assistance.

28. No views were expressed objecting to this article.

Role of conciliator

Article 11

(1) The role of the conciliator shall be to assist the parties to reach an amicable settlement of their dispute.

(2) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may have expressed and the need for a speedy settlement of the dispute.

(3) In assisting the parties to reach a fair and equitable settlement, the conciliator shall give consideration to, among other things, the terms of the contract, the law applicable to the substance of the dispute, the usages of the trade concerned and the circumstances surrounding the dispute.

29. It was suggested that this article (or art. 5) should stress the independent and impartial role of the conciliator, irrespective of whether he is appointed by only one party, by both parties or by an appointing authority. It was also suggested that there be incorporated into this article the provision on the conciliator's function to make proposals for a settlement (present art. 18). Another suggestion was that article 11 should state guidelines in respect of the conduct of proceedings by a panel of conciliators. For example, in the case of three conciliators, a majority could be required for any decision to be taken. In the case of two conciliators, consensus could be required, except perhaps in respect of diverging settlement proposals which, it was submitted, could each be communicated to the parties. In case of two conciliators, failure to reach the required consensus would be a basis for terminating the conciliation.

30. Paragraph (3) of article 11 sets out the points to which, among other things, consideration should be given by the conciliator in assisting the parties to reach a fair and equitable settlement. According to one view, the points listed did not fully accord with the idea of conciliation. It was stated, for example, that some of the points were too reminiscent of standards of adversary proceedings; that too much emphasis was placed on the legal aspects, and too little importance attached to such standards as fairness, justice or equity. It was submitted, in this connexion, that not only lawyers should be envisaged as possible conciliators. It was also suggested that the Rules should not set forth any standards at all because such a list would unduly restrict the conciliator in performing his task.

31. Under another view, however, the points listed in paragraph (3) were appropriate and represented a reasonably balanced set of standards. It was pointed out that the ideas of fairness and equity were not neglected in that provision, but set forth as the two basic criteria of a settlement that would thus govern the conciliator's efforts. It was pointed out that the points were quite different from the standards laid down in article 33 of the UNCITRAL Arbitration Rules. A suggestion was made to list as an additional point the previous business practices between the parties.

Request by conciliator for information

Article 12

(1) The conciliator may request each party to submit to him a written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. He may also request each party to submit a fuller statement of points at issue.

(2) At any stage of the conciliation proceedings the conciliator may request a party to submit to him such additional information as he deems appropriate.

32. The view was expressed that the second sentence of paragraph (1) was superfluous in that the right to "request a fuller statement of points at issue", as provided for in that sentence, was covered by paragraph (2) of that article, which dealt with the "request for additional information". Another view was that this article should not be changed because paragraph (1) related to what might be called the "pleadings", whereas paragraph (2) was directed towards production of evidence which the conciliator might consider necessary and therefore would be helpful in practice. It was also submitted that in the first sentence of paragraph (1) the words "that such party deems appropriate" were superfluous. A contrary view was that these words were desirable in underscoring the autonomy of the parties in preparing their written submissions and to eliminate arguments that any such submissions were void because of incompleteness.

33. The suggestion was made to change the right of the conciliator under paragraph (1) into a duty, by substituting the word "shall" for the word "may". This suggestion was based on the assumption that the notice envisaged under article 4 would merely contain a short statement of the intent to conciliate a particular dispute. It would, then, be appropriate to oblige the conciliator to request a detailed statement from the parties. While under another view the discretion of the conciliator was preferable, it was the general view that the issue had to be considered in connexion with the provision on the contents of the notice.

Communication between conciliator and parties

Article 13

(1) If, after reviewing the written materials submitted to him, the conciliator deems it advisable, he may invite the parties to meet with him.

(2) The conciliator may have oral discussions or communicate in writing with either party alone.

(3) Unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place shall be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings.

34. No specific comments were made on this article.

Administrative assistance

Article 14

In order to facilitate the conduct of the conciliation, the parties, or the conciliator after consultation with the parties, may arrange for administrative assistance to be provided by the appointing authority or other suitable institution.

35. While no specific comments were made on this provision, it was noted that the reference to the appointing authority should be considered in the light of the approach which the Rules would take in respect of the appointing authority.

Party suggestions for settlement of dispute

Article 15

The conciliator may invite the parties, or a party, to submit to him suggestions for settlement of the dispute. A party may do so upon his own initiative.

36. No specific comments were made on this article.

Obligation of parties to co-operate

Article 16

The parties shall in good faith endeavour to comply with requests by the conciliator to submit written materials, provide evidence, attend meetings and otherwise co-operate with him.

37. It was submitted that the heading of this article was misleading in that it implied that there was a binding obligation. It was, therefore, suggested that the term "obligation" be omitted and, for example, the heading "co-operation of parties with conciliator" be used.

Disclosure of information

Article 17

The conciliator, having regard to the procedures which he believes are most likely to lead to a settlement of the dispute, may determine the extent to which anything made known to him by a party shall be disclosed to the other party; provided, however, that he shall not disclose to a party anything made known to him by the other party subject to the condition that it be kept confidential.

38. The view was expressed that any statements, pleadings, or submissions of evidence as envisaged under articles 4 and 12 should be disclosed to the other party. It was, thus, suggested

that provision should be made for a corresponding exception to the general rule of discretion contained in the above provision on disclosure of information.

Proposals for settlement

Article 18

At any stage of the conciliation proceedings the conciliator may make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.

39. No specific comments were made on this article.

Settlement agreement

Article 19

(1) When it appears to the conciliator that there exist elements of a settlement which would be acceptable to the parties, he may formulate the terms of a possible settlement and submit them to the parties for their observations.

(2) If the parties reach agreement on a settlement of the dispute, they shall draw up and sign a written settlement agreement. Upon request of the parties, the conciliator shall draw up, or assist parties in drawing up, the settlement agreement.

(3) Upon signing by the parties the settlement agreement becomes binding on them.

40. It was suggested that there be added to paragraph (1) of this article a provision which would enable the conciliator, after having received the observations of the parties, to reformulate the terms of a possible settlement in the light of these observations.

41. Under one view, paragraph (3), which states the binding effect of the signed settlement agreement, was superfluous and potentially misleading. The reason was that the legal nature of the settlement agreement, including its validity and enforceability, depended on the terms of the agreement itself and on the applicable law. According to another view, it was preferable to have a rule expressing the binding effect of a signed settlement agreement in order to emphasize the ultimate purpose of conciliation, i.e., final settlement of the dispute. Thus, it should be made clear that the agreement had not merely a moral effect, although the applicable law might in some instances render the agreement invalid and non-enforceable.

42. As to this possibility, it was suggested that the provision be drafted in such a way that parties were made aware of the potential risk. It was further suggested that the Secretariat should also study the legal nature and effect of the settlement agreements under various national laws.

Confidentiality

Article 20

Unless otherwise agreed by the parties or required by law, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings, including any settlement agreement.

43. It was suggested that there be excluded from this provision the settlement agreement itself to the extent its disclosure might become necessary in an arbitral or judicial proceeding for its enforcement.

Termination of conciliation proceedings

Article 21

The conciliation proceedings are terminated:

(a) By the signing of the settlement agreement by the parties, on the date of the agreement; or

(b) By a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or

(c) By a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) By a written notice of a party to the conciliator and the other party to the effect that the conciliation proceedings are terminated, 30 days after the date of the declaration [unless such party revokes the declaration prior to the expiration of the 30-day period].

44. It was doubted whether the provisions on termination in this article were needed, in particular, the exact determination of the effective dates. However, under another view, this article, in its substance, was necessary in order to provide certainty in relations between parties and in view of article 22 which excluded recourse to arbitration or court proceedings before termination of the conciliation proceedings. In this respect, article 21 would have to be considered in the light of the position taken in regard to article 22.

45. It was suggested that termination by the conciliator (subpara. (b)) be dependent upon his having made at least one settlement proposal to the parties. However, another view was that in practice conduct of parties might make termination advisable before the conciliator had sufficient information upon which to base a recommendation. It was further suggested that in a revised draft the square brackets at the end of subparagraph (d) be omitted, and that the wording of that subparagraph, particularly the French version, be improved. Another suggestion was that insolvency or bankruptcy of one party should be a further cause of termination.

Resort to arbitral or judicial proceedings

Article 22

Neither party shall initiate arbitral or judicial proceedings in respect of a dispute that is the subject of conciliation proceedings from the date of the commencement of the conciliation proceedings, as defined in article 3, paragraph (3) (a), of these Rules, to the date of their termination, as provided in article 21.

46. It was noted that this provision does not cover the case where arbitral or judicial proceedings are initiated before the commencement of the conciliation proceedings.

47. In view of this possibility of parallel proceedings, it was suggested that parties be also permitted to initiate arbitral or court proceedings after the conciliation has started because there were no convincing reasons to treat these two cases differently. It was submitted that initiation of arbitral or court proceedings after conciliation had started would not necessarily indicate an unwillingness to conciliate. Such initiation could take place for reasonable purposes, such as preventing expiry of a prescription period or meeting the requirement, contained in some arbitration rules, of prompt submission of a dispute to arbitration.

48. Under another view, the idea behind this article was correct in that it emphasized the value of serious conciliation efforts although exceptions should be made for the last mentioned cases of initiation of arbitral or court proceedings for reasonable purposes. A suggestion in that direction was to request the party initiating arbitral or judicial proceedings to inform the other party and the conciliator in advance about such step and the purposes of it.

49. Another objection against the rule of exclusion contained in this article was that such exclusion would not be valid and enforceable under various applicable laws. Various suggestions were made in this respect. One was to not have any rule of exclusion in order to save parties from confusion or undesirable surprises. Another suggestion was to indicate in some way the potential risk of unenforceability of the rule. Yet another suggestion was to formulate the prohibition on the parties in terms of a "moral", not legally binding, obligation. It was the general view that these suggestions needed careful consideration.

Costs

Article 23

(1) Upon the termination of the conciliation proceedings, the conciliator shall fix the costs of the conciliation and give written notice thereof to the parties. The term "costs" includes only:

(a) The fee of the sole or the presiding conciliator, to be fixed by that conciliator in accordance with article 24 of these Rules;

(b) The travel and other expenses of the sole or the presiding conciliator and of any witnesses requested by a conciliator after consultation with the parties;

(c) The cost, travel and other expenses of any expert advice requested by a conciliator after consultation with the parties;

(d) The cost of any administrative assistance provided pursuant to article 14 of these Rules;

(e) Any fees and expenses of the appointing authority and X.

(2) The costs, as defined above, shall be borne equally by the parties. All other expenses incurred by a party, including the fee, travel and other expenses of a conciliator appointed by a party, shall be borne by that party.

50. It was pointed out that, in the light of the view previously expressed by the Commission that all conciliators should be independent and impartial, subparagraph (a) of paragraph (1) should relate to the fees of all conciliators, and not only to those of the sole or presiding conciliator.

51. It was suggested that, since the amount of the cost, travel and other expenses referred to in subparagraphs (b) and (c) of paragraph (1) might be considerable, the article should only make the parties liable to pay that amount if it had been agreed to by them; accordingly, the words "after consultation with" should be replaced by "if agreed to by".

52. It was observed that there was a possible difficulty created by the terms of the opening words of paragraph (1), taken together with the terms of article 25, paragraph (1). For while under article 25, paragraph (1), the conciliator was empowered, upon his appointment, to request each party for an advance of the costs referred to in article 23, paragraph (1), the latter costs were only fixed upon the termination of the conciliation proceedings.

53. It was suggested that paragraph (2) of this article be restructured in order to clarify the distinction between the two following categories of costs: costs which were to be borne equally by the parties, and all other expenses incurred by a party, which were to be borne by the party concerned.

54. There was support for the view that to make the party who has himself appointed a conciliator solely responsible for the fee, travel and other expenses of that conciliator implied that that conciliator acted as an agent of the appointing party. The Commission had, however, supported the principle that conciliators, including those appointed by one party, were intended to be impartial and independent. It followed that the fee, travel and other expenses of all conciliators should be borne equally by the parties.

55. It was observed that it might not always be appropriate that costs as defined in paragraph (1) should be borne equally by the parties. A fair and equitable settlement could require that one party bore a greater proportion of the costs.

Fees of conciliator

Article 24

The fees of the conciliator shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the conciliator and other relevant factors.

56. It was noted that the criteria adopted by this article to determine the amount of the fees of conciliators was the same

as those adopted by article 39 (1) of the UNCITRAL Arbitration Rules which determines the fees of arbitrators. However, in view of the differences between conciliation and arbitration, this might not be appropriate. One view was that the article should merely require the conciliator's fees to be reasonable in amount, without specification of the relevant factors to be considered. Another view, however, considered that specification of criteria was necessary in order to provide practical guidance to conciliators.

Deposits

Article 25

(1) The sole or the presiding conciliator, upon his appointment, may request each party to deposit an equal amount as an advance for the costs referred to in article 23, paragraph (1).

(2) During the course of the conciliation proceedings the sole or the presiding conciliator may request supplementary deposits in an equal amount from each party.

(3) Where a conciliator has been appointed by a party he may request a deposit or a supplementary deposit only from that party.

(4) If the required deposits under paragraphs (1) and (2) of this article are not paid in full by both parties within 30 days after the receipt of a request therefor, the conciliator may suspend the proceedings or may make a written declaration of termination in accordance with article 21, subparagraph (b), of these Rules.

57. It was suggested that a provision be added to the article along the lines of article 41 (5) of the UNCITRAL Arbitration Rules, requiring the conciliator to render an accounting to the parties of deposits, and to return any unexpended balance.

Role of conciliator in subsequent proceedings

Article 26

Unless the parties have agreed otherwise, no conciliator may act as an arbitrator in subsequent arbitral proceedings, or as a representative or counsel of a party, or be called as a

witness by a party in any arbitral or judicial proceedings in respect of a dispute that was the subject of the conciliation proceedings.

58. No objection was expressed to the principle embodied in this article. However, it was noted that the circumstances in which a conciliator may be prohibited from being a witness in other proceedings may be regulated by the applicable law. Accordingly, provisions of the applicable law may invalidate the prohibition contained in this article against calling a conciliator in arbitral or judicial proceedings in respect of disputes which were the subject of the conciliation proceedings.

Admissibility of evidence in other proceedings

Article 27

A party shall not be entitled to rely on or to introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that was the subject of the conciliation proceedings:

(a) Views expressed by the other party in respect of a possible solution of the dispute;

(b) Admissions made by the other party in the course of the conciliation proceedings;

(c) Proposals made by the conciliator;

(d) The fact that the other party has indicated his willingness to accept a proposal for settlement made by the conciliator.

59. It was noted that it might be more appropriate to formulate the prohibition contained in this article against relying on or introducing evidence in the form of an agreement by the parties instead of a rule prohibiting parties from relying on, or introducing, evidence.

ANNEX II

List of documents before the Commission

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

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

<i>Title or description</i>	<i>Document symbol</i>
Provisional agenda, annotations thereto and tentative schedule of meetings: note by the Secretary-General	A/CN.9/158
Memorandum on the second co-ordination meeting, held at Rome on 9 and 10 April 1979, as agreed upon by the participants	A/CN.9/162
Training and assistance in the field of international trade law: note by the Secretary-General	A/CN.9/173
State of signatures and ratifications of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules), adopted at Hamburg on 30 March 1978: note by the Secretary-General	A/CN.9/174

I. INTERNATIONAL TRADE CONTRACTS

A. Report of the Secretary-General: barter or exchange in international trade (A/CN.9/159)*

INTRODUCTION

1. The report of the Secretary-General on the programme of work of the Commission submitted to the eleventh session of the Commission contained a short discussion of the subject of international barter and exchange.¹ It was there pointed out that legal systems approach the contract of barter or exchange in different ways. In some legal systems the contract of barter is treated as though it were a sale of goods, whereas in other legal systems the rules in respect of barter are completely separate from those of sale.

2. It was also pointed out that the law relating to barter or exchange transactions is relatively undeveloped, apparently because such transactions are not frequent on the domestic level. However, it was suggested that there was some evidence that barter or exchange transactions were becoming more frequent in the international sector. It was therefore suggested that the Commission retain provisionally the contract of international barter or exchange in its programme of work and request further study by the Secretariat. The Commission adopted this suggestion.² This report is submitted in response to the Commission's request for a further study.

BARTER AND BARTER-LIKE TRANSACTIONS

1. Barter

3. The inquiries made by the Secretariat during the past year indicate that, while certain barter-like transactions have become a regular feature of international trade, the conclusion of a true barter contract in which the parties exchange goods for goods remains as rare an event in international trade as it is in domestic trade. Therefore, the Commission may wish to conclude that it would not be useful to undertake the unification of the law relating to barter in the strict legal sense of the term.

2. Barter-like transactions

Economic nature of the transaction

4. A barter-like transaction exists whenever the parties exchange goods, services or other items of economic

value with the intention that no more than a minimum amount of money ultimately be transferred from one party to the other. The emphasis lies on the underlying economic exchange and not on the legal form in which that exchange takes place. In particular, it is not important whether the barter-like transaction involves only one contract or more than one contract.

5. However, a barter-like transaction which involves only one contract will often be of such a nature that it would fall within some definite rubric of the law. For example, if the exchange of a new piece of machinery for a used piece of machinery plus a sum of money is not considered by the legal system to be a barter, it will undoubtedly be considered to be a sale of machinery in which a portion of the purchase price is paid in kind.

6. Of greater economic significance are the more complex barter-like transactions. Payment for the construction of a plant or a mine may be made in whole or in part by delivery of all or of a portion of the production of the plant or mine. Royalties for a licence of a patent or other industrial property may take the form of goods produced under the licence. A seller of goods may agree that as part of the transaction he will purchase other goods from his co-contractant or from a third party designated by his co-contractant.

7. Barter-like transactions may be initiated by either of the two sides to the transaction. The furnisher of the plant or mine or the licensor of the industrial property may enter into the transaction to secure a source of supply. The party acquiring the plant, mine or licence may wish to be assured of a market for the goods to be produced. An acquiring party which insists that the furnishing party purchase unrelated goods from it or from some third party may be attempting to reduce the monetary cost of the acquisition, or to earn the necessary foreign exchange.

8. The goal to be achieved by creating a barter-like transaction will determine many important terms in the final agreement or set of agreements. However, these motives are not significant for analysing the legal nature of the transaction.

Legal nature of the transaction

9. In considering the legal nature of the transaction, it is important to note that barter-like transactions in international trade tend to be complex and to involve several separate agreements. Each of the agreements would deal with a separate aspect of the total transaction. For example, a patent licence in which the licensor agrees to take in payment a certain quantity of goods

* 18 April 1979.

¹ A/CN.9/149/Add.2 (Yearbook... 1979, part two, IV, A, annex II).

² Report of the United Nations Commission on International Trade Law on the work of its eleventh session, *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17* (A/33/17), para. 69 (Yearbook... 1978, part one, II, A).

produced under the licence would normally involve at least two separate contracts: a patent licence and a contract to purchase goods. Typically, each of the two contracts would value the asset being transferred in monetary terms. The licensee-seller would agree to pay as royalties for the licence either a certain sum of money or at a certain rate. Conversely, the licensor-buyer would agree to pay a certain sum or to pay at a certain rate for the goods. The parties may or may not intend that the sum total to be paid by each would be equal in amount. In either case they would often agree that no money would change hands to the extent that the obligations could be set off against one another.

10. In such a pattern, the two or more contracts are, for the most part, ordinary contracts of licence, or of sale, or of construction with the usual terms to be found in such contracts. There are, however, at least two sets of provisions which differ from those to be found in the ordinary contract in order to effectuate the barter-like nature of the transaction. These are the payment terms and the remedies for non-performance.

Payment terms

11. The payment terms must reflect the intention that a minimum amount of money will actually change hands. The easiest way for this to come about is for the party who performs first to extend credit to the other party with an eventual reduction or elimination of the credit through later performance by the other party. Many other formulas can be imagined which might be better suited to the particular requirements of the individual transactions. Therefore, the means by which the payment provisions in the several contracts would be linked together would have to be a matter of negotiation between the parties.

Remedies

12. In principle, each of the parties has the right to exercise all of the remedies for breach of contract which would normally be available for breach of the type of contract in question. Among the remedies which are normally available when one party fails to perform his obligations under a contract is that the other party has a right to refuse to perform his obligations under the contract. One application of this rule is to be found in article 54 of the draft Convention on Contracts for the International Sale of Goods which provides that the seller of goods may make payment of the price a condition for handing over the goods or the documents which control the goods.³

³ *Ibid.*, para. 28.

13. Article 54 is a relatively easy application of the general rule because the justification for the seller's refusal to hand over the goods or the documents is the failure of the buyer to pay the price at the time of delivery.

14. When the failure to perform involves a more complex obligation than the obligation to pay the price, it is often difficult to decide whether the failure to perform was sufficiently serious to justify non-performance by the other party or whether the other party should be required to resort to other remedies.⁴ It is particularly difficult when the non-performance has not as yet occurred, but because of a serious deterioration in that party's ability to perform or in his creditworthiness or because of his conduct in preparing to perform or in actually performing the contract there are good grounds to conclude that he will not perform a substantial part of his obligation.⁵

15. The problem is even more difficult when the reciprocal obligations are as complex as the construction of a plant on the one hand, and delivery of goods over a long period of time on the other. Nevertheless, the parties will often wish to set out the conditions under which the failure to perform by one party will justify a suspension or termination of the obligation to perform by the other.

CONCLUSION

16. It can be seen that barter-like transactions in international trade are often very complex and, in so being, depart substantially from the simple model of the classical barter contract. Analytically these transactions do not constitute a single legal category. Instead, they are composed of several agreements which may be of the same legal character (e.g. reciprocal sales of goods) or may be of different legal types (e.g. a patent licence and a contract for the sale of goods).

17. Since barter-like transactions are composed of a number of different types of legal instruments, it does not appear that it would be useful to attempt to construct a single unified legal structure for them.

18. However, the Commission, in the context of its future work on international contract practices, may wish to consider whether consideration should be given to the preparation of standard clauses dealing with payment or with the right of one party to refuse performance because of the non-performance of the other party.

⁴ Cf. the draft Convention on Contracts for the International Sale of Goods, articles 45 (1) (a) and 60 (1) (a), which provide that the contract can be avoided if there has been a fundamental breach of contract.

⁵ *Ibid.*, article 62.

B. Note by the Secretary-General on the progress made by the Secretariat in respect of its investigatory study on contract practices in international trade (A/CN.9/160)*

1. The United Nations Commission on International Trade Law, at its eleventh session, adopted its new programme of work and decided that priority should be given, among other things, to the consideration of international contract practices, with special reference to "hardship" clauses, *force majeure* clauses, liquidated damages and penalty clauses, and clauses protecting parties against currency fluctuations.¹

2. It was suggested that an investigatory study be made by the Secretariat on contract practices in international trade, which should initially focus on typical clauses used in international contracts, and on the use of unfair clauses in trade between developed and developing countries.²

3. By a note verbale dated 14 July 1978, the Secretary-General invited Governments to supply him with copies, or relevant extracts therefrom, of international contracts to which the Government or one of its public entities was party and which might be of assistance in the preparation of the study. In this connexion, the Secretary-General noted that the success of the investigatory study would depend in large measure on whether it reflected contemporary commercial practices.

4. At the time of writing of this note, copies of contracts, or relevant extracts therefrom, had been received from the Governments of Argentina, Australia, Austria, Canada, Czechoslovakia, the German Democratic Republic, Guyana, Hungary, Poland, the Sudan and Turkey.

5. By a letter dated 27 July 1978, the Secretary of the Commission addressed himself to various international organizations, and national and international institutions and business associations for copies of general conditions and clauses used in international trade and prepared or employed by those organizations, institutions or associations.

6. At the time of writing of this note, the Secretariat, in response to that letter, had received copies of:

- 45 Agreements concluded between Governments, or between Governments and business firms or international organizations;
- 120 International contracts for the sale of various commodities;
- 100 Forms or order confirmations for the sale of different commodities;
- 80 General delivery conditions for the sale of different commodities, loan agreements, charter-parties, etc.;

150 Contract clauses relating to "hardship", *force majeure*, penalty clauses and liquidated damages clauses, clauses protecting parties against currency fluctuations, price revision clauses, and guarantee clauses.

7. This material has been obtained from sources in Argentina, Austria, Australia, Belgium, Canada, Czechoslovakia, the Federal Republic of Germany, the German Democratic Republic, the United Kingdom of Great Britain and Northern Ireland, Guyana, Chile, Hungary, China, Morocco, Mexico, Norway, Poland, Sweden, Turkey, Thailand and the United States of America. It is expected that further material will be obtained in the near future.

8. So far, the Secretariat has examined these materials mainly from the angle of liquidated damages and penalty clauses and clauses protecting parties against currency fluctuations. Reports on these matters (A/CN.9/161* and 164)** are submitted to the Commission at the present session. A report on contract practices relating to clauses on excuse for non-performance (relief, *force majeure* and frustration) is in an advanced state of preparation but could not be completed in time for the present session.

9. Some respondents have indicated to the Secretariat the hesitations they experience regarding the feasibility of preparing appropriate model clauses for international trade contracts that would be universally acceptable. In the view of these respondents such "universal" clauses would probably not reflect consistent commercial practice and their interpretation would probably vary according to the law applicable to the contract of which a clause forms part and according to the content in which a clause is placed.

10. In the view of the Secretariat, a study of contemporary international contract practices could determine whether generally acceptable clauses can indeed be identified or whether, as the Law Society in the United Kingdom suggested, guidelines should be prepared and issued on the matters which might be covered in different types of contracts and on how certain terms and phrases should be interpreted.

11. Beyond these immediate aims, the material already collected constitutes, it is suggested, valuable background material for the Commission's work in general. It would therefore be of interest that analytical compilations of the material be prepared according to subject matters. The Commission may wish to request the Secretariat to prepare such compilations, in addition to continuing work on the specific clauses identified at the eleventh session.

* 11 May 1979.

¹ UNCITRAL, report on the eleventh session (A/33/17), paras. 67 (c) (i) b, and 69 (Yearbook ... 1978, part one, II, A).

² *Ibid.*, para. 47.

* Reproduced in this volume, part two, I, C.

** Reproduced in this volume, part two, I, D.

C. Report of the Secretary-General: liquidated damages and penalty clauses (A/CN.9/161)*

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INTRODUCTION

1. At its tenth session, the United Nations Commission on International Trade Law requested the Secretary-General:

"to consider, as part of the study on the future long-term programme of work of the Commission which is to be presented at the eleventh session of the Commission, the feasibility and desirability of establishing a uniform régime governing liquidated damages clauses in international contracts".

2. In response to that request, the report of the Secretary-General submitted to the eleventh session on the programme of work of the Commission included a note by the Secretary-General on "Liquidated damages and penalty clauses".¹ This note considered the desirability and feasibility of unifying the rules on liquidated damages and penalty clauses in relation to a wide range of international commercial contracts.

3. At its eleventh session, the Commission considered this note, and decided to include liquidated damages and penalty clauses as a priority topic in its new pro-

gramme of work. The Commission requested the Secretariat to undertake a preliminary study of this topic.² The present report is made in pursuance of that decision.

I. PURPOSES OF LIQUIDATED DAMAGES AND PENALTY CLAUSES

4. In their typical form, these clauses require the payment of a sum of money upon the breach of a contractual obligation.³ Such clauses are inserted by the parties in their contract with the intention to secure one or more of the following purposes:

(a) The amount payable as compensation for breach is determined at the time of contracting. Such an agreed amount eliminates the expenses caused by the proof of loss. Furthermore, because of difficulties sometimes encountered in proving the extent of loss, the amount

² UNCITRAL, report on the eleventh session (A/33/17), para. 67 (Yearbook ... 1978, part one, II, A).

³ Under many legal systems, clauses requiring the performance of an act other than the payment of money upon breach of a contractual obligation are classed as penalty clauses. Furthermore, the obligation, the breach of which entails the payment of money or the performance of an act, need not arise out of contract but may be imposed extra-contractually, e.g. by statute. These types of penal clauses are not dealt with herein, as they play no significant part in international commercial transactions.

* 25 April 1979.

¹ A/CN.9/149/Add.1 (Yearbook ... 1978, part two, IV, A, annex I).

of damages which might be awarded after litigation can be uncertain, and not fully compensatory. An agreed amount is certain, and provides adequate compensation.

(b) Fixing the agreed amount at a sum higher than that which the creditor would save by not performing his obligations puts pressure on the debtor⁴ to perform, rather than breach, those obligations.⁵

(c) The agreed amount serves as the limit of liability of the debtor, and if so desired the amount can be used to fix a lower ceiling of liability than that fixed by the law of damages. The debtor is assisted by knowing in advance his maximum liability exposure.

5. Certainty as to the extent of damages, and the elimination of the expense of proving loss, can be of special importance in international trade contracts. A plaintiff who has to establish his loss in a foreign court may incur considerable expense, and also be uncertain as to the extent of his recovery. In certain circumstances, stimulating performance can also be of great importance. In contracts between parties from States with centrally planned economies great reliance is placed on receiving performance as the system of planning does not readily permit the existence of a market where damages received may be utilized for purchase of substitutes.⁶ Developing countries with scarce convertible currency may also find it difficult to find alternative suppliers. Furthermore, non-fulfilment of one item of a development programme can adversely affect the entire programme, but the loss caused may be difficult to quantify, and adequate compensation difficult to recover under the normal rules as to damages.

6. Use of an agreed sum to stimulate performance assumes special importance when the applicable law might refuse specific enforcement of an obligation, e.g. because specific enforcement is an exceptional remedy, or because its grant in the particular case might be contrary to public policy.

II. DEFINITION OF LIQUIDATED DAMAGES AND PENALTY CLAUSES

7. In order to determine the possible scope of uniform rules, it is necessary to examine the relationship between the typical liquidated damages and penalty clauses described above, and other contractual clauses which, while differing in form, nevertheless approximate to the former when they serve the same purposes.

⁴ Hereinafter, the party liable to pay liquidated damages or a penalty is referred to as "the debtor", and the party entitled to payment is referred to as "the creditor".

⁵ In the civil law systems, a clause having the first or both these objects is termed "a penalty clause", and would *prima facie* be valid. Under the common law, a clause fixing the amount of compensation is termed "a liquidated damages clause", and would *prima facie* be valid, while a clause seeking to coerce performance is termed a "penalty clause", and would be invalid. This divergence will be considered below and the use of the term "penalty clause" at this stage does not imply any judgement as to the validity or invalidity of the clause.

⁶ Eörsi, "Contractual remedies in socialist legal systems", *International Encyclopedia of Comparative Law*, vol. VII, para. 190; Szasz, *A Uniform Law on International Sale of Goods*, the CMEA General Conditions, pp. 161 and 163.

A. Clauses providing alternative obligations

8. Such clauses provide alternative methods of performance. However, a clause which fixes the price of goods at \$100 payable on 1 January, but gives the alternative of paying \$200 on 1 February, could, depending on the circumstances, be interpreted either as a genuine alternative obligation, the higher price reflecting the extended credit given to the buyer, or as a clause providing a sanction for non-performance on 1 January.

B. Clauses providing for the payment of a sum of money other than on a breach of contract

9. Contractual clauses may provide for the payment of sums of money other than on breach of contract, e.g. on the promisor's exercise of a right to withdraw from the contract. While such clauses are analytically distinct from liquidated damages or penalty clauses which require payment on breach, they may share the same functions, e.g. in the case of a payment due upon a withdrawal, to compensate the other party for loss resulting from withdrawal, or to deter from withdrawal.

C. Clauses providing for acceleration of payments

10. Commercial contracts sometimes provide for the payment of a sum in instalments. They may also provide that, upon a single default, all outstanding payments are payable immediately. While the obligation thereby created is to pay no more than the sum originally due, the greater financial burden of paying all instalments simultaneously would act as a deterrent against default.

D. Forfeiture clauses

11. While liquidated damages or penalty clauses provide for the payment of a sum of money upon default, forfeiture clauses provide that a sum of money paid by one party before default (e.g. as a part payment or deposit) is forfeited by that party upon default. Despite this distinction, forfeiture clauses may serve the same function as liquidated damages or penalty clauses: to compensate the party not in default, or to deter the party who is to suffer the forfeit from breach, or both.

E. Limitation clauses

12. A clause limiting liability fixes a maximum payable if liability is proved, but not a minimum. A plaintiff must establish the amount of his loss, and if the loss falls below the maximum, only the loss is recoverable. In the case of a liquidated damages or penalty clause, in general neither more nor less than the amount stipulated is recoverable, without proof of loss. To the extent that no more than the amount stipulated is recoverable, such a clause functions as a clause limiting liability.

III. SOME COMMON FEATURES IN THE REGULATION OF LIQUIDATED DAMAGES AND PENALTY CLAUSES

A. The accessory nature of liquidated damages and penalty clauses

13. In general, liquidated damages or penalties are only payable if there is liability for non-performance of

the principal obligation. Non-performance of the principal obligation may sometimes not entail liability e.g. because the principal obligation is void, or there is a sufficient defence for non-performance, such as *force majeure* or absence of fault, or a requisite *mise en demeure* or other notice has not been given. Since the purpose of liquidated damages or penalty clauses is to recover compensation or inflict punishment for breach of the principal obligation, no liquidated damages or penalties are payable when there is no breach. However, the rules in some legal systems enable the parties by express agreement to make the penalty payable even when non-performance of the principal obligation does not entail liability, e.g. because it is void or because of operative *force majeure* or the absence of fault.

B. Special regulation to prevent abuse

14. Many legal systems contain special rules to prevent the use of liquidated damages or penalty clauses to oppress the weaker party in certain transactions, e.g. employment contracts, to protect the employee; contracts of loan, to protect the debtor; and leases of lands and dwellings, to protect the tenant. No unification of these special rules is feasible, since they result from the special conditions and policies of each country, and accordingly these transactions must be excluded from the scope of any unified rules.⁷

IV. BASIC DIFFERENCES BETWEEN THE COMMON LAW AND CIVIL LAW REGARDING LIQUIDATED DAMAGES AND PENALTY CLAUSES

15. In the common law, liquidated damages clauses, i.e. clauses by which the parties, at the time of contracting, attempt to fix the amount of compensation payable on a breach of contract, are valid if they satisfy one or more of the following criteria: that the parties genuinely intended to provide for compensation, and not a punishment for breach; that the sum stipulated was a reasonable pre-estimate of the probable loss; and that the loss caused by the breach is impossible or difficult to quantify. Different jurisdictions attach differing degrees of importance to failure to satisfy one or other of the criteria. The courts have no power to vary the amount stipulated in such clauses. In contrast, a clause which, instead of or in addition to the above purpose, seeks to coerce a party into performing his obligation by the threat of a sum payable on breach, is invalid, and the party in breach is only liable for the damages recoverable under the general law.

16. Under the civil law, however, clauses pre-estimating damages or seeking to coerce a party into performing his obligation, or having both these objects, are in principle valid. The courts have the power to reduce the amount stipulated in such a clause in specified cir-

cumstances, e.g. if the amount is excessive or there has been part performance.

17. The sharpness of the distinction between the invalidity of clauses seeking to coerce performance in the common law, and their validity in the civil law, is somewhat diminished by the following factors:

(a) In civil law systems, penal clauses seeking to coerce performance are sometimes invalidated for reasons of public policy, e.g. as offending good morals, as contrary to good faith, or as providing for the unjust enrichment of one party. In one civil law system,⁸ all penal clauses which are purely coercive, and which therefore provide for private penalties, are invalid as being against public policy.

(b) Under the common law liquidated damages validly agreed upon might exceed the ordinary damages payable on breach. Where the debtor realizes this before breach, the liquidated damages clause would coerce performance. This would also be the case when the amount of damages likely to be awarded is uncertain, and in the absence of a liquidated damages clause a party might be tempted to breach the contract speculating on a low damages award.

18. Where the primary object of a clause is to limit liability by fixing the sum payable on breach at an amount below that recoverable as damages, both the common law and civil law systems give effect to the clause.⁹

V. OTHER DIFFERENCES IN THE RULES RELATING TO LIQUIDATED DAMAGES AND PENALTY CLAUSES

A. The relationship between recovery of the agreed amount and enforcement of performance

19. Where there is non-performance or defective performance of an obligation by one party, the law permits the other party in certain cases to enforce performance. When enforced performance is available, the question arises as to the relationship between enforcing performance and the recovery of agreed liquidated damages or a penalty. The solutions differ with the type of breach for which the agreed amount is payable.

(a) Cases where the agreed amount is payable on complete non-performance of an obligation

20. Under the common law, the creditor can obtain specific performance, or recover liquidated damages, but

⁸ In Belgium, where the French Civil Code is in force but without the amendment made in France to the provisions relating to penal clauses by the law No. 75-597 of 9 July 1975, it has been held that only clauses which provide compensation for loss caused by breach constitute penal clauses regulated by the provisions of the Civil Code, which *inter alia* provide that the sum specified in the clause can neither be increased or decreased. See the memorandum on the Penal Clause in Belgian Law drawn up by the Ministry of Justice for submission to the Committee of Experts on Penalty Clauses of the Council of Europe, Document EXP/Clauses pénales (75) 1.

⁹ Neither system would uphold the clause if it derogated from a mandatory law prohibiting the limitation of liability. There are other exceptions, e.g. under section 2-302 of the Uniform Commercial Code, such a clause can be invalidated if it is unconscionable, and under French law if the party broke the contract intentionally or with gross negligence the limitation would not apply.

⁷ The uniform rules on liquidated damages and penalty clauses adopted by the Council of Europe are contained in an appendix to resolution 78 (3) on Penal Clauses in Civil Law adopted by the Committee of Ministers on 20 January 1978. On this issue, article 8 of the uniform rules is as follows:

"The provisions of the preceding articles shall be without prejudice to rules relating to any particular type of contract owing to its special nature."

not both. Similarly, in some civil law systems the creditor can enforce either performance, or the penalty, but not both. In other civil law systems, however, while this is the rule in the absence of any agreement on the question, parties can agree that the creditor can enforce both the penalty and performance.

(b) *Cases where the agreed amount is payable on defective performance*

(i) *Cases where the agreed amount is payable for delay in performance*

21. There is general agreement in civil law systems that in such cases the creditor can enforce both the penalty and performance. Similarly, under the common law the creditor can obtain both specific performance of a delayed obligation and liquidated damages payable for delay.

(ii) *Cases where the penalty is payable for other types of defective performance*

22. Some civil law systems provide that in such cases the creditor can enforce both proper performance and the penalty. Other civil law systems provide that both proper performance and the penalty cannot be claimed unless the parties have agreed. In yet other civil law systems in any event only one or the other remedy can be claimed. The last would also be the position under the common law.

B. *The relationship between recovery of the agreed amount and recovery of damages*

23. Since one of the objects of an agreed amount is to avoid the difficulties of an inquiry into damages, the common law and most civil law systems do not permit the creditor, in cases where recoverable damages under the ordinary rules exceed the agreed amount, to waive the agreed amount and claim damages. Nor can the debtor, in cases where the amount recoverable as ordinary damages is less than the agreed amount, assert that he should only be liable for ordinary damages. There are, however, exceptions:

(a) Some civil law systems provide that, where the loss exceeds the agreed amount, the creditor can recover damages for the excess if he can prove that the breach of contract resulted from negligence, or an intention to injure.

(b) Some civil law systems provide that, where the loss exceeds the agreed amount, the creditor can recover damages for the excess if the parties have so agreed.

(c) Some civil law systems provide that, where the loss exceeds the agreed amount, the creditor can recover damages for the excess, unless the parties have agreed to the contrary.

(d) Some civil law systems provide that the agreed amount is not due if the debtor establishes that the creditor has not suffered any loss.

(e) Although under the common law the fact that no loss, or hardly any loss, resulted from the breach of contract does not in principle prevent the creditor from recovery of the full amount agreed as liquidated damages, in practice there is a tendency in such cases to

decide that the clause does not provide a genuine pre-estimate of loss, and therefore, is invalid.

C. *Judicial reduction or increase of liquidated damages or penalties*

Reduction

24. Under the common law a court has no power to reduce an amount validly agreed as liquidated damages. On the other hand most civil law systems give the court the power to reduce penalties, although the scope of the power varies with each system. The following are some of the main grounds on which courts are entitled to reduce penalties:

(a) If the obligation has been partly performed by the debtor before breach;

(b) If the penalty is disproportionately high, or excessive, or manifestly excessive;

(c) If the penalty is unreasonable, or iniquitous.

25. Most of the legal systems permitting reduction do not specify the criteria to be applied in determining whether, for example, part performance justifies a reduction, or whether the penalty is manifestly excessive, or unreasonable. The following are some of the main criteria which have been applied by courts in deciding whether a reduction is justified:

(a) The extent to which part performance has benefited the creditor;

(b) The extent of the disproportion between the amount of the penalty, and either the value of the actual loss suffered, or the amount recoverable as damages for the loss. This criterion is widely applied;

(c) The good or bad faith of the debtor, or the degree of his fault, in committing the breach of contract;

(d) Culpable conduct on the part of the creditor, such as failure to take action to mitigate his loss, which might have contributed to his loss;

(e) The extent to which the debtor has been enriched by his own breach of contract;

(f) The financial state of the debtor, and the effect that payment of the penalty would have on that State;

(g) All legitimate interest of the creditor in the payment of the penalty.

26. Under some civil law systems, the court can only reduce the penalty on an application for that purpose by the debtor. In others, the court can reduce the penalty of its own motion.

27. In some legal systems the parties can by agreement exclude reduction. Reduction is also excluded by some systems if payment of the penalty has already taken place. Some systems also exclude reduction where the penalty was stipulated as payable by a trader as part of a business transaction, or if the penalty clause was part of a commercial transaction between merchants.

Limit on penalty

28. Some legal systems control the penalty by providing that its value cannot exceed the value of the principal obligation for breach of which it is payable.

Increase

29. Both common law and most civil law systems do not confer on the courts the power to increase liquidated damages or penalties. At least one civil law system, however, permits the increase of a penalty if the agreed amount is manifestly derisory. It would appear that some of the criteria adopted to determine whether a penalty should be reduced would also be applicable to determine whether it should be increased, e.g. disproportion between the amount of the penalty and the value of the loss, the good or bad faith of the debtor, and the degree of his fault in committing the breach.

VI. SURVEY OF THE USE OF LIQUIDATED DAMAGES AND PENALTY CLAUSES IN INTERNATIONAL TRADE CONTRACTS

A. General conditions and contracts

30. In order to determine the nature and extent of the use of liquidated damages and penalty clauses in international trade contracts, a representative selection of general conditions and contracts from the collection with the Secretariat was analysed. The following are the relevant facts disclosed by the analysis:

31. Total number of general conditions and contracts examined 167

General conditions and contracts containing liquidated damages or penalty clauses 79

General conditions and contracts not containing liquidated damages or penalty clauses 88

32. Analysis of general conditions and contracts containing liquidated damages or penalty clauses

Types of contracts examined: sales, 71; supply of equipment and provision of services, 5; loans, 2; transport, 1.

Types of goods which were the subject-matter of the sales contracts: primary vegetable products (eg., jute, rubber, fibre); primary food products (e.g. cocoa); vegetable oils (coconut oil); grains; vegetables; hides; textiles and manufactured goods.

Kinds of breach for which liquidated damages or penalties were payable, and the number of liquidated damages or penalty clauses for each kind of breach¹⁰

Delay in delivery of goods by seller .. 24

Delay in payment by buyer 24

Delay in shipment by seller 11

Diminution of price consequent upon quality defects in goods 10

Delay by buyer in taking delivery ... 5

Failure to meet guaranteed standards . 4

Non-delivery of goods 4

Violation by buyer of prohibition of export out of the country of destination 3

Default in general 3

Delay in delivery of technical documentation 2

Non-payment of the price 2

Payment by borrower in advance of the stipulated date of repayment 1

Default in tender of documents 1

Default in shipment by seller 1

Delay by buyer in taking up documents presented by seller 1

Payment by buyer not in accordance with instructions 1

Methods adopted to determine the amount of the liquidated damages or penalty and their frequency

By reference to a percentage of the price of the goods and to another factor, e.g. amount of delay or extent of deviation from agreed standards . 29

By reference to a percentage of the payment due and to another factor, e.g. amount of delay in payment .. 18

By reference to a percentage of the value of goods delayed in delivery and to the extent of delay 15

Amount of penalty undetermined in contract form, and to be fixed by parties 9

By reference to the rate of interest usual for delayed payments in a particular country and the extent of delay 8

By reference to the weight or quantity of the goods and to the extent of delay 4

By reference to a percentage of the cost of defective goods and to the extent of deviation from agreed standards . 4

By reference to a percentage of the difference between the market price and the contract price 2

By reference to a sum which, if not paid, would enable the defaulter to make a profit out of the default .. 1

Origin of body drafting the general conditions or contracts

Developing countries of Asia and Africa 7

Socialist States of Eastern Europe ... 30

Western Europe and the United States of America 31

International organizations 11

¹⁰ Many contracts contained more than one kind of liquidated damage or penalty clause.

33. *Analysis of general conditions and contracts not containing liquidated damages or penalty clauses*

Types of contracts examined: sales, 75; concession agreements, 6; hire of services, 4; agency, 1.

Types of goods which were the subject-matter of the sales contracts: primary vegetable products (cotton, timber); primary food products (tea, cocoa, coffee); vegetable oils; grains; vegetables; hides; manufactured goods; animal oils; chemicals and fruit.

Origin of body drafting the general conditions or contract

Developing countries of Asia and Africa	15
Socialist States of Eastern Europe ...	8
Western Europe and the United States of America	54
International organizations	9
Jointly by a body in Western Europe and a body in a socialist State of Eastern Europe	2

34. The large majority of the documents examined were general conditions or standard contract forms in blank. Firm conclusions cannot be drawn from the printed clauses contained in such documents, as the printed clauses may be amended or rejected before the conclusion of a contract. However, they are evidence of the type of clause which the draftsmen would like to include. The predominance of the sales contract in the sample reflects both the existing composition of the Secretariat collection¹¹ and the frequency of the sale as an international commercial transaction.

35. Approximately half the documents examined contained liquidated damages or penalty clauses, while half did not. Since in general the same commodities were covered by sales documents containing such clauses and sales documents not containing such clauses, no special correlation seems to exist between the trade in a particular commodity and the use of such clauses. Some of the documents not containing such clauses made the common law applicable to the contract. In such cases, it could only be concluded that the parties did not wish to pre-estimate damages, for clauses seeking to coerce performance, even if considered desirable, would have been omitted because of their invalidity.

36. Where a liquidated damages or penalty clause was found, it could safely be inferred that the parties wished to specify in advance the extent of compensation payable. It could not in general be determined, however, whether the creditor was also seeking to coerce performance, since it is difficult to determine whether a specified amount has a coercive effect without knowing the probable saving to the breaching party from a breach.

¹¹ Efforts are currently being made to diversify the collection.

37. Penalties were most often stipulated for delay in performance. This may result from the frequency with which delay occurs, and the resulting advantages of quantifying in advance the compensation payable, and seeking to coerce the debtor into timely performance. Methods of calculating the agreed sum, e.g. as a percentage of the value of the goods delayed, or as interest on the unpaid sum, together with a ceiling on the extent to which the sum can increase, have also been devised which to a great extent avoid the possibility of the sum being invalidated as a penal sanction, or reduced as being excessive. In contrast, penalties are not often stipulated for quality defects. This may result from the difficulty of predicting in advance the type of defect that may occur, or the extent of loss likely to be caused.

38. The methods of computing the sum due may be very simple, e.g. a percentage of the sum due, or more complex, and requiring arbitration to ascertain the amount, e.g. a percentage of the value of goods which deviate from guaranteed standards, the percentage varying with the rate of deviation. Nevertheless the expense involved in applying even the more complex methods would probably be less than that involved in an inquiry into damages under the ordinary law.

39. The saving of costs normally effected by the use of liquidated damages or penalty clauses was frequently offset by other provisions, e.g. the agreed sum was sometimes made payable only on proof of actual damage, or a creditor was entitled to damages in addition to the agreed sum. Such provisions reflected a bias in formulation in favour of the party drafting the clause. Proof of actual damage as a precondition to recovery was inserted when the debtor was the draftsman. The availability of damages as an additional remedy was inserted when the creditor was the draftsman.

40. A special examination was made of a selection of the general conditions drafted under the auspices of the Economic Commission for Europe,¹² as these general conditions are intended for use whether the applicable law is the common law or a civil law system. While some of these general conditions provided for the payment of interest for delay in payment, or for a price reduction for delay in completion or delay in delivery, the rate of interest or the rate of the price reduction had to be inserted by the parties. The parties were therefore free to stipulate rates which were only pre-estimates of compensation for loss, or which also coerced performance.

¹² The following 10 general conditions were examined: Contract for the sale of cereals, No. 5A; General Conditions for the supply of plant and machinery for export, No. 188; General Conditions for the supply and erection of plant and machinery abroad, No. 188D; General Conditions for the export and import of sawn softwood, No. 410; General Conditions for the export and import of hardwood logs and sawn hardwood from the temperate zone, No. 420; General Conditions for the supply of plant and machinery for export, No. 574; General Conditions for the supply and erection of plant and machinery for import and export, No. 574A; General Conditions for the erection of plant and machinery abroad, No. 547D; General Conditions of Sale for the import and export of durable consumer goods and other engineering stock articles, No. 730; and General Conditions of Sale for dry fruit (shelled and unshelled) and dried fruit.

B. *General conditions of delivery, 1968-1975, of the Council for Mutual Economic Assistance (CMEA)*

(a) *Areas where penalties are imposed and extensively regulated by the general conditions*

41. Penalties are imposed and extensively regulated in the following instances of delay in the performance of an obligation by the seller: delay in the delivery of goods,¹³ delay in the delivery of technical documentation necessary for the operation of plant and machinery,¹⁴ delay in the repairing of defects where the buyer demands repair,¹⁵ and delay in notifying the buyer that a shipment has been made.¹⁶ A penalty is also provided for delay in the opening of a letter of credit by the buyer,¹⁷ and for the period elapsing between the refusal of the buyer to take delivery of defective lots of goods, and resumption of delivery of goods in proper conditions.¹⁸ In all these cases of delay, the amount of the penalty is fixed in the General Conditions by reference to the extent of the delay, and a further criterion, e.g. in the case of delay in delivery of goods, by reference to the value of goods delayed.¹⁹ Where the rates are fixed by the General Conditions or by a bilateral agreement, they cannot be reduced by an arbitration tribunal.²⁰ Rates fixed by contract can be reduced, on the ground that the absence of the necessary co-operation by the creditor, or the presence of unlawful conduct of the creditor, contributed to the breach by the debtor.²¹ As delay increases, so does the penalty, but not beyond a specified maximum.²² The penalty can be demanded in addition to proper performance. If the contract, a bilateral agreement, or the General Conditions does not establish a penalty for non-performance or unsatisfactory performance, the debtor is bound to compensate for losses thereby caused to the creditor.²³

(b) *Areas where parties are permitted to impose penalties*

42. Parties are permitted to impose penalties, and fix their rates for non-performance or unsatisfactory performance of his obligations by an obligor.²⁴ Rates fixed in the contract can be reduced on the grounds noted above.²⁵ The penalty can be demanded in addition to proper performance.

43. Where the General Conditions impose penalties for breach, they achieve several objectives: coercion of performance and recovery of definitely quantified com-

penensation, by fixing an appropriate amount; elimination of excessive penalties, by fixing a ceiling; and elimination of the expense of ascertaining damages. Where penalties are optionally fixed by the parties, the expense of ascertaining damages is eliminated, and certainty of recovery is promoted by the restricted grounds for reducing penalties.

44. In assessing the penalty provisions of the General Conditions as a model for unification, it should be noted that the General Conditions operate among a group of States with centrally planned economies with close economic co-operation. This facilitates agreement on policy issues such as the need to stimulate contract performance, the desirable rates of penalties, the exclusion of damages as a remedy, and the proper grounds for the reduction of penalties.

VII. THE POSSIBILITIES FOR UNIFICATION

45. The factors impeding the wider use of liquidated damages and penalty clauses may be summarized as follows:

(a) Clauses seeking to coerce performance are in principle valid in most civil law systems, but are invalid under the common law;²⁶

(b) A validly agreed amount can be varied in the civil law systems, but not under the common law;²⁷

(c) In the civil law systems, the grounds of public policy on which liquidated damages and penalty clauses can be invalidated differ;²⁸

(d) In the civil law systems the extent to which recovery of the agreed amount can be supplemented by other remedies differs;²⁹

(e) In the civil law systems the criteria determining the possibility and extent of reduction of an agreed amount differ;³⁰

(f) Uncertainty as to the definition of liquidated damages and penalty clauses.³¹

46. Express selection of a law to govern the contract would mitigate these uncertainties where the *lex fori* recognizes the applicability of the selected law to determine the effect of such clauses, and does not apply its own rules on the basis of public policy. However, there may be no express selection of a law or, even if there is, the *lex fori* may be undetermined.

A. *Policy differences to be reconciled between the common law and civil law*

47. The most serious impediments to unification are presented by the differences separating the common law from most civil law systems. The common law rule against enforcing the recovery of an amount stipulated to coerce performance appears to be based on the view that the appropriate remedy for breach of contract is the payment of compensation for loss caused by the breach. The need to stimulate performance is regarded as suffi-

¹³ Sect. 83 (1) of the General Conditions.

¹⁴ Sect. 84 (1).

¹⁵ Sect. 75 (4).

¹⁶ Sect. 87. The same penalty is payable for failure to notify.

¹⁷ Sect. 67.

¹⁸ Sect. 80 (3).

¹⁹ Sect. 83 (1).

²⁰ Sect. 67B (3).

²¹ Sect. 67B (4).

²² Sect. 83 (3).

²³ Sect. 67C. Furthermore, in the case where delivery has to be made within a fixed time, and there has either been no delivery within the fixed time, or no elimination of defects or supply of non-defective goods within the fixed time, the buyer has the alternative of recovering a penalty at a fixed rate, or recovering compensation for loss suffered, unless otherwise stated in a bilateral agreement or the contract (Sect. 77 (1) and Sect. 86 (2)).

²⁴ Sect. 67B (1).

²⁵ Sect. 67B (4).

²⁶ See chap. IV above.

²⁷ *Ibid.*

²⁸ See chap. V above.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ See chap. II above.

ciently satisfied by the coercive effect of a prospective award of damages. Permitting coercion of performance by the use of penalties is regarded as likely to lead to abuses by economically stronger contracting parties. Refusal to encourage coercion of performance may also reflect the refusal of the common law to order specific performance save in exceptional circumstances. The validity of agreements genuinely intended to fix compensation for breach, despite the fact that after breach the agreed amount is found to be higher or lower than that which is normally recoverable, is justified by the advantages of such agreements, and their legitimate purpose.

48. Criticism of the common law focuses on the desirability in many cases of a higher degree of coercion than that exerted by a prospective award of damages. Criticism is also directed to the uncertainty as to whether agreements fixing damages are valid or invalid,³² the expense of resolving this issue, and where the agreement is invalid, the consequent expense of determining the extent of damages.

49. The civil law position is supported by reference to the need in many cases to ensure performance because of the inadequacy of damages. Since coercive penalties are created by agreement, effect is given to the will of the parties. Abuses are checked by the power given to the courts to reduce excessive penalties. However, criticism is directed to the uncertainty and expense arising from the possibility of the agreed amount being reduced by the courts and the lack of clarity of the criteria applied in determining the extent of reduction.³³

B. Policy differences to be reconciled within the civil law systems

50. Differences as to the grounds of public policy which invalidate penalty clauses would be difficult to harmonize, since the grounds adopted by each legal system would be based on values of special importance to it. However, invalidation on such grounds does not appear to be frequent, and hence absence of harmony in this area may not involve an unacceptable degree of uncertainty.³⁴

³² The Indian Contract Act, 1872, and the Cyprus Law of Contract, 1930, which is modelled on the Indian Act, though based on the common law, reject the distinction between valid liquidated damages and invalid penalties. Section 74 of the Indian Act provides as follows:

"(1) When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

³³ In the harmonization attempted by the Council of Europe through resolution (78) 3 adopted by the Committee of Ministers, the validity of a coercive penalty is recognized. The resolution recommends the adoption of the following definition:

Article 1: "A penal clause is, for the purposes of this resolution, any clause in a contract which provides that if the promisor fails to perform the principal obligation, he shall be bound to pay a sum of money by way of penalty or compensation" (emphasis added).

³⁴ No harmonization of public policy grounds is recommended by resolution (78) 3 of the Committee of Ministers of the Council of Europe.

51. Differences in the extent to which recovery of the agreed sum can be supplemented by other remedies also reflect policy differences. For example, those legal systems which permit both recovery of the sum agreed and enforcement of performance stress the punitive element in the sum agreed, while others which only grant one or the other remedy lay less stress on this element.³⁵ Again, those legal systems which only permit recovery of the agreed amount even though the value of the loss exceeds such amount stress the saving of expense caused by eliminating an inquiry as to the extent of loss. Others which permit additional recovery lay stress on the importance of full compensation.³⁶

52. The different criteria applied to determine whether an agreed sum should be reduced mainly reflect two policies: prevention of unjust enrichment of the creditor, and the penalization of a party who has been at fault. Limited grounds for reduction promote certainty in the recoverability of the agreed amount, but at the cost of sometimes preventing a reduction that is appropriate.³⁷

³⁵ On this issue, resolution (78) 3 recommends the adoption of the following principles:

Article 2: "The promisee may not obtain concurrently performance of the principal obligation, as specified in the contract, and payment of the sum stipulated in the penal clause unless that sum was stipulated for delayed performance. Any stipulation to the contrary shall be void."

³⁶ On this issue, resolution (78) 3 recommends the following principles:

Article 5: "The promisee cannot obtain damages in respect of the failure to perform the principal obligation instead of, or in addition to, the sum stipulated."

This article is not mandatory, and the parties can derogate from it by agreement. However, article 6 provides: "Despite any stipulation to the contrary, the promisee cannot obtain a sum in excess of either the sum stipulated under the penal clause or the damages payable for the failure to perform the principal obligation whichever is the larger."

³⁷ On this issue, resolution (78) 3 recommends the following principle:

Article 7: "The sum stipulated may be reduced by the court when it is manifestly excessive. In particular, reduction may be made when the principal obligation has been performed in part. The sum may not be reduced below the damages payable for failure to perform the obligation."

However, the explanatory memorandum to article 7 states:

"26. It is left to each legal system to determine under what precise circumstances the sum concerned should be considered to be manifestly excessive. It is however, suggested that in a given case the courts may have regard to a number of factors such as:

- "(i) damage pre-estimated by the parties at the time of contracting and the damage actually suffered by the promisee;
- "(ii) the legitimate interests of the parties including the promisee's non-pecuniary interests;
- "(iii) the category of the contract and the circumstances under which it was concluded, in particular the relative social and economic position of the parties at the conclusion, or the fact that the contract was a standard form contract;
- "(iv) the reason for the failure to perform the obligation, in particular the good or bad faith of the promisor."

"27. This list of criteria to be taken into account should not be regarded as exhaustive, nor does it indicate any order of priority. When applying the criteria regard must also be had to the general law of contracts in the member State concerned, which may exclude or limit the possibility of using a particular criterion."

This approach may cause an unacceptable degree of uncertainty in trade transactions.

C. Scope of application of unified rules

53. The scope of application would need to be clear, and cover the formulations of liquidated damages and penalty clauses commonly used in international trade.³⁸

VIII. CONCLUSIONS

54. Liquidated damages and penalty clauses serve useful purposes, and are widely used. The case for unification rests on the desirability of ensuring their greater effectiveness. As clauses which only seek to pre-estimate compensation, although somewhat differently treated, are valid under all legal systems, the focus of unification would be the wider recognition of clauses seeking to coerce performance. It is difficult to determine whether, in general, current levels of contract performance in international trade are deficient, and need enhancement. It can be accepted, however, that whatever be the applicable law, contracting parties might for special reasons value the possibility of using, without uncertainty, a liquidated damages or penalty clause to increase the expectancy of performance.

55. Those legal systems which find clauses seeking to coerce performance unacceptable for policy reasons may, perhaps, be disposed to accept uniform rules validating such clauses subject to certain qualifications. Possible qualifications would be restricting the application of the rules to international contracts, excluding their application to consumer contracts, continuing to apply existing rules protecting a weaker contracting party against fraud and coercion and, in particular, making the

³⁸ Resolution (78) 3 recommends the following scope of application:

Article 1: "A penal clause is, for the purposes of this resolution, any clause in a contract which provides that if the promisor fails to perform the principal obligation he shall be bound to pay a sum of money by way of penalty or compensation."

However, paragraph 2 of the resolution also recommends to Governments "to consider the extent to which the principles set out in the appendix can be applied, subject to any necessary modifications, to other clauses which have the same aim or effect as penal clauses".

unified rules applicable only upon express selection by the parties. While the foregoing survey has revealed policy differences on issues other than the coercion of performance, such differences appear to be more readily susceptible to compromise.

56. The benefits of liquidated damages and penalty clauses noted above are applicable to international commercial contracts in general, and not merely to international sales. The formulation of unified rules applicable to a wide range of contracts does not appear to create special difficulties.³⁹

57. Two regional attempts at unifying the rules on liquidated damages and penalty clauses have been made, one by the Interparliamentary Consultative Council of Benelux,⁴⁰ and the other by the Council of Europe.⁴¹ Both seek to make national law on such clauses conform to the unified rules adopted by them. States adopting these unified rules may find acceptable a limited derogation from them in favour of unified rules applicable to international trade contracts.

58. As to the means by which unification can be achieved, it is clear that legislative intervention is necessary as the differing legal rules have a mandatory character. The drafting of a model clause for adoption by contracting parties would not suffice. It is also apparent that the cost of a diplomatic conference convened solely to adopt a convention containing uniform rules on this topic would be disproportionate to the possible advantages to be gained through the adoption of such rules. An alternative approach is the drafting of a model law to be adopted by States, containing uniform rules. The drafting of such a model law could be referred to a working group on international contract practices.

³⁹ Both the unified rules of Benelux and the Council of Europe are applicable to all types of contracts.

⁴⁰ By the Benelux Convention relating to the Penal clause, done at The Hague on 26 November 1973. The parties to the Convention are Belgium, Luxembourg and the Netherlands. The Convention has not yet entered into force.

⁴¹ By resolution (78) 3 adopted by the Committee of Ministers of the Council of Europe on 20 January 1978.

D. Report of the Secretary-General: clauses protecting parties against the effects of currency fluctuations (A/CN.9/164)*

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INTRODUCTION

1. At its eleventh session, the Commission adopted a new programme of work. One of the items on that programme calls for a "Study of international contract practices, with special reference to . . . clauses protecting parties against [the effects of] currency fluctuations".¹ The Commission, at that session, requested the Secretary-General to prepare a study on the foregoing item for submission to it at its twelfth session.² This report has been prepared in response to the Commission's request.

2. The currency value problem at issue here may be said to arise from the combined operation of both a legal principle and an empirical fact. The legal principle is that which is usually referred to as "nominalism", that is, the doctrine that the quantum of a monetary obligation is in the eyes of the law to be measured in numerical (i.e. number-of-monetary-unit terms) rather than in terms of real or effective value. As a principal work on the subject explains, "[t]he nominalistic principle means that a monetary obligation involves the payment of so many chattels, being legal tender at the time of payment, as, if added together according to the nominal value indicated thereon, produce a sum equal to the amount of the debt. In other words, the obligation to pay £10 is discharged if the creditor receives what at the time of performance are £10, regardless of both their intrinsic and their functional value."³ Or, as an English judge somewhat more bluntly put it, "A man who stipulates for a pound must take a pound when payment is made, whatever the pound is worth at that time."⁴

3. The other component of the problem is the commonplace fact that the value of a currency is subject to change over a period of time whether it be in terms of its exchange rate relation to other currencies or in its functional value measure by what it can buy and whether the change is brought about by a formal act of a monetary authority (e.g. devaluation) or occurs by reason of inflation or other factors related to the price of goods and services. A related observation in this context is the fact that as far as purchasing value is concerned the typical trend for a currency over time has been downwards.⁵

4. What this means, in simple terms, therefore, is that a creditor who lends 100 units of his national currency to a foreign borrower repayable in five years by payment of 200 units of the latter's national currency (based on the then prevailing exchange rate of 1 to 2) knows that he faces two risks: that the exchange rate situation may become such that at the time of repayment 200 units of the borrower's national currency is worth less than 100 units of his own, and, secondly, that even assuming no change in the exchange rate, the 100 units of his national currency which he will then receive will in terms of purchasing power be worth less than the 100 units he had lent to the borrower. Similarly, in the foregoing example, the borrower, assuming the loan was to be repaid in the creditor's currency, would face the risk that the exchange rate relation between the two currencies could be such that substantially more than 200 units of his own national currency would be required to pay off the nominal 100 units of foreign currency owed.

5. It becomes obvious, given the undoubted and so far unavoidable susceptibility of currencies to depreciation and appreciation, that the problem of how to maintain the value of a fixed monetary obligation (e.g. 100 units of currency X) is one of finding effective ways to either exclude, limit or compensate for, the operation of the principle of nominalism: how to ensure that the amount which one will receive tomorrow will be equivalent to the 100 units which one has foregone today and indeed that one does not end up receiving an amount in the currency of payment which by reason of intervening

¹ UNCITRAL, report on the eleventh session (A/33/17), para. 67 (c) (i) b (Yearbook . . . 1978, part one, II, A).

² *Ibid.*, para. 69.

³ F. A. Mann, "The Legal Aspect of Money" with special reference to Comparative Private and Public International Law (3rd ed., Oxford, Clarendon Press, 1971), p. 76 (footnote omitted) (hereinafter cited as Mann).

⁴ *Treseder-Griffin and Another v. Co-operative Insurance Society Ltd.* (1956) 2 Q.B. 127, 144, per Denning, Lord Justice, as he then was.

⁵ The problem of the depreciation of currency values is one that is also of special relevance to the current search for a unit of account in which to express the monetary obligations contained in many international conventions relating to the liability of parties engaged in the activity regulated under the Convention. Thus, with reference to the various transport conventions, it has been observed that "The inflation in all the countries over the world has resulted in an average depreciation of the currencies to 1/3 of the value it had in the year of 1934 with the consequences that the carrier's liability has eroded to the same extent". L. Hagbert, "Gold Value Clauses in International Transport Conventions", 5 *International Business Lawyer*, 253, 259 (1977).

exchange rate relation changes is nominally even less than 100 units of the currency lent.

I. THE MAINTENANCE OF VALUE

6. Before going on to describe the variety of methods which have been employed in seeking to maintain the value of a monetary obligation between the time it is incurred and the time it is to be discharged, it may be useful to note more fully the various ways in which a currency may change in value and some of the factors underlying such change. This should enable one to perceive more readily the risk which the particular maintenance-of-value provision is designed to guard against and thus to understand what "value" is being maintained.

7. One of the more obvious ways in which the "value" of a currency may change is in its value relation to other currencies, i.e. its exchange rate vis-à-vis another currency: instead of being exchanged at the rate of $1K = 2M$, for example, it is now exchanged at the rate of $1K = 1M$ (depreciation) or conversely at the rate of $1K = 3M$ (appreciation). In the past this kind of change occurred most typically through the action of the monetary authorities of the State concerned in formally devaluing or revaluing its currency in furtherance usually of an economic policy objective, such as increasing export of its goods, or sometimes in furtherance of a political decision, such as reducing its balance-of-payment surplus vis-à-vis another country.

8. The situation just described has undergone significant changes in recent years, reflecting the developments that have taken place in the international monetary system itself. Under the old system, as established by the Bretton Woods Agreement of 1944, which required members of the International Monetary Fund (IMF) to establish a par value for their currencies in relation to gold (and hence indirectly in relation to the currencies of other member States), devaluation or revaluation was a formal, clearly defined and deliberate act of government. It took place relatively infrequently and the new formal value once established remained operative until again changed by formal act of devaluation or revaluation.

9. However, since August of 1971 when the United States dollar was detached from the fixed parity system, most, if not all, of the currencies of international trade have been taken off the parity system and allowed to "float", with the result that the formal exchange value of such currencies is now determined by market forces rather than by the fiat of monetary authorities. Consequently, fluctuation of exchange values on a daily and even hourly basis has become an accepted fact, with little meaning left in the notion of formal devaluation or revaluation.⁶

⁶ In reality, though, State monetary authorities have not totally abandoned the determination of the formal value of their currencies to free market forces. From time to time they have "intervened", typically by the purchase or sale of large volumes of currency, sometimes with funds "borrowed" from another monetary authority, in order to ensure that the value of their currencies remain within a pre-determined desirable range.

10. Another sense in which the value of a currency may change is in its real or purchasing power, which though often related to, or reflected by, changes in the formal value of the currency, is nevertheless a separate and distinct phenomenon. In particular, changes in formal value become relevant only in the context of international transactions whereas purchasing power changes are of consequence even in the context of a wholly domestic transaction.

11. It is generally recognized that there are, in theory, two different aspects to the change in purchasing value question: changes on the side of money and changes on the side of goods and services, though there is considerable disagreement as to whether it is always possible in practice to separate one from the other or to decide which factor is in operation.⁷ The best-known phenomenon on the money side is inflation, which, in the simplest terms, is said to occur when "too much money chases after too few goods", and is best illustrated where the price of an item goes up not by reason of factors on the production side such as increased costs or reduced supply but because the price is bid up by the availability of more money in the hands of buyers directed to its acquisition.⁸

12. Similarly, the ideal illustration of changes in purchasing power of a currency attributable to the goods and services side of the money-goods equation would be the case where the price of an item goes up in reflection simply of diminished supply. When, as in the case of an oil embargo, the item involved is an essential one, the effect of such higher prices becomes generalized throughout the economy in the form of higher average prices for goods and services.

13. It appears, therefore, from the foregoing analysis that the "value" sought to be maintained by value clauses in contracts could be either the formal value, related to exchange rate considerations, or functional value, related to purchasing power, or to both kinds of value.

14. Some of the devices by which it has been sought to maintain value will now be considered.

II. ATTEMPTED SOLUTIONS

15. Paralleling the two forms of monetary risk analysed above, two broad categories of value clauses have emerged which are designed to protect parties against one or the other or both of these risks. These categories may be conveniently labelled as: "pure money-

For a description of the par value system and the "floating currencies" system in the context of the Articles of Agreement of IMF, see, respectively, J. Gold, "The Legal Structure of the Par Value System", 5 *Law and Policy in International Business* 190 (1973); and J. Gold, "Floating Currencies, SDRs and Gold", IMF Pamphlet Series No. 22 (1977, IMF, Washington, D.C.) (hereinafter cited as "Gold, Floating Currencies").

⁷ See Mann, at 74-75.

⁸ It is, of course, never this simple in reality: the very fact of inflation generally means that the cost of production of the item is itself affected by "inflated" wages, price of raw materials, rent etc., so that the higher price of the item is in significant part attributable to higher production cost factors and not just to the amount of money in the hands of buyers.

tary clauses" and "purchasing value maintenance clauses".

A. Pure monetary clauses

16. These clauses are characterized by the fact that they typically are directed towards the formal value of a monetary obligation, which they seek by various monetary devices to safeguard. Among such devices are the following.

(a) Compensatory interest rate

17. This is one of the oldest and most obvious devices employed in the attempt to safeguard against the risk of diminished value of the sum received in discharge of a monetary obligation. The creditor, by anticipating what he believes could be the rate of depreciation of the currency of payment (using, for example, the known rate of inflation), stipulates for a rate of interest which he hopes will compensate for such depreciation. Thus, if he believes the rate of depreciation to be 10 per cent a year, he might stipulate for an interest rate of 15 per cent a year, in which case he would view the true return on his principal to be 5 per cent whilst the remaining 10 per cent would be characterized as a maintenance-of-value device.⁹

18. This device, while it can be effective in many cases and has the added merit of simplicity, nevertheless suffers from certain rather obvious limitations; the depreciation factor may be unpredictable, or there may be legal restrictions as to the limits of interest rates in the jurisdictions whose laws are pertinent to the legal relationship created.¹⁰ Also, stipulation of a noticeably high interest rate may be psychologically unattractive to both borrower and lender, especially if competing lenders, by using other kinds of value devices, are able to keep their interest rates low in comparison.

(b) Stipulation of exchange rate

19. Another course often adopted by parties concerned about possible fluctuations in the relative value of the currencies involved in their transaction is to stipulate expressly a rate of exchange in their contract. Thus, the parties might stipulate that the loan amount of 100 units of m currency shall be repayable in k currency in five years from the date of the loan at 5 per cent interest per annum and at the conversion of 1m = 2k.

20. As thus appears, a device of this sort can be in the interest of both creditor and debtor to the extent it provides certainty by insulating their transactions from

the inherent risk of exchange rate modifications. Correspondingly, however, each party thereby forfeits the chance that any such exchange rate modification would turn out in his favour.

21. An interesting variant of the fixed exchange rate device is to provide for a corresponding modification of the obligation to the extent of any variation in the exchange rate relationship between the currency of payment and another currency or to the extent that such a variation exceeds a certain percentage. Such a clause was before court in the English case of *Multiservice Bookbinding Ltd. and Others v. Marden*.¹¹ In that case a value clause in a mortgage loan agreement provided that the sum repayable under the loan "shall be increased or decreased proportionately if at the close of business on the day preceding the day on which payment is made the rate of exchange between the Swiss franc and the pound sterling (the currency of payment) shall vary by more than three per cent from the rate of 12.075% francs to £1 prevailing at the date hereof".

22. In upholding the validity of this clause against the plaintiff's claim that it was unfair and unconscionable, the pound sterling having depreciated considerably as against the Swiss franc, the court observed that "... lender of money is entitled to ensure that he is repaid the real value of his loan and if he introduces a term which so provides, he is not stipulating for anything beyond the repayment of principal,"¹² and thus directly recognized the validity of maintenance-of-value devices.

23. It is interesting to note in connexion with this case that although the value sought to be maintained by the clause in question was the real (i.e. purchasing) value of the money owed, the clause was in strict analysis directed to the formal (or exchange) value of the pound. The fact that the real value was probably also maintained arises from the strength and stability of the reference currency, the Swiss franc: the formal, though not the purchasing value would still have been maintained, had the purchasing values of both currencies gone down by exactly the same proportion resulting in no change in the exchange rate relationship between them.

24. Mention might also be made of another interesting aspect of this case: the interest rate stipulation. Interest was to be at 2 per cent above bank rate—a rate which, as the court observed, already "reflects at least in part the unstable state of the pound sterling".¹³

(c) Denominating debt in currency of creditor or debtor

25. One or the other of the parties to an international financial transaction may seek to insulate himself from the exchange risk factor by having the debt denominated in his own national currency. Such an arrangement is effective to protect the party concerned against the risk that the intervening exchange situation might, in the case of the creditor, reduce the sum he will receive in his own national currency and, in the case of the debtor, increase the amount he has to pay in his own currency.

⁹ The arrangement need not, of course, be cast in the form of principal and interest: the same result can be achieved simply by stipulating for repayment of a lump sum which encompasses with it both a factor for use of money and a factor for depreciation as well as the principal advanced.

¹⁰ Most countries do in fact have some form of restriction on interest rates (usury laws) but numerous exceptions are recognized; hence, reference must be made to the particular law concerned in order to determine its applicability to the factual situation at hand—e.g., whether it applies to international transactions, who may invoke the defence of usury, etc. Cf., for example, the provision of New York State usury law stating: "No corporation shall hereafter interpose the defense of usury in any action..." (*General Obligation Law*, Sect. 23A, McKinney's Consolidated Laws of New York, Section 5-521).

¹¹ All England Law Reports 489 (Ch. D. 1977).

¹² *Ibid.*, at 502.

¹³ *Ibid.*, at 503.

26. Since the effect of such denomination is to shift the currency risk to the other party to the transaction, it is usually the party in a stronger bargaining position who is able to choose the currency of denomination. This does not necessarily mean that such parties always choose to have the debt denominated in their own currencies; other considerations may come into play and cause a different choice to be made. Thus, for example, the limited, or lack of, convertibility of a currency which might otherwise have been employed as the currency of account, will usually cause the debt to be denominated in a different currency, whether that of the other party or a third currency. Equally, it may be that the currency of one of the parties is the stronger and more stable of the two, in which case that currency might be chosen even though it is not that of the party in a stronger bargaining position because of the latter's belief that that currency is unlikely to lose value relative to his own.

27. It is no doubt for one or the other of the foregoing reasons that transactions between parties from developed countries and those from developing countries tend generally to be denominated in the currency of the former, whether such parties from developing countries be buyers (as of machinery), sellers (as of commodities), or borrowers (as in the Euro-currency market). Sometimes, however, and especially with intergovernmental loans, one may see part of the loan denominated in the currency of the borrower, usually for that portion of the loan required to defray local expenses in connexion with the project for which the loan is given.¹⁴

(d) *Denominating debt in specific third currency*

28. Sometimes the party who is in a position to make such determination will choose to denominate the debt in a currency neither his own nor that of the other party. The primary reason for such a choice is likely to be the strength and stability of the third currency as compared to those of the parties' countries. Thus British exporters who previously had denominated most of their transactions in pounds sterling have begun more and more to denominate them, especially long-term ones, in foreign currencies as a result of the sharp decline of the sterling in recent years.¹⁵

29. Often, however, transactions are denominated in a specific currency out of long-standing habit on the part of businessmen who have customarily employed that currency in the particular trade involved. Thus, for example, the United States dollar continues to be the primary currency of account and payment in many trades, its recent instability and weakness vis-à-vis such currencies as the Swiss franc or the German mark notwithstanding.

30. A variant of this device occurs in the lending practices of the International Development Association (IDA), an affiliate of the International Bank for Reconstruction and Development (World Bank), whose Gen-

eral Conditions provide, firstly, that "withdrawals (by the borrower) from the Loan Account shall be made in the respective currencies in which the expenditures to be financed out of the proceeds of the Loan have been paid or are payable . . .", and secondly, "that the principal of the Loan shall be repayable in the several currencies withdrawn from the Loan Account and the amount repayable in each currency shall be the amount withdrawn in that currency . . .".¹⁶

(e) *Optional currency clauses*

31. An optional currency clause is one which denominates the debt in more than one currency and gives to one of the parties the option of choosing in which currency the debt will be discharged. The party thus entitled would, therefore, wait until close to the day of payment before deciding, based on the intervening history of the currencies involved, which one should be paid in. Such clauses tend to be inserted in contracts in favour of creditors. Because of the enormous advantage they confer on the creditor and the corresponding disadvantage to the debtor, optional currency clauses are not popular in practice. Indeed, it has been observed that the only application of the optional currency device in the international money and capital market appears to be when it has been used as an incentive offered by a relatively weak borrower seeking to float a loan.¹⁷

32. A quite interesting form of the optional currency device occurs in the General Conditions of Lending of the World Bank. The optional currency device in this case is notable because it is the debtor who is given the option of selecting the currency of payment from a list of eligible currencies.

33. Under section 4.02 (a) of the General Conditions, the borrower may repay the sum due in a currency mutually agreed upon by the parties "or in such other eligible currency or currencies as may from time to time be designated or selected" pursuant to the section. An "eligible currency" is defined to be "the currency of any member of the Association which the Association from time to time determines to be freely convertible or freely exchangeable by the Association for currencies of other members of the Association for the purposes of its operations".¹⁸ Provision is also made whereby a borrower may, upon the giving of the requisite notice, effect a change in the eligible currency in which payment is to be made.¹⁹

34. It should be noted, however, that these payment options are coupled with a clause by which the loan is valued in terms of the United States dollar of the weight and fineness in effect on 1 January 1960.²⁰ While the

¹⁴ IDA, General Conditions Applicable to Loan and Guarantee Agreements (15 March 1974), art. IV, sects. 4.01 and 4.02 (a).

¹⁵ See *Report of the Committee on International Monetary Law to the 56th Conference of the International Law Association* (New Delhi, 1974), pp. 81-82 (hereinafter cited as "ILA 56th Report").

¹⁶ IBRD, General Conditions Applicable to Development Credit Agreements (15 March 1974), art. IV, sect. 4.02 (b).

¹⁷ *Ibid.*, sect. 4.02 (c).

¹⁸ Sect. 4.03. The existence of this clause would seem to suggest that the option device is aimed more at the convenience of the debtor than at giving him a financial advantage.

¹⁴ This practice is very much in evidence in the financial projects undertaken by the United Nations and its various specialized agencies in developing countries.

¹⁵ See Gold, *Floating Currencies*, p. 16, and materials therein cited.

effect of such "constant dollar" clause is to reduce the significance of the option as a means of taking advantage of possible depreciation in the value of the currency of denomination, there is remaining some possibility of an advantage to the debtor since the eligible currencies might not all have maintained the same value relationship either to the 1960 dollar or to one another.

35. Reference might also be made to an important protective factor which operates in favour of such institutional lenders as the World Bank and IDA, which consists of the fact that much of the funds given out in loans by these institutions is itself borrowed. By properly structuring the terms (e.g. their respective maturity dates) of its loans and its own debts the institution is able to shift the currency risk from itself to its own creditor. Thus, for example, if the institution has borrowed 1,000 units of a currency to finance a loan to a client, it stipulates to receive payment in exactly the same currency which is then passed through in discharge of its own obligation to its creditor, who, therefore, bears the risk of any intervening depreciation of such currency.²¹

(f) *Combination of currencies device*

36. One of the more complex maintenance-of-value devices encountered in international trade involves relating the value of the debt amount to the exchange rate performance of a number of major currencies against a particular major currency in which the debt is denominated.

37. Thus in a contract for the sale of machinery between the foreign trade corporation of a socialist country and a Hong Kong purchaser, the price, expressed in United States dollars, being payable by instalment over a five-year period, the following "monetary valorisation clause" was used:

"The monetary valorisation clause referred to (in a preceding clause) is based on the arithmetic average of the mean of buying and selling rates for the following six convertible currencies: Belgian franc commercial, Swiss franc, Swedish crown, Deutsch mark, Canadian dollar and Japanese yen in their relation to the US dollar as certified at the date of signing the contract by (a named London bank) or other banks in London mutually agreed by the parties involved.

"In case of any change in the arithmetic average of the mean of buying and selling rate of (the) US dollar against the above six currencies at the close of business on the due date of repayments, and if the change exceeds 2 (two) per cent, the amount of each payment shall be adjusted accordingly.

"In case no rates are available on the mentioned dates, the rates certified at the close of business of the last proceeding day on which the respective foreign exchange market was opened, will be used."

²¹ This pass-through aspect is emphasized by the fact that if the institution has had to purchase the currency required by the borrower with another currency, the borrower is deemed in effect to have borrowed that portion of the loan in the latter currency. See World Bank and IDA General Conditions, sects. 4.02 and 4.04 respectively.

38. The merits and disadvantages of such a device have been well-stated by the Committee on International Monetary Law of the International Law Association. Commenting on a similar device employed by certain Persian Gulf oil-producing States for protecting the value of the funds due to them during the conversion of such funds from the currency of account to that of payment, the Committee, in its report to the 56th Conference of the Association, observed:

"Such a monetary clause has one specific merit, namely its careful adjustment to the evolution of the parities of the most frequently used major currencies in international trade. It has allowed an effective adjustment of oil prices in accordance with recent monetary events. It would therefore be tempting to recommend its insertion in the various arrangements, more or less long-term, dealing with the supply of raw materials. Yet the disadvantages are of some importance. The first ensues from the complex operation of such a clause. Apart from the relatively modest problem of its drafting, it requires rather intricate calculations which only major enterprises and States with already properly qualified staff may have done. This is a genuine limitation on the wider use of the clause. Furthermore it only operates as an effective protective device with regard to variations of parity, no matter whether they are compatible or not with international obligations of States in force which means that they can cope exclusively with one legal phenomenon, namely exchange rate modifications. They do not offer any protection against economic developments affecting currencies, neither against depreciation nor appreciation in terms of purchasing power."²²

(g) *Reference-to-gold clauses*

39. Of all the value maintenance devices in use in both domestic and international monetary transactions, the most venerable and for a long time the most widely used is unquestionably the "gold-value" clause in its many different forms. While its variants are numerous, the essence of the gold-value clause is an attempt to link the value of the monetary obligation to a specified value in gold (expressed in terms of weight, fineness, and/or quantity) in such a way that the quantum of the obligation at any time (and more specifically at the time of repayment) is the amount in the currency of payment required to "buy" gold of the specified value; in other words, the debt is discharged only by payment of an amount in the currency of payment regarded as the monetary equivalent of gold of the specified value at the time of such payment.

40. While it is beyond the scope and purpose of this report to attempt a comprehensive review of the variety of gold and gold-value clauses,²³ the following two rep-

²² ILA 56th Report, p. 87.

²³ Something close to such a comprehensive review is contained in the ILA Monetary Law Committee's report. See also, G. R. Delaume "Gold and Currency Clauses in Contemporary International Loans", 9 *American Journal of Comparative Law* 199 (1960). Numerous references are collected in A. Nussbaum, *Money in the Law—National and International* (1950).

representative approaches will nevertheless serve to illustrate the gold-value technique. One of the better-known approaches is that embodied in section 344 of the Czechoslovak International Trade Code, which seeks to tie the value of the obligation to the gold content of the currency of denomination and requires a proportionate adjustment of the obligation to the extent of any variation in such gold content exceeding a defined range.

41. A standard clause based on this approach provides as follows:

"In case of a change in the gold content of the US\$ which is at present 0,888671 grammes of fine gold / or of the pound sterling which is at present 2,48828 grammes of fine gold / or in case of a change in the official price of gold in the United States of America which is at present 35 US\$ a Troy ounce of fine gold/ the value of the contract not yet paid, the value of the merchandise not yet delivered and the value of the instalments/claims/inclusive of interest shall be converted as on the date of the change in the gold content of the US\$ /or of the pound sterling or of the change of the official price of gold in the USA/ in proportion to the change occurred so that the equivalent in gold of all these deliveries and of the sum total of these payments remain the same as they would have been had the change not occurred."

42. From the context of international conventions come the other illustration. Article 22 of the Warsaw Convention,²⁴ as amended by the Hague Protocol of 1955, is typical of the gold-value technique employed in many similar conventions, which consists of denominating the obligation therein expressed in a specific gold currency with provision for conversion into the currency of payment on a gold-value basis. After fixing various monetary limits of liability in francs, article 22 goes on to state in paragraph 5 as follows:

"The sums mentioned in francs in this article shall be deemed to refer to a currency unit consisting of sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgement."

43. The enormous attractiveness of gold as a value-maintenance device is, of course, easy to appreciate. Among the recognized attributes of gold which have made it ideal for use first as money and then as the international measure of currency value are its assumed intrinsic value and its history of maintaining its value over time, appreciating as necessary to compensate for value changes on the part either of currency or of goods

and services. It is precisely these attributes of gold which commend it to the creditor or other party desirous of conserving the value of a fixed monetary obligation. To such a party, thus gold appears as in effect a non-depreciating currency, a perception reinforced by the role of gold as the measure of currency value under the international monetary system in effect until recent times.

44. The fate of the gold-value clause has been closely linked to the role of gold in the domestic and international monetary systems. Thus, for instance, in the days when gold coins actually were part of the domestic money of many States, the creditor could and often did achieve value maintenance simply by stipulating to be paid in gold coins rather than in any form of money.²⁵ Even after gold coinage had for all practical purposes disappeared from domestic circulation, the prevailing monetary system generally retained as its cornerstone the concept of gold convertibility. Notionally this amounted to a guarantee by the national monetary authority of the gold value of its currency, by being ready upon demand to convert such currency into gold. In such a situation, as one commentator has observed, "the denomination of an obligation in gold (was) nothing more than a lawful alternative to denomination in the national monetary unit",²⁶ with the result that there was little practical significance to the reference to gold provision in that context.

45. Hence the reference-to-gold clause achieved significance only when, as a result of a number of developments in the monetary sphere—including the cessation of domestic gold convertibility, legal tender legislation designed to force acceptance of bank notes and other forms of money, devaluations, and so forth—the value of a monetary obligation linked to gold no longer coincided as a matter of course with the nominal value of the debt as expressed in the national currency. Stipulating for the debt to be valued on a gold basis generally yielded for the creditor at the time of eventual repayment more units of the currency of payment than he would otherwise have received. Under these conditions the reference-to-gold clause grew in importance and popularity, serving well the needs of the creditor (and indirectly the interest of the borrower in the greater availability of credit) as well as the interest of others, such as, for example, the claimant under the compensation provisions of such international agreements as the Warsaw Convention which employ the gold-value device to denominate monetary obligations.

46. The success of the gold and gold-value clause occurred in an atmosphere of growing concern by national authorities as to the effect of such clauses on public confidence in the national currency and its implications for the sovereign authority to determine the value within the country's borders of such currency. These concerns were particularly pronounced in countries such as France and the United States where extensive use of

²⁴ Convention for the Unification of Certain Rules Relating to International Carriage by Air, done at Warsaw, 1929. Other conventions employing a similar technique include the Convention on the Contract for the International Carriage of Goods by Road (CMR), 1956 (Germinal franc); the Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships, 1957 (Poincaré franc); and the Convention on Civil Liability for Oil Pollution Damage, 1969 (Poincaré franc).

²⁵ Such clauses are thus more accurately described as "gold clauses" rather than "gold-value clauses".

²⁶ See Silard, "Maintenance-of-Value Arrangements in International Transactions", 5 *Law and Policy in International Business* 398, 401-402 (1973).

the gold clause mingled with open resistance by creditors and obligees to acceptance of the national money in discharge of obligations owed them. Already in 1873 the French Cour de cassation had declared the gold and gold-value clause (and similar protective clauses) contrary to "ordre public" and inconsistent with existing legal tender legislation when employed with reference to a domestic transaction.²⁷

47. Similarly in 1933 the United States Congress adopted the historic Joint Resolution by which it declared gold clauses contrary to public policy and decreed that obligations denominated in gold dollars may be discharged by coin or paper currency. While the exact ramifications of this enactment are still not settled,²⁸ yet its effect was to further throw into question the validity and usefulness of the reference-to-gold clause, particularly in view of the dominant role played by the United States dollar in international transactions, where denomination in United States dollars was, and remains, quite common. Furthermore, at about the same time or shortly thereafter a number of other countries enacted similar restrictive legislation which had the effect at the minimum of further limiting the scope of apparent validity of the gold-value (and other) protective clauses.²⁹

48. The usefulness and the suitability of a reference to gold as a value-maintenance device has been further undermined by developments within the international monetary system. There is little doubt that a major reason why the gold-value clause worked so well—at least on the international level—was because it was well-adapted to the prevailing international monetary system under which gold was recognized as the common denominator of national currencies. Thus under the system established by the Bretton Woods Agreement of 1944, not only was gold made the ultimate reference of value for national currencies, but there was also established an official price for gold. This price of \$US 35 per troy ounce was maintained essentially by the readiness of the United States authorities to convert United States dollars into gold for foreign monetary authorities at the set price and also the readiness to freely buy and sell gold in the open market.

49. This situation effectively came to an end on 15 August 1971 when, in response to continuing pressures on the dollar brought about in part by the mixed inflationary and recessionary effects of the Indo-China war and its aftermath, the President of the United States decided to suspend the free convertibility of the dollar into gold. The ensuing international monetary crisis culminated in the emergence of a two-tier gold market—one for transactions between central banks in which the price of gold remained at an established official level and one for private transactions in which the price of gold was allowed to be determined by free market forces. The result was not only a substantial divergence between the

official and the market price of gold, but also a wide and persistent fluctuation in such free market price.³⁰

50. With the entry into effect on 1 April 1978 of the Second Amendment to the Articles of Agreement of IMF, the process of demonetization of gold which has been in progress for the last few years is now complete. Under the Amendment, exchange arrangements may include "(1) the maintenance by a member of a value for its currency, in terms of the special drawing right or another denominator, other than gold, selected by the member . . .".³¹ Gold, in other words, far from being the ultimate reference of value of national currencies has become no more than a commodity with all the consequences of price instability that this entails.

51. Under these circumstances therefore gold has lost one of its chief virtues as a value-maintenance device, namely its ability to confer stability of value and certainty to a monetary transaction.

(h) *The unit-of-account method*

52. The most important value-maintenance device in use today is the composite unit of account or "basket of currencies" method. This approach involves denominating the debt not in terms of an individual currency or multiple currencies, but in a unit of account composed of cumulative proportions of a selected number of currencies chosen on the basis of some criterion deemed relevant for the purposes for which the unit of account will be used and which also determines the relative weighting to be given each currency making up the unit.

53. The unit of account thus differs from the familiar multiple currency clause in which the debt is denominated in a number of alternative currencies in each of which, at the option of the party entitled to choose, the debt may be discharged, for in the case of the unit of account each unit represents proportionate amounts of all the currencies of which it is composed. This holistic dimension to the unit of account also distinguishes it from the seemingly similar case where designated parts of the debt are denominated in different currencies such that analytically each part of the debt, with its corresponding currency of denomination, could be considered a separate obligation.³²

²⁷ Cass. Civ. 11 February 1873, S. 1873, 1.97, as construed in *Compagnie d'assurance La New York v. Deschamps*, Cass. Req. of 7 June 1920, S. 1920, 1. 193.

²⁸ See paras. 76-80 below.

²⁹ The legal issues are more fully discussed below, paras. 72 to 86.

³⁰ In view of subsequent developments in the international monetary system and the position taken later in this report as to the feasibility of a return to a gold-based maintenance-of-value device, it does not seem necessary to explore in fuller detail the problems created for the application of the gold-value clause in the two-tier gold market situation, such difficulties as deciding on the basis of which price the gold is to be valued and if on the basis of the market price, what the relevant date and place is. See, on these questions, P. Heller, "The Warsaw Convention and the Two-Tier Gold Market", 7 *Journal of World Trade Law*, 126 (1973). *Contra*, T. Asser, "Golden Limitations of Liability in International Transport Conventions and the Currency Crisis", 5 *Journal of Maritime Law and Commerce* 645 (1974). See also Gold, Floating Currencies, pp. 55-63.

³¹ Second Amendment to the IMF Articles of Agreement, sect. 2 (b).

³² Commenting on the purpose of such an arrangement, the ILA Monetary Law Committee concluded that it was probably fair to say that "in general, these combinations are primarily not meant to maintain value, but rather to allocate amounts in the currencies of the different countries where they are to be spent". ILA 56th Report, p. 83.

54. The best-known of the basket-of-currencies unit of account is the IMF Special Drawing Rights (SDR). Other international units of account include the transferable rouble of the Council for Mutual Economic Assistance, the European Economic Community (EEC) unit-of-account (EU), the European composite unit (EURCO) and the Arab currency-related unit (ARCRU), the last two being used primarily in the private international bond market.³³

55. The SDR, which was set up in 1969, is, as revised in June 1978, a composite of the currencies of the 16 unit countries whose share of total world export of goods and services in the period 1972-1976 exceeded one per cent on the average. These currencies range from the United States dollar, with a relative weighting of 33 per cent, to the Spanish peseta, with a weighting of 1½ per cent.³⁴ With the coming into effect of the Second Amendment to the IMF articles and the widespread recognition and use by States of the SDR both as a unit of account and as a *numéraire* of value in bilateral and multilateral transactions between themselves, it may be justified to conclude that the SDR has virtually replaced gold in the international monetary system.³⁵

56. Since, however, there remain some very important States not members of IMF and whose currencies are not convertible into SDR values and since, furthermore, only States and not individuals, may own or operate SDR accounts, the extent to which the SDR can become not only a universal unit of account but also a maintenance-of-value reference for private transactions is still an open question. Clearly much depends on the future evolution of the SDR, whether, for example, a way could be found acceptable to non-IMF members to relate their currencies to SDR values and what the attitude of courts would be to value-clauses in private contracts linked to the SDR.³⁶

57. The merit of the basket-of-currencies method of value protection is that it provides a relatively stable reference of value since its composite nature ensures that the weakness of one currency is balanced by the strength of another, thus counteracting the fluctuation tendency. Its composite nature also allows for flexibility and adaptability: depending on the purposes in view and the parties concerned, the number, identity and relative weights of

the component currencies could be chosen to suit the particular situation.³⁷

58. There are two major disadvantages to the device. The first is that it does not necessarily provide a hedge against depreciation in purchasing value. Thus, for example, the relative values of the currencies in the basket might be maintained as between themselves while in fact, because of the impact of inflation on those currencies, the over-all value of the unit in terms of purchasing power may have fallen considerably over the period in question. Secondly, because of the need to keep the unit under constant review both as regards the relationships among the component currencies and as regards the over-all value of the unit itself as well as the need to make authoritative calculations regarding the value of a particular currency in terms of the unit, considerable administrative and technical expertise is required to establish and operate a unit of account of the sort under consideration. This tends to make it impractical for use except by sophisticated parties who can understand its operation and have access to the means of obtaining the requisite calculations.³⁸

B. Purchasing value maintenance clauses

59. These clauses, as the heading suggests, are in essence directed towards maintaining the purchasing rather than the formal exchange value of the monetary obligation to which they relate. Consequently, they ordinarily take the form of a linkage between the amount of the monetary obligation owed and the price of goods and services, such that a change in the latter (usually, if of a certain size) causes a corresponding adjustment in the amount of the debt.

60. While such compensatory value clauses are familiar and easy to apply in the case of a domestic transaction in which typically only one currency and one set of price levels are involved, their use in an international transaction raises some interesting questions as regards the currency whose purchasing value is at stake. Although in practice value clauses of this sort generally refer to the domestic purchasing power of the currency of account, there seems to be nothing in principle which would preclude reference instead to the domestic purchasing power of some other relevant currency such as, for example, of the creditor's or the payor's country. This is particularly so where the latter currency is the currency of payment. The creditor may, in specifying the currency of payment, have planned to use the funds to make purchases in the country in whose currency he is to receive payment and he may be concerned that changes in the domestic purchasing value of that currency might conceivably not be fully reflected in the exchange rate

³³ For a useful survey of the most important basket-of-currencies units of account in use in world trade and international financing, see report of the United Nations Committee on Contributions, *Official Records of the General Assembly, Thirty-third Session, Supplement No. 11 (A/33/11)*.

³⁴ The full list of SDR currencies, with their corresponding weightings, is as follows: United States dollar (33 per cent); Deutsche mark (12½ per cent); French franc (7½ per cent); Japanese yen (7½ per cent); pound sterling (7½ per cent); Italian lira (5 per cent); Netherlands guilder (5 per cent); Canadian dollar (5 per cent); Belgian franc (4 per cent); Saudi Arabian riyal (3 per cent); Swedish krona (2 per cent); Iranian rial (2 per cent); Australian dollar (1½ per cent); Austrian schilling (1½ per cent); Norwegian krone (1½ per cent); Spanish peseta (1½ per cent).

³⁵ Until the Second Amendment the SDR was, of course, itself also defined in terms of gold.

³⁶ On the latter question, there appears to be some grounds for optimism. See Gold, *Floating Currencies*, pp. 60-63.

³⁷ Compare, for example, the make-up of the SDR with that of the EEC unit of account (EU) which contains specific amounts of the currencies of all of its nine members.

³⁸ Even as regards the SDR, IMF publishes currency values on a current basis for only 32 or so countries, although such calculations will be made for any other member currency upon request. One can certainly foresee difficulties for a court, say, in a developing country faced with an SDR-related clause in a contract whose construction and application is dependent on such prior calculations.

between that currency and the currency of account at the time of payment. It would seem therefore that the facts of each particular case should determine the appropriate currency and relevant price level reference.³⁹

61. The following appear to be the major types of compensatory purchasing value clauses.

(a) *Index clauses*

62. The most important and most familiar type of compensatory purchasing value clause, the index clause, seeks to link the amount due to the party to be paid to movements in the price of goods and services either as a whole (general index clause) or with respect to specific items (specific index clause). Such a clause will generally specify the source to which one must look for the authoritative figures on the relevant price movement, e.g. figures published by the United Nations Statistical Office, the commerce or trade ministry of the particular country concerned or even a particular trade association. Where no such source is identified or where, as often occurs in intergovernmental transactions, there is a vague reference to a price level—e.g. “the world market price of X commodity”—different problems of interpretation and application may arise, especially for a tribunal lacking the means or resources to conduct the appropriate verifications.⁴⁰

63. As regards the general index clause, which reflects more truly the concern for the over-all purchasing value of the currency involved than does the specific index clause, numerous examples occur of their use both at the domestic and the international levels, particularly in the form of cost-of-living adjustments to wages or as factors necessitating an adjustment in the price of work agreed to be done. Thus, for example, the compensation system of staff members of the United Nations consists of two elements—a fixed salary portion and a graduated post adjustment added to or subtracted from the base salary depending on the cost of living at the location in comparison to that in New York which serves as the reference point. This cost-of-living portion is subject to automatic adjustment whenever the cost-of-living index is determined to have moved upward by at least a certain percentage. Again, it is quite common in countries permitting it for the value of such long-term obligations as rent to be protected by an index clause, usually of the

general type, providing for an augmentation of the rent payable by the same percentage as that by which the price may have risen.

64. The specific index (or price escalation) clause is commonly encountered where, as in the case of a construction project, it is anticipated that the party to be paid will incur recoverable additional costs of a known nature but of indeterminate size during the period of performance of the contract—increases in the cost of labour and material, for example. The index clause in such a case would then be linked to the specific item or items as to which price movement could be anticipated.

65. An illustrative case is a contract between a public works corporation of a developing country and a foreign construction company which contained a price escalation clause based on the two elements of wages and the price of materials and goods. As to the former, it was provided that if there was any increase or decrease necessitated by the decision of the Government or by agreement with a recognized trade union during the life of the contract, “then the net amount of such increase or decrease shall be added to or deducted from the Contract Sum as the case may be”. Similarly, as to materials and goods a schedule of current market prices was established at the commencement of the contract as the “basic price” of each item and then followed the following provision:

“If during the progress of the works the market price of any of the materials and goods (listed in an appendix) varies from the basic price thereof, then the difference between the basic price and the market price payable by the Contractor and current when such materials or goods are bought shall be added to or deducted from the Contract Sum as the case may be.”

66. The foregoing example brings out a further point which deserves to be noted in this context. While it is generally the case that index clauses serve the interest of the creditor because of the basic tendency of price levels to move upwards, there may also be circumstances where the price level of the reference items declines and the index clause enables the debtor to benefit from such a decline. Hence a well-drawn clause will usually provide for such a case. Such a balanced clause, for instance, using the price of oil in the United States as the index would have worked to the benefit of the party to be paid during the period of high prices brought about by the shortages of 1973 and to the benefit of the payor when the shortages abated and prices declined significantly.

(b) *Quantity adjustment clauses*

67. In the situation here contemplated, the parties agree that a loss in purchasing power of the currency in which the amount due from the payor is denominated will be compensated for not, as in the usual case, by an augmentation of the amount payable, but by a corresponding reduction in the performance obligation of the other party. Thus, in the case of a seller, he may be allowed to adjust the quantity of the goods to be delivered to the new value of the amount he is to receive.

³⁹ In its discussion of this issue, the ILA Monetary Law Committee seems to suggest that reference to the purchasing value of the money of account is the fair and appropriate course of action (ILA 56th Report, p. 94). It is not entirely clear, however, why this should always be so. Where the money of account and that of payment are the same, no problem arises; where they differ, however, a contrary argument can at least be made. Thus, for example, where, in keeping with trade practice, the obligation is denominated in a specific third currency (e.g. the United States dollar), no convincing reason appears why a change in the domestic purchasing value alone of that currency should be any more relevant to the parties and particularly to the creditor than a change in the purchasing value of the currency of actual payment which in this example is that of the creditor's country.

⁴⁰ This is an important factor in considering the suitability of such clauses in international transactions, where the clause may fail to be applied, say, by a court in a developing country not equipped with the resources to easily conduct the necessary verification.

68. The situation could arise, for example, in a case where the goods are being supplied by the vendor on a cost-plus-fee basis to a buyer who, because of exchange control regulations in his own country, is limited to an absolute ceiling in the amount he can transmit abroad. If in such a case intervening cost increases or loss of value of the buyer's currency makes the amount, which the buyer is permitted to transmit, insufficient to pay for the agreed quantity, such insufficiency could be remedied by a corresponding reduction in the quantity to be supplied.

69. Other circumstances noted by ILA, in which quantity adjustment clauses operate, are in the field of development aid and in the supply of commodities under a medium- or long-term arrangement where the donor or obligor allocates a fixed monetary amount for the purpose and the actual quantity of goods (e.g. agricultural equipment) supplied or commodity provided is made to vary in accordance with the real economic value of the allotted funds at the time of consummation of the transaction.⁴¹

(c) Hardship clauses

70. One possibility which the parties have always had for dealing with changed circumstances such as those likely to be brought about by currency fluctuations is the inclusion of a "hardship clause" in their contract by which the party adversely affected by such circumstances is enabled to initiate the process of renegotiation with the other party with the hope of then working out a mutual accommodation in light of such monetary developments.

71. It appears that the use of the hardship clause for this purpose is on the increase and could perhaps become an accepted mode of coping with the currency fluctuation problem especially among businessmen with a long-standing relationship and mutual trust.⁴²

III. LEGAL AND POLICY ISSUES

72. Any proposal regarding the use of maintenance-of-value clauses in international contracts cannot overlook the legal and policy framework in which such clauses have to operate. In particular, national legislation and expressions of policy regarding the validity or enforceability of such clauses deserve close attention since, with regard at any rate to private contracts, there is in the final analysis a national law to which reference must be made in deciding on the validity or application of a term of such contracts. It is proposed in this part of the report to highlight some of these legal and policy issues by examining briefly the situation in a selected number of countries whose approach to these issues has had great influence not only on the policies of other countries but more generally on the entire legal climate with respect to such clauses in international trade and finance. The countries to be considered are France, the United States and the United Kingdom.⁴³

⁴¹ See ILA 56th Report, pp. 96-98.

⁴² See Gold, *Floating Currencies*, pp. 7-14.

⁴³ A wide-ranging survey of the situation in many countries appears in Mann, especially p. 146 ff.

A. France

73. As already noted above (para. 46) beginning from 1873, the French Cour de cassation had taken the position that gold and other value clauses were invalid on the ground that they were contrary to public policy as expressed in legal tender legislation compelling acceptance of inconvertible paper money (*cours forcé* legislation) and thus undermined the authority of the State to establish the value of such currency and to ensure its compulsory circulation. It was, however, recognized that the public policy rationale behind this holding applied most clearly as regards strictly domestic transactions and not in the case of a transaction having a predominantly international character.⁴⁴

74. However, this entire line of reasoning was finally reversed in 1957 by a decision of the same court denying the correctness of the public policy argument by which maintenance-of-value clauses had therefore been struck down.⁴⁵ Yet the situation in France remains far from clear, for, apart from the fact that some later cases have treated the international character of the transaction before them as relevant to the issue of validity, there is also superimposed the question of the effect of a law of 1958-1959,⁴⁶ prohibiting the indexing of obligations to the price level of goods and services except where there is a direct relationship to the subject-matter of the contract or the business of one of the parties.

75. In summary, the legal situation in France may perhaps be stated as follows: under French law maintenance-of-value clauses, even in domestic transactions, appear to be valid unless they contravene the provisions of the law of 1958-1959.

B. United States of America

76. Perhaps the best-known anti-gold-clause legislation is the 1933 Joint Resolution of the United States Congress which not only prohibited the use of gold and gold-value clauses as contrary to public policy, but went on to decree that:

"Every obligation, heretofore and hereafter incurred whether or not any such (gold or gold-value) provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts."⁴⁷

Although this provision has now been repealed as regards future transactions,⁴⁸ it remains important not only because of prior contracts still governed by it but also as one of the major pieces of legislation that have determined the course of development of value clauses in international transactions and as such still deserves study.

⁴⁴ Thus developed the well-known "paiements internationaux" exception to invalidity of value clauses under French law. See Mann, p. 151, note 3.

⁴⁵ Cass. Civ. 27 June 1957, D. 1957, 649. See Mann, p. 153, for a discussion of this case.

⁴⁶ Law of 30 December 1958, as amended by law of 4 February 1959. Code civil (Dalloz), art. 1243.

⁴⁷ 31 United States Code, sect. 463 (a).

⁴⁸ See para. 80 below.

77. As can be seen from the wording of the foregoing provision, the Joint Resolution unequivocally foreclosed the use of gold or gold-value clauses—the most popular and best-established value maintenance clause of the time—in any domestic contract. The question was whether it also jeopardized the validity of such a clause in an international transaction. At least four situations can be distinguished with respect to this question: (a) where the contract is between a United States party (citizen or resident) and a foreign party and the dollar is the currency of payment, (b) where the contract is between a United States party and a foreign party and the dollar is the unit of account but not the currency of payment, (c) where the contract is between two foreign parties and the dollar is the currency of payment, and (d) where the contract is between two foreign parties and the dollar is only the unit of account but not the currency of payment.

78. As regards these cases, it need only be observed that United States courts have generally drawn no distinction between domestic and international transactions nor have they recognized any distinction based on nationality or domicile of the parties;⁴⁹ similarly, foreign courts have by and large applied the provisions of this legislation to debts payable in United States dollars without regard to nationality issues.⁵⁰ Yet it remains possible that the court of a particular forum may refuse, on grounds of public policy, to give effect to this legislation, especially where to do so would deprive domestic creditors (e.g. bondholders) of United States debtors of the benefit of their value maintenance stipulation. Furthermore, since the Joint Resolution is in terms directed at debts payable in United States dollars, the question of obligations merely denominated in United States dollars as the unit of account but payable in some other currency may be regarded as still open.⁵¹

79. Another issue which may be regarded as still unresolved is the effect of the Joint Resolution on the validity of index clauses. While some commentators hold the view that such clauses come within the scope of that legislation,⁵² others have expressed doubt as to its applicability to that context.⁵³ What seems clear, though, is that cost-escalator-type clauses appear to be frequently used in practice in the United States, particularly in labour contracts and also among public utilities.

80. As noted above, the Joint Resolution of 1933 was repealed by an Act of 28 October 1977, section

4 (c) of which declares that the 1933 Joint Resolution "shall not apply to obligations issued on or after the date of enactment of this section."⁵⁴ It is difficult to assess what the impact of this repeal will be on the use of value, especially gold-value, clauses since developments in the international monetary system noted above have reduced gold to the status of a commodity like any other, thus taking away its unique suitability as a value maintenance device. The repeal does, however, have the positive effect of removing a major legal cloud hanging over the development of maintenance-of-value devices.

C. United Kingdom of Great Britain and Northern Ireland

81. Apart from the dictum of Denning, Lord Justice (as he then was), in a 1956 case decided on other grounds,⁵⁵ there appears to have been no serious question raised in England as to the validity of value-maintenance clauses in general and the gold-value clause in particular. In that case, L. J. Denning drew a distinction between domestic and international contracts and strongly implied that gold-value clauses, while accepted in the latter situation, were contrary to public policy and, therefore, unenforceable in the former. This view, criticized by many commentators,⁵⁶ has, however, not been followed. Indeed, as far back as 1934 the House of Lords, in a leading case on value-clauses, enforced a gold-value clause, though without express consideration of the public policy argument.⁵⁷ Also, as noted above, in a recent case, another English court, at first instance, expressly refused to follow L. J. Denning's dictum and instead enforced a clause pegging the value of a domestic obligation to the exchange value of a strong foreign currency.⁵⁸

82. Moreover, in a clear departure from the nominalistic approach, Lord Denning himself had joined the majority of the House of Lords in holding, in the groundbreaking case of *Miliangos v. George Frank (Textiles) Ltd.* (1976) AC 443, that an English court can render judgement in a foreign currency and that the operative rate of exchange for converting the judgement amount is that in effect on the date when the judgement is enforced.

83. The conclusion would seem warranted then that English law appears to pose no obstacles to the use of value-maintenance devices—at least of the type likely to be employed in modern circumstances.

84. As regards the matter of policy—the demonetization of gold under the current international monetary system has clearly removed one of the major considerations behind the various legislative and judicial efforts to curtail or altogether eliminate the use of value (especially gold-value) clauses, namely, the fear that the status of legal tender of inconvertible national currency such as bank-notes would otherwise be undermined.

⁴⁹ See, for example, *Guaranty Trust Co. v. Henwood, et al.*, 307 US 247 (1939), *Bethlehem Steel Co. v. Zurich General Accident and Liability Ins. Co.*, 307 US 265 (1939). For the view that different considerations should apply to domestic and to international transactions, see Note, "The Unit of Account: Enforceability Under American Law of Maintenance-of-Value Provisions in International Bonds", 71 *Yale Law Journal* 1294, especially at 1307 ff.

⁵⁰ See authorities cited in Mann, p. 159, notes 1-3.

⁵¹ See Silard, *Maintenance-of-Value*, pp. 404-405. It seems also to be generally agreed that the Joint Resolution of 1933 did not prohibit the use of foreign currency clauses for value protection. See Mann, p. 187, note 2.

⁵² See, in particular, Evan, "Inflation and the Declining Scope of Compulsory Monetary Nominations", *Proceedings and Committee Reports of the American Branch of the International Law Association*, 70 note 9, 80-81 note 54.

⁵³ See Nussbaum, *op. cit.*, p. 307, and Mann, p. 144.

⁵⁴ 91 Stat. 1229, 31 United States Code, sect. 463, note.

⁵⁵ *Treseder-Griffin v. Co-operative Insurance Society* (1956) 2 Q.B.127.

⁵⁶ See Mann, p. 155, note 2.

⁵⁷ *Feist v. Société intercommunale belge d'électricité* (1934) A.C.161.

⁵⁸ *Multiservice Bookbinding Ltd. and others v. Marden*.

This leaves the fear of their supposed inflationary tendency as the remaining rationale against the unrestricted use of value-maintenance devices. This concern has been stated as follows:

"Once value-safeguarding clauses, or particular types of such clauses, have come into common use, price increases in individual sectors or in the economy as a whole would be transmitted to a large number of already constituted financial claims. This would inevitably have repercussions on the general price level, which in turn would affect the reference figures of value-guarantee clauses, thereby inducing renewed price rises."⁵⁹

85. There exists, however, some disagreement even among economists as to how well-grounded this fear is.⁵⁹ At any rate, it has been argued that a well-managed system of sanctioning of value-maintenance devices may be beneficial not only in providing effective control of their use but also in avoiding resort to alternatives which may be harmful to the economy.⁶⁰

86. A further argument in support of value clauses in certain circumstances may be adduced from the perspective of equity. At least as regards loans floated domestically by large institutions, corporate and otherwise, a significant number of the subscribers are often individuals of fairly modest means—the elderly, widows, and other small investors. It may, therefore, be thought somewhat unfair on such investors not to permit them to protect the purchasing value of their investment and thus in effect to allow such economically stronger and sophisticated borrowers to repay the loan in substantially depreciated money.⁶¹

IV. CONCLUSIONS

87. The foregoing review of devices designed to protect parties from the effects of currency fluctuations appear to support the following conclusions:

(a) As long as monetary obligations remain outstanding for more than a short period and as long as such obligations are subject to changes in value consequent upon fluctuations in relevant currency values, the need will exist for value-protection devices and parties will seek to obtain such protection as best they can;

⁵⁹ Deutsche Bundesbank, Value Guaranty Clauses: Synopsis of the Bundesbank's Policy in Granting Permits. Quoted in Silard, *Maintenance-of-Value*, p. 407.

⁶⁰ See Silard, *op. cit.*, pp. 407-408, citing a case study of the experience of many Latin American countries and of the Central Bank of the Federal Republic of Germany.

⁶¹ A fairly strong argument in this tenor is made in Evan, *op. cit.*

(b) The existence of a fair and balanced method of value maintenance benefits both creditor and debtor not only in the stability (and hence relative certainty of expectations) that it can provide for both parties, but also in the inducement that it provides to the sources of capital to make such available, thus stimulating economic development and trade;

(c) Legal regulation of value-maintenance devices has so far concentrated on the advancement of monetary and economic policy with little attention to the objective of providing a check on the possible abuses of such devices by powerful creditors to the detriment of needy borrowers;

(d) While the history of value-maintenance clauses worldwide is replete with legal regulations of varying scope and stringency, there appears as of today no insurmountable obstacles to the use of such devices with regard to international transactions;

(e) The concerns that have historically underlain State restriction of value-maintenance devices—at least on the level of international transactions—have either lost their basis or can be regarded as supportable risks in the light of countervailing benefits.

(f) Of all the value-maintenance devices which are, or have been, in use in international commercial and financial transactions, the basket-of-currencies unit-of-account method appears to have the most chance of success under modern conditions and of such units-of-account, the SDR appears to offer the most practicable starting-point for a unit-of-account-based maintenance-of-value clause.

V. RECOMMENDATIONS

88. The Commission may wish to:

(a) Refer this item to the Working Group on International Negotiable Instruments, with a mandate to consider the entire question of value maintenance in international transactions with specific reference to the desirability and feasibility of work by the Commission on this topic and in the light of alternative proposals put before the Working Group by the Secretariat;

(b) Request the Secretariat to carry out further studies on this topic in consultation with the Study Group on International Payments, including, if necessary, the circulation of a questionnaire to Governments and interested international organizations and trade and banking circles, and to submit a report on its findings to the Working Group with appropriate recommendations.

II. INTERNATIONAL PAYMENTS

A. Report of the Working Group on International Negotiable Instruments on the work of its seventh session (New York, 3-12 January 1979) (A/CN.9/157)*

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INTRODUCTION

1. In response to decisions by the United Nations Commission on International Trade Law (UNCITRAL), the Secretary-General prepared a Draft Uniform Law on International Bills of Exchange and International Promissory Notes, with commentary (A/CN.9/WG.IV/WP.2).¹ At its fifth session (1972), the Commission established a Working Group on International Negotiable Instruments.² 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.³

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).⁴

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).⁵

4. The third session was held in Geneva in January 1975. At that session the Working Group continued its consideration of the articles concerning notice of dishonour (arts. 63 to 66). The Group also considered provisions regarding the sum due to a holder and to a party secondarily liable who takes up and pays the instrument (arts. 67 and 68) and provisions regarding the circumstances in which a party is discharged of his liability (arts. 69 to 78).⁶

5. The fourth session of the Working Group was held in New York in February 1976. At that session the Working Group considered articles 79 to 86 and articles 1 to 11 of the draft uniform law, thereby completing its first reading of the draft text of that law.⁷

6. At the fifth session of the Working Group, held in New York in July 1977, the Working Group commenced its second reading of the draft uniform law (retitled at that session "draft convention on international bills of exchange and international promissory notes") and considered articles 1 to 24.⁸

7. The sixth session of the Working Group was held at the United Nations Office at Geneva from 3 to 13

* 29 January 1979.

¹ Report of the United Nations Commission on International Trade Law on the work of its fourth session, *Official Records of the General Assembly, Twenty-Sixth Session, Supplement No. 17* (A/8417), para. 35 (Yearbook ... 1971, part one, II, A). For a brief history of the subject up to the fourth session of the Commission, see A/CN.9/53, paras. 1 to 7.

² UNCITRAL, report on the fifth session (A/8717), para. 61 (1) (a) (Yearbook ... 1972, part one, II, A).

³ *Ibid.*, para. 61 (1) (b).

⁴ 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 (Yearbook ... 1973, part two, II, 1).

⁵ Report of the Working Group on the work of its second session (New York, 7-18 January 1974), A/CN.9/86 (Yearbook ... 1974, part two, II, 1).

⁶ Report of the Working Group on the work of its third session (Geneva, 6-17 January 1975), A/CN.9/99 (Yearbook ... 1975, part two, II, 1).

⁷ Report of the Working Group on the work of its fourth session (New York, 2-12 February 1976), A/CN.9/117 (Yearbook ... 1976, part two, II, 1).

⁸ Report of the Working Group on the work of its fifth session (New York, 18-29 July 1977), A/CN.9/141 (Yearbook ... 1978, part two, II, A).

January 1978. At that session, the Working Group, continuing its second reading of the text of the Draft Convention on International Bills of Exchange and International Promissory Notes, considered articles 5 and 6 and articles 24 to 53.⁹

8. The Working Group held its seventh session at the United Nations Headquarters in New York from 3 to 12 January 1979. 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. With the exception of Egypt, all the members of the Working Group were represented at the seventh session. The session was also attended by observers of the following States: Afghanistan, Argentina, Australia, Austria, Brazil, Canada, Chile, Cuba, Czechoslovakia, Djibouti, German Democratic Republic, Ghana, Japan, Morocco, Sierra Leone, Swaziland, Thailand and United Republic of Tanzania, and by observers from the International Monetary Fund, the European Banking Federation and the Hague Conference on Private International Law.

9. The Working Group elected the following officers:
 Chairman Mr. René Roblot (France)
 Rapporteur Mr. Roberto Luis Mantilla-Molina (Mexico)

10. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.IV/WP.11); draft uniform law on international bills of exchange and international promissory notes, with commentary (A/CN.9/WG.IV/WP.2); draft uniform law on international bills of exchange and international promissory notes (first revision) (A/CN.9/WG.IV/WP.6 and Add.1 and 2); draft convention on international bills of exchange and international promissory notes (first revision) articles 5, 6, 24 to 45, as reviewed by a drafting party (A/CN.9/WG.IV/WP.9); draft convention on international bills of exchange and international promissory notes (first revision) articles 46 to 68, as reviewed by a drafting party (A/CN.9/WG.IV/WP.10); draft convention on international bills of exchange and international promissory notes (first revision) articles 24 and 68 to 86, as reviewed by a drafting party (A/CN.9/WG.IV/WP.12) and the respective reports of the Working Group on the work of its first (A/CN.9/77), second (A/CN.9/86), third (A/CN.9/99), fourth (A/CN.9/117) fifth (A/CN.9/141) and sixth (A/CN.9/147) sessions.

DELIBERATIONS AND DECISIONS

11. At the present session the Working Group continued its second reading of the text of the draft Convention on International Bills of Exchange and International Promissory Notes as revised by the Secretariat on the basis of the deliberations and decisions of the Working

Group as recorded in its report on the work of its six previous sessions.

12. The text of each article as revised appears at the beginning of the report on the deliberations relative to that article.

13. In the course of this session, the Working Group considered articles 24, 53 and 54 to 70. The text of the articles as approved by the Working Group is set forth in the annex to this report.

14. At the close of its session, the Working Group expressed its appreciation to the observers of Member States of the United Nations and to representatives of International Organizations who had attended the session. The Group also expressed its appreciation to the representatives of international banking and trade organizations that are members of the UNCITRAL Study Group on International Payments for the assistance they had given to the Working 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.

A. Articles 54 to 56 (presentment for payment)

Article 54

15. The text of article 54, as considered by the Working Group, is as follows:

"(1) Delay in making presentment for payment is excused when the delay is caused by circumstances which are beyond the control of the holder and which he could neither avoid nor overcome. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

"(2) Presentment for payment is dispensed with:

"(a) If the drawer, the maker, an endorser or a guarantor has waived presentment [expressly or by implication] such waiver shall bind only the party who made it;

"(b) If an instrument is not payable on demand, and the cause of delay in making presentment continues to operate beyond 30 days of maturity;

"(c) If an instrument is payable on demand, and the cause of delay continues to operate beyond 30 days after the expiration of the time-limit for presentment of payment;

"(d) If the drawee, the maker or the acceptor has no longer the power freely to deal with his assets, or is a fictitious person or a person not having capacity to make payment, or if the drawee, the maker or the acceptor is a corporation, partnership, association or other legal entity which, under the applicable law, is in liquidation or has ceased to exist;

"(e) As regards a bill, if the bill has been protected for dishonour by non-acceptance;

"(f) (deleted previously)

"(g) If there is no place at which the instrument must be presented in accordance with article 53 (g)."

⁹ Report of the Working Group on the work of its sixth session (Geneva, 3-13 January 1978), A/CN.9/147 (Yearbook ... 1978, part two, II, B).

Paragraph (1)

16. A number of issues were discussed in relation to this paragraph. Firstly, it was queried whether it was desirable to retain a provision on delay in making presentment in view of the decision of the Working Group at its last session to delete a similar provision with respect to presentment for acceptance.¹⁰ Deletion of the provision would not only maintain the appearance of consistency of the text, but would simplify it. However, the Group was of the opinion that it was justified to distinguish, in this respect, between presentment for acceptance and presentment for payment. Because of the system of fixed time-limits for presentment for acceptance, adopted in the draft Convention, such presentment should be dispensed with if, with the exercise of reasonable diligence, it could not be effected (in those cases where presentment was necessary) within those time-limits. Article 49 (2) (b) sets forth a provision to that effect. No such time-limits existed in respect of presentment for payment. Under the draft Convention, an instrument, except a demand instrument, must be presented for payment on the date of maturity or on the first business day which follows. A provision excusing delay because it was caused by circumstances beyond the control of the holder was thus justified. The Working Group therefore decided to retain paragraph (1) of article 54.

17. Another question raised concerned the drafting of this paragraph. It was observed that the wording would seem to cover not only objective external factors preventing presentment (e.g. strike at the bank where presentment was to be effected) but also subjective factors personal only to the holder, such as his illness. It would not be desirable to admit of such subjective factors in the operation of this provision. On one view it was even to be doubted whether the fact that the holder had been kidnapped should be considered an excuse under this provision. It was noted in this context that recognition was expressly denied such subjective factors under the comparable provision (art. 54) of the Uniform Law on Bills of Exchange and Promissory Notes annexed to the Geneva Convention of 1930, although that provision has not itself been free of problems of interpretation.

18. On the other hand, it was pointed out that the Working Group, on first reading of the text, had specifically instructed the Secretariat to conform the wording of this provision to that employed in the Prescription Convention (Convention on the Limitation Period in the International Sale of Goods), which the Secretariat had done. It was not desirable to reopen the matter at this stage. Furthermore, the comparable provisions of both the English Bills of Exchange Act (art. 46 (1)), and the American Uniform Commercial Code (sect. 3-511 (1)) were cast in similar language and one should be careful about departing too far from texts which had worked well so far and from which the present provision had been derived.

19. The Working Group, after deliberation, decided to retain this paragraph in its present form.

Paragraph (2), subparagraph (a)

20. The Working Group decided to delete "the maker" from this provision, on the ground that since, as with the acceptor, presentment to the maker was not necessary in order to render him liable, it was inappropriate to speak of a waiver of such presentment by the maker.

21. The Working Group considered in detail the kinds of waiver to be recognized—whether express or implied and whether on or off the instruments and the effect of such waivers—who should benefit from them and who was bound by them.

22. During discussion of the question of whether a waiver could be made by implication or must be express the consensus emerged that, at least as far as waivers off the instrument were concerned, there was juridically speaking no difference between an implied and an express waiver, putting aside questions of proof which were a matter for national law to decide. Consequently the Working Group focused its attention on the question of whether a Waiver must appear on the instrument or could be off it.

23. There was considerable support for the requirement that waivers be expressed on the instrument. This would not only simplify matters, avoiding uncertainty and difficult evidentiary questions, but would be fully consonant with the nature of a negotiable instrument as a more-or-less self-contained embodiment of rights and obligations. It was argued that while such an approach would be sound policy for any negotiable instruments legislation, it was critical for a régime for international instruments where the parties in interest might all be in different countries.

24. Under another view, however, the draft Convention should recognize expressly that a waiver outside the instrument had legal effect. It was noted that negotiable instruments were often used between merchants who have an ongoing business relationship and who often are in communication with one another. It was not uncommon in such situations for a waiver to be asked for and given, for example, by telex or even by letter. It would be unrealistic and impractical not to recognize the effect of such a waiver—at least as between immediate parties. It was further observed that in certain jurisdictions, a judge might well find it awkward to ignore an express waiver given in a letter by the defendant to the holder, bearing in mind in particular the fact that to do so might render the waiver unenforceable since, as an independent promise, it might lack the requisite consideration for its enforceability. Such a situation could hardly be conducive to justice between the parties.

25. The observation was made that the issue involved might on closer analysis be found to be not so much whether a waiver must be on the instrument or could be off it, but rather the effect to be given to a waiver, whether on or off the instrument, as regards the parties bound and the parties benefited. This was so

¹⁰ A/CN.9/147, para. 126.

because it might be supposed that under virtually all legal systems, an express waiver outside the instrument, say, by letter between two merchants, would in the end be given effect either as a separate promise under an independent cause of action or, as in some systems, by the invocation of a doctrine such as estoppel, by which a party to be charged would be precluded from setting up the defence of non-presentment against the holder in whose favour he had given the waiver. It was only when one moved from these immediate parties to subsequent holders and to persons becoming parties to the instrument after the waiver was given that one encountered difficulties.

26. The Working Group considered the effect of waivers in terms of those it should benefit and those it should bind. There was general agreement that a waiver should in principle bind only the person who has given it. However, it was reasoned that since the drawee is the party who creates the instrument and is the one ultimately liable on it, it was fitting that he should be able to lay down the conditions under which subsequent signatories might become parties to the instrument. The Group therefore concluded that a waiver by the drawer, if made on the instrument, was binding on all subsequent parties.

27. As to who could benefit from a waiver, the Working Group adopted the basic approach that any holder of the instrument should be able to benefit from a waiver made on the instrument, whereas a waiver off the instrument should in effect benefit such holder or holders as are contemplated by the terms of the waiver.

28. The following text was then considered by the Working Group:

“(2) Presentment for payment is dispensed with:

“(a) If the drawer, an endorser or guarantor has waived presentment expressly or by implication; such waiver:

“(i) If made on the instrument by the drawer, binds any subsequent party and benefits any holder;

“(ii) If made on the instrument by a party other than the drawer, binds only that party but benefits any holder;

“(iii) If made outside the instrument, binds only the party making it and benefits only a holder in whose favour it was made.”

29. With regard to the wording of the proposed text a question was raised as to how there could be an implied waiver on the instrument. In response, it was admitted that the concept was somewhat difficult to apprehend; nevertheless one could not say that such a fact-situation never arose. Thus the example was given of a decision of one Supreme Court by which a waiver was implied where a party had written on the instrument “I remain obliged”. The Working Group decided that since the notion could be useful in situations which might not necessarily be foreseen at this point, the possibility of an implied waiver on the instrument should be recognized.

It was further agreed that the words “a holder in whose favour it was made” in subparagraph (a) (iii) was meant to cover not just the particular holder to whom the waiver may have been given, but all those contemplated by the waiver, as where the endorser writes to the holder saying, “I hereby waive presentment by any holder of the bill”.

30. The Working Group then adopted the text proposed as it appears in paragraph 28 above.

31. One representative expressed reservations in respect of the rule in paragraph (2) that a waiver could be made by implication.

Paragraph (2), subparagraph (b)

32. The Working Group adopted this subparagraph without change.

Paragraph (2), subparagraph (c)

33. The Working Group adopted this subparagraph without change.

Paragraph (2), subparagraph (d)

34. The Working Group decided to conform the drafting of this provision to the comparable provision of article 49 (2) (a) with respect to presentment for acceptance (see A/CN.9/147, paras. 127-133; Yearbook . . . 1978, part two, II, B). It was, however, decided not to retain death of the drawee, the maker or the acceptor as a dispensing event in the case of presentment for payment on the ground that the decision whether or not to accept was personal to the drawee; in the case of payment, however, successors might have reason to want to make payment on the instrument because of the particular business transaction involved and there was no reason not to give them such opportunity.

35. The Working Group adopted this subparagraph subject to the following changes designed to conform it with article 49 (2) (a): insertion of the words “by reason of his insolvency” between the words “assets” and “or” in the second line and deletion of the words “under the applicable law, is in liquidation or” in the last two lines.

36. One representative was of the opinion that the words “to make payment” should be replaced by the words “to incur liability on the instrument”.

Paragraph (2), subparagraph (e)

37. It was observed with respect to this subparagraph that it was inappropriately placed within paragraph (2). Since under article 56 (1) (c) there was constructive dishonour by non-payment in the cases enumerated in article 54 (2), this was tantamount to saying as regards subparagraph (e) that there was dishonour by non-payment of an instrument which had already been protested for dishonour by non-acceptance: a double dishonour concept. Not only was it unnecessary to have such a concept, but its existence might even raise the argument that the holder under subparagraph (e) was also required to make protest for dishonour by non-payment, which would have been unacceptable.

38. In the light of the foregoing observations, the Working Group decided to put the substance of subparagraph (e) into a new paragraph (3) of article 54 to read as follows:

"(3) Presentment for payment is also dispensed with as regards a bill, if the bill has been protested for dishonour by non-acceptance."

Paragraph (2), subparagraph (f)

39. The Working Group reconsidered this provision which it had decided, on first reading, to delete (A/CN.9/86, para. 91; Yearbook . . . 1974, part two, II, 1). The deleted text had read as follows:

"(f) As regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to pay the bill and the drawer has no reason to believe that the bill would be paid if presented."

40. The Working Group was of the opinion that this text was of doubtful application in the case of bills and notes and decided not to reintroduce this provision into the draft Convention.

Paragraph (2), subparagraph (g)

41. The Working Group adopted this subparagraph without change.

Article 55

42. The text of article 55, as considered by the Working Group, is as follows:

"(1) If a bill is not duly presented for payment, the drawer, the endorsers and their guarantors are not liable thereon.

"(2) If a note is not duly presented for payment, the endorsers and their guarantors are not liable thereon.

"(3) Presentment of an instrument for payment is not necessary in order to render the acceptor or the maker or his guarantor liable thereon."

Paragraph (1)

43. The Working Group adopted this paragraph without change.

Paragraph (2)

44. The Working Group adopted this paragraph without change.

Paragraph (3)

45. The point was raised that this paragraph as currently worded was superfluous in that it stated the obvious; an acceptor became liable on the instrument as soon as he placed his signature on it and it could therefore not be said that an acceptor was not liable until presentment for payment had been made. In defence of the provision, it was observed that it was designed to correct precisely such a misapprehension which was sometimes encountered even among legal petitioners not familiar with negotiable instruments law.

46. The Working Group decided to retain the substance of this provision but to reword it as appears in paragraph 52 below.

47. The Working Group then took up consideration of a second issue raised in connexion with this paragraph, namely, the legal situation of the guarantor of the drawee: specifically, it was asked whether prior presentment for payment to the drawee was a prerequisite to the liability of his guarantor. The answer, it was agreed, depended on what the status of such a guarantor was in terms of negotiable instruments principles: was he primarily liable (like an acceptor) or was he only secondarily liable (like an endorser)?

48. A strong argument was made in favour of treating the guarantor of the drawee as a secondary party. It was recalled that the legal status of such a guarantor was only admitted by the Working Group at its last session after protracted debate in which strong doubt was expressed as to the juridical soundness of such a concept (see A/CN.9/147, paras. 91-97; Yearbook . . . 1978, part two, II, B). In view of this fact, one should be cautious about making such a guarantor into a party primarily liable in the system created by the draft Convention. It was further argued that to make the guarantor in this case liable before presentment had been made to the drawee would be inconsistent with the guarantor's undertaking in article 44 (2), as approved by the Working Group at its sixth session, that he will "pay the bill when due, if the drawer does not pay or does not accept and pay the bill". Under this view, the intent of article 44 (2) was, therefore, to make the guarantor of the drawee more like an endorser—a secondary rather than primary party.

49. Against this approach, it was argued that great practical difficulties would ensue if the guarantor of the drawee were treated as a secondary party. Not only would it require that formal presentment first be made to the drawee, but dishonour by the drawee would also trigger the formal process of protest, notice and recourse, which would be undesirable. In support of this position it was pointed out that the practice itself of putting the words "payment guaranteed" on the instrument, which the Working Group at its last session deemed to make the signer a guarantor of the drawee, was common in the United States. In this connexion it was noted that the relevant provision of the Uniform Commercial Code (S-3-416) expressly states that "presentment, notice of dishonour and protest are not necessary to charge" the guarantor.

50. As to the article 44 (2) argument, it was observed that it was necessary to draw a distinction between formal presentment, which was the matter in issue, and the fact simply of requesting and obtaining payment. Article 44 (2) should not be construed as contemplating the sort of formal presentment envisaged in article 55 (3) but had reference merely to the fact of payment by the drawee. Hence, there was no conflict between the concept of the guarantor of the drawee as a primary party and his undertaking as contained in article 44 (2).

51. The Working Group, adopting the foregoing reasoning, decided to treat the liability of the guarantor of the drawee as being of a primary nature in the context under consideration. Hence, the Group concluded that presentment to the drawee was not necessary in order to render the drawee's guarantor liable under paragraph (3) of article 55, and decided to amend the paragraph accordingly by the insertion of the words "or the guarantor of the drawee".

52. The text of paragraph (3) as adopted by the Working Group was therefore as follows:

"(3) Failure to present an instrument for payment does not discharge the acceptor or the maker or their guarantors or the guarantor of the drawee of liability thereon."

Article 56

53. The text of article 56, as considered by the Working Group, is as follows:

"(1) An instrument is considered to be dishonoured by non-payment:

"(a) When, under due presentment, payment is expressly refused or cannot with reasonable diligence be obtained;

"(b) When the holder cannot obtain the payment to which the terms of the instrument entitle him under this Convention;

"(c) If presentment for payment is dispensed with pursuant to article 54 (2) and the instrument is overdue and unpaid.

"(2) If a bill is dishonoured by non-payment, the holder may, subject to the provisions of article 57, exercise an immediate right of recourse against the drawer, the endorsers and their guarantors.

"(3) If a note is dishonoured by non-payment, the holder may, subject to the provisions of article 57, exercise an immediate right of recourse against the endorsers and their guarantors."

Paragraph (1), subparagraphs (a) and (b)

54. Several observations were made with regard to these subparagraphs: the drafting could be simplified by combining both provisions into one; no sound reason appeared for the requirements of due presentment and due diligence in subparagraph (a) but not in (b); and there was little, if any, substantive difference between the two subparagraphs as they now read since the same fact-situations could fall under either provision. It was also argued that the concept of due diligence was not relevant here: what was important was due presentment. If due presentment had been made and there was no payment, then there was dishonour pure and simple without the complicating inquiry into diligence. In the view of one representative it would be desirable if paragraph 1 (a) read as follows:

"When the acceptor or the drawee, upon due presentment, expressly refuses to pay the instrument or payment cannot be obtained with reasonable diligence."

55. Based on the foregoing observations, the Working Group decided to return to the earlier wording of these subparagraphs as presented to the Working Group at its second session (A/CN.9/86, paras. 95-97; Yearbook . . . 1974, part two, II, 1). That text read as follows:

"(1) An instrument is dishonoured by non-payment:

"(a) When payment is refused upon due presentment or when the holder cannot obtain the payment to which he is entitled under this Convention;"

Paragraph (1), subparagraph (c)

56. The Working Group adopted this subparagraph without change.

Paragraph (2)

57. A question was raised as to the logical compatibility of the word "immediate" in this provision with the requirement in article 57 that the holder first make protest before he can exercise his right of recourse against parties liable to him.

58. The Working Group decided to delete the word "immediate" from this paragraph on the ground that it could give a misleading impression to one not familiar with the usage of the term "immediate right of recourse" in Anglo-American jurisprudence from which it was borrowed.

59. The question was raised in this context whether, in the event of a dishonour by the drawee's refusal to accept or to pay, the holder must first go against the drawee's guarantor before he can go against the endorsers.

60. The Working Group decided to defer consideration of this issue until its next session.

61. The Working Group adopted this paragraph, subject to deleting the word "immediate" and changing the article preceding it from "an" to "a".

Paragraph (3)

62. The Working Group adopted this paragraph with the same changes as in paragraph (2).

B. Articles 57 to 68 (recourse)

Article 57

63. The text of article 57, as considered by the Working Group, is as follows:

"If an instrument has been dishonoured by non-acceptance or by non-payment the holder may exercise a right of recourse only after the instrument has been duly protested for dishonour in accordance with the provisions of articles 58 to 61.

64. The Working Group adopted this article without change.

65. One representative was of the view, however, that it would be desirable to deal in this article with the question of the right of recourse before maturity in the event of stoppage of payment by, or bankruptcy of, the drawee, the acceptor or the maker.

Article 58

66. The text of article 58, as considered by the Working Group, is as follows:

"(1) A protest is a statement of dishonour drawn up at the place where the instrument has been dishonoured and signed and dated by a person authorized to certify dishonour of a negotiable instrument by the law of that place. The statement must specify:

"(a) The person at whose request the instrument is protested;

"(b) The place of protest; and

"(c) The demand made and the answer given, if any, or the fact that the drawee or the acceptor or the maker could not be found.

"(2) A protest may be made:

"(a) On the instrument itself or on a slip affixed ('allonge'); or

"(b) As a separate document, in which case it must clearly identify the instrument that has been dishonoured.

"(3) Unless the instrument stipulates that protest must be made, a protest may be replaced by a declaration written on the instrument and signed and dated by the drawee or the acceptor or the maker, or, in the case of an instrument domiciled with a named person for payment, by that named person; the declaration must be to the effect that acceptance or payment is refused.

"(4) A declaration made in accordance with paragraph (3) is deemed to be a protest for the purposes of this Convention."

Paragraph (1)

67. The Working Group adopted this paragraph without change.

Paragraph (2)

68. The Working Group adopted this paragraph without change.

Paragraph (3)

69. The question was raised whether the drawee, the acceptor or the maker who had refused to make payment would be willing to oblige by providing the requisite declaration. In response it was pointed out that the drawer in the ordinary case would be a bank and that banks were generally willing to give reasons for their refusal to honour a bill. It was also noted that under the Geneva Uniform Law States were permitted by declaration to provide for an informal method of protest (annex II, art. 8 of the Geneva Convention) and this had worked reasonably well in those countries which had provided such facilities. A second question raised with respect to informal protest was whether, in a case where the facility was available, a holder who nevertheless opted for the formal protest method could recover the cost of such formal protest. The view was expressed that such costs should nevertheless be recoverable. In this connexion one observer reported that in his country the cost of pro-

test actually made was recoverable even when protest was not required.

70. A question was raised as to how the rules relating to protest could be applied in the case of presentment and dishonour by mail. Specifically, where was the place of dishonour at which according to article 58 (1) protest had to be drawn up?

71. It was noted in response that the issue of presentment by mail had been exhaustively discussed both by the Working Group (for example, in connexion with art. 48, A/CN.9/147, para. 124) and by the UNCITRAL Study Group on International Payments. A questionnaire circulated by the Secretariat on the matter revealed little or no usage of this method of presentment in international transactions largely because of the practical difficulties involved. The usual practice was to make presentment through a bank or other local agent in the foreign country, who would then see to the making of protest if this became necessary.

72. The Working Group, after discussion, adopted this paragraph without change.

Paragraph (4)

73. The Working Group adopted this paragraph without change.

Article 59

74. The text of article 59, as considered by the Working Group, is as follows:

"(1) Protest for dishonour by non-acceptance of a bill must be made on the day on which the bill is dishonoured or one of the two business days which follow.

"(2) Protest for dishonour by non-payment of an instrument must be made on the date of maturity or on one of the two business days which follow."

Paragraph (1)

75. A number of questions were raised as to the interpretation of the words "business days", in particular whether these words excluded public holidays or simply meant week-days. It was noted that Saturday was in some countries a business day but not in others and that in some countries (for example, federated States) one day might be a holiday in one part of the country but not in another. The suggestion was made that the draft Convention include an express definition of "business days".

76. It was pointed out in response that it was all but impossible to provide a general definition that would be applicable to the situation in every State under every circumstance. Furthermore, most States had special statutes in the form of Interpretation Acts which regulated such matters. The Working Group concluded that it was best for these reasons to leave this question to local law and practice. The most that could be done here was to have the matter discussed in the Commentary to the draft Convention.

77. To the question whether the "two business days" provision applied also to the informal protest provided

for under article 58 (3), the Working Group answered in the affirmative.

78. One representative was of the view that protest for dishonour by non-acceptance of a bill should be made within the time-limit fixed for presentment for acceptance under article 48, but that if the presentment took place on the last day of that time period, protest should be made on one of the two business days which follow.

79. The Working Group, after discussion, adopted this paragraph.

Paragraph (2)

80. It was noted that the use of the word "maturity" meant that the situation of a note payable on demand was excluded from regulation since the definition of "maturity" in article 5 (9) had reference only to demand bills. Secondly, it was noted that the prescribed period for protest—the date of maturity plus two business days following—might fall within the period of intervening delay excused under article 54 (1). Consequently, a holder might find that, upon making presentment at the expiration of the delay period and being refused payment, he could no longer meet the time period for protest allowed under the Convention. Such a result was clearly not intended.

81. As regards these two problems, the Working Group decided that they would be alleviated by making the time for protest run from the date of actual dishonour rather than of maturity and therefore decided to amend the paragraph to read as follows:

"Protest for dishonour of an instrument by non-payment must be made on the day on which the instrument is dishonoured or on one of the two business days which follow."

82. A third problem discussed in connexion with this paragraph was that noted by the Working Group at its second session, on the first reading of this text (A/CN.9/86, paras. 115-117; Yearbook . . . 1974, part two, II, 1), i.e. that if the time periods allowed for presentment, protest and notice of dishonour were put together, an unacceptably long period could transpire between the date of maturity of the instrument and notice given to the party to be charged.

83. As regards this problem, the Working Group, after considerable discussion, agreed on the following solution for the three time periods involved: a two-day period allowed for each of protest and notice of dishonour would be retained, but the period of grace for making presentment would be cut back from two business days to one. The Working Group decided that article 53 (e) should accordingly be amended to read as follows:

"(e) An instrument which is not payable on demand must be presented for payment on the date of maturity or on the first business day which follows."

84. In the view of one representative protest for dishonour by non-payment of an instrument should be made within the time-limit fixed for presentment for payment under article 53 (e) and (f); but if presentment of an instrument payable at sight took place on the last day of the

time period specified in article 53 (f), then protest should be made on the first business day which follows.

Article 60

85. The text of article 60, as considered by the Working Group, is as follows:

"(1) If a bill which must be protested for non-acceptance or for non-payment is not duly protested, the drawer, the endorsers and their guarantors are not liable thereon.

"(2) If a note which must be protested for non-payment is not duly protested, the endorsers and their guarantors are not liable thereon.

"(3) Protest of an instrument is not necessary in order to render the acceptor or the maker or his guarantor liable thereon."

Paragraphs (1) and (2)

86. The question was raised whether it would not be preferable in these two paragraphs to state that the parties mentioned there are exempt or exonerated from liability upon the failure of the holder to make protest rather than to say that they are "not liable": legally the parties were liable from the time they signed the instrument and became parties.

87. It was pointed out in response that while this may be so on strict negotiable instruments principles, the concept employed throughout the draft Convention was that a party was not liable unless certain conditions were fulfilled.

88. The Working Group decided to retain the two paragraphs in their present form.

Paragraph (3)

89. The Working Group decided to conform the drafting of this paragraph to the new wording of article 55 (3) for the reasons stated in paragraphs 45 to 50 above.

90. Accordingly, the paragraph as adopted reads as follows:

"(3) Failure to protest an instrument does not discharge the acceptor or the maker or their guarantors or the guarantor of the drawee of liability thereon."

Article 61

91. The text of article 61, as considered by the Working Group, is as follows:

"(1) Delay in protesting an instrument for dishonour is excused when the delay is caused by circumstances which are beyond the control of the holder and which he could neither avoid nor overcome. When the cause of delay ceases to operate, protest must be made with reasonable diligence.

"(2) Protest for dishonour by non-acceptance or by non-payment is dispensed with:

"[(a) If the drawer, an endorser or a guarantor has waived protest expressly or by implication; an express waiver on the instrument, if made by the drawer, is also operative in respect of all subsequent parties; if

made by any other party, it is operative only in respect of that party;]

"[(a) If the drawer, an endorser or a guarantor has waived protest expressly, whether on or outside the instrument; an express waiver on the instrument, if made by the drawer, is operative in respect of all subsequent parties; an express waiver outside the instrument, whether made by the drawer or by any other party, is operative only in respect of the party making it;]

"[(a) If the drawer, an endorser or a guarantor has waived protest expressly on the instrument; such waiver, if made by the drawer, is operative in respect of all subsequent parties; if made by any other party, it is operative only in respect of that party;]

"(b) If the cause of delay in making protest continues to operate beyond 30 days after the date of maturity;

"(c) As regards the drawer of a bill, if the drawer and the drawee or the acceptor are the same person;

"(d) (deleted)

"(e) If presentment for acceptance or for payment is dispensed with in accordance with article 49 (2) or 54 (2);

"(f) If the person claiming payment under article 80 cannot effect protest by reason of his inability to produce the instrument."

92. The Working Group considered a proposal to make each of the articles of this paragraph into a separate article on the ground that they each dealt with a separate issue. The same would apply to article 54. The Working Group did not, however, adopt this proposal for the reason that the present arrangement of the provisions was thought to be more conducive to their understanding, particularly in light of the fact that paragraph (2) (b) makes express reference to the content of paragraph (1).

Paragraph (1)

93. The question was raised whether this provision should also apply to informal protest as contemplated under article 58 (3). It was noted in this connexion that the Working Group at first reading had taken the position that the benefit of the provision should be extended only to the holder making a formal protest (A/CN.9/86, para. 127; Yearbook . . . 1974, part two, II, 1): the effect of article 58 (4) was, however, to extend it to both forms of protest.

94. Three possible fact situations were analysed:

- (i) Where *force majeure* prevents the making of both the formal and informal protest;
- (ii) Where *force majeure* prevents the making of the formal, but not the informal, protest;
- (iii) Where *force majeure* prevents the making of the informal, but not the formal protest.

It was only the third situation which raised any question.

95. The Working Group, after discussion, decided to support the present wording of both article 58 (4) and article 61 (1), the combined effect of which was to excuse delay in the circumstances specified regardless of the form of protest involved.

96. Attention was drawn in this connexion to the fact that under the terms of this paragraph only *force majeure* operating on the holder appeared to be recognized; yet under article 58 (3) it was not the holder but the party from whom payment was demanded who had to furnish the informal declaration. Should not such parties be mentioned in article 61 (1)?

97. In response, the view was expressed that the wording of this paragraph was broad enough to cover both situations—the important point was whether the holder was in fact precluded by circumstances beyond his control from making protest. On one view, however, it was not relevant to even speak in this context of *force majeure* affecting anyone but the holder since the alternative of formal protest was always open to the holder.

Paragraph (2), subparagraph (a)

98. The Working Group adopted the same view with respect to the situation regulated by this subparagraph as it had done with regard to article 54 (2) (a) for the reasons discussed in paragraphs 21 to 29 above.

99. The Working Group, after consideration, adopted the following text of subparagraph (2) (a):

"Protest for dishonour by non-acceptance or by non-payment is dispensed with:

"(a) If the drawer, an endorser or guarantor has waived protest expressly or by implication; such waiver:

- "(i) If made on the instrument by the drawer, binds any subsequent party and benefits any holder,
- "(ii) If made on the instrument by a party other than the drawer, binds only that party but benefits any holder;
- "(iii) If made outside the instrument, binds only the party making it and benefits only a holder in whose favour it was made."

Paragraph (2), subparagraph (b)

100. The Working Group adopted this subparagraph, subject to substitution of the word "dishonour" for "maturity" in keeping with its earlier decision regarding the date from which time for protest begins to run (see para. 81 above).

Paragraph (2), subparagraph (c)

101. The Working Group adopted this subparagraph without change.

Paragraph (2), subparagraph (d)

102. The Working Group confirmed that this subparagraph was properly deleted.

Paragraph (2), subparagraph (e)

103. The Working Group adopted this subparagraph without change.

Paragraph (2), subparagraph (f)

104. The question was raised as to the relationship between this provision and article 83, which provides a substitute method of effecting protest in the case of lost instruments. Allusion was also made to the practical difficulties of reconstructing the contents of a lost instrument.

105. The Working Group was agreed that an express link should be made in the text between the two provisions and, accordingly, amended subparagraph (f) to read as follows:

"(f) If the person claiming payment under article 80 cannot effect protest by reason of his inability to satisfy the requirements of article 83."

Article 62

106. The text of article 62, as considered by the Working Group, is as follows:

"(1) The holder, upon dishonour of a bill by non-acceptance or by non-payment, must give due notice of such dishonour to the drawer, the endorsers and their guarantors.

"(2) The holder, upon dishonour of a note by non-payment, must give due notice of such dishonour to the endorsers and their guarantors.

"(3) An endorser or a guarantor who received notice must give notice of dishonour to the party immediately preceding him and liable on the instrument.

"(4) Notice of dishonour operates for the benefit of any party who has a right of recourse on the instrument against the party notified."

107. The Working Group considered this article as a whole. The main question discussed was the possibility of unnecessary duplication of notices by reason of the requirements in paragraphs (1) and (3) that both the holder and the endorser give notice. The case was put of a bill drawn by A in favour of B. B transfers the bill to C who transfers it to D. Upon presentment by D to the drawee, there is dishonour. D, in accordance with paragraph (1), must give notice to A, B and C. Similarly, an endorser such as C must also give notice to his immediate endorser (if liable on the instrument), in this case B who already had received notice from D. What purpose was served by C's notice in such a case? What would be the legal consequences of C's failure to give notice to B, especially in light of the provisions of paragraph (4) by which notice operates for the benefit of all parties who have a right of recourse against the parties notified?

108. In response, it was pointed out that the entire system was designed to ensure that a party against whom recourse might be sought had a reasonable assurance of receiving prompt notice, even if this could lead to a duplication of notices; it was preferable to receive several notices than not to receive any at all or to receive it too

late to protect one's interest. Reliance on only the endorsee to give notice to his endorser, as in the Geneva Uniform Law (art. 45) meant that the interest of a series of endorsers could be jeopardized by the act of omission of one of the parties in the chain.

109. As to the legal consequences of a failure by one person to give notice when notice is in fact received through another person, there was ordinarily no damage suffered by the party to be notified. The one possible exception would be where notice was received too late to enable the endorser to take steps to protect his interest, as when his own endorser had become insolvent in the intervening period between when he would have received notice if it had been given directly by the one person and the time when he actually received notice from the other person. Thus in the example given in paragraph 107, except in the case of prejudicial delay just noted, C would ordinarily incur no liability to B for failing to give the latter notice and similarly D should incur no liability for failure to give B notice under paragraph (1) where C in fact notifies B.

110. In response to a question raised as to the desirability of including a provision similar to article 45 (3) of the Geneva Uniform Law respecting unknown addresses, the Working Group was agreed that the situation was adequately regulated by article 65 (2) of the draft Convention.

111. The Working Group adopted article 62 without change.

Article 63

112. The text of article 63, as considered by the Working Group, is as follows:

"(1) Notice of dishonour may be given in any form whatever and in any terms which identify the instrument and state that it has been dishonoured. The return of the dishonoured instrument is sufficient notice, provided it is accompanied by a statement indicating that it has been dishonoured.

"(2) Notice of dishonour is deemed to have been duly given if it is communicated or sent to the person to be notified by means appropriate in the circumstances, whether or not it is received by that person.

"(3) The burden of proving that notice has been duly given rests upon the person who is required to give such notice."

Paragraph (1)

113. In answer to a question as to why it was necessary for the returned instrument to be accompanied by a statement of dishonour, it was pointed out that an instrument might be returned to a party for any number of reasons not connected with dishonour. Furthermore, the requirement here was not for a formal statement—a simple notation on the instrument would do.

114. The Working Group decided to retain this paragraph as at present drafted.

Paragraph (2)

115. The Working Group adopted this paragraph.

Paragraph (3)

116. The Working Group adopted this paragraph without change.

Article 64

117. The text of article 64, as considered by the Working Group, is as follows:

"Notice of dishonour must be given within the two business days which follow:

"(a) The day of protest or, if protest is dispensed with, the day of dishonour; or

"(b) The receipt of notice given by another party."

118. The Working Group adopted this article, noting that it had already approved the principle underlying the article in connexion with its consideration of article 59 (see para. 83 above).

Article 65

119. The text of article 65, as considered by the Working Group, is as follows:

"(1) Delay in giving notice of dishonour is excused when the delay is caused by circumstances which are beyond the control of the holder and which he could neither avoid nor overcome. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

"(2) Notice of dishonour is dispensed with:

"(a) If the drawer, an endorser or a guarantor has waived notice of dishonour expressly or by implication; such waiver is operative only in respect of the party who made it;

"(b) If after the exercise of reasonable diligence notice cannot be given;

"(c) As regards the drawer of a bill, if the drawer and the drawee or the acceptor are the same person;

"(d) (deleted)"

Paragraph (1)

120. The Working Group adopted this paragraph without change.

Paragraph (2), subparagraph (a)

121. The Working Group decided to adopt the same rule with respect to notice as it had with respect to both presentment for payment (paras. 21-30 above) and protest for dishonour (paras. 98 and 99 above) and, accordingly, adopted the following text of subparagraph (a):

"Notice of dishonour is dispensed with:

"(a) If the drawer, an endorser or guarantor has waived notice of dishonour expressly or by implication; such waiver:

"(i) If made on the instrument by the drawer, binds any subsequent party and benefits any holder;

"(ii) If made on the instrument by a party other than the drawer, binds only that party but benefits any holder;

"(iii) If made outside the instrument, binds only the party making it and benefits only a holder in whose favour it was made."

Paragraph (2), subparagraph (b)

122. The Working Group discussed the concept of reasonable diligence imposed by this subparagraph, with specific reference to the extent to which the person seeking to give notice must go in ascertaining the address of the party to be notified.

123. One of the views expressed was that the concept of diligence imported a duty to inquire from known sources, such as the endorsee or endorser of the party whose address is unknown. On the other hand, it was observed that in no event should there be a duty to go beyond immediately available and accessible sources to ascertain an address, having regard in particular to the possibly international nature of the inquiry and the time-limit imposed for giving notice under the draft Convention.

124. The Working Group adopted this subparagraph, noting that it was impossible to lay down a hard and fast rule as to what constituted reasonable diligence: this was a matter best determined by the courts on a case-by-case basis.

Paragraph (2), subparagraph (c)

125. The Working Group adopted this subparagraph without change, approving also a suggestion that the commentary to the text deal with the question of countermanded orders.

Article 66

126. The text of article 66, as considered by the Working Group, is as follows:

"Failure to give due notice of dishonour renders a person who is required to give notice under article 62 to a party who is entitled to receive such notice liable for any damages which that party may suffer directly from such failure, provided that such damages do not exceed the amount due under article 67 or 68."

127. The Working Group adopted this article without change.

Article 66 bis

128. The text of article 66 bis, as considered by the Working Group, is as follows:

"The holder may exercise his rights on the instrument against any one party, or several or all parties, liable thereon and is not obliged to observe the order in which the parties have become bound."

129. The Working Group adopted this article without change.

Article 67

130. The text of article 67, as considered by the Working Group, is as follows:

"[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 (2) per cent per annum above the official money market rate effective in the main domestic centre of the country where the instrument was payable at maturity, to be calculated from the date of the maturity on the basis of the number of days and in accordance with the custom of that market, 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 on the basis of the number of days at the official money market rates effective on the date when the recourse is exercised at the place where the holder has his habitual residence or seat of business.]"

Paragraph (a)

131. It was observed that there was some ambiguity about the phrase "the amount of the instrument". Did or did it not include interest, as may be stipulated by the instrument? It presumably was intended to include such interest, but this was not immediately apparent from the wording.

132. The Working Group decided to redraft this provision so as to leave no doubt that interest, where provided for by the instrument, was to be recoverable.

Paragraph (b)

133. Discussion of this paragraph by the Working Group revolved around three main issues; what the interest rate should be and how it was to be expressed; the place with reference to which such rate was to be ascertained; and the amount to which such interest rate was to be applied.

134. As to the first issue, there was considerable discussion of the formula employed in the text and specifically of the concept of "official money market rate". Several short-comings were pointed out in the concept: it was difficult to apply to the situation of the non-market economies such as the centrally-planned economies of socialist States where there was no money market as such; similarly, it was difficult to speak of a "money market" with reference to the situation in many developing countries where the financial sector had not yet attained this level of sophistication; and even in a highly-developed capitalist economy such as in the United States, it was by no means clear what the "official money market rate" referred to since there were usually a number of rates which could be so described each applying to a different kind of transaction.

135. It was observed, however, with reference to this formula that it had been drafted in consultation with the Study Group on International Payments most of whose members were from banking circles, although there had also been some divergence of views within that Group as to the suitability of the formula.

136. Numerous suggestions and proposals were made in the course of the discussion aimed either at improving upon the existing formulation or at replacing it with some other. Among these were: to base the cal-

culation on a rate determined by the Central Bank of the State in whose currency the instrument is to be paid; to base it on a rate determined by a neutral body such as the International Monetary Fund; to base it on the prime interest rate at the relevant place; to have a fixed rate as is done under the Geneva Uniform Law (art. 48 (2)), either as the only rate or as an alternative to whatever other rate may be specified; to employ a very general formulation such as "the prevailing commercial lending rate" at the place in question, leaving the actual rate to be determined on the facts of each case; and making provision in the Final Clauses of the Convention for each State to declare what the appropriate rate would be if the rate were to be determined with reference to a place located in that State.

137. Considerable discussion ensued with respect to the merits of each of the foregoing proposals and suggestions, with no one idea being completely acceptable to all representatives. A number of broad principles, however, appeared to underlie the views expressed by most representatives. Thus, there was agreement that whatever formulation was adopted care had to be exercised to ensure that it could be applied in practice to the situation in every State, having regard to the divergent economic systems involved and the varying levels of commercial sophistication. There was also a widely-shared view that the formula should provide a reasonable degree of certainty so that parties would have a fair idea of their exposure and entitlements, while it should at the same time contain a measure of flexibility to cope with future developments in the commercial world.

138. A further view generally shared by representatives was that nothing in the provision should preclude parties from expressly stipulating for a rate of interest to be paid after maturity. Such a stipulated rate of interest should then apply instead of the rate provided for in paragraph (b).

139. The Working Group requested the Secretariat to redraft and present to the Group this paragraph in the light of the comments and views expressed in the discussion. The text as redrafted by the Secretariat appears in paragraph 149 below.

140. With respect to the place with reference to which the rate should be determined, a number of proposals were considered by the Working Group: the place of business or habitual residence of the payee; the place of business or habitual residence of the drawee; the country in whose currency the instrument was expressed; the place at which payment can be enforced; and the place where the instrument was payable, as provided for in the text.

141. The Working Group, after discussion, decided to retain the reference to the place where the instrument was payable on the ground that it was there that the holder expected to receive payment and it was, therefore, not unreasonable to assume that he would borrow funds there to substitute for that which he should have received.

142. As regards calculation of the interest payable in the after-maturity situation, the issue was whether the amount on which the interest provided for in paragraph

(b) should be based was the sum of the principal and interest stipulated in the instrument or simply the principal alone. The view was put forward that since analytically the debt owed after maturity was the principal plus interest, it was on this amount that the interest provided for in paragraph (b) should be based, the intent of the paragraph being to compensate the holder for the period during which he was out of the amount due him, namely, principal and interest.

143. The Working Group, adopting the foregoing reasoning, decided that the redrafted version of this paragraph should make clear that the interest provided for in the paragraph was to be a function of the total amount due on the instrument, including interest, if any. Reservations were, however, expressed by some representatives as to the desirability of such a compound interest approach.

Paragraph (c)

144. A question was raised as to the justification for the discount provided for under this paragraph. A suggestion was made in this connexion that in the case where a bill stipulated the payment of interest the amount due upon payment before maturity should simply be the principal plus interest accrued up to the date of payment, thus avoiding the concept of discount.

145. In response, it was pointed out that the party who was receiving funds before maturity was in effect getting unanticipated use of the money for the period between the date of payment and the date of maturity and it was not unreasonable to discount the amount he receives by a factor representing the value of such accelerated availability. It was exactly as if the holder had discounted the bill at a bank in anticipation of the maturity date. As to the suggested method of calculation based on the accumulated interest idea, this would not always work, for example, where the interest payable was not expressed in the form of a rate but as a lump sum or was included in the amount of the principal.

146. The Working Group discussed the reference to the "habitual residence or seat of business" of the holder. One representative expressed concern that the wording might be understood to provide an option in the case of an individual who might have both a place of business and a habitual residence, each in a different place. In response, it was pointed out that it had become customary in international conventions to employ this expression, the understanding being that "habitual residence" refers to an individual while the reference to "seat of business" pertains to corporations or other business entities.

147. On the basis of this explanation the Working Group decided to retain these two references, approving also a suggestion that the commentary to the text indicate the understanding. The Working Group decided, however, that the terminology should be conformed to that used in article 53 (g) (iii) and, accordingly, changed the reference to "seat of business" to read "principal place of business."

148. Some representatives expressed the view that the reference to "bill" in this paragraph should be changed to "instrument" to cover the conceivable case of a note whose payment had become accelerated.

149. The text of article 67, as redrafted by the Secretariat and reconsidered by the Working Group, is as follows:

Article 67

"(1) The holder may recover from any party liable:

"(a) At maturity: the amount of the instrument with interest, if interest has been stipulated for;

"(b) After maturity:

"(i) The amount of the instrument with interest, if interest has been stipulated for, to the date of maturity;

"(ii) If interest has been stipulated for after maturity, interest at the rate stipulated, or in the absence of such stipulation interest at the rate specified in paragraph (2), calculated from the date of maturity on the sum specified in paragraph 1 (b) (i);

"(iii) Any expenses of protest and of the notices given by him;

"(c) Before maturity:

"(i) The amount of the bill with interest, if interest has been stipulated for, to the date of payment, subject to a discount from the date of payment to the date of maturity, calculated in accordance with paragraph (3).

"(ii) Any expense of protest and of the notices given by him.

"(2) The rate of interest shall be [2] per cent per annum above the official rate (bank-rate) or other similar appropriate rate effective in the main domestic center of the country where the instrument was payable or, if there is no such rate, then at the rate of [] per cent per annum, to be calculated on the basis of the number of days in accordance with the custom of that centre.

"(3) The discount shall be at the official rate (discount rate) or other similar appropriate rate effective on the date when recourse is exercised at the place where the holder has his principal place of business or, if he does not have a place of business, his habitual residence, or, if there is no such rate, then at the rate of [] per cent per annum, to be calculated on the basis of the number of days and in accordance with the custom of that place."

150. The Working Group adopted the text of article 67 as set forth in the preceding paragraph.

Article 68

151. The text of article 68, as considered by the Working Group, is as follows:

"(1) A party who takes up and pays an instrument in accordance with article 67 may recover from the parties liable to him:

"(a) The entire sum which he was obliged to pay in accordance with article 67 and has paid;

"(b) Interest due on that sum at (2) per cent per annum above the official money market rate effective in the main domestic centre of the country of the place of payment calculated on the basis of the number of days from the day on which he made payment;

"(c) Any expenses which he has incurred.

"(2) Notwithstanding article 25 (4), if a party takes up and pays the instrument in accordance with article 67 and the instrument is transferred to him such transfer does not vest in that party the rights to and upon the instrument which any previous protected holder had."

Paragraph (1), subparagraphs (a) and (b)

152. The Working Group decided to align these two provisions with the wording it had adopted in respect of article 67 and, accordingly, adopted the following text of the two subparagraphs:

"A party who takes up and pays an instrument in accordance with article 67 may recover from the parties liable to him:

"(a) The entire sum which he was obliged to pay in accordance with article 67 and has paid;

"(b) Interest on that sum at the rate specified in article 67, paragraph 2, from the date on which he made payment;".

Paragraph (1), subparagraph (c)

153. The main issue discussed by the Working Group in this context was the nature of expenses which one could recover under this subparagraph. While there was general agreement that the present wording was too broad since it did not appear in terms to limit the kinds of expenses recoverable, widely divergent views were, however, expressed as to the proper content of the recoverable expenses.

154. On one view two kinds of expenses were recoverable: the expenses of giving notice pursuant to article 62 and the expenses involved in taking up and paying the instrument. The latter would consist of such items as bank charges and commissions incurred in remitting the funds to the holder and possibly re-exchange as recognized under the English Bills of Exchange Act (article 57 (2)). On another view, however, items such as bank charges and commissions are "external" to an instrument and do not relate to it the way items such as the principal and interest do; if one were to allow these costs, then what about the loss suffered by a party who had to liquidate some assets at an unfavourable market price in order to meet the obligation of payment?

155. A third view favoured the approach adopted by the Geneva Uniform Law (article 48 (3)) which allows the expenses of protest and notices "as well as other expenses", arguing that this formulation was familiar and had not caused much problem in practice.

156. Under a fourth view only the expenses incurred in giving notice should be allowed on the ground that any

others were either too speculative and hard to specify or would open the way for very divergent interpretations by national courts.

157. The Working Group, while noting the reservations of two representatives who favoured a broader formulation, decided to restrict recovery under this subparagraph to expenses incurred in giving notice pursuant to the draft Convention. The following text was, therefore, adopted by the Working Group:

"(c) any expenses of the notices given by him."

Paragraph (2)

158. The Working Group deferred consideration of this paragraph until its next session.

C. Article 70 (payment)

159. The text of article 70, as considered by the Working Group, is as follows:

"(1) A party is discharged of his liability on the instrument when due payment has been made in accordance with this article.

"(2) Due payment is payment by a party or the drawee to the holder of the amount due pursuant to article 67 or 68:

"(a) At or after maturity, or

"(b) Before maturity, upon discharge by non-acceptance.

"(Variant I)

"(3) Payment by a party or the drawee before maturity to a holder of the amount due pursuant to article 67 or 68 constitutes a defence available to any party as against a subsequent holder who is not a protected holder.

"(Variant II)

"(3) Payment by a party or the drawee before maturity to a holder of the amount due pursuant to article 67 or 68 constitutes a defence available to any party as against a subsequent holder who acquired the instrument with knowledge that it had already been paid.

"(Variant I)

"(4) The preceding paragraphs do not apply if the party or the drawee making payment knows at the time of payment that a third person has claimed the instrument or that the holder acquired the instrument by theft or forged the signature of the payee or an endorsee, or participated in such theft or forgery.

"(Variant II)

"(4) The preceding paragraphs do not apply if the party or the drawee making payment knows at the time of payment that the holder acquired the instrument by theft or forged the signature of the payee or an endorsee, or acquired the instrument with knowledge of such theft or forgery.

"(5) A person receiving payment of an instrument must deliver to the person making the payment the

receipted instrument, any authenticated protest and a receipted account."

160. The Working Group noted that the purpose of this article was to establish the circumstances in which payment of an instrument constitutes a discharge of liability on the instrument. Under the draft Convention, the principal rule is that in order that there be due payment three conditions must be fulfilled: (a) payment must be made to the holder, (b) the amount payable must be in accordance with article 67, and (c) payment must be made at maturity. The article sets forth special provisions in respect of payment before maturity. Such payment, if made upon dishonour by non-acceptance, is due payment; in any other case, such payment may constitute a defence in the circumstances contemplated by paragraph (3). Paragraph (4) of the proposed article deals with the special cases of *ius tertii*, namely where payment was made with knowledge of a claim to the instrument by a third person and of the forgery of an endorsement.

161. The Working Group was agreed that payment by a party or the drawee to the holder at maturity is due payment and constitutes a discharge. The Group was also agreed that the same rule should apply in the case of payment before maturity if payment was made upon dishonour by non-acceptance.

162. The Working Group was of the opinion that payment made before maturity in any other case should not be considered as due payment and therefore not be a discharge, though such payment could be set up as a defence against the person who received payment. Consequently, the Group adopted the following text of a new paragraph (2) (*bis*):

"Payment before maturity other than under paragraph (2) (b) of this article does not discharge the party making payment of his liability on the instrument except in respect of the person to whom payment was made."

163. The Working Group considered the case of an instrument having been paid before maturity by a drawee or a party liable and which remains in the possession of the person paid, who subsequently transfers it to a transferee with or without knowledge of the fact that the instrument had already been paid. The Group was of the view that it was reasonable to hold that if an instrument after having been paid was transferred to a transferee who took it with knowledge of the fact that it was paid, the payor should have a valid defence. However, if the transferee did not know that the instrument was already paid, the payor should, under one view, not be entitled to rely on the defence that he had paid the instrument as against the transferee. According to another view, the only case in which the payor could not rely on such a defence would be if the transferee was a protected holder.

164. The Working Group, after deliberation, was of the view that the draft Convention should not set forth provisions for such cases on the ground that they only rarely occurred in practice. Accordingly, the Group decided to delete the two variants of paragraph (3).

Paragraph (4)

165. There was consensus in the Working Group that payment of an instrument, even when made at maturity, should not be considered as due payment when the payor knew that the person receiving payment had stolen the (bearer) instrument, or forged the endorsement to him, or had participated in the theft or forgery. This rule was a counterpart of the rule on forged endorsements in article 22, and in article 24 (3).

166. One representative was of the view that payment was duly made if the payor, though he had knowledge, did not have sufficient evidence of the theft or forgery.

167. In the case where there is a claim to the instrument by a third person (*ius tertii*), the Working Group concluded that mere knowledge by the payor of such a claim would not prevent due payment, but that it was necessary that the claim be a valid claim and one that had been asserted. Therefore, the Group adopted variant I of paragraph (4) as follows:

"(4) Payment is not due payment if the party or the drawee making payment knows at the time of payment that a third person has asserted a valid claim to the instrument or that the holder acquired the instrument by theft or forged the signature of the payee or an endorsee, or participated in such theft or forgery."

168. As a result also of this decision, the Group adopted variant I of article 24 (3), which reads as follows:

"(3) A party may not raise as a defence against a holder who is not a protected holder the fact that a third person has a claim to the instrument unless:

"(a) Such third person asserted a valid claim to the instrument, or

"(b) Such holder acquired the instrument by theft or forged the signature of the payee or an endorsee, or participated in such theft."

169. The question was raised as to what would be the effect of the above provisions in the case where the payor knows that the holder who presents the instrument at maturity, or before maturity, upon this honour by non-acceptance, is bankrupt. After deliberation, it was agreed that article 70 should set forth no specific rule in respect of such a case but that the solution should be derived from the general principles of the draft convention and the applicable law on bankruptcy. The view was expressed that where the trustee in bankruptcy had asserted a claim to the instrument, the issue under some legal systems would be solved under article 70 (4) as adopted.

170. It was also suggested that this paragraph would have to be reconsidered if a decision were later taken by the Working Group to accelerate the maturity of an instrument upon the bankruptcy of the maker, drawee or acceptor.

Paragraph (5)

171. The Working Group decided to defer consideration of this paragraph until its next session.

FUTURE WORK

172. The Working Group noted that it was nearing completion of its work on the draft Convention on International Bills of Exchange and International Promissory Notes, but that at least one more session was required in order to accomplish this. Bearing in mind the desirability of putting the final draft text before the Commission at its twelfth session, in 1980, the Group decided to recommend to the Commission that a further session of the Working Group (its eighth session) be held in 1979, preferably during the first two weeks of September.

173. As to the venue of such a session, it was assumed that this would be Vienna or Geneva in view of the impending transfer of the International Trade Law Branch from New York to Vienna.

ANNEX

Draft Convention on International Bills of Exchange and International Promissory Notes

(Text of articles 24 (3) and 53 (e) and articles 54 to 70, as adopted by the Working Group on International Negotiable Instruments at its seventh session, held at New York from 3 to 12 January 1979)

Article 24

(3) A party may not raise as a defence against a holder who is not a protected holder the fact that a third person has a claim to the instrument unless:

(a) Such third person asserted a valid claim to the instrument, or

(b) Such holder acquired the instrument by theft or forged the signature of the payee or an endorsee, or participated in such theft.

Article 53

(e) An instrument which is not payable on demand must be presented for payment on the date of maturity or on the first business day which follows.

Article 54

(1) Delay in making presentment for payment is excused when the delay is caused by circumstances which are beyond the control of the holder and which he could neither avoid nor overcome. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

(2) Presentment for payment is dispensed with:

(a) If the drawer, an endorser or guarantor has waived presentment expressly or by implication; such waiver:

(i) If made on the instrument by the drawer, binds any subsequent party and benefits any holder;

(ii) If made on the instrument by a party other than the drawer, binds only that party but benefits any holder;

(iii) If made outside the instrument, binds only the party making it and benefits only a holder in whose favour it was made.

(b) If an instrument is not payable on demand, and the cause of delay in making presentment continues to operate beyond 30 days after maturity;

(c) If an instrument is payable on demand, and the cause of delay continues to operate beyond 30 days after the expiration of the time-limit for presentment for payment;

(d) If the drawee, the maker or the acceptor has no longer the power freely to deal with his assets, or is a fictitious person or a person not having capacity to make payment by reason of his insolvency, or if the drawee, the maker or the acceptor is a corporation, partnership, association or other legal entity which has ceased to exist;

(e) [See new paragraph 3 below]

(f) (deleted)

(g) If there is no place at which the instrument must be presented in accordance with article 53 (g).

(3) Presentment for payment is also dispensed with as regards a bill, if the bill has been protested for dishonour by non-acceptance.

Article 55

(1) If a bill is not duly presented for payment, the drawer, the endorsers and their guarantors are not liable thereon.

(2) If a note is not duly presented for payment, the endorsers and their guarantors are not liable thereon.

(3) Failure to present an instrument for payment does not discharge the acceptor or the maker or their guarantors or the guarantor of the drawee of liability thereon.

Article 56

(1) An instrument is considered to be dishonoured by non-payment:

(a) When payment is refused upon due presentment or when the holder cannot obtain the payment to which he is entitled under this Convention.

(b) ^a

(c) If presentment for payment is dispensed with pursuant to article 54 (2) and the instrument is overdue and unpaid.

(2) If a bill is dishonoured by non-payment, the holder may, subject to the provisions of article 57, exercise a right of recourse against the drawer, the endorsers and their guarantors.

(3) If a note is dishonoured by non-payment, the holder may, subject to the provisions of article 57, exercise a right of recourse against the endorsers and their guarantors.

[Section 3. Recourse]

Article 57

If an instrument has been dishonoured by non-acceptance or by non-payment, the holder may exercise a right of recourse only after the instrument has been duly protested for dishonour in accordance with the provisions of articles 58 to 61.

Article 58

(1) A protest is a statement of dishonour drawn up at the place where the instrument has been dishonoured and signed and dated by a person authorized to certify dishonour of a negotiable instrument by the law of that place. The statement must specify:

(a) The person at whose request the instrument is protested;

(b) The place of protest; and

(c) The demand made and the answer given, if any, or the fact that the drawee or the acceptor or the maker could not be found.

(2) A protest may be made:

(a) On the instrument itself or on a slip affixed thereto ("allonge"); or

(b) As a separate document, in which case it must clearly identify the instrument that has been dishonoured.

(3) Unless the instrument stipulates that protest must be made, a protest may be replaced by a declaration written on the instrument and signed and dated by the drawee or the acceptor or the maker, or, in the case of an instrument domiciled with a named person for payment, by that named person; the declaration must be to the effect that acceptance or payment is refused.

(4) A declaration made in accordance with paragraph (3) is deemed to be a protest for the purposes of this Convention.

^a The substance of former paragraphs (a) and (b) is now contained in the present paragraph (a). See para. 55 of the report.

Article 59

(1) Protest for dishonour of a bill by non-acceptance must be made on the day on which the bill is dishonoured or one of the two business days which follow.

(2) Protest for dishonour of an instrument by non-payment must be made on the day on which the instrument is dishonoured or on one of the two business days which follow.

Article 60

(1) If a bill which must be protested for non-acceptance or for non-payment is not duly protested, the drawer, the endorsers and their guarantors are not liable thereon.

(2) If a note which must be protested for non-payment is not duly protested, the endorsers and their guarantors are not liable thereon.

(3) Failure to protest an instrument does not discharge the acceptor or the maker or their guarantors or the guarantor of the drawee of liability thereon.

Article 61

(1) Delay in protesting an instrument for dishonour is excused when the delay is caused by circumstances which are beyond the control of the holder and which he could neither avoid nor overcome. When the cause of delay ceases to operate, protest must be made with reasonable diligence.

(2) Protest for dishonour by non-acceptance or by non-payment is dispensed with:

(a) If the drawer, an endorser or guarantor has waived protest expressly or by implication; such waiver:

(i) If made on the instrument by the drawer, binds any subsequent party and benefits any holder;

(ii) If made on the instrument by a party other than the drawer, binds only that party but benefits any holder;

(iii) If made outside the instrument, binds only the party making it and benefits only a holder in whose favour it was made.

(b) If the cause of delay in making protest continues to operate beyond 30 days after the date of dishonour;

(c) As regards the drawer of a bill, if the drawer and the drawee or the acceptor are the same person;

(d) (deleted)

(e) If presentment for acceptance or for payment is dispensed with in accordance with article 49 (2) or 54 (2);

(f) If the person claiming payment under article 80 cannot effect protest by reason of his inability to satisfy the requirements of article 83.

Article 62

(1) The holder, upon dishonour of a bill by non-acceptance or by non-payment, must give due notice of such dishonour to the drawer, the endorsers and their guarantors.

(2) The holder, upon dishonour of a note by non-payment, must give due notice of such dishonour to the endorsers and their guarantors.

(3) An endorser or a guarantor who received notice must give notice of dishonour to the party immediately preceding him and liable on the instrument.

(4) Notice of dishonour operates for the benefit of any party who has a right of recourse on the instrument against the party notified.

Article 63

(1) Notice of dishonour may be given in any form whatever and in any terms which identify the instrument and state that it has been dishonoured. The return of the dishonoured instrument is sufficient notice, provided it is accompanied by a statement indicating that it has been dishonoured.

(2) Notice of dishonour is deemed to have been duly given if it is communicated or sent to the person to be notified by means appropriate in the circumstances, whether or not it is received by that person.

(3) The burden of proving that notice has been duly given rests upon the person who is required to give such notice.

Article 64

Notice of dishonour must be given within the two business days which follow:

(a) The day of protest or, if protest is dispensed with, the day of dishonour; or

(b) The receipt of notice given by another party.

Article 65

(1) Delay in giving notice of dishonour is excused when the delay is caused by circumstances which are beyond the control of the holder and which he could neither avoid nor overcome. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

(2) Notice of dishonour is dispensed with:

(a) If the drawer, an endorser or guarantor has waived notice of dishonour expressly or by implication; such waiver:

(i) If made on the instrument by the drawer, binds any subsequent party and benefits any holder;

(ii) If made on the instrument by a party other than the drawer, binds only that party but benefits any holder;

(iii) If made outside the instrument, binds only the party making it and benefits only a holder in whose favour it was made.

(b) If after the exercise of reasonable diligence notice cannot be given;

(c) As regards the drawer of a bill, if the drawer and the drawee or the acceptor are the same person.

(d) (deleted)

Article 66

Failure to give due notice of dishonour renders a person who is required to give such notice under article 62 to a party who is entitled to receive such notice liable for any damages which that party may suffer directly from such failure, provided that such damages do not exceed the amount due under article 67 or 68.

Article 66 bis

The holder may exercise his rights on the instrument against any one party, or several or all parties, liable thereon and is not obliged to observe the order in which the parties have become bound.

Article 67

(1) The holder may recover from any party liable:

(a) At maturity: the amount of the instrument with interest, if interest has been stipulated for;

(b) After maturity:

(i) The amount of the instrument with interest, if interest has been stipulated for, to the date of maturity;

(ii) If interest has been stipulated for after maturity, interest at the rate stipulated, or in the absence of such stipulation, interest at the rate specified in paragraph (2), calculated from the date of maturity on the sum specified in paragraph 1 (b) (i);

(iii) Any expenses of protest and of the notices given by him;

(c) Before maturity:

- (i) The amount of the bill with interest, if interest has been stipulated for, to the date of payment, subject to a discount from the date of payment to the date of maturity, calculated in accordance with paragraph (3).
 - (ii) Any expenses of protest and of the notices given by him.
- (2) The rate of interest shall be [2] per cent per annum above the official rate (bank rate) or other similar appropriate rate effective in the main domestic centre of the country where the instrument was payable, or if there is no such rate, then at the rate of [] per cent per annum, to be calculated on the basis of the number of days in accordance with the custom of that centre.
- (3) The discount shall be at the official rate (discount rate) or other similar appropriate rate effective on the date when recourse is exercised at the place where the holder has his principal place of business, or if he does not have a place of business his habitual residence, or if there is no such rate then at the rate of [] per cent per annum, to be calculated on the basis of the number of days and in accordance with the custom of that place.

Article 68

(1) A party who takes up and pays an instrument in accordance with article 67 may recover from the parties liable to him:

- (a) The entire sum which he was obliged to pay in accordance with article 67 and has paid;
 - (b) Interest on that sum at the rate specified in article 67, paragraph 2, from the date on which he made payment;
 - (c) Any expenses of the notices given by him.
- (2) ^b

^b The Working Group deferred consideration of this paragraph until its next session.

[PART SIX. DISCHARGE]

Section 1. General

Article 69

- (1) (deleted)^c
- (2) (deleted)

Section 2. Payment

Article 70

(1) A party is discharged of his liability on the instrument when due payment has been made in accordance with this article.

(2) Due payment is payment by a party or the drawee to the holder of the amount due pursuant to article 67 or 68:

- (a) At or after maturity, or
- (b) Before maturity, upon dishonour by non-acceptance.

(2) (bis) Payment before maturity other than under paragraph (2) (b) of this article does not discharge the party making payment of his liability on the instrument except in respect of the person to whom payment was made.

(3) (deleted)

(4) Payment is not due payment if the party or the drawee making payment knows at the time of payment that a third person has asserted a valid claim to the instrument or that the holder acquired the instrument by theft or forged the signature of the payee or an endorsee, or participated in such theft or forgery.

(5) ^d

^c The Working Group was agreed that with the earlier deletion of paragraph (2) of this article by the Working Group (A/CN.9/99, paras. 51-55; Yearbook ... 1975, part two, II, 1) no purpose was served by the remaining paragraph.

^d The Working Group deferred consideration of this paragraph until its next session.

B. Report of the Secretary-General: stand-by letters of credit (A/CN.9/163)*

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I. INTRODUCTION

1. At its eleventh session the Commission adopted, as a priority topic in its new programme of work, "Stand-by letters of credit, to be studied in conjunction with the International Chamber of Commerce". It further requested the Secretariat to undertake a preliminary study of the topic.¹ The present report is submitted in pursuance of that decision.

* 9 May 1979.

¹ UNCITRAL, report on the eleventh session (A/33/17), para. 67 (Yearbook ... 1978, part one, II, A).

II. NATURE OF STAND-BY LETTERS OF CREDIT

2. The parties to a contract² sometimes agree that, in the event of non-performance or defective performance by the obligor,³ a specified sum is to be payable to the obligee⁴ under a letter of credit⁵ to be opened in favour of the obligee at the instance of the obligor. This stand-by letter of credit seeks to ensure that the obligor

² In the discussion below, this contract will be referred to as "the underlying contract".

³ In the discussion below, this party will be referred to as "the account party".

⁴ In the discussion below, this party will be referred to as "the beneficiary".

⁵ This is the "stand-by letter of credit".

will perform or, in the event of non-performance or defective performance, that the obligee will be compensated for resulting loss by payment under the letter of credit.

3. The letter of credit issued by a bank in favour of the beneficiary pursuant to the underlying contract will constitute a legal relationship between the bank and the beneficiary independent of the underlying contract. The letter of credit will, in conformity with the terms agreed in the underlying contract, specify the conditions to be satisfied by the beneficiary in order to entitle him to demand payment. Once he satisfies these conditions, the bank is obliged to pay him, without considering possible disputes between the beneficiary and the account party in relation to the underlying contract. The nature of the letter of credit (i.e. whether it is revocable or irrevocable, unconfirmed or confirmed) will also depend on the terms agreed between the beneficiary and the account party in the underlying contract.

III. DIFFICULTY IN THE USE OF STAND-BY LETTERS OF CREDIT

4. The letter of credit sometimes specifies that the money is payable under the credit upon certification by the beneficiary alone that there has been default by the account party. In such cases, it is open to the beneficiary to claim the money by fraudulently certifying to the bank that the account party is in default. The bank must then pay, and cannot withhold payment because it suspects a fraud.⁶ Eliminating or reducing this abuse is likely to promote the wider use of stand-by letters of credit.⁷

IV. EXISTING PROTECTION TO THE ACCOUNT PARTY

5. The account party currently may have the following protection against such fraud:

(a) Under the common law, the bank can withhold payment if the fraud of the beneficiary in making the claim is established and brought to the notice of the bank.⁸ However, while it may be possible to establish suspicious circumstances or sharp practice, it is difficult to establish fraud, and the scope of the defence is therefore limited.

(b) Where the beneficiary obtains the money under the letter of credit by a fraudulent allegation of default on the part of the account party, the latter can sue him for breach of the underlying contract and recover damages, which may include the amount paid. However, the beneficiary may have stipulated that the underlying con-

tract include jurisdiction or choice of law clauses which make litigation difficult or expensive.

(c) A bank is not entitled to pay under a documentary letter of credit unless the documents presented by the beneficiary comply strictly as to form with the documents required under the letter of credit. However, since in many of the cases of fraud, the underlying contract and the letter of credit entitles the beneficiary to present documents drafted by himself, the need for strict compliance is not an impediment to fraud.⁹

V. POSSIBLE MEANS OF PROTECTION AGAINST FRAUD

6. The following suggestions have been made for protecting the account party.

Certification of default by a third party

7. A requirement in the letter of credit that default of the account party must be certified by an independent third party could reduce the possibility of fraud. However, such certification may require costly and time-consuming inquiries, and may reduce the security of payment for the beneficiary.

Determination of default by bank

8. A requirement in the letter of credit that payment after demand by the beneficiary is conditional on a determination by the bank of default by the account party would reduce the possibility of fraud. However, banks are reluctant to investigate disputes relating to the underlying contract. It may also be unacceptable to the beneficiary as a source of delay in payment.

Compulsory arbitration subsequent to payment

9. It has been suggested¹⁰ that banks throughout the world may subscribe to a set of rules with the following features:

(a) All first demand stand-by credits issued by banks subscribing to the proposed rules and all parties thereto will be held to be governed by the uniform rules.

(b) In the event that the beneficiary makes a demand for payment under the stand-by credit upon the issuing bank, that bank will immediately make payment in full to the beneficiary.

(c) The bank will now obtain immediate reimbursement of the amount paid to the beneficiary from the ac-

⁹ In this connexion, art. 9 of the ICC Uniform Customs and Practice for Documentary Credits (1974) (ICC publication No. 325, 1978) is relevant:

"Banks assume no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any documents, or for the genuine 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."

¹⁰ The suggestion was submitted to the UNCITRAL Study Group on International Payments, Florence, 2-6 April 1979, by Mr. Robert C. Effros of the Legal Department of the International Monetary Fund.

⁶ Apart from being the general law, this is also the position under the ICC Uniform Customs and Practice for Documentary Credits (1974) (Yearbook... 1975, part two, II, 3, annex II): "(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." For a qualification where fraud by the beneficiary is established, see paragraph 5 (a) below.

⁷ The proposal by Australia at the eleventh session of the Commission that stand-by letters of credit be included in the new work programme was made with a view to the Commission investigating possible methods of curtailing such abuse.

⁸ *Edward Owen Engineering Ltd. v. Barclays Bank International Ltd.* (1978) 1 All. E. Rep. 976 (Court of Appeal); *Sztejn v. J. Henry Schroder Banking Corp.* (1941) 31 N.Y.S. 2d 631.

count party who procured the credit in favour of the beneficiary.

(d) The account party will be obligated to make timely payment to the issuing bank.

(e) The beneficiary's consent will be deemed to have been given to:

(i) The submission to arbitration of the issue of whether or not the account party has rendered performance of his obligations in respect of the underlying transactions;

(ii) The waiver by the beneficiary of any defence of sovereign immunity that it might otherwise be entitled to in respect of the jurisdiction of the arbitral tribunal and the execution of any award made by it.

(f) The decision of the arbitral tribunal may be in favour of the beneficiary or the account party. If the decision is in favour of the account party, the award immediately owing and payable by the beneficiary will include the sum of the following:

(i) The principal amount paid by the bank under the stand-by credit to the beneficiary;

(ii) Interest, as determined by the arbitral tribunal, to the date of payment;

(iii) An amount, to be determined by the arbitral tribunal to represent the damage to the commercial reputation of the account party incurred as a result of the actions of the beneficiary in respect of the claim made by it under the stand-by credit;

(iv) A penalty to be levied only in the event that the arbitrators find that the demand for payment under the stand-by credit made by the beneficiary was fraudulent.

10. This suggestion has been supported on the grounds that the rules proposed would assure the beneficiary of prompt payment, but would deter him from a fraudulent or unjustified claim because of the possibility of a subsequent investigation into its validity.

11. Any solution which requires the insertion in the letter of credit by agreement of parties of terms protecting the account party is open to the objection that the beneficiary would refuse to accept such conditions, and that the account party would not insist on them in order to secure the contract. Any solution which requires the unilateral insertion by banks of terms protecting the account party raises the question as to the interest which banks may have in the insertion of such conditions. Where the account party is financially sound, banks run little risk by paying a fraudulent claim, since they are sufficiently protected by an indemnity agreement with the account party. However, at the time the credit is opened it may be difficult to predict the financial condition of the account party at the time the indemnity may have to be enforced. Furthermore, the documents which are usually required to be presented by a beneficiary are a certificate

of the beneficiary asserting the default of the account party, and a bill of exchange drawn on the bank payable at sight. These documents¹¹ do not give the bank any security interest against the account party, and in the event of the latter's insolvency the bank would be an unsecured creditor. Banks therefore have some interest in reducing the incidence of fraudulent claims, as such a reduction correspondingly reduces the risk they bear that an account party may be unable to indemnify them.

VI. SCOPE OF FUTURE WORK

12. The inquiries so far made by the Secretariat disclose that the stand-by letter of credit is often used in international trade transactions. Decided cases show that account parties have sometimes alleged that claims by beneficiaries under stand-by letters of credit are fraudulent,¹² or alleged the possibility of fraudulent claims by beneficiaries.¹³ Decided cases also show the principals have sometimes alleged that claims by beneficiaries under first demand guarantees are fraudulent,¹⁴ in situations where stand-by letters of credit could have been used instead of first demand guarantees. Work directed to the issue of fraudulent claims would therefore appear to be justified. Furthermore, in view of the fact that stand-by letters of credit and first demand guarantees perform the same functions, and that the ICC Uniform Rules for Contract Guarantees do not regulate first demand guarantees,¹⁵ the work on stand-

¹¹ Stand-by letters of credit are therefore usually documentary letters of credit. However, stand-by letters of credit where no documents have to be presented ("clean" credits) have been used. The ICC Uniform Customs and Practice for Documentary Credits (Yearbook . . . 1975, part two, II, 3, annex II) are applicable to documentary stand-by letters of credit. The Uniform Customs do not, however, address the issue considered in this report.

¹² For example, *Dynamics Corporation of America v. The Citizens and Southern National Bank*, 356 F. Supp 991 (1973).

¹³ For example, *American Bell International Inc. and American Telephone and Telegraph Co. v. Manufacturers Hanover Trust Co.* (Supreme Court of the State of New York, County of New York, Index No. 3157/79) and *GTE International Incorporated v. Manufacturers Hanover Trust Co. and Crédit Lyonnais* (Supreme Court of the State of New York, County of New York, Index No. 3525/79).

¹⁴ *Harbottle (Mercantile) Ltd. v. National Westminster Bank* (1977) 2 All. E. Rep. 862; *Edward Owen Engineering Ltd. v. Barclays Bank International Ltd.* (1978) 1 All. E. Rep. 976.

¹⁵ ICC publication No. 325 notes:

"For the said reasons it has not been found advisable to make provision for so-called simple or first demand guarantees under which claims are payable without independent evidence of their validity. Although the Rules do not encourage the use of such guarantees and are not drafted to apply thereto (and there is evidence of a decline in their use in certain areas as their economic disadvantages are more fully understood), parties who so wish may agree to apply certain of the Rules to such guarantees."

The reason why the Rules are not drafted to apply to first demand guarantees is stated to be the desirability of investing guarantee practice with a moral content by establishing the principle of the need to justify a claim under a guarantee. However, art. 9 of the ICC Uniform Rules contemplate their application to a guarantee which specifies that the documentation to be produced in support of a claim is to be only a statement of claim by the beneficiary. When such a guarantee is either a performance or repayment guarantee, art. 9 (b) requires that the beneficiary also submit either a court decision or an arbitral award justifying the claim or the approval of the principal in writing to the claim and the amount to be paid.

by letters of credit would be relevant to first demand guarantees.

13. The programme of work of the Commission specifies that stand-by letters of credit be studied in conjunction with the International Chamber of Commerce (ICC). The issue of stand-by letters of credit was raised by the Secretariat at a meeting of ICC held on 6 April 1978 for the purpose of co-ordinating the work of ICC and that of the Commission. At that meeting, the Secretariat submitted a background paper on some of the issues raised by stand-by letters of credit, and in particular whether such credits would be governed by the ICC Uniform Customs and Practice for Documentary Credits or by the ICC Uniform Rules for Contract Guarantees. On that occasion ICC agreed to submit these issues to its Commission on Banking Technique and Practice. This Commission held a meeting, at which the Secretariat was represented, on 1 December 1978,

and decided to establish a Working Party to study the problems connected with stand-by letters of credit.¹⁶

14. The Working Party held a meeting, at which the Secretariat was represented, on 29 March 1979, and decided to issue a detailed questionnaire as to the practice relating to stand-by letters of credit, and the difficulties encountered in their use.

15. In view of the fact that ICC has issued rules to govern commercial letters of credit and contract guarantees, the Commission might wish to decide that ICC be encouraged to continue its current work on stand-by letters of credit, and that the Secretariat be instructed to co-operate closely with ICC and report the progress of work to the Commission. It is suggested that the Commission should request ICC to submit the results of its work for consideration by the Commission before final adoption.

¹⁶ ICC document No. 470/342.

C. Report of the Secretary-General: security interests; feasibility of uniform rules to be used in the financing of trade (A/CN.9/165)*

INTRODUCTION

1. At its eighth session the Commission requested the Secretary-General "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 international trade organizations and trade and financing institutions", and to submit a report on the subject at its tenth session.¹

2. In compliance with that request the Secretary-General submitted to the tenth session of the Commission a study on security interests, based on the study prepared at the request of the Secretary-General by Professor Ulrich Drobnig of the Max-Planck Institut für Ausländisches und Internationales Privatrecht (Max Planck Institute for Foreign and Private International Law of the Federal Republic of Germany) (A/CN.9/131),** a study on security interests in the United States of America, note by the Secretariat on article 9 of the Uniform Commercial Code (A/CN.9/132),*** and a report of the Secretary-General on security interests (A/CN.9/130).

3. The Commission considered these reports at its tenth session. Although some representatives expressed the view that in light of the practical difficulties in establishing a scheme of uniform rules, the chances of a successful outcome of the work would be slight, the Commission "was generally agreed that in view of the practical importance of security interests to international trade, the secretariat should be requested to continue work on the subject".²

* 17 May 1979.

** Yearbook ... 1977, part two, II, A.

*** *Ibid.*, part two, II, B.

¹ UNCITRAL, report on the eighth session (A/10017), para. 63 (Yearbook ... 1975, part one, II, A).

² UNCITRAL, report on the tenth session (A/32/17), annex II, para. 10 (Yearbook ... 1977, part one, II, A).

4. After an exchange of views on the feasibility of establishing uniform rules,³ the Commission focused on three possible methods of harmonization:

- (a) Preparation of rules of conflict of laws;
- (b) Creation of substantive rules that would apply only to international transactions; and
- (c) Unification of the national laws on security interests by means of a uniform law applicable both to national and to international transactions.

5. The discussions in the Commission revealed that there was little support for preparing rules on conflict of laws, and only some for creating an additional security interest that would be used primarily in international transactions but could also be used domestically. On the other hand there was considerable support for further study of the third method, i.e. the preparation of uniform rules, based on a functional approach, that would provide a basis for the unification of the national laws and would apply to domestic as well as international transactions.

6. Therefore, the Commission requested the Secretary-General:

"(a) To submit to the Commission at its twelfth session a further report on the feasibility of uniform rules on security interests and on their possible content, taking into account the comments and suggestions made in the Commission;

"(b) To carry out further work on the subject in consultation with interested international organizations and banking and trade institutions, and in particular to ascertain the practical need and relevance of an international security interest for international trade."⁴

³ The report of the discussion in Committee of the Whole II is to be found in *ibid.*, annex II, paras. 9 to 15.

⁴ A/32/17, para. 37.

7. This report is submitted in conformity with that request.

I. SECURITY INTERESTS AND COMMERCIAL CREDIT

8. In order to evaluate the practical need and relevance of uniform rules for security interests, it is necessary to examine the role of security interests in a credit system, whether that role is fulfilled under the current rules, and whether action by UNCITRAL could be useful to improve the situation.

Role of security interests in a credit system

9. A seller of goods or a financing institution which contemplates the extension of credit must be concerned with the possibility that the debtor will not repay the amount due at the stipulated date. Any risk in this regard increases the interest rate which the creditor would otherwise charge. If that risk is too great, the creditor will refuse to extend the credit requested. Therefore, it is to the advantage of both the debtor and the creditor to have means available to reduce the creditor's risk.

10. One of the most generally available means to reduce the creditor's risk is to arrange for some form of security upon which he can call in place of or in addition to the obligation of the debtor. Such forms of security can be classified under two types, first, a promise of a third party that it will pay the obligation of the debtor under certain circumstances and, secondly, a security interest in specified movable or immovable goods of the debtor.

Promises of third parties

11. Promises of third parties come in many forms. The third party may become a party to or guarantee the primary obligation by such means as a contract guarantee or an endorsement or *aval* on a negotiable instrument. In other cases the third party has no formal connexion with the underlying obligation but promises to pay the creditor if the debtor does not, or if he does not for certain specified reasons. One example of this type of third party promise is export credit insurance. In still other cases it is the third party who is expected to pay the creditor without any resort by the creditor against the debtor. Such is the case, for example, with the documentary letter of credit.

12. The promise of the third party to pay reduces the creditor's risk to the extent that the third party is solvent, has a reputation for discharging its obligations promptly, and is amenable to legal action in case of dispute. For these reasons the third parties who make promises of this nature in connexion with commercial obligations are usually large financial organizations such as banks or insurance companies and are typically doing business in the country of the creditor.

13. The third party may be able to make the promise to pay the underlying obligation, thereby reducing the creditor's risk of non-payment, without incurring any substantial risk of its own. For example, a bank which issues a letter of credit on behalf of a buyer with which

it has a long standing relationship may run no substantial credit risk whereas the buyer's credit may be completely unknown to the seller-beneficiary of the credit. However, in many cases the third party is exposed to the same credit risk as the creditor would have been.

14. Nevertheless, the third party may be willing to run this risk in order to encourage the creditor to extend credit to the debtor. This is a common experience with small corporations where the owners of the equity of the company, who may be shielded from the debts of the company by virtue of its incorporation, are required to guarantee the obligations of the company before a bank will extend it credit. This may also be the case with some government sponsored export insurance where the primary purpose of the insurer's promise may be to promote exports.

15. However, in most cases of commercial credit the reason the third party is willing to make its promise is that it charges a fee sufficient to make a profit after paying administrative costs and providing for the risk that it will be called on to pay in place of the debtor. Where the risk is low, the fee is low. Where the risk is higher, the fee is higher.

16. One important way to reduce the third party's risk is for the third party to take a security interest in the debtor's goods. In the ideal case the third party would be automatically reimbursed through the security interest if the debtor did not reimburse him as required by the contract. This is almost the case with the documentary letter of credit where, if the buyer does not reimburse the bank, the bank can reimburse itself in whole or in part by enforcing its security interest in the documents and, through the documents, in the goods. In other transactions the security interest which the third party can take may not be so closely connected with the transaction for which the third party promise is given. However, the better the security interest which the third party can secure, the less its risk. The smaller the risk to the third party, the more likely it will facilitate the extension of credit to the debtor by promising to pay the creditor under the agreed conditions and the lower the fee it is likely to charge for making this promise.

17. Third party promises in the form of contract guarantees, export credit insurance, letters of credit and the like are an important form of security which facilitates the extension of credit for both domestic and international trade. In the international sphere the law in respect of certain types of third party promises has already been unified.⁵ However, third party promises do not necessarily furnish the best or the least expensive form of security in all commercial situations, whether domestic or international. Furthermore, even when a form of third party promise is the fundamental security for an extension of credit, as has been discussed above, it may be supplemented by a security interest in the property of the debtor.

⁵ E.g. Uniform Customs and Practice for Documentary Credits (International Chamber of Commerce, publication No. 290), reprinted in Yearbook ... 1975, part two, II, 3.

Security interests in goods

18. While a security interest can be taken in any form of property, this report will not consider security interests in immovables.⁶

19. The function of a security interest, like that of a third party promise, is to decrease the risk to the secured creditor that it will not be reimbursed the amount owed by the debtor. To the extent that a security interest reduces the risk to the secured creditor, it increases the likelihood that the secured creditor will be willing to extend credit to the debtor and it decreases the cost of that credit.

20. A security interest decreases the risk by providing that the secured creditor will have a right to realize the value of specific items of property owned by the debtor (the "collateral") ahead of other creditors of the debtor. Therefore, the secured creditor can be assured that, to the extent of the value of the collateral and to the extent that the law affords a procedure whereby that value can be realized by the secured creditor in case of non-payment by the debtor, the credit risk has been reduced.

21. Nevertheless, in spite of the obvious usefulness of security interests to stimulate the extension of credit, in many countries the law is such that security interests are of little use in respect of domestic commercial credit and of even less use where the secured creditor is in a foreign country or where the collateral may move from one State to another. In order to increase the usefulness of security interests, extensive revisions of the law have been proposed in some countries. The conclusion reached by the Banking Laws Committee of the Government of India was that:

"In order to quicken the pace of implementation of the new economic programme of the Government aimed to maximize employment and yield optimum socio-economic benefits, the necessity is obvious for a statutory scheme which will take care of all the existing defects in our personal property security law."⁷

Defects in the current law

22. The defects in the current law in India as outlined in great detail in the report of the Banking Law Committee are illustrative of the situation in many countries, both developed and developing. The most pervasive problem is that of the existence of a number of different statutes governing different aspects of the law of security interests. These statutes have been adopted at different times to solve specific problems and have, at best, been only partially co-ordinated with one another. As a result there are conflicts in provisions, gaps in coverage, and confusion for business and financial circles, lawyers and the courts.

⁶ For the purposes of this report, immovables are restricted to land and buildings attached thereto. It is not necessary at this stage to consider under what conditions building materials or machinery might become immovables or under what conditions timber, crops or minerals in place might become movables.

⁷ Report on Personal Property Security Law 1977, para. 1.2.4.

23. Furthermore, since these statutes were adopted to solve specific problems, even within their sphere of application they often leave unsolved problems which were not of major importance at the time of their adoption but which are today. Having for the most part been adopted prior to the Second World War, they are not well suited to the current patterns of trade and financing.

24. In general, it can be said that in most countries the law of security interests has developed out of one or more of three different sources. Most, if not all, countries recognize a possessory security interest.⁸ In addition, some countries have developed a non-possessory security interest modelled on the mortgage of land. Finally, some countries have recognized a security interest growing out of the retention of title by an unpaid seller.

25. All three of these forms of security interest are of limited use for securing commercial credit. In particular, none of them is well designed for financing the acquisition of an inventory of goods held for sale or of an inventory of goods in the process of manufacture. Nevertheless, for many businesses the prime need for capital is the acquisition of inventory and the major asset which they would have to secure their obligations would be that inventory.

26. Typically, the procedures for realizing the value of the collateral in case of default by the debtor are slow and expensive and they do not encourage the sale of the collateral at prices similar to those that would be received at a commercial sale of similar goods.

27. The priorities between the secured creditor and other classes of claimants to the debtor's assets are often obscure. In case of the debtor's insolvency the secured creditor may discover that the collateral will be used to pay other obligations of the debtor or that extended litigation is necessary to establish its priority over other creditors in respect of the collateral.

28. All such defects in the law reduce the potential value of security interests to the creditor. It cannot be demonstrated in a verifiable manner that this loss of security has adverse economic effects, since it may be the case that credit is extended as willingly without a modern law of security interests as it would be with one. However, the experience of countries like India suggests that a modern law of security interests has the effect of providing sources of capital which would otherwise not be available, a matter of particular interest to the developing countries.⁹

II. POSSIBLE COURSES OF ACTION

Desirability of action by the Commission

29. Even if it is accepted that modernization of the law of security interests would be desirable, the question

⁸ The possessory security interest has usually been extended to include symbolic possession by the creditor of the collateral by control of those documents of title which are necessary in order to take physical possession of the collateral itself, such as ocean bills of lading, some other transport documents and in some cases warehouse receipts and the like.

⁹ Report on Personal Property Security Law 1977, para. 1.2.4.

remains whether it would be desirable for the Commission to undertake action in this field. The arguments in favour are twofold.

30. First, many countries which might wish to modernize their law of security interests would welcome the aid which the Commission could give by furnishing them with a model text adapted to present commercial requirements.

31. Secondly, so long as the law of security interests differs significantly in different countries, the legal problems which arise when goods subject to a non-possessory security interest are moved from one State to another are difficult to solve satisfactorily. It is obviously undesirable if the receiving State refuses to recognize the security interest created abroad. However, it is equally undesirable if the foreign creditor has rights not available to a domestic creditor or if the foreign creditor was not required to give the same degree of publicity to the existence of the security interest as would a domestic creditor. Nevertheless, under the current situation a court must often choose one or the other of these two undesirable results.

32. In order to alleviate this situation, the law must be sufficiently similar in the State where the security interest was originally created and the State where it would be enforced so that the rights of the debtor, creditor and third parties would not be seriously affected by the movement of the goods. Once this has been accomplished, it would be possible to devise rules of conflict of laws which would make it possible to enforce a security interest in a State other than that in which it was created without upsetting the expectations of other claimants against the debtor.

Harmonization or unification

33. It is thought that, in order to achieve most of the desired benefits from unifying the law of security interests, it is not necessary to achieve identity of text. Instead, a basic scheme could be devised with suggested alternatives for provisions which present particular difficulties. States which wished to reform this aspect of their law regarding credit, and particularly States which wished to harmonize their law with that of other States so as to facilitate credit transactions between those States, would have a model from which to begin. Naturally, the more a State diverged from the model, the less it would be in harmony with other States which conformed to the model and the less it would secure the benefits of unification or harmonization of the law. Nevertheless, if use of the model, even with derogations to meet local conditions, served to improve the credit system in a State and served to harmonize the law amongst States, it would have served a useful purpose.

34. The preparation of a model law might be carried out in close collaboration with appropriate regional organizations, such as the European Communities or regional development banks. To the extent that the problems faced by different countries in the development of the law of security interests arise out of differences in

economic development, appropriate regional organizations would be able to furnish the necessary expertise. Furthermore, if there were to be alternative versions of various provisions, it would be desirable that these variations be as uniform as possible between the principal trading partners and between States in the same stages of economic development.

Model law

35. The preparation of a model law would be a new working method for the Commission. To date the Commission has prepared three draft conventions and one set of model arbitration rules to be adopted by agreement of the parties.

36. Among the advantages to the use of a convention as the method of unification of law is the relatively greater likelihood that a State will not deviate from the agreed upon text when it adopts the convention by ratification or acceptance. This is of particular importance when the agreed upon text embodies a compromise in which the participants have given up positions of importance so as to achieve a common result. It is also important when the technical operation of the text requires uniformity in all jurisdictions in which it might be applied.

37. In other cases, however, it is not so important that the law be identical in every respect. Indeed, it may be obvious that the search for complete uniformity would hinder any movement towards unification. In such a case the existence of a model on which actual adoptions can be based may facilitate later decisions to use the model either as drafted or with modifications.

38. In the case of security interests, absolute uniformity on a world-wide basis is not now feasible. Therefore, the preparation of a model law for adoption by States with such modifications as they may deem desirable would be a proper method and could be expected to aid the development of a domestic credit system and to further the use of security interests in international trade as an alternative method of financing.

39. In those regions of the world, such as Western Europe, where there is a significant movement of goods subject to a security interest, there may be more need for the text as adopted in the different States to approach absolute uniformity. In such regions, there could be agreement amongst the interested States to adopt a uniform text, whether that text was the model law as proposed by the Commission or a new text based upon the model law.

III. POSSIBLE CONTENT OF RULES

40. At its tenth session the Commission requested the Secretary-General to consider in the report to be submitted to its twelfth session the possible content of uniform rules on security interests.¹⁰ This portion of the report is submitted in conformity with that request.

¹⁰ Para. 6 *supra*.

Form of security agreements

41. The uniform rules would have to indicate the form necessary for a security agreement to be enforceable by the creditor against the debtor. Other rules might govern the enforceability of the security agreement against third parties such as good faith purchasers of the goods or other creditors.

42. There are several possible approaches which could be taken to the required form of the security agreement:

(a) All security agreements might be required to be in writing and legally authenticated by a notary or a designated public official.

(b) All security agreements might be required to be in writing, but not to be authenticated.

(c) A security agreement might not be required to be in writing if there were other indicia of its existence, such as the transfer of possession of the collateral to the creditor.

(d) No security agreement might be required to be in writing.

In addition, it would be possible to provide that some security agreements had to be in writing and authenticated even if alternative (b), (c) or (d) was chosen as the basic rule.

Required and permissible provisions in the security agreement

43. Whether the security agreement were oral, written or authenticated, it would be necessary to determine the minimum content necessary for the agreement to be in existence. In some legal systems it is necessary only that the security agreement identify the debtor, the creditor, and the collateral. In such case all of the other terms of the transaction, including even the amount and the due date of the obligation for which the security interest was created can be proven in case of dispute by the means available to prove the contents of commercial contracts in general. In other legal systems the required minimum content of a security agreement is more extensive. If an extensive minimum content were required in the uniform rules, it might be thought desirable to specify the extent to which other terms not in the explicit agreement could be proven by the means available to prove the content of commercial contracts in general.

Rights of the secured party on default

44. If the secured party is to be reimbursed from the collateral on the default of the debtor, procedures must be provided which will permit the secured party to realize the economic value of the collateral. That can be done by allowing the secured party (a) to take possession and keep the goods, (b) to sell the goods, or (c) to have the goods sold by a third person. These three basic procedures are not mutually exclusive in that the uniform rules could permit any or all of these procedures to be used either at the discretion of the secured party or under conditions specified in the rules.

45. The rules might provide whether the secured party would be allowed to take possession of the collateral without the intervention of the public authorities. If this were to be permitted, the rules might provide criteria for determining the conditions under which it would be permitted.

46. The rules might provide the extent to which the parties would be allowed to provide for remedies different from those set out in the rules themselves. This could be accomplished by stating specifically certain matters in regard to which the parties were to be allowed to contract. This could also be accomplished by stating certain specific matters in regard to which they would not be allowed to contract.

Types of moveables which may be used as collateral

47. Although in principle there are no assets of a debtor which could not be used as collateral, certain kinds of moveables and moveables which are used in certain ways raise special problems.

48. As was noted above, moveables can become immoveables by attachment to the land or, in some legal systems, by being used in conjunction with the exploitation of the land. Therefore, the uniform rules might consider whether such goods as a steel beam, a furnace or a machine tool remain moveables and subject to the uniform rules after they have been incorporated into a building. Whether or not the rules consider that question, it may be thought to be desirable to determine the relationship between a security interest created in the beam, furnace or machine tool before it was incorporated or installed and an interest in the land itself.

49. Conversely, it may be thought desirable to consider whether a security interest could be created in timber, fruit, crops, minerals and the like prior to the time they are separated from the land.

50. There are special problems in attempting to create a security interest in goods held as inventory for sale. Among these are the difficulty of describing the specific units subject to the security interest, the question of how new units of inventory purchased to replace those sold in the ordinary course of business become subject to the security interest, and the conflict between the purchaser in the ordinary course of business and the secured creditor. If it is considered desirable to facilitate the use of inventory as collateral, special rules on these and related matters would be necessary to make it feasible to do so.

51. Somewhat similar problems are raised if the debtor is to use claims he has against third parties as collateral. Although claims in the form of negotiable instruments can be given as collateral by transferring possession of the instrument, claims which are not in the form of negotiable instruments, such as trade accounts, cannot be given as collateral in this manner. Nevertheless, it may be thought desirable to facilitate the use of claims not in the form of negotiable instruments as collateral, in which case special rules would be necessary.

Conflicts between secured creditor and third parties

52. It would be necessary to determine the third parties who would have prior rights in the collateral as against the secured creditor and those who would be subordinated to the secured creditor.

53. A primary question would be whether a secured creditor would have its priority, whatever that priority might be, by reason of the conclusion of the security agreement or whether it would have to take an additional step to establish its priority. Such additional step might include having the collateral marked with the name of the creditor, having the place where the collateral is located marked with the name of the creditor, or having the agreement filed or registered in a public office.

54. The uniform rules might govern the priorities only between the different creditors who claimed an interest in the collateral by virtue of a security agreement. The rules might also govern the priorities between secured creditors and other creditors who claim an interest in the collateral by virtue of the judgement of a court, by virtue of the operation of law (such as the claim to the goods which an unpaid artisan has repaired), by virtue of a tax claim or by virtue of other rules of law. It might be thought desirable to provide for the priorities in respect of certain of these claims but not in respect of others.

55. It would be necessary to decide whether a purchaser of the collateral purchased it subject to or free of the security interest. It would be possible to differentiate between those purchasers who knew or ought to have known of the security interest and those who neither knew nor had any reason to know of it. If such a differentiation were made, it might be thought that the purchaser ought to have known of the security interest when the collateral or the place the collateral was kept was marked with the name of the creditor or when the security agreement was filed or registered in a public office, as the case may be.

56. Different rules might be considered desirable for a purchaser of goods held as inventory for sale in the event that the uniform rules are designed to facilitate the use of inventory as collateral.

Effect of foreign created security interests

57. Although few legal systems provide for the effect of a security interest created in another State, it might be thought desirable for the uniform rules to do so.

58. One question which might be considered is whether the validity of a security interest—and the agreement by which it was created—are to be determined by the law of the State where the security interest was first created or by the law of the State where

the security interest is to be enforced. The problem can arise in two ways. First, the security agreement is validly concluded in the first State but not in the second State, e.g. the second State requires an authenticated instrument whereas the first State requires only that the agreement be in writing. Secondly, the security agreement is not validly concluded in the first State but would be in the second State. In this second case, it might be decided that since the agreement is not valid in the State where it was created, it is not valid in the State where it was to be enforced. Alternatively, it might be held that it is valid in the second State, but only from the moment the collateral enters the second State.

59. A similar question arises when the State where the security interest is to be enforced requires some additional act to create the secured creditor's rights against third parties. It could be decided that if the secured creditor had done all that was necessary in the first State, he should not lose his rights if the collateral is removed from the first State. On the other hand it could be thought that it should be necessary for the secured creditor to have taken the actions required by the law of the second State in order to enforce his security interest in that State against third parties in that State.

CONCLUSION

60. The Commission may wish to conclude that the subject of security interests is of sufficient importance for it to continue work in respect of it. The importance derives from the fact that, while the use of security interests is an important means of financing commercial transactions, the law in most States is rudimentary and as such is not appropriate to respond to the needs of modern commerce.

61. As was explained in the body of this report, the Secretariat is strongly of the view that, in the present state of development of the law, it would not be feasible to try to achieve unification by means of a uniform law in the form of a convention. Instead, a model law could be devised with suggested alternatives for provisions which present particular difficulties. Such a model law would serve (a) to assist countries in modernizing their law in regard to security interests, (b) to bring about a common approach to solving the problems inherent in a system of security interests, and thereby (c) to place at the disposal of merchants and traders an alternative means of financing commercial transactions.

62. If the Commission were to agree with these policy considerations, it may wish to request the Secretary-General to prepare a preliminary draft with an accompanying commentary and to do so in consultation with interested international organizations and banking and trade institutions.

D. List of relevant documents not reproduced in the present volume**WORKING GROUP ON INTERNATIONAL NEGOTIABLE INSTRUMENTS,
SEVENTH SESSION**

<i>Title or description</i>	<i>Document symbol</i>
Draft Convention on International Bills of Exchange and International Promissory Notes (first revision), articles 46 to 68, as reviewed by a drafting party	A/CN.9/WG.IV/WP.10
Provisional agenda	A/CN.9/WG.IV/WP.11
Draft Convention on International Bills of Exchange and International Promissory Notes (first revision), articles 24 and 68 to 86, as reviewed by a drafting party	A/CN.9/WG.IV/WP.12

III. INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION

A. Draft UNCITRAL Conciliation Rules: preliminary draft prepared by the Secretary-General (A/CN.9/166)*

SCOPE OF APPLICATION

Article 1

(1) These Rules shall apply when the parties to a contract have agreed in writing that disputes in relation to that contract shall be referred to conciliation under the UNCITRAL Conciliation Rules.

(2) The parties may also agree to refer to conciliation under these Rules disputes arising out of legal relationships that are not contractual.

(3) The parties may agree in writing to any modification of these Rules.

NUMBER OF CONCILIATORS

Article 2

There shall be one conciliator unless the parties have agreed that there shall be three conciliators.

COMMENCEMENT OF CONCILIATION PROCEEDINGS

Article 3

(1) The party initiating recourse to conciliation shall give to the other party a written notice of conciliation.

(2) The other party shall within 30 days after receipt of the notice of conciliation reply to the party having given notice.

(3) (a) If in his reply the other party consents to conciliation, the conciliation proceedings shall commence on the date on which such reply is received by the party having given notice;

(b) If in his reply the other party refuses conciliation or if he does not reply within 30 days, there shall be no conciliation proceedings.

NOTICE OF CONCILIATION

Article 4

(1) The notice of conciliation shall include:

(a) An invitation that the dispute be referred to conciliation;

(b) The names and addresses of the parties;

(c) A reference to the conciliation clause or the separate conciliation agreement that is invoked;

(d) A reference to the contract the legal relationship out of or in relation to which the dispute arises;

(e) A brief description of the general nature of the dispute;

(f) A brief description of the points at issue.

(2) The notice of conciliation may also include:

(a) If no agreement has previously been reached on the number of conciliators, a proposal that there shall be one conciliator or three conciliators;

(b) (i) In conciliation proceedings with one conciliator, a proposal as to the name of the conciliator;

(ii) In conciliation proceedings with three conciliators, the name of the conciliator appointed by the party giving notice of conciliation.

(3) The party consenting to conciliation may in his reply give his own description of the general nature of the dispute and the points at issue. He may also indicate in his reply his agreement or disagreement with the proposals made by the other party under paragraph 2 (a) and (b) (i) of this article and, in conciliation proceedings with three conciliators, indicate the name of the conciliator appointed by him.

APPOINTMENT OF CONCILIATOR(S)

Article 5

(1) If a sole conciliator is to be appointed, and if within 15 days after the commencement of the conciliation proceedings the parties have not agreed on the name of the conciliator, either party may apply to the appointing authority agreed upon by the parties to make the appointment according to the procedure laid down in article 7 of these Rules.

(2) If three conciliators are to be appointed, each party shall appoint one conciliator. The two conciliators thus appointed shall choose the third conciliator who will act as presiding conciliator. If within 15 days upon their appointment the conciliators appointed by the parties have not agreed on the name of the third conciliator, either party may apply to the appointing authority agreed upon by the parties to make the appointment according to the procedure laid down in article 7 of these Rules.

(3) If no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses to act or fails to appoint the conciliator within 60 days of the receipt of a party's request therefor, either party may request X to designate an appointing authority. The request shall be accompanied by a copy of the notice of conciliation and of the reply given thereto.

* 26 March 1979. A commentary on these Rules may be found in document A/CN.9/167, reproduced in this volume, part two, III, B, below.

APPLICATION TO APPOINTING AUTHORITY

Article 6

(1) The application to the appointing authority shall be accompanied by a copy of the notice of conciliation and of the reply given thereto and may suggest the professional qualifications of the sole or the presiding conciliator.

(2) The party applying to the appointing authority shall send a copy of the application to the other party. The other party may within 15 days after the receipt of the copy of the application send to the appointing authority such suggestions as he may wish to make on the professional qualifications of the sole or the presiding conciliator.

APPOINTMENT OF CONCILIATOR BY
APPOINTING AUTHORITY*Article 7*

(1) The appointing authority shall, by telegram or telex, confirm to the parties the receipt of the application.

(2) The appointing authority shall proceed with the appointment of the sole or presiding conciliator without undue delay, using the following list-procedure:

(a) The appointing authority shall communicate to the parties an identical list containing at least three names;

(b) Within 15 days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which he objects and numbered the remaining names on the list in the order of his preference;

(c) After the expiration of the above period of time, the appointing authority shall appoint the sole or the presiding conciliator from among the names approved on the lists returned to it in accordance with the order of preference indicated by the parties;

(d) If for any reason the appointment cannot be made according to this procedure, the appointing authority shall exercise its discretion in appointing the sole or the presiding conciliator.

(3) In making the appointment, the appointing authority shall have regard to the suggestions of the parties as to the qualifications of the sole or the presiding conciliator and to such considerations as are likely to secure the appointment of an independent and impartial person. It shall also take into account the advisability of appointing a sole or a presiding conciliator of a nationality other than the nationalities of the parties.

NOTIFICATION OF APPOINTMENT OF CONCILIATOR

Article 8

The appointing authority, upon making the appointment, shall forthwith notify the parties of the name and address of the conciliator.*

* This and all following articles, in which the expression "conciliator" is used without qualification, apply to either a sole conciliator or to three conciliators, as the case may be.

FORWARDING OF NOTICE AND REPLY TO CONCILIATOR

Article 9

A copy of the notice of conciliation and of the reply thereto shall be given to the conciliator promptly after his appointment. This shall be done by the parties if they made the appointment, or by the appointing authority if it made the appointment.

REPRESENTATION AND ASSISTANCE

Article 10

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons must be communicated in writing to the other party and to the conciliator; such communication must specify whether the appointment is being made for purposes of representation or assistance.

ROLE OF CONCILIATOR

Article 11

(1) The role of the conciliator shall be to assist the parties to reach an amicable settlement of their dispute.

(2) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may have expressed and the need for a speedy settlement of the dispute.

(3) In assisting the parties to reach a fair and equitable settlement, the conciliator shall give consideration to, among other things, the terms of the contract, the law applicable to the substance of the dispute, the usages of the trade concerned and the circumstances surrounding the dispute.

REQUEST BY CONCILIATOR FOR INFORMATION

Article 12

(1) The conciliator may request each party to submit to him a written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. He may also request each party to submit a fuller statement of points at issue.

(2) At any stage of the conciliation proceedings the conciliator may request a party to submit to him such additional information as he deems appropriate.

COMMUNICATION BETWEEN CONCILIATOR AND PARTIES

Article 13

(1) If, after reviewing the written materials submitted to him, the conciliator deems it advisable, he may invite the parties to meet with him.

(2) The conciliator may have oral discussions or communicate in writing with either party alone.

(3) Unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place shall be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings.

ADMINISTRATIVE ASSISTANCE

Article 14

In order to facilitate the conduct of the conciliation, the parties, or the conciliator after consultation with the parties, may arrange for administrative assistance to be provided by the appointing authority or other suitable institution.

PARTY SUGGESTIONS FOR SETTLEMENT OF DISPUTE

Article 15

The conciliator may invite the parties, or a party, to submit to him suggestions for settlement of the dispute. A party may do so upon his own initiative.

OBLIGATION OF PARTIES TO CO-OPERATE

Article 16

The parties shall in good faith endeavour to comply with requests by the conciliator to submit written materials, provide evidence, attend meetings and otherwise co-operate with him.

DISCLOSURE OF INFORMATION

Article 17

The conciliator, having regard to the procedures which he believes are most likely to lead to a settlement of the dispute, may determine the extent to which anything made known to him by a party shall be disclosed to the other party; provided, however, that he shall not disclose to a party anything made known to him by the other party subject to the condition that it be kept confidential.

PROPOSALS FOR SETTLEMENT

Article 18

At any stage of the conciliation proceedings the conciliator may make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.

SETTLEMENT AGREEMENT

Article 19

(1) When it appears to the conciliator that there exist elements of a settlement which would be acceptable to the parties, he may formulate the terms of a possible settlement and submit them to the parties for their observations.

(2) If the parties reach agreement on a settlement of the dispute, they shall draw up and sign a written settlement agreement.* Upon request of the parties, the conciliator shall draw up, or assist parties in drawing up, the settlement agreement.

* It is recommended that the settlement agreement contain a clause that any dispute arising out of or relating to the interpretation or performance of the settlement agreement shall be submitted to arbitration.

(3) Upon signing by the parties the settlement agreement becomes binding on them.

CONFIDENTIALITY

Article 20

Unless otherwise agreed by the parties or required by law, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings, including any settlement agreement.

TERMINATION OF CONCILIATION PROCEEDINGS

Article 21

The conciliation proceedings are terminated:

(a) By the signing of the settlement agreement by the parties, on the date of the agreement; or

(b) By a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or

(c) By a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) By a written notice of a party to the conciliator and the other party to the effect that the conciliation proceedings are terminated, 30 days after the date of the declaration [, unless such party revokes the declaration prior to the expiration of the 30-day period].

RESORT TO ARBITRAL OR JUDICIAL PROCEEDINGS

Article 22

Neither party shall initiate arbitral or judicial proceedings in respect of a dispute that is the subject of conciliation proceedings from the date of the commencement of the conciliation proceedings, as defined in article 3, paragraph (3) (a), of these Rules, to the date of their termination, as provided in article 21.

COSTS

Article 23

(1) Upon the termination of the conciliation proceedings, the conciliator shall fix the costs of the conciliation and give written notice thereof to the parties. The term "costs" includes only:

(a) The fee of the sole or the presiding conciliator, to be fixed by that conciliator in accordance with article 24 of these Rules;

(b) The travel and other expenses of the sole or the presiding conciliator and of any witnesses requested by a conciliator after consultation with the parties;

(c) The cost, travel and other expenses of any expert advice requested by a conciliator after consultation with the parties;

(d) The cost of any administrative assistance provided pursuant to article 14 of these Rules;

(e) Any fees and expenses of the appointing authority and X.

(2) The costs, as defined above, shall be borne equally by the parties. All other expenses incurred by a party, including the fee, travel and other expenses of a conciliator appointed by a party, shall be borne by that party.

FEES OF CONCILIATOR

Article 24

The fees of the conciliator shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the conciliator and other relevant factors.

DEPOSITS

Article 25

(1) The sole or the presiding conciliator, upon his appointment, may request each party to deposit an equal amount as an advance for the costs referred to in article 23, paragraph (1).

(2) During the course of the conciliation proceedings the sole or the presiding conciliator may request supplementary deposits in an equal amount from each party.

(3) Where a conciliator has been appointed by a party he may request a deposit or a supplementary deposit only from that party.

(4) If the required deposits under paragraphs (1) and (2) of this article are not paid in full by both parties within 30 days after the receipt of a request therefor, the conciliator may suspend the proceedings or may make a written declaration of termination in accordance with article 21, subparagraph (b), of these Rules.

ROLE OF CONCILIATOR IN SUBSEQUENT PROCEEDINGS

Article 26

Unless the parties have agreed otherwise, no conciliator may act as an arbitrator in subsequent arbitral proceedings, or as a representative or counsel of a party, or be called as a witness by a party in any arbitral or judicial proceedings in respect of a dispute that was the subject of the conciliation proceedings.

ADMISSIBILITY OF EVIDENCE IN OTHER PROCEEDINGS

Article 27

A party shall not be entitled to rely on or to introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that was the subject of the conciliation proceedings:

(a) Views expressed by the other party in respect of a possible solution of the dispute;

(b) Admissions made by the other party in the course of the conciliation proceedings;

(c) Proposals made by the conciliator;

(d) The fact that the other party has indicated his willingness to accept a proposal for settlement made by the conciliator.

B. Report of the Secretary-General: conciliation of international trade disputes (A/CN.9/167)*

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* 2 April 1979.

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INTRODUCTION

1. The United Nations Commission on International Trade Law adopted at its eleventh session (30 May-16 June 1978) a new work programme.¹ One of the priority items included in that programme, under the general heading of international commercial arbitration, is "Conciliation of international trade disputes and its relation to arbitration and to the UNCITRAL Arbitration Rules".² The Commission requested the Secretary-General to submit to it a report on this matter at the twelfth session.³

2. This report has been prepared pursuant to that request. It takes into account the results of consultations which the Secretariat had with representatives of the International Council for Commercial Arbitration and the International Chamber of Commerce in September 1978 and February 1979. Professor Pieter Sanders (Netherlands), who acted as a consultant to the Secretariat in the drafting of the UNCITRAL Arbitration Rules, also acted as consultant in the preparation of the draft UNCITRAL Conciliation Rules.

3. The report, in chapter I, deals with the nature and characteristics of conciliation. It discusses the purpose, potential advantages and particular features of conciliation as distinguished from other methods of dispute settlement. This discussion of underlying considerations could provide useful guidance in the elaboration of conciliation rules.

4. Chapter II sets forth a commentary on a preliminary draft of UNCITRAL Conciliation Rules (A/CN.9/166),* which resulted from the above-mentioned consultative meetings. It is suggested that the Commission, if it were of the view that the issuance of UNCITRAL Conciliation Rules would be a useful contribution to the settlement of trade disputes, follow the same procedures which led to the successful adoption of the UNCITRAL Arbitration Rules, i.e. a first reading in plenary, a request to the Secretary-General to produce a revised draft which takes into account the deliberations and decisions of the Commission, and a second and final reading and subsequent adoption of the Rules at the next session. However, it would seem

desirable that the revised draft be communicated to Governments for comments and that such comments be placed before the Commission when it considers the revised draft.

I. NATURE AND CHARACTERISTICS OF CONCILIATION

A. *As distinguished from other methods of dispute settlement*

5. Conciliation is one out of various methods of dispute settlement. It may be broadly defined as a "procedure to achieve an amicable dispute settlement with the "assistance of an independent third party".

6. In that the aim of conciliation is to settle a dispute amicably by agreement, it may be characterized as "non-judicial" and, thus, be distinguished from arbitral or court proceedings with their imposed terms of settlement. While arbitrators and judges "decide" the case in the form of an award or decision which is binding on the parties, conciliators merely "recommend" or "suggest" possible settlement terms which become binding on the parties only after they have agreed to them. While it is true that also during arbitral or court proceedings parties may settle their dispute by agreement (e.g. "*accord des parties*"), such settlement is not the typical or intended purpose of those proceedings.

7. "Third-party assistance", as the other criterion in the above definition, distinguishes conciliation from normal party negotiations which usually are the first step in trying to settle a dispute. The "independent" character of the third party marks the difference between conciliation and party negotiations which are often held through counsel and agents. Such persons, who assist or represent a party, usually act in the interest of the party by whom they are retained, while the role of a conciliator is a neutral, independent one.

8. Various approaches to conciliation are found in multilateral or bilateral treaties, in national statutes, or, most commonly, in rules adopted by certain arbitration or trade associations. They range from a mediation-type intervention by a "go-between" intermediary to a well-structured and formal panel-type procedure by a permanent body. In order to ascertain the merits of such approaches and to select the one most suitable to commercial transactions, the purpose and potential advantages of conciliation in the field of international trade may briefly be discussed.

* Reproduced in this volume, part two, III, A, above.

¹ *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17 (A/33/17)*, para. 69 (Yearbook... 1978, part one, II, A).

² *Ibid.*, para. 67 (c) (iv).

³ *Ibid.*, para. 69.

B. *Purpose and potential advantages of conciliation*

9. When a business dispute has arisen, it is advantageous to settle the difference without having to resort to costly and time-consuming proceedings, the outcome of which may be uncertain. This explains to some extent the fact that arbitration is increasingly favoured over court litigation and may also provide a reason for preferring conciliation to court proceedings.

10. Potential advantages of conciliation over arbitration are less easily assessed. Conciliation, unlike arbitration, is not in all circumstances a final method of dispute settlement. The conciliation attempt may fail, with the undesirable result that money and time have been spent in vain.

11. Although this potential disadvantage cannot be disregarded, it is mitigated by the following considerations. One is the factual assumption that parties will only initiate conciliation proceedings if they regard a settlement on agreed terms as likely. Another consideration is that, if parties during conciliation proceedings realize that a settlement agreement is impossible, they will discontinue conciliation and so avoid further expenses.

12. However, both considerations, like others referred to below, would only be effective in reducing the disadvantages of conciliation if the conciliation rules are shaped accordingly, e.g. by requiring consent at the start of the proceedings and by permitting a relatively unhampered recourse to other procedures. Other rules that would offset possible disadvantages of conciliation when compared with arbitral or judicial proceedings would be those ensuring inexpensive and speedy proceedings, such as rules providing for the possibility of written proceedings, appointment of a single conciliator, as the normal rule, and reasonably short periods of time for the submission of documents.

13. Conciliation rules that are drafted with these considerations in mind may well make it worth while for parties to attempt a settlement through conciliation, especially in view of the fact that arbitration in international commercial disputes is increasingly costly and time-consuming. Though conciliation should not be regarded as a general substitute for arbitration, it may be considered as a possible and viable alternative. One particular advantage is of course the non-adversary character of conciliation. While some businessmen may see no significant reason why binding arbitration, in spite of its adversary character, should adversely affect their business relationships, others will view amicable proceedings as conducive to, or even necessary for, the preservation of good business relationships.

14. This latter attitude seems prevalent in countries which, because of their culture and tradition, favour non-adversary settlement on acceptable terms to decisions imposed by third parties after adversary proceedings. Conciliation is, for example, widespread in China, Japan, and various African countries. In other regions, too, conciliation appeals to business partners who have long-standing relations and wish to maintain them,

despite a one-time difference, and who, therefore, prefer the "marriage counsellor" in conciliation proceedings to the "divorce judge" of proceedings in an arbitration tribunal or a domestic court.

15. In addition, there are legal considerations that could be advanced in favour of conciliation. One is the fact that various procedural laws and rules discourage arbitrators and judges from promoting amicable settlements. The underlying purpose to avoid any compromising or prejudicial attitude may, even without such provisions, deter judges or arbitrators from making settlement proposals.

16. Conciliation would also appear preferable in view of the fact that certain matters are not arbitrable under the applicable law or because parties lack the legal capacity to arbitrate. Furthermore, reluctance to submit to arbitration or litigation may be caused by uncertainty about the applicable law. Beyond that, conciliation could be of particular value where—for example, in long-term contracts or even outside contractual relationships—problems arise as to certain matters which are less juridical than technical. Conciliation with its emphasis on party agreement has a wider scope of application than any juridical procedure which is limited to certain subject-matters regulated by definite rules.

17. Even within areas governed by legal provisions conciliation may be preferred for the very reason that it lessens the impact of such rules. Parties may want a settlement "in the spirit of conciliation" which is not necessarily based on strict legal grounds but more on what they perceive as a just and a reasonable outcome of their give and take. Although legal rules cannot be fully disregarded, allowance should be made for parties' attempts to find an acceptable and dispute-settling compromise, which may not necessarily coincide with the terms of a "legally correct" decision.

C. *Guiding principles for conciliation rules*

18. It would follow that the potential advantages of conciliation will only materialize if the procedural rules are tailored to the needs and expectations of the parties. In view of the various possible techniques it seems necessary to achieve clarity about the intended concept and principles. These not merely affect the procedural aspect of conciliation proceedings, but also substantive issues, such as the binding effect of a submission to conciliation, the confidentiality of the proceedings, and the relationship of conciliation to other proceedings.

19. The purpose of conciliation, namely to achieve an amicable settlement, is obviously a primary consideration in the elaboration of conciliation rules. It is therefore necessary that the parties retain, as much as possible, freedom of action with regard to initiating conciliation, adapting the proceedings to their particular case, and discontinuing any seemingly futile attempt at conciliation.

20. The next important principle is to make conciliation an attractive alternative by providing for speedy

and inexpensive proceedings. Periods of time for certain procedural steps should be reasonably short, without neglecting the particular features of international disputes. Above all, a single conciliator should be envisaged as the normal procedure, though parties should be at liberty to opt for three conciliators.

21. The desirable informality of proceedings bears also on the further principle which is to endow the conciliator with a reasonably wide discretion. Being entrusted by the parties with the conduct of the proceedings, he should be enabled to perform his function without any unduly impeding rules. Since his role is essentially to assist parties, he should consult with the parties even on procedural points and take into account their views to the extent possible.

22. To implement these rather liberal guidelines, more is required than a short set of rules which would state in substance that the parties and the conciliator can do what they regard as appropriate. Detailed provisions seem advisable, to be used as recommended guidelines. Since the above-mentioned principles may partly conflict, their respective impact should be assessed and balanced in respect of each specific provision.

II. COMMENTARY ON THE DRAFT UNCITRAL CONCILIATION RULES*

A. Scope of application

Article 1. Scope of application

23. Many conciliation rules at present in force restrict their application to certain parties, areas or subject-matters. For example, they require that at least one of the parties be a member of a certain chamber of commerce or trade association, a national of a certain State, or a Contracting Party to a Convention. Application may also be limited to disputes within a certain region or within the jurisdiction of a certain court of arbitration or similar body.

24. Such restrictions would obviously be inappropriate for UNCITRAL Conciliation Rules which, like the UNCITRAL Arbitration Rules, are designed for universal application. Thus, article 1 does not contain any limit as to certain categories of persons, areas or subject-matters. Paragraph (2) envisages the use of conciliation even in disputes arising out of non-contractual relationships. This accords with the earlier mentioned consideration (see above, para. 16) that conciliation may cover a wider field than any judicial procedure in that it may be used in all kinds of disputes which can be settled by party agreement. If there is a desire to express the principal field of application, i.e. "international commercial disputes", this could be done in a preamble or in the promoting resolution, following the example of the UNCITRAL Arbitration Rules (General Assembly resolution 31/98).

25. Paragraph (3) of article 1, by allowing modifications, underlines the non-mandatory character of the

Rules as recommended guidelines. It enables the parties to tailor the Rules according to their particular needs if they feel that the Rules are not in all respects suitable under the specific circumstances. It should also be noted that, in addition to the general rule of paragraph (3), the possibility of a modifying agreement is mentioned in some specific provisions (e.g. arts. 20, 26) in order to emphasize party autonomy in these particular contexts.

26. Following the model of the UNCITRAL Arbitration Rules, consideration could be given to adding to article 1, paragraph (1), in a foot-note, a model conciliation clause along the following lines:

"Model conciliation clause"

"In the event of a difference arising out of or relating to this contract the parties shall endeavour to seek a solution of that difference by amicable settlement under the UNCITRAL Conciliation Rules as at present in force.

"Note: Parties may wish to consider adding the following clause:

"The appointing authority shall be . . ."

27. If parties wish to combine this clause with a reference to arbitration in the case of failure of the conciliation, they should pay attention to the possibly narrower scope of an arbitration clause (see, for instance, standard ICC arbitration clause: "All disputes arising in connection with the present contract . . ." which, as is more apparent in the French version "*Tous différends découlant du présent contrat*", presumably excludes ancillary disputes, such as one relating to the filling of gaps in long-term contracts). Such difference in scope, however, would not be encountered where parties choose the model arbitration clause recommended in the UNCITRAL Arbitration Rules.

B. Initiation of conciliation and appointment of conciliator(s)

Article 2. Number of conciliators

28. Article 2 envisages conciliation by a sole conciliator except where the parties prefer to appoint three conciliators. Since the task of a conciliator is basically to assist the parties in finding acceptable terms of a settlement, one conciliator will normally be adequate. A single conciliator may also better be able to conduct proceedings informally and hold confidential discussions with one or both parties (as envisaged under art. 17). The preference for a sole conciliator is, above all, supported by the need to provide for inexpensive and speedy proceedings. This would help to make conciliation a viable alternative to other methods of dispute settlement and reduce the adverse effects of a possible failure.

29. Under certain circumstances, more than one conciliator may be required. That may be the case, for example, where in a complex dispute various types of

* The text of the draft UNCITRAL Conciliation Rules is contained in document A/CN.9/166, reproduced in this volume, part two, III, A, above.

expertise are needed. Also, it may sometimes be difficult to find a conciliator who is sufficiently familiar with the law and trade usages of the two or more countries with which an international transaction is connected.

30. In such and other cases, parties may agree under article 2 on conciliation with three conciliators, and subsequent relevant articles (e.g. on appointment procedure and costs) take such an agreement into account. No provision is made for conciliation with two conciliators because of its proximity to negotiations by parties assisted by their respective counsel or agents. A panel of two conciliators, each of whom appointed by a party, would run counter to the basic requirement of a good conciliator, i.e. impartiality, independence, and the ability to take an unprejudiced look at the matter in dispute. This essential element of successful conciliation is secured under the Rules by adding a third ("the presiding") conciliator to the two others who are conceived as party appointees if conciliation by a panel of three conciliators is desired.

31. The Rules contain no specific provisions as to how certain decisions are arrived at when conciliation proceedings are conducted by three conciliators. Since in such a case two of the conciliators are to be appointed by the parties themselves the submission of a proposal for a settlement and the taking of a decision will in the normal course of events fall to the presiding conciliator after consultation by him of the two party-appointed conciliators. The absence of any provision in this respect means, however, that the three conciliators have discretion to conduct the proceedings in such a manner as is appropriate in the case at issue.

Article 3. Commencement of conciliation proceedings

32. Article 3, in particular paragraph (3), is based on the view that a contract clause referring disputes to conciliation is not by itself sufficient for initiating conciliation proceedings. Required are, after a dispute has arisen, that one party requests and the other party consents to conciliation. In contrast to arbitration, conciliation is self-enforced and can take place only if both parties in the event of a dispute are still willing to seek an amicable solution of the difference. Almost all existing conciliation rules reflect this particular nature of conciliation, even where, exceptionally, "mandatory" conciliation is envisaged before arbitration, the same practical result is reached in that the unwillingness of a party to conciliate is conceived of as a failure of conciliation, thus opening the road to arbitration.

33. Consequently, there are no conciliation proceedings if the party notified refuses conciliation or does not even reply within the period specified. In case of consent, the date of the commencement of the proceedings is determined by paragraph (3) (a). This is of particular relevance in the context of the provision which precludes parties from resorting to arbitration or litigation during the conciliation proceedings (see below, art. 22).

34. The requirement in article 3, paragraph (1), that the notice of conciliation be in writing, is recommended

despite the fact that a party may well orally inquire about the other party's willingness to conciliate. Written form seems preferable in terms of clarity and easy proof. It helps to emphasize the serious and final character of the request as the relevant first step in determining within a certain period whether conciliation will take place or not. It is also relevant with regard to articles 6, paragraph (1), and 9, according to which copies of the notice must be sent to an appointing authority and to the conciliator. Finally, to require a notice in writing is reasonable in view of the prescribed contents of a notice set out in article 4.

Article 4. Notice of conciliation

35. The points listed in this article are designed to identify the disputed issues and their context, the suggestions contained in paragraphs (2) and (3) are intended to facilitate and accelerate the commencement of the conciliation proceedings. The primary addressee of the notice is the other party who needs to know, as a basis for his own decision, what is the object of the proposed conciliation. A secondary addressee is the conciliator to whom a copy of the notice (and of the reply) must be sent promptly upon his appointment (see below, art. 9). The notice and the reply constitute general information which may later be supplemented upon his request in accordance with article 12.

36. Another addressee can be the appointing authority under article 6. Among other things, the notice and the reply enable the appointing authority, in addition to any party suggestions as to the professional qualifications of the conciliator, to select as conciliator a person well-suited for the particular dispute at issue, having regard to the type of dispute, the expertise needed, the nationality and places of business of the parties.

Article 5. Appointment of conciliator(s)

37. Article 5 implements, in substance, the principle of party autonomy with regard to the appointment of a conciliator. To assist the parties, it lays down certain supplementary provisions that are appropriate in "ad hoc conciliation" which is not tied to any particular institution.

38. Paragraph (1) deals with the appointment of a sole conciliator. It provides for resort to an agreed appointing authority if the parties have not, by the time specified, agreed on the name of the conciliator.

39. Paragraph (2) sets out the appointment procedure in the case where parties have agreed on conciliation with three conciliators. It reflects the above considerations (see para. 31) of adding to two party appointees an independent "presiding" conciliator. Again, resort to an agreed appointing authority is foreseen here if an agreement on the appointment of the presiding conciliator cannot be reached in time.

40. Paragraph (3) provides a "last resort" for the exceptional case that the parties have not agreed on an appointing authority or that the appointing authority

does not appoint the conciliator within the period specified. The recommended procedure is to request a third person ("X") to designate an appointing authority. The Commission will have to decide what person or institution should be entrusted with this function.

Article 6. Application to appointing authority

41. Article 6 describes the procedure of enlisting the assistance of the appointing authority which has been agreed upon by the parties or, exceptionally, designated by X under article 5, paragraph (3). The required application must be accompanied by a copy of the notice and of the reply, for the purpose already explained (see above, para. 36).

42. The requirement that a copy of the application be sent to the other party serves a dual purpose. It informs him about the fact that the next step in initiating conciliation proceedings has been taken. It also gives him, like the applicant, the opportunity to make any suggestions as to the professional qualifications of the conciliator, including any specific expertise in, or familiarity with, a certain subject-matter.

Article 7. Appointment of conciliator by appointing authority

Article 8. Notification of appointment of conciliator

43. Articles 7 and 8 describe the functions of the appointing authority in appointing the sole or presiding conciliator, as the case may be. First, the appointing authority confirms the receipt of the application to both parties by telegram or telex. This kind of communication is intended to speedily inform the parties about the receipt, thus erasing any doubts as to, for example, the existence or accessibility of the respective institution or person. The confirmation may also be relevant for calculating the time period specified in article 5, paragraph (3).

44. The appointing authority, then, proceeds with the appointment, using the list-procedure which is taken from the UNCITRAL Arbitration Rules (see art. 6, para. 3). This selection method implements, to a considerable extent, the principle of party autonomy by attaching great importance to the parties' approval, objection, or preference in respect of the listed candidates.

45. Paragraph (3) of article 7 sets out certain considerations that should guide the appointing authority in its selection. The overriding concern is to secure the appointment of an independent and impartial conciliator which is the best guarantee for successful conciliation proceedings. One such consideration relates to the advisability to appoint a "neutral" conciliator of a third nationality; this is not formulated as a rigid rule (as found in some conciliation rules) because there may well be circumstances in which it would be proper to appoint as conciliator a person of the same nationality as that of one of the parties.

46. Another important consideration is the professional qualification. One might add the ability to medi-

ate between parties, which is different from deciding cases. Thus, the qualifications expected from a good conciliator are not necessarily identical to those required from an arbitrator or judge.

C. Conduct of conciliation proceedings

Article 9. Forwarding of notice and reply to conciliator

47. The appointing authority's final step in the appointment procedure, besides notifying the parties of the name and address of the conciliator (under art. 8), is to send a copy of the notice of conciliation and of the reply to the conciliator for the purpose already explained (see above, para. 35). Where the conciliator has not been appointed by an appointing authority but by the parties themselves, it falls of course to the parties to provide him with a copy of the notice and the reply.

Article 10. Representation and assistance

48. This article is modelled after article 4 of the UNCITRAL Arbitration Rules. It allows parties to be represented or assisted by third persons which is of particular practical relevance in international contexts. The requirement to inform in advance not only the conciliator but also the other party is intended to avoid any possible surprise. The further requirement to indicate whether the appointment is for the purpose of representation or for the purpose of assistance seems appropriate in view of the different functions of such persons, in particular, concerning their capacity to make and accept any settlement proposals.

Article 11. Role of conciliator

49. Article 11 states the basic function of the conciliator and sets forth general guidelines for his conduct. His primary role is to assist parties to reach an amicable settlement. Paragraph (2) stresses that, with due regard to the parties' wishes and the need for speedy proceedings (cf. above, paras. 19, 20), the conciliator may exercise his discretion in conducting the conciliation proceedings.

50. Paragraph (3) provides a non-exclusive list of considerations to guide the conciliator in his assisting function. It brings out the earlier mentioned potential advantage of conciliation that the settlement shall be reached "in the spirit of conciliation" by agreement of the parties (see above, para. 17). Thus, the law applicable to the substance of the dispute is not listed as a solely decisive factor but as one amongst many considerations. Still, the relevant legal rules may serve as a guide for the conciliator and the parties in their search for a fair and equitable solution of the dispute. This is, in particular, true with regard to settlement proposals by the conciliator which tend to be less acceptable to a party who could expect to gain more from a decision (by a court or arbitration tribunal) on strictly legal grounds.

Article 12. Request by conciliator for information

Article 13. Communication between conciliator and parties

51. Articles 12 and 13 describe in detail the procedural powers which enable the conciliator to carry out his function. His competence to request information from the parties is further supported by article 16 obliging the parties to comply with the conciliator's requests. Article 13 provides the conciliator with a wide variety of modes of conducting the proceedings. His discretion is merely limited with regard to the place of meetings with the parties. Here he is bound by party agreement and must take into account any respective suggestions by the parties.

52. It should be noted that the draft UNCITRAL Conciliation Rules do not empower the conciliator to appoint an expert on his own initiative to assist him. This solution has been chosen in view of the nature of conciliation as amicable party proceedings with third-party assistance, and of the policy that parties should not incur possible high costs without prior commitment.

Article 14. Administrative assistance

53. Many arbitration courts, chambers of commerce, trade associations, and similar bodies place administrative assistance at the disposal of parties desiring conciliation. Consequently, their rules provide for various administrative functions which range from the simple forwarding and registering of communications to the keeping of lists of conciliators and the taking of decisions on procedure, costs, and the appointment of a conciliator.

54. There may be some doubt as to the advisability of too close a link of conciliation proceedings with a body which may later be involved in the arbitration of the same dispute. Yet, there is a certain value in providing strictly administrative assistance as envisaged under article 14. Such assistance could include registration and forwarding of communications, providing translation and interpretation, and making arrangements for meetings.

Article 15. Party suggestions for settlement of dispute

55. Article 15 is designed to promote an amicable settlement based on party suggestions. These suggestions will help the conciliator to make reasonable proposals for settlement and to formulate the terms of a possible settlement as envisaged by article 19. Parties may make suggestions on their own initiative or upon an invitation by the conciliator. The term "invite" indicates that there is not, on the part of the conciliator, a "request" with which parties must comply in accordance with article 16.

Article 16. Obligation of parties to co-operate

56. Article 16 underpins the conciliator's "competence to request" by obliging the parties to endeavour to comply in good faith. This obligation is phrased in a somewhat lenient way since the success of conciliation depends ultimately on the will and attitude of the parties.

Article 17. Disclosure of information

57. In the context of conciliation two different issues of confidentiality must be distinguished. One, dealt with in article 20, relates to the desirability that the contents of the proceedings not be disclosed to outsiders. The other, which is the subject of article 17, relates to the flow of information between the parties to the conciliation proceedings. The key issue here is whether the conciliator should disclose to a party all information obtained from the other party or to what extent he must keep it confidential.

58. Existing conciliation rules deal with this delicate problem, if at all, in rather varying ways, reflecting different perceptions of the concept of conciliation and the function of the conciliator. Where the conciliator is regarded as a messenger-type mediator whose task is to bring the parties together, confidentiality would be inappropriate, except, perhaps, for settlement proposals made by a party with the express request for confidentiality. Where, however, the assistance by the conciliator is viewed as an active and influential intervention, stricter confidentiality seems justified.

59. This second concept is reflected in article 17 which, in general, leaves the decision about confidentiality or disclosure to the conciliator. To provide him with discretionary power in this matter seems reasonable in view of the fact that it is he who knows best what steps to take in order to achieve an amicable settlement. However, his discretion is restricted by any express demand of a party that certain information be kept confidential.

Article 18. Proposals for settlement

Article 19. Settlement agreement

60. Articles 18 and 19 outline the procedures that could lead to a successful conclusion of the conciliation proceedings. Article 18 envisages settlement proposals by the conciliator which, in the interest of the informality of the proceedings, can be made orally and without stating the reasons for the proposal.

61. Article 19, paragraph (1), invites the conciliator to formulate possible settlement terms when the proceedings have reached an appropriate stage. If the parties accept the terms, the settlement agreement should be drawn up by the parties, possibly assisted by the conciliator, or, if they so wish, by the conciliator alone. The requirement that the agreement be in writing is not only so that parties may sign it; it is also appropriate in order to avoid any uncertainty or dispute about the exact details of the settlement terms. The document to be drawn up contains only the terms of the settlement and does not report on the proceedings (as prescribed by some existing rules in the context of a more formal type of conciliation).

62. According to paragraph (3), the settlement agreement becomes binding on the parties upon their signature. It has the same legal effect as any other binding party agreement or contract. In terms of enforceability, it is not equal to an "arbitral award on

agreed terms" (as provided for in at least one set of conciliation rules). Whether parties could, nevertheless, obtain the advantages of easy recognition and enforcement by entering the settlement agreement as an "*accord des parties*" in arbitration proceedings would depend on the arbitration rules and applicable law.

Article 20. Confidentiality

63. Article 20 deals with the second issue of confidentiality identified above (see para. 57). Subject to the agreement of the parties or mandatory law, it prohibits to disclose to outsiders any matters relating to the conciliation proceedings. Such guarantee of confidentiality seems conducive to reaching an amicable settlement in informal party proceedings with third-party assistance, although some existing conciliation rules allow publication to some extent and sometimes encourage communication to certain bodies, for example, in order to exert outside influence upon the parties to accept a settlement proposal.

D. Termination of conciliation proceedings and costs

Article 21. Termination of conciliation proceedings

Article 22. Resort to arbitral or judicial proceedings

64. Article 21 sets out the various possible ways in which the conciliation proceedings may be terminated and determines the effective date of the termination. Clarity about the duration of the proceedings is of general interest to the parties and the conciliator in that it informs them exactly about the point up to which their conduct is governed by the Conciliation Rules. The particular relevance of article 21 becomes apparent if viewed together with the rule in article 22 which precludes resort to arbitration or litigation during the period specified.

65. Articles 21 and 22 deal with the delicate question whether submission to conciliation has any binding effect and, if yes, to what extent. The existing rules provide a varied picture in that regard, ranging from the most liberal position, i.e. each party can at any time terminate the proceedings with immediate effect, to differently shaped obligations, e.g. to participate in the proceedings for a predetermined period of time or until a settlement proposal has been rejected.

66. The rule expressed in articles 21 and 22 is inspired by the principle of absolute freedom of the parties and the voluntary spirit of conciliation. It is also based on the conviction that any attempt to compel parties to continue participation in the proceedings, let alone to try to conciliate with one party being passive or obstructive, would not lead to a genuine settlement.

67. Article 21, therefore, allows not only both parties in common agreement but also either party alone to terminate the conciliation proceedings. The conciliation proceedings may also be terminated by the conciliator if he regards the conciliation effort as having failed and by the signing of the settlement agreement.

Article 23. Costs

Article 24. Fees of conciliator

Article 25. Deposits

68. Articles 23 to 25 deal with the fixing of the costs of conciliation and the deposit of costs. These provisions are similar to those adopted in the UNCITRAL Arbitration Rules (arts. 38 to 41), but modified because of the different nature of conciliation proceedings. For example, the costs of conciliation include costs of expert advice only if that advice had been requested by the conciliator after consultation with the parties (art. 23, para. (1) (b), comp. art. 38 (a), UNCITRAL Arbitration Rules). This provision reflects the conciliator's limited power to appoint experts discussed earlier (see above, para. 52; comp. art. 27, para. 1, UNCITRAL Arbitration Rules).

69. Another difference is the clear distinction between the sole or the presiding conciliator (whose fees are included in the costs of conciliation) and the two party appointees (whose close links to one of the parties are taken into account by excluding them from the normal cost calculation). Also, in conciliation, no matter what is its outcome, there is not one "successful" and one "unsuccessful" party. Thus, the costs of the conciliation proceedings are to be divided equally between the parties (art. 23, para. (2)), while the costs of arbitration are in principle borne by the unsuccessful party (cf. art. 40, para. 1, UNCITRAL Arbitration Rules). There may, however, be particular circumstances calling for a different apportionment of the costs of conciliation. This may be agreed between the parties themselves, possibly already in the settlement agreement as part of the over-all settlement of the dispute.

E. Exclusions in arbitral and judicial proceedings

Article 26. Role of conciliator in subsequent proceedings

70. Article 26 precludes the conciliator from acting in subsequent non-conciliatory proceedings concerning the same dispute in certain capacities in which his previous function and experience as conciliator could influence such proceedings and their outcome. It serves the purpose of conciliation proceedings unimpeded by any fear of later disadvantages. The most obvious incompatibility would exist in respect of an appointment as arbitrator after conciliation proceedings have failed. Here, the integrity and impartiality expected from an arbitrator could be impaired, for example, by any knowledge of an admission or suggestion made by a party during conciliation or by any settlement proposals which the conciliator may have made, possibly with reference to a particular legal rule.

71. While this exclusion is contained in most conciliation rules (sometimes "enforced" by requiring the conciliator upon his appointment to sign a respective statement), it seems also reasonable to preclude the conciliator from acting as representative, counsel or witness. Although the actual danger of bias, prejudice or

competitive advantage due to the knowledge obtained during conciliation may not be great, it seems appropriate to avoid even the slightest doubt or suspicion in that regard.

72. Besides, the parties can always agree to let the conciliator act in these functions, as this rule of preclusion is designed for their own protection. They may, for example, do so where the conciliator's familiarity with the dispute is regarded as an asset rather than a disadvantage or where the conciliation attempt has failed at an early stage without much involvement of the conciliator.

Article 27. Admissibility of evidence in other proceedings

73. Article 27 is designed to serve the same purpose as article 26, that is, to ensure negotiations in the spirit of conciliation unimpeded by any fear of later disadvantages. While article 26 deals with the personal aspect in terms of a later role of the conciliator, article 27 is concerned with substantive information or views expressed during the conciliation proceedings. It attempts to answer the difficult question to what extent such information should be inadmissible in other proceedings because of its possibly adverse effect on the position of a party.

74. Most existing conciliation rules deal with this problem, if at all, in rather general terms, such as "Nothing that has transpired in connexion with the conciliation proceedings shall in any way affect the legal rights of any of the parties whether in an arbitration or in a court of law". Such wording would seem to be too

narrow in that there may be more at stake than the effects of disclosure on the legal rights of the parties, i.e. other disadvantages which disclosure may have on the position of a party in arbitral or judicial proceedings.

75. On the other hand, such rule seems to be too wide in that it would cover "all that has transpired". It could include, for example, the information contained in an expert opinion or a report about an examination of goods which no longer exist at the time of the other proceedings. In such cases, it would seem reasonable, or even necessary, to allow the use of this evidence in other proceedings.

76. Article 27, therefore, attempts to define certain categories of information which would be inadmissible in other proceedings. Taking into account the purpose of the provision, it lists as "classified material" various kinds of information or statements given for the purpose of reaching a settlement agreement. It is this common thrust of the items listed which makes them potentially prejudicial to one or the other party and justifies their inadmissibility in other proceedings.

77. In conclusion, it may be noted here that article 27 is wider than article 26 in two respects. It does not only relate to subsequent proceedings and, what is even more important in practical terms, not only to proceedings in respect of the same dispute as the conciliation proceedings. This wider scope seems appropriate in view of the practical possibility that a certain legal aspect or fact which is, for example, the object of an admission or is an ingredient in a settlement proposal may become relevant in a different context which is the subject of other proceedings, possibly already at the time of the conciliation proceedings.

C. Report of the Secretary-General: study on the application and interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (A/CN.9/168)*

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* 20 April 1979.

INTRODUCTION

1. At its tenth session, the United Nations Commission on International Trade Law considered certain recommendations of the Asian-African Legal Consultative Committee (AALCC) relating to international commercial arbitration and requested the Secretary-General to prepare studies on these matters, in consultation with the AALCC and other interested organizations.¹ Pursuant to that request, the Secretariat had consultations with representatives of AALCC, the International Council for Commercial Arbitration and the International Chamber of Commerce. One of the proposals generated during the above discussions and consultations was to examine the application and interpretation of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958 Convention).

2. Such a study, it was thought, could be useful in assisting the Commission in its considerations on further work in respect of international commercial arbitration as set out in a note by the Secretariat (A/CN.9/169).^{*} It could help to clarify the practical application of the 1958 Convention and its relevance to the proposals of AALCC and, as these proposals were not meant to be exclusive, to other issues in need of clarification. It could also facilitate the decision on the suggestion of AALCC to implement its proposals by way of a protocol to the 1958 Convention, the desirability and feasibility of which would, to a considerable degree, depend on the results of the survey on the practical experience with that Convention.

3. The survey examines judgements of many national courts concerning the application and interpretation of the 1958 Convention. It analyses these decisions, the extracts of which have been published in the *Yearbook Commercial Arbitration*,² in order to identify any divergencies, ambiguities, lacunae or similar problems and to assess the value of the 1958 Convention in its practical application. The study also relies on pertinent commentaries by Prof. Pieter Sanders (Netherlands), the general editor of the *Yearbook Commercial Arbitration*.³

I. SCOPE OF APPLICATION OF 1958 CONVENTION (ART. I)

A. Recognition and enforcement of arbitral awards made in the territory of another State

4. According to article I, paragraph 1, the 1958 Convention applies "to the recognition and enforcement of arbitral awards made in the territory of a State other

than the State where the recognition and enforcement of such awards are sought". The two requirements, i.e. that there be an arbitral award and that such award be of foreign origin, have apparently not caused any considerable difficulties or problems. This is also true with regard to the two exceptions to the second requirement provided for in the Convention, i.e. the extension to arbitral awards made in the country of enforcement but not considered as domestic under its law (art. I, para. 1, second sentence) and the possible restriction to awards made in another Contracting State (by virtue of a reciprocity reservation under para. 3).

5. On occasion, however, the first requirement has been interpreted in divergent and sometimes doubtful ways. For example, the Court of Appeal at The Hague, Netherlands, held that the Convention did not apply to a certain decision by two arbitrators because it was not an arbitral award under the law of the State where it was made.⁴ Yet, the Dutch Supreme Court expressed the opposite view that the question of what constitutes an arbitral award under article I is not to be answered on the basis of a particular national law because the 1958 Convention refers to such law only in connexion with the grounds for refusal (art. V).⁵

6. Another example is the recent decision of the Italian Supreme Court according to which the 1958 Convention also applies to awards made in a so-called "*arbitrato irrituale*" (free, informal arbitration).⁶ It has been questioned whether this interpretation corresponds with the view of those who drafted the Convention.⁷ Yet, the result in the particular case might have been the same, due to another doubtful point of reasoning. The Supreme Court qualified the arbitration procedure under the rules of the London Corn Trade Association as "*arbitrato irrituale*" although there would be good reasons to regard it as "*arbitrato rituale*" (as was done by the lower court, the Court of Appeal of Venice).⁸ It may be concluded that such uncertainties could hardly be avoided by any uniform rule due to the great variety of arbitration procedures and rules.

B. Awards arising out of differences between persons, whether physical or legal

7. As the applicability of the 1959 Convention depends on the requirements stated above, the nationality of the parties (unlike under the 1927 Geneva Convention for the Execution of Foreign Arbitral Awards) is irrelevant even where a national law prohibits its nationals to exclude the jurisdiction of its courts by agreeing on foreign arbitration. This has been recognized, in

^{*} Reproduced in this volume, part two, III, D, below.

¹ UNCITRAL, report on the tenth session (A/32/17), para. 39, and annex II, paras. 27-37 (Yearbook . . . 1977, part one, II, A). The recommendations of AALCC are reproduced in A/CN.9/127 (*ibid.*, part two, III).

² See "Court decisions on the New York Convention 1958", *Yearbook Commercial Arbitration* (Deventer, Kluwer), vol. I-1976, pp. 182-206; vol. II-1977, pp. 232-253; vol. III-1978, pp. 274-295; vol. IV-1979 (to be published in May 1979), pp. 254-338.

³ *Yearbook Commercial Arbitration*, vol. I-1976, pp. 207-218; vol. II-1977, pp. 254-264; vol. IV-1979, pp. 231-253 (consolidated commentary for vols. III and IV by Prof. Pieter Sanders with the assistance of Dr. Albert Jan van den Berg). In the

following foot-notes the volumes of the *Yearbook Commercial Arbitration* will be referred to in the abbreviated term: "YCA I (1976)", "YCA II (1977)", "YCA III (1978)", and "YCA IV (1979)".

⁴ Hague Court of Appeal, decision of 8 September 1972, YCA I (1976), pp. 196, 197 (A).

⁵ Supreme Court (Hoge Raad), decision of 26 October 1973, YCA I (1976), pp. 196, 197 (B).

⁶ Corte di Cassazione (Sez. Un.), decision of 18 September 1978, No. 4167, YCA IV (1979), p. 296.

⁷ Sanders, "Consolidated Commentary", YCA IV (1979), pp. 232-233.

⁸ Cf. Sanders, *ibid.*, p. 233; also Corte di Appello di Firenze, decision of 22 October 1976, YCA III (1978), p. 279.

contrast to decisions of lower courts,⁹ by the Italian Supreme Court in holding that the 1958 Convention supersedes the respective provision of national law (art. 2, Code of Civil Procedure).¹⁰

8. In other contexts, however, the nationality of the parties and the international character of their transaction may become relevant. It may, for instance, be used as a criterion for the applicability of article II specifying the arbitration agreement (see below, para. 18). It may also lead to non-application of national law in the context of arbitrability and public policy under article V, paragraph 2 (see below, paras. 45-47). Another example is provided by the decision of a Tunisian court which held that a public enterprise, irrespective of whether under domestic law it can agree to arbitration, has the capacity to do so where it is a party to an international transaction with a foreign enterprise.¹¹

9. As indicated by this decision, public enterprises are included under the term "differences between persons, whether physical or legal". The same can be said about a State proper and its agencies although it has been doubted whether that would be true in the case where a State acts "*iure imperii*", i.e. in the exercise of its sovereign authority.¹² It may be submitted that the issue of State immunity, to which the distinction between "*acta iure imperii*" and "*acta iure gestionis*" relates, is not a problem of the scope of application of the 1958 Convention and that the Convention, while generally applicable, does not itself answer the question whether a State can successfully invoke the plea of State immunity. The defence of State immunity may rather become relevant in the context of other issues, for example, the validity of the arbitration agreement (art. II, para. 3; art. V, para. 1 (a)) or the public policy of the country where recognition and enforcement are sought (art. V, para. 2 (b)).

10. This interpretation seems to be supported by most of the court decision in point, although it is not always clear under which provision or criterion the issue of State immunity is dealt with. For example, a United States District Court held that the arbitration clause in a salvage contract which had been signed by the captain of a navy vessel was null and void for reasons of sovereign immunity which only Congress could have waived.¹³

⁹ Tribunale di Milano, decision of 11 December 1972, YCA I (1976), p. 191; Tribunale di Ravenna, decision of 15 April 1970, YCA I (1976), p. 190.

¹⁰ Corte di Cassazione (Sez. Un.) decision of 13 December 1971, No. 3620, YCA I (1976), p. 190; also decision of 25 January 1977, No. 361, YCA IV (1979), p. 284.

¹¹ Court of First Instance of Tunis, decision of 22 March 1976, YCA III (1978), p. 283.

¹² Hague Court of Appeal, decision of 8 September 1972, YCA I (1976), p. 197 (sub. A). Also the Dutch Supreme Court (Hoge Raad), in its decision of 26 October 1973 (YCA I (1976), p. 197 (B)), apparently regarded sovereign immunity as an issue of the applicability of the 1958 Convention, without denying the applicability because of the nature of the transaction ("on equal footing") and in view of "an international tendency to restrict the cases in which a State can invoke in a foreign court its immunity".

¹³ United States District Court for the Southern District of New York, decision of 21 December 1976, YCA III (1978), p. 290. The Court ruled that the Public Vessels Act, 46 USC sect. 781, which permits suits against the United States in its District

Another United States District Court rejected the defence of sovereign immunity, invoked by a foreign State in a dispute arising out of a contract for the delivery of cement, on the grounds that a consent to arbitrate constituted a waiver of State immunity under the United States Foreign Sovereign Immunities Act of 1976.¹⁴

11. "Differences between persons" contemplated in article I, paragraph 1, are not limited to commercial transactions. While this was certainly the type of transaction envisaged, the Convention permits such restriction merely by way of a reservation under article I, paragraph 3. The restriction to "differences arising out of legal relationships which are considered as commercial under the national law of the State making such declaration" has been rather narrowly interpreted by an Indian court. The Bombay High Court, while acknowledging the commercial nature of plant construction contract, held nevertheless that this transaction was not covered by the reservation as embodied in section 3 of the Foreign Awards (Recognition and Enforcement) Act of 1961 because there was no statutory provision or operative legal principle in Indian Law which conferred the commercial character upon the transaction at hand.¹⁵

C. Retroactivity of 1958 Convention and of implementing legislation

12. Unlike the Geneva Convention of 1927, the 1958 Convention contains no provision on whether it is to be applied retroactively, i.e. to arbitral awards made, or arbitration agreements concluded, before its entry into force. This has led to a number of divergent court decisions. For example, some courts have held that the Convention could not be applied to arbitral awards made before its ratification or entry into force,¹⁶ while others have applied it retroactively, often based on the view that the 1958 Convention is essentially of a procedural nature.¹⁷

13. The argument of the procedural character of the Convention was also used in favour of retroactivity in cases where the contract containing the arbitral clause had been concluded before the entry into force of the Convention and even where the arbitration proceedings had been started before that point of time;¹⁸ yet, other

Courts, cannot be viewed as a waiver of sovereign immunity by Congress in relation to arbitration agreements.

¹⁴ United States District Court for the District of Columbia, decision of 25 September 1978, YCA IV (1979), pp. 337, 338.

¹⁵ Bombay High Court, decision of 4 April 1977, YCA IV (1979), p. 271.

¹⁶ E.g. Cour de Justice civile de Genève, decision of 12 May 1967, YCA I (1976), p. 199; Obergericht of Basel, decision of 3 June 1971, YCA IV (1979), 309; High Court of Ghana, decision of 29 September 1965, YCA III (1978), p. 276 (based on an express provision against retroactivity of the Arbitration Act of 1961).

¹⁷ Hanseatisches Oberlandesgericht Hamburg, decision of 27 July 1978, YCA IV (1979), pp. 266, 267 (with regard to award made before entry into force of Convention in other Contracting State); United States District Court, Eastern District, New York, decision of 4 June 1974, YCA I (1976), p. 202; United States Court of Appeals for the Second Circuit, decision of 29 May 1975, YCA I (1976), p. 202.

¹⁸ Corte di Cassazione (Sez. Un.), decision of 13 December 1971, No. 3620, YCA I (1976), p. 190; also its decisions of 10 November 1973, No. 2969, YCA I (1976), p. 192, and of 25 January 1977, No. 361, YCA IV (1979), p. 284.

decisions stressed the substantive nature of the Convention and denied any retroactive effect under such circumstances.¹⁹

14. It may be suggested that this issue which is of particular relevance to newly adhering States be clarified in the legislation implementing the 1958 Convention. As to the substance of such provision, a solution in favour of retroactivity seems recommendable in view of the basically procedural nature of the Convention and also in view of the fact that the Diplomatic Conference on the 1958 Convention rejected a proposal to make the Convention applicable only to awards made after its entry into force.

II. VALID ARBITRATION AGREEMENT IN WRITING (ART. II AND ART. V, PARA. 1 (a))

A. Field of application

15. Article 2 defines the requirement of an arbitration agreement between the parties. It obliges each Contracting State to recognize such an agreement and, in particular, the courts of a Contracting State to refer the parties to arbitration when seized of an action in respect of a dispute which is the subject of such arbitration agreement. The requirement set out in article II is also relevant at a later stage, after an award has been made. Here, the defendant may invoke as ground for refusal under article V, paragraph 1 (a), that there was no valid arbitration agreement.

16. The interpretation and application of article II has given rise to a number of difficulties and divergencies that may, at least in part, be attributed to the haste with which this article was adopted in 1958: the provision on the recognition of arbitration agreements, originally reserved for a separate protocol, was incorporated into the 1958 Convention only on the last day of the Diplomatic Conference.

17. One of the questions not answered in the Convention is its scope of application in respect of the type or types of arbitration agreement. One possible criterion would be that the agreement provides for arbitration in a State other than the State where a court has to decide about the reference to arbitration. While this would correspond with the applicability of the Convention itself (under art. I), it should be noted that the issue dealt with here is different (as art. I relates to arbitral awards, not arbitration agreements) and that the above analogy is only rarely relied on.

18. Another criterion could be that at least one of the parties be a national of a State other than the one in which the court is seized with the matter at issue, although the nationality of the parties is irrelevant in the context of article I (see above, para. 7). This criterion has, for example, been adopted in the legislation imple-

menting the 1958 Convention in the United Kingdom of Great Britain and Northern Ireland (sect. 1, Arbitration Act of 1975) and the United States of America (9 USC S 202; with an extension to relationships between its nationals if reasonably related to a foreign State). Yet another possible criterion could be that the arbitration agreement concerns an international trade transaction (cf. art. I, para. 1 (a) of the European Convention of 1961). While the selection of the appropriate criterion is often made by the legislator, the following uncertainties and lacunae of the provision on arbitration agreements have been troubling the courts.

B. Requirement as to form of agreement ("in writing")

19. Article II, paragraph 1, requires an arbitration "agreement in writing" which is defined in paragraph 2 as "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams". This form requirement, which is also relevant in the context of article V, paragraph 1 (a), has given rise to a number of varying court decisions. The least problematic of the rather varied circumstances may be the case where parties agreed by telex to arbitration. Here, the Austrian Supreme Court, in contrast to the Lower Court, regarded this as equal to an exchange of telegrams (and added that the formal requirements for the arbitration agreement must not be judged by national law but exclusively by article II, paragraph 2, of the 1958 Convention).²¹

20. Less clear are the cases in which only one party signed the arbitration agreement and the other kept it without objecting. In one such case, where the other party protested against the arbitral clause only two months after the delivery of goods, a Dutch court interpreted article II rather extensively by holding that the form requirement was met because the parties had been aware of the existence of the arbitral clause.²² On the other hand, a very restrictive interpretation was adopted by the Italian Supreme Court in a similar case where, however, the other party had produced the contract in court, signed another copy, and appointed an arbitrator.²³ The ruling was based on the view that the admission of the existence of an arbitration agreement was not equal to a written document which under article II must clearly express the intent of both parties.

21. Yet, according to another Italian court the intention of the parties need not be expressed in the same document, as the agreement may under article II, paragraph 2, be contained in an exchange of letters or telegrams. Thus, an arbitral clause in purchase orders, not signed or returned by the seller, was held to be valid in view of that fact that invoices referring to the purchase orders were signed by him.²⁴ A similar reasoning underlies two decisions which held that a written manifestation

²¹ Oberster Gerichtshof, decision of 17 November 1971, YCA I (1976), p. 183.

²² Rechtbank Rotterdam, decision of 26 June 1970, YCA I (1976), p. 195.

²³ Corte di Cassazione, decision of 18 September 1978, No. 4167, YCA IV (1979), pp. 296, 300.

²⁴ Corte di Appello di Firenze, decision of 8 October 1977, YCA IV (1979), p. 289.

¹⁹ Corte di Cassazione (Sez. Un.), decision of 30 April 1969, No. 1403, YCA I (1976), p. 189; Tribunale di Ravenna, decision of 15 April 1970, YCA I (1976), p. 190.

²⁰ Corte di Cassazione (Sez. Un.), decision of 10 November 1973, No. 2469, YCA I (1976), p. 192.

of the will of the parties suffices as the 1958 Convention does not require the signature of both parties in case of an exchange of letters.²⁵ Thus, if not both parties have signed, at least an exchange of written communications would be required.

22. This requirement is rarely met in the case of a sales confirmation, a rather common trade practice. Where, as is often the case, the confirmation of sale was not returned to the other party, the arbitration agreement was held not to be valid under article II of the Convention, regardless of the *lex loci* which may not require the written form,²⁶ even where the parties had followed the same procedure before without objection.²⁷ It should be noted, however, that this result excludes recognition and enforcement of the arbitration agreement only under the 1958 Convention; as provided for under article VII, the Convention does not deprive parties from rights to enforcement under other legal instruments, for example, a national arbitration law,²⁸ a bilateral treaty²⁹ or another Convention (e.g. the European Convention of 1961).³⁰

23. Additional problems arise where third persons such as agents or brokers are involved. In one case, for example, a broker had sent a note containing an arbitration clause to the parties who, without signing it, acknowledged receipt. He had also sent them sales confirmations which were signed and returned to the broker but not forwarded to the other party. The confirmation of the sales terms by both parties was held to be sufficient on the ground that the applicable national law authorized the broker to receive the written declarations of the will of the parties.³¹ In a similar case, the signing of an agreement by brokers was held to be sufficient as such signing was equal to party signatures under the applicable national law.³²

24. The applicable national law was also relied on in answering the related question whether the power of attorney must be in writing, as required for the conclusion of the arbitration agreement under article II. The Italian Supreme Court held that under French law (in contrast to Italian law) a power of attorney may be granted orally (and proven by testimony).³³ Yet, other courts decided that the form requirement of article II

should also be applied to the power of attorney,³⁴ because otherwise the purpose of article II would be defeated.³⁵

25. A different problem arises in the rather common fact situation that the contract does not contain an arbitral clause as a result of express agreement but that the parties refer to general conditions, or use a standard form, containing an arbitral clause. Here, one could hesitate to recognize such reference as a valid arbitration agreement in view of the purpose of the form requirement under article II. Most courts, however, have regarded the incorporation as sufficient, for example, with regard to general conditions,³⁶ to standard forms of contract,³⁷ and charter parties referred to in bills of lading.³⁸

26. The same result was reached by Italian courts in regarding article II as a uniform rule which supersedes domestic law and, therefore, not applying provisions of Italian law which require specific approval in writing of the arbitral clause if contained in general conditions or model contracts.³⁹ However, the Italian Supreme Court held that a mere reference is not sufficient,⁴⁰ even where the arbitral clause is contained in the contract form signed by the parties.⁴¹ Following the rationale of the domestic law rule, i.e. to ensure awareness of the parties, the Supreme Court has made an exception where the contract was the result of specific negotiations which made the parties aware of the consequences agreed to.⁴² Another obvious exception would be where the Italian law is not applicable, for example, to a contract concluded in another State.⁴³

C. Referral to arbitration (art. II, para. 3)

27. According to paragraph 3 of article II, parties to a valid arbitration agreement shall, upon request by one of them, be referred to arbitration by any court seized of an action relating to the same subject-matter. The decision about a stay of court proceedings is in some cases complicated by the fact that more than two

²⁵ Obergericht of Basel, decision of 3 June 1971, YCA IV (1979), pp. 309, 310; Landgericht Zweibrücken, 11 January 1978, YCA IV (1979), pp. 262, 263.

²⁶ Corte di Appello di Napoli, decision of 13 December 1974, YCA I (1976), p. 193; Tribunal du canton de Genève, decision of 6 June 1967, YCA I (1976), p. 199.

²⁷ Oberlandesgericht Düsseldorf, decision of 8 November 1971, YCA II (1977), p. 237.

²⁸ E.g. decision above, foot-note 27.

²⁹ E.g. Bundesgerichtshof, Federal Republic of Germany, decision of 9 March 1978, YCA IV (1979), p. 264.

³⁰ E.g. Bundesgerichtshof, Federal Republic of Germany, decision of 25 May 1970, YCA II (1977), p. 237.

³¹ Landgericht Hamburg, decision of 19 December 1967, YCA II (1977), p. 235.

³² Corte di Cassazione (Sez. Un.), decision of 8 April 1975, No. 1269, YCA II (1977), p. 247. The court added that the arbitration clause was binding since this document made express reference to the clause contained in the charter party.

³³ Corte di Cassazione (Sez. Un.), decision of 25 January 1977, No. 361, YCA IV (1979), p. 284.

³⁴ Supreme Court of Greece, decision of 14 January 1977, No. 88/1977, YCA IV (1979), p. 269.

³⁵ Landgericht Hamburg, decision of 16 March 1977, YCA III (1978), p. 274.

³⁶ Tribunal de Strasbourg, decision of 9 October 1970, YCA II (1977), p. 244; Bundesgerichtshof, decision of 12 February 1976, YCA II (1977), p. 242 (with the requirement that the general conditions be inserted in the contract or attached to it).

³⁷ E.g. United States District Court of the Southern District of New York, decision of 2 December 1977, YCA IV (1979), p. 331.

³⁸ Queen's Bench Division (admiralty court), decision of 13 January 1978, YCA IV (1979), p. 323; United States District Court of the Southern District of New York, decision of 18 August 1977, YCA IV (1979), p. 329.

³⁹ Corte di Appello di Firenze, decision of 8 October 1977, YCA IV (1979), p. 289; Corte di Appello di Napoli, decision of 20 February 1975, YCA IV (1979), p. 275; Corte di Appello di Torino, decision of 30 March 1973, YCA I (1976), p. 191.

⁴⁰ Corte di Cassazione (Sez. Un.), decision of 22 April 1976, No. 1439, YCA II (1977), p. 249.

⁴¹ Corte di Cassazione (Sez. Un.), decision of 25 May 1976, No. 1877, YCA III (1978), p. 279.

⁴² Corte di Cassazione (Sez. Un.), decisions of 18 April 1978, No. 1842, YCA IV (1979), p. 282, and of 12 May 1977, No. 3989, YCA IV (1979), p. 286; also Tribunale di Napoli, decision of 30 June 1976, YCA IV (1979), p. 277.

⁴³ Corte di Cassazione (Sez. Un.), decision of 8 November 1976, No. 4082, YCA IV (1979), p. 280.

parties are involved, not all of whom are bound by arbitration agreements. For example, where a parent company and its wholly owned subsidiary were sued, but only the parent company had concluded an arbitration agreement, the request of the subsidiary for a stay of court proceedings was granted.⁴⁴ However, where a distributor sued both the other party to the contract and a new distributor, allegedly appointed contrary to the sole distribution agreement, the arbitration clause in the contract was not viewed as an obstacle to joint court proceedings because both defendants were sued on substantially the same grounds and in order to avoid conflicting results.⁴⁵

28. On the other hand, substantial similarity of claims is no compelling reason for disregarding an arbitration agreement of two potentially liable parties. For example, in holding a time-charterer liable to an insurance company, the Moscow City Court observed that the defendant might obtain compensation from the shipowner under the charter party but that it could not decide that matter in view of the arbitration clause contained in the charter contract.⁴⁶ Even a claim which arose out of a relationship not governed by an arbitration agreement was referred to arbitration after it had been assigned (by a consignee) to a third person (charterer) who had agreed on arbitration with the defendant (in the charter party).⁴⁷

29. Another question relating to court jurisdiction is whether an arbitration agreement precludes an attachment or similar measure. Where such a procedure is not part of the normal enforcement of an award but requested during or even before arbitration proceedings, the answer depends on the understanding of the aim of the 1958 Convention, in particular, article II. Some courts have held that such pre-award attachments were not consistent with the arbitration agreements and the purpose of the 1958 Convention because they would in fact impede expeditious arbitration proceedings.⁴⁸ Yet, other courts have granted such attachments on the ground that these would not discourage resort to arbitration or obstruct the course of arbitral proceedings but would rather make the later award meaningful by preserving the subject-matter or assets intact within the jurisdictions.⁴⁹ It may be suggested that this issue possibly justifies a uniform rule of recommendation.

⁴⁴ High Court of Justice, Chancery Division, London, decision of 6 October 1977, YCA IV (1979), p. 317.

⁴⁵ Tribunale di Milano, decision of 22 March 1976, YCA II (1977), p. 248.

⁴⁶ Moscow City Court (Civil Dept.), decision of 6 May 1968, YCA I (1976), p. 206.

⁴⁷ United States District Court, C. D. California, decision of 2 December 1976, YCA III (1978), p. 289.

⁴⁸ United States Court of Appeals for the Third Circuit, decision of 8 July 1974, YCA I (1976), p. 204; United States District Court of the Southern District of New York, decisions of 22 December 1975, YCA III (1978), p. 286, and of 18 August 1977, YCA IV (1979), p. 329.

⁴⁹ United States District Court of the Southern District of New York, decision of 21 March 1977, YCA III (1978), p. 293 (based on sect. 8 of the US Arbitration Act, 9 USC); United States Court of Appeals, Second Circuit, decision of 20 June 1977, YCA IV (1979), p. 328; Queen's Bench Division (admiralty court), decision of 13 January 1978, YCA IV (1979), p. 323; Corte di Cassazione (Sez. Un.), decision of 12 May 1977, No. 3989, YCA IV (1979), p. 286.

III. PROCEDURAL RULES ON RECOGNITION AND ENFORCEMENT OF AWARDS (ARTS. III, IV)

30. Article III provides for recognition and enforcement of awards as governed by the 1958 Convention "in accordance with the rules of procedure of the territory where the award is relied upon". National procedural provisions which supplement the rules of the Convention have been applied in a number of cases reported in the *Yearbook Commercial Arbitration*.⁵⁰ The decisions relate, for example, to discovery of evidence, estoppel, set-off, consolidation or entry of judgement. However, these judgements do not warrant a close examination here as they reveal no particular difficulty with the interpretation of the Convention itself and pertain more to the interpretation of domestic laws.

31. Few decisions have been reported and apparently no serious problems encountered with regard to article IV which sets out the technical formalities for obtaining recognition and enforcement of an award.⁵¹ This should be welcomed in view of the importance of article IV: by requiring merely the furnishing of the award and the agreement, the Convention eliminates the former requirement of double-exequatur and concentrates judicial control in the country of enforcement. A party furnishing these two documents produces *prima facie* evidence of his right to enforcement of the award. His request is to be granted if none of the following grounds of refusal are proven by the other party (art. V, para. 1) or found by the court (para. 2).

IV. GROUNDS FOR REFUSING RECOGNITION AND ENFORCEMENT (ART. V)

A. Violation of principles of due process (para. 1 (b))

32. As the ground for refusal under paragraph 1 (a) has already been dealt with in connexion with article II, the first reason to be considered now is the one contained in subparagraph (b). This provision sets basic standards of due process by requiring proper notice of the appointment of the arbitrator and of the arbitration proceedings and by ensuring the party's ability to present his case.

33. Adequate information about the arbitrator and the proceedings is of particular importance in case of an award against an absent party.⁵² While this ground for refusal has been invoked in a number of cases, it was accepted in only one reported case.⁵³ Here, the names of the arbitrators were not made known to the parties, except for the president of the tribunal who signed the award. This procedure was held to violate standards of due process in that it precluded a party from effectively challenging an arbitrator. As to the formal requirements of the notice to the parties, two Mexican courts have

⁵⁰ Cf. commentaries to article III, YCA I (1976), p. 212; YCA II (1977), p. 258; YCA IV (1979), p. 243.

⁵¹ Cf. commentaries to art. IV, YCA I (1976), p. 213; YCA II (1977), p. 260; YCA IV (1979), p. 245.

⁵² Cf. Corte di Appello di Roma, decision of 24 September 1973, YCA I (1976), p. 192.

⁵³ Oberlandesgericht Köln, decision of 10 June 1976, YCA IV (1979), p. 258.

held that a specific national provision was not applicable on the ground that the parties had impliedly waived it by agreeing on a certain set of arbitration rules.⁵⁴

34. The principle of due process that parties should be able to present their case is regarded as very fundamental (and usually as part of a State's public policy). Yet, not every limitation or obstacle to a full presentation of the case leads to refusal of enforcement. For example, no violation was found where arbitrators did not postpone a hearing although a witness could not appear due to his prior commitment to lecture at university.⁵⁵ Also, where a party had not disclosed certain facts and the other party could not fully substantiate his claim, the defence was rejected on the ground that paragraph 1 (b) was not concerned with maturation of claims or other factual conditions for substantiation but merely secured the procedural right to present the case as possible at the time.⁵⁶

B. Decision on matters beyond scope of arbitration agreement (para. 1 (c))

35. Recognition and enforcement may be refused under paragraph 1 (c) if the award deals with a difference, or contains a decision on a matter, beyond the scope of the submission to arbitration. The few reported decisions dealing with this ground for refusal allow the conclusion that arbitrators very rarely exceed the substantive limits drawn by the parties. Where this defence was invoked it was either due to misinterpretation or based on objections not directly in point.

36. For example, one party alleged that a certain award was beyond the scope of submission because it was a declaratory award. That was rejected by the court on the ground that paragraph 1 (c) was concerned with substance, not procedure, and that a declaratory award is merely a procedure for deciding the substantive claim.⁵⁷

37. Another defendant based his objection under paragraph 1 (c) on the ground that the arbitration agreement was invalid because it did not clearly specify the disputes covered by it. This defence, which pertains more to subparagraph (a) than (c), was rejected because the defendant did not in fact assert a decision beyond the (allegedly indefinite) scope of submissions and for reasons of estoppel.⁵⁸ In another case, a party contended that the arbitrators had exceeded the terms of the arbitration agreement because the proceedings were

started after the expiration of an agreed period for arbitration claims. The Court of Appeals which had accordingly denied the competence of the arbitral tribunal was ordered to reconsider its decision in view of the ambiguity of the agreement clause invoked.⁵⁹

C. Irregularity in composition of arbitral authority or arbitration procedure (para. 1 (d))

38. Recognition and enforcement of an award may be refused under paragraph 1 (d) if "the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place". This provision implements the principle of the freedom of the parties in respect of the composition of the arbitration tribunal and the arbitral procedure primarily by the rules agreed upon by the parties and only then by the law of the place of arbitration if the parties have not exercised their freedom in regulating the procedural point at issue. This priority given to the parties' wishes, which is merely limited by the public policy ground under paragraph 2 (b), has been recognized in reported court decisions.

39. For example, where an arbitration had been conducted in two stages (first a quality arbitration by two experts, then the arbitration proper with three arbitrators), the court refused enforcement of the award on the grounds that this procedure, even if customary at the place of arbitration, was contrary to the express agreement (to settle "all disputes in one and the same arbitral proceedings") and unknown to the objecting party who had justifiably relied on the printed rules of local usage which did not mention such a two-state procedure.⁶⁰ The same result was reached, and the prevailing nature of the agreement over national law underlined, where parties had agreed on arbitration by three arbitrators, the third to be chosen by the two party-appointees.⁶¹ Relying on a national law provision under which the third arbitrator would only act as umpire, the two arbitrators, after agreeing on a decision, had not regarded it as necessary to appoint a third arbitrator.

40. An interesting contrast becomes apparent in respect of another case where the same composition had been envisaged by the parties.⁶² Here, the responding party refused to appoint his arbitrator and the claimant designated the one arbitrator, appointed by him, as a sole arbitrator as provided for in the law of the country where the arbitration took place. Enforcement of the award was granted on the ground that such appointment procedure was in accordance with the national law although a different composition of the arbitral tribunal had been agreed upon by the parties. The supplementary

⁵⁴ Tribunal Superior de Justicia, Eighteenth Civil Court of First Instance for the Federal District of Mexico, decision of 24 February 1977, YCA IV (1979), p. 301; Tribunal Superior de Justicia, Court of Appeals (Fifth Chamber) for the Federal District of Mexico, decision of 1 August 1977, YCA IV (1979), p. 302.

⁵⁵ United States Court of Appeals, Second Circuit, decision of 23 December 1974, YCA I (1976), p. 205.

⁵⁶ United States District Court, District of New Jersey, decision of 12 May 1976, YCA II (1977), p. 250.

⁵⁷ United States District Court, Eastern District of Michigan, Southern Division, decision of 15 March 1977, YCA III (1978), p. 291.

⁵⁸ President of Rechtbank, The Hague, decision of 26 April 1973, YCA IV (1979), p. 305 (the estoppel was based on the fact that the defendant, assisted by a lawyer, had two years earlier participated in negotiations and not objected to the conditions of the arbitration agreement).

⁵⁹ Bundesgerichtshof, Federal Republic of Germany, decision of 12 February 1976, YCA II (1977), p. 242 (including the decision of the Lower Court).

⁶⁰ Appellationsgericht Kanton Baselstadt, decision of 6 September 1968, YCA I (1976), p. 200.

⁶¹ Corte di Appello di Firenze, decision of 13 April 1978, YCA IV (1979), p. 294.

⁶² Corte di Appello di Venezia, decision of 21 May 1976, YCA III (1978), p. 277.

reliance on national law ("failing such agreement") was justified in view of the fact that the arbitration agreement did not contain a provision for the particular contingency of a refusal by one party to appoint his arbitrator. It may be added that this judgement also deals with another aspect pertaining to paragraph 1 (d), i.e. qualification of the arbitrator. Objections based on bias or non-qualification are apparently not uncommon but without success at the stage of enforcement.⁶³

D. *Award not yet binding or has been set aside*
(para. 1 (e))

41. Under article V, paragraph 1 (e), recognition and enforcement may be refused if "the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made". As already mentioned in the context of article IV (see above, para. 31), the 1958 Convention does not require a double-exequatur or an enforcement order of the country of origin but merely that the award has become binding. "Binding" means that the award is no longer open to ordinary means of recourse, such as appeals to a court or a second arbitration instance;⁶⁴ extraordinary means of recourse, which may lead to setting aside, annulment or suspension, are relevant as ground for refusal only after they have been successful (cf. text of para. 1 (e) and of art. VI).

42. This interpretation has been generally adopted in the reported decisions, except for few inconsistent remarks, e.g. "the award is entitled to confirmation since it attained the status of judgment in the country where it was made"; "the awards became binding at the moment they were deposited with the court of the place of arbitration".⁶⁵ The same positive assessment is justified with regard to annulment as the second ground for refusal under paragraph 1 (e).

43. It may be noted that the 1958 Convention does not determine the grounds on which an award may be set aside, unlike the European Convention of 1961 (art. IX) which allows setting aside only on the grounds set out as reasons for refusal in paragraph 1 (a) to (d) of the 1958 Convention. Thus, the 1958 Convention, in effect, lends force to reasons which may be rather unexpected due to the disparity of national laws or which may be so much geared to particular local circumstances that their forced recognition in the country of enforcement would seem inappropriate.

E. *Dispute not arbitrable under law of country where enforcement is sought* (para. 2 (a))

44. According to article V, paragraph 2 (a), recognition and enforcement may be refused if the subject-matter of the difference is not capable of settlement by

⁶³ E.g. also United States Court of Appeals for the Fifth Circuit, decision of 19 July 1976, YCA II (1977), p. 252.

⁶⁴ Thus, e.g., Tribunale di Napoli, decision of 30 June 1976, YCA IV (1979), p. 277; Landgericht Bremen, decision of 8 June 1967, YCA II (1977), p. 234.

⁶⁵ Cf. commentaries to article V 1 (e), YCA I (1976), p. 218 ("Enforcement in U.S.A.", (3)), and YCA II (1977), p. 262.

arbitration under the law of the country where recognition and enforcement is sought. This and the other reason contained in article V, i.e. enforcement "contrary to public policy", paragraph 2 (b), are to be taken into account by the competent authority *ex officio* because they are within the substantive domain of the country of enforcement and intended to serve its interests.

45. However, enforcement of awards has rarely been refused on the ground of non-arbitrability.⁶⁶ That is in conformity with a recognizable trend to interpret the grounds for refusal narrowly. Restrictive national laws are often applied in a more lenient way to international agreements than to purely domestic transactions or even interpreted as merely governing domestic affairs.⁶⁷

F. *Enforcement contrary to public policy* (para. 2 (b))

46. The same tendency of restraint is particularly apparent in decisions considering the public policy ground (para. 2 (b)). Here, the hesitation to impose domestic standards on international transactions is expressed by a distinction between international public order and domestic public order or by a restriction to extreme, intolerable cases.⁶⁸ For example, in the above reported case where a sole arbitrator had made the award although the agreement had provided for three arbitrators (see para. 40), the court granted enforcement although the procedure was contrary to domestic public policy.⁶⁹ Various courts held that the enforcement of foreign awards which did not state the reasons was not contrary to public policy under paragraph 2 (b) although the lack of reasons in domestic awards would violate domestic public policy.⁷⁰

47. In a similar vein, the mere fact that only nationals of the country of arbitration had been allowed as arbitrators was not viewed as a violation of public policy.⁷¹ As these examples indicate, the public policy ground is often examined where none of the other grounds for refusal could be invoked. Yet, the experience gathered from the reported decisions leads to the conclusion that enforcement of foreign arbitral awards is refused only in exceptional cases.

CONCLUSIONS

48. The survey reveals that there are wide areas within the realm of the 1958 Convention which have not

⁶⁶ Cour d'appel de Liège (Belgium), decision of 12 May 1977, YCA IV (1979), p. 254.

⁶⁷ E.g. United States Supreme Court, decision of 17 June 1974, YCA I (1976), p. 203.

⁶⁸ Obergericht Basel, decision of 3 June 1971, YCA IV (1979), p. 309.

⁶⁹ Corte di Appello di Venezia, decision of 21 May 1976, YCA III (1978), p. 277.

⁷⁰ E.g. Corte di Appello di Firenze, decision of 8 October 1977, YCA IV (1979), p. 289; Hanseatisches Oberlandesgericht Hamburg, decision of 27 July 1978, YCA IV (1979), p. 266; Corte di Appello di Napoli, decision of 20 February 1975, YCA IV (1979), p. 275.

⁷¹ Bundesgericht (Switzerland), decision of 3 May 1967, YCA I (1976), p. 200; Oberster Gerichtshof (Austria), decision of 11 June 1969, YCA II (1977), p. 232; Bundesgerichtshof (Federal Republic of Germany), decision of 6 March 1969, YCA II (1977), p. 235.

given rise to any noteworthy problems. The same can be said about the articles which have not been specifically dealt with here. Certain difficulties and divergencies have been discovered in the application and interpretation of articles II and V, and, to a lesser degree, article I.

49. The problems encountered are sometimes due to the fact that the 1958 Convention does not regulate certain issues. This has on occasions led to uncertainty about the applicable law, e.g. in respect of the validity of the arbitration agreement, and, due to the disparity of national laws, to different results. One possible way of improvement could be to attempt to reduce that disparity by recommending uniform rules which would take into account the specific features of international arbitration agreements and awards. That would be in con-

formity with the discernible trend of national restraint in international contexts.

50. However, the problems identified in this report are not of such a magnitude that their existence would justify the preparation of a protocol to the 1958 Convention. In the light of the more than 100 reported decisions on the 1958 Convention, one cannot but conclude that this Convention has satisfactorily met the general purpose for which it was adopted and that, for that reason, it would, at least at this juncture, be inadvisable to amend its provisions. Notwithstanding this, other steps designed to eliminate certain problem areas could well be taken which, if successful, would facilitate the application of the Convention. These steps are discussed in document A/CN.9/169.

D. Note by the Secretariat: further work in respect of international commercial arbitration (A/CN.9/169)*

1. At its tenth session, the United Nations Commission on International Trade Law (UNCITRAL) considered certain recommendations on international commercial arbitration addressed to it by the Asian-African Legal Consultative Committee (AALCC).¹ AALCC in its decision, reproduced in document A/CN.9/127** and briefly commented upon in a note by the Secretariat (A/CN.9/127/Add.1), had recommended, *inter alia*, clarification of the following issues:

"(a) Where the parties have themselves chosen the arbitration rules for settling their disputes, the arbitration proceedings should be conducted pursuant to those rules notwithstanding provisions to the contrary in the law applicable to the arbitral procedure and the award rendered should be recognized and enforced by Contracting States to the 1958 New York Convention;

"(b) Where an arbitral award has been rendered under procedures which operate unfairly against a party, recognition and enforcement may be refused;

"(c) Where a governmental agency is a party to a commercial transaction and it has entered in respect of that transaction into an arbitration agreement, it should not be able to invoke sovereign immunity in respect of an arbitration commenced pursuant to that agreement."²

2. The Commission, in its decision of 17 June 1977, requested the Secretary-General to consult with AALCC and other interested international organizations and to prepare further studies on the matters raised by AALCC.³

3. The Secretary-General submitted in document A/CN.9/168*** a study on the application and interpretation of the 1958 New York Convention on the Rec-

ognition and Enforcement of Foreign Arbitral Awards. The present note sets forth certain suggestions as to what further steps could usefully be taken by the Commission in respect of international commercial arbitration. It reflects the discussions and views expressed at the tenth session of the Commission as well as the consensus reached by the participants in a consultative meeting held at Paris on 7 and 8 September 1978.⁴

4. It may be recalled that AALCC suggested that a protocol to the 1958 New York Convention could possibly clarify the issues identified by it. During the discussions at the Commission's tenth session the predominant opinion was that, if it were decided at a later stage to implement the proposals of AALCC, the preparation of a protocol to the 1958 New York Convention was not an appropriate approach.⁵ That view was shared by the participants in the consultative meeting referred to above.

5. The principal reason advanced in the Commission and the consultative meeting was that the 1958 New York Convention had been widely accepted and was, despite some minor deficiencies, considered to be a successful instrument for facilitating the recognition and enforcement of foreign arbitral awards. This assessment is confirmed by the survey of more than 100 court decisions on the application and interpretation of the 1958 New York Convention to be found in document A/CN.9/168. As stated in the conclusions therein (para. 50), the Convention has satisfactorily met the general purpose for which it was adopted and the problems identified in that survey are not of such a magnitude that their existence would justify the preparation of a protocol to the 1958 New York Convention or the modification of some of its provisions.

* Participants in this meeting were representatives of the Commission's secretariat and of the secretariat of AALCC, and members of the International Council for Commercial Arbitration (ICCA) and of the Commission on International Arbitration of the International Chamber of Commerce (ICC). Discussions were also held by the Commission's secretariat with representatives of member States of AALCC at the twentieth session of AALCC held at Seoul from 19 to 26 February 1979.

⁵ A/32/17, annex II, para. 31 (Yearbook ... 1977, part one, II, A).

* 11 May 1979.

** Yearbook ... 1977, part two, III.

*** Reproduced in this volume, part two, III, C, above.

¹ UNCITRAL, report on the tenth session (A/32/17), annex II, paras. 27-37 (Yearbook ... 1977, part one, II, A).

² A/CN.9/127, annex; also reproduced in Yearbook ... 1977, part two, III.

³ A/32/17, para. 39 (Yearbook ... 1977, part one, II, A).

6. The participants in the consultative meeting referred to earlier were of the unanimous view that it would be in the interest of international commercial arbitration if UNCITRAL would initiate steps leading to the establishment of uniform standards of arbitral procedure. It was considered that the preparation of a model law on arbitration would be the most appropriate way to achieve the desired uniformity. Such undertaking, if successful, would also meet the concerns expressed in the AALCC recommendations. It would have to be considered whether such model law should be geared to international commercial arbitration or whether it should cover both international and domestic arbitration proceedings.

7. The major reason for this proposal is the fact that most national laws on arbitral procedure were drafted to meet the needs of domestic arbitration and that many of these laws are in need of revision. A model law could therefore be useful particularly if it would take into account the specific features of international commercial arbitration and modern arbitration practice. Another reason, which was stated by Professor Ion Nestor (Romania) in his report on arbitration submitted to the fifth session of the Commission,⁶ is the need for greater uniformity of national laws on arbitration.

8. Yet another reason is the divergence existing between frequently used arbitration rules and national laws; this is the area of concern expressed by AALCC in its recommendations. For example, some national laws restrict the power of the parties to determine the applicable

⁶ A/CN.9/64, para. 140 (Yearbook . . . 1972, part two, III).

law. Some national laws do not recognize the competence of the arbitral tribunal to decide about its own jurisdiction, or they provide for judicial control over the composition of the tribunal and sometimes even over the application of substantive law. Other laws establish certain nationality requirements for the arbitrators or require the award to be accompanied by a statement of reasons irrespective of any agreement by the parties to the contrary.

9. It is suggested that an UNCITRAL model law on arbitral procedure would, if implemented at the national level, solve many of the problems referred to. It would also establish universal standards of fairness and would, thus, meet the concern expressed in one of the proposals of AALCC. Moreover, such a model law would prevent some, if not all, of the difficulties detected in the survey on the application and interpretation of the 1958 New York Convention (cf. A/CN.9/168, para. 49). Finally, by the elimination of certain local particularities in national laws, a model law would be relevant in the context of the proposal of ICC to limit the reasons for setting aside awards to the grounds for refusing recognition and enforcement specified in article V, paragraph 1 (a-d) of the 1958 New York Convention.

10. If the Commission were to agree with the above recommendation, it may wish to request the Secretary-General (a) to prepare an analytical compilation of provisions of national laws pertaining to arbitration procedure, setting forth the major differences between such provisions, and (b) to prepare, in consultation with interested international bodies, a preliminary draft of a model law on arbitral procedure.

E. Note by the Secretariat: issues relevant in the context of the UNCITRAL Arbitration Rules (A/CN.9/170)*

1. The secretariat of the Commission wishes to draw attention to two issues that have arisen in the context of the UNCITRAL Arbitration Rules. These issues relate to the use of the Rules in institutional arbitration and to the designation of an appointing authority.

I. THE USE OF THE UNCITRAL ARBITRATION RULES IN ADMINISTERED ARBITRATION

2. The Commission will recall that when the Rules were first submitted in preliminary draft form¹ they provided for "administered" and "non-administered" arbitration, depending on whether the parties selected an arbitral institution to administer the arbitration (administered arbitration) or agreed to arbitration without selecting such an institution (non-administered arbitration). The differences between the draft rules applicable to these two types of arbitration were slight. Basically, the arbitral institution in administered arbitration was entrusted with the functions which, in non-administered arbitration, were those of the appointing authority.

3. The Commission, when it considered the preliminary draft Rules at its eighth session (1975), had a full discussion on the desirability of including administered arbitration within the scope of the UNCITRAL Arbitration Rules. The prevailing view in the Commission was "to exclude, for the time being, administered arbitration from the scope of the Rules, but to permit parties to designate in advance a person or institution to carry out the functions of an appointing authority as specified in the Rules".²

4. Since 1977, when the Rules were issued, several arbitral institutions have declared their willingness to serve as an administrative body in connexion with the UNCITRAL Arbitration Rules or have adopted these Rules as their own. One example is provided by the rules of procedure of the Inter-American Commercial Arbitration Commission (IACAC), issued on 1 January 1978. The IACAC rules reproduce the substantive provisions of the UNCITRAL Arbitration Rules as "adapted to the institutional requirements of the Inter-American Commercial Arbitration Commission". An example of

* 11 May 1979.

¹ A/CN.9/97 (Yearbook . . . 1975, part two, III, 1).

² UNCITRAL, report on the eighth session (A/10017), p. 41 (Yearbook . . . 1975, part one, II, A).

such adaptation is that the term "IACAC" is substituted in the IACAC rules for "UNCITRAL" and "appointing authority". The parties are deemed to have made the IACAC rules a part of their arbitration agreement whenever they have provided for arbitration by the Inter-American Commercial Arbitration Commission or under its rules. Another example of the adoption of the UNCITRAL Arbitration Rules by an arbitral institution is found in the Arbitration Rules of the London Court of Arbitration (1978 edition) which make provision for subsidiary³ and primary⁴ application of the UNCITRAL Arbitration Rules. Yet another example is where an arbitral institution, though it has its own set of rules has declared that it is prepared to act in accordance with any other set of rules. This was done, for instance, by the Arbitration Institute of the Stockholm Chamber of Commerce which referred in particular to the UNCITRAL Arbitration Rules.⁵

5. The question of the use of the UNCITRAL Arbitration Rules in administered arbitration was raised in a somewhat different context at the recent session of the Asian-African Legal Consultative Committee (AALCC) at Seoul in February 1979. The dispute settlement scheme evolved by the AALCC envisages arbitration under the auspices of national institutions or regional centres, *ad hoc* arbitration under the UNCITRAL Arbitration Rules and also under the auspices of international agencies in specific areas. AALCC has established regional centres for arbitration at Kuala Lumpur and at Cairo and will soon establish a third centre in an African country. At its Seoul session AALCC, in its Sub-Committee on International Trade Law Matters, discussed, *inter alia*, the question of the extent to which the UNCITRAL Arbitration Rules could be used by a regional centre as its own rules and what modifications would be necessary in that case. The issue in particular is that the regional centres, in contrast to other existing arbitral institutions, do not yet have their own arbitration rules. While it is of course for AALCC and the regional centres to determine which institutional rules should be adopted, it would assist the secretariat of the Commission, which collaborates closely with the secretariat of AALCC, if the Commission were to have an exchange of views on the general issue raised in this part of the note.

6. There are thus different ways in which arbitral institutions have approached the UNCITRAL Arbitration Rules in the context of administered arbitration. Several conclusions may be drawn:

(a) Although the Rules were written with non-administered arbitration in mind, they have nevertheless proved to be suitable for use in administered arbitration. The IACAC Arbitration Rules, for instance, are identical to the UNCITRAL Arbitration Rules except for

³ Rule 2 (8): "Unless otherwise provided in these Rules, the UNCITRAL Arbitration Rules shall apply to an arbitration held under these Rules."

⁴ Rule 2 (9): "If the parties so agree, the arbitration shall be conducted under the UNCITRAL Arbitration Rules to the exclusion of such of these Rules as are at variance with the UNCITRAL Rules."

⁵ *Arbitration in Sweden*, published by the Stockholm Chamber of Commerce (1977), p. 8.

certain modifications of form, to permit accommodation of these Rules by IACAC, and the addition of an administrative fee schedule.

(b) The mere fact that arbitral institutions have adapted, or seek to adapt, the UNCITRAL Arbitration Rules to their institutional requirements seems to indicate that there might be a need, if not for UNCITRAL rules for administered arbitration, then for a general recommendation as to how the Rules might best be adapted to such arbitration.

(c) Whilst the adaptation of the UNCITRAL Arbitration Rules to administered arbitration may be seen as promoting the establishment of uniform standards of arbitral procedure, two questions should nevertheless be considered. First, should the Commission scrutinize the use of its Rules in such a manner? Secondly, what is the situation when parties have agreed to arbitration under the UNCITRAL Arbitration Rules before an arbitral institution which, in one way or another, administers arbitration "in accordance with" the Rules? As to the latter question, it would appear that no ambiguities exist where, as is the case with the Arbitration Institute of the Stockholm Chamber of Commerce, the arbitral institution has declared that it is prepared to act in accordance with the UNCITRAL Arbitration Rules and as an appointing authority under these Rules. Ambiguity may exist, however, where, as under rule 2 (9) of the Arbitration Rules of the London Court of Arbitration, the rules of the arbitral institution remain applicable to the extent they are not "at variance with the UNCITRAL Rules".

II. THE APPOINTING AUTHORITY

7. The UNCITRAL Arbitration Rules provide, in specified instances, for the intervention of an appointing authority. The parties may designate an appointing authority at the time the arbitration agreement is concluded or such authority may thereafter be agreed upon by the parties when they wish to enlist its assistance in the appointment of an arbitrator. In one particular instance the appointing authority may be designated by the Secretary-General of the Permanent Court of Arbitration at The Hague (arts. 6 (2) and 7 (2) (b)).

8. Under the Rules, the functions of an appointing authority, in the circumstances specified in the relevant articles, are:

(a) To appoint the sole arbitrator (art. 6 (2)) or, where there are to be three arbitrators, the second arbitrator (art. 7 (2)) and the presiding arbitrator (art. 7 (3));

(b) To decide on the challenge of an arbitrator (art. 12 (1));

(c) To appoint an arbitrator in replacement (art. 13);

(d) To assist the arbitral tribunal in fixing its fees (art. 39 (2), (3) and (4)) and the amounts of any deposits or supplementary deposits of costs (art. 41).

9. Since the UNCITRAL Arbitration Rules have not been written for institutional arbitration, the assistance of an appointing authority may be an essential

element in the arbitral process. The Commission recognized this by drafting detailed rules regarding the functions of the appointing authority and by advocating, in the model arbitration clause accompanying the Rules, that the name of the institution which, or the person who, will function as appointing authority be indicated in the arbitration clause itself.

10. The parties may of course designate any institution or person as appointing authority, but it is likely that the consent of the institution or person concerned would first have to be obtained. There is, moreover, not always absolute certainty that a person or institution, once designated, will indeed act, or act promptly, when called upon to do so under the Rules. Also, parties and their counsel may well be ignorant as to which institutions or persons can be designated as an appointing authority.

11. These are some of the reasons that have been advanced in communications to the secretariat as warranting the establishment of a list of arbitral institutions that have declared their willingness to act as appointing

authority under the UNCITRAL Arbitration Rules and whose prior consent to act as such would not be required. As was stated in a letter received earlier this year by the secretariat: "In view of all the skill and work that have gone into the drafting of the UNCITRAL Rules, it would be unfortunate if their use were hampered by the mere lack of recognized appointing authorities".

12. It may be noted that several institutions have already indicated that they are prepared to serve as appointing authority under the UNCITRAL Arbitration Rules. Among these are the following: The International Chamber of Commerce, the London Court of Arbitration, the American Arbitration Association, and the Arbitration Institute of the Stockholm Chamber of Commerce.

13. The Commission may wish to consider the desirability of issuing a list of arbitral institutions that have declared their willingness, if so requested to serve as appointing authority under the UNCITRAL Arbitration Rules. It is assumed that many institutions would make such a declaration if their attention were drawn to the appropriateness of doing so.

IV. NEW INTERNATIONAL ECONOMIC ORDER

Report of the Secretary-General: possible work programme of the Commission (A/CN.9/171)*

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Introduction

1. The General Assembly, in resolutions 3494 (XXX) of 15 December 1975, 31/99 of 15 December 1976 and 32/145 of 16 December 1977, called on the Commission "to take account of the relevant provisions of the resolutions of the sixth and seventh special sessions of the Assembly that laid down the foundations of the new international economic order, bearing in mind the need for United Nations organs to participate in the implementation of those resolutions".

2. The Commission, in a decision taken at its eleventh session,¹ expressed the view that "in order to implement the mandate given to it by the General Assembly in the above resolutions, it (was) necessary ...

* 2 May 1979.

¹ Report of the United Nations Commission on International Trade Law on the work of its eleventh session, *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17 (A/33/17)*, para. 71 (Yearbook ... 1978, part one, II, A).

to determine the legal implications of the new international economic order". By that decision, the Commission requested the Secretary-General to place before it at the present session a report setting forth

"subject-matters that are relevant in the context of the development of a new international economic order and that would be suitable for consideration by the Commission, accompanied, where appropriate, with background reports and recommendations as to the action that could be taken by the Commission;".

This report is submitted in compliance with that request.

3. In accordance with the Commission's request, the Secretary-General, by a note verbale dated 6 October 1978, invited Governments to submit their views and proposals as to subject-matters that are relevant in the context of the development of a new international economic order and that would be suitable for consideration by the Commission. As at 16 April 1979, 13 replies of Governments had been received.

4. The Commission, at its eleventh session, also established a working group but deferred the designation of the States members of that Group until its present session.

5. This report, divided in two chapters, is based on:

(a) The views expressed and proposals submitted at the eleventh session of the United Nations Commission on International Trade Law (UNCITRAL);

(b) The discussions in the Sixth Committee on the Commission's report on the work of its eleventh session, and

(c) The suggestions contained in the replies of Governments to the note verbale mentioned in paragraph 3.

6. Chapter I of the report follows the order of the Programme of Action on the Establishment of a New International Economic Order, which is contained in General Assembly resolution 3202 (S-VI). This, it is thought, facilitates the consideration of those aspects of the new international economic order which might have a legal bearing.

I. Review of subject-matters of possible relevance to international trade

A. GENERAL PRINCIPLES OF INTERNATIONAL ECONOMIC DEVELOPMENT

1. General principles

7. The resolutions of the sixth and seventh special sessions of the General Assembly and the Charter of Economic Rights and Duties of States set forth general principles which should govern international economic relations.² The General Assembly declared as the fundamental purpose of the Charter of Economic Rights and Duties of States that of promoting the establishment of the new international economic order, based on equity, sovereign equality, interdependence, common interest and co-operation among all States, irrespective of their economic and social systems.³

8. In respect of these general principles a proposal was submitted by the Philippines at the thirty-first session of the General Assembly, entitled "Draft convention on the principles and norms of international economic development law".⁴ At its thirty-third session, the General Assembly adopted a recommendation⁵ by the Sixth Committee to include in the provisional agenda of the thirty-fourth session (1979) an item entitled "Consolidation and progressive development of the principles and norms of international economic law relating in particular to the legal aspects of the new international economic order".⁶

² General Assembly resolution 3201 (S-VI), "Declaration on the Establishment of a New International Economic Order", para. 4.

³ General Assembly resolution 3281 (XXIX), "Charter of Economic Rights and Duties of States" (hereinafter referred to as the Charter), Preamble.

⁴ A/C.6/31/L.7.

⁵ Official Records of the General Assembly, Thirty-third Session, Plenary Meetings, 86th meeting, para. 64.

⁶ Ibid., Thirty-third Session, Annexes, agenda item 123, document A/33/484, para. 5.

9. So far, the general principles of international economic law have been the subject of discussion mainly in the Sixth Committee. It was there stated that international law should be codified in such a way as to make it an instrument of justice in international relations by facilitating the regulation and development of equitable and mutually beneficial co-operation among States not only in the political and legal fields but also in trade and other economic matters.⁷ The fifth session of the United Nations Conference on Trade and Development (UNCTAD) will also deal with the further development of the rules and principles governing international economic relations.⁸

2. Non-discrimination

10. In the Sixth Committee, reference was made to the need for elimination of discrimination in international trade⁹ (Algeria, Chad, Cuba, Czechoslovakia, Democratic Yemen, Iran, Pakistan, Ukrainian SSR, USSR). The view was expressed that the application of discriminatory measures constituted one of the basic obstacles to the development of international trade. The Commission may recall that at its second session it considered but did not accept, a proposal that work should be started on the preparation of a draft convention on the elimination of discrimination in laws affecting international trade.

B. COMMODITIES

1. Commodity agreements

11. The Programme of Action on the Establishment of a New International Economic Order lists as one important measure the expeditious formulation of commodity agreements, where appropriate, in order to regulate and to stabilize the world markets for raw materials and primary commodities.¹⁰ The subject of commodity agreements was also included among the proposals of several Governments (Colombia, New Zealand, Togo) for the work of UNCITRAL.

12. In the view of one Government (New Zealand), the Commission's legal expertise might be of considerable value in facilitating the preparation, *inter alia*, of the draft of the Third International Cocoa Agreement, in the negotiating of an international arrangement to replace the International Wheat Agreement of 1971¹¹ and in the preparation of the draft International Rubber Agreement.

2. Producers' associations

13. According to the Programme of Action, all efforts should be made to facilitate the functioning of producers' associations, including their joint marketing arrangements.¹² In the course of the last 20 years about

⁷ A/33/419, report of the Sixth Committee.

⁸ General Assembly resolution 33/154, para. 3 (c).

⁹ See article 4 of the Charter.

¹⁰ General Assembly resolution 3202 (S-VI), "Programme of Action on the Establishment of a New International Economic Order", I, 3 (a) (iii). See also article 6 of the Charter.

¹¹ See also General Assembly resolution 33/156.

¹² General Assembly resolution 3202 (S-VI), I, 1 (c). See also article 5 of the Charter.

20 interregional and regional producers' associations have been created.¹³ Within the framework of work on economic co-operation among developing countries, UNCTAD has prepared two studies on the legal aspects of multinational marketing enterprises.¹⁴ This subject has also been proposed by Governments for the work of UNCITRAL (Colombia, Togo).

C. TRADE

1. Generalized system of preferences

14. According to General Assembly resolutions 3202 (S-VI)¹⁵ and 3362 (S-VII)¹⁶ a generalized system of preferences for their exports is of fundamental interest to developing countries.¹⁷ UNCTAD has set up a Special Committee on Preferences which has reviewed the existing arrangements for consultations on the system since 1973 and has made suggestions for the improvement of such procedures.¹⁸ Consultations on the system have also taken place within the framework of the General Agreement on Tariffs and Trade (GATT).¹⁹ Proposals for codification of a generalized system of preferences have been made in the Sixth Committee (Pakistan) and in reply to the note of the Secretary-General (Togo).

2. Most-favoured-nation treatment

15. Apart from, and without prejudice to, generalized non-discriminatory and non-reciprocal preferences in favour of developing countries, international trade should, according to article 26 of the Charter, be conducted on the basis of most-favoured-nation treatment.

16. The International Law Commission (ILC) included the most-favoured-nation clause in its programme of work in 1967, because it felt that clarification of its legal aspects might be of assistance to UNCITRAL. ILC has now elaborated a set of draft articles on most-favoured-nation clauses, which will be considered by the thirty-fifth session (1980) of the General Assembly.²⁰

3. Trade obstacles

17. The above-mentioned resolutions call for the progressive removal of tariff and non-tariff trade barriers and of restrictive business practices.²¹ This item has also been proposed for the work of UNCITRAL during the debate in the Sixth Committee (Nigeria) and by one Government (Togo) in its reply. The removal of

tariff and non-tariff barriers to trade is included in the programmes of work of UNCTAD and GATT as well as of the Economic Commission for Europe (ECE). In its resolution 33/196 on protectionism, the General Assembly urged the developed countries to eliminate speedily all forms of protectionist measures and practices against the exports of developing countries.

18. Within ECE, the Committee on the Development of Trade deals with trade obstacles of all kinds. ECE has published inventories of trade obstacles²² and encouraged practical action aiming at the reduction or progressive elimination of all kinds of obstacles to the development of trade.²³ Some countries have concluded bilateral agreements on the reciprocal elimination of obstacles to trade.²⁴

4. Restrictive business practices and unfair competition

19. As far as the elimination of restrictive business practices is concerned, the resolution of the seventh special session of the General Assembly called for a set of equitable principles and rules.²⁵ Within UNCTAD, a Group of Experts on Restrictive Business Practices has been established which has so far held five sessions.²⁶ As a result of the work of this Group a first draft of a model law or laws on restrictive business practices to assist developing countries in devising appropriate legislation has been prepared by the UNCTAD secretariat.²⁷ On the recommendation of the UNCTAD Trade and Development Board²⁸ the General Assembly decided to convene between September 1979 and April 1980 at Geneva a United Nations Conference on Restrictive Business Practices to negotiate and to adopt a set of multilaterally agreed equitable principles and rules for the control of restrictive business practices having adverse effects on international trade, particularly that of developing countries, and on the economic development of those countries.²⁹

20. Work on the limitation of restrictive business practices has been carried out also in connexion with the preparation of an international code on transfer of technology and a code of conduct of transnational corporations. Other organizations like the World Intellectual Property Organization (WIPO) and the United Nations Industrial Development Organization (UNIDO) are also dealing with the problem of restrictive business practices.

21. It has been proposed by one Government (Yugoslavia), that UNCITRAL should also take up this item. In the view of this Government, UNCITRAL should analyse whether all aspects of the problem of restrictive business practices have been included in the work done so far and should moreover function as a co-

¹³ See "Progress achieved by Governments in the implementation of the Charter of Economic Rights and Duties of States" (E/5999).

¹⁴ TD/B/C.7/28 and TD/B/C.7/30.

¹⁵ I, 3 (a) (x).

¹⁶ I, 8.

¹⁷ See also articles 18 and 19 of the Charter.

¹⁸ TD/B/713; see also decision 179 (XVIII) of the Trade and Development Board (*Official Records of the General Assembly, Thirty-third Session, Supplement No. 15 (A/33/15)*, vol. II, p. 157).

¹⁹ See also General Assembly resolution 33/199, "Multilateral trade negotiations".

²⁰ General Assembly resolution 33/139.

²¹ General Assembly resolutions 3202 (S-VI), I, 3 (a) (ii), and 3362 (S-VII), I, 8.

²² "Consolidated inventory of administrative restrictions in East-West trade" (TRADE/R.336); see also a note of the secretariat, TRADE/R.353.

²³ See article 14 of the Charter.

²⁴ This new type of agreement has been concluded by Finland and five socialist countries, see ECE/TRADE/128, p. 9.

²⁵ General Assembly resolution 3362 (S-VII), I, 10.

²⁶ See A/33/15, p. 80; see also TD/B/717 (TD/B/C.2/AC.6/10; TD/B/C.2/AC.6/13, TD/B/C.2/AC.6/18).

²⁷ TD/B/C.2/AC.6/16.

²⁸ General Assembly resolution 178 (XVIII).

²⁹ General Assembly resolution 33/153.

ordinating body which should ensure conformity between the various drafts.

22. Closely related with the problem of restrictive business practices are questions of unfair competition. The Programme of Action deals with them under a special aspect. It calls for efforts to eliminate such protective and other measures of state as constitute unfair competition.³⁰ So far, unfair competition is dealt with mainly in national legislation, while existing international conventions, which do not cover all aspects of the problem, are not adhered to by all States.

5. Code on international trade law

23. Trade obstacles in a wider sense also arise because of differences in the legal régime of international trade applied by the various countries. The General Assembly has time and again reaffirmed

"its conviction that the progressive harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, especially those affecting the developing countries, would significantly contribute to universal economic co-operation among all States on a basis of equality and to the elimination of discrimination in international trade and, thereby, to the well-being of all peoples".³¹

It is on this ground that the General Assembly justified the convening of a United Nations Conference on Contracts for the International Sale of Goods.³²

24. The preparation of a code of international trade law was proposed as a topic for the first programme of work of the Commission and was mentioned again as a possible subject for inclusion in the new work programme of UNCITRAL.

25. In support of the inclusion of this topic, it was noted that the current method of unifying special areas of trade law might eventually produce lack of harmony between the various instruments, both because the instruments might contain conflicting rules and because the same problems might be resolved differently in different instruments.

26. The importance of this topic was also stressed during the discussion in the Sixth Committee on the report of the eleventh session of the Commission (Brazil, Hungary, Iran). A unified international trade law free from any discrimination was called a vital necessity for all States (Afghanistan; similar views were expressed by Sierra Leone and Trinidad and Tobago).

27. In underlining the relation between the establishment of the new international economic order and the legal regulation of international trade, the view was expressed that the principles of the new international economic order should form the general part of a future code of international trade law (Poland).

28. The progressive codification of international trade law is included in the programme of work of the International Institute for the Unification of Private Law

(UNIDROIT), which so far has drafted, within a proposed general part of a future code, the chapters on the formation and interpretation of contracts.³³

6. Uniform conflict of law rules

29. Another means of removing legal uncertainties is the elaboration of uniform conflict of law rules. This topic has been included, though without priority, into the new programme of work of the Commission.³⁴ Governments have, in their proposals, especially referred to questions of the applicable law in respect of the transfer of technology (New Zealand) and the activities of transnational corporations (Nigeria).

30. The Hague Conference on Private International Law has dealt with conflict of law rules regarding international sale of goods and other types of contracts. One Government (Senegal), in its reply, suggested that the Commission should, as it did in respect of the unification of substantive rules of law, also undertake work on uniform conflict of law rules for all international commercial contracts.

7. General conditions, standard clauses and model rules

31. In addition to the drafting of conventions and similar legal instruments, general conditions, standard clauses, and model rules for various types of contracts could be prepared; this would be of special interest to developing countries. The study of international contract practices has already been included into the programme of work of the Commission.³⁵

32. In so far as special contractual clauses are concerned, proposals have been made in respect of clauses concerning the effect of change of circumstances on contracts (Poland, Senegal), *force majeure* clauses (Poland, Senegal), clauses in respect of contractual compensation and contractual penalties (Poland), and good faith (Senegal).

33. Additional proposals have been made regarding the preparation of general terms of auctions (Poland) and the elaboration of a legal instrument guaranteeing rules of honest conduct in negotiations of trade contracts (Poland).

8. Arbitration

34. Another proposal in the context of the new international economic order deals with international arbitration, especially the composition of the arbitration court and the effects of the arbitral awards (Senegal). Arbitration has already been included into the programme of work of UNCITRAL as a matter of priority.³⁶

9. Recognition and enforcement of judgements

35. In reply to the note of the Secretary-General it has been proposed that the Commission study questions

³³ UNIDROIT 1979, Study L, document 15.

³⁴ A/33/17, paras. 41 and 46.

³⁵ See A/CN.9/159 to 161 (reproduced in this volume, part two, I, A to C), and 162.

³⁶ See A/CN.9/166 to 170 (reproduced in this volume, part two, III).

³⁰ General Assembly resolution 3202 (S-VI), I, 2 (h).

³¹ General Assembly resolution 33/93.

³² A/CONF.97/2.

related to the recognition and the enforcement of judgments in commercial matters (Madagascar). This topic is included in the list of possible items for the programme of work of the Commission,³⁷ but was not given priority.

D. MONETARY SYSTEM

1. Monetary system in general

36. The Programme of Action attaches great importance to the international monetary system and to the financing of the development of developing countries. Related subjects have been proposed for the work of the Commission by some Governments (Colombia, Togo). These proposals include:

The renegotiation of debts of developing countries;³⁸

Measures against the impact of the inflation on the economies of developing countries;³⁹

Measures to eliminate the instability of the international monetary system;⁴⁰

The maintenance of the real value of the financial resources of the developing countries.

2. Exchange rates

37. As far as the uncertainty of exchange rates is concerned, UNCITRAL has taken up this matter in the context of the contractual relations of commercial parties.⁴¹

3. Tax treaties

38. In this context it may be mentioned that another legal aspect of the international financial relations has been dealt with by a group of experts on tax treaties⁴² between developed and developing countries,⁴³ and that a model bilateral convention for the avoidance of double taxation and the prevention of tax evasion is under preparation.⁴⁴

E. INDUSTRIALIZATION

1. Investment law

39. The Programme of Action on the Establishment of a New International Economic Order asks for all efforts on the part of the developed countries to encourage investors to finance industrial production projects, particularly export-oriented production, in developing countries, in agreement with the latter and

within the context of their laws and regulations.⁴⁵ It has been proposed by one Government (Togo) that UNCITRAL should deal with the industrial development of developing countries.

2. Investment contracts

40. Investment itself, the importation and installation of industrial units require various commercial contracts, most of which have not been the subject of appropriate legal regulation, whether on the national or international level. To assist developing countries in this field, UNIDO has prepared various manuals and guidelines.⁴⁶ ECE drafted guides⁴⁷ and general conditions⁴⁸ which could be used by developing countries.

41. In the view of one Government (Yugoslavia), the establishment of uniform rules for consulting contracts⁴⁹ and engineering contracts would constitute a significant contribution to the regulation of this important matter, since these types of contracts are insufficiently regulated.

3. Economic co-operation agreements

42. The setting up of new industrial capacities including raw materials and commodity-transforming facilities in the developing countries requires a close co-operation between these countries and the developed countries, as well as among developing countries themselves.⁵⁰ International economic co-operation will be a major item on the agenda for the special session of the General Assembly in 1980.⁵¹

43. One Government (Czechoslovakia) has proposed to regulate, perhaps in the form of a convention, the obligation of the States to co-operate mutually in their international economic relations.⁵² The co-operation between States was also proposed by another Government (Togo).

44. In its resolution entitled "Development and international economic co-operation", the seventh special session of the General Assembly entrusted UNIDO, in consultation with UNCTAD, with the work on a general

⁴⁵ General Assembly resolution 3202 (S-VI), III (b), Article 2, para. 2 (a), of the Charter provides that each State has the right to regulate and exercise authority over *foreign* investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities and that no State shall be compelled to grant preferential treatment to foreign investment.

⁴⁶ "A guide to industrial purchasing" (ID/82); "Subcontracting for modernizing economies" (ID/129); "Guidelines for contracting for industrial projects in developing countries" (ID/149).

⁴⁷ "Guide on drawing up contracts for large industrial works" (ECE/TRADE/117).

⁴⁸ General Conditions for the Supply of and Plant Machinery for Export, No. 188; General Conditions for the Supply and Erection of Plant and Machinery for Import and Export, No. 188A; Additional Clauses for Supervision of Erection of Plant and Machinery Abroad, No. 188B; General Conditions for the Erection of Plant and Machinery Abroad, No. 188D.

⁴⁹ See also ID/3/Rev.1, "Manual on the use of consultants in developing countries".

⁵⁰ The United Nations Conference on Technical Co-operation among Developing Countries was held at Buenos Aires in 1978; see also General Assembly resolution 33/134.

⁵¹ General Assembly resolution 33/198.

⁵² The duty of States to co-operate is included in articles 7, 8 and 9 of the Charter.

³⁷ A/33/17, para. 42.

³⁸ See also General Assembly resolution 33/159, "Debt problems of the developing countries".

³⁹ See also General Assembly resolution 33/155, "Effects of the world inflationary phenomenon on the development process".

⁴⁰ This problem is dealt with by the International Monetary Fund.

⁴¹ See the study on clauses protecting parties against the effects of currency fluctuations (A/CN.9/164; reproduced in this volume, part two, I, D).

⁴² The work of the group of experts on tax treaties is also relevant to the formulation of a code of conduct for transnational corporations; see E/C.10/AC.2/10.

⁴³ See ST/ESA/11, "Guidelines for tax treaties between developed and developing countries".

⁴⁴ E/1978/36.

set of guidelines for bilateral industrial co-operation.⁵³ Both secretariats have dealt jointly with trade and trade-related aspects of industrial collaboration arrangements.⁵⁴ UNCTAD has emphasized the role of inter-governmental framework agreements in promoting industrial collaboration arrangements,⁵⁵ whereas UNIDO has examined the ways in which the instrument of inter-governmental agreements might be used as a framework for international industrial co-operation.⁵⁶

45. On a regional level, the Committee for Trade and Development of ECE has analysed co-operation and co-operation agreements for several years⁵⁷ and keeps a register of trade and co-operation agreements.⁵⁸

4. *Contracts on industrial co-operation*

46. The Committee for Trade and Development of ECE has formulated a guide on drawing up international contracts on industrial co-operation.⁵⁹ This guide is mainly, but not exclusively, concerned with co-operation arrangements between socialist and capitalist countries in Europe.

47. UNIDO has dealt with another type of contract which is used in the context of industrialization and investment, i.e., the contract to set up joint ventures.⁶⁰

F. TRANSFER OF TECHNOLOGY

1. *Importance of technology*

48. The transfer of technology has been singled out in the Programme of Action as an especially important item. It was advocated that not only an international code of conduct for the transfer of technology be formulated but also that commercial practices governing transfer of technology be adapted to the requirements of the developing countries.⁶¹ It may be noted that the resolution of the seventh special session contains a chapter on science and technology.⁶²

49. An over-all review of the application of science and technology in the developing countries and the international co-operation in this field will be undertaken by the United Nations Conference on Science and Technology for Development which will be convened in Vienna from 20 to 31 August 1979.⁶³

50. Questions of transfer of technology are also on the agenda of the third General Conference of UNIDO, to be convened at New Delhi from 21 January to 8 February 1980. Item 5 (b) (iii) of this agenda is formulated

⁵³ General Assembly resolution 3362 (S-VII), IV, 7.

⁵⁴ TD/B/C.2/188/Rev.1.

⁵⁵ UNCTAD/ST/MD/12, TD/B/C.2/179.

⁵⁶ ID/B/C.3/68.

⁵⁷ "Analytical report on industrial co-operation among ECE countries" (E/ECE/844/Rev.1).

⁵⁸ TRADE/R.334/Rev.2.

⁵⁹ ECE/TRADE/124.

⁶⁰ "Manual on the establishment of industrial joint-venture agreements in developing countries" (ID/68).

⁶¹ General Assembly resolution 3202 (S-VI), IV (a) and (d).

⁶² General Assembly resolution 3362 (S-VII), III.

⁶³ In this connexion, see especially A/CONF.81/PC.19, "Overview of activities of organs, organizations and programmes of the United Nations system", and A/CONF.81/PC.21, "Preliminary draft programme of action, target area III: transfer of technology for the benefit of development".

as "International co-operation in the field of transfer and development of industrial technologies with a view to increasing the technological capabilities of the developing countries".⁶⁴

2. *Code of conduct for the transfer of technology*

51. Several Governments, in their proposals for the work of UNCITRAL, have referred to the transfer of technology (Chad, Colombia, New Zealand, Togo, Yugoslavia). In the view of one Government (New Zealand), UNCITRAL should consider the code of conduct for the transfer of technology in relation to the most appropriate applicable law and to the settlement of disputes. Another Government (Yugoslavia) stresses the need of co-ordination in this field because several bodies currently deal with the transfer of technology.

52. Work on the code is being carried out in the United Nations Conference on an International Code of Conduct on the Transfer of Technology, which held its first session⁶⁵ from 16 October to 11 November 1978, on the basis of preparatory work by UNCTAD.⁶⁶ A resumed session took place during the first quarter of 1979. There will be a subsequent session if necessary.⁶⁷ Transfer of technology has been considered also in connexion with the activities of multinational corporations.⁶⁸

3. *Contracts for the transfer of technology*

53. The transfer of technology was one of the subjects suggested for examination by the Commission.⁶⁹ Apart from the work on an international code of conduct on the transfer of technology, UNCITRAL, in the view of one Government (Yugoslavia), should elaborate general terms or a standard contract on the transfer of technology among industrial and developing countries.

54. So far there exists no international unified law on licensing contracts (patents, trade marks, know-how) and most national legal systems do not regulate these contracts adequately. There are, however, studies, manuals and guidelines prepared by UNCTAD,⁷⁰ UNIDO,⁷¹ WIPO,⁷² and ECE.⁷³

⁶⁴ General Assembly resolution 33/77.

⁶⁵ TD/CODE TOT/10, report; TD/CODE TOT/9, draft code.

⁶⁶ TD/CODE TOT/1 and 4.

⁶⁷ General Assembly resolution 33/157.

⁶⁸ ST/ESA/12.

⁶⁹ A/33/17, para. 41, II (c), and para. 59.

⁷⁰ UNCTAD is preparing a handbook entitled "Transfer of technology"; see A/CONF.81/PC.19, p. 30.

⁷¹ See ID/98, "Guidelines for the acquisition of foreign technology in developing countries with special reference to technology licence agreements"; ID/187, "Development and transfer of technology series No. 1. National approaches to the acquisition of technology"; ID/189, "Development and transfer of technology series No. 2. UNIDO abstracts on technology transfer. Studies and reports on the development and transfer of technology (1970-1976)".

⁷² WIPO published a licensing guide for developing countries in 1977.

⁷³ ECE has elaborated a "Guide for use in drawing up contracts relating to the international transfer of know-how in the engineering industry" (TRADE/222/Rev.1); see also "Licensing and leasing" (TRADE/INF.2); further, ECE is preparing a manual on licensing procedures and related aspects of technology transfer (TRADE/R.374).

4. Industrial property rights

55. Some Governments (Colombia, Yugoslavia) have proposed that UNCITRAL deal with industrial property rights. In this field, UNCTAD has analysed the role of the patent system in the transfer of technology to developing countries⁷⁴ and WIPO has prepared various model laws for developing countries, notably on inventions, marks, trade names, acts of unfair competition, industrial designs, appellations of origin and indications of source.⁷⁵ Model laws for developing countries on inventions and know-how and on trade marks are to be issued by WIPO in 1979.⁷⁶

G. TRANSNATIONAL CORPORATIONS

1. Activities of transnational corporations

56. Chapter V of the Programme of Action deals with regulations of and control over the activities of transnational corporations.⁷⁷ In the course of discussions in the Sixth Committee (Colombia, Democratic Yemen, Kuwait, Nigeria, Syria, Yugoslavia), and in reply to the note of the Secretary-General (Colombia, Czechoslovakia, Poland, Senegal, Togo, Yugoslavia), many Governments have proposed that UNCITRAL should deal with transnational corporations.⁷⁸ It may be recalled that the past and current programmes of work of the Commission contain an item entitled "Multinational enterprises", but that the Commission did not accord priority to it.⁷⁹

57. It may be recalled that the Commission, at its eighth session, had before it a report of the Secretary-General⁸⁰ on multinational enterprises. The Commission decided to maintain this item on its agenda but not, for the time being, to undertake itself work on the subject.⁸¹ This decision was taken in view 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.

58. The Commission on Transnational Corporations established an Intergovernmental Working Group on a Code of Conduct, which held seven sessions so far (the eighth session will be in May 1979) and which will forward a draft Code of Conduct on Transnational Corporations⁸² to that Commission. The Commission on Transnational Corporations will consider the work related to the formulation of a code of conduct at its fifth session in May 1979.⁸³

⁷⁴ TD/B/AC.11/19.

⁷⁵ These model laws are available in English, French and Spanish.

⁷⁶ A/CONF.81/PC/19, p. 27.

⁷⁷ See also ST/ESA/15, "Summary of the hearings before the Group of Eminent Persons to Study the Impact of Multinational Corporations on Development and on International Relations".

⁷⁸ See Article 2, para. 2 (b), of the Charter.

⁷⁹ A/33/17, para. 41, II (b), and para. 59.

⁸⁰ A/CN.9/104 (Yearbook... 1975, part two, VI).

⁸¹ UNCITRAL, report on the eighth session (A/10017), para. 94 (Yearbook... 1975, part one, II, A).

⁸² E/C.10/AC.2/8 and 9. The report of the latest session of the Intergovernmental Working Group is not yet available.

⁸³ E/C.10/44.

59. One Government (Yugoslavia) considers as a very significant question of the law of the new international economic order the legal status of branch offices of transnational corporations in developing countries relative to head offices.

2. Illicit payments

60. In the context of transnational corporations, the Economic and Social Council established the *Ad Hoc* Intergovernmental Working Group on the Problem of Corrupt Practices, and requested United Nations agencies and bodies, especially UNCITRAL, to render such assistance to the *Ad Hoc* Intergovernmental Working Group as it may request.⁸⁴

61. After preparatory work by the *Ad Hoc* Intergovernmental Working Group,⁸⁵ the Economic and Social Council established a committee to prepare an international agreement on illicit payments. This committee held its first session from 29 January to 3 February 1979 and discussed a draft convention⁸⁶ which it is intended should be finalized at a second session in May 1979⁸⁷ and will eventually form the basis for consideration by a conference of plenipotentiaries in 1980.⁸⁸

H. PERMANENT SOVEREIGNTY OF STATES OVER NATURAL RESOURCES

1. Natural resources

62. Another item in the Programme of Action relates to assistance in the exercise of permanent sovereignty of States over natural resources.⁸⁹ The exploration and exploitation of natural resources is of great importance for development.⁹⁰ The General Assembly deals frequently with multilateral development assistance for the exploration of natural resources⁹¹ and the Economic and Social Council has established a Committee on Natural Resources.⁹² Several proposals of Governments for the work of UNCITRAL deal with the permanent sovereignty of States over natural resources (Colombia, Nigeria, Senegal, Yugoslavia).

2. Nationalization

63. Several proposals (Nigeria, Senegal, Yugoslavia) are concerned with compensation in cases of nationalization, expropriation and other aspects of transfer of ownership. These questions are considered as important and of universal significance and have been the centre of attention during the elaboration and discussion of the Charter of Economic Rights and Duties of States.⁹³ These questions have also been discussed in the Committee on Natural Resources⁹⁴ and in connexion with

⁸⁴ Economic and Social Council resolution 2041 (LXI).

⁸⁵ For the reports of this Working Group, see E/1978/39 and E/1978/115.

⁸⁶ E/AC.67/L.1 and L.2.

⁸⁷ E/AC.67/2.

⁸⁸ Economic and Social Council resolution 1978/71.

⁸⁹ General Assembly resolution 3202 (S-VI), VIII.

⁹⁰ *Ibid.*, IV (e).

⁹¹ General Assembly resolution 33/194.

⁹² Economic and Social Council resolution 1535 (XLIX).

⁹³ Controversy arose especially regarding the notion of "appropriate" compensation. See article 2, para. 2 (c), of the Charter.

⁹⁴ E/C.7/76, para. 73.

the elaboration of a code of conduct for transnational corporations.⁹⁵

3. Environment

64. One special aspect of natural resources is the environment. Proposals of Governments (Colombia, Poland) relate to the co-operation of States in evolving international norms and regulations in the field of the environment.⁹⁶ The United Nations Conference on the Law of the Sea deals with environmental questions in connexion with sea-bed resources and their protection. As regards the environment in general valuable work is being rendered by the United Nations Environment Programme (UNEP).⁹⁷

II. Issues for consideration

A. SCOPE OF LAW OF INTERNATIONAL TRADE

65. It would appear that the basic question which confronts the Commission is not whether the Commission should deal with the key issues of and general policies underlying the new international economic order as such. These issues and policies are to a great extent of a political and economic nature and cannot be dealt with by a legal body such as the Commission. Therefore, it would seem to follow that the Commission, in considering in what manner it could best implement the mandate conferred upon it by the General Assembly, should focus its attention on subject-matters in the area of international trade law that are relevant in the context of the new international economic order.

66. In this connexion it may be noted that the view has been expressed, during discussions in the Sixth Committee and in replies from Governments, that the preparation of legal instruments such as the UNCITRAL Arbitration Rules, the draft Convention on the Carriage of Goods by Sea and the draft Convention on Contracts for the International Sale of Goods, constitutes a significant contribution to the implementation of the new international economic order. This view was reiterated by the Asian-African Legal Consultative Committee (AALCC), at its twentieth session held at Seoul in February 1979, when it evaluated the action taken by the Commission at the latter's eleventh session "with regard to the recommendation by AALCC concerning UNCITRAL's future programme of work with particular emphasis on the aspect of legal implications arising from the new international economic order". The relevant part of the report⁹⁸ of the AALCC Standing Sub-Committee on International Trade Law Matters reads as follows:

"The discussion in the Sub-Committee revealed that, because of the specific nature of UNCITRAL's work and of the mandate given to it by the United

Nations General Assembly, it was first of all important that UNCITRAL gave due consideration to the policies underlying the new international economic order in each of the subject-matters under consideration by it, as appropriate. In this connexion, reference was made to the important work carried out by UNCITRAL in respect of the United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules), adopted by a United Nations conference of plenipotentiaries in 1978. That Convention had taken into account the interests of developing nations in this important mode of transport and had achieved a more equitable balance between the interests of the shipper and carrier.

"... The Sub-Committee was, therefore, of the view that the aims which the new international economic order sought to achieve would, in respect of UNCITRAL, best be served if an approach similar to that taken in respect of the new Hamburg Rules would permeate the other work of UNCITRAL."

67. Accordingly, the Commission, in considering its tasks and functions in respect of the new international economic order, may wish to conclude that the establishment of legal rules on several topics included in the past and current programmes of work is of direct relevance to the new international economic order.

68. Chapter I of this report sets forth a list of subject-matters which, in different degrees, may be said to bear upon international trade and to have legal implications. In this respect several points may be noted. First, if the Commission's traditional approach to the unification and harmonization of international trade law is used as a yardstick, the majority of subject-matters listed there could be considered as falling outside the scope of its work. Secondly, if by another interpretation of its mandate, the Commission would take up certain of the subject-matters listed in respect of which economic aspects are preponderant, it would probably be necessary for it to organize its working methods in such a way that the necessary consensus in respect of the broad content of the legal rules to be drafted is reached before the actual preparation of legal texts.

69. Therefore, it seems that the essential question is not so much whether the Commission has the mandate to deal with a given topic, but rather whether the Commission can realistically deal with such topic without losing its effectiveness as a legislative body. Past experience has shown that consensus and a high standard of expertise in matters under consideration are important elements of such effectiveness.

B. CO-ORDINATION AND CO-OPERATION

70. A second important issue, which was also raised by several Governments (Argentina, Germany, Federal Republic of, United Kingdom, Yugoslavia), concerns the co-ordination or work between international organizations and bodies within and without the United Nations system. This issue does not arise solely in the context of the new international economic order, though problems of co-ordination may be aggravated by the

⁹⁵ See art. 52 of the draft code.

⁹⁶ See article 30 of the Charter.

⁹⁷ See also Economic and Social Council resolution 1978/62, "International co-operation on the environment".

⁹⁸ Report of the Standing Sub-Committee on International Trade Law Matters of the Asian-African Legal Consultative Committee (twentieth session, Seoul, 20-26 February 1979), para. 9.

fact that the General Assembly called upon all organs of the United Nations to implement the new international economic order.

71. The terms of reference of the Commission expressly include the task of co-ordinating the work of organizations active in the field of international trade law and of encouraging co-operation among them. Adequate working relationships have been established with some international organizations, principally with those outside the United Nations system, but not as yet with others.

72. The purpose of co-ordination is not only to avoid duplication of efforts. More important is that the legal texts drafted by various organs and organizations in the international trade law field should reflect a common approach and constitute a coherent system. Also, there are indications that the legislative activity on the international level has now reached such proportions that, without effective co-ordination, a stage of confusion may well be reached very soon, leading to conflicting rules, and therefore non-ratification by States, or, simply, non-application by the courts. Hence, there is justification for a co-ordinating and, perhaps, supervisory body.

73. The Commission, at its eleventh session, considered a number of suggestions as to machinery for more effective co-ordination:

(a) Co-ordination by the secretariat, through inter-secretariat meetings;

(b) The establishment of a co-ordinating committee consisting of members of the Commission;

(c) The establishment of a steering committee composed of members of bodies engaged in the unification of international trade law.

While the procedure under (a) has led to positive results with organizations outside the United Nations system, it has proved inadequate within that system. It is submitted that a committee of the kind referred to under (b) or (c) above might be an appropriate procedure if it were given by the General Assembly express terms of reference.

74. It may be noted that, in the economic field, the General Assembly emphasized the need to oversee and monitor the implementation of the decisions and agreements reached in various appropriate fora of the United Nations and, to this end, decided to convene in 1980 a special session of the General Assembly in order to

ascertain the progress made in the establishment of the new international economic order and to take appropriate action for the promotion of the development of developing countries and international economic co-operation.⁹⁹ In this context, one Government (Argentina) suggested that the work of the Commission be co-ordinated with the work of the Committee of the Whole which was established by General Assembly resolution 32/174.

75. In the view of another Government (Yugoslavia), the fact that codification of international and uniform norms is performed by many organizations imposes the need for co-ordination of common and general matters; this would be in the interest of all those involved in the codification and the establishment of the new international economic order. In the view of that Government, as long as there is no co-ordinating centre for general legal issues, there will be not only the risk of duplication of work but also the danger of contradictory legislation.

76. It is clear that the Commission has no power to oblige other organizations to take up an item of work or cease to deal with an item. One course of action therefore would be to wait till other organizations refer certain subjects of a general legal nature to the Commission. One Government (United Kingdom) has suggested that UNCITRAL could assume on an agency basis the examination of certain aspects of a new international economic order referred to it by other United Nations bodies, which were appropriate to its expertise.

C. WORKING GROUP ON THE NEW INTERNATIONAL ECONOMIC ORDER

77. The Commission, at its eleventh session, established a Working Group on the New International Economic Order but deferred the designation of the States members of this Group until the present session.

78. Under the decision taken at the eleventh session, the Working Group would have as mandate to examine the present report in order to make recommendations as to specific topics that could appropriately form part of the programme of work of the Commission. It is thought that a general discussion in the Commission on the issues set forth in sections A and B of this chapter of the report would assist the Working Group in its task.

⁹⁹ General Assembly resolution 32/174.

V. TRANSPORT LAW

A. Report of the Secretary-General: survey of the work of international organizations in the field of transport law (A/CN.9/172)*

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Introduction

1. At its eleventh session (New York, 30 May-16 June 1978) the United Nations Commission on International Trade Law considered the future programme of work of the Commission.¹ In this connexion the Commission decided that priority should be given, *inter alia*, to consideration of the subject of transportation. The Commission requested the Secretary-General to prepare "studies setting forth the work so far accomplished by international organizations in the fields of multimodal transport, charter-parties, marine insurance, transport by container and the forwarding of goods".² The present report has been prepared pursuant to this request.

2. The report first mentions in brief the major resolutions of the General Assembly, the Economic and Social Council of the United Nations and the United Nations Conference on Trade and Development (UNCTAD) in the field of transport. The report then considers the work of international organizations on the five topics in the field of transportation law specifically referred to in the Commission's decision: multimodal transport, charter-parties, marine insurance, transport by container and the forwarding of goods.

I. Major resolutions of the General Assembly, the Economic and Social Council and UNCTAD in the field of transport (in chronological order)

3. In resolution 1082 A (XXXIX) of 30 July 1965, the Economic and Social Council noted the need for an integrated approach within the United Nations concerning transport policies, the importance of appropriate institutional arrangements for the development and maintenance of transport facilities, and the over-all responsibility of the Economic and Social Council and the Secretary-General in promoting and co-ordinating activities in the field of transport development.

4. The Economic and Social Council, by resolution 1373 (XLV) of 2 August 1968, requested the Secretary-General to assume responsibility for all forms of land transport, as well as water transport on inland waterways and by coastal or short-sea services, including port facilities associated with such transport. The resolution also asked the Secretary-General to co-ordinate all activities involving the use of more than one mode of transport and to undertake studies or research in the field of intermodal or interdisciplinary transport matters.

5. At its second session UNCTAD adopted resolution 14 (II) of 25 March 1968, by which it extended its competence to cover international shipping legislation, particularly concerning bills of lading for carriage of goods by sea, charter-parties, marine insurance and the possibility of drafting an international instrument dealing with international relations in shipping.

* 26 March 1979.

¹ *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17 (A/33/17)*, chap. IV (Yearbook ... 1978, part one, II, A).

² *Ibid.*, paras. 67 (c) (vii) and 68.

6. The Trade and Development Board of UNCTAD, by resolution 46 (VII) of 21 September 1968, instructed the Committee on Shipping of UNCTAD to create a Working Group on International Shipping Legislation and to establish the terms of reference of that Working Group on the basis of UNCTAD Conference resolution 14 (II) of 25 March 1968.

7. On 25 April 1969, the Committee on Shipping of UNCTAD adopted resolution 7 (III) creating an UNCTAD Working Group on International Shipping Legislation, which was charged with reviewing the economic and commercial aspects of international legislation and practices in the field of shipping and making recommendations to UNCITRAL concerning the drafting of new legislation or other appropriate action in the field of shipping. At its first session (Geneva, 1-12 December 1969), the UNCTAD Working Group on International Shipping Legislation adopted the following work programme, listed in order of priority: bills of lading, charter-parties, general average, marine insurance, and economic and commercial aspects of international legislation and practices in other areas of shipping.

8. By resolution 1734 (LIV) of 10 January 1973, the Economic and Social Council requested UNCTAD to take up the subject of international combined transport and to prepare studies on all relevant aspects, including such matters as effects on international trade and transport, balance of payments, costs of international transport, insurance, and the relation of the international combined transport of goods to national policies on transport, trade and insurance. The Trade and Development Board of UNCTAD was requested to establish an intergovernmental preparatory group charged with preparing a draft convention on international multimodal transport for submission to a conference of plenipotentiaries.

9. The Economic and Social Council, by decision 6 (LVI) of 14 May 1974, requested the Trade and Development Board of UNCTAD to convene an *ad hoc* intergovernmental group on container standards. This intergovernmental group would assess the work done by the International Organization for Standardization (ISO) concerning freight containers and the impact of standardization in container transport on the economies, particularly of developing countries, and would consider the practicability and desirability of drawing up an international agreement on container standards.

10. By resolution 2043 (LXI) of 5 August 1976, the Economic and Social Council recalled its and the General Assembly's prior resolutions on the decentralization of economic and social activities and the strengthening of the regional commissions. The Council reaffirmed that the regional commissions should become the main general economic and social development centres within the United Nations system for their respective regions.

11. The Committee for Programme and Co-ordination (CPC) noted in the report on its seventeenth ses-

sion³ that for maritime transport at the global level the Intergovernmental Maritime Consultative Organization (IMCO) was responsible for maritime matters that were primarily of a technical nature or concerned the safety of shipping and UNCTAD was responsible for trade and development and related aspects of shipping. The Committee recommended that primary responsibility within the United Nations system should be vested in UNCTAD for multimodal transport and containerization, in the United Nations Department of Economic and Social Affairs for new transport technologies and in the Economic Commission for Europe (ECE) (acting on behalf of the system) for the transport of dangerous goods.⁴ The conclusions and recommendations of CPC were endorsed by the Economic and Social Council in resolution 2098 (LXIII) of 3 August 1977.

12. In the report on its seventeenth session, CPC also recommended that primary responsibility within the United Nations system for transport by land and inland waterways, coastal shipping and short sea services should be transferred from United Nations Headquarters to the regional commissions. This recommendation was endorsed by the Economic and Social Council in its resolution 2098 (LXIII) of 3 August 1977. By resolution 32/206 of 21 December 1977, the General Assembly authorized the Secretary-General to submit programme proposals for transferring resources for the increased activities in the transport programmes of the regional commissions and the actual transfer of funds was then approved by General Assembly resolution 33/116 C (III) of 29 January 1979.

13. Following the adoption of Economic and Social Council resolution 2098 (LXIII) of 3 August 1977,⁵ assigning primary responsibility for work on multimodal transport and containerization to UNCTAD, the Trade and Development Board of UNCTAD adopted decision 169 (XVIII) on 15 September 1978. This decision expanded the terms of reference of the UNCTAD Committee on Shipping to include work on the global aspects of multimodal transport and containerization, wherever there is a sea link.

II. Survey of the work of international organizations on the five topics specifically referred to at the eleventh session of UNCITRAL

A. MULTIMODAL TRANSPORT

(a) Work linked to the work of UNCTAD on multimodal transport

14. Based on Economic and Social Council resolution 1734 (LIV) of 10 January 1973,⁶ the Trade and Development Board adopted decision 96 (XII) of 10 May 1973 which established an Intergovernmental Preparatory Group on a Convention on International Multimodal Transport. The Preparatory Group was requested

³ *Ibid.*, Thirty-second Session, Supplement No. 38 (A/32/38), para. 14 (1).

⁴ *Ibid.*, para. 14 (2).

⁵ See para. 11 above.

⁶ See para. 8 above.

to elaborate a preliminary draft for a Convention on International Multimodal Transport, bearing in mind the particular needs and requirements of developing countries.

15. For the purposes of the work of UNCTAD, international intermodal transport is considered to cover the international transport of goods from one country to another by more than one mode of transport (sea, rail, road or air) on the basis of a single transport document issued by a "multimodal transport operator" to the shipper of the goods. In a number of studies prepared for the Preparatory Group, the UNCTAD secretariat has examined the economic, commercial and legal issues involved in international multimodal transport. Studies by the UNCTAD secretariat have also explored the liability, insurance, customs and documentary régimes applicable to such transport operations, as well as the technical, financial and labour aspects of modern transport techniques.

16. The Intergovernmental Preparatory Group held six sessions and at the conclusion of the sixth session (21 February-9 March 1979) it approved a draft Convention on International Multimodal Transport. The draft Convention would set internationally binding norms of liability for multimodal transport operations and would establish an international legal régime for contracts and documents used in the course of international multimodal transport. The draft Convention contains provisions dealing, *inter alia*, with the following subjects: the scope of application of the Convention; issuance, content and evidentiary effect of multimodal transport documents; liability of the multimodal transport operator for loss, damage or delay in the delivery of the goods; liability of the consignor of the goods; claims and actions arising under the Convention; and the rights of national authorities to have consultations with multimodal transport operators, especially before the introduction of new technology and services.

17. The draft Convention on International Multimodal Transport will be submitted for consideration to a conference of plenipotentiaries. Issues left unresolved by the Intergovernmental Preparatory Group and which will have to be settled by the conference include the treatment of customs questions in the Convention, the monetary limits on the liability of multimodal transport operators both for concealed and for non-concealed damage to the goods, and certain aspects of the required content of multimodal transport documents.

18. The General Assembly, by resolution 33/160 of 20 December 1978, decided that the Trade and Development Board of UNCTAD should convene a conference of plenipotentiaries on a convention on international multimodal transport. The Conference is expected to be convened in November 1979.

19. The regional commissions have co-operated with UNCTAD in the elaboration of a draft Convention on International Multimodal Transport by organizing regional seminars and preparatory meetings on the subject, preparing working papers, and providing technical

assistance to States in the region prior to their participation in sessions of the UNCTAD Intergovernmental Preparatory Group on a Convention on International Multimodal Transport.

20. A number of international organizations followed closely the work of the UNCTAD Intergovernmental Preparatory Group by attending its sessions or presenting their views by means of written comments. These international organizations included, *inter alia*, IMCO, the International Civil Aviation Organization (ICAO), the League of Arab States (LAS), the Organization of African Unity (OAU), the Organization of American States (OAS), the European Economic Community (EEC), the Organization for Economic Co-operation and Development (OECD), the Central Office for International Railway Transport (OCTI), the Customs Co-operation Council (CCC), the International Chamber of Commerce (ICC), the International Road Transport Union (IRU), the Baltic and International Maritime Conference (BIMCO), the International Air Transport Association (IATA), the International Chamber of Shipping (ICS), the International Federation of Forwarding Agents' Associations (FIATA), the International Maritime Committee (IMC) and the International Shipowners Association (INSA).

(b) *Work not linked to the work of UNCTAD on multimodal transport*

21. The International Institute for the Unification of Private Law (UNIDROIT) prepared in 1965 the first draft convention on the subject of multimodal transport, the Draft Convention on Contract for the Combined International Carriage of Goods (Rome Draft, 1965). In 1969 the International Maritime Committee approved a Draft Convention on Combined Transports (Tokyo Rules, 1969). The latter draft convention was considered at a round table meeting of international organizations convened by UNIDROIT in 1970, which adopted a Draft Convention on the International Combined Transport of Goods (Round Table Draft, 1970). The Round Table Draft was the subject of further discussions at joint meetings of IMCO and ECE, which resulted in 1972 in the preparation of a Draft Convention on the International Combined Transport of Goods (TCM Convention, 1972). Consideration of the draft TCM Convention was however not included by the Economic and Social Council in the agenda of the 1972 United Nations/IMCO Conference on International Container Traffic. At the Conference, opportunity was provided for an exchange of views on general policy questions concerning international multimodal transport and the Conference approved a resolution which then formed the basis of Economic and Social Council resolution 1734 (LIV) of 10 January 1973.⁷

22. A number of international organizations have drawn up uniform rules or forms covering the multimodal transport of goods. Among such uniform rules or forms are the following:

⁷ See para. 8 above.

(a) Uniform Rules for a Combined Transport Document (ICC Rules), by ICC (ICC publication 298 published in 1975, incorporating ICC publication 273 of 1973 on the subject but revising it as to the liability of the combined transport operator for delay);

(b) Combined Transport Bill of Lading (COMBICONBILL), approved and recommended in 1971 by BIMCO;

(c) Standard Conditions Governing FIATA Combined Transport Bills of Lading (FBL), approved by FIATA in 1970, revised in 1978, so that it is now subject to the ICC Uniform Rules for a Combined Transport Document;

(d) Combined Transport Document (INSA Standard Form), approved and recommended by INSA in 1974;

(e) Combined Transport Document (COMBIDOC), issued jointly by BIMCO and INSA in 1977, and approved by ICC as meeting all requirements of the ICC Uniform Rules for a Combined Transport Document;

(f) Recommendation for the format of Combined Transport Bills of Lading, included in the recently issued version of the publication by ICS entitled "Recommendations for the Format of Bills of Lading".

23. In 1960 the socialist States in Eastern Europe adopted an Agreement concerning the Combined Carriage of Goods by Rail and Water.

24. IATA has elaborated a system of using the standard airway bill as the sole multimodal transport document for carriage involving aircraft and trucks where the air carrier is the responsible multimodal transport operator.

25. OCTI will convene a conference in 1980 to consider revision of the 1970 CIM Convention concerning the Carriage of Goods by Rail and the 1970 CIV Convention concerning the Carriage of Passengers and Baggage by Rail. The Revision Conference will also have the opportunity to consider the possible harmonization of the transport law on international carriage by rail with the transport laws governing other modes of international transport.

26. In 1976 the Economic Commission for Latin America (ECLA) prepared a report on international multimodal transport over land, which identified the major obstacles to the establishment of multimodal land-transport services in the region. ECLA is now preparing a draft Latin American Convention on the Civil Liability of Carriers in International Land Transport. Under the draft Convention the same standards of liability are intended to apply to carriers by road and carriers by rail.

27. The Committee of Experts on the Transport of Dangerous Goods, established by the Economic and Social Council and serviced by ECE, is engaged in developing common standards with regard to the packaging, labelling and handling of dangerous goods. The Committee usually makes recommendations which are then implemented by Governments as national regulations and by international organizations whose regula-

tions incorporate the recommendations or are modelled on them. The Committee is considering the possibility of drafting an international convention on the transport of dangerous goods by all modes of transport.

28. A study of combined railroad transport facilities for international traffic has been undertaken jointly by ICC, the International Road Transport Union, the International Union of Railways and the International Union of Combined Rail/Road Enterprises.

B. CHARTER-PARTIES

29. The subject of charter-parties has been on the work programme of the UNCTAD Working Group on International Shipping Legislation since its first session, which was held in 1969. At its fourth session (27 January-7 February 1975) the Working Group considered a report prepared by the UNCTAD secretariat on the subject of charter-parties (TD/B/C.4/ISL/13). This report examined the principal clauses in voyage and time charter-parties and suggested that such clauses be standardized. The report also suggested that consideration be given to the preparation of mandatory international legislation on certain aspects of the respective liabilities of the shipowner and the charterer.

30. The UNCTAD Working Group requested that the UNCTAD secretariat prepare additional studies involving a comparative analysis of the principal clauses in voyage and time charter-parties. These studies are now under preparation and the UNCTAD Working Group on International Shipping Legislation is expected to meet in 1981 to decide on future action concerning the subject of charter-parties on the basis of the new studies.

31. At a conference held in September 1977 IMC approved draft Charter-party (Laytime) Definitions. The Definitions are now before a Joint Working Group formed by experts appointed by IMC, the General Council of British Shipping and BIMCO.

C. MARINE INSURANCE

32. The subject of legal problems in marine insurance has been on the work programme of the UNCTAD Working Group on International Shipping Legislation since its first session, which was held in 1969. The UNCTAD secretariat has recently issued a report (TD/B/C.4/ISL/27 and Add.1), which considers various legal and documentary aspects of marine hull and cargo insurance contract forms. The report identifies legal problems arising from ambiguities, inequities or gaps in such contract forms and analyses areas where improvement is warranted. The report also recommends that an internationally representative group of experts on marine insurance, including representatives of both insurers and assureds, should be asked to draw up an internationally accepted legal base for marine insurance contracts.

33. The UNCTAD Working Group on International Shipping Legislation will consider the UNCTAD sec-

secretariat's report on marine insurance at its sixth session in June 1979 and will then decide the course of further work concerning the subject of marine insurance. In paragraph 251 of TD/B/C.4/ISL/27 it is suggested that the Working Group might convene an *ad hoc* group of experts from Government and industry, representing both hull and cargo insurers and assureds, charged with examining the desirability or feasibility of preparing (a) a set of non-binding, comprehensive international uniform policy conditions agreed to on an international, industry-wide basis, (b) an international convention on marine insurance, and (c) a common legal base for transport insurance contracts for all modes of transport.

34. There is no international convention governing the subject of marine insurance. The International Law Association attempted to achieve some uniformity in this field by developing in 1901 the Glasgow Marine Insurance Rules. The Rules, which were designed to be incorporated by contract into marine insurance policies, failed to gain wide acceptance.

35. The Commission of the European Communities is now considering a Draft Directive on the co-ordination of laws, regulations and administrative provisions relating to insurance contracts. It has not yet been decided whether the Draft Directive will also apply to marine insurance contracts.

36. The International Union of Marine Insurance and ICC have issued jointly a publication entitled "Tables of practical equivalents of the principal terms, clauses and conditions of cover used in various countries for the insurance of cargo against the risks of international transport". The third edition of this publication appeared in 1969.

37. The Committee on the Development of Trade of ECE has established an *Ad Hoc* Working Party on Insurance Problems charged with studying the problems of transport insurance and reinsurance that are of particular importance to international trade relations.

38. It may be noted that, for the fourth session (November 1977) of the Intergovernmental Preparatory Group on a Convention on International Multimodal Transport, the UNCTAD secretariat had prepared a report on the feasibility of establishing Protection and Indemnity Clubs in developing countries. The Intergovernmental Preparatory Group has also been concerned with insurance coverage and guarantees covering the liability of multimodal transport operators for loss or damage to the cargo, for violation of customs and other regulation in the country where the multimodal transport operator transacts business, and for loss or damage suffered by third parties. There is agreement, however, in the Intergovernmental Preparatory Group on a Convention on International Intermodal Transport that the traditional role of marine cargo insurance as the main supplier of protection against the economic consequences of cargo loss or damage should be preserved.⁸

⁸ Report of the Intergovernmental Preparatory Group on a Convention on International Intermodal Transport on the first part of its third session (Geneva, 16 February-4 March 1976), documents TD/B/602 and TD/B/AC.15/18, annex I, part B.

39. Under the laws of many States, the principles of general average applicable to carriage of goods by sea may be taken from a set of rules drawn up jointly by national maritime law associations and known as the York-Antwerp Rules. These Rules, last revised by IMC at its Hamburg Conference in 1974, are normally incorporated in contracts of carriage by sea and then voluntarily enforced by shipowners, shipper-consignees and insurers.

40. One of the recommendations adopted at the first session of UNCTAD in 1964 dealt, *inter alia*, with the subject of marine insurance. Recommendation A.IV.23 stated that "the competent international organizations should examine the question of the adoption of: (a) uniform clauses for marine, land and air transport insurance".

41. Since 1969 marine insurance has been on the agenda of the UNCTAD Committee on Invisibles and Financing Related to Trade. For the seventh session (1975) of that Committee the UNCTAD secretariat prepared a study entitled "Marine Cargo Insurance", which analysed the institutional aspects of marine cargo insurance and explored the commercial and economic problems experienced by marine cargo insurance markets in developing countries (TD/B/C.3/120). Another UNCTAD secretariat study (TD/B/C.3/137) advocated a policy of insuring large risks, including risks under hull insurance, in the domestic insurance markets of developing countries, and this policy was endorsed in 1977 by the UNCTAD Committee on Invisibles and Financing Related to Trade in its resolution 13 (VIII).

D. TRANSPORT BY CONTAINER

42. Based on Economic and Social Council decision 6 (LVI) of 14 May 1974,⁹ the Trade and Development Board of UNCTAD adopted decision 118 (XIV) of 13 September 1974 which established an *Ad Hoc* Intergovernmental Group on Container Standards for International Multimodal Transport. The *Ad Hoc* Intergovernmental Group was requested, *inter alia*, to consider the practicability and desirability of drawing up an international agreement on container standards. The mandate of the *Ad Hoc* Intergovernmental Group on Container Standards for International Multimodal Transport was renewed in September 1977 by the UNCTAD Trade and Development Board in its decision 157 (XVII).

43. At the two sessions of the *Ad Hoc* Intergovernmental Group on Container Standards for International Multimodal Transport held to date (the second session was held from 20 November to 1 December 1978), no consensus was reached on the practicability and desirability of a binding international agreement on standards for containers used in international multimodal transport.

44. The regional commissions, as well as a number of international organizations, including, *inter alia*,

⁹ See para. 9 above.

IMCO, ICAO, EEC, OAS, the East African Community (EAC), ICS, ISO and FIATA have participated in the work of the UNCTAD *Ad Hoc* Intergovernmental Group on Container Standards for International Multimodal Transport.

45. The question of container standards was discussed at the 1972 United Nations/IMCO Conference on International Container Traffic (13 November-2 December 1972). The main preparatory work for this Conference was done by IMCO and ECE, based on earlier work by UNIDROIT and IMC. The Conference adopted resolution 4 concerning container standards, which then formed the basis for Economic and Social Council decision 6 (LVI) of 14 May 1974.⁹

46. The 1972 United Nations/IMCO Conference on International Container Traffic, while failing to reach agreement on the Draft Convention on the International Combined Transport of Goods (TCM Convention), adopted the International Convention for Safe Containers. This Convention derived from the work of IMCO on the safety-related and technical aspects of container transport and it has been in force since 1977. The two fundamental purposes of the Convention are the maintenance of safety in the transport and handling of containers and the enhancement of efficiency in the international multimodal transport of containers. The safety standards established by the International Convention for Safe Containers apply to all modes of transport.

47. The International Organization for Standardization (ISO), through its Technical Committee 104 "Freight containers", has been engaged since 1960 in the formulation of international standards which permit the intermodal movement of containerized goods without the need for physical rehandling of the goods at each transport stage. Major savings can then be realized through significant reductions in handling and waiting time of carriers, handling costs, cargo damage, pilferage, documentation and time in transit.

48. ISO is concerned with the development and subsequent publication of international standards for intermodal interchangeability of containers which take into account the technical, practical, economic and safety factors involved. The freight container standards refer in particular to dimensions, strength specifications and testing, handling features, and the identification and marking of containers. In ISO/Technical Committee 104 the interests and views of producers, suppliers, users (including consumers), Governments and of the scientific community are considered and account is also taken of the particular requirements of rail, sea and road carriers and of national transport regulations. Although the ISO International Standards are not mandatory, the standards concerning freight containers have been implemented widely.

49. Within IATA, the Unit Load Device Board has developed a number of standard sizes for containers and intends to develop standards also for submodules. In the view of IATA, to achieve full compatibility of containers in water/land/air transport, it will be necessary to

establish international standards or specifications for the height of the loading bed of road vehicles.

50. It should be noted that, in air transport of cargo, unit load devices conforming to standards established by three different organizations are in use: IATA, the Air Transport Association/Society of Automotive Engineers and ISO.

51. ECE has been concerned with customs questions concerning containers and has established a Group of Rapporteurs on the subject. Two Customs Conventions on Containers have been adopted on the basis of work within ECE, one on 18 May 1956 and the other on 2 December 1972.

52. It may further be noted that, within ISO, technical committees are engaged in the development of voluntary international standards for dimensions of pallets for through transit of goods (ISO/TC.51, "Pallets for unit load method of materials handling") and for standardization in the field of packaging (ISO/TC.122, "Packaging").

53. UNIDROIT has studied the desirability and feasibility of preparing uniform provisions on the legal status of containers and other loading units, such as lighters discharged from sea-going vessels, pallets, igloos. However, after considering the matter, the Council of UNIDROIT decided to delete from the work programme for 1978-1980 the subject of the "legal status of containers and other loading units".

E. THE FORWARDING OF GOODS

(a) *Freight forwarder acting as agent*

54. There are two basically distinct types of freight forwarders in international transport. The first type functions strictly as an agent, normally for the shipper but on occasion for the carrier. In the usual case the freight forwarder acts as an agent for the shipper in arranging for the transport of the goods and handling the administrative details connected with the transport. The forwarding agent does not issue his own transport document or bill of lading and does not assume responsibility for the proper performance of the transport by the actual carrier or carriers. As far as the carrier or carriers are concerned, the contract of carriage is between the carriers and the shipper and not between the carriers and the forwarding agent.

55. Since the freight forwarder acts solely as an agent, the usual national and international rules applicable to "agency" govern the relationship between the freight forwarder and the shipper or carrier on whose behalf the freight forwarder is acting. Mention may therefore be made of the work of the Hague Conference on Private International Law on the law applicable to agency. In June 1977 a Special Committee of the Hague Conference completed work on a draft Convention on the Law Applicable to Agency and the Convention was signed on 14 March 1978. The Convention covers the relationship between principal and agent and the relationship of both principal and agent with third parties connected with the activities of the agent.

56. It may also be noted that a conference of plenipotentiaries will be held in Bucharest, Romania, from 28 May to 13 June 1979, to consider the draft Convention Providing a Uniform Law on Agency of an International Character in the Sale and Purchase of Goods, which had been prepared by UNIDROIT.

57. In 1966 UNIDROIT completed preparation of a draft Convention on the Contract of Agency for Forwarding Agents relating to the International Carriage of Goods. In April 1976, at a meeting of representatives from UNIDROIT, ICC and FIATA, it was decided that uniform rules on forwarding agency, based on the 1966 UNIDROIT draft Convention, should not be drawn up. The work programme of UNIDROIT for the triennium 1978-1980 specifically excluded work on the subject of "forwarding agency".

58. It may be noted that in 1957 FIATA introduced the Forwarding Agent's Certificate of Transport (FCT document), which makes it clear that the forwarding agent is not acting as the carrier and that he only assumes responsibility for exercising due care in the selection of carriers and in the transmittal of instructions to carriers. Under the FCT document the forwarding agent is not liable to the shipper for the carrier's performance.

(b) *Freight forwarder acting as principal*

59. The second type of freight forwarder in international transport functions as a principal, that is, in his own name. This type of freight forwarder assembles and consolidates smaller shipments of different shippers and assumes responsibility for the transport of the goods from point of receipt to final point of destination. The carriage may involve more than one mode of transport and the freight forwarder may perform part of the carriage himself or he may entrust its performance to one or more actual carriers. Usually such a freight forwarder issues his own transport document or bill of lading to the shipper (who might not even know the identity of the actual carrier or carriers) and charges a single comprehensive rate for the transport from point of pick-up to point of ultimate destination. As far as the contract of carriage with the actual carrier or carriers is concerned, the freight forwarder is the shipper.

60. In multimodal transport it is often the freight forwarder who becomes the multimodal transport operator. The freight forwarder then decides both on the modes of transport and on the particular carriers to be utilized within each mode. The work of international organizations in the field of multimodal transport, described above in part II A of the present report, is therefore of direct relevance to the legal position of the freight forwarder acting as a principal in his own name.

61. The responsibilities of a freight forwarder acting as a multimodal transport operator may extend over segments during the transport where he himself performs the functions of a warehouseman or arranges for the retention of a warehouseman. The goods may be warehoused for a period while the freight forwarder is consolidating shipments or is waiting for a carrier to pick up the shipments, while the goods are transferred

from one mode of transport to another, or at the place of destination before the goods can be handed over to the consignee. UNIDROIT is now considering the desirability and feasibility of drawing up uniform rules on the warehousing contract. A set of draft articles on the liability of international terminal operators connected with international carriage, prepared by the UNIDROIT secretariat, was approved, with some modifications, by a UNIDROIT Study Group in January 1979. The draft text approved by the Study Group will be submitted to the Governing Council of UNIDROIT for a decision concerning further work on the subject.

62. The freight forwarder may also assume responsibility for filing the necessary papers to secure export or import licenses, to obtain customs clearances while the goods are in transit, and to act as customs house broker. The freight forwarder would then have to be concerned with the applicable customs regulations and international agreements concerning customs transit. The following are some of the major international agreements concerning customs:

(a) Customs Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Conventions of 1959 and 1975), drafted under the auspices of ECE;

(b) International Convention on the Simplification and Harmonization of Customs Procedures, and its annex E.I concerning Customs Transit (Kyoto Convention 1974), drafted by the Customs Co-operation Council;

(c) Customs Convention on the International Transit of Goods (ITI Convention 1971), drafted by the Customs Co-operation Council;

(d) Customs Conventions on Containers, 1956 and 1972;

(e) Convention concerning Customs Clearance for the International Transport of Goods by Road Vehicles, 1965; prepared under the auspices of the Council for Mutual Economic Assistance;

(f) Transit System of the European Economic Community;

(g) International Convention to Facilitate the Crossing of Frontiers for Goods Carried by Rail (TIF Convention 1952), prepared under the auspices of ECE;

(h) Customs Convention on the ATA Carnet for the Temporary Admission of Goods (ATA Convention 1961), drafted by the Customs Co-operation Council.

63. The Customs Co-operation Council has considered the establishment of a link among the systems of customs transit that now exist under different international agreements. This subject is also under study within the European region by the Inland Transport Committee of ECE.

III. Conclusions and recommendations

64. Of the five topics of transportation law examined in this survey primary responsibility within the United Nations family has been entrusted to UNCTAD for multimodal transport and for containerization by

resolutions of the Economic and Social Council and the General Assembly. Within UNCTAD, the work aimed at preparing a draft Convention on International Multimodal Transport has been completed. On the other hand, although UNCTAD has established an intergovernmental group on container standards, that group has not yet been able to reach a consensus on the practicability and desirability of an international agreement that would impose mandatory standards for containers used in international transport.

65. The topics of charter-parties and marine insurance have been on the work programme of the UNCTAD Working Group on International Shipping Legislation since 1969. While the UNCTAD secretariat has issued major studies on both these topics, no decision has apparently yet been taken by any UNCTAD body as to the desirability of preparing international legislation on either subject. It may be noted that in the 1974 UNCTAD secretariat study on charter-parties¹⁰ the suggestion was made that the task of preparing mandatory international regulation of certain aspects of charter-parties might be given to the UNCITRAL Working Group on International Legislation on Shipping. The Commission might wish to consider whether it should inform UNCTAD that it stands ready to undertake work on these topics aimed at the preparation of international

¹⁰ "Charter-Parties: report by the secretariat of UNCTAD", document TD/B/C.4/ISL/13, paras. 537-538.

legislation. The Commission might also wish to consider whether it should explore on its own the practicability and feasibility of drafting an international agreement or uniform rules on charter-parties or on marine insurance.

66. At present, no international organization is engaged in work focused directly on the legal problems arising from the involvement of forwarders in the international transport of goods. The work of UNCTAD concerning multimodal transport and the responsibilities of the multimodal transport operator does cover, however, the legal issues connected with the involvement of freight forwarders acting as principals in international multimodal transport operations.

67. The Commission might also wish to consider whether an international convention or uniform rules concerning the legal status of freight forwarders, whose involvement in international transport is strictly in the capacity of agents, would be desirable. The starting-point for consideration of the subject by the Commission might be the 1966 UNIDROIT draft Convention on the Contract of Agency for Forwarding Agents relating to the International Carriage of Goods.

68. The Commission might further wish to consider whether it should inform the regional commissions of the United Nations of its willingness to provide technical and drafting assistance for their projects involving the preparation of regional agreements or legislation concerning transport by land and by inland waterways.

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

<i>Title or description</i>	<i>Document symbol</i>
State of signatures and ratifications of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules), adopted at Hamburg on 30 March 1978: note by the Secretary-General	A/CN.9/174

VI. ACTIVITIES OF OTHER ORGANIZATIONS

Report of the Secretary-General: current activities of international organizations related to the harmonization and unification of international trade law (A/CN.9/175)*

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Introduction

1. The United Nations Commission on International Trade Law (UNCITRAL), at its third session, requested the Secretary-General "to submit reports to the annual session 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

* 1 May 1979.

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 (Yearbook ... 1968-1970, part two, III, A).

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), at the seventh session in 1974 (A/CN.9/94 and Add.1-2), at the eighth session in 1975 (A/CN.9/106),* at the ninth session in 1976 (A/CN.9/119),** at the tenth session in 1977 (A/CN.9/129 and Add. 1)*** and at the eleventh session in 1978 (A/CN.9/151).****

3. The present report, prepared for the twelfth session (1979), is based on information submitted by in-

* Yearbook ... 1975, part two, V.

** Yearbook ... 1976, part two, VI.

*** Yearbook ... 1977, part two, VI.

**** Yearbook ... 1978, part two, V.

ternational organizations concerning their current work. In some cases, this report includes information on progress with respect to projects for which background material is included in earlier reports.²

4. In the field of international transport, the present report does not include information on the current work of international organizations concerning multimodal transport, charter-parties, marine insurance, transport by container and the forwarding of goods. Information on the work of international organizations on these topics may be found in another document prepared for the twelfth session (1979) of the Commission, the "Survey of the work of international organizations in the field of transport law" (A/CN.9/172; reproduced in this volume, part two, V, A).

5. The current activities of the following international organizations are described in the present report:

(a) *United Nations bodies and specialized agencies:* United Nations Conference on Trade and Development (UNCTAD) (paras. 23, 37, 39, 45-46, 87, 105-107); United Nations Economic Commission for Europe (ECE) (paras. 11-12, 18, 34, 44, 49, 57, 76, 88, 97, 109, 114, 116-117, 126); United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) (para. 19); United Nations Industrial Development Organization (UNIDO) (para. 124); Food and Agriculture Organization of the United Nations (FAO) (paras. 13, 95, 111); Inter-Governmental Maritime Consultative Organization (IMCO) (paras. 40-41, 56); International Civil Aviation Organization (ICAO) (paras. 53-55, 67); International Monetary Fund (IMF) (paras. 33, 37); and World Health Organization (WHO) (paras. 13, 95, 111).

(b) *Other international organizations:* African Development Bank (para. 113); Bank for International Settlements (para. 36); Caribbean Community (para. 85); Central Office for International Transport by Rail (OCTI) (para. 50); Commission of the European Communities (CEC) (paras. 28, 65, 69, 72, 86, 89, 91-92, 94); Council for Mutual Economic Assistance (CMEA) (paras. 10, 24, 83-84, 108, 123, 125); Council of Europe (CE) (paras. 29, 32, 80-82, 93, 96); Customs Co-operation Council (CCC) (paras. 16, 78-79, 98, 115, 118-122); Hague Conference on Private International Law (paras. 70-71, 73-74); International Institute for the Unification of Private Law (UNIDROIT) (paras. 7-8, 52, 56, 66, 90, 100-103); and Latin American Free Trade Association (LAFTA) (paras. 38, 51).

(c) *International non-governmental organizations:* Inter-American Commercial Arbitration Commission (para. 64); International Chamber of Commerce (ICC) (paras. 9, 14, 20, 22, 25-27, 30-31, 33, 58-63, 68, 75); International Chamber of Shipping (ICS) (paras. 37, 42, 77, 110, 127); International Maritime Committee (CMI) (paras. 15, 21, 35, 38, 41, 43, 47-48, 60, 99,

104); International Law Association (ILA) (para. 112); and International Organization for Standardization (ISO) (para. 17).

6. This report is arranged according to major subjects in international trade law. Under each subject the relevant activities of the international organizations are discussed in turn.

I. International contracts

A. LAW GOVERNING INTERNATIONAL CONTRACTS

7. In April 1978 a Steering Committee of UNIDROIT adopted a revised text of draft rules on the interpretation of international contracts. The Steering Committee requested the secretariat of UNIDROIT to combine in a single document the draft rules on the interpretation of international contracts and the draft rules on the formation of international contracts adopted earlier. The combined text, accompanied by an explanatory report, was issued as UNIDROIT Study L-Doc.15 and will be placed before a study group that is to meet in September 1979.

8. UNIDROIT is examining the desirability and feasibility of drawing up uniform rules on the quality and quantity control of goods that are the subjects of international contracts. A study on quality controls in the international sale of goods, prepared by Dr. Vilus (Yugoslavia), has been circulated to member States of UNIDROIT for comments (UNIDROIT Study LX-Doc.1).

9. ICC, through a working party established by its Commission on International Commercial Practice, has followed closely the work of UNCITRAL on the contract for the international sale of goods.

B. GENERAL CONDITIONS FOR INTERNATIONAL CONTRACTS

10. In 1978 work within CMEA continued, aimed at improving further the General Conditions of Delivery of Goods between Organizations in the CMEA member States, which had been adopted in 1968 and modified in 1975. In January 1979 the Executive Committee of CMEA approved certain proposals concerning the responsibility of economic organizations for non-performance or unsatisfactory performance of obligations and the CMEA Standing Commission on Foreign Trade was directed to incorporate these proposals into the General Conditions of Delivery.

11. Under the auspices of ECE, the Group of Experts on International Trade Practices relating to Agricultural Products has reviewed the General Conditions for International Dealings in Potatoes and the Rules of Valuation for Potatoes, which had been adopted by ECE previously. The Group of Experts is expected to conclude its work on this subject in 1979 and the texts will then be published as the "United Nations/ECE General Conditions of Sale for Potatoes". At its next session the Group of Experts will also discuss a proposal to commence work on general conditions for sale of milk and milk products.

² Background material may be found in the reports referred to in para. 2 above and in the *Digest of legal activities of international organizations and other international institutions*, published under the auspices of the International Institute for the Unification of Private Law (UNIDROIT).

C. INTERNATIONAL TRADE TERMS AND STANDARDS

12. Under the auspices of ECE, the Working Party on Facilitation of International Trade Procedures is continuing its work of preparing descriptions of the functions performed by about 130 documents used in international trade, with a view to establishing internationally agreed descriptions of their functions. The Working Party is also examining data elements, i.e. groups of words conveying certain information, that appear in these documents.

13. Under the Joint FAO/WHO Food Standards Programme, established by these two organizations in 1962, the intergovernmental Codex Alimentarius Commission and its subsidiary bodies elaborate comprehensive international food standards and international maximum limits for pesticide residues in food. These standards are then adopted by the Codex Alimentarius Commission and circulated to Governments for acceptance and implementation by national legislation. About 150 such food standards have been developed to date, as well as over 1000 maximum limits for pesticide residues in particular food products and a general standard covering the labelling of all prepackaged foods. Codex Co-ordinating Committees for Africa, Asia and Latin America are utilized to ensure that the work of the Codex Alimentarius Commission takes into account the particular needs of developing countries.

14. ICC is continuing its work aimed at revising the existing INCOTERMS to reflect changes in transportation techniques, legal practices and documentary procedures. The revision is expected to be completed by the beginning of 1980.

15. CMI considered at its September 1977 conference draft Charter-party (laytime) Definitions. The draft Definitions are now being examined by a working group of experts and will then be circulated to the shipping industry for comments.

16. CCC is currently engaged in revising its Glossary of International Customs Terms. The revision will take into account the definitions found in international instruments adopted by the Council, customs terms used in national automatic data processing systems and the work of other international organizations, particularly ECE.

17. The International Standards prepared by ISO are often used as a basis for international tendering and contracts. As at the end of 1978 ISO has published more than 3700 international standards. Within ISO, the technical work of elaborating international standards is carried out through technical committees; particular mention may be made of Technical Committee 68, concerned with banking procedures, and Technical Committee 154, concerned with documents and data elements in administration, commerce and industry.

D. MODEL CONTRACTS, CLAUSES AND FORMS

18. At its fourteenth session in November 1978, the Group of Experts on International Contract Practices in Industry of ECE adopted the "Guide for Draw-

ing up International Contracts between Parties Associated for the Purpose of Executing a Specific Project". The Guide will be published during the course of 1979. The Group of Experts will now consider international engineering contracts, including related aspects of technical assistance. A preliminary draft text will be discussed at the fifteenth session of the Group of Experts in November 1979.

19. The International Trade Division of ESCAP is engaged in the preparation of standard contracts and general conditions for use in the tropical timber trade in the region. In this connexion, the International Trade Division has undertaken a comprehensive study of existing trade practices; the results of this study will be presented to an ESCAP Expert Group Meeting on Contracts and Grading and Specification Rules for Tropical Timber.

20. ICC has recognized that market instability, primarily due to inflation and the high cost of raw materials, poses serious difficulties in the performance of long-term contracts. ICC is therefore preparing model contract clauses dealing with the adaptation of contracts to economic variations (i.e. *force majeure* and hardship clauses), with the computation of damages and with the determination in advance of the amount of damages for breach of contract.

21. A Sub-Committee of CMI is considering the legal problems arising in international contracts due to changes in economic conditions.

22. ICC is preparing standard security interest clauses for inclusion in international contracts of sale. These clauses would provide that title to the goods sold only passes to the buyer when the seller has been paid in full, unless the seller is protected by an appropriate collateral security interest clause.

23. The secretariat of UNCTAD is studying the feasibility of drawing up model rules for regional associations (ports, shippers, shipowners) and joint ventures in the field of maritime transport. The model rules, which might then be published as a handbook, would be designed to facilitate co-operation among developing countries concerning shipping and ports.

24. During 1977 and 1978 the Conference of Chartering and Ship-Ownning Organizations of member States of CMEA drafted and approved a number of standard forms for marine charters and bills of lading covering particular types of goods and trade routes.

II. International payments

A. WORK ON CONVENTIONS AND UNIFORM RULES ON INTERNATIONAL PAYMENTS

25. ICC published in December 1978 Standard Forms for Issuing Documentary Credits (ICC Publication No. 323), which are adapted to the revised text of the ICC Uniform Customs and Practice for Documentary Credits. An ICC working party is now preparing a standard application form for use by applicants for documentary credits; the form, addressed by the applicant to

the issuing bank, will be in harmony with the forms in ICC Publication No. 323 and the ECE layout key.

26. ICC is now examining stand-by letters of credit and contract guarantees that provide for payment on simple demand. The ICC Uniform Rules for Contract Guarantees (ICC Publication No. 325) were not intended to cover such arrangements.

27. ICC published in August 1978 Uniform Rules for Contract Guarantees (ICC Publication No. 325), which had been prepared in close co-operation with UNCITRAL. An ICC working party is now considering the drafting of model forms for the issuance of contract guarantees subject to the Uniform Rules.

28. CEC is engaged in the preparation of a directive on guarantees and indemnities. Work on a draft directive on the subject, aimed at the harmonization of the laws of member States of EEC, is near completion.

29. The secretariat of the Council of Europe considered the particular topics in the area of creditors' rights that might usefully be examined under the auspices of the Council. Based on the results of this inquiry, the Committee of Ministers of the Council of Europe established a committee of experts, charged with preparing either an international convention or a recommendation dealing with clauses on the retention of security interests. A number of international organizations, including the secretariat of UNCITRAL, will be invited to participate as observers in the work of the committee of experts.

30. ICC published in 1978 revised Uniform Rules for Collections (ICC Publication No. 322), which provide standard rules applicable to international collection operations. An ICC working party is now engaged in preparing, for use by banks carrying out such collection operations, standard forms based on the ECE layout key.

31. A working party of ICC is preparing standards applicable to the liquidation of outstanding forward foreign exchange contracts where one of the contracting parties becomes insolvent. The working party has drawn up draft rules on the subject and consultations on the basis of this draft are now in progress.

32. The Convention relating to Stops on Bearer Securities in International Circulation, adopted under the auspices of the Council of Europe, entered into force on 11 February 1979. The Secretary-General of the Council published a list of bearer securities in international circulation on 11 December 1978. Based on a recommendation of experts, the Committee of Ministers of the Council of Europe named a Belgian institution, the Office belge de valeurs mobilières, as the Central Bureau envisaged in the Convention and its annex.

33. IMF and ICC have both co-operated actively in the work of UNCITRAL on international negotiable instruments. The IMF and the ICC have participated as observers in meetings convened under UNCITRAL auspices dealing with the subject of negotiable instruments.

B. VALUE CLAUSES IN INTERNATIONAL CONVENTIONS

34. At its thirty-eighth (special) session on 5 July 1978, the Inland Transport Committee of ECE adopted protocols concerning the unit of account in the following ECE transport conventions: Convention on the Contract for the International Carriage of Goods by Road (CMR Convention); Convention on the Contract for the International Carriage of Passengers and Luggage by Road (CVR Convention); Convention relating to the Limitation of the Liability of Owners of Inland Navigation Vessels (CLN Convention); and Convention on the Contract for the International Carriage of Passengers and Luggage by Inland Waterway (CVN Convention). These protocols were opened for signature on 1 September 1978.

35. CMI is preparing draft Protocols to the 1924 Brussels Convention for the Unification of Certain Rules relating to Bills of Lading and to the 1957 Brussels Convention relating to the Limitation of the Liability of Owners of Sea-going Ships, substituting for the reference therein to Poincaré francs the unit of account adopted in the 1976 London Convention of Limitation of Maritime Claims and in the 1978 United Nations Convention on the Carriage of Goods by Sea. The purpose of these Protocols is to bring up to date the 1924 and 1957 Conventions for the interval until the 1976 and 1978 Convention replacing them come into force.

C. ELECTRONIC FUNDS TRANSFER

36. In 1978 the Bank for International Settlements arranged a meeting of experts from its member central banks on the question of liability arising from electronic transfers of funds. This meeting was related to the work of UNCITRAL on electronic fund transfers and a summary report of the discussions was sent to the secretariat of UNCITRAL in December 1978.

III. International transport

A. TRANSPORT BY SEA

37. UNCTAD, IMF and ICS participated in the work of UNCITRAL concerning ocean bills of lading and attended UNCITRAL meetings dealing with the drafting of a convention on the carriage of goods by sea. In addition, all three of these organizations attended the 1978 Hamburg Conference which adopted the United Nations Convention on the Carriage of Goods by Sea, 1978 (the Hamburg Rules).

38. LAFTA and CMI have both been examining the provisions of the United Nations Convention on the Carriage of Goods by Sea, 1978 (the Hamburg Rules) with a view toward developing a common position that their respective members might take regarding the Convention.

39. The Convention on a Code of Conduct for Liner Conferences has not yet entered into force, although 33 States had become Contracting States as at 1 January 1979. The secretariat of UNCTAD stands

ready to assist States in ratifying or acceding to the Convention and in implementing its provisions. It is expected that the status of the Convention on a Code of Conduct for Liner Conferences will be discussed at the fifth session of UNCTAD (Manila, 6 May-1 June 1979).

40. In the long-term work programme of IMCO, the following legal subjects were included and referred for consideration by the Legal Committee:

- (i) Possible review of the 1926 Brussels Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, and the 1967 revision thereof;
- (ii) Possible review of the Brussels Conventions on Maritime Law, drafted under the auspices of the International Maritime Committee, with a view to their replacement by updated conventions adopted under IMCO auspices.

41. CMI submitted for consideration by the Legal Committee of IMCO the draft Convention on Off-Shore Mobile Craft and the draft Convention on Civil Jurisdiction, Choice of Law, Recognition and Enforcement of Judgements in Matters of Collision at Sea. Both these subjects are included in the work programme of the IMCO Legal Committee.

42. ICS follows closely the work of IMCO, and has often submitted papers for consideration at various IMCO meetings.

43. CMI has established a Sub-Committee charged with considering problems relating to collisions at sea.

44. Within ECE, the Working Party on Facilitation of International Trade Procedures is engaged in preliminary work toward adoption of draft recommendations on maritime transport document procedures (TRADE/WP.4/GE.2/R.114) and on shipping marks (TRADE/WP.4/GE.2/R.122).

B. LEGAL ISSUES RELATED TO TRANSPORT BY SEA

45. The Committee on Shipping of UNCTAD considered in April 1977 a report prepared by the UNCTAD Secretariat concerning the legal and economic consequences for international shipping of the existence or absence of a genuine link, as defined in international conventions that are in force, between a vessel and its flag of registry. The report was considered by a group of experts in February 1978. The group of experts concluded that the expansion of "flag of convenience" (open-registry) fleets has adversely affected the development and competitiveness of the merchant fleets of developing countries and recommended that UNCTAD should continue to study the subject. These findings will be considered at the fifth session of UNCTAD (Manila, 6 May-1 June 1979), together with proposals formulated by the UNCTAD secretariat for increasing the participation of developing countries in world shipping and the eventual phasing out of flag-of-convenience operations.

46. In 1975 the Committee on Shipping of UNCTAD considered a report on the treatment of foreign merchant vessels in ports (TD/B/C.4/136) prepared by the UNCTAD secretariat. The report reviewed the international conventions, rules and regulations that have a bearing on the status of foreign merchant vessels in ports. At its ninth session, to be held in 1980, the Committee on Shipping of UNCTAD will decide upon the course of further work on this subject.

47. A Sub-Committee of CMI is considering the possibility of international unification of rules relating to contracts of towage.

48. CMI is co-operating with UNIDROIT in studying the liability of sea terminals.

C. TRANSPORT OVER LAND

49. The Group of Experts on the Transport of Perishable Foodstuffs, a subsidiary body of the Inland Transport Committee of ECE, is continuing its work to amend the technical annexes of the Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be Used for such Carriage.

50. OCTI will convene in 1980 the eighth Ordinary Revision Conference, which will consider the restructuring and modification of the CIM Convention (concerning the contract for the international carriage of goods by rail) and the CIV Convention (concerning the contract for the international carriage of passengers and baggage by rail). These Conventions govern the legal régime for carriage by rail among 32 States, of which 26 are in Europe, 3 in Asia and 3 in Africa.

51. LAFTA is now considering adoption of a multilateral convention concerning transport by road among States members of the Association. A draft convention has already been prepared by the secretariat of the organization.

52. For the work of UNIDROIT concerning the possibility of preparing a draft convention on civil liability for damage caused as a consequence of the carriage of hazardous substances by road, see paragraph 66 below (V. Products liability).

D. TRANSPORT BY AIR

53. ICAO has been concerned with the legal problems arising from the lease, charter and interchange of aircraft in international operations, particularly regarding the regulation and enforcement of air safety standards when aircraft registered in one State is operated by an operator belonging to another State. To deal with these problems a conference held in September 1978 in Montreal adopted a Protocol to Amend the 1952 Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface. Similarly, the Legal Committee of ICAO approved in February 1978 a new draft article that would amend the 1944 Chicago Convention and is now considering a possible revision of the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft.

54. The general work programme of the Legal Committee of ICAO includes the item "Consolidation of the instruments of the 'Warsaw System' into a single convention". The Legal Bureau of ICAO has been requested to prepare two draft "texts of convenience": one consolidating the provisions of the instruments of the "Warsaw System" that are in force, and the other consolidating all the instruments of that system. These draft texts will then be sent to States for their comments.

55. In June 1978 the Council of ICAO referred to the Legal Committee the question of the authority and responsibility of the pilot-in-command of an aircraft during acts of unlawful interference. The question had earlier been considered by other subsidiary bodies of ICAO.

E. TRANSPORT BY AIR-CUSHION VEHICLES

56. In September 1976 UNIDROIT transmitted to IMCO three draft conventions concerning the legal status of air-cushion vehicles, dealing, respectively, with registration and nationality, with the international carriage of passengers and their luggage by sea and by inland water-way, and with the civil liability of owners and operators of air-cushion vehicles for damage caused to third parties. Consideration of these draft conventions is included in the work programme of the Legal Committee of IMCO. In 1978 the Legal Committee of IMCO had an exchange of views on the draft Convention on Registration and Nationality of Air-Cushion Vehicles.

IV. International commercial arbitration

A. ACTIVITIES CONCERNING SPECIALIZED TYPES OF ARBITRATION

57. In March 1978 the United Nations/ECE Arbitration Rules for Certain Categories of Perishable Agricultural Products were adopted by the Committee on Agricultural Problems of ECE. These Rules became operational in July 1978 when the ECE Working Party on Standardization of Perishable Produce nominated the four members of the United Nations/ECE Chamber for Arbitral Procedures who are to serve for the period 1978-1982.

58. In October 1978 ICC published Standard Clauses and Rules on the Regulation of Contractual Relations, applicable to those cases where the arbitrators are to serve as regulating influences during the performance of long-term contracts, either by filling gaps in such contracts or by adapting the contracts to changed circumstances (ICC Publication No. 326).

59. The International Centre for Technical Expertise, established by ICC in December 1976, may be utilized by the parties to a contract to effect the nomination of a neutral expert to resolve a technical problem during the performance of the contract. In the past two years the Centre has appointed a number of such neutral

experts to settle technical disputes that arose under a wide range of contractual relationships.

60. ICC and CMI have established a joint international maritime arbitration centre (ICC Publication No. 324).

B. INFORMATION ON ARBITRATION LAWS AND PRACTICE

61. ICC is now preparing a revised, up-to-date edition of ICC document No. 11 entitled "Arbitration and the Law throughout the World", which had been published in 1955. It is expected that the first volume, dealing with the laws on arbitration of European countries, will be issued in 1980.

62. While preserving the confidentiality of arbitral awards rendered under the auspices of the ICC Court of Arbitration, ICC is preparing a compilation of excerpts from those awards that contain legal solutions of general interest.

63. Under the auspices of its Institute on Business Law and Practice ICC organizes introductory seminars on international commercial arbitration for lawyers and businessmen. At these introductory seminars the participants attend a series of lectures by leading practitioners and take part in model arbitral proceedings. ICC is also planning advanced seminars dealing with specific problems that arise in international commercial arbitration; in 1979 advanced seminars will consider the drafting of arbitration clauses and the conduct of arbitral proceedings.

64. Effective 1 January 1978, the Rules of the Inter-American Commercial Arbitration Commission were amended so as to comply essentially with the UNCITRAL Arbitration Rules.

V. Products liability

65. CEC is preparing a directive for the harmonization of the laws of member States of EEC regulating the liability of manufacturers of defective products and facilitating the bringing of actions against such manufacturers. A draft directive on the subject has been submitted by the Commission to the Council of Ministers of the EEC.

66. At the request of the Inland Transport Committee of the United Nations Economic Commission for Europe, UNIDROIT is studying the possibility of preparing a draft convention concerning civil liability for damage caused as a consequence of the carriage of hazardous cargo by road. UNIDROIT has commissioned Dr. Hill (United Kingdom) to prepare a study on the subject.

67. The Legal Committee of ICAO is considering the preparation of a new international instrument on liability for damage caused by noise and sonic boom. A report on the subject, together with a questionnaire, was prepared and circulated to member States of ICAO and to international organizations.

VI. Private international law

A. INTERNATIONAL CONTRACTS

68. ICC is preparing guidelines for the determination of the law applicable to international commercial relationships. These guidelines will contain general rules on determining the applicable substantive law and flexible presumptions concerning the various categories of contracts that are utilized in finding the applicable substantive law.

69. The member States of the European Communities are expected to conclude in the near future a convention establishing uniform rules of conflict of laws in relation to contractual obligations.

70. The Hague Conference on Private International Law is examining the conflict rules relating to the law applicable to the international sale of goods, with particular reference to the possibility of excluding consumer sales from coverage under the general rules. A report on the subject is to be issued prior to a preparatory meeting in June 1979. In 1980, at its fourteenth session, the Hague Conference will decide whether a general revision of the 1955 Convention on the Law Applicable to International Sales of Goods should be undertaken.

B. INTERNATIONAL PAYMENTS

71. The Hague Conference on Private International Law is considering the possibility of preparing an international convention on the law applicable to negotiable instruments. The Permanent Bureau of the Hague Conference is preparing a report on the subject, taking fully into account the work of UNCITRAL on the substantive law applicable to negotiable instruments.

72. The member States of the European Communities are engaged in work aimed at the drafting of a convention that would establish uniform rules of conflict of laws concerning insolvency of natural and legal persons. In its present form the draft "Bankruptcy Convention" also includes a small number of uniform rules on the substantive law of bankruptcy.

C. AGENCY

73. The Hague Conference on Private International Law completed the preparation of a Convention on the Law Applicable to Agency at its thirteenth session (October 1976) and at a subsequent Special Commission meeting (June 1977). The preliminary documents, summary records of meetings, the text of the Convention and an explanatory report will be published in volume IV of the acts and documents of the thirteenth session. The Convention on the Law Applicable to Agency was first signed on 14 March 1978.

D. LICENSING AGREEMENTS AND KNOW-HOW

74. The Hague Conference on Private International Law is considering the possibility of drafting an international convention on the law applicable to licensing agreements and know-how. The Permanent Bureau

of the Hague Conference is preparing an extensive report on the feasibility of undertaking this work, in liaison with the World Intellectual Property Organization (WIPO).

VII. Automatic data processing

A. USE OF AUTOMATIC DATA PROCESSING IN INTERNATIONAL TRADE

75. A Working Group established by ICC is currently examining the banking and commercial problems involved in the use of automatic data processing in international trade. The Working Group continues to work in close co-operation with interested intergovernmental organizations, particularly ECE and UNCITRAL.

76. Within ECE, the Working Party on Facilitation of International Trade Procedures is engaged in preliminary work aimed at developing an internationally approved coding of terms of payments. A preliminary report concerning this work may be found in document TRADE/WP.4/GE.1/R.108.

77. ICS intends to publish during 1979 a comprehensive manual on automatic data processing, in order to meet the needs of combined transport operators for common codes and standards to be utilized in trade data interchange.

B. USE OF AUTOMATIC DATA PROCESSING IN CUSTOMS OPERATIONS

78. Within CCC, a working party is continuing its work relating to automatic data processing techniques used by customs administrations. The working party is engaged in comparative studies of computerized customs operations and in research on the standardization and coding of data elements required to meet customs formalities. The research on standardization and coding is co-ordinated with the activities of other organizations, such as ECE and ISO.

79. Since 1973, CCC has been engaged in developing the Harmonized Commodity Description and Coding System, based mainly on the Customs Co-operation Council Nomenclature and the revised Standard International Trade Classification prepared by the United Nations Statistical Office. The System is intended to meet the requirements of a wide range of users, including customs authorities, statisticians, carriers and producers. It is hoped that the System will be completed by the end of 1981.

C. SAFEGUARDING OF STORED DATA

80. A Committee of experts established by the Council of Europe has prepared a draft convention for the protection of persons with regard to information stored in computer data banks. This draft convention is to be considered by a working group prior to the next session of the committee of experts. The committee of experts has also prepared a draft resolution concerning the regulations applicable to electronic data banks which store medical files.

81. In 1979 the Council of Europe will organize a symposium on the protection of the users of computerized systems which are concerned with legal matters.

D. TEACHING AND TRAINING

82. A working group, established under the auspices of the Council of Europe, has prepared a draft resolution on teaching and training concerning automatic legal information systems and has devised a model programme for teaching this subject in universities.

VIII. Industrial and intellectual property law

A. PATENTS, COPYRIGHTS AND TRADE MARKS

83. In July 1978 the heads of the patent offices of the member States of CMEA adopted a standard position on the preparation and improvement by CMEA member States of their national legislation governing patents.

84. Work in continuing within CMEA on the preparation of an intergovernmental agreement establishing a single unified document designed to protect inventions.

85. The Caribbean Community commissioned comparative studies on the legislation of member States of the Community in the fields of industrial designs, copyrights and neighbouring rights and patents. Member States of the Caribbean Community are now considering these studies with a view toward determining the desirability of harmonizing their national laws on these subjects.

86. CEC is engaged in the preparation of a directive for the harmonization of the laws of member States of EEC on trade marks.

B. TRANSFER OF TECHNOLOGY

87. Since 1975 UNCTAD has been engaged in the preparation of an international code of conduct on the transfer of technology, corresponding to the needs and conditions prevalent in developing countries and to the special conditions found in various flows of trade in technology. In 1976 UNCTAD established an Intergovernmental Group of Experts, which, at its sixth session (26 June-7 July 1978), completed its task of drafting an international code of conduct on the transfer of technology. Pursuant to General Assembly resolution 32/188, the United Nations Conference on an International Code of Conduct on the Transfer of Technology was convened in Geneva under UNCTAD auspices from 16 October to 11 November 1978. The Conference made substantial progress towards the negotiation and adoption of an international code of conduct on the transfer of technology and a resumed session of the Conference was convened by the Secretary-General of UNCTAD in the first quarter of 1979.

88. The Committee on the Development of Trade of ECE is engaged in drawing up a manual on licensing procedures and related aspects of technology transfer. It

is expected that the manual will be issued in 1979 and that it will include factual information in separate chapters for 20 countries.

IX. Other topics of international trade law

A. LAW OF AGENCY

89. CEC is preparing a directive for the harmonization of the laws of member States of EEC concerning the practice of the profession of self-employed commercial agent. A draft directive on the subject was submitted by the Commission to the Council of Ministers of EEC in December 1976.

90. A conference will be convened in Bucharest, Romania, from 28 May to 13 June 1979 to consider adoption of the draft Convention providing a Uniform Law on Agency of an International Character in the Sale and Purchase of Goods, which had been prepared under the auspices of UNIDROIT. Invitations to attend the conference have been extended to all member States of the United Nations and to interested international organizations.

B. COMPANY LAW

91. The member States of the European Communities are engaged in work aimed at the drafting of a convention that would impose uniform rules for mergers between companies and other businesses established in different member States of EEC.

92. CEC is preparing draft directives on certain aspects of company law, on the law relating to groups of companies, as well as on banking, insurance, securities and taxation. In addition, the Council and the Commission of the European Communities have adopted regulations concerning the law of competition in EEC and the Commission has made a number of decisions in individual cases involving competition policy.

C. CONSUMER PROTECTION

93. Within the Council of Europe, a committee of experts has prepared a questionnaire on the role of associations, public and private organizations in defending the collective interests of consumers. Based on the responses to this questionnaire, the European Committee on Legal Co-operation might request the committee of experts to undertake the preparation of a draft resolution on the subject.

94. The European Communities have undertaken a comprehensive programme concerning consumer protection on the basis of a resolution of the Council of Ministers adopted in April 1975. The programme covers such matters as consumer credit, unfair contract terms, price and product labelling, and misleading advertising. It is intended that a number of directives will be issued dealing with consumer protection.

95. One of the main purposes of the Joint FAO/WHO Food Standards Programme is to protect consumers against possible health hazards in food, arising

from the use of chemicals in the production and processing of foods, from inadequate standards of hygiene and from environmental contamination. The Codex Alimentarius Commission has adopted a number of codes concerning food hygiene and technological practices in food production. In addition, the recommended international food standards and limits for pesticide residues in food can be used as a basis for national legislation for the protection of consumers against health hazards, fraud and substandard products, both imported and domestically produced.

D. LAW OF EVIDENCE

96. Within the Council of Europe a committee of experts is considering the problems in the law of evidence posed by the new forms of reproducing documents and recording data. The committee of experts has elaborated a number of principles that could be included in a draft resolution on the subject. A working group has been asked to prepare a draft aimed at harmonizing (a) certain aspects of the applicable law concerning the need for written documentation and the period of required retention of documents; and (b) the probative value of microfilms and of recorded data in a data bank. This draft will deal in particular with the circumstances when the copy of a document may be considered and accepted as conforming to the original.

97. Within ECE, the Working Party on Facilitation of International Trade Procedures is preparing a draft recommendation concerning signatures and their authentication (TRADE/WR.4/GE.2/R.111/Rev.1).

98. The Permanent Technical Committee of CCC has prepared a draft recommendation to the effect that for customs purposes commercial invoices produced by the one-run method should be deemed just as valid as commercial invoices which were typed or handwritten. The draft recommendation, scheduled to be considered by the Council in May 1979, also provides that for customs purposes commercial invoices need not bear handwritten signatures.

99. CMI has established a Sub-Committee for the study of national rules on expert evidence in maritime disputes.

E. INTERNATIONAL FACTORING

100. In 1978 UNIDROIT established a study group charged with preparing a uniform law applicable to international factoring operations. At its first session in February 1979 the Study Group considered a questionnaire on the principal problems involved and decided on the main points that should form the core of the future convention providing a uniform law governing international factoring operations.

F. INTERNATIONAL LEASING

101. Since 1977 a study group established by UNIDROIT has been engaged in the preparation of uniform rules for contracts of leasing. At its February 1979

session, the Study Group considered a tentative draft set of uniform rules prepared by the UNIDROIT secretariat with the assistance of the Chairman of the Study Group, Mr. Réczei (Hungary). The draft uniform rules are concerned with the type of equipment leasing generally referred to as "financial leasing", i.e. triangular transactions in which one party (the financier) purchases from a supplier a plant, capital goods or equipment, the use of which for business or professional purposes is granted by the financier to the user. Based on the discussions at the February 1979 session of the Study Group, the draft uniform rules will be revised by the UNIDROIT secretariat in consultation with the Chairman of the Study Group.

G. LAW RELATING TO PIPELINES

102. Based on an analysis of the replies to a questionnaire to Governments, UNIDROIT decided to maintain on its work programme the harmonization or unification of certain aspects of the law relating to pipelines but not to undertake any work on the subject in the triennium 1978 to 1980.

H. WAREHOUSING

103. UNIDROIT has established a study group to consider the drawing up of uniform rules concerning the warehousing contract. At its January 1979 session the Study Group had before it a preliminary draft convention on the liability of international terminal operators (UNIDROIT Study XLIV-Doc.5) prepared by the UNIDROIT secretariat. With some amendments, the Study Group approved the preliminary draft convention which is based on the concept of the "international terminal operator", defined as any person who, against payment, undertakes the safekeeping of goods before, during or after their international carriage. The basic rules on liability and on limitations of liability are based on the United Nations Convention on the Carriage of Goods by Sea, 1978 (the Hamburg Rules). The draft text approved by the Study Group in January 1979 will be submitted to the Governing Council of UNIDROIT for a decision concerning future work on the subject of warehousing contracts.

104. For the related work of CMI on the liability of sea terminals, see paragraph 48 above (III. International transport, B. *Legal issues related to transport by sea*).

X. Facilitation of international trade

A. CO-OPERATION FOR EXPANSION OF INTERNATIONAL TRADE

105. Within the framework of its work on economic co-operation between developing countries UNCTAD has prepared studies and draft model statutes concerning multinational marketing enterprises, draft agreements on economic integration groupings, draft trade agreements

between developing and socialist countries, and draft agreements concerning the regulation of multinational companies.

106. An *Ad Hoc* Group of Experts established by UNCTAD was charged with formulating a set of equitable, multilaterally agreed-upon principles and rules for the control of restrictive business practices that have adverse effects on international trade, particularly on trade by developing countries. At its sixth session (17-27 April 1979) the Group of Experts is expected to complete its work. By resolution 33/153 of 20 December 1978, the General Assembly decided that a conference be convened, between September 1979 and April 1980 under UNCTAD auspices, to negotiate and adopt equitable principles and rules on restrictive business practices and to decide on the legal character of such principles and rules. The exact dates for the conference will be set by UNCTAD at its forthcoming fifth session.

107. The UNCTAD *Ad Hoc* Group of Experts referred to in the preceding paragraph is also engaged in the elaboration of a model law or laws on restrictive business practices in order to assist developing countries in devising appropriate legislation on the subject. At its April 1979 session the Group of Experts will continue its work, based on the draft model laws prepared by the UNCTAD secretariat and contained in document TD/B/C.2/AC.6/16.

108. The Legal Conference of representatives of member States of CMEA has discussed questions concerning the joint establishment and operation by CMEA member States of international economic organizations; a draft model agreement on an international organization for scientific and technical co-operation in a specific area is under preparation.

109. At its September 1978 session, the Working Party on Facilitation of International Trade Procedures of ECE noted that treaties concerning the international transport of goods, conditions for the transit and importation of goods, and international trade in certain products, such as dangerous goods and endangered species, often require the submission of detailed information to governmental authorities in accordance with a standardized document annexed to the treaty. If, because of recent developments in reproduction and transmission techniques or in international trading practices, it is desirable to modify the standardized document, then it is now necessary to amend the treaty. The Working Party therefore recommended that such standardized documents should not form an integral part of the text of the treaty and that the content and layout of the documents should be left for decision by a competent organ of the organization under whose auspices the treaty in question had been negotiated.

110. ICS is actively involved in the work of ECE on trade facilitation. ICS regularly submits papers and sends observers to sessions of the subsidiary bodies of ECE that are concerned with trade facilitation.

111. The Joint FAO/WHO Food Standards Programme is intended to protect consumers against possible health hazards in food, to ensure fair practices in the food trade and to facilitate international trade in food. The international food standards developed under this Programme reduce the technical, non-tariff obstacles to increased international trade in food and can be used both to promote the food industries of developing countries and to increase their ability to export to countries with detailed national rules on food standards.

112. In November 1978 the Executive Council of ILA established a working group charged with examining the legal issues involved in the establishment of a new international economic order, with a view to identifying topics which may be appropriate for consideration by committees of ILA. The working group will consider, *inter alia*, the new rules relating to trade and in particular to trade in commodities, the institutional aspects of GATT, and the most-favoured-nation clause in the context of recent trade agreements. The working group is to submit its report to the Executive Council of ILA in May 1979.

113. The basic legal documents of the African Development Bank are now being examined by the Bank with a view to changing the legal régime so as to permit membership by non-African States.

B. CO-OPERATION IN THE CUSTOMS AREA

114. The Group of Experts on Customs Questions affecting transport, a subsidiary body of the Inland Transport Committee of ECE, is continuing its consideration of the extension of the territorial scope of application of the Customs Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention), including the possibility of establishing a link among the different existing customs transit systems.

115. The Permanent Technical Committee of CCC is considering the possible advantages that might be gained if an international convention were prepared in order to provide a link between the existing customs transit systems. Further studies will be prepared concerning this question in consultation with interested trade and transport circles.

116. Within ECE, subsidiary bodies of the Inland Transport Committee are continuing to study the question of the harmonization of the conditions for the exercise of customs and other controls at frontiers, including the possibility of an international agreement on the subject. It is expected that an in-depth study will be prepared in 1979 for submission to the Inland Transport Committee.

117. Within ECE, the Working Party on Facilitation of International Trade Procedures is engaged in the preparation of a draft recommendation concerning facilitation of import clearance procedures (TRADE/WP.4/GE.2/R.122).

118. CCC is continuing its work of preparing annexes to the 1973 Kyoto Convention on the Simplification and Harmonization of Customs Procedures. These annexes establish the basic principles concerning customs rules and procedures applicable to particular areas of customs activity. The three annexes adopted during 1978 dealt, respectively, with (a) reimportation in the same State, (b) relief from import duties and taxes in respect of goods declared for home use, and (c) customs formalities applicable to commercial means of transport.

119. The Customs Co-operation Council Nomenclature provides a common, systematic basis for the classification of goods in national customs tariffs. As a result of co-operation by the Council and the United Nations Statistical Office, a one-to-one correlation has been established between this Nomenclature and the revised Standard International Trade Classification. The Customs Co-operation Council Nomenclature is constantly brought up to date in accordance with technological developments and is at present used by 142 States as a basis for their customs tariffs.

120. CCC is working on the implementation of the 1977 International Convention on Mutual Administrative Assistance for the Prevention, Investigation, and Repression of Customs Offences, adopted under the auspices of the Council in Nairobi. This Convention will strengthen the actions of the Council directed against smuggling and customs fraud in all its forms.

121. For the work of CCC to revise its Glossary of International Customs Terms, see paragraph 16 above (I. International contracts, C. *International trade terms and standards*).

122. For the work of the Customs Co-operation Council concerning the law of evidence and customs operations, see paragraph 98 above (IX. Other topics of international trade law, D. *Law of evidence*).

C. FACILITATION OF CO-OPERATION IN PRODUCTION

123. In January 1979 the Executive Committee of CMEA approved general terms for specialization and co-operation in production. These general terms were drafted by the Legal Conference of representatives of

member States of CMEA and they will take effect on 1 January 1980.

124. UNIDO is concerned with the promotion of industrialization by developing countries, with particular emphasis on the manufacturing sector. In its activities UNIDO is cognizant of the close interrelationship between the production and trade aspects in the development process of the developing countries.

D. ELIMINATION OF DOUBLE TAXATION

125. In order to promote the future development of co-operation between member States of CMEA, its Standing Commission on Monetary and Financial Questions drew up an intergovernmental agreement on the elimination of double income and property taxation of juridical persons, which was signed by member States of CMEA in May 1978. Both this agreement and the international agreement on the elimination of double income and property taxation of physical persons, which had been signed in May 1977, entered into force on 1 January 1979.

E. INFORMATION ON INTERNATIONAL TRADE LAW DEVELOPMENTS

126. The Committee on the Development of Trade of ECE is continuing its examination of the feasibility of a multilateral system of notification of laws and regulations concerning foreign trade and changes therein (MUNOSYST). As an experiment in 1978, a limited number of ECE member States sent notification of new laws and regulations, and of changes in prior laws or regulations, in a few self-selected fields. Progress was also achieved in identifying primary and secondary sources of information for any future system. Based on the replies to a questionnaire, the ECE secretariat will submit a feasibility study to the twenty-eighth session of the Committee on the Development of Trade in December 1979.

127. ICS is preparing model Export Cargo Shipping Instructions, to be used by combined transport operators in the collection of basic transport information.

I. COMMENTARY ON THE CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS, DONE AT NEW YORK, 14 JUNE 1974 (A/CONF.63/17)*

This commentary has been prepared pursuant to a request by the United Nations Conference on Prescription (Limitation) in the International Sale of Goods (New York, 20 May-14 June 1974) at which the Convention on the Limitation Period in the International Sale of Goods was adopted. It has been written under the responsibility of the United Nations Office of Legal Affairs by Professor Kazuaki Sono of Hokkaido University, Japan, who served as Secretary of the Drafting Committee of the Conference.

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* 27 June 1978.

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Preamble

The States Parties to the present Convention,

Considering that international trade is an important factor in the promotion of friendly relations amongst States,

Believing that the adoption of uniform rules governing the limitation period in the international sale of goods would facilitate the development of world trade,

Have agreed as follows:

Introduction: Objective of the Convention

1. This Convention is concerned with the period of time within which the parties to a contract of international sale of goods may commence legal proceedings for the exercise of claims arising from or relating to such contracts.

2. Differences in national laws governing the limitation of claims or the prescription of rights create serious practical difficulties. The prescription or limitation periods under national laws vary widely. Some periods seem too short (e.g. six months, one year) to

meet the practical requirements of international sales transactions, in view of the time that may be needed for negotiations and then for the institution of legal proceedings in a foreign and, often, distant country. Other limitation periods (in some cases up to 30 years) are inappropriately long for transactions involving the international sale of goods and fail to provide the basic protection that limitation rules were intended to accord, such as protection from the uncertainty and threat to business stability posed by the delayed presentation of claims and from the loss or staleness of evidence pertaining to claims presented with undue delay.

3. National rules not only differ, but in many instances they are also difficult to apply to international sales transactions.¹ One difficulty arises from the fact that some national laws apply a single rule of prescrip-

¹ For some illustrations of difficulties, see R. Kuratowski, *Limitation of Actions Founded on Contract and Prescription of Contractual Obligations in Private International Law*, *Estratto Pagliavatti del Terzo Congresso di Diritto Comparato*, vol. III—Paris IV, pp. 447-460; E. Harris, *Time-Limits for Claims and Actions*, in *Unification of the Law Governing International Sale of Goods* (J. Honnold, ed. 1966), pp. 201-223. Also see H. Trammer, *Time-Limits for Claims and Actions in International Trade*, *ibid.*, pp. 225-233.

tion or limitation to a wide variety of transactions and relationships. As a result, the rules are expressed in general and sometimes vague terms that are difficult to apply to the specific problems of an international sale. This difficulty is magnified for international transactions, since merchants and their lawyers will often be unfamiliar with the import of these general terms and with the techniques of interpretation used in a foreign legal system.

4. Perhaps even more serious is the uncertainty as to which national law will be applicable to an international sales transaction. Apart from the problems of choice of law that customarily arise in an international transaction, problems of prescription or limitation present a special difficulty of characterization or qualification: some legal systems consider these rules as "substantive" and therefore must decide which national law is applicable; other systems consider them as part of the "procedural" rules of the forum; still other legal systems follow a combination of the above approaches.²

5. In light of the difficulties mentioned in paragraphs 2-4 above, i.e. the differences in the time periods for bringing claims under various national laws, the problems in determining which national law is to apply and what effect it is to have, and the need to provide specific rules in this area adapted to the practical needs of international commerce, it was felt that the problems were sufficiently serious to justify the preparation of uniform rules on prescription or limitation of claims arising from the international sale of goods. In addition, substantive unification of the national laws on the prescription or limitation of claims would not only remove doubt and uncertainty in legal relations arising from the international sale of goods but would also serve the interests of justice and equity: under present conditions it is possible that an unexpected or severe application of a national rule on prescription or limitation of claims will prevent redress of a just claim, or that a lax application of such a rule will fail to provide adequate protection against claims that are stale or unfounded.

6. In view of the widely varying concepts and approaches prevailing under national laws with respect to the limitation of claims and the prescription of rights, it has been considered advisable to provide in a convention uniform rules that are as concrete and complete as possible. A brief and general uniform law (such as a law merely specifying the length of the prescription or limitation period) would do little in actual practice to achieve unification, since the divergent rules of national law would then be brought into play in "interpreting" such a brief and general provision. Since this Convention is confined to one type of transaction—the purchase and sale of goods—it is possible to state uniform rules for this type of transaction with a degree of concreteness and specificity that is not feasible in statutes that deal with many different types of transactions and claims. The loss of uniformity in the ap-

plication of this Convention through the use of divergent rules and concepts of national law may not be wholly avoided, but this Convention seeks to minimize the danger by dealing with the problems that are inherent in this field as specifically as feasible within the scope of a convention of manageable length.³

Part I. Substantive provisions

SPHERE OF APPLICATION

Article 1

[Introductory provisions: *subject-matter and definitions*]*

1. This Convention shall determine when claims of a buyer and a seller against each other arising from a contract of international sale of goods or relating to its breach, termination or invalidity can no longer be exercised by reason of the expiration of a period of time. Such period of time is hereinafter referred to as "the limitation period".

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

3. In this Convention:

(a) "Buyer", "seller" and "party" means persons who buy or sell, or agree to buy or sell, goods, and the successors to and assigns of their rights or obligations under the contract of sale;

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

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

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

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

(f) "Persons" includes corporation, company, partnership, association or entity, whether private or public, which can sue or be sued;

(g) "Writing" includes telegram and telex;

(h) "Year" means a year according to the Gregorian calendar.

COMMENTARY

I. The subject-matter covered by the Convention, paragraph (1)

1. Under paragraph (1) of article 1, this Convention governs *the period* within which the parties to a contract of international sale of goods must exercise against each other any claim arising from or relating

* Captions are not contained in the Convention; they are added to this commentary only for ease of reference and should not be considered as forming part of the Convention.

³ See also art. 7, on rules for interpretation and application of the provisions of this Convention.

² See para. 5 of commentary on art. 3.

to such contract or be time-barred from asserting it. The characterization of this period and the legal effect of its expiration on the rights or claims of the parties differ widely under the various national legal systems. In view of the international character of this Convention and in order to promote uniformity in its interpretation and application, the use of traditional terms, such as "prescription of rights", "limitation of claims" or "limitation of legal proceedings", having differing connotations in the various legal systems, was avoided in the Convention. Consequently, paragraph (1) employs the neutral expression "when claims . . . can no longer be exercised by reason of the expiration of a period of time" to denote the subject-matter covered by the Convention. Thus the Convention is applicable irrespective of the particular theoretical approach or terminology employed by the applicable national law, as long as the period of time in question performs the function described in the first sentence of article 1(1). The second sentence of paragraph (1) of this article provides that in the Convention such a time-period shall be called "the limitation period".

2. Specific aspects of the Convention's sphere of application will be discussed in relation to: (a) the parties governed by the Convention, and (b) the types of claims that are subject to the limitation period.

(a) *The parties*

3. Paragraph (1) of article 1 shows that this Convention is directed to claims arising from the relationship of *buyer and seller*. The terms "buyer", "seller" and "party", as defined in article 1 (3) (a), include the "successors to and assigns of their rights or obligations under the contract of sale". Thus the Convention also governs the limitation period for the assertion of rights and obligations which are acquired through succession by operation of law (as on death or bankruptcy) or through voluntary assignment or delegation by a party to an international sales contract. Other important "successors" include insurers who become subrogated to the rights of a party under a sales contract and the surviving company which results from a merger of companies or from a corporate reorganization.

4. It should be noted that, under article 1 (3) (a), to be a "buyer" or "seller" a person must "buy or sell, or agree to buy or sell, goods". Thus a party who has only the right (or "option") to *conclude* a sales contract is not a "buyer" or "seller" unless and until the sales contract is in fact concluded. Thus, rights under the option agreement (as contrasted with rights under a contract that may result from the exercise of the option) are not governed by the Convention.

(b) *Transactions subject to the Convention; types of claims*

5. Under article 1 (1), this Convention applies to "claims . . . arising from a contract of international sale of goods or relating to its breach, termination or invalidity". Article 2 determines whether a contract of sale of goods is "international"; article 3 details the

circumstances under which a Contracting State must apply the rules of this Convention; and articles 4 through 6 exclude from the scope of the Convention certain defined types of sales, goods, claims and contracts.

6. Paragraph (1) of article 1 provides that this Convention governs claims "arising from a contract of international sale of goods" as well as claims "relating to its breach, termination or invalidity". The requirement that claims "arise from" a sales contract serves to exclude claims that arise independently of the contract, such as claims based on tort or *delict*. The language "relating to" the breach, termination or invalidity in article 1 (1) is broad enough to cover not only claims arising from but also claims "relating to" the breach, termination or invalidity of an international sales contract. For example, the buyer may have made an advance payment to the seller under a sales contract which the seller fails to perform alleging impossibility, government regulation or some similar supervening event. The seller might also claim that the contract was invalid for some other reasons. Whether these events constitute an excuse for the seller's failure to perform may often be in dispute. Hence, the buyer may need to bring an action against the seller presenting, in the alternative, claims both for breach of contract and for restitution of the advance payment. Because of the frequent connexion, in practice, between these two types of claims, both are governed by this Convention.⁴

7. The references in article 1 (1) to the "contract" and to the relationship between "a buyer and a seller against each other" serve to exclude from the coverage of the Convention claims against a seller by a person who has purchased the goods from someone other than the seller. For example, where a manufacturer sells goods to a distributor who resells the goods to a sub-purchaser, a claim by the subpurchaser against the manufacturer would not be governed by the Convention. See also paragraph 3, above. Nor does this Convention apply to claims of the buyer or seller against a person who is neither a "buyer" nor "seller", but who had guaranteed the performance by the buyer or seller of an obligation under the contract of sale.⁵

⁴ The language "relating to" is also relevant where the applicable law of the contract requires that the invalidity of a contract must first be established by way of an *action for annulment*. In such a case, a mere assertion that a contract is terminated or invalid does not create a basis for the assertion of claims against the other party until the termination or invalidity itself has been established by the courts. Under the broad language of article 1 (1), the period for bringing such an action for annulment falls within the scope of this Convention. (As to the possibility of excluding actions for annulment from the application of this Convention by way of a reservation, see art. 35 and its accompanying commentary.) Of course, where the termination or invalidity need not first be established by an action for annulment, this Convention does not affect provisions in the applicable national law that may require the assertion of termination or invalidity against the other party by means other than the institution of legal proceedings within a fixed time-limit. See art. 1 (2) and para. 9 below.

⁵ For similar reasons, claims based upon a documentary letter of credit will not come within the scope of this Convention. The documentary letter of credit is an undertaking by banks independent of the underlying sales contract and does not constitute the legal relationship of "a buyer and a seller against each other".

II. *This Convention is not applicable to "time-limits" (déchéance), paragraph (2)*

8. Paragraph (2) of article 1 makes it clear that this Convention only governs *the limitation period* within which parties to a contract of international sale of goods must commence legal proceedings (as defined in article 1 (3) (e)) for the exercise of any claim arising from the contract or relating to its breach, termination or invalidity. Thus, the Convention has no effect on any rules under the applicable law concerning "time-limits" (*déchéance*), that make giving notice to the other party a prerequisite for the acquisition or exercise of a particular type of claim. Typical examples include the requirements that within a specified period of time the other party be given notice of the alleged defects in the goods delivered or of the refusal to accept such goods on grounds of non-conformity or defects. These notice requirements are designed to permit the parties to take prompt action in adjustment of their current performance under a sales transaction—e.g. making tests to ascertain the quality of goods on delivery, or retaking and salvaging rejected goods. In such cases, failure by a party to give notice as required may deprive that party of the right to assert claims based on the alleged defects or non-conformity of the goods.⁶ A further example of such "time-limits" (*déchéance*), which are not governed by this Convention, is a requirement under the applicable law that notice of termination or rescission of a contract be given to the other party within a specified period of time.⁷

9. Paragraph (2) of article 1 also preserves the validity of "time-limits" under national laws within which one party is required, as a condition for the acquisition or exercise of his claim, to perform any act "other than the institution of legal proceedings". Thus, this paragraph preserves "time-limits" which, while variously expressed, are not comparable to the general limitation period governed by this Convention in that they are addressed to something "other than the institution of legal proceedings".⁸ When the parties have stipulated in their sales contract a "time-limit" which is not directed at "the institution of legal proceedings", the question of the validity of this stipulation shall be determined by the applicable law.

III. *Definitions, paragraph (3)*

10. "Person" is defined in article 1 (3) (f) to include "corporation, company, partnership, association or entity, whether public or private, which can sue or be

⁶ For example, art. 39 (1) of the Uniform Law on the International Sale of Goods (ULIS), annexed to the Hague Convention of 1964, provides that "the buyer shall lose the right to rely on a lack of conformity of the goods if he has not given the seller notice thereof *promptly* after he has discovered the lack of conformity or ought to have discovered it".

⁷ A number of articles of ULIS provide that a party may avoid the contract only if he has made a declaration to the other party of his intention to avoid the contract, under varying circumstances, "within a reasonable time" (arts. 26, 30, 62 (1)), or "promptly" (arts. 32, 43, 62 (2), 66 (2), 67, 75).

⁸ See also art. 9 (2) (a) and accompanying commentary, para. 3.

sued". This definition is intended to show that this Convention is applicable without regard to the form of the organization that enters into a contract of international sale of goods. "Public" entities often engage in commercial activities and it is important to make it clear that such entities are subject to this Convention in the same way as "private" entities. Furthermore, the term public entity covers not only governmental agencies but also States, to the extent that they can sue or be sued. (The question of the immunity of a Contracting State before its own or foreign courts is not affected by this Convention.) An organization need not be corporate to be a "person". A partnership, an association or an "entity" "which can sue or be sued" in its own name under the applicable national law, is a "person" for the purpose of this Convention.

11. Most of the other definitions of terms in paragraph (3) of article 1 can best be considered in connexion with the provisions in the Convention that employ the term in question. For example, the definition of "legal proceedings" in paragraph (3) (c) can best be considered in connexion with article 15; the definition of "breach of contract" in paragraph (3) (d) can best be considered in connexion with articles 10 (1) and 12 (2); and the definition of "year" in paragraph (3) (h) in connexion with articles 8 and 28.

12. Certain other terms used in this Convention (such as "claims" and "rights") are not defined, since their meaning can best be seen in the light of the context in which they are used and of the objectives of this Convention.⁹ It is important to note that the construction of these terms by reference to the varying conceptions found in national laws would be inconsistent with the international character of the Convention and with its objective to promote uniformity in interpretation and application.¹⁰

Article 2

[*Definition of a contract of international sale*]

For the purposes of this Convention:

(a) A contract of sale of goods shall be considered international if, at the time of the conclusion of the contract, the buyer and the seller have their places of business in different States;

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

(c) Where a party to a contract of sale of goods has places of business in more than one State, the

⁹ Representatives at the Diplomatic Conference which adopted this Convention were generally agreed that the term "goods" means tangible movables. The term, however, was not defined formally, partly because the use of the words "*objets mobiliers corporels*" in the French text of the Convention already implied this and partly because the exclusions from the scope of the Convention provided in arts. 4 through 6 also made this point clear.

¹⁰ See art. 7 and accompanying commentary.

place of business shall be that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at the time of the conclusion of the contract;

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

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

COMMENTARY

1. This article deals with the degree of internationality that makes a contract of sale of goods an "international" one for the purposes of this Convention.

I. *The basic criteria, subparagraphs (a) and (b)*

2. Subparagraph (a) provides that for a contract of sale of goods to be considered international, the contract must satisfy the following three requirements: (i) *at the time of the conclusion of the contract*, (ii) the parties must have their *places of business* (and not simply centres of only formal significance, such as places of incorporation), (iii) *in different States* (whether these are Contracting or non-Contracting States). In short, the parties' places of business at the time of the conclusion of the contract may *not* be in the same State. The simplicity and clarity of these basic criteria will contribute to certainty in establishing whether a sale of goods is "international" for the purposes of this Convention.

3. The simplicity and clarity of the criteria contained in subparagraph (a) are further enhanced by subparagraph (b) of this article. Under subparagraph (b), the contract will not be considered "international", and hence the Convention will not govern, where one of the parties to the contract neither knew or had reason to know "at any time before or at the conclusion of the contract" that the place of business of the other party was in a different State. One example of such a situation is where one of the parties was acting as agent for a foreign undisclosed principal. Subparagraph (b) is designed to protect a party who enters into a contract of sale with another party, justifiably assuming that the places of both parties are in the same State, from finding out later to his surprise that he had entered into an international sales contract that is subject to this Convention.¹¹

II. *Place of business, subparagraph (c)*

4. This subparagraph deals with the situation where one of the parties to a sales contract has more than one place of business. Characterizing the sales contract as "international" for purposes of article 2 (a) in cases where a party has a number of places of business, causes

no problem where all the places of business of one party (X) are situated in States other than the one where the other party (Y) has his place of business; whichever place is designated as the relevant place of business of X, the places of business of X and Y will be in *different* States. The problem arises only when one of X's places of business is situated in the *same* State as the place of business of Y. In such a case it becomes crucial to determine which of the different places of business of X is the relevant place of business within the meaning of subparagraph (a) of this article.

5. Subparagraph (c) lays down the criterion for determining the relevant place of business for the purposes of this Convention where a party has more than one place of business: it is the place of business "which has the closest relationship to the contract and its performance". The phrase "the contract and its performance" refers to the transaction as a whole, including factors relating to the offer and the acceptance as well as the performance of the contract. In determining the place of business which has the "closest relationship", subparagraph (c) states that regard shall be given to "the circumstances known to or contemplated by the parties at the time of the conclusion of the contract". Circumstances that may not be known to one of the parties at the time of entering into the contract would include supervision over the making of the contract by a head office located in another State or the foreign origin or final destination of the goods. When these circumstances are not known to or contemplated by both parties, they are not to be taken into consideration.

III. *Habitual residence, subparagraph (d)*

6. This subparagraph deals with the case where one of the parties does not have a place of business. Most international contracts are entered into by businessmen who have recognized places of business. Occasionally, however, a person who does not have an established "place of business" may enter into a contract of international sale of goods where the goods are intended for commercial purposes, and not simply for "personal, family or household use" within the meaning of article 4 of this Convention. The present provision provides that, in this situation, the reference shall be to the habitual residence of such a party.

IV. *Nationality of the parties; civil or commercial character of the parties or the contract, subparagraph (e)*

7. This paragraph provides that neither the nationality of the parties nor the civil or commercial character of the parties or the contract shall be taken into consideration for the purposes of this Convention. Classification of a contract of sale of goods as "international" under article 2 (a) depends primarily on a determination that "the seller and buyer have their places of business in different States". In defining "place of business" in article 2 (c) and in referring to "habitual residence" in article 2 (d) there are no references to the nationality,

¹¹ As to the possibility of making a reservation with respect to the definition of an international sale, see art. 38 and accompanying commentary.

place of incorporation or place of the head office of any party. Subparagraph (e) emphasizes this fact by providing specifically that the nationality of the parties shall not be taken into consideration.

8. In some legal systems the national law relating to contracts of sale of goods has different provisions for cases where the parties or the contract are classified as "commercial" than for cases where the parties or the contract are classified as "civil". In other legal systems the distinction between "civil" and "commercial" parties or contracts is not known. In order to avoid possible differences in interpretation by national courts applying this Convention, subparagraph (e) of article 2 provides that, for the purposes of this Convention, the "*commercial or civil character of the parties or of the contract*" under the applicable national law shall be disregarded.¹²

Article 3

[Application of the Convention; exclusion of the rules of private international law]

1. This Convention shall apply only if, at the time of the conclusion of the contract the places of business of the parties to a contract of international sale of goods are in Contracting States.

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

3. This Convention shall not apply when the parties have expressly excluded its application.

COMMENTARY

1. Paragraphs (1) and (2) of this article deal with the question: when must a Contracting State apply the rules of this Convention? Paragraph (3) deals with the freedom of the parties to exclude the application of the Convention.

I. Application of the Convention, paragraph (1)

2. Article 3 (1) provides that this Convention *must* be applied if, "at the time of the conclusion of the contract, the places of business of the parties to a contract of international sale of goods are in Contracting States". Thus, a Contracting State is *not bound* under this Convention to apply the rules of the Convention when one party has his relevant place of business in a non-Contracting State even if the sales contract in question falls within the definition of "a contract of international sale of goods" under article 2 (a). (See also art. 33.)

3. It must be emphasized in this connexion that the nationality of a party is not relevant for the purposes of the application of this Convention (art. 2 (e)). Thus, whether the place of incorporation or the head office of the parties is in a Contracting or a non-Contracting State is not relevant for determining the applicability of this Convention. The only relevant question is whether for each party the place of business having "the

closest relationship to the contract and its performance" is located in a Contracting State (art. 2 (c)).¹³

II. Exclusion of the rules of private international law, paragraph (2)

4. Paragraph (2) of this article provides that, subject to any contrary provisions in this Convention, the Convention must be applied without regard to "the law which would otherwise be applicable by virtue of the rules of private international law". This language is designed to emphasize the fact that the applicability of this Convention depends on the basic test established in article 3 (1) rather than on the general rules of private international law.

5. If the applicability of this Convention were linked to the rules of private international law, special difficulties would have been presented because of the unusually divergent approaches in different legal systems to the characterization of the subject-matter of this Convention. For example, while most civil law systems characterize problems of prescription as substantive questions and apply the proper law of the contract (*lex causae contractus*) (and in some cases, the "proper law of prescription"), most common law jurisdictions characterize limitation problems as questions of procedure and, on this ground, apply the rules of the forum (*lex fori*). In some jurisdictions, a combination of the two characterizations may be possible. It has already been pointed out that this Convention governs regardless of the different theoretical approaches to the problem under national laws as long as the period in question has the function described under article 1 (1) and (2).¹⁴ The combined effect of paragraphs (1) and (2) of article 3 is certainty and uniformity in the application of this Convention.

6. The opening phrase of the paragraph, "unless this Convention provides otherwise", is occasioned by specific provisions of the Convention which make room for national law to modify certain rules under the Convention. One such instance is paragraph (3) of article 22 which provides, *inter alia*, that the validity of a clause defined therein shall not be affected by the provisions in the other paragraphs of article 22, "provided that such clause is valid under the law applicable to the contract of sale". Another example is the last phrase of article 15, which provides that the rule under that article is "subject to the law governing the proceedings".

III. Exclusion of the applicability of the Convention by agreement of the parties, paragraph (3)

7. Paragraph (3) allows the parties to agree to exclude the application of the Convention, provided that this is done "expressly". Thus, for example, where the parties have chosen as "the law applicable to the contract" the law of a non-Contracting State, which treats the question of limitation as substantive, an implication

¹³ As to the possibility of further limiting the application of the Convention by way of reservation, see art. 34 and accompanying commentary. See also art. 37.

¹⁴ See para. 1 of commentary on art. 1.

¹² See also para. 3 of commentary to art. 3.

might arise that the parties have excluded the application of this Convention because of their implied choice of the prescription rules contained in the chosen national law. Such an interpretation is more likely to arise if the legal proceedings are brought in a form of one of those Contracting States which also characterizes the limitation question as substantive. However, in such a case this Convention still applies because the exclusion of the application of this Convention was not "express". Furthermore, permitting an implied exclusion of the application of this Convention would defeat the purpose of article 3 (2).¹⁵

8. There is no requirement as to the time and form in which the agreement of the parties for the exclusion of this Convention must be expressed. Where, under article 3 (3), the parties have expressly excluded the application of this Convention, their claims will be regulated according to the law deemed to be applicable under the rules of private international law of the forum (cf. art. 3 (2)).

Article 4

[Exclusion of certain sales and types of goods]

This Convention shall not apply to sales:

- (a) Of goods bought for personal, family or household use;
- (b) By auction;
- (c) On execution or otherwise by authority of law;
- (d) Of stocks, shares, investment securities, negotiable instruments or money;
- (e) Of ships, vessels or aircraft;
- (f) Of electricity.

COMMENTARY

I. *Exclusion of consumer sales, subparagraph (a)*

1. Subparagraph (a) of this article excludes consumer sales from the scope of this Convention. A particular sale is outside the scope of this Convention if the goods are bought "for personal, family or household use". The usage of the word "personal" in conjunction with the words "family or household" indicates that the intended use must be non-commercial. Thus, for example, none of the following situations is excluded from the Convention: a camera bought by a professional photographer for use in his business, soap or other toiletries bought by a corporation for the personal use of its employees, and a single automobile bought by a car dealer for resale.

2. The rationale for excluding consumer sales from the Convention is that in a number of countries such transactions are subject to various types of national laws that are designed to protect consumers. In order to avoid any risk of impairing the effectiveness of such national laws, it was considered advisable that questions of prescription or limitation relating to consumer sales should be excluded from this Convention. In addition,

most consumer sales are domestic transactions and it was felt that the Convention should not apply to the relatively few cases where consumer sales were international transactions (e.g. because the buyer was a tourist with his habitual residence in another country).¹⁶

II. *Exclusion of sales by auction, subparagraph (b)*

3. Subparagraph (b) of this article excludes from the scope of this Convention sales by auction. Because sales by auction are often subject to special rules under various national laws, it was considered desirable that they should in all respects remain subject to these special rules. In addition, the length of the limitation period should not be affected by the location of the place of business of the successful bidder at an auction since at the opening of the auction the seller could not know which buyer would make a particular purchase.

III. *Exclusion of sales on execution or otherwise by authority of law, subparagraph (c)*

4. Subparagraph (c) of this article excludes sales on judicial or administrative execution or otherwise by authority of law, because such sales are usually governed by special rules in the State under whose authority the execution sale is made. Furthermore, such sales do not constitute a significant part of international trade and may, therefore, safely be regarded as purely domestic operations.

IV. *Exclusion of sales of stocks, shares, investment securities, negotiable instruments or money, subparagraph (d)*

5. This subparagraph excludes sales of stocks, shares, investment securities, negotiable instruments and money.¹⁷ Such transactions present problems that are different from the usual international sale of goods and, in addition, in many countries, are subject to special mandatory rules.

V. *Exclusion of sales of ships, vessels and aircraft, subparagraph (e)*

6. This subparagraph excludes from the scope of the Convention all sales of ships, vessels and aircraft, items which are often subject to different special rules under the various national legal systems. In some legal systems there may be a question whether such items are "goods". Under most national laws at least certain types of ships, vessels and aircraft are subject to special registration requirements. The rules under various national laws, specifying the ships, vessels and aircraft that must be registered, differ widely. Since the relevant place of registration, and therefore the law which would govern the registration, might not be known at the time of the sale, the sale of all ships, vessels and aircraft was excluded in order to make uniform the application of this Convention.

¹⁶ See art. 2 (b)

¹⁷ As to whether commercial paper of the type enumerated might be "goods", see foot-note 6 to commentary on art. 1.

¹⁵ See paras. 4 and 5, *supra*.

VI. *Exclusion of sales of electricity, subparagraph (f)*

7. This subparagraph excludes sales of electricity from the scope of the Convention on the ground that international sales of electricity present unique problems that are different from those presented by the usual international sale of goods.

Article 5

[Exclusion of certain claims]

This Convention shall not apply to claims based upon;

- (a) Death of, or personal injury to, any person;
- (b) Nuclear damage caused by the goods sold;
- (c) A lien, mortgage or other security interest in property;
- (d) A judgement or award made in legal proceedings;
- (e) A document on which direct enforcement or execution can be obtained in accordance with the law of the place where such enforcement or execution is sought;
- (f) A bill of exchange, cheque or promissory note.

COMMENTARY

1. Subparagraph (a) excludes from the Convention claims based on the death of or personal injury to any person. If such a claim is based on tort (or *delict*), the claim would be excluded from this Convention by virtue of the provisions of article 1 (1).¹⁸ However, under some circumstances, claims for liability for the death or personal injury of the buyer or of some other person might be based on the failure of the goods to comply with the contract; furthermore, a claim by the buyer against the seller for pecuniary loss or damage might arise because of personal injuries suffered by persons *other than himself* (including by a subpurchaser). While such claims based on personal injuries, under some legal systems, may be regarded as contractual, in other legal systems the characterization is in doubt and in still others all such claims may be regarded as delictual. Therefore, in order to avoid possible doubt and diversity in interpretation, this subparagraph excludes *all* claims based on "death of, or personal injury to, any person"; it would also be often inappropriate to subject such claims to the same limitation period as the one applicable to the usual type of commercial claims based on contract.

2. Subparagraph (b) excludes claims based on "nuclear damage caused by the goods sold". The effects of such damage may not appear until a long period after exposure to radio-active materials. In addition, special periods for the extinction of actions based on nuclear damage are contained in the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963.¹⁹

¹⁸ See para. 6 of commentary on art. 1.

¹⁹ See art. VI (basic periods of 10 or 20 years, subject to certain adjustments); art. I (1) (k) (definition of "nuclear damage").

3. Subparagraph (c) excludes claims based on "a lien, mortgage or other security interest in property". It should be noted that this subparagraph excludes rights based not only on "lien" and "mortgage" but also rights based on "other security interest in property". This latter phrase is sufficiently broad to exclude rights asserted by a seller for the recovery of property sold under a "conditional sale" or similar arrangement designed to permit the seizure of property on default of payment. Liens, mortgages and other security interests involve rights *in rem* which traditionally have been governed by the *lex situs* and are enmeshed with a wide variety of rights affecting other creditors; expanding the scope of the Convention to include such claims would have impeded the adoption of the Convention.

4. Of course, the expiration of the limitation period applicable to a claim based on a sales contract may have serious consequences with respect to the enforcement of a lien, mortgage or other interest securing that claim. However, for the reasons given in connexion with article 25 (1) (para. 2 of commentary on art. 25), this Convention does not attempt to prescribe uniform rules with respect to such consequences, and leaves these questions to the applicable national law. It may be expected that the tribunals of Contracting States in solving these problems will give full effect to the basic policies of this Convention with respect to the institution of legal proceedings for the enforcement of stale claims.

5. Under subparagraph (d), claims based on "a judgement or award made in legal proceedings" are excluded even though the judgement or award may have resulted from a claim arising from an international sale. This exclusion is consistent with the purpose of this Convention to regulate the period within which the parties to a contract of international sale of goods must *bring legal proceedings* for the exercise of any claims arising under that contract.²⁰ Moreover, in actions to enforce a judgement or award, it may be difficult to ascertain whether the underlying claim arose from an international sale of goods and satisfied the other requirements for the applicability of this Convention. In addition, the enforcement of a judgement or award involves the procedural rules of the forum (including rules concerning "merger" of the claim in the judgement) and thus would be difficult to subject to a uniform rule limited to claims derived from the international sale of goods.

6. Subparagraph (e) excludes claims based on "a document on which direct enforcement or execution can be obtained in accordance with the law of the place where such enforcement or execution is sought". Such documents are given different names and rules in various national jurisdictions (e.g. *titre exécutoire*), but they have an independent legal effect that differentiates them from claims that must first be established by way of legal proceedings in which the breach of the contract of sale must be proved. In addition, these documents present some of the problems mentioned with respect to subparagraph (d) (para. 5, above). (Subparagraph (e) is also analo-

²⁰ See para. 1 of commentary on art. 1.

gous to the exclusion under subparagraph (f) of claims based on documents having a legal identity distinct from the sales contract.)

7. Subparagraph (f) excludes claims based on "a bill of exchange, cheque or promissory note". Such an instrument may be given (or accepted) in connexion with the obligation to pay for goods sold in an international transaction subject to this Convention. Such instruments are in many cases governed by international conventions or national laws that state special periods of limitation. In addition, such instruments are often circulated among third persons who have no connexion with or knowledge of the underlying sales transactions; moreover, the obligation under the instrument may be distinct (or "abstracted") from the sales transaction that occasioned the issuance of the instrument. In view of these facts, claims under the instruments described in subparagraph (f) are excluded from this Convention.²¹

Article 6

[Mixed contracts]

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

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

COMMENTARY

1. This article deals with two different situations relating to mixed contracts.

I. *Sale of goods and supply of labour or other services by the seller, paragraph (1)*

2. This paragraph deals with contracts under which the seller undertakes to sell goods as well as to supply labour or other services. An example of such a contract is where the seller agrees to sell machinery and undertakes to set it up in a plant in working condition or to supervise its installation. In such cases, paragraph (1) provides that where the "preponderant part" of the obligation of the seller consists in the supply of labour or other services, the contract is not subject to the provisions of this Convention.

3. It is important to note that this paragraph does not attempt to determine whether obligations created by one instrument or transaction comprise essentially one or two contracts. Thus, the question whether the seller's obligations relating to the sale of goods and those relating to the supply of labour or other services can be considered as two separate contracts (under what is sometimes called the doctrine of "severability" of contracts) will be resolved in accordance with the applicable national law.

²¹ Contrast the treatment of assignees of rights under the sales contract (art. 1 (3) (a)).

II. *Supply of materials by the buyer, paragraph (2)*

4. The opening phrase of paragraph (2) of this article provides that the sale of goods to be manufactured by the seller to the buyer's order is as much subject to the provisions of this Convention as the sale of ready-made goods.

5. However, the concluding phrase in this paragraph, "unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production", is designed to exclude from the scope of this Convention those contracts under which *the buyer undertakes to supply the seller* (the manufacturer) with a *substantial* part of the necessary materials from which the goods are to be manufactured or produced. Since such contracts are more akin to contracts for the supply of *services* or labour than to contracts for sale of goods, they are excluded from the scope of this Convention in line with the basic rule of paragraph (1).

Article 7

[Interpretation to promote uniformity]

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.

COMMENTARY

National rules on limitation (prescription) are subject to sharp divergencies in approach and concept. Thus, it is especially important to avoid differing constructions of the provisions of this Convention by national courts, each dependent upon the varying concepts of the particular national law that it was applying. To this end, article 7 emphasizes the importance, in interpreting and applying the provisions of the Convention, of having due regard for the international character of the Convention and the need to promote uniformity. Illustrations of the application of this article may be found elsewhere in the commentary, e.g. in article 1 at paragraphs 10-12; article 14, foot-note 1; and article 22, foot-note 1.

THE DURATION AND COMMENCEMENT OF THE LIMITATION PERIOD

Article 8

[Length of the period]

The limitation period shall be four years.

COMMENTARY

1. Establishing the length of the limitation period required the reconciliation of various conflicting considerations. On the one hand, the limitation period must be adequate for the investigation of claims, negotiation for possible settlements making the arrangements necessary for bringing legal proceedings. In assessing the time required, consideration was given to the special problems resulting from the distance that often separates

the parties to an international sale and the complications resulting from differences in language and legal systems. On the other hand, the limitation period should not be so long as to fail to provide protection against the dangers of uncertainty and injustice that would result from the extended passage of time without the resolution of disputed claims. (These dangers include the loss of evidence and the possible threat to business stability or solvency resulting from extended delays.)

2. In the course of drafting this Convention, it was generally considered that a limitation period within the range of three to five years would be appropriate.²² The limitation period of four years established in this article is a product of compromise. In reaching this decision, account was taken of other provisions in this Convention affecting the running of the limitation period. These provisions include articles 9 to 12 (rules relating to the commencement of the running of the period), article 19 (a new period commences to run afresh when the creditor performs an act which has the effect of recommencing the original limitation period in a given jurisdiction), article 20 (a new period commences to run when the debt is acknowledged by the debtor), articles 17, 18 and 21 (rules extending the limitation period), and article 22 (modification of the period by the parties).

Article 9

[Basic rule on commencement of the period]

1. Subject to the provisions of articles 10, 11 and 12, the limitation period shall commence on the date on which the claim accrues.

2. The commencement of the limitation period shall not be postponed by:

(a) A requirement that the party be given a notice as described in paragraph 2 of article 1, or

(b) A provision in an arbitration agreement that no right shall arise until an arbitration award has been made.

COMMENTARY

1. Articles 9 to 12 govern the point in time at which the limitation period starts to run with regard to all claims covered by this Convention. Article 9 (1) provides the basic rule as to the commencement of the period: the limitation period commences to run "on the date on which the claim accrues". Article 10 provides special rules for the purpose of the application of the basic rule provided in article 9 (1) with regard to claims arising from breach, non-conformity of goods, and fraud. Article 11 deals with the situation where the seller gives an express undertaking relating to the goods. Article 12 covers the cases where the contract was terminated be-

fore the time when the performance would have become due.

2. While many claims will be governed by the rules under article 10, claims may also arise without breach or fraud. One example is a claim for the restitution of advance payments where the performance under the contract is excused under the applicable national law because of impossibility of performance, *force majeure*, and the like.²³ Such claims will be governed by the basic rule provided in article 9 (1). Whether such a claim exists and, if it does, when it accrues, is not governed by this Convention and must be decided under the applicable national law.

3. Article 9 (2) (a) was designed to eliminate any difference in the starting point of the running of the limitation period under the Convention where under the applicable national law one party is required, as a prerequisite for the acquisition or exercise of his claim, to give notice to the other party, or where the parties agreed, validly under the applicable national law, that notice be given to the other party of any claim within a specified period of time. Where such notice is required, either by statute or by contract, the time when a claim is considered to "accrue" may be determined in a number of ways. Thus, under some national laws, such claims "accrue" when the necessary notice is given; under other national laws claims may "accrue" before the notice, provided the notice is then in fact given within a prescribed period. Under article 9 (2) (a) the commencement of the limitation period "shall not be postponed" by the requirement of such notices.²⁴

4. Article 9 (2) (b) deals with the effect of a provision in an arbitration agreement stating that "no right shall arise until an arbitration award has been made". Under article 9 (2) (b) such a contractual provision will be disregarded for the purpose of determining the starting point for the running of the limitation period under the Convention. The reason behind this provision is similar to that behind the rule in article 9 (2) (a). (See para. 3, above.)

Article 10

[Special rules: breach; defect or non-conformity of the goods; fraud]

1. A claim arising from a breach of contract shall accrue on the date on which such breach occurs.

2. A claim arising from a defect or other lack of conformity shall accrue on the date on which the goods are actually handed over to, or their tender is refused by, the buyer.

3. A claim based on fraud committed before or at the time of the conclusion of the contract or during its performance shall accrue on the date on which the fraud was or reasonably could have been discovered.

²² To help resolve the question of the length of the limitation period and other relevant issues, a questionnaire was addressed to Governments and interested international organizations, and the replies, reporting national rules and suggestions from each region, were analysed in a report of the Secretary-General (A/CN.9/70/Add.2, sect.14; Yearbook... 1972, part two, I, B, 1).

²³ As to other examples of such claims, see para. 6 of commentary on art. 1.

²⁴ This rule, of course, has no effect on the rules of the applicable national law requiring notice. See art. 1 (2) and accompanying commentary, paras. 8 and 9.

COMMENTARY

1. The basic rule as to the commencement of the limitation period is provided in article 9 (1): "The limitation period shall commence on the date on which the claim *accrues*". Article 10 is designed to eliminate difficulties in determining when a claim "accrues" by providing specific rules as to the time when a claim arising from a breach of contract, from a defect or other lack of conformity, or based on fraud, should be deemed to have "accrued".

I. *Breach of contract, paragraph (1)*

2. With respect to a claim arising from breach of contract, article 10 (1) provides that the claim "shall accrue on the date on which such breach occurs".²⁵ "Breach of contract" is defined in article 1 (3) (d) to mean "the failure of a party to perform the contract or any performance not in conformity with the contract". The application of this rule may be illustrated by the following examples:

Example 10A: The sales contract required the seller to place goods at the buyer's disposal on 1 June. The seller failed to supply or tender any goods under the contract on 1 June or on any subsequent date. The limitation period for bringing any legal proceedings by the buyer in respect of the breach of the contract commences to run on the date on which the breach of contract occurred, i.e., in this example, on 1 June, the date for performance required under the contract.

Example 10B: The sales contract required the seller to place goods at the buyer's disposal on 1 June. The seller failed to supply or tender any goods under the contract on 1 June. However, a few weeks thereafter the buyer agreed to the extension of the time for delivery until 1 December. On 1 December, the seller again failed to perform. If the above extension of the time for delivery was valid, the limitation period commences to run on 1 December, the date of "breach" of the contract.

Example 10C: The sales contract provided that the buyer may pay the price at the time of delivery of the goods and obtain a 2 per cent discount. The contract also provided that the buyer must, at the latest, pay within 60 days of the delivery. The buyer did not pay on delivery of the goods. The limitation period does not commence to run until the end of the 60-day period because there was no "breach" of contract by the buyer until the time for his performance expired.

Example 10D: The sales contract provided that the goods should be shipped in a specified year on a date to be named by the buyer. The buyer might have requested shipment in January, but he only requested shipment on 30 December of that year. The seller did not perform. The limitation period with respect to this failure to perform did not commence until 30 December since, under the terms of the contract, there was no "breach" of the contract until the date specified by the buyer for shipment had arrived.

²⁵ Art. 10 (2) contains a special rule applicable to those breaches of contract that take the form of a defect or lack of conformity of the goods.

II. *Claims by buyers relying on non-conformity of the goods, paragraph (2)*

3. With regard to a claim by the buyer of a breach of contract "arising from a defect or other lack of conformity" of the delivered goods, article 10 (2) provides a special rule: the claim "shall accrue on the date on which the goods are actually handed over to, or their tender is refused by, the buyer". The phrase "a claim arising from a defect or other lack of conformity" of the goods is sufficiently broad to include any respect in which the goods may fail to comply with the requirements of the contract.

4. The phrase "the goods are actually handed over to ... the buyer" refers to the existence of circumstances which constitute placing the goods under the buyer's "actual" control regardless of whether or not this occurs on the due date or at the place contemplated by the contract.²⁶ Unless the goods have reached the stage where "actual" inspection of the goods by the buyer is possible, the goods cannot be regarded to have been "actually handed over to ... the buyer".

Example 10E: Seller in Santiago agreed to ship goods to a buyer in Bombay: the terms of shipment were "F.O.B. Santiago". Pursuant to the contract, the seller loaded the goods on board a ship in Santiago on 1 June. The goods reached Bombay on 1 August, and on the same date the carrier notified the buyer that he could take possession of the goods. On 15 August the buyer took possession of the goods. Under these facts, the goods are "actually handed over" to the buyer on 15 August.

5. The result in example 10E is not affected by the fact that under the terms of the contract the risk of loss during the ocean voyage rested on the buyer. Nor is this result affected by the fact that, under some legal systems, it might be concluded that "title" or "ownership" in the goods passed to the buyer when the goods were loaded on the ship in Santiago. Alternative forms of price quotation (F.O.B. seller's city; F.O.B. buyer's city; F.A.S.; C.I.F. and the like) have significance in relation to possible changes in freight rates and the manner of arranging for insurance, but they have no significance in relationship to the time when the goods were "actually" handed over to the buyer.²⁷

6. In a case where the buyer refuses to accept the goods although the seller placed them at his disposal, there is no date on which the goods are "actually handed over" to the buyer. For this reason, article 10 (2) contains an alternative rule which provides that where the

²⁶ The term "delivery" was intentionally avoided because of the differences in the definition of this legal concept in various legal systems, particularly where there was purported "delivery" of non-conforming goods.

²⁷ Of course, if the buyer takes effective physical control over the goods in the seller's city and thereafter ships the goods, then the goods would have been actually handed over to the buyer in the seller's city. It may also be noted that goods may be handed over to agents or assigns of the buyer who are authorized to receive them. Cf. art. 1 (3) (a). For the purpose of illustration, assume that the buyer in example 10E, above, resells the goods to C during the transit of the goods and transfers the bill of lading to C. The goods are handed over to the "buyer" when C actually takes possession of the goods.

that in view of the seller's repudiation the contract is terminated.

3. Under some legal systems, notification, in advance of refusal to perform an obligation that will be due in the future is regarded as an anticipatory breach upon which both an election to terminate and a legal action for breach may be based. Circumstances such as bankruptcy or other events manifesting an inability to perform may also become grounds upon which one party may terminate the contract before the performance is due under the contract. In such circumstances, where a party who is entitled to declare the contract terminated "exercises this right", the limitation period runs from "the date on which the declaration is made to the other party". On the facts in the above example, this date is 15 July.

4. It will be noted that paragraph (1) is only applicable in cases where a party elects to exercise his right to declare the contract terminated. If in the above case, such an election (i.e., by the notification of termination made on 15 July) had not taken place, "the limitation period shall commence on the date on which performance is due", 1 December in the above example.³² This result is in conformity with the general rule of article 10 (1) concerning the point of time at which a claim for breach of contract "accrues".³³

5. In the interest of definiteness and uniformity, under this paragraph the period commences on the earlier date (15 July) only when a party affirmatively "declares" the contract terminated. Thus, termination resulting from a rule of the applicable national law to the effect that in certain circumstances the contract shall be automatically considered as terminated is not termination resulting from a "declaration" by a party within the meaning of paragraph (1). It should also be noted that article 12 does not govern the situation, existing under some legal systems, whereby circumstances such as repudiation or bankruptcy prior to the time performance is due entitle one party to declare that the performance is due immediately.³⁴

II. Instalment contracts, paragraph (2)

6. For claims arising out of breaches of instalment contracts for the delivery of or payment for goods, article 12 (2) follows the same approach as article 10 (1). The limitation period "shall, in relation to each separate instalment, commence on the date on which

³² This Convention does not specify the time when a notification of termination must be given. However, the second sentence of paragraph (1) of article 12 restricts the application of this rule to those instances where the declaration to terminate the contract is made "before performance becomes due".

³³ While the second sentence of article 12 (1) is intended to attain the same result as under article 10 (1), the expression "the date on which performance is due" was employed in article 12 (1) rather than the words "breach occurs" to avoid possible confusion, particularly in a jurisdiction where "anticipatory breach" is a recognized legal concept.

³⁴ Under these circumstances, where a party validly declares that performance is due immediately and the other party then does not perform, the acceleration of the "due date" will lead to a "breach" at an earlier date, and hence to the earlier commencement of the running of the limitation period.

the particular *breach occurs*".³⁵ This rule will minimize the theoretical difficulties as to whether a particular instalment contract should be regarded as a set of several contracts or as a single contract. The application of article 12 (2) may be illustrated by the following example:

Example 12B: A contract of sale made on 1 June required the seller to sell the buyer 4,000 kg of sugar, with deliveries of 1,000 kg on 1 July, 1 August, 1 September and 1 October. Each of the four instalments was delivered late. The buyer, while he complained to the seller of these late deliveries, did not elect to terminate the contract although he was entitled to do so under the national law applicable to the contract. Under these facts, the limitation period would be applied separately to each claim arising from the late delivery in July, August, September, and October.

7. However, if one party does exercise his right to declare the instalment contract terminated by reason of such breach, article 12 (2) provides that "the limitation period in respect of all relevant instalments" commences when such declaration was made. This rule may be illustrated as follows:

Example 12C: The contract is the same as in Example 12B above. The first instalment, delivered on 1 July, proved on examination to be so seriously defective that the buyer rightfully took two steps: he rejected the defective instalment and he notified the seller on 5 July that the contract was terminated as to future instalments. Once termination is thus effected, the single limitation period for claims arising from all relevant instalments (i.e., here the July, August, September, and October instalments) commences on the date of the declaration that the contract is terminated, i.e., 5 July.

8. For the purpose of paragraph (2), the determining factor is the buyer's election to "declare the contract terminated" as to future instalments. The term "all relevant instalments" embraces all instalments, whether preceding or subsequent to the event giving rise to the declaration of the termination of the instalment contract, which are covered by or affected by the termination of the contract. This approach reflects the fact that the right to terminate the contract may arise from the cumulative effect of breaches in the performance of a number of instalments.

CESSATION AND EXTENSION OF THE LIMITATION PERIOD

Article 13

[Judicial proceedings]

The limitation period shall cease to run when the creditor performs any act which, under the law of the court where the proceedings are instituted, is recog-

³⁵ The reference to "breach" in the first sentence of art. 12 (2) does not preclude the application of art. 10 (2) for determining the date on which the breach occurred, in cases where the breach consisted of non-conformity of the goods; art. 10 (2) is a special rule while art. 10 (1) deals with breach in general. See also art. 1 (3) (d).

buyer refuses to accept the tendered goods, the claim shall accrue on the date on which the *tender* of the goods *was refused* by the buyer. The commencement of the limitation period will not be affected, once the buyer refused to accept the tendered goods, by the buyer thereafter taking possession of the goods under the contract.²⁸

III. Claims based on fraud, paragraph (3)

7. Fraud committed while the contract was being negotiated or at the time of the conclusion of the contract or during its performance may give rise to various claims. Where a claim based on fraud arises in tort (or *delict*), it is, of course, outside the scope of this Convention.²⁹ However, the defrauded party may be entitled to avoid or rescind the contract under the applicable national law. If the contract is avoided, the defrauded party may want to ask for the restitution of advance payments, if any. This claim for restitution of any advance payments falls within the scope of this Convention.³⁰ For such a claim, article 10 (3) provides that it should be deemed to have accrued "on the date on which the fraud was or reasonably could have been discovered".

Article 11

[Express undertaking]

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

COMMENTARY

1. Article 11 provides a special rule for cases where the seller has given the buyer an express undertaking (such as a warranty or guarantee) relating to the goods, which is stated to have effect for a certain period of time. This period may be expressed in terms of a specific period of time or otherwise, such as in terms of an amount of performance. Under this article if the notice is given before the expiration of the period of the undertaking, the commencement of the limitation period for claims arising from the undertaking is from "the date on which the buyer notifies the seller of the fact on which the claim is based". Where the notice has not been given

²⁸ The over-all fairness of the rules contained in arts. 9 and 10 needs to be considered in the light of the following factors: (a) exclusion from the Convention (art. 5 (a)) of claims based on "death of, or personal injury to, any person"; (b) confining the scope of this Convention to claims that arise in relation to a *contract*—thereby excluding claims based on tort or *delict* (see discussion in para. 6 of commentary on art. (1)); (c) exclusion of consumer sales from the Convention (art. 4 (a)); (d) the special provisions for claims based on an express undertaking given by the seller which is stated to have effect for a period of time (art. 11).

²⁹ See para. 6 of commentary on art. 1.

³⁰ See para. 6 of commentary on art. 1.

before the expiration of the period of the undertaking, article 11 provides that the limitation period shall commence "on the date of the expiration of the period of the undertaking".³¹

2. Article 11 does not specify when the seller's "express undertaking" must be given. The seller, after delivering the goods, might adjust certain components and in this connexion might give an express warranty at that time. Such an express undertaking, although given after the delivery of the goods, would be governed by this article.

Article 12

[Termination before performance is due; instalment contracts]

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

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

COMMENTARY

1. Both paragraphs (1) and (2) of article 12 deal with problems that arise when a party is entitled to terminate the contract before performance is due. Paragraph (1) establishes the basic general rule; paragraph (2) deals with the special problems that arise when a contract calls for the delivery of goods, or the payment for goods, in instalments.

I. Basic rule, paragraph (1)

2. The basic rule of paragraph (1) may be illustrated by the following:

Example 12A: Under a contract of sale made on 1 June the seller is to deliver the goods on 1 December. On 1 July the seller (without a valid excuse) notifies the buyer that he will not deliver the goods required by the contract. On 15 July the buyer declares to the seller

³¹ This article does not affect the time-limit within which such notice must be given for the exercise of a claim under the undertaking. See art. 1 (2) and para. 8 of accompanying commentary.

nized as commencing judicial proceedings against the debtor or as asserting his claim in such proceedings already instituted against the debtor, for the purpose of obtaining satisfaction or recognition of his claim.

COMMENTARY

1. As was noted earlier (introduction, para. 1), this Convention is essentially concerned with the time within which the parties to a contract for the international sale of goods may bring legal proceedings to exercise claims arising from such contract. Article 8 states the length of the limitation period. Articles 24 to 27 state the consequences of the expiration of the period; these include the rule (art. 25 (1)) that no claim for which the limitation period has expired "shall be recognized or enforced in any legal proceedings". To complete this structure, article 13 provides that the "limitation period shall cease to run" when the creditor commences judicial proceedings against the debtor for the purpose of obtaining satisfaction or recognition of his claim (provision for "legal" proceedings other than "judicial" proceedings—e.g., arbitral and administrative proceedings—is made in arts. 14 and 15). The net effect of these rules is substantially the same as providing that a proceeding for the enforcement of claims may only be brought before the limitation period has expired. However, the approach of this Convention, in stating that the limitation period shall "cease to run" when the proceeding is instituted, provides a basis for dealing with problems that arise when such proceeding fails to result in a decision on the merits or is otherwise abortive (see art. 17).

2. Article 13 is designed to identify the stage which the judicial proceedings must reach in order to halt the running of the limitation period. Under the various legal systems judicial proceedings may be started in different ways. Under some national laws a claim may be filed or pleaded in court only after the plaintiff has taken certain preliminary steps (e.g., service of a "summons" or "complaint"). In some national jurisdictions these preliminary steps may be taken by the parties or their attorneys without resort to a court; nevertheless, these steps are regarded as commencing the judicial proceedings. In some other national jurisdictions judicial proceedings are considered to commence only at some later stage in the proceedings. For this reason, article 13 refers to the creditor's performance of "any act which, under the law of the court where the proceedings are instituted, is recognized as commencing judicial proceedings", rather than to any particular procedural steps that must be taken by the creditor. The limitation period ceases to run if the creditor performs any act recognized by the law of the forum as commencing judicial proceedings against the debtor for the purpose of satisfying the creditor's claim.³⁶

³⁶ Initiation by the creditor against the debtor of a criminal proceeding for fraud or active participation by the creditor in state-initiated criminal proceedings against the debtor, under some legal systems, would stop the running of the limitation period under this Convention if, under the local law, the creditor's act constitutes institution of a proceeding "for the purpose of obtaining satisfaction or recognition of his claim".

3. This article also covers the case where the creditor adds a claim to a judicial proceeding he had instituted earlier against the debtor. In such a case, the procedural step that stops the running of the limitation period depends on when, under the law of the forum, the creditor is regarded to have performed the act of "asserting his claim" in the pending proceeding.³⁷

Article 14

[Arbitration]

1. Where the parties have agreed to submit to arbitration, the limitation period shall cease to run when either party commences arbitral proceedings in the manner provided for in the arbitration agreement or by the law applicable to such proceedings.

2. In the absence of any such provision, arbitral proceedings shall be deemed to commence on the date on which a request that the claim in dispute be referred to arbitration is delivered at the habitual residence or place of business of the other party or, if he has no such residence or place of business, then at his last known residence or place of business.

COMMENTARY

1. Article 14 applies to arbitration based on an actual agreement of the parties to submit certain disputes to arbitration.³⁸ Article 13 relies on the law of the judicial forum to determine the point in the judicial proceedings at which the limitation period shall cease to run. The same approach cannot be used in relation to arbitral proceedings since under many national laws the manner of commencing arbitral proceedings is left to the agreement of the parties. Thus, article 14 (1) provides that any question as to what acts constitute the commencement of arbitral proceedings is to be answered by "the arbitration agreement or by the law applicable to such proceedings".

2. If the arbitration agreement or the applicable law does not regulate the manner of commencing arbitral proceedings, under paragraph (2) the decisive point is the date on which "a request that the claim in dispute be referred to arbitration is delivered at the habitual residence or place of business of the other party"; if he has no such residence or place of business, the request may be delivered at his last-known residence or place of business. Under paragraph (2), the request for arbitration must be "delivered" at the designated place. Thus, the risk of a failure or error in transmission falls on the sender of the request to arbitrate, but the sender need not establish that it actually came into the hands of the other party in view of the practical difficulties involved in

³⁷ The permissibility of amendment of claims in a pending proceeding and its effect are questions left to the law of the forum.

³⁸ Art. 14 applies only where the parties "have agreed to submit to arbitration". Obligatory "arbitration" not based on an agreement of the parties would be characterized as "judicial proceedings" for the purpose of the Convention. See arts. 1 (3) (e), and 13.

proving receipt by a designated person following delivery of the request at the place specified in the article.

Article 15

[Legal proceedings arising from death, bankruptcy or a similar occurrence]

In any legal proceedings other than those mentioned in articles 13 and 14, including legal proceedings commenced upon the occurrence of:

- (a) The death or incapacity of the debtor,
- (b) The bankruptcy or any state of insolvency affecting the whole of the property of the debtor, or
- (c) The dissolution or liquidation of a corporation, company, partnership, association or entity when it is the debtor,

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

COMMENTARY

1. Article 15 governs the effect of commencing legal proceedings other than those mentioned in articles 13 and 14. Such proceedings include, *inter alia*, proceedings for the distribution of assets on death, bankruptcy, and the dissolution or liquidation of a corporation, as illustrated in subparagraphs (a) through (c) of article 15. It should be noted that the illustrations set forth in subparagraphs (a) through (c) do not limit the scope of the article, since it applies to "any legal proceedings other than those mentioned in articles 13 and 14". Thus, receivership proceedings or the re-organization of a corporation are also covered by this article. These proceedings often differ from ordinary judicial or arbitral proceedings in that they are not instituted by individual creditors; instead, creditors are given the opportunity to file claims in existing proceedings. Consequently, article 15 provides that the limitation period ceases to run "when the creditor asserts his claim in such proceedings for the purpose of obtaining satisfaction or recognition of the claim".

2. However, the rule of article 15 that the limitation period ceases to run when the creditor first asserts his claim in a legal proceeding covered by that article is "subject to the law governing the proceedings". As noted previously (para. 1 of the commentary to art. 13), the net effect in articles 13, 14 and 15, that the limitation period "shall cease to run" in the cases covered by these articles, is substantially the same as providing that claims may be exercised through legal proceedings if such proceedings are commenced before the limitation period established under this Convention has expired. Because of the peculiarly local nature and importance of the proceedings covered by article 15, it is necessary to respect fully the municipal law governing these pro-

ceedings. Creditors will often rely on that municipal law, particularly as to the time when claims should be filed, and might be misled if such law were not honoured. For this reason, the concluding phrase of this article provides that if the municipal law governing the proceedings prescribes different rules with regard to the necessary timing of claims for admissibility, these rules will prevail over this Convention.³⁹ This may be illustrated by the following examples:

Example 15A: The law of a forum requires that a claim be filed within a short specified period of time after the commencement of a bankruptcy proceeding and provides that the claim is barred after the expiration of that period. If the creditor does not assert his claim within the specified period, he cannot assert his claim in that bankruptcy proceeding or otherwise even if the limitation period under this Convention has not expired.

Example 15B: The law of a forum directs the trustee in bankruptcy to recognize claims against the bankrupt which were enforceable at the time of the commencement of the bankruptcy proceedings. If the limitation period under this Convention had not expired at the time of the commencement of the bankruptcy proceeding, the creditor's claim is not time-barred even if the limitation period under this Convention already expired at the time he actually asserts his claim in the bankruptcy proceeding.

Example 15C: The law of a forum provides that the commencement of a bankruptcy proceeding shall suspend (cease) the running of the limitation period with regard to all claims which may be asserted in that proceeding. The net effect of this suspension is the same as the provision mentioned in Example 15C. Thus, if the limitation period under this Convention had not expired at the time of the commencement of the bankruptcy proceeding, the creditor's claim is not time-barred even if the limitation period under this Convention already expired at the time he actually asserts his claim in the bankruptcy proceeding.

Article 16

[Counterclaims]

For the purposes of articles 13, 14 and 15, any act performed by way of counterclaim shall be deemed to have been performed on the same date as the act performed in relation to the claim against which the counterclaim is raised, provided that both the claim and the counterclaim relate to the same contract or to several contracts concluded in the course of the same transaction.

³⁹ As has been noted (para. 3 of commentary on art. 1), this Convention applies only to the limitation period for claims between parties to a contract for the international sale of goods. In the proceedings covered by this article involving the distribution of assets (as in bankruptcy), the limitation period may affect the rights of third parties. The effect of the expiration of the limitation period established under this Convention on the rights of third parties is not regulated by this Convention but is left to the applicable national law.

COMMENTARY

1. This article deals with the point in time when a counterclaim⁴⁰ is deemed to have been instituted for the purposes of articles 13, 14 and 15. This provision may be examined in terms of the following example:

Example 16A: The seller asserted his claim in a legal proceeding against the buyer on 1 March. In that same legal proceeding, the buyer interposed a counterclaim on 1 December. The limitation period governing the buyer's counterclaim would, in normal course, have expired on 1 June.

2. In the above example, the crucial question is whether the buyer's counterclaim shall be deemed to be instituted (a) on 1 March, the time when the seller asserted his claim or (b) on 1 December 1975, when the buyer's counterclaim was in fact interposed in the pending legal proceeding. Article 16 chooses alternative (a).

3. Article 16 applies when the seller's claim and the buyer's counterclaim relate to the same contract or to several contracts concluded in the course of the same transaction.⁴¹ The same benefit is not given to the buyer when his claim against the seller arises from a different transaction than the one which provided the basis for the seller's claim against the buyer; in this latter case, the buyer must actually interpose his counterclaim before the expiration of the limitation period.

*Article 17**[Proceedings not resulting in a decision on the merits of the claim]*

1. Where a claim has been asserted in legal proceedings within the limitation period in accordance with articles 13, 14, 15 or 16, but such legal proceedings have ended without a decision binding on the merits of the claim, the limitation period shall be deemed to have continued to run.

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

COMMENTARY

1. Article 17 is addressed to the problems that arise when the legal proceedings in which a creditor

asserted his claim end without an adjudication on the merits of the claim. Under articles 13, 14 (1) and 15, when a creditor asserts his claim in legal proceedings for the purpose of satisfying his claim, the limitation period "shall cease to run"; when a creditor asserts his claim in legal proceedings before the expiration of the limitation period, in the absence of some further provision, the limitation period would never expire. Consequently, supplementary rules are required when such a proceeding does not lead to an adjudication on the merits of the claim. Legal proceedings may end without a decision binding on the merits of the claim for various reasons. A proceeding may be dismissed because it was brought in a tribunal lacking competence over the case; procedural defects may prevent adjudication on the merits; a higher authority within the same jurisdiction may declare that the lower court lacked competence to handle the case; arbitration may be stayed or the arbitral award may be set aside by a judicial authority within the same jurisdiction; moreover, a proceeding may not result in a decision binding on the merits of the claim because the creditor discontinues the proceedings or withdraws his claim. Article 17 covers all such instances where the "legal proceedings have ended without a decision binding on the merits of the claim". The general rule under paragraph 1 is that "the limitation period shall be deemed to have continued to run" and the cessation of the running of the limitation period under articles 13, 14, 15 or 16 is rendered inapplicable when such proceedings ended without a binding decision on the merits.

2. Paragraph 2 of this article, however, takes account of the possibility that, a substantial period of time after the creditor asserted his claim in a legal proceeding, that proceeding may be brought to an end without a decision on the merits because of lack of jurisdiction, a procedural defect, or some other reason. If this occurs after the expiration of the limitation period, the creditor would have no opportunity to institute a new legal proceeding; if this occurs shortly before the expiration of the limitation period the creditor may have insufficient time to institute a new legal proceeding.⁴² To meet these problems, article 17 (2) provides that "If, at the time such legal proceedings ended, the limitation period has expired or has less than one year to run, the creditor shall be entitled to a period of one year from the date on which the legal proceedings ended".

*Article 18**[Joint debtors: recourse actions]*

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

⁴⁰ The meaning of "counterclaim" in this article may be derived from the reference in arts. 13 and 15 to proceedings employed "for the purpose of obtaining satisfaction or recognition" of a claim. A counterclaim can lead to affirmative recovery by the defendant against the plaintiff; the use of a claim "as a defence or for the purpose of set-off", after the limitation period for that claim has expired, is governed by art. 25 (2). (See para. 3 of commentary on art. 25.) The question whether a counterclaim is admissible on procedural grounds is, of course, left to the procedural rules of the forum.

⁴¹ For example, if the plaintiff asserts a claim on the basis of a distributorship agreement and the defendant counterclaims based on an agreement to sell related to the distributorship agreement, these two claims might be regarded as arising "in the course of the same transaction".

⁴² The question whether a second legal proceeding pertaining to the same claim is admissible is, of course, left to the procedural law of the forum.

such party in writing within that period that the proceedings have been commenced.

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

3. Where the legal proceedings referred to in paragraphs 1 and 2 of this article have ended, the limitation period in respect of the claim of the creditor or the buyer against the party jointly and severally liable or against the seller shall be deemed not to have ceased running by virtue of paragraphs 1 and 2 of this article, but the creditor or the buyer shall be entitled to an additional year from the date on which the legal proceedings ended, if at that time the limitation period had expired or had less than one year to run.

COMMENTARY

I. *Effect of the institution of legal proceedings against a joint debtor, paragraph (1)*

1. The purpose of paragraph (1) of this article is to resolve questions that may arise in the following situation. Two persons (A and B) are jointly and severally responsible for the performance of a sales transaction. The other party (P) commences a legal proceeding against A within the limitation period. What is the effect of the legal proceeding commenced by P against A on the limitation period applicable to P's claim against B?

2. Under some national laws the institution of legal proceedings against A also stops the running of the limitation period applicable to P's claim against B. Under some other national laws the institution of legal proceedings against A has no effect on the running of the limitation period with regard to B. Consequently, the formulation of a uniform rule on this issue was considered desirable. A rule to the effect that the institution of legal proceedings against A has no effect on the running of the period against B would involve certain practical difficulties. Such a rule would make it advisable for the creditor (P) to institute legal proceedings against both A and B within the limitation period—at least in cases where there is some doubt concerning the financial ability of A to satisfy a judgement. Where A and B are in different jurisdictions, it may not be feasible to institute a single proceeding against them both, and instituting separate proceedings in different jurisdictions, merely to prevent the running of the limitation period against the second debtor (B), would involve expenses that turn out to have been incurred needlessly in all cases where A can and does satisfy the judgement.

3. Under article 18 (1), where legal proceedings have been commenced against A, the limitation period

"shall cease to run" not only with respect to A but also with respect to B, the party jointly and severally liable with A. It will be noted that article 18 (1) becomes applicable only when the creditor informs B in writing within the limitation period that legal proceedings have been instituted against A. This written notice gives B the opportunity, if he chooses, to intervene or participate in the proceedings against A, provided such intervention by B is allowed under the procedural law of the forum. Whether or not B may intervene, the limitation period for the creditor's claim against joint debtor B ceases to run when the creditor institutes legal proceedings against joint debtor A, provided that the creditor gives the required notice to B.

II. *Recourse actions, paragraph (2)*

4. Paragraph (2) of this article deals with the following situation: A sells goods to B who resells the goods to a subpurchaser C. C commences legal proceedings against B on the ground that the goods are defective. In such a case, recovery on C's claim against B may give rise to a claim by B against A for indemnification.

5. If C commences the legal proceedings against B only toward the end of the limitation period applicable to B's possible claim against A, B may not have sufficient time to institute legal proceedings against A, particularly if B wants to await the final adjudication of C's claim against him before commencing an action against A. In the absence of a rule in this Convention protecting B in such a case, B will be compelled to immediately institute legal proceedings against A, even though the need for indemnification is at that point speculative, and will arise only if C prevails in his claim against B. For this reason, article 18 (2) provides that where the subpurchaser C has commenced legal proceedings against the buyer B, the limitation period "shall cease to run" with respect to B's claim against the seller A.

6. It should be noted, however, that the limitation period applicable to B's claim against A shall "cease to run" only if B "informs [A] in writing within that period that the proceedings have been commenced". Hence, if C only commenced the legal proceedings against B⁴³ after the expiration of the limitation period applicable to B's claim against A under this Convention, B will not be protected under article 18 (2). It was felt necessary to so limit the operation of article 18 (2) in order to safeguard the original seller from being exposed, subsequent to the expiration of the limitation period provided under this Convention for claims against him, to possible claims that may arise as a consequence of a resale of the goods by the original buyer.⁴⁴

⁴³ In many cases the sale by B to C will be a domestic sale for which no limitation period is prescribed by this Convention.

⁴⁴ In any case, claims based on the death or personal injury of any person, including the subpurchaser, are not covered by the Convention (see art. 5 (a) and accompanying commentary, para. 1).

III. *Time-limit for commencing legal proceedings against joint debtors or against the seller, paragraph (3)*

7. Paragraph (3) completes article 18 the same way as article 17 completes the operation of articles 13, 14, 15 and 16 where the legal proceedings covered by those articles ended without a decision binding on the merits of the claim. In the absence of paragraph (3), the limitation period for the claims referred to in paragraphs (1) and (2) of article 18 would never expire since they provide that "the limitation period prescribed in this Convention shall cease to run". Therefore, under paragraph (3) of article 18, where the legal proceedings referred to in paragraphs (1) and (2) of that article have ended, the limitation period for any claims by the creditor against other persons jointly and severally liable or by the buyer against the seller "shall be deemed not to have ceased running" at the time such legal proceedings were commenced. However, if at the time these legal proceedings ended, the limitation period for the claims referred to in paragraphs (1) and (2) had already expired or had less than one year to run, paragraph (3) provides an additional period (i.e., one year from the date on which those legal proceedings ended) within which the creditor or the buyer may institute legal proceedings.⁴⁵

Article 19

[*Recommencement of the period by service of notice*]

Where the creditor performs, in the State in which the debtor has his place of business and before the expiration of the limitation period, any act, other than the acts described in articles 13, 14, 15 and 16, which under the law of that State has the effect of recommencing a limitation period, a new limitation period of four years shall commence on the date prescribed by that law.

COMMENTARY

1. Under some national laws certain acts by the creditor such as a demand for performance may have the effect of recommencing the limitation period which is provided under the local law, even though these acts are not linked to the institution of legal proceedings. (In some jurisdictions a letter or even a verbal demand may suffice.) In other legal systems, such acts by the creditor would not recommence the limitation period, and the creditor would have to institute legal proceedings in order to stop the running of the period. Article 19 is a compromise between these two approaches. This article permits continued reliance on the special local procedure to which parties in some jurisdictions may have become accustomed; on the other hand, it assures that the creditor will not be allowed to take advantage of a local procedure for recom-

mencing the limitation period with which the debtor may not be familiar. Thus, article 19 is applicable only when the creditor performs such act, pursuant to the special local procedure on recommencing the limitation period, "in the State in which the debtor has his place of business" before the expiration of the limitation period provided under this Convention. It may be noted that article 19 is applicable only if the act performed by the creditor would (in the absence of this Convention) have "the effect of *recommencing*" the local limitation period under the law of the State of the debtor. If the local rule only provides an additional shorter period after such act rather than "recommencing" the original limitation period, such local rule would not have the effect of bringing article 19 into operation.⁴⁶

2. The effect given to such act under article 19 is that "a new limitation period of four years" commences to run afresh from the date on which the local limitation period would otherwise have recommenced in the absence of this Convention. It should be noted that this consequence differs from the effect of the institution of legal proceedings (arts. 13, 14, 15 and 16); on the institution of legal proceedings the period "shall cease to run" subject to the adjustments provided in articles 17 and 18.

Article 20

[*Acknowledgement by debtor*]

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

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

COMMENTARY

1. The basic aims of the limitation period under this Convention are both to prevent the institution of legal proceedings at such a late date that the evidence is likely to be unreliable and to provide a degree of certainty in the legal relationships covered. An extension of the limitation period where the debtor acknowledges his obligation to the creditor before the expiration of the original limitation period is consistent with these aims. Consequently, under paragraph (1) of this article, when such acknowledgement occurs, a new limitation period of four years from the date of the acknowledgement will begin to run.

⁴⁶ If, under the local law, "the effect of recommencing a limitation period" is given subject to certain conditions, the existence of such conditions under the local law will not interfere with the application of article 19.

⁴⁵ See also art. 23 for the over-all limitation for instituting legal proceedings.

2. In view of the significant impact which this rule may have on the debtor's obligations, paragraph (1) requires that the acknowledgement be in writing. A writing by a debtor confirming an earlier oral acknowledgement becomes an "acknowledgement" within the meaning of this article when the confirmation in writing is made.⁴⁷ The "acknowledgement" of the original debt will sometimes be similar to a transaction creating a new debt (sometimes called a "novation") which, under the applicable national law, may be deemed to be independent of the original obligation; in such cases the original transaction need not be proved to justify recovery under the new obligation. Applicable national law may not require that the "novation" be effected in writing. The rule of paragraph (1) of article 20, that an "acknowledgement" must be in writing, is not intended to interfere with the rules of the applicable national law on "novation".

3. Paragraph (2) deals with "payment of interest or partial performance of an obligation" when these acts imply an acknowledgement of the debt. In both cases, the new limitation period will commence to run afresh only with respect to the particular obligation acknowledged by such act. Partial payment of a debt is the typical instance of such partial performance, but the language of paragraph (2) is sufficiently broad to include other types of partial performance such as the partial repair by a seller of a defective machine. Whether there was an implied acknowledgement under the particular circumstances and if there was, the extent of the obligation so acknowledged, are questions that must be resolved on the basis of all relevant facts concerning the obligation and the act "acknowledging" the existence of the obligation.

Article 21

[Extension where institution of legal proceedings prevented]

Where, as a result of a circumstance which is beyond the control of the creditor and which he could neither avoid nor overcome, the creditor has been prevented from causing the limitation period to cease to run, the limitation period shall be extended so as not to expire before the expiration of one year from the date on which the relevant circumstance ceased to exist.

COMMENTARY

1. This article provides for a limited extension of the limitation period when circumstances beyond the creditor's control prevent him from instituting legal proceedings.⁴⁸ This problem is often considered under

⁴⁷ The term "writing" is defined in art. 1 (3) (g) of this Convention.

⁴⁸ Under arts. 13, 14, 15 and 16, it is provided that the limitation period shall "cease to run" when a creditor asserts his claim in legal proceedings. The present article, in referring to circumstances preventing the creditor "from causing the limitation period to cease to run", refers to the actions described under those articles.

the heading of "*force majeure*" or impossibility; however, this article does not employ those terms since they have different connotations in different legal systems. Instead, the basic test is whether the creditor "has been prevented" from taking appropriate action so as to stop the running of the limitation period. To avoid excessive liberality, no extension is permitted unless: (1) the preventing circumstance was "beyond the control of the creditor", and (2) the creditor could not have avoided or overcome the occurrence of such circumstance.⁴⁹ There are many types of preventing circumstances that are "*beyond the control of the creditor*" and which therefore might provide a basis for an extension under this article. These may include: a state of war or the interruption of communications; the death or incapacity of the debtor where an administrator of the debtor's assets has not yet been appointed (cf. art. 15); the debtor's misstatement or concealment of his identity or address which prevents the creditor from instituting legal proceedings; fraudulent concealment by the debtor of defects in the goods.⁵⁰

2. There is no justification for extending the limitation period when the circumstance that prevented the institution of legal proceedings ceased to exist a substantial period in advance of the end of the normal limitation period under the Convention. Nor is there reason to extend the period for a longer period than is needed to institute legal proceedings to obtain satisfaction or recognition of the claim. For these reasons, the limitation period is extended only for one year from the date on which the preventing circumstance is removed. Thus, if, at the time the preventing circumstance ceased to exist, the limitation period had expired or had less than one year to run, the creditor is given one year from the date on which the preventing circumstance ceased to exist.⁵¹

MODIFICATION OF THE LIMITATION PERIOD BY THE PARTIES

Article 22

[Modification by the parties]

1. The limitation period cannot be modified or affected by any declaration or agreement between the parties, except in the cases provided for in paragraph (2) of this article.

2. The debtor may at any time during the running of the limitation period extend the period by a

⁴⁹ It should be noted that even if these requirements were met with regard to a particular circumstance, if, in fact, the creditor had not been "prevented" from taking other appropriate action that would have stopped the running of the limitation period, this article would not permit the extension. Whether the creditor has been "prevented" from taking any action to stop the running of the limitation period is a question to be determined in the light of all the relevant facts surrounding the relationship between the creditor and the debtor. See art. 30 and accompanying commentary.

⁵⁰ As to the time when the limitation period commences to run with regard to claims based on fraud, see art. 10 (3).

⁵¹ See also art. 23 on the over-all limitation for commencing legal proceedings.

declaration in writing to the creditor. This declaration may be renewed.

3. The provisions of this article shall not affect the validity of a clause in the contract of sale which stipulates that arbitral proceedings shall be commenced within a shorter period of limitation than that prescribed by this Convention, provided that such clause is valid under the law applicable to the contract of sale.

COMMENTARY

1. Paragraph (1) of article 22 establishes the general rule that this Convention does not allow parties to modify the limitation period. Exceptions to this rule, provided in paragraphs (2) and (3) of the article are explained below.

I. Extension of the limitation period

2. Paragraph (2) permits the debtor to extend the limitation period "by a declaration in writing to the creditor". While such an extension can be renewed by the debtor, the total period of permissible extension is subject to the over-all limitation provided under article 23. The extension can be accomplished by a unilateral declaration by the debtor; more often, the declaration by the debtor will be part of a wider agreement by the parties. As extension of the limitation period may have important consequences on the rights of the parties, only a declaration in writing can extend the period.

3. Under paragraph (2), a declaration by the debtor extending the limitation period is effective only if made "during the running of the limitation period". This restriction in the Convention would deny effect to possible attempts to extend the period by a declaration made at the time of contracting or at some other time before the claim accrues or the breach occurs.⁵² Without this restriction a party with stronger bargaining power might impose such extensions at the time of contracting; in addition, a clause extending the limitation period might be a part of a form contract to which the other party might not give sufficient attention. Similarly, a declaration by a debtor made after the expiration of the limitation period under this Convention will not be given effect, since it was not made "during the running of the limitation period".

4. Allowance of extension after the commencement of the limitation period, on the other hand, may be useful to prevent the hasty institution of legal proceedings close to the end of the period when the parties are still negotiating or are awaiting the outcome of similar proceedings in other forums.⁵³

⁵² Under arts. 9 through 12, the limitation period does not commence to run unless the claim has accrued or the breach has occurred.

⁵³ It may be noted that paragraph (1) of this article also precludes arrangements which would "affect" the limitation period. Thus, the effect of an agreement by the parties not to invoke prescription or limitation as a defence in legal proceedings is also regulated by this article because its effect of not allowing the assertion of the expiration of the limitation period is practically the same as extending the period. Cf. art. 24.

II. Arbitration

5. In order to give effect to contract clauses, often used in commodity trading, which provide that any dispute must be submitted to arbitration within a short period (e.g. within six months), paragraph (3) of article 22 makes an exception to the general rule of paragraph (1) by stating that this Convention does not render such clauses invalid. And, to guard against the possible abuse of such a provision, paragraph (3) concludes with the proviso that such clause must be valid under the law applicable to the sales contract. For example, the applicable national law may give courts the power, on the grounds of hardship to a party, to extend the short period provided for in the contract for the submission of disputes to arbitration; this Convention does not interfere with the continued exercise of this power by a court.

GENERAL LIMIT OF THE LIMITATION PERIOD

Article 23

[Over-all limitation for bringing legal proceedings]

Notwithstanding the provisions of this Convention, a limitation period shall in any event expire not later than 10 years from the date on which it commenced to run under articles 9, 10, 11 and 12 of this Convention.

COMMENTARY

As already noted, this Convention contains provisions which permit the limitation period to be extended or modified in various situations (arts. 17 to 22). Thus, it is possible that the period will be extended, in some cases, for such a substantially prolonged period that the institution of the legal proceedings toward the end of that extended period would be no longer compatible with the purpose of this Convention of providing a definite limitation period. Moreover, as explained above (para. 1 of commentary on art. 17), under articles 13, 14, 15 and 16 of this Convention, when a creditor asserts his claim in legal proceedings, the limitation period "shall cease to run"; when a creditor asserts his claim in legal proceedings in one State before the expiration of the limitation period, in the absence of further provision,⁵⁴ the limitation period would never expire in that State or in other States. (See art. 30 and its accompanying commentary.) This article, therefore, sets forth an over-all cut-off point beyond which no legal proceedings may be instituted under any circumstance. This cut-off point is the expiration of 10 years from the date on which the limitation period commenced to run under articles 9, 10, 11 and 12.⁵⁵

⁵⁴ E.g., see arts. 17 (1) and 18 (3).

⁵⁵ It may be noted that, under arts. 19 and 20, "a new limitation period" commences to run afresh under the circumstances specified in those articles. Such a new limitation period is technically not the same period which had commenced to run under art. 9, 10, 11 or 12. However, the over-all limitation provided under art. 23 is intended to apply to all forms of prolongation of the original limitation period, including the creation of a "new limitation period" under art. 19 or 20.

CONSEQUENCES OF THE EXPIRATION OF THE LIMITATION PERIOD

Article 24

[Who can invoke limitation]

Expiration of the limitation period shall be taken into consideration in any legal proceedings only if invoked by a party to such proceedings.

COMMENTARY

1. Article 24 is addressed to the following question: if none of the parties to the legal proceedings chooses to assert that the claim is barred by the expiration of the limitation period under this Convention, may the tribunal hearing the claim raise the issue on its own (*suo officio*)? This article answers the above question in the negative: expiration of the limitation period is to be considered by a tribunal "only if invoked by a party to such proceedings". It may be stated in support of this result that many of the facts relevant to determining when the limitation period runs, ceases to run or expires, will be known only to the parties and will not ordinarily be disclosed when evidence is presented pertaining to the substance of the claim (e.g., facts relevant to possible prolongation of the limitation period under arts. 20 and 22). Under some legal systems, it would be deemed a departure from the customary neutral role of judges to require or even authorize them on their own to raise the issue and search out the facts relating to expiration of the limitation period. Moreover, this question is not of great practical importance because a party entitled to interpose this defence to the claim will rarely fail to do so. In addition, article 24 does not bar a tribunal from drawing the attention of the parties to the time that elapsed between the accrual of the claim and the commencement of the legal proceeding and from inquiring whether one of the parties wishes that the issue of the expiration of the limitation period be taken into consideration.⁵⁶ There may also be instances where a debtor prefers not to invoke the expiration of the limitation period as a defence because of his special business relationship with the creditor, while wanting an adjudication on the merits of the creditor's claim. For these reasons, article 24 provides that a tribunal shall consider the issue of expiration of the limitation period "only if invoked by a party to such proceedings".

2. However, it was noted by several representatives at the Conference which adopted this Convention that limitation is a matter of public policy and should not be subjected to the parties' discretion; according to these representatives the tribunal should take the expiration of the limitation period into account *suo officio*. The tribunal can obtain the relevant facts from the parties without having to burden itself with the collection of evidence, and in any event the question of who has the burden of collecting evidence should not affect the issue of who may *invoke* limitation. Article 36 reflects this view by permitting a State to declare at the

⁵⁶ Whether this would be proper judicial practice is a matter for decision under the procedural laws of the forum.

time of its ratification or accession to this Convention "that it shall not be compelled to apply the provisions of article 24 of this Convention".

Article 25

[Effect of expiration of the period; set-off]

1. Subject to the provisions of paragraph (2) of this article and of article 24, no claim shall be recognized or enforced in any legal proceedings commenced after the expiration of the limitation period.

2. Notwithstanding the expiration of the limitation period, one party may rely on his claim as a defence or for the purpose of set-off against a claim asserted by the other party, provided that in the latter case this may only be done:

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

(b) If the claims could have been set-off at any time before the expiration of the limitation period.

COMMENTARY

I. Effect of expiration of the period, paragraph (1)

1. Paragraph (1) of article 25 emphasizes this Convention's basic aim of providing a limitation period within which the parties must commence legal proceedings for the exercise of their claims. (See para. 1 of commentary on art. 1.) Once the limitation period has expired, the claims can no longer be recognized or enforced in any legal proceedings.

2. It should be noted that paragraph (1) of this article is only concerned with the recognition or enforcement of claims "in any legal proceedings". This Convention does not attempt to resolve all possible questions that might be raised with respect to the effect of the expiration of the limitation period. For example, if collateral of the debtor remains in the possession of the creditor after the expiration of the period, questions may arise as to the right of the creditor to continue in possession of the collateral or to liquidate the collateral through sale. These issues may arise in a wide variety of factual settings and the results may vary due to differences in the security arrangements and in the national laws applicable to those arrangements. It may be expected, however, that the tribunals of Contracting States, when dealing with these problems, will give full effect to the basic policy of this Convention incorporated in article 25, which states that claims shall not be recognized or enforced in legal proceedings commenced after the expiration of the limitation period.⁵⁷

II. Claim used as a defence or for the purpose of set-off, paragraph (2)

3. The rules of paragraph (2) can be illustrated by the following examples:

⁵⁷ See also art. 5 (c). As to the effect of voluntary performance of an obligation after the expiration of the limitation period, see art. 26 and accompanying commentary.

Example 25A: An international sales contract required A to deliver specified goods to B on 1 June of each year from 1975 through 1980. B claimed that the goods delivered in 1975 were defective. B did not pay for the goods delivered in 1980, and A instituted legal proceedings in 1981 to recover the price.

On these facts B may use his claim against A, based on defects of the goods delivered in 1975, as a set-off against A's claim. Such set-off is permitted under subparagraph (a) of article 25 (2), since both claims relate to the same contract;⁵⁸ the set-off by B is not barred even though the limitation period for B's claim expired in 1979, i.e. prior to his assertion of the claim in the legal proceedings and also prior to the accrual of the claim by A against B for the price of the goods delivered in 1980. It should also be noted that under article 25 (2), B may rely on this claim "for the purpose of set-off". Thus, if A's claim is for \$1,000 and B's claim is for \$2,000, B's claim may extinguish A's claim but it may not be used as a basis for affirmative recovery against A for \$1,000.⁵⁹

Example 25B: On 1 June 1975, A delivered goods to B based on a contract of international sale of goods; B claimed the goods were defective. On 1 June 1978, under a different contract, B delivered goods to A; A claimed these goods were defective and in 1980 instituted legal proceedings against B based on this claim.

In these proceedings B may rely on his claim against A for the purpose of set-off even though B's claim arose in 1975—more than four years prior to the time when the claim was asserted in court as a set-off to A's claim. Under subparagraph (b) of article 25 (2), the claims "could have been set-off" before the date when the limitation period on B's claim expired—i.e. between 1 June 1978, the date on which A's claim accrued against B, and 1 June 1979.⁶⁰

Article 26

[Restitution of performance after the expiration of the period]

Where the debtor performs his obligation after the expiration of the limitation period, he shall not on that ground be entitled in any way to claim restitution even if he did not know at the time when he performed his obligation that the limitation period had expired.

COMMENTARY

1. As has been noted above (para. 1 of commentary on art. 25), expiration of the limitation period precludes the recognition or enforcement of the claims *in legal pro-*

⁵⁸ For an example where claims relate "to several contracts concluded in the course of the same transaction", see foot-note 2 in the commentary to art. 16.

⁵⁹ As to legal proceedings permitting affirmative recovery by the defendant against the plaintiff (i.e. counterclaims), see art. 16 and its accompanying commentary.

⁶⁰ This example assumes that the two claims could have been set-off under the applicable national law. This Convention does not affect the applicable law which regulates the permissibility of set-offs; the Convention only governs the limitation period for asserting claims, including claims asserted as set-offs.

ceedings. If a party obtains satisfaction of his claim in a manner other than through legal proceedings, this consequence is not initially the concern of the Convention. However, due to the existence of differences in theoretical approaches as to the nature of prescription or limitation under various national laws,⁶¹ differing consequences may be attributed to an act by the debtor whereby he voluntarily performed his obligation only learning later that the limitation period for the creditor's claim against him had already expired. Article 26 aims to provide a uniform result where the debtor voluntarily performed his obligation after the expiration of the limitation period. Article 26 is included in the Convention not because this Convention adopts any particular theory as to the character of the limitation but because providing an answer to the problem will assist in eliminating unnecessary disputes and divergencies in interpretation.

2. The basic aims of the limitation period, i.e. to prevent the institution of legal proceedings at such a late date that the evidence is unreliable and to provide a degree of certainty in legal relationships, are not violated where the debtor voluntarily performs his obligation after the expiration of the limitation period. Article 26 accordingly provides that the debtor cannot claim restitution for any performance of his obligation to the creditor which he has voluntarily performed "even if he did not know" at the time of such performance that the limitation period had expired. It should be noted that this provision deals only with the effectiveness of claims for restitution based on the contention that the performance could not have been required because the limitation period had run.⁶²

Article 27

[Interest]

The expiration of the limitation period with respect to a principal debt shall have the same effect with respect to an obligation to pay interest on that debt.

COMMENTARY

To avoid divergent interpretations involving the theoretical question whether an obligation to pay interest is "independent" from the obligation to pay the principal debt, article 27 provides a uniform rule that "the expiration of the limitation period with respect to a principal debt shall have the same effect with respect to an obligation to pay interest on that debt". (Cf. art. 20 (2).)

⁶¹ E.g., whether the claim itself is extinguished (prescription), or whether it is only the assertion of the claim in legal proceedings that is barred because of the expiry of the limitation period while the claim itself still exists. It has already been pointed out that this Convention governs limitation of legal proceedings regardless of the theoretical approach to the problem under national laws. See para. 1 of commentary on art. 1 and para. 5 of commentary on art. 3.

⁶² Art. 26 does not deal with the question whether the creditor is entitled to apply a debtor's payment to the satisfaction of a time-barred claim where the creditor has many claims against the debtor some of which are time-barred and the debtor neither expressly nor impliedly indicated that the payment is for satisfaction of a particular debt. Solution of this question is left to the applicable national law.

CALCULATION OF THE PERIOD

Article 28

[Basic rule]

1. The limitation period shall be calculated in such a way that it shall expire at the end of the day which corresponds to the date on which the period commenced to run. If there is no such corresponding date, the period shall expire at the end of the last day of the last month of the limitation period.

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

COMMENTARY

1. One traditional formula for the calculation of the limitation period is to exclude the first day of the period and to include the last day. The concept of "inclusion" and "exclusion" of days, however, may be misunderstood by those who are not familiar with the application of this rule. For this reason, article 28 adopts a different formula to reach the same result. Under this article, where a limitation period begins on 1 June, the day when the period expires is the corresponding day of the later year, i.e., 1 June. The second sentence of article 28 (1) covers the situation which may occur in a leap year. (Thus, when the initial day is 29 February of a leap year, and the later year is not a leap year, the date on which the limitation period expires is "the last day of the last month of the limitation period", i.e., 28 February of the later year.)

2. Paragraph (2) of article 28 is designed to overcome problems that may be encountered because of the existence of the international date line. If the date in State X is a day ahead of the date in State Y, the limitation period, which would commence on 1 May according to the date in State Y, will commence on 2 May in State X; therefore if the legal proceedings are instituted in State X, the last day for its commencement is 2 May in the relevant later year.

3. Since a number of different calendars are used in different States, for uniformity "year" is defined to mean a year according to the Gregorian calendar for the purpose of this Convention (art. 1 (3) (h)). Under article 28, therefore, years shall always be calculated according to the Gregorian calendar, even if the place where the legal proceedings are instituted uses a different calendar.

Article 29

[Effect of holiday]

Where the last day of the limitation period falls on an official holiday or other *dies non juridicus* precluding the appropriate legal action in the jurisdiction where the creditor institutes legal proceedings or asserts a claim as envisaged in article 13, 14 or 15, the limitation period shall be extended so as not to expire until the end of the first day following that official holiday or *dies non juridicus* on which such proceedings could be instituted or on which such a claim could be asserted in that jurisdiction.

COMMENTARY

1. This article deals with the problem that arises when the limitation period would end on a day when the courts and other tribunals are closed so that the creditor cannot take the steps prescribed in article 13, 14 or 15 to commence legal proceedings. This article provides for such cases by extending the limitation period "until the end of the first day following that official holiday or *dies non juridicus* on which such proceedings could be instituted or on which such a claim could be asserted in that jurisdiction".

2. It is recognized that the curtailment of the period that might result from the fact that the last day of the limitation period is a holiday is minor in relation to the total limitation period calculated in terms of years. However in many legal systems, such an extension is provided and local attorneys may rely on it. In addition, attorneys in one country might not know the legal holidays or "other *dies non juridicus*" in another country. The limited extension provided for in this article will avoid such difficulties.

3. It may be noted that the extension granted under this article is operative only in the jurisdiction where timely institution of legal proceedings was precluded due to such "official holiday or other *dies non juridicus*" (cf. art. 30).

INTERNATIONAL EFFECT

Article 30

[Acts or circumstances to be given international effect]

The acts and circumstances referred to in articles 13 through 19 which have taken place in one Contracting State shall have effect for the purposes of this Convention in another Contracting State, provided that the creditor has taken all reasonable steps to ensure that the debtor is informed of the relevant act or circumstances as soon as possible.

COMMENTARY

1. Article 30 refers to the effect which Contracting States must give to "acts or circumstances" referred to in articles 13 through 19 that had taken place in other Contracting States. Those articles deal with the point which various types of legal proceedings must reach in order to extend the limitation period or to stop it from running. The purpose of article 30 is to ensure that the acts and circumstances referred to in articles 13 through 19, when occurring in one Contracting State, will be given the same effect of stopping or extending the limitation period in any other Contracting State. The problems to which this article is addressed may be illustrated by the following examples:

Example 30A: Buyer's claim against Seller arising from an international sale of goods accrued in 1975. In 1978 Buyer instituted a legal proceeding against Seller in Contracting State X. In 1981 the proceeding in State X led to a decision on the merits of the claim in favour of Buyer and in 1982 Buyer sought its execution in Contracting State Y. Enforcement of the decision is refused by State Y. Since Buyer's claim accrued more than four

years prior to 1981, Buyer's claim would be barred if he wished to institute a new legal proceeding in State Y unless the limitation period is regarded to have "ceased to run" also in State Y by virtue of the institution in 1978 of the legal proceeding in State X. Under article 30, stopping of the running of the period by the institution of a legal proceeding in State X has the same effect in State Y and Buyer may institute a new legal proceeding in State Y, subject to the over-all limitation under article 23 for bringing legal proceedings.

Example 30B: Buyer's claim against Seller arising from an international sale of goods accrued in 1975. In 1978 Buyer instituted a legal proceeding against Seller in Contracting State X. In 1981 the proceeding in State X led to a decision on the merits of the claim in favour of Buyer. Seller's assets are in Contracting State Y. State Y would recognize and enforce the decision of State X but the law of State Y does not preclude Buyer from asserting his original claim afresh in legal proceedings in State Y, provided that the limitation period with regard to the original claim had not expired. Buyer, finding it easier to sue again on the original claim than to involve himself in a complicated process of proving the validity of the first decision for its enforcement in State Y, decides to institute a new legal proceeding in State Y. Under article 30, stopping of the running of the limitation period by the institution of the legal proceeding in State X has the same effect in State Y and Buyer may institute a new legal proceeding in State Y, subject to the over-all limitation under article 23 for bringing legal proceedings.⁶³

Example 30C: Buyer's claim against Seller arising from an international sale of goods accrued in 1975. In 1978 Buyer instituted a legal proceeding against Seller in Contracting State X. In 1980, while the proceeding in State X was still pending, Buyer instituted a legal proceeding in Contracting State Y based on the same claim. Since Buyer's claim arose more than four years prior to the institution of the proceeding in State Y, that proceeding would be barred unless the limitation period "ceased to run" when the legal proceeding was commenced in State X. Under article 30, Buyer's legal proceeding in State Y is not time-barred because State Y must recognize the cessation of the running of the limitation period that had taken place in State X by virtue of the institution of the legal proceeding in State X within the limitation period.⁶⁴

2. Article 30 also refers to article 17, which deals with the effect on the running of the period of a legal proceeding that ends without a decision on the merits

⁶³ A creditor who received an unfavourable decision on the merits of his claim may also consider having his claim re-tried in another State provided that he is not precluded from asserting his original claim afresh in legal proceedings in that State. Legal rules such as *res judicata*, "merger" of the claim in the judgement, or the like, may prevent the assertion of the original claim after a decision on the merits of the claim in another State. This is a question to be answered according to the procedural law of the forum and is not covered by this Convention.

⁶⁴ Whether a legal proceeding may be instituted on a claim while another legal proceeding is pending in another State concerning the same claim will be resolved by the procedural law of the forum and is not covered by this Convention.

of the claim. To afford the creditor an opportunity to institute a further legal proceeding, in such cases the creditor is assured of a period of one year from the date on which the proceedings ended. Thus, in example 30C, if the proceeding in State X ended on 1 February 1980 without a decision on the merits of the claim, the limitation period "shall be deemed to have continued to run" but the period is extended to 1 February 1981.⁶⁵ Under article 30, if State X is a Contracting State, these events in State X must be given "international" effect in Contracting State Y and a legal proceeding may be brought in State Y until 1 February 1981.⁶⁶

3. Article 30 also prescribes the "international" effect of the recommencement of the limitation period which, under article 19, may occur in some jurisdictions as a result of acts such as the service of a demand notice. Attention is also drawn to the rules of article 18 concerning recourse actions and the effect of the institution of legal proceedings against a joint debtor. Under article 30, the effect given to the circumstances mentioned in articles 18 and 19 must also be given by other Contracting States.

4. The "international" effect of acts in one Contracting State (State X) in a second Contracting State (State Y) applies only with respect to acts covered by the articles listed in article 30. It may be noted that under this Convention the effectiveness of certain other acts does not depend on where they take place: e.g., acknowledgement of the debt (art. 20) and a declaration or agreement modifying the limitation period (art. 22) have the effect prescribed in those articles without regard to the place where the acknowledgement, declaration or agreement takes place.

5. An important requirement for the applicability of article 30 is that the creditor must take "all reasonable steps to ensure that the debtor is informed of the relevant act or circumstances as soon as possible". While in most instances commencement of a legal proceeding will require notification to the defendant-debtor, under some procedural rules this may not be necessary in certain cases. The above requirement was added to ensure that all reasonable steps were taken to apprise the debtor of the fact that due to certain acts of circumstances in one Contracting State, the limitation period has also been stopped or extended in all other Contracting States.

Part II. Implementation

Article 31

[Federal State; non-unitary State]

1. If a Contracting State has two or more territorial units in which, according to its constitution,

⁶⁵ The close relationship between the provisions of this Convention as to the circumstances when the limitation period "ceases to run" on the institution of legal proceedings (i.e., arts. 13, 14, 15 and 16) and the rules of art. 17 concerning the effect of proceedings not resulting in a decision on the merits of the claim is discussed in the commentary on art. 17.

⁶⁶ Art. 30 does not bar a Contracting State from giving comparable effect to acts occurring in non-Contracting States; but this Convention does not require that such "international" effect be given to circumstances that took place in non-Contracting States.

different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations shall be notified to the Secretary-General of the United Nations and shall state expressly the territorial units to which the Convention applies.

3. If a Contracting State described in paragraph (1) of this article makes no declaration at the time of signature, ratification or accession, the Convention shall have effect within all territorial units of that State.

COMMENTARY

1. Where a Contracting State to this Convention is a federal or non-unitary State, the federal authority may not have the power to implement certain provisions of this Convention in its constituent states or provinces because those provisions may relate to matters that are within the legislative jurisdiction of such constituent states or provinces. On the other hand, adoption by a State of this Convention obligates that State to take the necessary implementing steps that would give the provisions of part 1 of this Convention (subject to the reservations permitted under part III) the force of law within that State. Yet, a federal or non-unitary State may not be able to so implement this Convention unless each of its constituent states or provinces passes appropriate legislation. Article 31 is designed to enable a federal or non-unitary State to adopt this Convention even if that State could not absolutely ensure that *all* of its constituent states or provinces will take the legislative steps necessary to implement the provisions of this Convention. Thus, under article 31 (1), a federal or non-unitary State may, "at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them". Under article 31 (2), a State making such a declaration must state "expressly the territorial units to which the Convention applies" at the time of the notification of the declaration to the Secretary-General of the United Nations. The important qualification under article 31 (1) is that the different systems of law applicable in the various territorial units must be *based on the constitution* of the federal or non-unitary State making such a declaration.

2. It may be noted that article 31 (1) further provides that the declaration thereunder may be amended *at any time* by submitting another declaration. Such an amendment should technically be regarded as a combination of a new declaration and a withdrawal of the original declaration; article 40 governs the point in time when such an amended declaration will take effect.

3. Paragraph (3) of article 31 reflects the *basic* obligation of a State adopting this Convention to imple-

ment the provisions of the Convention within the whole territory of that State: in the absence of any declaration permitted under this article "at the time of signature, ratification or accession" by a federal or non-unitary State, this Convention shall have effect "within *all* territorial units of that State".

Article 32

[Determination of the proper law when federal or a non-unitary State is involved]

Where in this Convention reference is made to the law of a State in which different systems of law apply such reference shall be construed to mean the law of the particular legal system concerned.

COMMENTARY

In this Convention, several references have been made to the law of a State. For example, articles 12 and 22 (3) refer to "the law *applicable* to the contract"; article 14 (1) refers to "the law *applicable* to [arbitral] proceedings"; and article 15 refers to "the law *governing* the proceedings". In such cases, the determination as to the proper law to govern each situation will be made in accordance with the private international law rules of the forum. Article 32 is intended to clarify that the same approach should be pursued in arriving at the proper law where different systems of law exist in the State whose law is chosen as applicable by the conflict-of-laws rules of the forum.⁶⁷

Article 33

[Non-applicability to prior contracts]

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

COMMENTARY

1. This article serves to clarify the application of the principle prescribed in article 3 (1) by providing a definite rule as to the contracts to which this Convention applies: a Contracting State is bound to apply the provisions of the Convention to contracts that are concluded on or *after* the date of the *entry into force* of this Convention in the State concerned.

2. The date of the entry into force of this Convention is dealt with in article 44 of this Convention (see also art. 3 (3)).

Part III. Declarations and reservations

Article 34

[Declarations limiting the application of the Convention]

Two or more Contracting States may at any time declare that contracts of sale between a seller having a place of business in one of these States and a buyer having a place of business in another of these States

⁶⁷ Cf. art. 13, where the reference is to "the law of the court".

shall not be governed by this Convention, because they apply to the matters governed by this Convention the same or closely related legal rules.

here to legal systems where termination or invalidity of a contract need not first be established by way of a legal proceeding brought for this purpose.

COMMENTARY

1. Some States, in the absence of this Convention, apply the same or closely related rules to the subject-matter governed by this Convention, *i.e.*, limitation (prescription) of claims based on a contract of international sale of goods. Under article 34 these States are permitted, if they so choose, to apply their common or closely related rules to claims arising from transaction involving buyers and sellers in such States, and yet adhere to the Convention.

2. This article enables two or more Contracting States to make a joint declaration, *at any time*, that contracts of sale entered into by a seller having a place of business in one of these States and a buyer having a place of business in another of these States, "*shall not be governed by this Convention*". The over-all effect is that such contracts are *excluded from the scope* of application of the Convention by virtue of such a declaration. It should be noted that a declaration under article 34 may be made well after the time these States have ratified this Convention. (See also art. 40 and accompanying commentary, para. 2.)⁶⁸

Article 35

[Reservation with respect to actions for annulment of the contract]

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

COMMENTARY

As has already been noted, this Convention governs the limitation period for bringing an "action for annulment" in those legal systems which require that the nullity of a contract be first established by way of a legal proceeding instituted for that purpose.⁶⁹ However, in the States which require an initial judicial determination of the contract's invalidity, the limitation period for bringing such actions may be different from the normal period for the exercise of claims based on the contract. This article permits a State to declare that it will not apply the provisions of this Convention to actions for annulment of the contract. Consequently, the State which has made a reservation under this article may continue to apply its particular local rules (including its rules of private international law) to actions for annulment of contracts. It may be noted that reservations under this article may also be made by States which ad-

Article 36

[Reservation with respect to who can invoke limitation]

Any State may declare, at the time of the deposit of its instrument of ratification or accession, that it shall not be compelled to apply the provisions of article 24 of this Convention.

COMMENTARY

This article permits a Contracting State to make a reservation with regard to the application of the rule of article 24 which provides that a tribunal shall take into consideration the expiration of the limitation period only if a party invokes it. (The need for this reservation has already been noted in para. 2 of commentary on art. 24.)

Article 37

[Relationship with conventions containing limitation provisions in respect of international sale of goods]

This Convention shall not prevail over conventions already entered into or which may be entered into, and which contain provisions concerning the matters covered by this Convention, provided that the seller and buyer have their places of business in States parties to such a convention.

COMMENTARY

1. This article provides that this Convention shall not prevail over present or future conventions which contain provisions concerning the limitation or prescription of claims based on the international sale of goods. In case of conflict, therefore, the rules of those other conventions shall be applied to the limitation or prescription of claims, rather than the rules of this Convention.

2. Such situations could occur in regard to conventions that deal with the international sale of a particular commodity, or a special group of commodities. In addition, it has been suggested that article 49 of the 1964 ULIS may conflict with some of the provisions of part I of this Convention. A conflicting provision may also be contained in conventions concluded on the regional level, such as the General Conditions of Delivery of Goods between Organizations of the Member Countries of the Council for Mutual Economic Assistance, 1968. Article 37 permits States parties to such a convention to apply its conflicting provision only when both the seller and the buyer have their places of business in States which have ratified that convention.

3. It may be noted that the rule in this article operates automatically, without requiring any advance declaration by the States who are parties to the convention containing a conflicting provision as to the limitation or prescription of claims (cf. art. 34).

⁶⁸ As to the situations where the same limitation rules are applied among several States because these States are parties to conventions containing limitation provisions in respect of international sales, see art. 37.

⁶⁹ See foot-note 4 in commentary on art. 1 and its accompanying text.

Article 38

[Reservations with respect to the definition of a contract of international sale]

1. A Contracting State which is a party to an existing convention relating to the international sale of goods may declare, at the time of the deposit of its instrument of ratification or accession, that it will apply this Convention exclusively to contracts of international sale of goods as defined in such existing convention.

2. Such declaration shall cease to be effective on the first day of the month following the expiration of 12 months after a new convention on the international sale of goods, concluded under the auspices of the United Nations, shall have entered into force.

COMMENTARY

1. Article 2 of this Convention deals with the degree of internationality which makes a contract for sale of goods an "international" one for the purposes of this Convention. Article 3 (1) sets the obligation of Contracting States to apply the provisions of this Convention to contracts of international sale of goods. Article 38 is designed to facilitate adoption of this Convention by States which are already parties to an existing convention on the international sale of goods (such as ULIS) which contains a definition of "international" sale different from article 2 of this Convention. Article 38 permits such a State to exclude the application of article 2 with regard to the definition of "international" sale by making a declaration that it will apply this Convention only to international sales of goods as defined in such an existing convention. The net effect of such a declaration is to obligate the declaring State to apply the provisions of this Convention *only* to those contracts which fall within the definition of a contract of international sale of goods under the other existing convention when a legal proceeding is commenced within the jurisdiction of that State.⁷⁰

2. Article 38 (2), however, makes it clear that reservations permitted under article 38 (1) is a temporary expedient; it also reflects the general expectations of the Conference which adopted this Convention that the definition of "international" sale of goods be ultimately brought into line with the definition in a new convention on the international sale of goods the draft of which is presently under study by the United Nations Commission on International Trade Law.

Article 39

[No other reservations permitted]

No reservation other than those made in accordance with articles 34, 35, 36, and 38 shall be permitted.

⁷⁰ See e.g., ULIS art. 1. It is expected, however, that the difference in the applicable scope, because of a reservation under art. 38, will not be so great as might first appear from the comparison of art. 1 of ULIS and art. 2 of this Convention. Cf. art. 2 (b) (c).

COMMENTARY

This article provides a basis for uniformity in application of the Convention by prohibiting Contracting States from making any reservation other than those specifically permitted under this Convention.⁷¹

Article 40

[When declarations and reservations take effect; withdrawal]

1. Declarations made under this Convention shall be addressed to the Secretary-General of the United Nations and shall take effect simultaneously with the entry of this Convention into force in respect of the State concerned, except declarations made thereafter. The latter declarations shall take effect on the first day of the month following the expiration of six months after the date of their receipt by the Secretary-General of the United Nations.

2. Any State which has made a declaration under this Convention may withdraw it at any time by a notification addressed to the Secretary-General of the United Nations. Such withdrawal shall take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the Secretary-General of the United Nations. In the case of a declaration made under article 34 of this Convention, such withdrawal shall also render inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that article.

COMMENTARY

1. Paragraph (1) of this article provides the manner in which declarations under articles 31, 34, 35, 36 and 38 must be made and specifies the point in time when such declarations take effect. Article 40 (2) permits withdrawal of such declarations and provides both the manner in which such withdrawal may be made and the point in time when it becomes effective.

2. It may be noted that, under the last sentence of article 40 (2), a joint declaration made under article 34 becomes inoperative when one of the parties to that joint declaration withdraws therefrom. Even where a joint declaration has been made by *more than two* States, a notification of withdrawal to the Secretary-General of the United Nations by one of those States will render the joint declaration inoperative in respect of the remaining States on the first day of the month following the expiration of six months after that notification. Thus, if the other remaining States still wish to maintain the joint declaration under article 34 among themselves, they will have to make a new declaration in accordance with article 40 (1).

⁷¹ The 1969 Vienna Convention on the Law of Treaties provides, *inter alia*, that a State may make a reservation, when ratifying or acceding to a Convention, unless the treaty provides that only specified reservations, which do not include the reservation in question, may be made (art. 19).

Part IV. Final clauses*Article 41*

This Convention shall be open until 31 December 1975 for signature by all States at the Headquarters of the United Nations.

Article 42

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

Article 43

This Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 44

1. This Convention shall enter into force on the first day of the month following the expiration of six months after the date of the deposit of the tenth instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the tenth instrument of ratification or accession, this Convention shall enter into force on the first day of the month following the expiration of six months after the date of the deposit of its instrument of ratification or accession.

Article 45

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

2. The denunciation shall take effect on the first day of the month following the expiration of 12 months after receipt of the notification by the Secretary-General of the United Nations.

Article 46

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

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III. CHECK LIST OF UNCITRAL DOCUMENTS

List of documents before the Commission at its twelfth session

Title or description

Document symbol

A. GENERAL SERIES

International payments; draft Convention on International Bills of Exchange and International Promissory Notes: report of the Working Group on International Negotiable Instruments on the work of its seventh session (New York, 3-12 January 1979)	A/CN.9/157
Provisional agenda, annotations thereto and tentative schedule of meetings: note by the Secretary-General	A/CN.9/158
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Liquidated damages and penalty clauses: report of the Secretary-General	A/CN.9/161
Memorandum on the second co-ordination meeting, held at Rome on 9 and 10 April 1979, as agreed upon by the participants . .	A/CN.9/162
Stand-by letters of credit: report of the Secretary-General	A/CN.9/163
Clauses protecting parties against the effects of currency fluctuations: report of the Secretary-General	A/CN.9/164
Security interests; feasibility of uniform rules to be used in the financing of trade: report of the Secretary-General	A/CN.9/165
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International commercial arbitration; issues relevant in the context of the UNCITRAL Arbitration Rules: note by the Secretariat . . .	A/CN.9/170

<i>Title or description</i>	<i>Document symbol</i>
New international economic order; possible work programme of the Commission: report of the Secretary-General	A/CN.9/171
Survey of the work of international organizations in the field of transport law: report of the Secretary-General	A/CN.9/172
Training and assistance in the field of international trade law: note by the Secretary-General	A/CN.9/173
State of signatures and ratifications of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules), adopted at Hamburg on 30 March 1978: note by the Secretary-General	A/CN.9/174
Current activities of international organizations related to the harmonization and unification of international trade law: report of the Secretary-General	A/CN.9/175
B. RESTRICTED SERIES	
Draft report of the United Nations Commission on International Trade Law on the work of its twelfth session (Vienna, 18-29 June 1979)	A/CN.9/(XII)/CRP.1 and Add.1-6, 6A-6E and 7-11; CRP.1A
Proposal submitted by Egypt, Ghana, India, Indonesia, Kenya, Nigeria and Yugoslavia .	A/CN.9/(XII)/CRP.2
C. INFORMATION SERIES	
List of participants	A/CN.9/(XII)/INF.1 and Rev.1
Working Group on International Negotiable Instruments, seventh session	
Draft Convention on International Bills of Exchange and International Promissory Notes (first revision), articles 46 to 68, as reviewed by a drafting party	A/CN.9/WG.IV/WP.10
Provisional agenda	A/CN.9/WG.IV/WP.11
Draft Convention on International Bills of Exchange and International Promissory Notes (first revision), articles 24 and 68 to 86, as reviewed by a drafting party	A/CN.9/WG.IV/WP.12