

**United Nations  
Commission on  
International  
Trade Law**

**YEARBOOK**

**Volume XI: 1980**



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## CONTENTS

INTRODUCTION .....	Page v
--------------------	-----------

### Part One. Reports of the Commission on annual sessions; comments and action thereon

I.	THE TWELFTH SESSION (1979); 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 (first part of the nineteenth session) .....	3
B.	General Assembly: report of the Sixth Committee (A/34/780) .....	4
C.	General Assembly resolutions 34/142 and 34/143 of 17 December 1979 .....	4
II.	THE THIRTEENTH SESSION (1980)	
A.	Report of the United Nations Commission on International Trade Law on the work of its thirteenth session (New York, 14-25 July 1980) (A/35/17) ..	7
B.	United Nations Conference on Trade and Development (UNCTAD): extract from the report of the Trade and Development Board (twenty-first session) .....	30
C.	General Assembly: report of the Sixth Committee (A/35/627) .....	30
D.	General Assembly resolutions 35/51 and 35/52 of 10 December 1980 .....	31
E.	List of relevant documents not reproduced in the present volume .....	33

### Part Two. Studies and reports on specific subjects

I.	INTERNATIONAL SALE OF GOODS	
	Note by the Secretary-General: United Nations Conference on Contracts for the International Sale of Goods (A/CN.9/183) .....	37
II.	INTERNATIONAL CONTRACT PRACTICES	
	Report of the Working Group on International Contract Practices on the work of its first session (Vienna, 24-28 September 1979) (A/CN.9/177) .....	39
III.	INTERNATIONAL PAYMENTS	
A.	Report of the Working Group on International Negotiable Instruments on the work of its eighth session (Geneva, 3-14 September 1979) (A/CN.9/178)	43
B.	Report of the Working Group on International Negotiable Instruments on the work of its ninth session (New York, 2-11 January 1980) (A/CN.9/181) ..	53
C.	Draft Convention on International Bills of Exchange and International Promissory Notes as adopted by the Working Group on International Negotiable Instruments at its eighth session (Geneva, 3-14 September 1979) and its ninth session (New York, 2-11 January 1980) (A/CN.9/181, annex) ..	77
D.	Report of the Secretary-General: security interests, issues to be considered in the preparation of uniform rules (A/CN.9/186) .....	89

	<i>Page</i>
<b>IV. INTERNATIONAL COMMERCIAL ARBITRATION</b>	
A. Draft prepared by the Secretary-General: revised draft UNCITRAL Conciliation Rules (A/CN.9/179) . . . . .	97
B. Report of the Secretary-General: commentary on the revised draft of UNCITRAL Conciliation Rules (A/CN.9/180) . . . . .	100
C. Observations and comments by States and international organizations on the revised draft UNCITRAL Conciliation Rules (A/CN.9/187 and Add. 1 to 3) . . . . .	108
D. Note by the Secretary-General: issues relating to the use of the UNCITRAL Arbitration Rules and the designation of an appointing authority (A/CN.9/189) . . . . .	114
<b>V. NEW INTERNATIONAL ECONOMIC ORDER</b>	
A. Report of the Working Group on the New International Economic Order on the work of its session (New York, 14-25 January 1980) (A/CN.9/176) . . . . .	117
B. Study by the Secretary-General: international contracts in the field of industrial development (A/CN.9/191) . . . . .	121
C. Note by the Secretariat: legal implications of the new international economic order (A/CN.9/193) . . . . .	135
D. Note by the Secretariat: legal implications of the new international economic order (A/CN.9/194) . . . . .	136
<b>VI. ACTIVITIES OF OTHER ORGANIZATIONS</b>	
Report of the Secretary-General: current activities of international organizations related to the harmonization and unification of international trade law (A/CN.9/192 and Add. 1 and 2) . . . . .	137

### **Part Three. Annexes**

<b>I. TEXTS ADOPTED BY THE UNITED NATIONS CONFERENCE ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (Vienna, 10 March-11 April 1980)</b>	
A. Final Act (A/CONF.97/18) . . . . .	149
B. Convention on Contracts for the International Sale of Goods (A/CONF.7/18, annex I) . . . . .	151
C. Protocol amending the Convention on the Limitation Period in the International Sale of Goods (A/CONF.97/18, annex II) . . . . .	162
<b>II. UNCITRAL CONCILIATION RULES ADOPTED BY THE THIRTEENTH SESSION OF THE COMMISSION</b> . . . . .	165
<b>III. GENERAL ASSEMBLY: RESOLUTIONS 34/150 OF 17 DECEMBER 1979 AND 35/166 OF 15 DECEMBER 1980 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"</b> . . . . .	166
<b>IV. BIBLIOGRAPHY OF RECENT WRITINGS RELATED TO THE WORK OF UNCITRAL</b> . . . . .	168
<b>V. CHECK LIST OF UNCITRAL DOCUMENTS</b> . . . . .	170

**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 eleventh volume in the series of Yearbooks of the United Nations Commission on International Trade Law (UNCITRAL).<sup>1</sup> This volume covers the period from July 1979 to the end of 1980.

The present volume consists of three parts. Part One completes the presentation of the documents relating to the Commission's report on the work of its twelfth session by including material (such as action by the General Assembly) which was not available when the manuscript of the tenth volume was prepared. Part One also contains the Commission's report on the work of its thirteenth session, which was held in New York from 14 to 25 July 1980, and the action thereon by the United Nations Conference on Trade and Development (UNCTAD) and by the General Assembly.

Part Two reproduces most of the documents considered at the thirteenth session of the Commission. These documents include reports of the Commission's three working groups dealing respectively with international contract practices, international negotiable instruments and a new international economic order, as well as comments and proposals by Governments and reports of the Secretary-General.

Part Three contains the Final Act of the United Nations Conference on Contracts for the International Sale of Goods which met in Vienna from 10 March to 11 April 1980. The Final Act contains as annexes the text of the Convention on Contracts for the International Sale of Goods and the Protocol to the Convention on the Limitation Period in the International Sale of Goods, both of which were adopted by the Conference. Also included in Part Three are two resolutions of the General Assembly which have to do with the Commission, a bibliography of recent writings related to the Commission's work, prepared by the Secretariat, and a check list of UNCITRAL documents.

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<sup>1</sup> To 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
X	1979	E.81.V.2

## I. THE TWELFTH SESSION (1979); 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 (first part of the nineteenth session)\*

"B. *Progressive development of the law of international trade: twelfth annual report of the United Nations Commission on International Trade Law (agenda item 9 (b))*

"272. For its consideration of this item, the Board had before it the report of UNCITRAL on the work of its twelfth session,<sup>19</sup> which had been circulated under cover of TD/B/760.

"273. The representative of the USSR stated that the Commission had considered at its twelfth session several questions which concerned, *inter alia*, the activities of UNCTAD, in particular the legal implications of the new international economic order. He said that there were two different approaches to the problem. According to one approach, which his country shared, UNCITRAL should give priority attention to such questions of relations between States—where such relationships were connected with international trade—as the principle of non-discrimination, the principle of most-favoured-nation treatment, and the democratic and equitable basis of such relationships in counterweight to the policies of hegemonism and the subordination of other States. The other approach, a purely formal one in his view, was that the Commission should not touch upon the question of relations between States. He suggested that in its work UNCITRAL should take into account the activities of other international organizations, in particular of the United Nations system. He reiterated the position of his country's delegation at the twelfth session of the United Nations Commission on International Trade Law.

"274. He especially underlined the importance of the most-favoured-nation principle and recalled in this connexion the "Principles governing international trade relations and trade policy conducive to development", adopted at the first session of UNCTAD, in particular, General Principle Eight. Most trade treaties and agreements between States had provisions for mutually according most-favoured-nation treatment, among them treaties and agreements between States having different economic and social systems.

"275. In spite of the general recognition of most-favoured-nation treatment as a universal principle in international economic relations, in the foreign trade policy of a number of developed market-economy countries there were deviations from the generally recognized norm which brought about an element of discrimination. These trends were not to be bypassed by UNCTAD since they touched upon the interests of all States participating in international trade.

#### *"Action by the Board*

"276. At its 523rd meeting, on 17 October 1979, the Board took note of the report of UNCITRAL on its twelfth session and of the comments made thereon.

<sup>19</sup> For the printed text, see *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17 (A/34/17)* (Yearbook ... 1979, part one, II, A)."

\* *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 15 (A/34/15)*, vol. II, chapter VI.

### B. General Assembly: report of the Sixth Committee (A/34/780)\*

1. At its 4th plenary meeting, on 21 September 1979, the General Assembly decided to include in the agenda of its thirty-fourth session the item entitled "Report of the United Nations Commission on International Trade Law on the work of its twelfth session" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered this item at its 24th to 30th meetings, from 22 October to 1 November, and at its 57th meeting on 3 December. The summary records of those meetings (A/C.6/34/SR.24-30 and 57) contain the views of representatives who spoke during the consideration of this item.

3. At the 24th meeting, on 22 October 1979, Mr. L. Kopac (Czechoslovakia), the Chairman of the Commission at its twelfth session, introduced its report on the work of that session.<sup>1</sup> The Committee had before it, in connexion with this item, a note by the Secretary-General setting forth the comments on the Commission's report by the Trade

and Development Board of the United Nations Conference on Trade and Development (A/C.6/34/L.5).

4. At the 30th Meeting, on 1 November, the Committee's attention was drawn by its Chairman to the draft resolution contained in paragraph 131 of the Commission's report on the subject of co-ordination in the field of international trade law. At the same meeting, the Committee adopted this draft resolution by consensus (see resolution 34/142).

5. At the 57th meeting, on 3 December, the representative of Austria introduced a draft resolution (A/C.6/34/L.16) sponsored by Argentina, Austria, Bangladesh, Brazil, Canada, Czechoslovakia, Finland, the German Democratic Republic, Greece, Hungary, Italy, Japan, Kenya, Morocco, Nigeria, the Philippines, Romania, Spain, Sweden, Tunisia and Yugoslavia, later joined by France and Ghana.

6. At the same meeting, the Committee adopted draft resolution A/C.6/34/L.16 by consensus (see resolution 34/143).

\* 17 December 1979. *Official Records of the General Assembly, Thirty-fourth Session, Annexes*, agenda item 109.

<sup>1</sup> (Yearbook ... 1979, 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)). At its 25th meeting, on 23 October 1979, after being advised of the financial implications by its Secretary, the Committee decided to have reproduced *in extenso* this statement by the Chairman of the Commission, the text of which is reproduced in document A/C.6/34/L.6.

#### RECOMMENDATIONS OF THE SIXTH COMMITTEE

7. 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 34/142 and 34/143. See section C below.*

### C. General Assembly resolutions 34/142 and 34/143 of 17 December 1979

#### 34/142. 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 lead to the duplication of work or the establishment of conflicting rules, resulting in non-ratification by states or non-application by the courts,

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

Law 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 by the United Nations Commission on International Trade Law of the Working Group on the New International Economic Order and its mandate, as well as the programmes of work of the other working groups of the Commission,

*Reaffirming* its resolution 33/92 of 16 December 1978,

1. *Reaffirms* the mandate of the United Nations Commission on International Trade Law in the co-ordination of 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 United Nations Commission on International Trade Law;

3. *Invites* all organs and organizations concerned to co-operate with the United Nations Commission on International Trade Law 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 participation in the various international organizations concerned with international trade law;

## II. THE THIRTEENTH SESSION (1980)

### A. Report of the United Nations Commission on International Trade Law on the work of its thirteenth session (New York, 14-25 July 1980) (A/35/17)\*

#### CONTENTS

	Paragraphs	Chapter	Paragraphs
INTRODUCTION .....	1-2	VI. NEW INTERNATIONAL ECONOMIC ORDER .....	118-143
Chapter		VII. CO-ORDINATION OF WORK .....	144-150
I. ORGANIZATION OF THE SESSION .....	3-11	VIII. TRAINING AND ASSISTANCE IN THE FIELD OF INTERNATIONAL TRADE LAW .....	151-162
A. Opening .....	3	IX. FUTURE WORK AND OTHER BUSINESS .....	163-175
B. Membership and attendance .....	4-7	A. Date and agenda of the fourteenth session of the Commission .....	163
C. Election of officers .....	8	B. Composition and sessions of Working Groups .....	164-167
D. Agenda .....	9	C. General Assembly resolution on the report of the Commission on the work of its twelfth session .....	168
E. Decisions of the Commission .....	10	D. Current activities of international organi- zations related to the harmonization and unification of International Trade Law ...	169
F. Adoption of the report .....	11	E. United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules) .....	170
II. INTERNATIONAL SALE OF GOODS .....	12	F. UNCITRAL law library .....	171-172
III. INTERNATIONAL TRADE CONTRACTS .....	13-16	G. Summary records .....	173-175
IV. INTERNATIONAL PAYMENTS .....	17-28		
A. Draft Convention on International Bills of Exchange and International Promissory Notes, and Uniform Rules on Interna- tional Cheques .....	17-22	Annex	Page
B. Security interests in goods .....	23-28	LIST OF DOCUMENTS BEFORE THE COMMISSION .....	30
V. INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION .....	29-117		
A. UNCITRAL Conciliation Rules .....	29-106		
B. UNCITRAL Arbitration Rules .....	107-113		
C. Model Arbitration Law .....	114-117		

#### INTRODUCTION

1. The present report of the United Nations Commission on International Trade Law covers the Commission's thirteenth session, held at New York from 14 to 25 July 1980.

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-fifth Session, Supplement No. 17.

#### CHAPTER I. ORGANIZATION OF THE SESSION

##### A. Opening

3. The United Nations Commission on International Trade Law (UNCITRAL) commenced its thirteenth session on 14 July 1980. 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 Com-

mission from 29 to 36 States. The present members of the Commission, elected on 15 December 1976 and 9 November 1979, are the following States:<sup>1</sup> Australia,\* Austria,\* Burundi,\* Chile,\* Colombia,\* Cuba,\*\* Cyprus,\*\* Czechoslovakia,\*\* Egypt,\* Finland,\* France,\* German Democratic Republic,\* Germany, Federal Republic of,\*\* Ghana,\* Guatemala,\*\* Hungary,\*\* India,\*\* Indonesia,\* Iraq,\*\* Italy,\*\* Japan,\* Kenya,\*\* Nigeria,\* Peru,\*\* Philippines,\*\* Senegal,\*\* Sierra Leone,\*\* Singapore,\* Spain,\*\* Trinidad and Tobago,\*\* Uganda,\*\* Union of Soviet Socialist Republics,\* United Kingdom of Great Britain and Northern Ireland,\* United Republic of Tanzania,\* United States of America\*\* and Yugoslavia.\*\*

5. With the exception of Burundi, 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: Argentina, Bahrain, Brazil, Bulgaria, Burma, Canada, China, El Salvador, Greece, Israel, Mali, Mexico, Morocco, Netherlands, Nicaragua, Panama, Poland, Syrian Arab Republic, Tunisia, Ukrainian Soviet Socialist Republic and Venezuela.

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

(a) *United Nations organs*

United Nations Conference on Trade and Development and the United Nations Industrial Development Organization.

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

\*\* Term of office expires on the day before the opening of the regular annual session of the Commission in 1986.

<sup>1</sup> 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. To fill the vacancies that would occur on that date, the General Assembly, at its thirty-fourth session on 9 November 1979, elected (or re-elected) 19 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 (14 July 1980) 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 1986).

(b) *Specialized agency*  
World Bank.

(c) *Intergovernmental organizations*  
Hague Conference on Private International Law and International Institute for the Unification of Private Law.

(d) *International non-governmental organization*  
International Chamber of Commerce.

### C. Election of officers

8. The Commission elected the following officers by acclamation:<sup>2</sup>

Chairman . . . . . Mr. R. Herber (Federal Republic of Germany)

Vice-Chairmen . . . Mr. P. C. Goh (Singapore)  
Mr. J. Simani (Kenya)  
Mr. H. Wagner (German Democratic Republic)

Rapporteur . . . . . Mrs. O. R. Valdés Pérez (Cuba)

### D. Agenda

9. The agenda of the session as adopted by the Commission at its 227th meeting, on 14 July 1980, was as follows:

1. Opening of the session
2. Election of officers
3. Adoption of the agenda: tentative schedule of meetings
4. International sale of goods
5. International contract practices
6. International payments
7. International commercial arbitration
8. New international economic order
9. Co-ordination of work
10. Training and assistance in the field of international trade law
11. Future work
12. Other business
13. Date and place of the fourteenth 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 thirteenth session were all reached by consensus.

### F. Adoption of the report

11. The Commission adopted the present report at its 242nd meeting, on 25 July 1980.

## CHAPTER II. INTERNATIONAL SALE OF GOODS

12. The Commission had before it a note by the Secretary-General on the United Nations Conference on

<sup>2</sup> The elections took place at the 227th meeting on 14 July 1980, the 230th meeting on 15 July 1980 and the 236th and 237th meetings on 21 July 1980. 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)).

Contracts for the International Sale of Goods (A/CN.9/183).<sup>\*</sup> The Conference was held at Vienna, Austria, from 10 March to 11 April 1980. The Commission noted with appreciation that the Conference had adopted the United Nations Convention on Contracts for the International Sale of Goods and a Protocol Amending the Convention on the Limitation Period in the International Sale of Goods. It expressed its hope that the Convention, which has already been signed by six States, would receive the widest possible acceptance. Several delegations indicated that their Governments were actively examining the Convention with a view to its being signed and ratified.

### CHAPTER III. INTERNATIONAL TRADE CONTRACTS<sup>3</sup>

13. 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 protecting parties against the effects of fluctuations in the value of currency.<sup>4</sup>

14. At its twelfth session, the Commission had before it, among other reports dealing with international contract practices, a report of the Secretary-General entitled "Liquidated damages and penalty clauses" (A/CN.9/161). At that session, the Commission decided that work should be undertaken directed to the formulation of uniform rules regulating liquidated damages and penalty clauses, and entrusted the work to the Working Group on International Contract Practices, with a mandate to consider the feasibility of formulating uniform rules on liquidated damages and penalty clauses applicable to a wide range of international trade contracts.<sup>5</sup>

15. At the present session, the Commission had before it the report of the Working Group on International Contract Practices on the work of its first session, held at Vienna from 24 to 28 September 1979 (A/CN.9/177).<sup>\*\*</sup> The report noted that, after a general discussion, the Working Group had considered preliminary draft rules regulating liquidated damages and penalty clauses prepared by the Secretariat. While the discussion of these preliminary rules by the Working Group had revealed a consensus on certain principles set forth in the draft rules, it had also shown that divergent views were entertained on other principles. However, there was general agreement in the Working Group that further work on the subject was justified, and that greater consensus might be achieved on a set of rules designed to regulate liquidated damages and penalty clauses in selected types of international trade contracts. The Working Group therefore recommended to the Commission that another session of the Working Group should be convened and that the Secretariat be

requested to undertake a further study to be submitted to that session focusing on the following issues:

(a) The manner in which liquidated damages and penalty clauses are drafted and used in various types of international trade contracts;

(b) The particular types of international trade contracts which might usefully be regulated by uniform rules; and

(c) The legal difficulties encountered in the use of liquidated damages and penalty clauses, as shown by court and arbitral decisions.

16. The Commission, after expressing its appreciation to the Working Group for the progress made by it, accepted its recommendations.

### CHAPTER IV. INTERNATIONAL PAYMENTS

#### A. *Draft Convention on International Bills of Exchange and International Promissory Notes, and Uniform Rules on International Cheques*<sup>6</sup>

17. The Commission had before it the reports of the Working Group on International Negotiable Instruments on the work of its eighth session, held at Geneva from 3 to 14 September 1979, and of its ninth session, held at New York from 3 to 11 January 1980 (A/CN.9/178\* and A/CN.9/181).<sup>\*\*</sup> The reports set forth the progress made by the Working Group at these sessions on the preparation of a draft Convention on International Bills of Exchange and International Promissory Notes, and on the preparation of Uniform Rules on International Cheques. The proposed instruments would establish uniform rules applicable to an international instrument (bill of exchange, promissory note or cheque) for optional use in international payments.

18. The report of the Working Group on the work of its eighth session (A/CN.9/178) noted that the Working Group considered in second reading articles 1, 5, 9, 11 and 70 to 86 of the draft Convention and in third reading articles 1 to 12 of the draft Convention. The Working Group requested the Secretariat to make appropriate arrangements for the establishment of corresponding versions of the draft Convention in the four working languages of the Commission (English, French, Spanish and Russian) and to find a way of establishing corresponding versions in Arabic and Chinese<sup>7</sup> before the draft Convention was considered at a diplomatic conference. The Working Group also noted that the Commission, at its twelfth session, had authorized the Working Group to proceed with the drafting of uniform rules for international cheques if the Group was of the view that the formulation of such rules was desirable and the application of the draft Convention could be extended to include international cheques.<sup>8</sup>

\* Reproduced in this volume, part two, I, below.

\*\* Reproduced in this volume, part two, II, below.

<sup>3</sup> The Commission considered this subject at its 227th meeting on 14 July 1980.

<sup>4</sup> *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).

<sup>5</sup> *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17 (A/34/17)*, para. 31 (Yearbook ... 1979, part one, II, A).

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

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

<sup>6</sup> The Commission considered this subject at its 227th and 228th meetings on 14 July 1980.

<sup>7</sup> A Chinese version of the draft Convention has now been established; see A/CN.9/181, Annex, in the Chinese version.

<sup>8</sup> *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17 (A/34/17)*, para. 44 (Yearbook ... 1979, part one, II, A).

The Working Group also noted that the UNCITRAL Study Group on International Payments was of the view that the cheque was widely used for settling international commercial transactions, and that there was substantial support for the establishment of uniform rules applicable to international cheques. The Working Group accordingly requested the Secretariat to commence preparatory work in respect of international cheques.

19. The report of the Working Group on the work of its ninth session (A/CN.9/181) noted that the Working Group considered in its third reading articles 13 to 85 of the draft Convention, and also considered article 5 (10) in connexion with article 22. The Working Group thereby completed the substance of its work on the draft Convention subject to reconsideration of certain issues referred to the UNCITRAL Study Group on International Payments for its opinion. The report further noted that the Working Group held a preliminary exchange of views on articles 1 to 30 of the draft Uniform Rules applicable to International Cheques drawn up by the Secretariat (A/CN.9/WG.10/WP.15). The Working Group requested the Secretariat to complete the draft Uniform Rules, including rules on crossed cheques, and to submit a study on legal issues arising outside the cheque. The Working Group also agreed to a suggestion by the Secretariat that it convene a Drafting Group for the purpose of harmonizing the language versions of the draft Convention, and requested the Secretariat to establish a commentary on the draft Convention.

#### *Discussion at the session*

20. The view was expressed that, since the Working Group had completed the substance of its work on the draft Convention on International Bills of Exchange and International Promissory Notes, this text should be circulated for comments to Governments and then considered by the Commission without awaiting the completion of the work by the Working Group on uniform rules for international cheques. Such an approach, it was submitted, would accelerate the course of the work. The prevailing view, however, was that the Commission should defer its consideration of the draft Convention until the Working Group had completed its work on international cheques. Such a course would enable the Working Group to reconsider relevant articles in the draft Convention in the light of issues which may arise during the consideration of the uniform rules on international cheques, and to present either a single integrated text or two texts which were harmonized to the extent possible.

21. It was also submitted that as international cheques, which were mainly payment instruments, differed in their legal character from international bills of exchange and international promissory notes, which were mainly credit instruments, the uniform rules relating to cheques should be set forth in a separate draft Convention. Under another view, however, the question as to whether it was appropriate to have one or two conventions should be left in the first instance for decision by the Working Group.

22. The Commission expressed its appreciation of the progress made by the Working Group, and requested it to

complete its work as expeditiously as possible. The Commission also was agreed that the Secretariat should prepare a commentary to the draft Convention with the least possible delay.

### *B. Security interests in goods<sup>9</sup>*

#### *Introduction*

23. At its twelfth session the Commission had before it a report (A/CN.9/165)\* submitted by the Secretary-General in compliance with a request made by the Commission at its tenth session. The report considered the feasibility of uniform rules on security interests and their possible content. It suggested 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.

24. After considering this report, the Commission requested the Secretariat to prepare a further report setting out the issues to be considered in the preparation of uniform rules on security interests and to propose the manner in which those issues might be decided.<sup>10</sup>

25. At the present session the Commission had before it a report of the Secretary-General entitled "Security Interests: Issues to be considered in the preparation of uniform rules" (A/CN.9/186)\*\* submitted in compliance with the request made by the Commission at its twelfth session.

#### *Discussion at the session*

26. The discussion at the session revealed a concern that the subject of security interests was too complex for there to be reasonable expectations that uniform rules might be developed. It was pointed out that concepts of security interests and title retention were understood differently in various legal systems and it would be difficult for many of those legal systems to make the adjustments necessary to accommodate the different concepts envisaged. This was thought to be particularly true since the subject-matter of security interests was closely connected with other areas of the law, such as that of bankruptcy, which would also have to be unified or harmonized for the proposed model law to be effective.

27. It was suggested that the Commission might wish to await the outcome of the work on retention of title by the Council of Europe and on factoring by the International Institute for the Unification of Private Law (UNIDROIT) before it undertook any further work of its own. It was also suggested that, if further work were to be undertaken in the future, emphasis should be placed on the practical problems in respect of security interests in international trade.

\* Reproduced in Yearbook ... 1979, part two, II, C.

\*\* Reproduced in this volume, part two, III, D, below.

<sup>9</sup> The Commission considered this subject at its 236th meeting on 21 July 1980.

<sup>10</sup> Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17 (A/34/17), para. 54 (Yearbook ... 1979, part one, III, A).

### Decision

28. The Commission took note of the report of the Secretary-General. After a general discussion the view was reached that world-wide unification of the law of security interests in goods, for the reasons brought out in the discussions, was in all likelihood unattainable. The Commission therefore decided that no further work should at present be carried out by the Secretariat and that the item should no longer be accorded priority. However, the report prepared by the Secretary-General and previous reports on the subject might well prove useful if and when the subject was considered in other fora.

## CHAPTER V. INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION

### A. UNCITRAL Conciliation Rules<sup>11</sup>

#### Introduction

29. The Commission, at its twelfth session, considered preliminary draft UNCITRAL Conciliation Rules drawn up by the Secretariat (A/CN.9/166)\* and requested 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.”<sup>12</sup>

30. At the present session, the Commission had before it revised draft UNCITRAL Conciliation Rules (A/CN.9/179),\*\* together with a commentary (A/CN.9/180)\*\*\* and the observations of Governments and international organizations (A/CN.9/187 and Add. 1, 2 and 3).\*\*\*\* The Commission noted that, in drawing up the revised Rules, the Secretariat had taken into account the views expressed by representatives and observers at the twelfth session and had held consultations with representatives of the International Council for Commercial Arbitration and the International Chamber of Commerce.

31. After a general discussion relating in particular to the different nature of conciliation when compared with arbitration, the Commission considered the articles of the revised draft Rules separately and in turn.

32. The Commission established a Drafting Party consisting of the representatives of Chile, China, France, Iraq, Nigeria, Spain, the Union of Soviet Socialist Republics, the United Kingdom and the United States. The Commission requested the Drafting Party to review the articles considered by the Commission and to ensure that the various language versions (Arabic, Chinese, English, French, Russian, Spanish) were in concordance.

### “Application of the Rules

#### “Article 1

“(1) These Rules apply to conciliation of disputes arising out of or relating to a contractual or other legal relationship where the parties seeking an amicable settlement of their dispute have agreed that the UNCITRAL Conciliation Rules apply.

“(2) The parties may agree to any modification of these Rules.”

#### Paragraph (1)

33. The question was raised whether the agreement between the parties to apply the UNCITRAL Conciliation Rules to a conciliation procedure should be in writing. In favour of such a requirement it was stated that conciliation proceedings under the UNCITRAL Conciliation Rules had certain legal consequences, such as the undertaking by the parties not to initiate during the conciliation proceedings any arbitral or judicial proceedings in respect of the same dispute (art. 16) or the undertaking in respect of evidence to be introduced in such proceedings (art. 20). The contrary view was expressed that the requirement of writing should not be included in article 1 since it would prevent parties from agreeing orally on the application of the Rules.

34. The Commission, after discussion, was of the view that the requirement of writing was already to a certain extent met by article 2 which required a party initiating conciliation to send an invitation in written form to the other party. The requirement of writing in paragraph (1) of article 2 should therefore be expanded to include a reference to the UNCITRAL Conciliation Rules. Such requirement would be fully met if article 2 provided that the acceptance would also be in writing.

35. The Commission considered the question whether the Rules should state specifically that their application was limited to disputes arising out of international commercial relationships. One representative suggested that the word “international” should be inserted before the word “disputes”. It was noted that the UNCITRAL Arbitration Rules did not set forth any such restriction, but that the General Assembly in its resolution 31/98 of 15 December 1976 had recommended the use of these Rules for “the settlement of disputes arising in the context of international commercial relations”. The Commission, after deliberation, was agreed that the same procedure should be followed in respect of the UNCITRAL Conciliation Rules and that it should invite the General Assembly to adopt a similar resolution.

\* Reproduced in Yearbook ... 1979, part two, III, A.

\*\* Reproduced in this volume, part two, IV, A, below.

\*\*\* Reproduced in this volume, part two, IV, B, below.

\*\*\*\* Reproduced in this volume, part two, IV, C, below.

<sup>11</sup> The Commission considered this subject at its 228th to 235th meetings, from 14 to 18 July 1980.

<sup>12</sup> Report of the United Nations Commission on International Trade Law on the work of its twelfth session, *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17* (A/34/17), para. 88 (Yearbook ... 1979, part one, II, A).



*Paragraph (2)*

36. The Commission considered a proposal that paragraph (2) should allow not only a modification of a rule but also its exclusion. In justification of the proposal it was stated that several rules placed certain obligations on the parties. However, the parties should be free to agree that a given obligation should not be imposed in conciliation proceedings between them. The Commission, after deliberation, was agreed to modify paragraph (2) accordingly.

37. It was further proposed that paragraph (2) should reflect that the parties could exclude or vary any of the Rules at any time, whether before, during or after the commencement of the conciliation proceedings. The Commission accepted this proposal.

*New paragraph (3)*

38. In the course of the discussions on other provisions of the revised UNCITRAL Conciliation Rules it was noted that in several instances the question arose of a possible conflict between a given rule and a provision of law. After discussion, the Commission was of the view that, rather than specifying in individual rules that a provision of law took precedence over the rule at issue, it would be more appropriate to include in the UNCITRAL Conciliation Rules a general provision on the lines of article 1, paragraph (2), of the UNCITRAL Arbitration Rules. The Commission requested the Drafting Party to draw up such provision.

39. The text of article 1 as reviewed by the Drafting Party was as follows:

*"APPLICATION OF THE RULES"**"Article 1"*

"(1) These Rules apply to conciliation of disputes arising out of or relating to a contractual or other legal relationship where the parties seeking an amicable settlement of their dispute have agreed that the UNCITRAL Conciliation Rules apply.

"(2) The parties may agree to exclude or vary any of these Rules at any time.

"(3) Where any of these Rules is in conflict with a provision of law from which the parties cannot derogate, that provision prevails."

\* \* \*

*"Commencement of conciliation proceedings"**"Article 2"*

"(1) The party initiating conciliation sends to the other party a written invitation to conciliate, briefly identifying the subject of the dispute.

"(2) Conciliation proceedings commence when the other party accepts the invitation to conciliate.

"(3) If the other party refuses conciliation, there will be no conciliation proceedings.

"(4) If the party initiating conciliation has not received a reply within thirty days from the date on which he sent the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate. If he so elects, he informs the other party accordingly."

*Paragraph (1)*

40. The Commission, pursuant to its view taken with regard to the proposal that the reference to the application of the Rules should be in writing (see above, para. 34), decided to include in paragraph (1) of article 2 a reference to the UNCITRAL Conciliation Rules.

*Paragraph (2)*

41. The Commission considered, in the same context, whether the acceptance of the invitation to conciliate should be in writing. In favour of that requirement it was observed that it was desirable that the parties have a written record of their agreement on the application of the Rules for purposes of proof. On the other hand, it was thought that such requirement might unduly delay the commencement of the conciliation proceedings. The Commission, after deliberation, was agreed that the parties should be given the opportunity to commence conciliation proceedings even where the acceptance was made orally but that, in such a case, it was advisable to confirm the oral acceptance in writing.

*Paragraph (3)*

42. The Commission did not accept a proposal that paragraph (3) be deleted. While it was true that this paragraph stated the obvious, its retention seemed desirable for the sake of completeness: paragraph (3), together with paragraphs (2) and (4), stated the three possible reactions of the other party towards an invitation to conciliate. It also emphasized the voluntary nature of conciliation.

*Paragraph (4)*

43. The Commission considered various proposals relating to the time-period under paragraph (4). One proposal was that a reply should be considered as having been made in time if it had been dispatched, though not necessarily received, within the period of 30 days. However, it was felt that such a rule would not be appropriate since it would be contrary to the interest of the invitor not to know at the end of the period whether there would be conciliation and the other party was in a position to select the proper means of timely communication.

44. Another proposal was that the paragraph should emphasize that the invitor could specify the time-period within which he expected a reply by the other party. Such emphasis could be achieved by inverting the order of the two periods envisaged under paragraph (4). However, it was felt that the present text was in accordance with normal legal drafting and that the 30-day period provided a useful yardstick. There was also some concern about a possible abuse of the option to specify the time-period. To meet this concern, it was proposed to require that the time specified

by the invitor be reasonable. However, this further proposal was not adopted in view of its ambiguity and lack of certainty.

45. Yet another proposal was to delete paragraph (4) in view of the voluntary and flexible nature of conciliation. However, the provision in paragraph (4) was retained as a useful means of achieving, within a given period of time, certainty as to whether conciliation proceedings would take place.

46. The text of article 2 as reviewed by the Drafting Party was as follows:

**"COMMENCEMENT OF CONCILIATION PROCEEDINGS**

**"Article 2**

"(1) The party initiating conciliation sends to the other party a written invitation to conciliate under these Rules, briefly identifying the subject of the dispute.

"(2) Conciliation proceedings commence when the other party accepts the invitation to conciliate. If the acceptance is made orally, it is advisable that it be confirmed in writing.

"(3) If the other party rejects the invitation, there will be no conciliation proceedings.

"(4) If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate. If he so elects, he informs the other party accordingly."

\* \* \*

**"Number of conciliators**

**"Article 3**

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

47. In the course of the discussions of this and other articles, in particular article 7, the question was raised in what manner two or three conciliators would act. It was noted, for instance, that article 4, paragraph (1) (c), referred to a "presiding conciliator" where there were three conciliators though the Rules did not set forth any rule as to the powers of a presiding conciliator. Furthermore, it was not immediately clear whether conciliators in inviting parties to submit statements and documents or in making proposals for a settlement agreement would, in doing so, have to act jointly or whether they could also act individually.

48. The Commission, after deliberation, was of the view that the Rules should set forth the general principle that in conciliation proceedings with more than one conciliator, the conciliators should act jointly. The Commission requested the Drafting Party to draft appropriate additional wording in article 3.

49. The Commission adopted this article subject to the above amendment.

50. The text of article 3 as reviewed by the Drafting Party was as follows:

**"NUMBER OF CONCILIATORS**

**"Article 3**

"There shall be one conciliator unless the parties agree that there shall be two or three conciliators. Where there is more than one conciliator, they ought, as a general rule, to act jointly."

\* \* \*

**"Appointment of conciliator(s)**

**"Article 4**

"(1) (a) In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of a sole conciliator;

"(b) In conciliation proceedings with two conciliators, each party appoints one conciliator;

"(c) In conciliation proceedings with three conciliators, each party appoints one conciliator. The parties shall endeavour to reach agreement on the name of the presiding conciliator.

"(2) Parties may enlist the assistance of an appropriate institution or person in connexion with the appointment of conciliators. In particular,

"(a) A party may request such an institution or person to recommend the names of suitable individuals to act as conciliator;

"or

"(b) The parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.

"In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or presiding conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties."

51. The Commission was in agreement with this provision but decided that, for the reasons stated under article 3 (see above, paras. 47 and 48), the words "presiding conciliator" in paragraph (1) (c) and the last sentence of paragraph (2) should be replaced by the words "third conciliator".

52. The text of article 4 as reviewed by the Drafting Party was as follows:

**"APPOINTMENT OF CONCILIATOR(S)**

**"Article 4**

"(1) (a) In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of a sole conciliator;

"(b) In conciliation proceedings with two conciliators, each party appoints one conciliator;

"(c) In conciliation proceedings with three conciliators, each party appoints one conciliator. The parties shall endeavour to reach agreement on the name of the third conciliator.

"(2) Parties may enlist the assistance of an appropriate institution or person in connexion with the appointment of conciliators. In particular,

"(a) A party may request such an institution or person to recommend the names of suitable individuals to act as conciliator; or

"(b) The parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.

"In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties."

\* \* \*

#### *"Submission of statements to conciliator"*

##### *"Article 5"*

"(1) Upon the appointment of the conciliator,\* each party submits to the conciliator a brief written statement describing the general nature of the dispute and the points at issue. Each party sends a copy of his statement to the other party.

"(2) The conciliator may request each party to submit to him a further 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. The party sends a copy of his statement to the other party.

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

"\* In this and all following articles, the term 'conciliator' applies to either a sole conciliator, two or three conciliators, as the case may be."

#### *Paragraph (1)*

53. It was observed that paragraph (1) did not make it immediately clear at what point in time the parties were to submit their statements to the conciliator. While there would be no difficulty in this respect in conciliation proceedings with one conciliator, parties might not always know in conciliation proceedings with two or more conciliators whether the second or third conciliator had been appointed. The Commission was of the view that the paragraph could be drafted more clearly by providing that it would be the conciliator who, upon his appointment, would request each party to submit to him a brief written statement.

#### *Paragraphs (2) and (3)*

54. The Commission adopted the substance of these paragraphs.

55. The text of article 5 as reviewed by the Drafting Party was as follows:

#### *"SUBMISSION OF STATEMENTS TO CONCILIATOR"*

##### *"Article 5"*

"(1) The conciliator,\* upon his appointment, requests each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party sends a copy of his statement to the other party.

"(2) The conciliator may request each party to submit to him a further 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. The party sends a copy of his statement to the other party.

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

"\* In this and all following articles, the term 'conciliator' applies to either a sole conciliator, two or three conciliators, as the case may be."

\* \* \*

#### *"Representation and assistance"*

##### *"Article 6"*

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

56. The Commission adopted the substance of this article.

57. The text of the article as reviewed by the Drafting Party was as follows:

#### *"REPRESENTATION AND ASSISTANCE"*

##### *"Article 6"*

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

\* \* \*

#### *"Role of the conciliator"*

##### *"Article 7"*

"(1) The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

"(2) The conciliator will be guided by principles of fairness, equity and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices of the parties.

"(3) 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.

"(4) The conciliator may, at any stage of the conciliation proceedings, 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."

#### *Paragraph (1)*

58. It was observed that the word "assist" used in this paragraph had a different meaning from the word "assist" used in article 6. The general view was that, while this was so, it would not be necessary to use a different word in one or the other article since the different meaning of the word resulted clearly from the context.

#### *Paragraph (2)*

59. Various suggestions were made as to the principles that should guide the conciliator during the conciliation proceedings. These suggestions related to the order in which the guidelines should be set forth and to the inclusion of the criterion of the law applicable to the substance of the dispute. However, none of these suggestions received general support. In order to better harmonize the text in all languages, it was agreed in the English text to delete the word "equity" which was in any case thought to be embodied in the word "fairness", and to insert the word "objectivity". This was not considered to be a change in the substance.

60. It was observed that the reference to "any previous business practices of the parties" could suggest that the conciliator was to have regard not only to the previous dealings of the parties with each other but also to the previous dealings of the parties with others. It was suggested that this phrase referred only to the practices between the parties, more general practices being covered by the phrase "usages of the trade".

#### *Paragraph (3)*

61. The observation was made that there could well be cases where a party wished to submit evidence through witnesses. It was therefore proposed that appropriate wording should be added to paragraph (3) which would make it possible for a party to request the conciliator to hear witnesses whose evidence the party considered relevant. The Commission accepted this proposal. The Commission was of the view that, under article 17, in such a case the costs of calling a witness would have to be borne by the party making the request unless the other party had expressly agreed that the witness be heard by the conciliator.

#### *Paragraph (4)*

62. The Commission adopted the substance of this paragraph.

63. The text of article 7 as reviewed by the Drafting Party was as follows:

#### *"ROLE OF CONCILIATOR"*

##### *"Article 7"*

"(1) The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

"(2) The conciliator will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

"(3) 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 express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.

"(4) The conciliator may, at any stage of the conciliation proceedings, 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."

\* \* \*

#### *"Administrative assistance"*

##### *"Article 8"*

"In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator after consultation with the parties, may arrange for administrative assistance by a suitable institution."

64. The Commission considered and adopted a proposal that the conciliator could arrange for administrative assistance only with the consent of the parties and that mere consultations with the parties would not suffice.

65. The Commission also accepted a proposal that administrative assistance could be provided not only by an institution but also by a person.

66. The text as reviewed by the Drafting Party was as follows:

#### *"ADMINISTRATIVE ASSISTANCE"*

##### *"Article 8"*

"In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person."

\* \* \*

*"Communication between conciliator and parties"**"Article 9"*

"(1) The conciliator may invite the parties to meet with him, or may communicate orally or in writing with the parties, or with a party alone.

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

*Paragraph (1)*

67. The Commission, after deliberation, was of the view that it was in the interest of the procedure of conciliation that the conciliator, if he communicated or met with one party, should also communicate or meet with the other party. The Commission therefore requested the Drafting Party to redraft the paragraph accordingly.

*Paragraph (2)*

68. The Commission adopted the substance of this paragraph.

69. The text of article 9 as reviewed by the Drafting Party was as follows:

"COMMUNICATION BETWEEN CONCILIATOR AND  
PARTIES

*"Article 9"*

"(1) The conciliator may invite the parties to meet with him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.

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

\* \* \*

*"Disclosure of information"**"Article 10"*

"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 will 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."

70. Different views were expressed as to the discretion of the conciliator to disclose to the other party information he had received from a party. Under one view it would be in the interest of conciliation proceedings that the conciliator be given such a discretion. Under another view it

was important that a party knew about any information that had been given to the conciliator by the other party. There was, however, wide agreement that the conciliator was bound not to disclose information made known to him subject to the condition that it be kept confidential.

71. The Commission considered and adopted a new proposal drawn up in the light of the discussions, according to which factual information concerning the dispute received from a party by the conciliator should be disclosed to the other party but that any information made subject to the condition that it be kept confidential should not be disclosed.

72. The text of article 10 as reviewed by the Drafting Party was as follows:

"DISCLOSURE OF INFORMATION

*"Article 10"*

"When the conciliator receives factual information concerning the dispute from a party, he discloses the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate. However, when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator does not disclose that information to the other party."

\* \* \*

*"Party suggestions for settlement of dispute"**"Article 11"*

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

73. It was noted that this article provided, in the first place, for the invitation by the conciliator to the parties to submit to him suggestions for a settlement of the dispute and, then, for the parties themselves, on their own initiative, to submit such suggestions. It was suggested that the article should first state that a party could, if he so wished, submit suggestions and that, in second instance, he could be invited to do so by the conciliator. The Commission accepted this proposal.

74. The text of article 11 as reviewed by the Drafting Party was as follows (as to different numbering see below, para. 76):

"SUGGESTIONS BY PARTIES FOR SETTLEMENT OF DISPUTE

*"Article 12"*

"Each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute."

\* \* \*

*"Co-operation of parties with conciliator"**"Article 12"*

"The parties will 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."

75. It was suggested that the duty of the parties to co-operate with the conciliator should be stressed as the general rule and that, therefore, the article should be redrafted to make this clear. The Commission accepted this suggestion.

76. The Commission also accepted a proposal that the order of articles 11 and 12 be inverted on the ground that article 11 related to suggestions for the settlement of the dispute which was also the subject of article 13.

77. The text of article 12 as reviewed by the Drafting Party was as follows:

*"CO-OPERATION OF PARTIES WITH CONCILIATOR"**"Article 11"*

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

\* \* \*

*"Settlement agreement"**"Article 13"*

"(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. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

"(2) If the parties reach agreement on a settlement of the dispute, they draw up and sign a written settlement agreement.\* Upon request of the parties, the conciliator draws up, or assists the parties in drawing up, the settlement agreement.

"(3) The parties by signing the settlement agreement accept it as a final and binding settlement of their dispute.

"\* It is recommended that the settlement agreement contain a clause that any dispute arising out of or relating to the interpretation and performance of the settlement agreement shall be submitted to arbitration."

*Paragraph (1)*

78. It was noted that paragraph (1) gave the conciliator discretion to formulate the terms of a possible settlement even though elements of a settlement acceptable to the parties had emerged during the conciliation proceedings. The view was expressed that, in such a case, the conciliator should not have any discretion but that it was incumbent

upon him to formulate a proposal for a settlement agreement. The Commission accepted this view and decided to replace the words "he may formulate" by the words "he formulates".

*Paragraph (2)*

79. The question was raised whether the footnote relating to the written settlement agreement between the parties should be retained. The Commission, after deliberation, was of the view that drawing the attention of the parties to an arbitration clause in the agreement served a useful purpose but that the footnote should be reworded as set forth below (para. 81).

*Paragraph (3)*

80. There was considerable discussion on the meaning of the word "final" as used in this paragraph. It was felt that this word could give rise to misinterpretation and that it was preferable to replace it by wording that would indicate that once a settlement agreement was signed by the parties there would no longer be a dispute between them in respect of the issues covered by the agreement and the parties should be contractually bound by the settlement. The Commission adopted the wording set forth below (para. 81).

81. The text as reviewed by the Drafting Party was as follows:

*"SETTLEMENT AGREEMENT"**"Article 13"*

"(1) When it appears to the conciliator that there exist elements of a settlement which would be acceptable to the parties, he formulates the terms of a possible settlement and submits them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

"(2) If the parties reach agreement on a settlement of the dispute, they draw up and sign a written settlement agreement.\* If requested by the parties, the conciliator draws up, or assists the parties in drawing up, the settlement agreement.

"(3) The parties by signing the settlement agreement put an end to the dispute and are bound by the agreement.

"\* The parties may wish to consider including in the settlement agreement a clause that any dispute arising out of or relating to the settlement agreement shall be submitted to arbitration."

\* \* \*

*"Confidentiality"**"Article 14"*

"Unless otherwise agreed by the parties or required by law, the conciliator and the parties must keep confidential all matters relating to the conciliation proceedings. Confidentiality extends also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement."

82. In accordance with the decision under article 1 (see para. 38 above), the Commission decided to strike out the words "or required by law" since that issue was now covered by article 1, paragraph (3). The Commission also decided that it was not necessary to retain the words "unless otherwise agreed by the parties" since under article 1, paragraph (2) the parties may agree to any modification of the Rules. Subject to these amendments, the Commission adopted the substance of article 14.

83. The text of article 14 as reviewed by the Drafting Party was as follows:

"CONFIDENTIALITY

"Article 14

"The conciliator and the parties must keep confidential all matters relating to the conciliation proceedings. Confidentiality extends also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement."

\* \* \*

"Termination of conciliation proceedings

"Article 15

"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 declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration."

84. It was suggested that the provisions on termination of conciliation proceedings include a provision according to which the proceedings would be terminated also if the conciliator resigned or died. According to another view it would not be possible to state every eventuality that could give rise to termination and that article 15 dealt with the situations in which conciliation proceedings were terminated by an express act (signing of settlement agreement or written declaration) of the parties or the conciliator.

85. The text of article 15 as reviewed by the Drafting Party was as follows:

"TERMINATION OF CONCILIATION PROCEEDINGS

"Article 15

"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 declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration."

\* \* \*

"Resort to arbitral or judicial proceedings

"Article 16

"The parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights."

86. While there was general support for the basic idea expressed in this article, different views were expressed as to the extent of the undertaking of the parties not to initiate arbitral or judicial proceedings during the conciliation proceedings. The Commission, after discussion, was of the view that the policy underlying article 16 was acceptable and should be retained.

87. In respect of the faculty of a party to initiate other proceedings where these are necessary for the preservation of his rights, it was suggested that article 16 should set forth a special rule according to which parties who agree to conciliation are considered to have also agreed to the extension of the period of prescription by a period of time equivalent to the duration of the conciliation proceedings. The Commission did not retain this suggestion on the ground that under some legal systems such a rule would probably not be operative.

88. The Commission expressed the view that it was self-evident that parties who were engaged in arbitral or judicial proceedings could at any time attempt to settle their dispute by conciliation and that article 16 should therefore not be interpreted as preventing this. There was nothing in the Rules that prevent parties from agreeing to initiate or continue conciliation, after commencing arbitration or judicial proceedings.

89. The text of article 16 as reviewed by the Drafting Party was as follows:

"RESORT TO ARBITRAL OR JUDICIAL PROCEEDINGS

"Article 16

"The parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the

conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights."

\* \* \*

#### "Costs"

#### "Article 17"

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

"(a) The fee of the conciliator which shall be reasonable in amount;

"(b) The travel and other expenses of the conciliator;

"(c) The travel and other expenses of any witnesses requested by the conciliator with the consent of the parties;

"(d) The cost, travel and other expenses of any expert advice requested by the conciliator with the consent of the parties;

"(e) The cost of any administrative assistance provided pursuant to article 8 of these Rules.

"(2) The costs, as defined above, are borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party are borne by that party."

#### Paragraph (1)

90. It was noted that the costs fixed by the conciliator under article 17 were the "final" costs. Article 18, on the other hand, dealt with a pre-estimate of the types of costs referred to in article 17.

91. The Commission accepted an amendment to paragraph (1) (e) to add a reference to article 4, paragraph (2) (b) and, as a consequence, to delete the word "administrative".

#### Paragraph (2)

92. The Commission adopted the substance of paragraph (2).

93. The text of article 17 as reviewed by the Drafting Party was as follows:

#### "COSTS"

#### "Article 17"

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

"(a) The fee of the conciliator which shall be reasonable in amount;

"(b) The travel and other expenses of the conciliator;

"(c) The travel and other expenses of any witnesses requested by the conciliator with the consent of the parties;

"(d) The cost of any expert advice requested by the conciliator with the consent of the parties;

"(e) The cost of any assistance provided pursuant to article 4, paragraph (2) (b), and 8 of these Rules.

"(2) The costs, as defined above, are borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party are borne by that party."

\* \* \*

#### "Deposits"

#### "Article 18"

"(1) The conciliator, upon his appointment, may request each party to deposit an equal amount as an advance for the costs referred to in article 17, paragraph (1).

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

"(3) If the required deposits under paragraphs (1) and (2) of this article are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination to the parties, effective on the date of that declaration.

"(4) Upon termination of the conciliation proceedings, the conciliator renders an accounting to the parties of the deposits received and returns any unexpended balance to the parties."

#### Paragraph (1)

94. The Commission requested the Drafting Party to redraft the wording of paragraph (1) so as to make it clear that the amount of the deposit reflected the estimate of the conciliator of the costs referred to in article 17, paragraph (1).

#### Paragraphs (2), (3) and (4)

95. The Commission adopted the substance of these paragraphs.

96. The text of article 18 as reviewed by the Drafting Party was as follows:

#### "DEPOSITS"

#### "Article 18"

"(1) The conciliator, upon his appointment, may request each party to deposit an equal amount as an advance for the costs referred to in article 17, paragraph (1), which he expects will be incurred.

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



"(3) If the required deposits under paragraphs (1) and (2) of this article are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination to the parties, effective on the date of that declaration.

"(4) Upon termination of the conciliation proceedings, the conciliator renders an accounting to the parties of the deposits received and returns any unexpended balance to the parties."

\* \* \*

*"Role of conciliator in subsequent proceedings"*

*"Article 19"*

"Unless the parties have agreed otherwise, a conciliator may not act as an arbitrator in subsequent arbitral proceedings, or as a representative or counsel of a party, or be presented 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."

97. The Commission, after deliberation, was agreed that article 19 should reflect an undertaking of the parties and of the conciliator. The Commission requested the Drafting Party to redraft the article accordingly.

98. The Commission decided that it was no longer necessary to retain the words "unless the parties have agreed otherwise" since under article 1, paragraph (2), the parties may agree on any modification of the Rules.

99. The text of article 19 as reviewed by the Drafting Party was as follows:

*"ROLE OF CONCILIATOR IN OTHER PROCEEDINGS"*

*"Article 19"*

"The parties and the conciliator undertake that the conciliator will not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings. The parties also undertake that they will not present the conciliator as a witness in any such proceedings."

\* \* \*

*"Admissibility of evidence in other proceedings"*

*"Article 20"*

"The parties undertake not to rely on or 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 had indicated his willingness to accept a proposal for settlement made by the conciliator."

100. The Commission expressed agreement with the policy underlying article 20. It was observed that under the Rules parties could not only express views in respect of a possible settlement of the dispute but could also under article 11 (now art. 12) make suggestions in that respect. It was therefore proposed that article 20 (a) should be redrafted and refer to such suggestions. The Commission accepted this proposal.

101. The text of article 20 as reviewed by the Drafting Party was as follows:

*"ADMISSIBILITY OF EVIDENCE IN OTHER PROCEEDINGS"*

*"Article 20"*

"The parties undertake not to rely on or 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 or suggestions made by the other party in respect of a possible settlement 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 had indicated his willingness to accept a proposal for settlement made by the conciliator."

\* \* \*

*Model conciliation clause<sup>13</sup>*

102. The Commission considered the model conciliation clauses suggested in the revised draft UNCITRAL Conciliation Rules:

*"MODEL CONCILIATION CLAUSE"*

*"Variant A:*

"Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force.

*"Variant B:*

"In the event of a dispute arising out of or relating to this contract, a party, before resorting to the courts or, if so provided for, to arbitration, shall invite the other party to seek an amicable settlement of that dispute by conciliation in accordance with the UNCITRAL Conciliation Rules as at present in force."

103. The opinion was expressed that it would not be necessary to set out model conciliation clauses in the UNCITRAL Conciliation Rules.

<sup>13</sup> The Commission considered this subject at its 241st meeting on 23 July 1980.

104. It was agreed, subject to the addition of the word "the" in the last clause, to retain variant A, which was non-committal and contained merely an agreement on the application of the UNCITRAL Conciliation Rules. The Commission did not accept proposals to draw the attention of the parties to the possibility of agreeing on a commitment to conciliate and then to specify the articles of the Conciliation Rules which would have to be modified. The view was expressed that this could possibly be interpreted as not corresponding to the voluntary concept underlying the Rules and that the general reference to articles to be modified might create difficulties and uncertainty. The Commission was agreed, however, that the following sentence be added after the model clause: "The parties may agree on other conciliation clauses."

#### *Adoption of the Rules and decision of the Commission*

105. The Commission unanimously adopted the UNCITRAL Conciliation Rules, as reviewed by the Drafting Party, in the Arabic, Chinese, English, French, Russian and Spanish language versions.

106. The Commission, at its 241st meeting, on 23 July 1980, adopted the following decision:

#### *The United Nations Commission on International Trade Law,*

*Recognizing* the value of conciliation as a method of amicably settling disputes arising in the context of international commercial relations,

*Being convinced* that the establishment of conciliation rules that are acceptable to countries with different legal, social and economic systems would contribute to the development of harmonious economic relations between peoples,

*Having prepared* the UNCITRAL Conciliation Rules after having considered the observations of Governments and interested organizations,

1. *Adopts* the UNCITRAL Conciliation Rules as set out hereinafter;

2. *Invites* the General Assembly to recommend the use of the UNCITRAL Conciliation Rules in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation;

3. *Requests* the Secretary-General to arrange for the widest possible distribution of the UNCITRAL Conciliation Rules.

\* \* \*

## UNCITRAL CONCILIATION RULES

### APPLICATION OF THE RULES

#### *Article 1*

(1) These Rules apply to conciliation of disputes arising out of or relating to a contractual or other legal relationship where the parties seeking an amicable settlement of their dispute have agreed that the UNCITRAL Conciliation Rules apply.

(2) The parties may agree to exclude or vary any of these Rules at any time.

(3) Where any of these Rules is in conflict with a provision of law from which the parties cannot derogate, that provision prevails.

### COMMENCEMENT OF CONCILIATION PROCEEDINGS

#### *Article 2*

(1) The party initiating conciliation sends to the other party a written invitation to conciliate under these Rules, briefly identifying the subject of the dispute.

(2) Conciliation proceedings commence when the other party accepts the invitation to conciliate. If the acceptance is made orally, it is advisable that it be confirmed in writing.

(3) If the other party rejects the invitation, there will be no conciliation proceedings.

(4) If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate. If he so elects, he informs the other party accordingly.

### NUMBER OF CONCILIATORS

#### *Article 3*

There shall be one conciliator unless the parties agree that there shall be two or three conciliators. Where there is more than one conciliator, they ought, as a general rule, to act jointly.

### APPOINTMENT OF CONCILIATORS

#### *Article 4*

(1) (a) In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of a sole conciliator;

(b) In conciliation proceedings with two conciliators, each party appoints one conciliator;

(c) In conciliation proceedings with three conciliators, each party appoints one conciliator. The parties shall endeavour to reach agreement on the name of the third conciliator.

(2) Parties may enlist the assistance of an appropriate institution or person in connexion with the appointment of conciliators. In particular,

(a) A party may request such an institution or person to recommend the names of suitable individuals to act as conciliator; or

(b) The parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.

In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

### SUBMISSION OF STATEMENTS TO CONCILIATOR

#### *Article 5*

(1) The conciliator,\* upon his appointment, requests each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party sends a copy of his statement to the other party.

(2) The conciliator may request each party to submit to him a further 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. The party sends a copy of his statement to the other party.

\* In this and all following articles, the term "conciliator" applies to a sole conciliator, two or three conciliators, as the case may be.

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

#### REPRESENTATION AND ASSISTANCE

##### Article 6

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

#### ROLE OF CONCILIATOR

##### Article 7

(1) The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

(2) The conciliator will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

(3) 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 express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.

(4) The conciliator may, at any stage of the conciliation proceedings, 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.

#### ADMINISTRATIVE ASSISTANCE

##### Article 8

In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

#### COMMUNICATION BETWEEN CONCILIATOR AND PARTIES

##### Article 9

(1) The conciliator may invite the parties to meet with him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.

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

#### DISCLOSURE OF INFORMATION

##### Article 10

When the conciliator receives factual information concerning the dispute from a party, he discloses the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate. However, when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator does not disclose that information to the other party.

#### CO-OPERATION OF PARTIES WITH CONCILIATOR

##### Article 11

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

#### SUGGESTIONS BY PARTIES FOR SETTLEMENT OF DISPUTE

##### Article 12

Each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

#### SETTLEMENT AGREEMENT

##### Article 13

(1) When it appears to the conciliator that there exist elements of a settlement which would be acceptable to the parties, he formulates the terms of a possible settlement and submits them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

(2) If the parties reach agreement on a settlement of the dispute, they draw up and sign a written settlement agreement.\* If requested by the parties, the conciliator draws up, or assists the parties in drawing up, the settlement agreement.

(3) The parties by signing the settlement agreement put an end to the dispute and are bound by the agreement.

#### CONFIDENTIALITY

##### Article 14

The conciliator and the parties must keep confidential all matters relating to the conciliation proceedings. Confidentiality extends also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

#### TERMINATION OF CONCILIATION PROCEEDINGS

##### Article 15

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 declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

#### RESORT TO ARBITRAL OR JUDICIAL PROCEEDINGS

##### Article 16

The parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.

#### COSTS

##### Article 17

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

\* The parties may wish to consider including in the settlement agreement a clause that any dispute arising out of or relating to the settlement agreement shall be submitted to arbitration.

(a) The fee of the conciliator which shall be reasonable in amount;

(b) The travel and other expenses of the conciliator;

(c) The travel and other expenses of witnesses requested by the conciliator with the consent of the parties;

(d) The cost of any expert advice requested by the conciliator with the consent of the parties;

(e) The cost of any assistance provided pursuant to articles 4, paragraph (2) (b), and 8 of these Rules.

(2) The costs, as defined above, are borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party are borne by that party.

#### DEPOSITS

##### Article 18

(1) The conciliator, upon his appointment, may request each party to deposit an equal amount as an advance for the costs referred to in article 17, paragraph (1) which he expects will be incurred.

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

(3) If the required deposits under paragraphs (1) and (2) of this article are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination to the parties, effective on the date of that declaration.

(4) Upon termination of the conciliation proceedings, the conciliator renders an accounting to the parties of the deposits received and returns any unexpended balance to the parties.

#### ROLE OF CONCILIATOR IN OTHER PROCEEDINGS

##### Article 19

The parties and the conciliator undertake that the conciliator will not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings. The parties also undertake that they will not present the conciliator as a witness in any such proceedings.

#### ADMISSIBILITY OF EVIDENCE IN OTHER PROCEEDINGS

##### Article 20

The parties undertake not to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings:

(a) Views expressed or suggestions made by the other party in respect of a possible settlement 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 had indicated his willingness to accept a proposal for settlement made by the conciliator.

#### MODEL CONCILIATION CLAUSE

Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force.

(The parties may agree on other conciliation clauses.)

## B. UNCITRAL Arbitration Rules

### Introduction

107. The Commission, at its twelfth session, considered certain issues relevant in the context of the UNCITRAL Arbitration Rules.<sup>14</sup> One issue was whether the Commission should take steps to facilitate the use of the Rules in administered arbitration and seek to prevent disparity in their use by arbitral institutions. The other issue was whether it would be desirable and feasible to issue 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.

108. The Commission, at that session, decided to request 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 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.”<sup>15</sup>

109. The Commission, at its present session, had before it a note by the Secretary-General (A/CN.9/189)\* which takes into account the views expressed by the Commission at its twelfth session and information obtained in consultative meetings with members of the International Council for Commercial Arbitration and representatives of the International Chamber of Commerce. As to the first issue, the note suggests, and sets forth, guidelines to be issued in order to assist arbitral institutions in formulating rules for administering arbitrations under the UNCITRAL Arbitration Rules and to encourage them to leave these Rules unchanged. As to the second issue, the note suggests that the publication by the United Nations of a list of arbitral institutions willing to act as appointing authorities would not be desirable but that it should be left to the institutions themselves to declare their willingness to act as such.

*Discussion on the use of the UNCITRAL Arbitration Rules in administered arbitration*<sup>16</sup>

110. The Commission held an exchange of views on the desirability of issuing guidelines for administered arbitra-

\* Reproduced in this volume, part two, IV, D, below.

<sup>14</sup> See Report of the United Nations Commission on International Trade Law on the work of its twelfth session, *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17* (A/34/17), paras 57-70 (Yearbook ... 1979, part one, II, A).

<sup>15</sup> *Ibid.*, para. 71 (Yearbook ... 1979, part one, II, A).

<sup>16</sup> The Commission considered this subject at its 236th meeting on 21 July 1980.

tion and on the draft guidelines prepared by the Secretariat. It was observed that such guidelines should be addressed not only to arbitral institutions but also to other relevant institutions, such as chambers of commerce.

111. There was support for the idea of preparing guidelines in the form of recommendations and for the approach taken in the draft guidelines. However, it was felt that, due to the late publication of the note, representatives had not had sufficient time to consult with interested circles. The Commission, therefore, decided not to discuss the contents of the draft guidelines in detail and to postpone consideration of the Secretary-General's proposal.

*Discussion on the designation of an appointing authority*<sup>17</sup>

112. The Commission, after deliberation, was agreed that it was not desirable to issue 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. It was felt that such a list could never be complete and fully accurate. Furthermore, neither the Commission nor the Secretariat was in a position to judge whether an institution which applied for inclusion in the list was genuine and qualified. This was seen as particularly important since inclusion in a list published by the United Nations might be interpreted as carrying with it a stamp of approval or recommendation. It was, therefore, felt that it should be left to arbitral institutions themselves to declare that they are prepared to act as appointing authorities.

*Decision of the Commission*

113. The Commission, at its 236th meeting, on 21 July 1980, adopted the following decision:

*The United Nations Commission on International Trade Law,*

1. *Takes note* of the note by the Secretary-General on "issues relating to the use of the UNCITRAL Arbitration Rules and the designation of an appointing authority" (A/CN.9/189);

2. *Decides* to postpone the consideration of the draft guidelines for administering arbitrations under the UNCITRAL Arbitration Rules to its next session;

3. *Decides* not to issue a list of arbitral institutions that have declared their willingness to act as appointing authorities under the UNCITRAL Arbitration Rules.

*C. Model arbitration law*<sup>18</sup>

114. The Commission had before it a note by the Secretariat entitled "Progress report on the preparation of a model law on arbitral procedure" (A/CN.9/190). The note sets forth the initial work undertaken by the Secretariat pursuant to a request by the Commission, at its twelfth session, to prepare an analytical compilation of

provisions of national laws pertaining to arbitration procedure and to prepare a preliminary draft of a model law on arbitral procedure.<sup>19</sup>

115. The note refers to difficulties in obtaining the materials necessary for the preparation of a complete and up-to-date compilation of national laws. In order to assist the Secretariat in that task, the Commission was agreed to invite the Governments of Member States of the United Nations, in particular those being members of the Commission, to provide the Secretariat with relevant materials on national legislation and case law, together with pertinent treatises where available.

116. The Commission, after deliberation, took note of the progress report and the suggestions therein as to the further work to be undertaken in that field.

*Decision of the Commission*

117. The Commission, at its 236th meeting, on 21 July 1980, adopted the following decision:

*The United Nations Commission on International Trade Law,*

1. *Takes note* of the progress report on the preparation of a model law on arbitral procedure (A/CN.9/190) and of the suggestions therein as to the further work to be undertaken in that field;

2. *Invites* Governments, in particular those that are members of the Commission, to provide the Secretariat with relevant materials on national legislation and case law, and pertinent treatises where available.

CHAPTER VI. NEW INTERNATIONAL ECONOMIC ORDER

*Introduction*

118. The United Nations Commission on International Trade Law, at its eleventh session, included in its work programme a topic entitled "The legal implications of the new international economic order" and accorded priority to the consideration of this subject. The Commission, on that occasion, also established a Working Group on the New International Economic Order, but deferred the designation of the States members of that Group until its twelfth session.<sup>20</sup>

119. At its twelfth session the Commission designated the following States as members of the Working Group: 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

<sup>17</sup> The Commission considered this subject at its 236th meeting on 21 July 1980.

<sup>18</sup> The Commission considered this subject at its 236th meeting on 21 July 1980.

<sup>19</sup> Report of the United Nations Commission on International Trade Law on the work of its twelfth session, *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17 (A/34/17)*, para. 81 (Yearbook . . . 1979, part one, II, A).

<sup>20</sup> 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).

Great Britain and Northern Ireland, and United States of America.<sup>21</sup>

120. At its twelfth 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).<sup>\*</sup> That report, submitted pursuant to a request by the Commission, reviewed 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.

121. The Commission, at that session, requested its Working Group to examine the report of the Secretary-General taking into account the records of the discussions of UNCITRAL on its eleventh and twelfth sessions and to make recommendations as to specific topics which could appropriately form part of the programme of work of the Commission, and as to the steps that could usefully be taken by the Commission in respect of co-ordination in the field of international trade law.

122. The Working Group held its session at United Nations Headquarters in New York from 14 to 25 January 1980. At that session the Working Group reached consensus on a list of topics which it proposed to the Commission for possible inclusion in its programme of work.

123. At its present session, the Commission had before it the report of its Working Group on the work of its session (A/CN.9/176).<sup>\*\*</sup> Among the recommendations which the Working Group submitted to the Commission for consideration were the following topics:

1. Legal aspects of multilateral commodity agreements;
2. Study aimed at identifying legal issues arising in the context of foreign investment that might be suitable for consideration by the Commission;
3. Study on intergovernmental bilateral agreements on industrial co-operation;
4. Harmonization, unification and review of contractual provisions commonly occurring in international contracts in the field of industrial development, such as contracts on research and development, consulting, engineering, supply and construction of large industrial works (including turn-key contracts or contracts *produit en main*), transfer of technology (including licensing), service and maintenance, technical assistance, leasing, joint venture, and industrial co-operation in general;
5. Identification of concrete legal problems arising from the activities of transnational corporations, having regard to, in particular, the need for co-ordination of work with other competent bodies in this field;

<sup>\*</sup> Yearbook ... 1979, part two, IV.

<sup>\*\*</sup> Reproduced in this volume, part two, V, A, below.

<sup>21</sup> Report of the United Nations Commission on International Trade Law on the work of its twelfth session, *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17* (A/34/17), para. 100 (Yearbook ... 1979, part one, II, A).

6. Study on concession agreements and other agreements in the field of natural resources taking into account the work carried out by other competent bodies in this field and the need for co-ordination.

124. The Commission noted that the Working Group had not discussed the order of priorities to be accorded to the topics proposed by it, but that the Working Group had expressed the opinion that item 4 was of special importance to developing countries and to the work of the Commission in the context of the new international economic order.

125. The Commission, at its present session, had before it a study on item 4, which had been prepared by the Secretary-General in response to a request by the Working Group (A/CN.9/191).<sup>\*</sup> The study reviewed the various types of contract used in the context of industrialization, described their main characteristics and content and referred to the work carried out in this field by other organizations.

126. The Commission also had before it the reply of the United Nations Conference on Trade and Development concerning the legal aspects of international commodity agreements (A/CN.9/193)<sup>\*\*</sup> and a resolution of the Asian-African Legal Consultative Committee (AALCC) concerning the work of UNCITRAL in respect of the new international economic order (A/CN.9/194).<sup>\*\*\*</sup>

#### *Discussion at the session*

127. The Commission expressed its appreciation to the Working Group on the New International Economic Order for the work carried out by it. The recommendations submitted by the Working Group to the Commission showed that there were aspects of the new international economic order which could usefully be dealt with by the Commission. The Commission also expressed its appreciation to the Chairman of the Working Group, Professor Kazuaki Sono (Japan), for having guided the Working Group during its deliberations.

128. The Commission noted that the report of the Working Group had been the subject of discussions by the AALCC, and that the Group's recommendations had been favourably received by AALCC.

129. There was general agreement that the report of the Working Group was carefully worded, that its findings were well balanced and that the strength of its recommendations derived from the fact that they had been adopted by consensus. It was emphasized that the Commission, in dealing with the proposed topics, should bear in mind the objectives set forth in such documents as the Declaration on the Establishment of a New International Economic Order and the Charter of Economic Rights and Duties of States.

130. The Commission was agreed it should select certain subject-matters recommended by the Working Group for priority treatment. It was also noted that other work carried out by UNCITRAL constituted a significant contribution to the implementation of the new international economic order.

<sup>\*</sup> Reproduced in this volume, part two, V, B, below.

<sup>\*\*</sup> Reproduced in this volume, part two, V, C, below.

<sup>\*\*\*</sup> Reproduced in this volume, part two, V, D, below.

131. The Commission endorsed the view of the Working Group that item 4, referred to above, would be of special importance. The view was expressed that this item comprised many different types of contract in the area of industrial development and might, therefore, well absorb during the next few years most of the resources of the Secretariat.

132. The proposal was made that priority should also be given to the item "Intergovernmental agreements on industrial co-operation", since such agreements frequently included provisions which were relevant to contractual relationships between enterprises. Moreover, intergovernmental agreements often constituted the basis for dealings between enterprises and could, therefore, not be disregarded.

133. Under another view, however, such agreements should not be given priority because they were in essence of a bilateral nature and because they concerned public law matters. Nevertheless, while no immediate substantive work should be commenced, it would be useful to establish a universal register of intergovernmental agreements on industrial co-operation, as suggested by the Working Group.

134. Various other proposals relating to matters included in the Working Group's list were made but not retained by the Commission as matters with priority. There was wide agreement, however, that all items were relevant in the context of the co-ordinating functions of the Commission.

135. Divergent views were expressed as to the sphere of competence of the Commission and whether or not matters of public international law could be included in the work programme of the Commission. It was stressed by some that the Commission was primarily, if not solely, concerned with matters of private law. Under another view, however, the participation of governmental agencies in international trade was considerable and public law relationships could therefore not be ignored. Moreover, the dividing line between private and public law was not always easily discernible.

136. In considering the different types of contract set forth in the report of the Secretary-General, there was wide agreement in the Commission to commence work on contractual provisions relating to contracts for the supply and construction of large industrial works (including turn-key contracts or contracts *produit en main*) and contracts on industrial co-operation in general. It was noted that these contracts were of a complex nature and included elements found also in other types of contract. It was thought that these contracts would, therefore, form a basis for possible future work in respect of other related contracts. It was also felt that the elaboration of model clauses, contracts or rules in regard to the supply of large industrial works was a logical sequence to the law of sales.

137. The view was expressed that work on contracts for the supply of plants and on industrial co-operation should take into account relevant intergovernmental agreements since contracts between enterprises did not exist in a vacuum and could not be treated in isolation. It was not

possible to ignore the role of States in industrial development, and it was thus essential to study the impact of intergovernmental agreements relating to economic and industrial co-operation on the contracts between enterprises.

138. It was proposed in this connexion that the work of the Commission in the context of the new international economic order should include a study of the most-favoured-nation clause. This proposal was opposed on the ground that the General Assembly had currently before it the work on the most-favoured-nation clause carried out by the International Law Commission and thus the Commission should await the Assembly's decisions in this matter.

139. The Commission endorsed the suggestion by the Secretariat that its work in respect of the contracts selected by the Commission should comprise studies of the available literature and the relevant work, if any, of other organizations and should analyse international contract practices. It was noted that the work of the Secretariat would be facilitated if members of the Commission provided the Secretariat with copies of such contracts.

140. The view was also expressed that, in line with the recommendations of the Working Group, the Commission should consider the desirability of harmonizing and unifying contractual provisions or clauses commonly occurring in international contracts in the field of industrial development. Hence, the Secretariat should also review such clauses and establish a checklist of them.

141. It was generally agreed that the Secretariat in carrying out the preparatory work should have a certain measure of discretion. There was also agreement that decisions on the direction the work should ultimately take should be taken in stages and that it was not now feasible to determine the ultimate end-product.

142. The Commission was informed that the UNCITRAL budget contained an allocation for convening a small group of experts for the purpose of assisting the Secretariat in carrying out the preparatory work. The Commission was of the view that the decision to convene such a group of experts should be left to the Secretariat.

#### *Decision of the Commission*

143. The Commission, at its 242nd meeting, on 25 July 1980, 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 the New International Economic Order on the work of its session held at New York from 14 to 25 January 1980 and of the study by the Secretary-General on International Contracts in the Field of Industrial Development;

2. *Welcomes* the recommendations of the Working Group concerning subject-matters to be included in the work programme of the Commission;

3. *Agrees* to accord priority to work related to contracts in the field of industrial development;



4. *Requests* the Secretary-General:

(a) To carry out preparatory work in respect of contracts on supply and construction of large industrial works and on industrial co-operation;

(b) To submit a report to the Working Group on the New International Economic Order;

5. *Decides* that the Working Group on the New International Economic Order shall be composed of all States members of the Commission;

6. *Requests* the Working Group to submit a progress report to the fourteenth session of the Commission.

#### CHAPTER VII. CO-ORDINATION OF WORK

144. The Commission had before it General Assembly resolutions 34/142\* and 34/150\*\* and part of the report of the Working Group on the New International Economic Order.

145. The Commission expressed its appreciation that the General Assembly, on the recommendation of the Commission, had adopted resolution 34/142\* of 17 December 1979 on co-ordination in the field of international trade law. The Commission awaits the actions to be taken by the Secretary-General in implementation of paragraph 5 of the resolution.

146. The Commission also noted with appreciation that the General Assembly, in resolution 34/150\*\* of 17 December 1979 on 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, had requested the Secretary-General, in collaboration with the United Nations Institute for Training and Research and in co-ordination with the United Nations Commission on International Trade Law, to study the question of the 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, with a view to embodying them in one or more instruments as appropriate. The Commission expressed its willingness to co-operate in the field of co-ordination with the Secretary-General in the conduct of this study.

147. The Commission was informed of the work programme of the International Institute for the Unification of Private Law (UNIDROIT) in the field of international trade law as approved by the fifty-ninth session of the Governing Board, and noted with appreciation the quality of co-ordination in this regard between UNIDROIT and the Commission through their respective secretariats.

148. The Commission was also informed that it is intended to request the Fourteenth Session of the Hague Conference on Private International Law to change the procedures of the Conference, so that, when it is dealing with matters of universal interest, such as matters of international trade law, all States will be invited to participate.

149. The Commission was of the view that the co-ordination of the legal activities of United Nations bodies took on a particular importance at a time when these bodies were increasingly active in the elaboration and adoption of legal rules. This was particularly so in the area of the new international economic order in view of the fact that the General Assembly had on several occasions drawn the attention of United Nations organs to the need to participate in the implementation of General Assembly resolutions pertaining to the new international economic order. The Commission was agreed that the recommendations of its Working Group on the New International Economic Order, if fully implemented, would go a long way to improve the current lack of co-ordination. However, it was felt that more information was required about the programmes and terms of reference of the various United Nations organs before it would be possible to recommend a concrete course of action.

150. The Commission therefore requested its Secretariat to submit to it at its next annual session complete information on the activities of other organs and international organizations so as to enable the Commission to consider the question of co-ordination of work in full knowledge of the issues involved and to take such decisions as may be appropriate.

#### CHAPTER VIII. TRAINING AND ASSISTANCE IN THE FIELD OF INTERNATIONAL TRADE LAW<sup>22</sup>

##### *Introduction*

151. The Commission recalled that, at its tenth session, consequent upon the cancellation due to lack of funds of the second UNCITRAL symposium on international trade law planned in connexion with that session, it had 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".<sup>23</sup>

152. In response to this recommendation and after considering the report of the Secretary-General (A/33/177) submitted to it at its request, 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

\* Reproduced in this volume, part one, I, C, above.

\*\* Reproduced in this volume, part three, III, below.

<sup>22</sup> The Commission considered this item at its 239th and 240th meetings on 23 July 1980.

<sup>23</sup> *Official Records of the General Assembly, Thirty-second Session, Supplement No. 17 (A/32/17)*, para. 45 (Yearbook ... 1977, part one, II, A, para. 45).



Wider Appreciation of International Law not specifically earmarked by the contributors to some other activity within the Programme.

153. The Commission was informed that to date no funds had been made available for the UNCITRAL symposia from the above Programme of Assistance.

#### *Discussion at the session*

154. There was general agreement that the UNCITRAL symposia corresponded to a need and should therefore be continued. It was suggested that the Secretariat should study the possibility of arranging for regional seminars. It was discussed whether future symposia should be held on the occasion of a session of the Commission as had been the first symposium in 1975 in Geneva, or whether regional seminars should be organized in Africa, Asia and Latin America.

155. In favour of holding future symposia on the occasion of a session of the Commission, it was pointed out that among the representatives to the Commission were a number of experts in various aspects of international trade law who could contribute to the symposium. This would have the advantage that the Commission would be immediately involved in the symposium and that there would be no additional expense in making this expertise available. Holding of the symposium on the occasion of a session of the Commission would also give the participants the opportunity to become better acquainted with the work of the Commission itself.

156. On the other hand it was pointed out that the holding of regional seminars had the advantage that there would be less cost in respect of the participants than if they were brought from various developing countries to New York or Vienna. It would be possible to make use of local experts in international trade law if the seminars were held regionally. It was also suggested that the seminars would have a greater impact if held regionally, both because it would be possible for more participants to attend and because of the publicity which would be created in the region where the seminar was held.

157. The Commission was informed that the Government of Sweden had pledged a contribution to the Symposium. The representatives of Austria, Canada, the Federal Republic of Germany, Finland, the Netherlands and Yugoslavia expressed the willingness of their Governments to contribute to the holding of a symposium on the occasion of the fourteenth session of the Commission in 1981 at Vienna. The Commission expressed its appreciation to the Governments of these countries and noted that the sums thus pledged would be sufficient to finance the travel and subsistence of approximately 15 participants from developing countries, and expressed the hope that further contributions would be forthcoming.

158. There was general agreement that the subject-matter to be discussed at the symposium should cover those matters in which UNCITRAL is or had been active, in particular, arbitration and conciliation, sales, maritime law and the legal implications of the new international economic order.

159. It was suggested that the Commission should attempt to plan programmes of study in international trade law of a longer duration, perhaps of six months or more. In this connexion it was suggested that co-operative arrangements might be made with some universities or institutes.

#### *Fellowships and internship arrangements*

160. The representative of France informed the Commission that his Government had decided to make available under the auspices of UNCITRAL a fellowship to a candidate from a developing country for training in international trade law. The Commission took note with appreciation of this offer.

#### *Assistance*

161. It was suggested that the Commission might make available to the developing countries its help when they are planning to review their domestic commercial and international trade law. In such activities the Commission should co-operate with other organizations which are also engaged in such work.

#### *Decision*

162. At its 240th meeting, on 23 July 1980, the Commission unanimously adopted the following decision:

#### *The United Nations Commission on International Trade Law,*

1. *Decides* to hold the second UNCITRAL symposium on international trade law on the occasion of the fourteenth session of the Commission at Vienna in 1981;

2. *Expresses its appreciation* to the States which have offered to make contributions to the holding of the second UNCITRAL symposium on international trade law;

3. *Invites* other States to make similar contributions so that the number of participants from developing countries might be increased;

4. *Requests* the Secretary-General:

(a) To make the necessary arrangements for the holding of the Second UNCITRAL Symposium on International Trade Law on the occasion of its fourteenth session at Vienna in 1981;

(b) To report to it on the possibility of holding regional seminars.

#### CHAPTER IX. FUTURE WORK AND OTHER BUSINESS<sup>24</sup>

##### *A. Date and agenda of the fourteenth session of the Commission*

163. It was decided that the fourteenth session of the Commission would be held from 19 to 26 June 1981 at Vienna. As to the agenda of that session, the Commission was informed by its Secretary that, in regard to international contract practices, the Commission would have before it the report of the Working Group on International Contract Practices on the work of its second session, and

<sup>24</sup> The Commission considered this subject at its 239th, 240th and 241st meetings on 23 and 24 July 1980.

reports of the Secretary-General on termination clauses and *force majeure* clauses. In regard to international commercial arbitration, the Commission would examine the Guidelines for administering arbitration under the UNCITRAL Arbitration Rules. The Commission was also informed that the UNCITRAL Study Group on International Payments had considered the proposal made by France at the Commission's eleventh session regarding the establishment of a universal unit of account for international conventions, and that the Commission might appropriately consider the subject at the next session. The Commission was also informed about the progress of the work of the Study Group on International Payments in respect of the legal aspects of electronic funds transfers, and that in the view of the Study Group further work should focus on payment methods by non-negotiable paper. The Commission requested the Secretariat to submit to it at its next session a progress report on the matter, so that it might give directives on the scope of further work after having considered the Study Group's conclusions. However, work could continue within the Study Group. The Commission was also informed that it would have before it a report on co-ordination of work in the field of international trade law. The Commission also decided that it would consider, at each of its sessions, the status of conventions that were the outcome of work carried out by it.

#### B. *Composition and sessions of Working Groups*

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

(a) Tenth session, from 5 to 16 January 1981, at Vienna;

(b) If a further session were required, eleventh session, at a date to be decided by the Working Group, in New York.

165. It was decided that the Working Group on the New International Economic Order would be comprised of all States members of the Commission and that the Working Group would meet from 9 to 18 June 1981 at Vienna.

166. It was decided that the second session of the Working Group on International Contract Practices would be held from 13 to 17 April 1981 in New York.

167. The Commission elected Guatemala and Trinidad and Tobago to the Working Group on International Contract Practices, to replace Brazil and Mexico which had ceased to be members of the Commission. The Commission also elected Chile to replace Mexico on the Working Group on International Negotiable Instruments.

#### C. *General Assembly resolution on the report of the Commission on the work of its twelfth session*

168. The Commission took note of General Assembly resolution 34/143\* of 17 December 1979 on the report of the United Nations Commission on International Trade Law on the work of its twelfth session.

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

169. 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.9/192 and Add. 1 and 2).<sup>\*</sup> It requested that future reports be more detailed in respect of matters of current interest to the Commission, so that they would give more information to Governments.

#### E. *United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules)*

170. The Commission noted that, at the time of its present session, the United Nations Convention on the Carriage of Goods by Sea (concluded at Hamburg on 31 March 1978 and open for signature by all States until 30 April 1979) had been ratified or acceded to by only three States, whereas twenty-seven States had signed the Convention. Ratification by twenty States will be required in order to bring the Convention into force. The hope was expressed that those States which had signed the Convention would proceed to ratification in the near future and that other States would consider acceding to the Convention.

#### F. *UNCITRAL law library*

171. The Commission heard a statement by its Secretary on the UNCITRAL law library at the location of the International Trade Law Branch at Vienna, Austria. The Commission considered the means by which the Secretariat could further develop its library holdings within the budgetary resources allocated to it.

172. The Commission, after deliberation, unanimously adopted the following decision:

##### *The United Nations Commission on International Trade Law,*

*Being of the view* that the preparatory work carried out by the International Trade Law Branch of the Office of Legal Affairs, which functions as its Secretariat, is an essential element of its own work,

*Invites* Governments to place the UNCITRAL law library at Vienna on their mailing lists for legal materials such as official journals, gazettes, legislative texts and other relevant publications.

#### G. *Summary records*

173. The Commission took note of the General Assembly Resolution 34/50 on 23 November 1979, by virtue of which summary records for subsidiary organs of the General Assembly, with the exception of the International Law Commission and the Committee of the Whole established under General Assembly Resolution 32/174, are to be discontinued during the experimental period of one year.

\* Reproduced in this volume, part one, I, C, above.

\* Reproduced in this volume, part two, VI, A, B and C, below.

174. The Commission, whilst appreciating the concerns underlying that resolution draws the attention of the General Assembly to the relevance of summary records for the legislative history of United Nations treaties, conventions and other texts of a legal character. To date, three United Nations conventions based on draft texts prepared by the Commission, have been concluded, and the UNCITRAL Arbitration Rules, drawn up by the Commission and recommended by the General Assembly, are being applied world-wide in the settlement of international commercial disputes. In respect of all these texts, complete summary records, reflecting the preparatory stage of the work, are available to governments, academic scholars, lawyers and other interested persons. The Commission

believes that it is in the interest of the legislative work of the work of the United Nations that this practice be continued.

175. For these reasons, the Commission requests the General Assembly to authorize that summary records be drawn up of those meetings of the Commission that are devoted to the discussion of legal texts.

#### ANNEX

##### List of documents before the Commission

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

#### B. United Nations Conference on Trade and Development (UNCTAD): extract from the report of the Trade and Development Board (twenty-first session)\*

"B. *Progressive development of the law of international trade: thirteenth annual report of the United Nations Commission on International Trade Law (agenda item 10 (b))*

"464. For the consideration of this item the Board had before it the report of UNCITRAL on the work of its thirteenth session,<sup>32</sup> which had been circulated under cover of TD/B/824.

##### "Action by the Board

"465. At its 543rd meeting, on 24 September 1980, the Board took note of the report of UNCITRAL on its thirteenth session.

<sup>32</sup> For the printed text, see *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17)*."

\* *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 15 (A/35/15)*, vol. II, chapter VII.

#### C. General Assembly: report of the Sixth Committee (A/35/627)\*

1. At its 3rd plenary meeting, on 19 September 1980, the General Assembly decided to include in the agenda of its thirty-fifth session the item entitled "Report of the United Nations Commission on International Trade Law on the work of its thirteenth session" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered this item at its 4th to 10th meetings, from 25 September to 3 October, and at its 41st meeting, on 7 November 1980. The summary records of those meetings (A/C.6/35/SR.4-10 and 41) contain the views of representatives who spoke during the consideration of this item.

3. At the 4th meeting, on 25 September, the Chairman of the United Nations Commission on International Trade Law at its thirteenth session introduced its report on the work of that session.<sup>1</sup> The Committee had before it, in connexion with this item, notes by the Secretary-General

on the United Nations Conference on Contracts for the International Sale of Goods, held at Vienna from 10 March to 11 April 1980 (A/C.6/35/L.2) and on the comments by the Trade and Development Board of the United Nations Conference on Trade and Development (A/C.6/35/L.3).

4. At the 41st meeting, on 7 November, the representative of Austria introduced a draft resolution (A/C.6/35/L.9) sponsored by Argentina, Australia, Austria, Bangladesh, Bolivia, Brazil, Canada, Chile, Cyprus, Czechoslovakia, Egypt, Finland, France, Germany, Federal Republic of, Greece, Guyana, Italy, Jamaica, Kenya, Morocco, the Netherlands, Nigeria, the Philippines, Romania, Sweden, Trinidad and Tobago, Turkey, the United States of America and Yugoslavia, later joined by Panama and Spain. The administrative and financial implications of the draft resolution were set out in document A/C.6/35/L.11.

5. At the same meeting, the Committee adopted draft resolution A/C.6/35/L.9 by consensus (see resolution 35/51).

6. Also at the 41st meeting, the representative of Austria introduced a draft resolution (A/C.6/35/L.10) sponsored by Argentina, Australia, Austria, Bolivia,

\* 19 November 1980, *Official Records of the General Assembly, Thirty-fifth Session*, agenda item 107.

<sup>1</sup> [Reproduced in this volume, part one, II, A, above.] 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).

Canada, Chile, Cyprus, Egypt, Finland, France, Germany, Federal Republic of, Greece, Italy, Jamaica, Japan, Kenya, Mexico, the Netherlands, Panama, the Philippines, Spain, Sweden, Trinidad and Tobago, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Uruguay, later joined by Nigeria. The administrative and financial implications of the draft resolution were set out in document A/C.6/35/L.12.

7. At the same meeting, the Committee adopted draft resolution A/C.6/35/L.10 by consensus (see resolution 35/52).

8. A statement of explanation of vote after the vote was made by the representative of Peru, speaking also for the representatives of Colombia, Ecuador and Venezuela.

#### RECOMMENDATIONS OF THE SIXTH COMMITTEE

9. 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 35/51 and 35/52. See section D below.]*

#### D. General Assembly resolutions 35/51 and 35/52 of 10 December 1980

##### 35/51 REPORT OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

*The General Assembly,*

*Having considered* the report of the United Nations Commission on International Trade Law on the work of its thirteenth session,<sup>1</sup>

*Recalling* its resolutions 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law and defined the object and terms of reference of the Commission, 3108 (XXVIII) of 12 December 1973, by which it increased the membership of the Commission, 31/99 of 15 December 1976, by which Governments of Member States not members of the Commission were entitled to attend as observers the sessions of the Commission and its working groups, and 34/142 of 17 December 1979, by which the co-ordinating function of the Commission in the field of international trade law was emphasized, as well as its previous resolutions concerning the reports of the Commission on the work of its annual sessions,

*Recalling also* its resolutions 3201 (S-VI) and 3202 (S-VI) of 1 May 1974, 3281 (XXIX) of 12 December 1974 and 3362 (S-VII) of 16 September 1975,

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

*Having regard* for the need to take into account the different social and legal systems in harmonizing the rules of international trade law,

*Stressing* the usefulness and importance of organizing symposia for promoting better knowledge and understanding of international trade law and, especially, for the training of young lawyers from developing countries in this field,

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

2. *Takes note* of the successful conclusion of the United Nations Conference on Contracts for the International Sale of Goods, held at Vienna from 10 March to 11 April 1980, which has resulted in the adoption of the Convention on Contracts for the International Sale of Goods<sup>2</sup> and a Protocol Amending the Convention on the Limitation Period in the International Sale of Goods;<sup>3</sup>

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

4. *Notes with satisfaction* that the United Nations Commission on International Trade Law has unanimously adopted the Conciliation Rules of the Commission;<sup>4</sup>

5. *Calls upon* the United Nations Commission on International Trade Law to continue to take account of the relevant provisions of the resolutions concerning the new international economic order, as adopted by the General Assembly at its sixth and seventh special sessions;

6. *Welcomes* the decision of the United Nations Commission on International Trade Law to the effect that its Working Group on the New International Economic Order shall be composed of all States members of the Commission;<sup>5</sup>

7. *Takes note with appreciation*, of the fact that the United Nations Commission on International Trade Law has welcomed the recommendation of the Working Group on the New International Economic Order concerning subject-matters to be included in the programme of work of the Commission and endorses the decision of the Commission that preparatory work be carried out in respect of contracts on supply and construction of large industrial works and on industrial co-operation;<sup>5</sup>

<sup>2</sup> A/CONF. 97/18, annex I (reproduced in this volume, part three, I, B, below).

<sup>3</sup> *Ibid.*, annex II (reproduced in this volume, part three, I, C, below).

<sup>4</sup> *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17)*, paras. 105 and 106 (reproduced in this volume, part three, II, A, above).

<sup>5</sup> *Ibid.*, para. 143.

<sup>1</sup> *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17)* (reproduced in this volume, part one, II, A, above).



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

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

(a) Continue its work on the topics included in its programme of work;

(b) Continue its work on training and assistance in the field of international trade law, taking into account the special interests of the developing countries;

(c) Maintain close collaboration with the United Nations Conference on Trade and Development, the International Law Commission and the United Nations Industrial Development Organization and continue to collaborate with international organizations active in the field of international trade law;

(d) Continue to maintain liaison with the Commission on Transnational Corporations with regard to the consideration of legal problems that would be susceptible of action by the United Nations Commission on International Trade Law;

10. *Expresses its appreciation* to all States which have offered to make contributions to the holding at Vienna in 1981 of the second symposium on international trade law of the United Nations Commission on International Trade Law on the occasion of the fourteenth session of the Commission;

11. *Appeals* to other States and to organizations, institutions and individuals to make similar contributions so that the number of participants in the second symposium from developing countries might be increased;

12. *Reaffirms* the importance of the legal work that is being undertaken by the United Nations Commission on International Trade Law and of the increased role of the International Trade Law Branch of the Office of Legal Affairs of the Secretariat as the substantive secretariat of the Commission and, in this connexion:

(a) Recognizes the relevance of summary records for the legislative history of United Nations treaties, conventions and other texts of a legal character and emphasizes the advisability of continuing the practice of drawing up complete summary records for meetings of the Commission that are devoted to the preparation of draft conventions or other legal instruments\*;

\* Resolution 35/10 B of 3 November 1980, provided in part that an exception of the discontinuance of summary records as called for in resolution 34/50 be made, *inter alia*, for the United Nations Commission on International Trade Law "for meetings devoted to the discussion of legal texts". The resolution goes on to request the bodies for which an exception was made "to keep their requirements for summary records whenever possible to a reasonable minimum and to dispense, whenever possible, with meeting records".

(b) Requests the Secretary-General to earmark, out of the funds allocated to the common library of the Vienna International Centre, such an amount as is necessary for the maintenance of the law library of the Commission and for the acquisition of materials that are required in the context of the programme of work of the Commission;

(c) Appeals to Governments to contribute to the law library of the Commission at Vienna legal materials which are relevant to the work of the Commission, including official journals, gazettes and legislative texts;

(d) Further appeals to Governments to provide the secretariat of the Commission with relevant materials pertaining to arbitration procedure so that it can complete its work on a model law on arbitral procedure;

13. *Requests* the Secretary-General to forward to the United Nations Commission on International Trade Law the records of the discussion at the thirty-fifth session of the General Assembly relating to the report of the Commission on the work of its thirteenth session.

81st plenary meeting

#### 35/52. CONCILIATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

*The General Assembly,*

*Recognizing* the value of conciliation as a method of amicably settling disputes arising in the context of international commercial relations,

*Convinced* that the establishment of conciliation rules that are acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations,

*Noting* that the Conciliation Rules of the United Nations Commission on International Trade Law were adopted by the Commission at its thirteenth session<sup>6</sup> after consideration of the observations of Governments and interested organizations,

1. *Recommends* the use of the Conciliation Rules of the United Nations Commission on International Trade Law in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation;

2. *Requests* the Secretary-General to arrange for the widest possible distribution of the Conciliation Rules.

81st plenary meeting

<sup>6</sup> *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17)*, paras. 105 and 106 (reproduced in this volume, part one, II, A, above).

**E. 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 Secretariat .....	A/CN.9/182
International commercial arbitration, progress report on the preparation of a model law on arbitral procedure: note by the Secretariat .....	A/CN.9/190

## I. INTERNATIONAL SALE OF GOODS

Note by the Secretary-General: United Nations Conference on Contracts for the International Sale of Goods (CISG)

1. Pursuant to General Assembly resolution 3096 (XXVIII) of 18 December 1975, the United Nations Conference on Contracts for the International Sale of Goods was held in Vienna from 10 March to 11 April 1980.

2. Sixty-two States were represented at the Conference. One State, one Specialized Agency, six other intergovernmental or governmental organizations and one non-governmental organization were observers to the Conference.

3. The Conference elected Mr. G. Eörsi (Hungary) as President, Mr. R. Loew (Austria) as Chairman of the First Committee, Mr. R. Mantilla-Molina (Mexico) as Chairman of the Second Committee, Mr. W. L. H. Kuan (Singapore) as Chairman of the Drafting Committee, and Mr. P. E. Mathanjiki (Kenya) as Chairman of the Credentials Committee. The Conference was serviced by the Secretariat of the United Nations Commission on International Trade Law.

\* 21 May 1980

### Part Two

## STUDIES AND REPORTS ON SPECIFIC SUBJECTS

4. The Conference adopted the following resolutions: (a) The Conference adopted the Convention on Contracts for the International Sale of Goods (CISG) and the Final Act of the Conference. (b) The Conference adopted the Convention on the Limitation Period in the International Sale of Goods (CPLG). (c) The Conference adopted the Convention on the International Sale of Goods (CISG) and the Final Act of the Conference. (d) The Conference adopted the Convention on the Limitation Period in the International Sale of Goods (CPLG). (e) The Conference adopted the Convention on the International Sale of Goods (CISG) and the Final Act of the Conference. (f) The Conference adopted the Convention on the Limitation Period in the International Sale of Goods (CPLG). (g) The Conference adopted the Convention on the International Sale of Goods (CISG) and the Final Act of the Conference. (h) The Conference adopted the Convention on the Limitation Period in the International Sale of Goods (CPLG). (i) The Conference adopted the Convention on the International Sale of Goods (CISG) and the Final Act of the Conference. (j) The Conference adopted the Convention on the Limitation Period in the International Sale of Goods (CPLG). (k) The Conference adopted the Convention on the International Sale of Goods (CISG) and the Final Act of the Conference. (l) The Conference adopted the Convention on the Limitation Period in the International Sale of Goods (CPLG). (m) The Conference adopted the Convention on the International Sale of Goods (CISG) and the Final Act of the Conference. (n) The Conference adopted the Convention on the Limitation Period in the International Sale of Goods (CPLG). (o) The Conference adopted the Convention on the International Sale of Goods (CISG) and the Final Act of the Conference. (p) The Conference adopted the Convention on the Limitation Period in the International Sale of Goods (CPLG). (q) The Conference adopted the Convention on the International Sale of Goods (CISG) and the Final Act of the Conference. (r) The Conference adopted the Convention on the Limitation Period in the International Sale of Goods (CPLG). (s) The Conference adopted the Convention on the International Sale of Goods (CISG) and the Final Act of the Conference. (t) The Conference adopted the Convention on the Limitation Period in the International Sale of Goods (CPLG). (u) The Conference adopted the Convention on the International Sale of Goods (CISG) and the Final Act of the Conference. (v) The Conference adopted the Convention on the Limitation Period in the International Sale of Goods (CPLG). (w) The Conference adopted the Convention on the International Sale of Goods (CISG) and the Final Act of the Conference. (x) The Conference adopted the Convention on the Limitation Period in the International Sale of Goods (CPLG). (y) The Conference adopted the Convention on the International Sale of Goods (CISG) and the Final Act of the Conference. (z) The Conference adopted the Convention on the Limitation Period in the International Sale of Goods (CPLG).

5. The Conference adopted the following resolutions: (a) The Conference adopted the Convention on Contracts for the International Sale of Goods (CISG) and the Final Act of the Conference. (b) The Conference adopted the Convention on the Limitation Period in the International Sale of Goods (CPLG). (c) The Conference adopted the Convention on the International Sale of Goods (CISG) and the Final Act of the Conference. (d) The Conference adopted the Convention on the Limitation Period in the International Sale of Goods (CPLG). (e) The Conference adopted the Convention on the International Sale of Goods (CISG) and the Final Act of the Conference. (f) The Conference adopted the Convention on the Limitation Period in the International Sale of Goods (CPLG). (g) The Conference adopted the Convention on the International Sale of Goods (CISG) and the Final Act of the Conference. (h) The Conference adopted the Convention on the Limitation Period in the International Sale of Goods (CPLG). (i) The Conference adopted the Convention on the International Sale of Goods (CISG) and the Final Act of the Conference. (j) The Conference adopted the Convention on the Limitation Period in the International Sale of Goods (CPLG). (k) The Conference adopted the Convention on the International Sale of Goods (CISG) and the Final Act of the Conference. (l) The Conference adopted the Convention on the Limitation Period in the International Sale of Goods (CPLG). (m) The Conference adopted the Convention on the International Sale of Goods (CISG) and the Final Act of the Conference. (n) The Conference adopted the Convention on the Limitation Period in the International Sale of Goods (CPLG). (o) The Conference adopted the Convention on the International Sale of Goods (CISG) and the Final Act of the Conference. (p) The Conference adopted the Convention on the Limitation Period in the International Sale of Goods (CPLG). (q) The Conference adopted the Convention on the International Sale of Goods (CISG) and the Final Act of the Conference. (r) The Conference adopted the Convention on the Limitation Period in the International Sale of Goods (CPLG). (s) The Conference adopted the Convention on the International Sale of Goods (CISG) and the Final Act of the Conference. (t) The Conference adopted the Convention on the Limitation Period in the International Sale of Goods (CPLG). (u) The Conference adopted the Convention on the International Sale of Goods (CISG) and the Final Act of the Conference. (v) The Conference adopted the Convention on the Limitation Period in the International Sale of Goods (CPLG). (w) The Conference adopted the Convention on the International Sale of Goods (CISG) and the Final Act of the Conference. (x) The Conference adopted the Convention on the Limitation Period in the International Sale of Goods (CPLG). (y) The Conference adopted the Convention on the International Sale of Goods (CISG) and the Final Act of the Conference. (z) The Conference adopted the Convention on the Limitation Period in the International Sale of Goods (CPLG).

## I. INTERNATIONAL SALE OF GOODS

**Note by the Secretary-General: United Nations Conference on Contracts for the International Sale of Goods (A/CN.9/183)\***

1. Pursuant to General Assembly resolution 33/93 of 16 December 1978, the United Nations Conference on Contracts for the International Sale of Goods was held at Vienna from 10 March to 11 April 1980.

2. Sixty-two States were represented at the Conference. One State, one Specialized Agency, six other inter-governmental organizations and one non-governmental organization sent observers to the Conference.

3. The Conference elected Mr. G. Eörsi (Hungary) as President, Mr. R. Loewe (Austria) as Chairman of the First Committee, Mr. R. Mantilla-Molina (Mexico) as Chairman of the Second Committee, Mr. W. L. H. Khoo (Singapore) as Chairman of the Drafting Committee, and Mr. P. K. Mathanjuki (Kenya) as Chairman of the Credentials Committee. The Conference was serviced by the Secretariat of the United Nations Commission on International Trade Law.

4. The Conference adopted a Final Act (A/CONF.97/18),\* the United Nations Convention on Contracts for the International Sale of Goods, (A/CONF.97/18, annex I)\* and a Protocol Amending the Convention on the Limitation Period in the International Sale of Goods (A/CONF.97/18, annex II).\*

5. The Convention was opened for signature at the concluding meeting of the Conference on 11 April 1980 and, on that day, signed by 6 States: Austria, Chile, Ghana, Hungary, Singapore, Yugoslavia. The Convention will remain open for signature at United Nations Headquarters in New York until 30 September 1981. It was opened for accession as from the date it was opened for signature (11 April 1980), in accordance with its provisions.

6. The Protocol was opened for accession as from the closing date of the Conference (11 April 1980), in accordance with its provisions.

\* 21 May 1980.

\* Reproduced in this volume, part three, I, below.



## II. INTERNATIONAL CONTRACT PRACTICES

### Report of the Working Group on International Contract Practices on the work of its first session (Vienna, 24-28 September 1979) (A/CN.9/177)\*

#### CONTENTS

	Paragraphs
I. INTRODUCTION . . . . .	1-9
II. GENERAL DISCUSSION . . . . .	10-13
III. CONSIDERATION OF DRAFT RULES BY THE WORKING GROUP . . . . .	14-39
IV. FUTURE WORK . . . . .	40-43

#### I. INTRODUCTION

1. At its twelfth session, the United Nations Commission on International Trade Law decided to re-name its Working Group on the International Sale of Goods as the Working Group on International Contract Practices,<sup>1</sup> and requested 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.<sup>2</sup>

2. The Working Group is currently composed of the following States members of the Commission: Austria, Brazil, Czechoslovakia, France, Ghana, Hungary, India, Japan, Kenya, Mexico, Philippines, Sierra Leone, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and the United States of America.

3. The Working Group held its first session at the Hofburg, Vienna, from 24 to 28 September 1979. All members of the Working Group were represented except Ghana, Hungary, Kenya, Philippines and Sierra Leone.

4. The session was attended by observers from the following States members of the Commission: Chile, Egypt, German Democratic Republic, Greece and Indonesia.

5. The session was also attended by observers from the following Member States of the United Nations: Argentina, China, Iraq, Kuwait, Pakistan, Poland, Romania, Thailand, Uruguay and Venezuela.

6. The session was attended by an observer from the following international organization: Council of Europe.

7. The Working Group elected the following officers:

Chairman . . . . . Mr. J. Barrera-Graf (Mexico)  
Rapporteur . . . . . Mr. M. Cuker (Czechoslovakia)

8. The following documents were placed before the session:

(a) Report of the Secretary-General entitled "Liquidated Damages and Penalty Clauses" (A/CN.9/161)\* submitted to the twelfth session of the Commission;

(b) A publication (in English and French only) of the Council of Europe entitled "Penal Clauses in Civil Law" containing the text of resolution 78 (3) adopted by the Committee of Ministers of the Council of Europe on 20 January 1978, with an Explanatory Memorandum;

(c) The text (in French only) of the Benelux Convention on Penal Clauses signed at the Hague on 26 November 1973.

9. The Working Group adopted the following agenda:

- (a) Election of officers;
- (b) Adoption of the agenda;
- (c) Consideration of the feasibility of formulating uniform rules on liquidated damages and penalty clauses applicable to a wide range of international trade contracts;
- (d) Other business;
- (e) Adoption of the report.

#### II. GENERAL DISCUSSION

10. The Working Group took note of the decision taken by the Commission at its twelfth session (18-29 June 1979) by which the Group was requested "to consider the feasibility of formulating uniform rules on liquidated damages and penalty clauses applicable to a wide range of international trade contracts", and to report its conclusions to the Commission at a future session.<sup>3</sup>

11. After a general discussion on the main differences obtaining in the Common Law and the Civil Law systems in respect of the validity and enforceability of agreements

\* 4 October 1979.

<sup>1</sup> Report of the United Nations Commission on International Trade Law on the work of its twelfth session (1979), *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17* (A/34/17), para. 126 (Yearbook . . . 1979, part one, II, A).

<sup>2</sup> *Ibid.*, para. 31 (Yearbook . . . 1979, part one, II, A).

\* Yearbook . . . 1979, part two, I, C.

<sup>3</sup> Report of the United Nations Commission on International Trade Law on the work of its twelfth session (1979), *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17* (A/34/17), paras. 30 and 31 (Yearbook . . . 1979, part one, II, A).

providing for damages and penalties and of the purposes which such agreements seek to achieve, the Working Group considered the following issues:

- A. Possible scope of rules applicable to such agreements.
- B. The accessory nature of such agreements.
- C. The relationship between the right to obtain performance of a contractual obligation and performance of agreements accessory to it.
- D. The relationship between the right to obtain performance of the accessory obligation and damages for breach of the contractual obligation to which it is accessory.
- E. Limitations on the freedom of the parties to stipulate a sum of money by way of penalty, and the power of courts and arbitral tribunals to modify the amount of the sum stipulated.

12. The Working Group was of the view that it would be premature to decide what should be the character of the proposed rules (e.g. model clause, model law or convention). One representative suggested that work should be directed towards the preparation of model clauses.

13. The Working Group requested the Secretariat to prepare preliminary draft rules on these issues, taking into account the views expressed thereon during the general discussion, and to submit the draft rules for consideration by the Group. The draft Rules set forth below were accordingly submitted by the Secretariat to the Working Group.

### III. CONSIDERATION OF DRAFT RULES BY THE WORKING GROUP

#### 14. A. *Possible scope of rules applicable to such agreements*

##### *Draft Rule 1*

"These Rules apply where the parties to a contract have agreed (in writing) that, in the event of failure by the promisor (debtor) to perform his obligation, or a specified obligation, under the contract, he will pay to the promisee (creditor) or forfeit to him a sum of money (or perform a specified act) (, whether by way of compensation or penalty or both)."

15. The Working Group was generally agreed that the proposed Rules should apply to international trade contracts only, but that it should be considered at a later stage of the work whether certain specific contracts or obligations should be excluded from the application of the Rules. Furthermore the Rules should apply to agreements in international trade contracts, irrespective of whether such agreements envisaged the payment of a sum of money by way of compensation for loss suffered, or by way of penalty in order to coerce the debtor to perform.

16. The Working Group was agreed that the character of the proposed Rules, and the circumstances under which they would become applicable to a particular contract, were related issues. Thus if the proposed Rules were drafted in the form of model clauses, they would only become applicable by agreement of the parties to a contract to that effect. The circumstances under which the Rules would become applicable should therefore only be finally defined after the character of the Rules was determined.

17. The Working Group was agreed that the Rules should only regulate cases where parties had agreed that, in the event of failure by the promisor to perform his obligation under the contract, he would pay to the promisee, or forfeit to him, a sum of money. Therefore, the Rules should not regulate clauses stipulating something other than the payment of a sum of money, such as the performance of an act. Three representatives expressed the view that the Rules should also apply to cases where the stipulation envisaged the performance of an act other than the payment of money, such as the forfeiture of property.

18. Views were expressed both in favour of including, and in favour of deleting, the phrases "in writing" and "whether by way of compensation or penalty or both". The Working Group was agreed that these questions should be considered at a later stage, and therefore maintained these phrases between brackets.

19. There was general agreement that the text should clearly state that the Rules were applicable, not only to cases of a promise to pay, or forfeiture of, a sum of money on total failure by the promisor to perform his obligations, but also to cases where the breach consisted of defective or partial performance. The Secretariat was also requested to clarify the meaning of the phrase "to perform his obligation, or a specified obligation, under the contract", contained in the draft Rule.

#### 20. B. *The accessory nature of such agreements*

##### *Draft Rule 2*

"Unless the Parties have agreed otherwise, the promisee is not entitled to enforce the agreement if the promisor is not liable for his failure to perform the obligation (is not in breach of the obligation) to which the agreement relates."

21. The Working Group was of the view that the agreement, unless it clearly provided otherwise, should be considered as accessory to the contractual obligation to which it related. Therefore, if the promisor was not liable for his failure to perform the contractual obligation because of exemption based on *force majeure* or the like, the promisee was not entitled to claim the stipulated sum. However there was general agreement that, as the opening words of the draft Rule indicated, parties were at liberty to provide that the promisee was entitled to claim the stipulated sum by reason of the fact that the contractual obligation was breached even though the promisor was not liable for such breach. The Group was agreed that, in such a case, the claim of the promisee should be subject to any mandatory limitations set forth by the Rules regarding the enforceability of an agreement.

#### 22. C. *The relationship between the right to obtain performance of a contractual obligation and performance of agreements accessory to it*

##### *Draft Rule 3*

"(1) Unless the parties have agreed otherwise, the promisee is not entitled to enforce the agreement if he requests performance of the obligation to which the agreement relates.

"(2) The provision of paragraph (1) of this Rule does not apply if the agreement relates to delay in performance."

#### Draft Rule 4

"The promisee may, at his option, either enforce the agreement or request performance of the obligation to which the agreement relates."

23. There was a divergence of views as to what were the appropriate principles to regulate this issue. The opinion was expressed that draft Rule 3 set forth acceptable principles. The promisee should in general not be entitled both to enforce due performance of a contractual obligation and to claim the sum of money stipulated because the result would be excessively harsh on the promisor. However, under one view, parties could agree that the promisee should be so entitled. Under another view, such an agreement might produce such harsh results as to invoke rules on invalidity.

24. The view was expressed that the appropriate principles were contained in the following text:

"Payment of an agreed sum does not exempt the promisor from performance of the obligation, for breach of which he has paid the agreed sum, unless the parties had agreed otherwise."

25. In support of this text it was noted that the essential purpose of the contract was performance by the promisor, and that the object of the stipulated sum payable on breach was to compensate the promisee for loss resulting from the breach. It was therefore not unfair if the promisee were given the right both to obtain proper performance and to obtain the stipulated sum. It was stated that the proposed rule reflected the principle that the payment of the sum stipulated should not in itself nullify the contract. The rule would be particularly appropriate in cases where the breach consisted of delay in performance, or partial or defective performance.

26. The Working Group, after deliberation, decided to retain the proposed text as a variant of draft Rule 3 for later consideration.

27. In regard to draft Rule 3, the view was also expressed that a mere request for performance of the obligation to which the agreement relates should not be sufficient to disentitle the promisee to enforce the agreement. He should only be so disentitled if he obtains performance of the obligation to which the agreement relates.

28. The Working Group decided to delete draft Rule 4 because the principle set forth therein was already embodied in draft Rule 3.

29. D. *The relationship between the right to obtain performance of the accessory obligation and damages for breach of the contractual obligation to which it is accessory*

#### Draft Rule 5

##### Variant A

"(1) Unless the parties have agreed otherwise, the promisee is not entitled to claim damages but can only enforce the agreement.

"(2) Nevertheless, the promisee is not entitled to a sum of money in excess of the sum stipulated in the agreement or in excess of the amount of damages which he could have claimed if no such sum had been stipulated, whichever is the larger."

30. Divergent views were advanced on the question whether the normative rule should state that, where a penalty clause or liquidated damages clause had been stipulated, the promisee could not claim damages. Under one view the draft Rules should set forth this principle. Under another view the purpose of such a clause was not only to pre-estimate damages but also to coerce performance of the contract. Hence, if the promisor breached the contract, the sum stipulated could be claimed by the promisee, but the contract should remain enforceable and damages could be claimed for its breach.

31. In reply to this view, it was stated that such a rule could lead to unsatisfactory consequences, as in a case where the stipulated sum represented a pre-estimate of damages and because of non-performance the promisee obtained payment both of full damages and the stipulated sum. Under yet another view if the amount of the damage suffered was in excess of the sum stipulated, the promisee should be allowed to claim the amount of damages not covered by the sum stipulated.

32. The Working Group was unable to reach consensus on which norm should be adopted. However there was agreement that, whatever norm would be adopted, the parties should have the faculty to modify such norm by common agreement, it being understood that standards by which the validity or appropriateness of the clause would be judged (future draft Rule 6) would apply.

33. The Working Group decided to postpone to a later stage the discussion of paragraph (2) of draft Rule 5.

34. In view of this lack of consensus, the Working Group decided that, for the time being, draft Rule 5 should set forth three variants:

##### Variant A

The text as set out above.

##### Variant B

"(1) In case of non-performance of the principal obligation the promisee is entitled to obtain the sum of money or to request the performance of the act as stipulated in the penalty clause. The parties may agree that such sum of money or such act constitute a minimum and that the promisee may claim full compensation. In such a case the promisee must prove his actual loss before the competent court.

"(2) The parties may agree that the sum of money stipulated by the agreement constitutes a maximum amount and that the promisor may obtain a reduction of the sum stipulated to an amount of damages actually suffered by the promisee. In such a case the promisor must prove his claim before the competent court."

##### Variant C

"Unless the parties have agreed otherwise, the promisee, in addition to the sum stipulated, can obtain

damages in respect of the failure to perform the contractual obligation to the extent that damages exceed the amount of the sum stipulated."

35. With respect to variants B and C, two representatives stated that they could not support the rules contained therein on the ground that they removed the benefit, inherent in a liquidated damages clause, of certainty about the extent of possible future claims for damages.

36. The view was expressed that the provisions of draft Rules 2, 3 and 5 introduced by the phrase "unless the parties have agreed otherwise", might imply that such agreements in all circumstances were reasonable and valid. According to this view, in some circumstances, such agreements could be excessively harsh and should not be enforced. It was suggested that, in order to avoid possible misinterpretation, the substance of draft Rules 2, 3 and 5 should be combined in a single rule as follows:

"Unless the parties have agreed otherwise, the agreement (described in Rule 1) shall be construed as follows:" (draft Rules 2, 3 and 5 to follow without the opening words "unless the parties have agreed otherwise").

37. E. *Limitations on the freedom of the parties to stipulate a sum of money by way of penalty, and the power of courts and arbitral tribunals to modify the amount of the sum stipulated*

The Working Group held a preliminary discussion in respect of the mandatory limitations which the Rules might contain. There was general agreement that the draft Rules should contain provisions regarding the enforceability and validity of an agreement stipulating that the party in breach of a contractual obligation was bound to pay a specified sum of money. However no consensus could be reached as to the degree of control a court or arbitral institution should exercise. According to one view the sum stipulated by the parties should not be subject to modification by a court or arbitral institution; according to another view the only sanction the Rules should impose should be the invalidity of the agreement in cases where the sum stipulated was manifestly excessive in relation to the damages which the parties, at the time of the stipulation of the agreement, could foresee as the consequence of breach of the contractual obligation. Under this view, the promisee, in the event of the agreement having been declared void, should still be entitled to claim damages.

38. The Working Group, after deliberation, decided to retain the following texts for future consideration:

#### *Draft Rule 6*

##### *Variant A*

"An agreement stipulating a sum payable on breach of the contract shall be void if it is grossly excessive in relationship to both (a) the harm that could reasonably have been anticipated from the breach, and (b) the actual harm caused thereby. The foregoing relationships are not excessive to the extent that such harm cannot be precisely predicted or established."

##### *Variant B*

"The sum stipulated may be reduced by the court when it is manifestly excessive, but only where such sum

did not constitute a genuine pre-estimate by the parties of the damage likely to be suffered by the promisee."

##### *Variant C*

"A provision to the effect that a court should not have the power to modify the sum stipulated."

##### *Variant D*

"Any penalty clause the amount of which, at the time when it was stipulated, was manifestly excessive in relation to the damages which could be foreseen as the consequence of non-fulfilment of the obligation, is deemed not to have been written."

39. It was observed that the words "manifestly excessive", contained in some of the proposed variants, could introduce uncertainty as to the circumstances in which courts would exercise their discretion. While it was agreed that the decision as to whether the sum stipulated was manifestly excessive would depend on questions of fact, the Group requested the Secretariat to propose, for consideration at a future session, an appropriate wording.

#### IV. FUTURE WORK

40. There was general agreement that, while the discussion at the present session had revealed a divergence of views on certain issues, further work by the Working Group on the subject of liquidated damages and penalty clauses was justified. It was noted that the provisions of Resolution 78 (3) of the Council of Europe, and those of the Benelux Convention on the Penalty Clause, on which divergent views had been expressed, were directed to the unification of national laws governing a wide variety of domestic transactions. Greater consensus might be achieved on a set of rules designed to regulate liquidated damages and penalty clauses in selected types of international trade contracts.

41. The Working Group was therefore of the view that the Secretariat should undertake a further study to be submitted to the next session of the Working Group focusing on the following issues:

(a) The manner in which liquidated damages and penalty clauses are drafted and used in various types of international trade contracts;

(b) The particular types of international trade contracts which might usefully be regulated by uniform rules;

(c) The legal difficulties encountered in the use of liquidated damages and penalty clauses, as shown by court and arbitral decisions.

Such a study, apart from its value in the further work of the Working Group, would be useful for commercial and legal circles.

42. The Working Group was of the view that the Secretariat could submit to the next session of the Working Group a revised set of draft rules for regulating liquidated damages and penalty clauses, if the further work of the Secretariat disclosed the desirability of drafting such a revised set of rules.

43. The Working Group decided to recommend to the Commission the holding of a further session of the Working Group, leaving the date of this session to be decided by the Commission at its thirteenth session.

### III. INTERNATIONAL PAYMENTS

#### A. Report of the Working Group on International Negotiable Instruments on the work of its eighth session (Geneva, 3-14 September 1979) (A/CN.9/178)\*

#### CONTENTS

	<i>Paragraphs</i>
INTRODUCTION .....	1-11
DELIBERATIONS AND DECISIONS .....	12-104
Articles 70 to 78 (Discharge) .....	16-58
Article 79 (Limitation) .....	59-67
Articles 80 to 86 (Lost instruments) .....	68-97
Further work in respect of the draft Convention .....	98-100
Desirability of preparing uniform rules applicable to international cheques .....	101-104
FUTURE WORK .....	105

#### 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).<sup>1</sup> At its fifth session (1972), the Commission established a Working Group on International Negotiable Instruments. The Commission requested that the above draft uniform law be submitted to the Working Group and entrusted the Working Group with the preparation of a final draft.<sup>2</sup>

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).<sup>3</sup>

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).<sup>4</sup>

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).<sup>5</sup>

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.<sup>6</sup>

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.<sup>7</sup>

7. The sixth session of the Working Group was held at the United Nations Office in Geneva from 3 to 13 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 Promis-

\* 5 October 1979.

<sup>1</sup> Report of the United Nations Commission on International Trade Law on the work of its fourth session, *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17* (A/8417) (UNCITRAL, report on the fourth session (1971)), para. 35 (Yearbook ... 1971, part one, II, A). For a brief history of the subject up to the fourth session of the Commission, see A/CN.9/53, paras. 1 to 7; report of the United Nations Commission on International Trade Law on the work of its fifth session, *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 17* (A/8717), report on the fifth session (1972), para. 61 (2) (c) (Yearbook ... 1972, part one, II, A).

<sup>2</sup> UNCITRAL, report on the fifth session (1972), para. 61 (1) (a) (Yearbook ... 1972, part one, II, A).

<sup>3</sup> 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).

<sup>4</sup> Report of the Working Group on International Negotiable Instruments on the work of its second session (New York, 7-18 January 1974), A/CN.9/86 (Yearbook ... 1974, part two, II, 1).

<sup>5</sup> Report of the Working Group on International Negotiable Instruments on the work of its third session (Geneva, 6-17 January 1975), A/CN.9/99 (Yearbook ... 1975, part two, II, 1).

<sup>6</sup> Report of the Working Group on International Negotiable Instruments on the work of its fourth session (New York, 2-12 February 1976), A/CN.9/117 (Yearbook ... 1976, part two, II, 1).

<sup>7</sup> Report of the Working Group on International Negotiable Instruments on the work of its fifth session (New York, 18-29 July 1977), A/CN.9/141 (Yearbook ... 1978, part two, II, A).

sory Notes, considered articles 5 and 6 and articles 24 to 53.<sup>8</sup>

8. The seventh session of the Working Group was held in New York in January 1979. 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 24 and 53 to 70.<sup>9</sup>

9. The Working Group held its eighth session at the United Nations Office in Geneva from 3 to 14 September 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 Nigeria, all the members of the Working Group were represented at the eighth session. The session was also attended by observers of the following states: Argentina, Austria, Brazil, Burma, Chile, Cuba, German Democratic Republic, Indonesia, Japan, Kenya, Pakistan, People's Republic of China, Spain and Thailand, and by observers from the International Monetary Fund, the Bank for International Settlements, the European Communities, the Hague Conference on Private International Law and the European Banking Federation.

10. The Working Group elected the following officers:  
Chairman . . . . . Mr. René Roblot (France)  
Rapporteur . . . . . Mr. Roberto Luis Mantilla-Molina  
(Mexico)

11. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.IV/WP.13): 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 und 2): note by the Secretariat: desirability of preparing uniform rules applicable to international cheques (A/CN.9/WG.IV/CRP.5): 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),† sixth (A/CN.9/147)†† and seventh (A/CN.9/157)††† sessions.

\* Yearbook . . . 1973, part two, II, 1.

\*\* Yearbook . . . 1974, part two, II, 1.

\*\*\* Yearbook . . . 1975, part two, II, 1.

\*\*\*\* Yearbook . . . 1976, part two, II, 1.

† Yearbook . . . 1978, part two, II, A.

†† Yearbook . . . 1978, part two, II, B.

††† Yearbook . . . 1979, part two, II, A.

<sup>8</sup> Report of the Working Group on International Negotiable Instruments on the work of its sixth session (Geneva, 3-13 January 1978), A/CN.9/147 (Yearbook . . . 1978, part two, II, B).

<sup>9</sup> 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 (Yearbook . . . 1979, part two, II, A).

## DELIBERATIONS AND DECISIONS

12. 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 reports on the work of its seven previous sessions.

13. The text of each article as revised appears at the beginning of the report on the deliberations relative to that article.

14. In the course of this session, the Working Group considered articles 1, 5, 9, 11 and 70 to 86.

15. 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.

## ARTICLES 70 TO 78 (DISCHARGE)

### Article 70, paragraph (2)

16. The text of article 70, paragraph (2), as considered by the Working Group, is as follows:

"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."

17. The Working Group decided to add after the words "to the holder" the words "or to a party subsequent to himself". This modification was deemed necessary because of the fact that a person having rights on the instrument need not necessarily be a holder. Thus, a guarantor who had paid the instrument and received possession of it was not a holder but had, under article 45, rights on the instrument against parties who were liable thereon to the party for whom he became a guarantor. Similarly, the drawer who paid an instrument upon dishonour by the drawee or the acceptor, had rights against the acceptor though he lacked the status of a holder, unless the bill was endorsed to him or the last endorsement was in blank.

### Article 70, paragraph (5)

18. The text of article 70, paragraph (5), as considered by the Working Group, is as follows:

"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."

19. The Working Group, after discussion, was agreed that a person who paid an instrument was entitled to receive possession of the instrument. The right to possession was justified by the fact that, if the instrument remained in the hands of the person receiving payment and that person transferred the instrument to a protected holder, the payor would be obliged to pay the instrument a second time upon presentment by the protected holder.

20. The Working Group was also agreed that the person from whom payment was demanded should not be required to pay if the instrument was not delivered to him and that withholding of payment in these circumstances should not constitute a dishonour by non-payment. Consequently, in such a case, the person who had refused to deliver the instrument would not be entitled to exercise a right of recourse against prior parties.

21. It was also agreed that, if the person from whom payment was demanded paid the instrument, though it was not delivered to him, such payment should constitute a discharge of liability on the instrument, subject to article 25. The following examples were given: the maker issues an instrument to the payee. The payee endorses the note to A, and A endorses it to B. B presents the instrument for payment to the maker. Example (a): the maker refuses payment. Upon protest, B asks payment from the payee. The payee pays but B retains the instrument. Subsequently, B requests payment from A. A may raise as a defence against B that the instrument was paid by the payee, and therefore he is discharged of his liability on the note (article 78). Example (b): B presents the note for payment to the maker. The maker pays but B retains possession of the note. B endorses the note to C who is not a protected holder. C presents the note for payment to the maker. Because C is not a protected holder, the maker may raise the defence that he paid the instrument and that such payment constitutes a discharge. If, on the other hand, C is a protected holder, then payment by the maker cannot be raised as a defence, neither by the maker nor by parties prior to C.

22. The Working Group, after consideration, decided to delete the adjective "authenticated" in view of the fact that article 58 no longer provided for an authenticated protest.

23. The Working Group, upon further examination of article 70, also concluded that the use of the words "due payment" in paragraphs (1), (2) and (4) of this article might give rise to misunderstanding and that it would be preferable to use the wording of an earlier draft of the article according to which a party was discharged of his liability on the instrument when he paid the holder or a party subsequent to himself the amount due pursuant to articles 67 or 68. The Group requested the Secretariat to redraft the article accordingly.

#### *Article 71, paragraph (1)*

24. The text of article 71, paragraph (1), as considered by the Working Group, is as follows:

"The holder is not obliged to take partial payment."

25. The Working Group adopted this paragraph without change.

#### *Article 71, paragraph (2)*

26. The text of article 71, paragraph (2), as considered by the Working Group, is as follows:

"If the holder does not take partial payment, the instrument is dishonoured by non-payment."

27. The Working Group adopted this paragraph without change. However, the view was expressed that, since the provision of this paragraph followed logically from the provision of paragraph (1), it could be deleted or, if it were maintained, it should be made part of paragraph (1).

#### *Article 71, paragraph (3)*

28. The text of article 71, paragraph (3), as considered by the Working Group, is as follows:

"If the holder takes partial payment from the drawee or the acceptor or the maker:

"(a) The acceptor or the maker is discharged of his liability on the instrument to the extent of the amount paid; and

"(b) The instrument is to be considered as dishonoured by non-payment as to the amount unpaid."

29. The Working Group adopted this paragraph without change. The question was raised whether provision should be made for partial payment by parties secondarily liable because of dishonour. The Group was of the opinion that no special rules were required to cover such cases.

#### *Article 71, paragraph (4)*

30. The text of article 71, paragraph (4), as considered by the Working Group, is as follows:

"The drawee or the acceptor or the maker making partial payment may require that mention of such payment be made on the instrument and that a receipt therefor be given to him."

31. The Working Group adopted this paragraph without change. The Working Group did not adopt a suggestion to delete the requirement that a receipt for partial payment be given to the payor.

#### *Article 71, paragraph (5)*

32.. The text of article 71, paragraph (5), as considered by the Working Group, is as follows:

"When an instrument has been paid in part, a party who pays the unpaid amount is discharged of his liability thereon. In that case, the person receiving the payment must deliver the receipted instrument and any authenticated protest to the party making the payment."

33. The Working Group adopted this paragraph subject to the deletion of the word "authenticated" before the word "protest" and alignment with the redrafted text of article 70, paragraph (5).

#### *Article 72*

34. The text of article 72, as considered by the Working Group, is as follows:



"(1) The holder may refuse to take payment in a place other than the place where the instrument was duly presented for payment in accordance with article 53 (g).

"(2) If payment is not then made in the place where the instrument was duly presented for payment in accordance with article 53 (g), the instrument is considered as dishonoured by non-payment."

35. The Working Group adopted this article without change.

#### Article 74

36. The text of article 74, as considered by the Working Group, is as follows:

"(1) An instrument must be paid in the currency in which the amount of the instrument is expressed.

"(2) The drawer or the maker may indicate on the instrument that it must be paid in a specified currency other than the currency in which the amount of the instrument is expressed. In that case:

"(a) The instrument must be paid in the currency so specified;

"(b) The amount payable is to be calculated according to the rate of exchange indicated on the instrument. Failing such an indication, the amount payable is to be calculated according to the rate of exchange for sight drafts on the date of maturity:

"(i) Ruling at the place where the instrument must be presented for payment in accordance with article 53 (g), if the specified currency is that of that place (local currency); or

"(ii) If the specified currency is not that of that place, according to the usages of the place where the instrument must be presented for payment in accordance with article 53 (g).

"(c) If such an instrument is dishonoured by non-acceptance, the amount payable is to be calculated:

"(i) If the rate of exchange is indicated on the instrument [according to that rate] [at the option of the holder, according to that rate or according to the rate ruling on the date of dishonour or on the date of actual payment].

"(ii) If no rate of exchange is indicated on the instrument [according to the rate of exchange for sight drafts ruling at the date of actual payment] [according to the rate of exchange for sight drafts ruling at the date of actual payment, if such payment is made before maturity, and at the date of maturity, if such payment is made at or after the date of maturity] [at the option of the holder, according to the rate of exchange ruling at the date of dishonour or on the date of actual payment].

"(d) If such an instrument is dishonoured by non-payment, the amount is to be calculated:

"(i) If the rate of exchange is indicated on the instrument [according to that rate] [at the

option of the holder, according to that rate or according to the rate of exchange ruling on the date of maturity or on the date of actual payment].

"(ii) If no rate of exchange is indicated on the instrument [according to the rate of exchange for sight drafts ruling on the date of actual payment] [according to the rate of exchange for sight drafts ruling at the date of maturity] [at the option of the holder, according to the rate of exchange ruling on the date of maturity or on the date of actual payment].

"(3) [Nothing in this article prevents a court from awarding damages for loss caused to the holder by reason of fluctuations in rates of exchange if such loss is caused by dishonour for non-acceptance or non-payment.]

"(4) The rate of exchange ruling at a certain date is the rate of exchange ruling [at the place where the instrument must be presented for payment in accordance with article 53 (g)] [at the place of actual payment] [at the option of the holder, at the place where the instrument must be presented for payment in accordance with article 53 (g) or at the place of actual payment]."

37. The question was raised whether the draft Convention in its current version allowed for an instrument to be drawn in or related to units of account, such as special drawing rights (SDRs) or European Monetary Units. It was generally agreed that the wording of article 1, paragraphs (2) (b) and (3) (b), and article 7 did not contemplate the drawing of a bill or the making of a note in such or similar units. Some support was expressed in favour of making it possible under the Convention to draw such bills or make such notes in view of the fact that this would make the bill or note more attractive for international payments.

38. The Working Group, after discussion, was of the view that it could not pronounce itself on the desirability of the proposed modifications without having at its disposal information from the banking community as to the likelihood of instruments being drawn or made in units of account. It, therefore, requested the Secretariat to consult the UNCITRAL Study Group on International Payments on current practice and possible future developments and to report to it thereon at the ninth session of the Working Group.

39. The further question was raised whether the fact that in many countries exchange control regulations prohibited payment in foreign currency would not run counter to the principle laid down in this article that an instrument must be paid in the currency in which its amount is expressed. The Group was agreed that the Convention should contain an express provision to the effect that the provisions of the Convention were subject to regulatory measures pertaining to exchange control as well as to regulatory measures which a Contracting State was bound to apply by virtue of international agreements to which it was a party. In this respect, reference was made to article 8, section (2) (b) of the Articles of Agreement of the International Monetary Fund according to which "exchange contracts which involve the currency of any



Member and which are contrary to the exchange control regulations of that Member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any Member". The Working Group requested the Secretariat to draft an appropriate text reflecting its decision and to submit such text at its next session.

#### *Paragraph (1)*

40. The Working Group adopted paragraph (1) of article 74 without change. However, it was understood that this paragraph would have to be reviewed if it were decided at a later stage to allow for the drawing or making of an instrument in international units of account.

#### *Paragraph (2)*

41. As to paragraph (2), there was consensus that the drawer or the maker should be permitted to stipulate on the instrument that it must be paid in a specified currency other than the currency in which the amount of the instrument is expressed. It was also agreed that in such a case the provisions laid down in subparagraphs (a) and (b) should apply.

42. The Working Group did not reach consensus as to which provision should be adopted if an instrument containing a stipulation as to payment in a specified currency other than that of the amount of the instrument was dishonoured by non-acceptance. Whilst there was agreement that, if the instrument indicated the rate of exchange, the amount payable should be calculated according to the rate, two views were expressed in respect of the method of calculation of the amount payable in the event that no rate of exchange was indicated on the instrument.

43. Four representatives expressed the view that the holder should have the option in respect of the calculation of the amount payable, between the rate of exchange prevailing on the date of dishonour or on the date of actual payment. Two representatives were of the view that the amount payable should be calculated according to the rate of exchange for sight drafts ruling at the date of actual payment. In respect of the latter view, a distinction was made, by one representative, between payment before maturity and at, or after, maturity. Before maturity the amount payable should be calculated according to the rate of exchange for sight drafts ruling at the date of actual payment whilst at, or after, maturity the rate of exchange should be that prevailing at the date of maturity. However, in this connexion, it was observed that in the case of a bill payable after sight there would not be a maturity date if there was dishonour by non-acceptance.

44. In respect of an instrument dishonoured by non-payment, the Working Group was agreed that, if the instrument indicated a rate of exchange, that rate should be used to calculate the amount payable. There was no consensus as to which rate of exchange should be used if it was not indicated on the instrument. According to four representatives, the holder should have the option of choosing between the rate of exchange ruling on the date of maturity or on the rate of exchange prevailing on the date of actual payment. According to one representative, the amount of the instrument should be calculated according to

the rate of exchange for sight drafts ruling on the date of maturity. According to another representative, the applicable rate of exchange should be the one prevailing on the date of actual payment.

45. The Working Group requested the Secretariat to inquire whether in practice instruments were drawn in a currency other than the currency in which its amount is expressed without indication of the rate of exchange.

#### *Paragraph (3)*

46. It was observed that paragraph (3) of article 74 did not create a statutory right entitling a person to damages in the event of his suffering loss because of fluctuations in rates of exchange. There was, however, general agreement that the provision would serve a useful purpose in that it clarified that the rights of a holder were not necessarily limited to the rights set forth in article 74. The Working Group, therefore, decided to retain paragraph (3) and to delete the brackets.

#### *Paragraph (4)*

47. The Working Group was agreed that the draft Convention should set forth a rule specifying the place which should determine the rate of exchange if the amount payable is to be calculated according to a rate prevailing at a given date. One representative expressed the view that the rule should not apply in situations where no rate of exchange is indicated on the instrument or where a specific rate is indicated. No consensus could be reached as to which place should prevail: the place of presentment for payment or, at the option of the holder, the place of presentment or the place of actual payment. Four representatives were of the view that the holder should have the option of choosing between the rate of exchange ruling at the place where the instrument was presented for payment and that ruling at the place of actual payment. Two representatives expressed the view that the decisive rate of exchange should be the one ruling at the place of presentment.

#### *Possible supplementary rules*

48. It was noted that article 74 was based on the principle that an instrument was to be paid in the currency in which the amount of the instrument was expressed. However, there might be cases where, as had been noted previously, the exchange regulations of a country would prohibit the entering into monetary obligations in a foreign currency. In such cases, provided the instrument was enforceable, a party would, therefore, be called upon to discharge his obligation in local currency. This, in turn, could give rise to problems similar to those dealt with in article 74. It was, therefore, suggested that the draft Convention set forth additional provisions governing cases where the amount of the instrument, though expressed in a foreign currency, was to be paid in a local currency and if the amount payable was to be calculated according to a rate of exchange.

49. The Working Group, after discussion, requested the Secretariat to examine whether and to what extent currency exchange regulations would indicate the desirability of supplementary rules and whether in the context of the Convention such rules were feasible.

### Article 75

50. The text of article 75, as considered by the Working Group, is as follows:

"(1) If a party offers payment by placing the amount due in accordance with article 67 or 68 at the disposal of the holder and the holder refuses to take such payment:

"(a) Such party is not liable for any interest or costs or loss caused to the holder by reason of fluctuations in rates of exchanges; and

"(b) Any party who has a right of recourse against such party [is not liable for such interest, cost or loss] [is discharged of his liability on the instrument].

"(2) The provisions of paragraph (1) (b) also apply if the party tendering payment to the holder is the drawee."

51. The Working Group, after discussion, decided to delete this article for the following reasons. It was felt that the situation covered under this provision raised a problem of suretyship, and only one out of many such problems, which should better be left to the applicable national laws on suretyship. In addition, none of the alternative provisions set out in paragraph (1) (b) met with general approval by the Group. Furthermore, it was realized that the concept of tender as adopted in paragraph (1) was not known in all legal systems and might create unnecessary difficulties. For example, the condition of placing the amount at the disposal of the holder, as laid down in that paragraph, could, under certain circumstances, be considered by some legal systems as payment which, under article 70, would entail consequences different from the ones envisaged in article 75.

### Article 76

52. The text of article 76, as considered by the Working Group, is as follows:

"[(1) A party is discharged of his liability on the instrument if the holder, at or after maturity, writes on the instrument an unconditional renunciation of his rights thereon against such party.

"(2) Such renunciation does not affect the right to the instrument of the party who renounced his rights thereon.]"

53. The Working Group, after discussion, decided to delete this article by reason of the fact that renunciations written on the instrument were hardly ever found in practice.

54. The Group did not adopt a suggestion to include in the Convention an article dealing with the legal effects of another type of renunciation, namely, the striking out of a party's signature on the instrument. It was agreed that such a provision merely stated the obvious and could even be harmful in that it could raise questions concerning the title of the holder.

### Article 77

55. The text of article 77, as considered by the Working Group, is as follows:

"[A party liable who rightfully becomes the holder of the instrument is discharged of liability thereon to any party who had a right of recourse against him.]"

56. The Working Group was divided on the question whether article 77 should be retained, possibly with some modifications, or whether it should be deleted. According to two representatives, the provision in article 77 could serve a useful purpose in that it adopted the principle of *confusio* for a defined set of circumstances. According to four representatives, the article should not be retained because it merely stated the obvious and could create certain difficulties, in particular, with regard to the undefined term "rightfully". It was understood that this prevailing view was not opposed to a possible reconsideration at a later stage.

### Article 78

57. The text of article 78, as considered by the Working Group, is as follows:

"When a party is discharged of liability on an instrument, any party who had a right of recourse against him is also discharged."

58. It was observed that this provision envisaged cases where the holder had received payment of the full amount of the instrument. Since the draft Convention allowed for partial payment, the provision should make it clear that the discharge of a party by reason of payment of the party against whom he had a right of recourse was a discharge "to the same extent". The Working Group requested the Secretariat to redraft the article accordingly.

### ARTICLE 79 (LIMITATION (PRESCRIPTION))

#### Article 79, paragraph (1)

59. The text of article 79, paragraph (1), as considered by the Working Group, is as follows:

"A right of action arising on an instrument can no longer be exercised against a party after four years have elapsed after the date on which that party became first liable to pay the instrument."

60. The Working Group was agreed that the period of limitation should be of a duration of four years.

61. As to the date from which the period should commence to run, the Group, after discussion, was of the view that the date on which a party became first liable to pay the instrument should not be retained because it would not be immediately clear what date it was. Instead, the Group decided that the proper date would be the date of maturity in cases where an action was brought against the acceptor or the maker and their guarantor, and the date of protest for dishonour or, where protest was dispensed with, the date of dishonour, in cases where an action was brought against an endorser, drawer or their guarantor. The Group requested the Secretariat to redraft paragraph (1) into two paragraphs reflecting actions brought against parties primarily liable and parties secondarily liable. Consistent with a decision taken at its fourth session, the Group was agreed that the maturity date of an instrument payable on demand was the date on which the instrument was pre-

sented for payment. According to one view, the limitation period of an instrument payable on demand should run from the date of its issue or from its date. It was noted that this paragraph could give rise to a situation in which the acceptor or the maker could be discharged before parties secondarily liable.

*Article 79, paragraph (2)*

62. The text of article 79, paragraph (2), as considered by the Working Group, is as follows:

"If an endorser or the drawer of a bill or the endorser of a note has taken up and paid the bill or the note within one year before the expiration of the period referred to in paragraph (1), such endorser or drawer may exercise his right of action against [the acceptor or the maker] [prior parties or the acceptor or the maker] within one year after the date on which he took up and paid the instrument."

63. The Working Group agreed in principle with the provision that an endorser or the drawer of an instrument should not, in respect of the period of time within which he could bring an action on the instrument, suffer from the fact that a subsequent party had brought an action on the instrument at such point of time that the time limit within which he could bring his action was unreasonably short. Consequently, the provision that such endorser or drawer should have at least one year within which to bring his action, from the date on which he paid the instrument, should be maintained. However, the Group was of the view that the present wording of paragraph (2) did not make it sufficiently clear that such an endorser or drawer was entitled to a period of one year within which to bring his action even when the four-year period had expired. The Group, therefore, requested the Secretariat to redraft paragraph (2) accordingly.

64. The Working Group also decided that the minimum period of one year should be available to any endorser as against any prior party.

65. The Working Group further decided that paragraph (2) should also deal with the action by a guarantor, not only against a prior party but also against the party whose liability he had guaranteed.

66. Furthermore, it was noted that the draft Convention conferred a statutory right of action, in certain circumstances, to a party who had suffered loss or damage (see articles 22, 66 and 81). The Secretariat was requested to consider the feasibility of drafting a separate paragraph in respect of the limitation period for such rights of action outside the instrument.

67. The Working Group was of the opinion that it was for the law of each High Contracting Party to the Convention to determine the causes of interruption or suspension of a limitation period in the case of actions on instruments which came before its courts. Likewise, it was for such law to determine whether such interruption or suspension should operate in respect of all parties on the instrument or only against that party in respect of whom the period had been interrupted.

ARTICLES 80 TO 86 (LOST INSTRUMENTS)

*Article 80, paragraph (1)*

68. The text of article 80, paragraph (1), as considered by the Working Group, is as follows:

"When an instrument is lost, whether by destruction, theft or otherwise, the person who lost the instrument has, subject to the provision of paragraph (2) of this article, the same right to payment which he would have had if he had been in possession of the instrument and the party from whom payment is claimed cannot set up as a defence against liability on the instrument the fact that the person claiming payment is not in possession thereof."

69. The Working Group considered whether the draft Convention should make provision for the payment of a lost instrument by the drawee. The general view was that, since a drawee is not liable on the instrument, payment by him would be at his own risk. According to this view, article 80 dealt with the situation where if certain conditions had been met there was an obligation on the parties liable to pay. Such obligation could not be imposed upon the drawee. Consequently, the draft Convention should not set forth any provision in this respect. The Working Group requested the Secretariat to modify articles 81, paragraphs (1) and (3), 82, paragraph (1), and 84 accordingly, by using the word "party" and not the word "person".

70. One representative was of the view that the draft Convention should provide that the drawee who paid and was given a security received the security on behalf of the drawer whose account he would debit upon payment. The draft Convention should, therefore, provide for a right of the drawer to the security if it had been given to the drawee.

71. The Working Group adopted article 80, paragraph (1), without change. The Group noted that under this paragraph the party from whom payment was claimed not only could not raise the defence that the person claiming payment was not a holder but also was not entitled to withhold payment because of non-delivery of the instrument (article 70).

*Article 80, paragraph (2)*

72. The text of article 80, paragraph (2), as considered by the Working Group, is as follows:

"(a) The person claiming payment of a lost instrument must state in writing to the party from whom he claims payment:

"(i) The facts showing that, if he had been in possession of the instrument, he would have had a right to payment from the party from whom payment is claimed;

"(ii) The facts which prevent production of the instrument; and

"(iii) The elements of the lost instrument pertaining to the requirements set out in article 1 (2) or 1 (3).

"(b) The party from whom payment of a lost instrument is claimed may require the person claiming payment to give security in order to indemnify him for any loss which he may suffer by reason of the subsequent payment of the lost instrument.

"(c) The nature of the security and its terms are to be determined by agreement between the person claiming payment and the party from whom payment is claimed. Failing such an agreement, the Court may determine whether security is called for and, if so, the nature of the security and its terms.

"(d) If the security cannot be given, the Court may order the party from whom payment is claimed to deposit the amount of the lost instrument, and any interest and expenses which may be claimed under articles 67 and 68, with the court or any other competent authority, and may determine the duration of such deposit. Such deposit is to be considered as payment to the person claiming payment."

73. The Working Group adopted subparagraph (a), subject to modifying the order of subparagraphs (i), (ii) and (iii) by placing subparagraph (iii) before subparagraph (i). The Working Group adopted subparagraphs (b) and (c) without change.

74. The Working Group noted that under subparagraphs (c) and (d) the Court had discretion not only to determine whether security was called for but also, in case the security could not be given, to order that the party from whom payment was claimed was not required to pay.

75. The Working Group decided that, in subparagraph (d), after the words "competent authority" the words "or institution" should be added. The Group adopted subparagraph (d) subject to this change.

#### *Article 81*

76. The text of article 81, as considered by the Working Group, is as follows:

"(1) A [party] [person] who has paid a lost instrument and to whom the instrument is subsequently presented for payment by another person must notify the person to whom he paid of such presentment.

"(2) Such notification must be given on the day the instrument is presented or on one of the two business days which follow and must state the name of the person presenting the instrument and the date and place of presentment.

"(3) Failure to notify renders the party [person] who has paid the lost instrument liable for any damages which the person whom he paid may suffer from such failure, provided that the total amount of the damages does not exceed the amount of the instrument and any interest and expenses which may be claimed under article 67 or 68.

"[add provisions on delay]."

77. It was proposed that article 81 should set forth provisions under which the duty to notify under paragraph (1) should comprise the delivery of the notification to the

address in the place where payment of the instrument was to be made and that the person who received payment on the lost instrument should inform the person paid of that address. The Working Group did not retain this proposal on the ground that it was in the interest of the person having received payment to indicate to the payor to what address notice should be given.

78. The proposal was made that if the person who had received payment objected to payment being made to the person presenting the instrument by reason of his having a better title to the instrument, the person to whom the instrument was presented was obliged to defer payment for a specified period of time. Under this proposal, therefore, the draft Convention would establish a compulsory moratorium which would enable the party sued on the instrument to determine whether or not to make payment. The proposal also provided for damages to be paid by the person who objected if it were decided by the Court that payment on the instrument should be made to the person presenting it.

79. The Working Group, after discussion, did not retain this proposal on the ground that the draft Convention should not set forth a special provision which in certain circumstances would oblige the party liable not to pay a protected holder of the instrument. The Group was of the view that the general principles of the draft Convention governing the allocation of risks, set forth in article 70, paragraph (4), provided an adequate solution.

80. The Working Group decided that the following provisions on delay in giving notice and dispensation should be added:

"(4) Delay in giving notice is excused when the delay is caused by circumstances which are beyond the control of the person who has paid the lost instrument and which he could neither avoid nor overcome. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

"(5) Notice is dispensed with when the cause of delay in giving notice continues to operate beyond 30 days after the last date on which it should have been given."

#### *Article 82*

81. The text of article 82, as considered by the Working Group, is as follows:

"(1) A [party] [person] who has paid a lost instrument in accordance with the provisions of article 80 and who is subsequently required to, and does, pay the instrument, or who loses his right to recover from any party liable to him, has the right

"(a) if security was given, to realize the security; or

"(b) if the amount was deposited with the Court or other competent authority, to reclaim the amount so deposited.

"[(2) The person who has given security in accordance with the provisions of paragraph (2) (b) of article 80, may reclaim the security when the party for whose benefit the security was given no longer has the

right to realize the security under paragraph (1) and the acceptor or the maker can no longer be sued on the instrument by virtue of article 79, or when he cannot obtain payment from any party liable to him because of that party's raising a valid defence or that party's insolvency.]

"(3) If the amount was deposited with a Court or other competent authority in accordance with paragraph (2) (d) of article 80 and was not reclaimed under paragraph (1) (b) of this article within the period of time provided by article 79 during which the party who has deposited the amount and the acceptor or the maker can be sued on the instrument, the person for whose benefit the amount was deposited may request the Court which ordered the deposit to order that the amount deposited be paid out to him. The Court may grant such request upon such terms and conditions as it may require."

82. The Working Group considered what rules should apply where the holder who had lost the instrument demanded payment, in a recourse action, from a prior party and, in particular, in what situations the party who had paid a lost instrument could realize the security given for his benefit or, if he had deposited the amount under article 80, paragraph (2) (d), could reclaim the amount so deposited. The following example was given: the drawer issues an instrument to the payee who endorses it in blank and delivers it to A. B steals the instrument from A and delivers it to C who is a protected holder. The bill is not accepted. A, who lost the instrument, after due protest, demands payment from the payee under article 80. The payee pays A, and A gives security to the payee under article 80, paragraph (2) (b). Before the payee brings an action on the lost instrument against the drawer, the drawer pays the instrument to C. The Working Group, after discussion, was of the opinion that the payee had a right to retain the security and that A who has lost the instrument should bear the loss. The same solution would obtain if the drawer had drawn the instrument without recourse and the payee was required to pay C.

83. The Working Group considered which rule should obtain where the person who had paid the lost instrument could no longer recover from any party liable to him because of the operation of article 79. The Group was of the view that the person who had given the security was entitled to reclaim it if: (a) the party for whose benefit it was given was, by virtue of article 79, no longer liable on the instrument and (b) had, by virtue of article 79, no right of recourse against any party liable to him. In the example given in the preceding paragraph, therefore, the payee was not entitled to realize the security or to reclaim the amount deposited under article 80, paragraph (2) (d).

84. The Working Group requested the Secretariat to prepare a new draft of article 82 which would further distinguish between situations where a party secondarily liable loses his right of recourse by reason of the fact that the instrument was lost (in which case he would be entitled to realize his security) and where such a party loses that right by virtue of circumstances not connected with the loss of the instrument (in which case he would not *ipso facto* be entitled to realize his security). The Group also requested

the Secretariat to redraft paragraph (1) (a) of article 82 with a view to clarifying that the right to realize the security was proportional to the amount of reimbursement.

### Article 83

85. The text of article 83, as considered by the Working Group, is as follows:

"A person claiming payment of a lost instrument duly effects protest for dishonour by non-payment by the use of a copy of the lost instrument or a writing establishing the elements of the lost instrument pertaining to the requirements set out in article 1 (2) or 1 (3)."

86. The Working Group decided that the writing to which the article referred should be a writing that satisfied the requirements of article 80, paragraph (2) (a). The Group requested the Secretariat to modify the article accordingly.

87. The Working Group was of the view that a person claiming payment should be entitled to use a copy of a lost instrument, not only for the purpose of effecting protest, but also for that of claiming payment. The Group, therefore, requested the Secretariat to modify article 80, paragraph (2) (a), accordingly.

88. It was observed that the articles of the draft Convention dealing with lost instruments did not expressly require the giving of notice of dishonour to prior parties. The view was expressed that it would be adequate if the commentary drew attention to the fact that the duty to give notice of dishonour also obtained in the case of dishonour of a lost instrument.

### Article 84

89. The text of article 84, as considered by the Working Group, is as follows:

"A person receiving payment of a lost instrument in accordance with article 80 must deliver to the person paying the writing required under paragraph (2) (a) of article 80 receipted by him and any authenticated protest."

90. The Working Group adopted this article subject to replacing the word "person" in the second line by the word "party", by deleting the word "authenticated" before the word "protest", and by adding after this word the words "and a receipted account".

### Article 85

91. The text of article 85, as considered by the Working Group, is as follows:

"(a) A party who paid a lost instrument in accordance with article 80 has the same rights which he would have had if he had been in possession of the instrument.

"(b) Such party may exercise his rights only if he is in possession of the receipted writing referred to in article 84."

92. The Working Group adopted this article without modification.

93. The question was raised whether, if the lost instrument was found and put in circulation, the procedure provided for under article 80 *et seq.* should still apply. The Working Group, after discussion, was of the view that the procedure provided for in the case of a lost instrument solely prevented a party liable on the instrument from raising against the person who had lost the instrument the defence that such a person was not a holder because he was not in possession of the instrument. It followed that any other defence available to a party against a holder, e. g. a claim by a third party to the instrument, remained available to a party from whom payment was demanded under article 80. The Group concluded that it was not necessary to state in the section on lost instruments that the rights of a person who had lost the instrument were subject to the general rules and principles set forth elsewhere in the draft Convention.

94. The question was raised whether the Court, which under article 80, paragraph (2) (c), could be asked to determine whether security was called for and the nature and terms of a security, should be given the discretionary power of deciding whether the writing referred to in paragraph (2) (a) of article 80 was sufficient to oblige the party from whom payment was claimed to pay. The Working Group was of the view that the question whether the writing was sufficient for the purposes of article 80 was one of proof and that it was understood that the Court could make an order that payment should not be made.

#### Article 86

95. The text of article 86, as considered by the Working Group, is as follows:

"[(a) When an instrument was lost by the payee or by his endorsee for collection whether by destruction, wrongful detention or otherwise, the payee, upon due proof of the fact that he or his endorsee for collection lost the instrument, shall have the right to request the drawer or the maker to issue a duplicate of the lost instrument. The drawer or maker, upon issuing such duplicate may request the payee to give security in order to indemnify him for any loss which he may suffer by reason of the subsequent payment of the lost instrument.

"(b) The kind of security and its terms shall be determined by agreement between the drawer or maker issuing a duplicate of a lost instrument and the payee. Failing such an agreement, the kind of security and its terms shall be determined by the Court.

"(c) (i) The drawer or the maker when issuing a duplicate of a lost bill or note may write on the face thereof the word "duplicate" (or words of similar import).

(ii) When an instrument is marked as being a duplicate, it shall be considered as an instrument under this law, provided that a duplicate of a lost bill or note cannot be negotiated except for purposes of collection.

"(d) Refusal by the drawer or maker to issue a duplicate of a lost instrument shall render the drawer or

maker liable for any damages that the payee may suffer from such refusal (provided that the total amount of the damages shall not exceed the amount of the lost instrument).]"

96. The Working Group decided that this article should not be retained. It appeared that on the basis of the available evidence duplicates of an instrument only rarely occurred and that it would, therefore, not be justified that the draft Convention set forth a special article dealing with duplicates.

#### Other matters

97. The question was raised whether the draft Convention should contain provisions applicable to bills drawn in a set. The Working Group was of the view that, since bills drawn in a set were no longer in great use, the draft Convention should not set forth any provisions therefor.

#### FURTHER WORK IN RESPECT OF THE DRAFT CONVENTION ON INTERNATIONAL BILLS OF EXCHANGE AND INTERNATIONAL PROMISSORY NOTES

98. The Working Group requested the Secretariat to make appropriate arrangements for the establishment of corresponding versions of the draft Convention in the four working languages of the Commission. It was noted with concern that neither the Working Group nor the Commission were in a position to establish corresponding versions in Arabic and Chinese as these languages are not working languages of the Commission. The Group expressed the view that it would be desirable to find ways and means to establish such versions before the draft Convention is considered at the diplomatic conference.

99. The Working Group, having terminated the consideration of the draft Convention in second reading, began reconsideration of those articles of the draft Convention which it had placed between brackets and other matters on which it had reserved decisions. With regard to the headings and sub-headings to be inserted in the draft Convention at appropriate places, the Working Group requested the Secretariat to prepare a document setting forth proposals.

100. With respect to the articles placed between brackets, the Working Group took the following decisions:

1. *Article 1, paragraphs (2) (a) and (3) (a)*: To leave the words "Convention of ..." between brackets, by reason of the fact that the precise title or abbreviated title of the Convention would be decided on at a later stage;

2. *Article 5, paragraph (8)*: The definition of party to read as follows: "'Party' means any person who has signed an instrument";

3. *Article 5, paragraph (9)*: The definition of maturity to read as follows: "'Maturity' means the date of payment referred to in article 9 and, in the case of a demand bill, the date on which the instrument is presented for payment". One representative reserved his position in respect of this definition on the ground that it did not clearly indicate the maturity date of a bill drawn payable after sight;

4. *Article 5, paragraph (10)*: With respect to the definition of forged signature it was agreed to re-examine this definition in connexion with articles 22 and 28. In particular, it should be examined whether a signature placed on an instrument by an agent without authority should be assimilated to a forged signature;

5. *Article 5, paragraph (6)*: Opinions were equally divided on the question whether the draft Convention should expressly refer to the possibility of the making of a note made payable at a fixed period after sight. The Working Group, therefore, decided to place the paragraph between brackets for decision by the Commission;

6. *Article 11, paragraph (2) (a)*: This paragraph was modified as follows: "A party who signed the instrument before the completion may invoke the non-observance of the agreement as a defence against a holder, provided the holder had knowledge of the non-observance of the agreement when he became a holder."

#### DESIRABILITY OF PREPARING UNIFORM RULES APPLICABLE TO INTERNATIONAL CHEQUES

101. The Working Group recalled that the Commission, at its fifth session, had requested the Group to consider the desirability of preparing uniform rules applicable to international cheques, and to consider whether this could best be achieved by extending the application of the draft Convention on International Bills of Exchange and International Promissory Notes to international cheques or by drawing up a separate text on international cheques. The Working Group also noted that the Commission, at its twelfth session, had authorized the Working Group to proceed with the drafting of rules, if the Group was of the view that the formulation of uniform rules for international cheques was desirable and the application of the draft Convention could be extended to include international cheques.

102. The Working Group noted that the UNCITRAL Study Group on International Payments had stated, on the basis of replies received to a questionnaire, that the cheque was widely used for settling international commercial transactions. Moreover, the replies to the questionnaire showed substantial support for the establishment of uniform rules applicable to international cheques. The Group was also of

the view that the fact that the draft Convention on International Bills of Exchange and International Promissory Notes had now been completed by it would considerably facilitate the drawing up of uniform rules on cheques.

103. The Working Group, therefore, requested the Secretariat to commence preparatory work in respect of cheques. It was agreed that it should decide later, in the light of the issues raised by the drafting of uniform rules, whether it would request the Commission to enlarge the mandate of the Working Group so as to enable such rules to be embodied in a separate draft convention or whether the draft Convention on International Bills of Exchange and International Promissory Notes should be modified so as to include international cheques.

104. In respect of the preparatory work to be carried out by the Secretariat, the Working Group was of the view that studies should be prepared showing the difference in substance between the Geneva Uniform Law on Bills of Exchange and Promissory Notes and the Geneva Uniform Law on Cheques, and to carry out similar work in respect of the Bills of Exchange Act and the relevant provisions of the Uniform Commercial Code. Such preparatory work should preferably be made available to the Working Group in time for its ninth session. The Secretariat should consider if, because of the time factor involved, it would be necessary to have recourse to consultants. In addition, the Secretariat should place before the Working Group draft articles applicable to international cheques, taking into account the draft Convention on International Bills of Exchange and International Promissory Notes adopted by the Working Group and the special features of the law on cheques.

#### FUTURE WORK

105. Pursuant to a decision of the Commission at its twelfth session,<sup>10</sup> the Working Group was agreed that it should hold its ninth session at Headquarters in New York from 2 to 11 January 1980.

<sup>10</sup> Report of the United Nations Commission on International Trade Law on the work of its twelfth session, *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17 (A/34/17)*, para. 124 (b) (Yearbook ... 1979, part one, II, A).

### B. Report of the Working Group on International Negotiable Instruments on the work of its ninth session (New York, 2-11 January 1980) (A/CN.9/181)\*

#### CONTENTS

	<i>Paragraphs</i>
INTRODUCTION .....	1-12
DELIBERATIONS AND DECISIONS .....	13-211
I. Draft Convention on International Bills of Exchange and International Promissory Notes .....	17-155
Part Three: Transfer, holder .....	17-41
Articles 12-22 .....	17-41

\* 13 March 1980.



## CONTENTS (continued)

	Paragraphs
Part Four: Rights and liabilities	42-72
Articles 23-26 (Section 1. The rights of a holder and protected holder)	42-47
Articles 27-33 (Section 2A. General)	47-48
Article 34 (Section 2B. The drawer)	49-51
Article 34 bis (Section 2C. The maker)	52-53
Articles 35-40 (Section 2D. The drawee and the acceptor)	54-57
Articles 41-42 (Section 2E. The endorser)	58-61
Articles 43-45 (Section 2F. The guarantor)	62-72
Part Five: Presentment, dishonour and recourse	73-115
Articles 46-51 (Section 1. Presentment for acceptance)	73-93
Articles 52-56 (Section 2. Presentment for payment)	94-104
Articles 57-68 (Section 3. Recourse)	105-115
Part Six: Discharge	116-155
Article 69 (Section 1. General)	—
Articles 70-86 (Section 2. Payment)	116-155
II. Uniform rules applicable to international cheques	156-207
Articles 1-30 bis	160-207
III. Future work	208-211

## 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).<sup>1</sup> At its fifth session (1972), the Commission established a Working Group on International Negotiable Instruments. The Commission requested that the above draft uniform law be submitted to the Working Group and entrusted the Working Group with the preparation of a final draft.<sup>2</sup>

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).<sup>3</sup>

3. The second session of the Working Group was held in New York in January 1974. At that session the Working Group continued its 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).<sup>4</sup>

<sup>1</sup> 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. See also Report of the United Nations Commission on International Trade Law on the work of its fifth session, *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 17* (A/8717, para. 61 (2) (c)) (Yearbook ... 1972, part one, II, A).

<sup>2</sup> Report of the United Nations Commission on International Trade Law on the work of its fifth session, *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 17* (A/8717, para. 61 (1) (a)) (Yearbook ... 1972, part one, II, A).

<sup>3</sup> 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).

<sup>4</sup> Report of the Working Group on International Negotiable Instruments on the work of its second session (New York, 7-18 January 1974), A/CN.9/86 (Yearbook ... 1974, part two, II, 1).

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).<sup>5</sup>

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.<sup>6</sup>

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.<sup>7</sup>

7. The sixth session of the Working Group was held in Geneva in 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.<sup>8</sup>

8. The seventh session of the Working Group was held in New York in January 1979. At that session, the Working Group, continuing its second reading of the text of the Draft Convention on International Bills of Exchange and

<sup>5</sup> Report of the Working Group on International Negotiable Instruments on the work of its third session (Geneva, 6-17 January 1975), A/CN.9/99 (Yearbook ... 1975, part two, II, 1).

<sup>6</sup> Report of the Working Group on International Negotiable Instruments on the work of its fourth session (New York, 2-12 February 1976), A/CN.9/117 (Yearbook ... 1976, part two, II, 1).

<sup>7</sup> Report of the Working Group on International Negotiable Instruments on the work of its fifth session (New York, 18-29 July 1977), A/CN.9/141 (Yearbook ... 1978, part two, II, A).

<sup>8</sup> Report of the Working Group on International Negotiable Instruments on the work of its sixth session (Geneva, 3-13 January 1978), A/CN.9/147 (Yearbook ... 1978, part two, II, B).



International Promissory Notes, considered articles 24 and 53 to 70.<sup>9</sup>

9. The eighth session of the Working Group was held in Geneva in September 1979. 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 1, 5, 9, 11 and 70 to 86.<sup>10</sup>

10. The Working Group held its ninth session at the United Nations Headquarters in New York from 2 to 11 January 1980. 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 Nigeria, all the members of the Working Group were represented at the ninth session. The session was also attended by observers of the following states: Argentina, Australia, Bulgaria, Chile, People's Republic of China, Colombia, German Democratic Republic, Ghana, Guyana, Haiti, Hungary, Ireland, Japan, Niger, Philippines, Portugal, Rwanda, Sri Lanka, Trinidad and Tobago and Yugoslavia, and by observers from the International Monetary Fund, the Hague Conference on Private International Law, the European Banking Federation and the International Chamber of Commerce.

11. The Working Group elected the following officers:  
Chairman . . . . . Mr. René Roblot (France)  
Rapporteur . . . . . Mr. Roberto Luis Mantilla-Molina (Mexico)

12. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.IV/WP.14); 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); note by the Secretariat: desirability of preparing uniform rules applicable to international cheques (A/CN.9/WG.IV/CRP.5); 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); 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),† sixth (A/CN.9/147),††

seventh (A/CN.9/157)\* and eighth (A/CN.9/178)\*\* sessions; draft convention on international bills of exchange and international promissory notes, articles 5 (8-10), 9 (6), 11 (2), 70 (2, 5), 71, 72 and 74-86 as adopted by the Working Group at its eighth session (A/CN.9/WG.IV/WP.16); text of articles 25 (1) (a), 70, 74 bis and 78 as redrafted by the Secretariat (A/CN.9/WG.IV/WP.17) and a note by the Secretariat setting forth uniform rules applicable to international cheques (A/CN.9/WG.IV/WP.15).

### Deliberations and decisions

13. At the present session the Working Group continued consideration of the draft Convention on International Bills of Exchange and International Promissory Notes in third reading. The Group considered articles 13 to 85, and considered article 5 (10) in connection with article 22.

14. The articles of the draft Convention as adopted by the Working Group at the eighth and the present sessions are set forth as an annex to this report.

15. The Working Group also had a preliminary exchange of views on articles 1 to 30 of the uniform rules applicable to international cheques as drafted by the Secretariat (A/CN.9/WG.IV/WP.15).

16. 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.

### I. DRAFT CONVENTION ON INTERNATIONAL BILLS OF EXCHANGE AND INTERNATIONAL PROMISSORY NOTES

#### [PART THREE: TRANSFER, HOLDER (articles 12-22)]<sup>11</sup>

#### Article 13

17. The text of article 13 as considered by the Working Group is as follows:

"An instrument is transferred

"(a) By endorsement and delivery of the instrument by the endorser to the endorsee; or

"(b) By mere delivery of the instrument if the last endorsement is in blank."

18. The Working Group adopted this paragraph without change.

*New article (to be inserted between article 13 and article 13 bis)*

19. The text of a new article considered by the Working Group is as follows:

"(a) An endorsement must be written on the instrument or on a slip affixed thereto ('allonge'). It must be signed;

\* Yearbook . . . 1973, part two, II, 1.

\*\* Yearbook . . . 1974, part two, II, 1.

\*\*\* Yearbook . . . 1975, part two, II, 1.

\*\*\*\* Yearbook . . . 1976, part two, II, 1.

† Yearbook . . . 1978, part two, II, A.

†† Yearbook . . . 1978, part two, II, B.

<sup>9</sup> 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 (Yearbook . . . 1979, part two, II, A).

<sup>10</sup> Report of the Working Group on International Negotiable Instruments on the work of its eighth session (Geneva, 3-14 September 1979), A/CN.9/178 (reproduced in this volume, part two, III, A, above).

\* Yearbook . . . 1979, part two, II, A.

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

<sup>11</sup> This and subsequent headings are those provisionally included in the text of the Draft Convention. Articles 2, 12, 14, 17 (1), 31, 32, 33, 35, 40, 52, 69, 73, 75, 76, 77 and 86 had previously been deleted by the Working Group.

“(b) An endorsement may be made

“(i) In blank, that is, by a signature alone or by a signature accompanied by a statement to the effect that the instrument is payable to any person in possession thereof;

“(ii) Special, by a signature accompanied by an indication of the person to whom the instrument is payable.”

20. The Working Group adopted the article without change.

#### *Article 13 bis*

21. The text of article 13 *bis* as considered by the Working Group is as follows:

“(1) A person is a holder if he is

“(a) The payee in possession of the instrument; or

“(b) In possession of an instrument

“(i) Which has been endorsed to him; or

“(ii) On which the last endorsement is in blank

and on which there appears an uninterrupted series of endorsements, even if any of the endorsements was forged or was signed by an agent without authority.

“(2) When an endorsement in blank is followed by another endorsement, the person who signed this last endorsement is deemed to be an endorsee by the endorsement in blank.

“(3) A person is not prevented from being a holder by the fact that the instrument was obtained under circumstances, including incapacity or fraud, duress or mistake of any kind, that would give rise to a claim to, or to a defence upon the instrument.”

22. The Group adopted this article without change.

#### *Article 15*

23. The text of article 15 as considered by the Working Group is as follows:

“The holder of an instrument on which the last endorsement is in blank may

“(a) Further endorse the instrument either in blank or to a specified person; or

“(b) Convert the blank endorsement into a special endorsement by indicating therein that the instrument is payable to himself or to some other specified person; or

“(c) Transfer the instrument in accordance with paragraph (b) of article 13.”

24. The Group adopted this article without change.

#### *Article 16*

25. The text of article 16 as considered by the Working Group is as follows:

“[When the drawer, the maker or an endorser has inserted in the instrument or in the endorsement such words as ‘not negotiable’, ‘not transferable’, ‘not to

order’, ‘pay (X) only’, or words of similar import, the transferee does not become a holder except for purposes of collection.]”

26. The Working Group decided to retain this article subject to the following modification of the opening words of the article: “When the drawer or the maker has inserted in the instrument, or an endorser in his endorsement, such words as . . .”.

27. This modification did not entail any change in substance but was adopted in order to make it clear that the article would not apply if an endorser had inserted in the instrument such words as “not negotiable” etc. In such a case, the provision on material alteration (art. 29) would apply.

#### *Articles 17, 18 and 19*

28. The texts of articles 17, 18 and 19 as considered by the Working Group are as follows:

##### *“Article 17*

“(1) (deleted)

“(2) A conditional endorsement transfers the instrument irrespective of whether the condition is fulfilled.

“(3) A claim to or a defence upon the instrument based on the fact that the condition was not fulfilled may not be raised except by the party who endorsed conditionally against his immediate transferee.

##### *“Article 18*

“An endorsement in respect of a part of the sum due under the instrument is ineffective as an endorsement.

##### *“Article 19*

“When there are two or more endorsements, it is presumed, unless the contrary is established, that each endorsement was made in the order in which it appears on the instrument.”

29. The Group adopted these articles without change.

#### *Article 20*

30. The text of article 20 as considered by the Working Group is as follows:

“(1) When an endorsement contains the words ‘for collection’, ‘for deposit’, ‘value in collection’, ‘by procuration’, ‘pay any bank’, or words of similar import, authorizing the endorsee to collect the instrument (endorsement for collection), the endorsee

“(a) May only endorse the instrument for purposes of collection;

“(b) May exercise all the rights arising out of the instrument;

“(c) Is subject to all claims and defences which may be set up against the endorser;

“(2) The endorser for collection is not liable upon the instrument to any subsequent holder.”

31. Two questions were raised: (a) whether it was necessary to indicate expressly in article 20 that the endorsee for collection was an agent of the endorser or, instead, a holder in his own right; (b) whether payment made to the endorsee for collection after the termination or revocation of the authority inherent in the endorsement was due payment if the payor knew about such termination or revocation. The example was given of a statutory termination of the authority upon the death of the endorser.

32. As to the first question, the Working Group was of the view that it was not necessary to specify in article 20 that the endorsee for collection was a holder in his own right. The purpose of article 20 was to set forth certain limitations to the rights of such an endorsee as a holder.

33. As to the second question, the Working Group, after discussion, was of the view that the draft Convention should deal with the case where payment was made to the endorsee for collection by a payor with knowledge of the termination or revocation of the authority given by the endorser to the endorsee for collection. In this respect, attention was drawn to article 18 of the Geneva Uniform Law which provided that the mandate contained in an endorsement for collection did not terminate by reason of the death of the party giving the mandate or by reason of his becoming legally incapable.

34. However, the Group was of the view that the draft Convention should not distinguish between termination and revocation of the authority and the bankruptcy and death of the principal and should relate only to the question of discharge by due payment to an endorsee for collection. Such payment in order to be due payment should be in accordance with article 70, paragraph (3). The Group adopted the article without change.

#### *Articles 21 and 21 bis*

35. The texts of articles 21 and 21 *bis* as considered by the Working Group are as follows:

#### *"Article 21*

"The holder of an instrument may transfer it to a prior party or the drawee in accordance with article 13; nevertheless, in the case where the transferee was a prior holder of the instrument, no endorsement is required and any endorsement which would prevent him from qualifying as a holder may be struck out.

#### *"Article 21 bis*

"An instrument may be transferred in accordance with article 13 after maturity, except by the drawee, the acceptor or the maker."

36. The Working Group adopted these articles without change.

#### *Article 22*

37. The text of article 22 as considered by the Working Group is as follows:

"(1) If an endorsement is forged, the person whose endorsement is forged has against the forger and against

the person who took the instrument directly from the forger the right to recover compensation for any damage that he may have suffered because of the forgery.

"(2) [The drawer or maker of the instrument has a similar right to compensation in circumstances where damage is caused to him by the forgery of the signature of the payee.]

"(3) (deleted provisionally)."

38. The Working Group, after deliberation, was of the view that: (a) article 22 should deal only with cases where an endorsement was forged and not where a signature other than an endorsement was forged; (b) article 22 should also encompass situations where parties other than an endorser suffered damage because of a forged endorsement. Consequently, the Working Group decided to replace in paragraph (1) the words "the person whose endorsement is forged" by the words "any party" and to delete paragraph (2) of this article.

39. The Group discussed the question whether a signature placed on an instrument by an agent without authority should be assimilated to a forged signature. In this connexion, the Group considered the definition of "forged signature" contained in article 5, paragraph (10). This paragraph reads as follows:

"(10) 'Forged signature' includes a signature which is forged by the wrongful or unauthorized use of a stamp, symbol, facsimile, perforation or other means by which a signature may be made in accordance with article 27."

40. The Working Group was of the view that article 22 should cover not only the cases of forged signature as defined in article 5, paragraph (10), but also the case of a signature by an agent without authority. The Group, accordingly, decided to add a paragraph as follows:

"(2) For the purposes of this article, an endorsement placed on an instrument by a person in a representative capacity without authority has the same effects as a forged endorsement."

41. The Working Group was of the view that paragraph (1) of article 22 applied in the following situations:

(a) A forges the endorsement of B;

(b) A, without authority, endorses an instrument by using a stamp, symbol, facsimile, perforation or other means by which a signature may be made in accordance with article 27;

(c) An agent signs his name in a representative capacity without authority.

The cases under (a) and (b) above were covered by article 5, paragraph (10), and the case under (c) above by article 22, paragraph (2).

#### [PART FOUR: RIGHTS AND LIABILITIES]

##### [SECTION 1. THE RIGHTS OF A HOLDER AND A PROTECTED HOLDER]

42. The texts of articles 23 and 24 as considered by the Working Group are as follows:

"Article 23

"(1) The holder of an instrument has all the rights conferred on him by this Convention against the parties to the instrument.

"(2) The holder is entitled to transfer the instrument in accordance with article 13.

"Article 24

"(1) A party may set up against a holder who is not a protected holder:

"(a) Any defence available under this Convention;

"(b) Any defence based on an underlying transaction between himself and the drawer or a previous holder or arising from the circumstances as a result of which he became a party;

"(c) Any defence to contractual liability based on a transaction between himself and the holder;

"(d) Any defence based on incapacity of such party to incur liability on the instrument or on the fact that such party signed without knowledge that his signature made him a party to the instrument, provided that such absence of knowledge was not due to negligence.

"(2) The rights to an instrument of a holder who is not a protected holder are subject to any valid claim to the instrument on the part of any person.

"(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."

43. The Working Group adopted these articles without change.

Article 25

44. The text of article 25 as considered by the Working Group is as follows:

"(1) A party may not set up against a protected holder any defence except:

"(a) Defences under articles 27 (1), 28, 29 (1), 30 (2) and (3), 34 (2), 41 (1) and (2), 43 (4), 54, [55], [58], [60] and 79 of this Convention;

"(b) Defences based on the incapacity of such party to incur liability on the instrument;

"(c) Defences based on the fact that such party signed without knowledge that his signature made him a party to the instrument, provided that such absence of knowledge was not due to his negligence.

"(2) Except as provided in paragraph (3), the rights to an instrument of a protected holder are not subject to any claim to the instrument on the part of any person.

"(3) The rights of a protected holder are not free from any valid claim to, or any defence to liability upon,

the instrument arising from the underlying transaction between himself and the party by whom the claim or defence is raised or arising from any fraudulent act on the part of such holder in obtaining the signature on the instrument of that party.

"(4) The transfer of an instrument by a protected holder vests in any subsequent holder the rights to and upon the instrument which the protected holder had, except where such subsequent holder participated in a transaction which gives rise to a claim to or a defence upon the instrument."

45. The Working Group considered which defences may be set up against a protected holder. The Working Group was of the view that paragraph (1) (a) of this article should not list among such defences those which appeared *ex facie* the instrument. For instance, under article 34, paragraph (2), the drawer, by an express stipulation on the bill, could exclude his liability to the holder thereof. It was evident that the protected holder of such a bill could not overcome the drawer's defence against liability, but since this resulted from the face of the bill it would be superfluous to list it in article 25, paragraph (1) (a).

46. The Working Group agreed to list the following provisions in article 25, paragraph (1) (a): articles 27 (1), 28, 29 (1), 30 (2) and (3), 50, 55, 57, 60 and 79. The Group adopted the article as amended.

Articles 26, 27, 28, 29, 30, 30 bis

47. The texts of articles 26, 27, 28, 29, 30, 30 bis as considered by the Working Group are as follows:

"Article 26

"Every holder is presumed to be protected holder, unless the contrary is proved."

[SECTION 2. LIABILITY OF THE PARTIES]

[A. General]

"Article 27

"(1) Subject to the provisions of articles 28 and 30, a person is not liable on an instrument unless he signs it.

"(2) A person who signs in a name which is not his own is liable as if he had signed it in his own name.

"(3) A signature may be in handwriting or by facsimile, perforations, symbols or any other mechanical means.\*

"Article 28

"A forged signature on an instrument does not impose any liability thereon on the person whose signature was forged. Nevertheless, such person is liable as if he had signed the instrument himself where he has, expressly or impliedly, accepted to be bound by the forged signature or represented that the signature was his own.

"Article (X)

"A Contracting State whose legislation requires that a signature on an instrument be handwritten may, at the time of signature, ratification or accession, make a declaration to the effect that a signature placed on an instrument in its territory must be executed in handwriting."

*"Article 29"*

"(1) If an instrument has been materially altered

"(a) Parties who have signed the instrument subsequent to the material alteration are liable thereon according to the terms of the altered text.

"(b) Parties who have signed the instrument before the material alteration are liable thereon according to the terms of the original text. Nevertheless, a party who has himself made, authorized, or assented to, the material alteration is liable on the instrument according to the terms of the altered text.

"(2) Failing proof to the contrary, a signature is deemed to have been placed on the instrument after the material alteration.

"(3) Any alteration is material which modifies the written undertaking on the instrument of any party in any respect.

*"Article 30"*

"(1) An instrument may be signed by an agent.

"(2) The name or signature of a principal placed on the instrument by an agent with his authority imposes liability on the principal and not on the agent.

"(3) The signature of an agent placed by him on an instrument without authority, or with authority to sign but not showing on the instrument that he is signing in a representative capacity for a named person, or showing on the instrument that he is signing in a representative capacity but not naming the person whom he represents, imposes liability thereon on such agent and not on the person whom the agent purports to represent.

"(4) The question whether a signature was placed on the instrument in a representative capacity may be determined only by reference to what appears on the instrument.

"(5) An agent who is liable pursuant to paragraph 3 and who pays the instrument has the same rights as the person for whom he purported to act would have had if that person had paid the instrument.

*"Article 30 bis"*

"The order to pay contained in a bill does not of itself operate as an assignment of a right to payment existing outside of the bill."

48. The Group adopted this article without change.

*[B. The drawer]**Article 34*

49. The text of article 34 as considered by the Working Group is as follows:

"(1) The drawer engages that upon dishonour of the bill by non-acceptance or non-payment, and upon any necessary protest, he will pay to the holder the amount of the bill, and any interest and expenses which may be recovered under articles 67 or 68.

"(2) The drawer may exclude or limit his own liability by an express stipulation on the bill. Such stipulation has effect only with respect to the drawer."

50. The Working Group considered the question whether the undertaking of the drawer to pay the holder should be extended to payment to a party who was not a holder. The Group was agreed that the undertaking of the drawer should extend also to a party who had reacquired the instrument but who, because of not having struck out a subsequent endorsement, did not qualify as a holder under article 13 *bis*.

51. The Working Group, therefore, decided to modify paragraph (1) of article 34 by adding after the words "he will pay to the holder" the words "or to any party who takes up and pays the bill in accordance with article 67". The Group was agreed that a similar modification should be made in the provisions in respect of the undertaking of the maker (art. 34 *bis* (1)), the acceptor (art. 36 (2)), and the endorser (art. 41 (1)).

*[C. The maker]**Article 34 bis*

52. The text of article 34 *bis* as considered by the Working Group is as follows:

"(1) The maker engages that he will pay to the holder the amount of the note, and any interest and expenses which may be recovered under article 67 or 68.

"(2) The maker may not exclude or limit his own liability by a stipulation on the note. Any such stipulation is without effect."

53. The Working Group adopted this article subject to the modification agreed to under article 34 (see above, para. 51).

*[D. The drawee and the acceptor]**Article 36*

54. The text of article 36 as considered by the Working Group is as follows:

"(1) The drawee is not liable on a bill until he accepts it.

"(2) The acceptor engages that he will pay to the holder, or the drawer who has paid the bill, the amount of the bill, and any interest and expenses which may be recovered under article 67 or 68."

55. The Group adopted this article subject to the modification agreed to under article 34 (see above, para. 51).

*Articles 37, 38 and 39*

56. The texts of articles 37, 38 and 39 as considered by the Working Group are as follows:

*"Article 37"*

"An acceptance must be written on the bill and may be effected:

"(a) By the signature of the drawee accompanied by the word "accepted" or by words of similar import, or

"(b) By the signature alone of the drawee.

*"Article 38"*

"(1) An incomplete instrument which satisfies the requirements set out in article 1 (2) (a) may be accepted by the drawee before it has been signed by the drawer, or while otherwise incomplete.

"(2) A bill may be accepted before, at or after maturity, or after it has been dishonoured by non-acceptance or non-payment.

"(3) When a bill drawn payable at a fixed period after sight, or a bill which must be presented for acceptance before a specified date, is accepted, the acceptor must indicate the date of his acceptance; failing such indication by the acceptor, the drawer, before the issue of the bill, or the holder may insert the date of acceptance.

"(4) If a bill drawn payable at a fixed period after sight is dishonoured by non-acceptance and the drawee subsequently accepts it, the holder is entitled to have the acceptance dated as of the date on which the bill was dishonoured.

*"Article 39"*

"(1) An acceptance must be unqualified. An acceptance is qualified if it is conditional or varies the terms of the bill.

"(2) If the drawee stipulates on the bill that his acceptance is subject to qualification:

"(a) He is nevertheless bound according to the terms of his qualified acceptance;

"(b) The bill is dishonoured by non-acceptance, except that the holder may take an acceptance relating to only a part of the amount of the bill. In that case, the bill is dishonoured by non-acceptance as to the remaining part of the amount.

"(3) An acceptance indicating that payment will be made at a particular address or by a particular agent is not a qualified acceptance, provided that:

"(a) The place in which payment is to be made is not changed;

"(b) The bill is not drawn payable by another agent."

57. The Group adopted these articles without change.

*[E. The endorser]**Article 41*

58. The text of article 41 as considered by the Working Group is as follows:

"(1) The endorser engages that upon dishonour of the instrument by non-acceptance or non-payment, and upon any necessary protest, he will pay to the holder the amount of the instrument, and any interest and expenses which may be recovered under article 67 or 68.

"(2) The endorser may exclude or limit his own liability by an express stipulation on the instrument. Such stipulation has effect only with respect to that endorser."

59. The Group adopted this article subject to adding to paragraph (1) the addition agreed to under article 34 (see para 51 above).

*Article 42*

60. The text of article 42 as considered by the Working Group is as follows:

*(Alternative A)*

"(1) Any person who transfers an instrument by mere delivery is liable to any holder subsequent to himself for any damages that such holder may suffer on account of the fact that prior to such transfer

"(a) A signature on the instrument was forged or unauthorized; or

"(b) The instrument was materially altered; or

"(c) A party has a valid claim or defence against him; or

"(d) The bill is dishonoured by non-acceptance or non-payment or the note is dishonoured by non-payment.

"(2) The damages according to paragraph (1) may not exceed the amount referred to in article 67 or 68.

"(3) Liability on account of any defect mentioned in paragraph (1) is incurred only to a holder who took the instrument without knowledge of such defect."

61. The Group adopted this article without change.

*[F. The guarantor]**Article 43*

62. The text of article 43 as considered by the Working Group is as follows:

"(1) Payment of an instrument, whether or not it has been accepted, may be guaranteed, as to the whole or part of its amount, for the account of a party or the drawee, by any person, who may or may not have become a party. A guarantee may be given by any person who may or may not be a party.

"(2) A guarantee must be written on the instrument or on a slip affixed thereto ('allonge').

"(3) A guarantee is expressed by the words: 'guaranteed', 'aval', 'good as aval' or words of similar import, accompanied by the signature of the guarantor.

"(4) A guarantee may be effected by a signature alone. Unless the content otherwise requires,

"(a) The signature alone on the front of the instrument, other than that of the drawer or the drawee, is a guarantee;

"(b) The signature alone of the drawee on the front of the instrument is an acceptance; and

"(c) A signature alone on the back of the instrument other than that of the drawee is an endorsement.

"(5) A guarantor may specify the person for whom he has become guarantor. In the absence of such

specification, the person for whom he has become guarantor is the acceptor or the drawee in the case of a bill, and the maker, in the case of a note."

63. As regards paragraph (1), the Working Group decided to add the word "already" after the words "may or may not" in the last line. The Working Group also decided to delete in the first sentence of the paragraph the words "by any person who may or may not have become a party" on the ground that they could give rise to misinterpretation and were unnecessary. The Working Group adopted the article subject to these modifications.

#### *Article 44*

64. The text of article 44 as considered by the Working Group is as follows:

"(1) A guarantor is liable on the instrument to the same extent as the party for whom he has become guarantor, unless the guarantor has stipulated otherwise on the instrument.

"(2) If the person for whom he has become guarantor is the drawee, the guarantor undertakes to pay the bill when due, if the drawee does not pay or does not accept and pay the bill."

65. The question was raised as to what was the meaning of the words "to the same extent as" in paragraph (1) and, in particular, whether these words should be interpreted to mean that a guarantor could raise against the holder the defences which were available to the party for whom he had become guarantor. The Working Group was of the view that the words "to the same extent as" should be interpreted as follows:

"(a) In the absence of any stipulation to the contrary, the guarantor of a party was liable for the amount for which the party guaranteed was liable;

"(b) The nature of the liability of the guarantor was the same as the nature of the liability of the party for whom he became guarantor; thus, a guarantor for an endorser was liable only upon due presentment and protest whilst the guarantor of an acceptor was liable even if the instrument was not presented for payment or protested;

"(c) A guarantor was entitled to raise, in addition to his own defences, those defences available to the party for whom he became guarantor."

66. The Working Group did not accept a proposal that the word "party" in paragraph (1) should be modified to read "party or person" on the ground that the draft Convention set forth special rules as regards the liability of the guarantor for the drawee.

67. As regards paragraph (2) of article 44, it was observed that there might be a contradiction between this paragraph and article 55, paragraph (3), in that paragraph (2) of article 44 appeared to state that the liability of the guarantor for the drawee would crystallize only if the drawee did not pay or did not accept and pay the bill, whereas article 55, paragraph (3) preserved the liability of the guarantor of the drawee in the case where no presentment to the drawee had been made. The Working Group

was of the view that presentment to the drawee should not be necessary in order to make the guarantor of the drawee liable.

68. Consequently, the Working Group decided that article 44, paragraph (2) should be modified to read as follows:

"If the person for whom he has become guarantor is the drawee, the guarantor undertakes to pay the bill when due."

69. The Working Group adopted article 44 as amended.

#### *Article 45*

70. The text of article 45 as considered by the Working Group is as follows:

"The guarantor who pays the instrument has rights thereon against the party for whom he became guarantor and against parties who are liable thereon to that party."

71. The question was raised as to what rights the guarantor who paid the instrument had against the party for whom he became guarantor and against parties who were liable on the instrument to that party. The Group was of the view that the guarantor should have the rights to payment arising out of the instrument as if he were the holder.

72. The further question was raised as to what the rights of the guarantor who had guaranteed and paid only part of the amount of the instrument would be. It was observed that in such a case the holder who had received partial payment would not part with the instrument and that this raised in turn the question of how the guarantor could then exercise his rights on the instrument against prior parties. The Group requested the Secretariat to include a provision in article 71 following the approach of the Geneva Convention (article 51) relating to partial payment.

### [PART FIVE: PRESENTMENT, DISHONOUR AND RECOURSE]

#### [SECTION 1. PRESENTMENT FOR ACCEPTANCE]

#### *Article 46*

73. The text of article 46 as considered by the Working Group is as follows:

"(1) A bill may be presented for acceptance.

"(2) A bill must be presented for acceptance:

"(a) When the drawer has stipulated on the bill that it must be presented for acceptance;

"(b) When the bill is drawn payable at a fixed period after sight; or

"(c) When the bill is drawn payable elsewhere than at the residence or place of business of the drawee, except where such a bill is payable on demand."

74. The Group adopted this article without change.

### Article 47

75. The text of article 47 as considered by the Working Group is as follows:

"(1) The drawer may stipulate on the bill that it must not be presented for acceptance or that it must not be so presented before a specified date or before the occurrence of a specified event.

"(2) If a bill is presented for acceptance notwithstanding a stipulation permitted under paragraph (1) and acceptance is refused, the bill is not thereby dishonoured.

"(3) If the drawee accepts a bill notwithstanding a stipulation that it must not be presented for acceptance, the acceptance is effective."

76. It was noted that article 47, in that it allowed the drawer to stipulate that the bill was not to be presented for acceptance, could give rise to difficulties of interpretation. In particular, it was not immediately clear whether the drawer was entitled to place such a stipulation on a bill which under article 46 had to be presented for acceptance.

77. The general view was that the drawer should have this faculty also in respect of a bill drawn payable at a fixed period after sight or drawn payable elsewhere than at the residence or place of business of the drawee. It was understood that the purpose of the stipulation under article 47 was to permit the drawer to limit or exclude his liability in case of non-acceptance of a bill by the drawee. Accordingly, the Group decided that paragraph (1) should be preceded by the following words: "Notwithstanding the provisions of article 46".

### Articles 47 bis and 48

78. The text of article 47 *bis* as considered by the Working Group is as follows:

"(1) Presentment for acceptance must be made to the drawee by or on behalf of the holder or the drawer.

"(2) A bill drawn upon two or more drawees may be presented to any one of them, unless the bill clearly indicates otherwise.

"(3) Presentment for acceptance may be made to a person or authority other than the drawee if that person or authority is entitled under the applicable law to accept the bill."

79. The Working Group, after deliberation, was of the opinion that the term "presentment for acceptance" as used in the draft Convention should be interpreted as an act to which the Convention attached legal effects. Hence, presentment for acceptance by the drawer, though often occurring in practice, could not be considered as presentment for acceptance under the Convention. The Group, therefore, decided to delete the words "or the drawer" at the end of paragraph (1).

80. The Working Group adopted the substance of article 47 *bis* as amended and decided to incorporate it into article 48 so that the provisions of article 47 *bis* would form part of the concept of due presentment.

81. The text of article 48 as considered by the Working Group is as follows:

"A bill is duly presented for acceptance if it is presented in accordance with the following rules:

"(a) The holder must present the bill to the drawee on a business day at a reasonable hour. Where a place of acceptance is specified in the bill, presentment must be made at that place.

"(b) If a bill is drawn payable on a fixed date, presentment for acceptance must be made before or on the date of maturity.

"(c) A bill drawn payable on demand or at a fixed period after sight must be presented for acceptance within one year of its date.

"(d) A bill in which the drawer has stated a date or time-limit for presentment for acceptance must be presented on the stated date or within the stated time-limit."

82. The Working Group decided that this article should be modified as noted in paragraph 80 above.

83. The Working Group considered the following revised text which, in accordance with the decision by the Working Group (see para. 80 above) incorporated the provisions of article 47 *bis* and 48:

"A bill is duly presented for acceptance if it is presented in accordance with the following rules:

"(a) The holder must present the bill to the drawee on a business day at a reasonable hour;

"(b) A bill drawn upon two or more drawees may be presented to any one of them, unless the bill clearly indicates otherwise;

"(c) Presentment for acceptance may be made to a person or authority other than the drawee if that person or authority is entitled under the applicable law to accept the bill;

"(d) If a bill is drawn payable on a fixed date, presentment for acceptance must be made before or on the date of maturity;

"(e) A bill drawn payable on demand or at a fixed period after sight must be presented for acceptance within one year of its date;

"(f) A bill in which the drawer has stated a date or time-limit for presentment for acceptance must be presented on the stated date or within the stated time-limit."

84. The Working Group, after deliberation, adopted this text without change.

85. It was observed by two representatives that the draft Convention should state clearly that presentment of a bill for acceptance could also be made by a person in possession of the bill other than the holder, acting on behalf of the holder. On the other hand, presentment for payment should be made only by the holder. The difference in approach in respect of these two kinds of presentment would lead to the following result: if a person other than the holder presented a bill for payment, payment by



the acceptor to such a person would not constitute due payment and refusal to pay on the part of the acceptor would therefore not constitute dishonour. However, if a bill was presented for acceptance by a person acting on behalf of the holder, refusal by the drawee to accept would constitute dishonour by non-acceptance.

#### Article 49

86. The text of article 49 as considered by the Working Group is as follows:

"Presentment for acceptance is dispensed with

"(a) If the drawee is dead or has no longer the power freely to deal with his assets by reason of his insolvency, or is a fictitious person or a person not having capacity to incur liability on the instrument as an acceptor, or if the drawee is a corporation, partnership, association or other legal entity which has ceased to exist;

"(b) When, with the exercise of reasonable diligence, presentment cannot be effected within the time-limits prescribed for presentment for acceptance."

87. The Group adopted the article without change. It requested the Secretariat to clarify in the commentary that the application of this article was not restricted to those bills which under article 46, paragraph (2) must be presented for acceptance.

#### Article 50

88. The text of article 50 as considered by the Working Group is as follows:

"If a bill which must be presented for acceptance is not so presented, the drawer, the endorsers and their guarantors are not liable on the bill."

89. The Group adopted the article without change.

#### Article 51

90. The text of article 51 as considered by the Working Group is as follows:

"(1) A bill is considered to be dishonoured by non-acceptance.

"(a) When the drawee, upon due presentment, expressly refuses to accept the bill or acceptance cannot be obtained with reasonable diligence or when the holder cannot obtain the acceptance to which he is entitled under this Convention;

"(b) If presentment for acceptance is dispensed with pursuant to article 49, unless the bill is in fact accepted.

"(2) If a bill is dishonoured by non-acceptance the holder may, subject to the provisions of article 57, exercise an immediate right of recourse against the drawer, the endorsers and their guarantors."

91. The Working Group considered the question whether the holder of a bill was entitled to an immediate right of recourse against the guarantor of the drawee and whether it was necessary for the holder to protest the bill before being able to exercise his right of recourse. The

Group was of the view that the holder should be entitled to such immediate right of recourse and that protest was not necessary in order to preserve his rights against the guarantor of the drawee.

92. Accordingly, the Working Group modified paragraph (2) of article 51 as follows:

"(2) If a bill is dishonoured by non-acceptance the holder may

"(a) Subject to the provisions of article 57, exercise an immediate right of recourse against the drawer, the endorsers and their guarantors;

"(b) Exercise an immediate right of recourse against the guarantor of the drawee."

93. The Working Group adopted article 51 as amended.

### [SECTION 2. PRESENTMENT FOR PAYMENT]

#### Article 53

94. The text of article 53 as considered by the Working Group is as follows:

"An instrument is duly presented for payment if it is presented in accordance with the following rules:

"(a) The holder must present the instrument to the drawee or to the acceptor or to the maker on a business day at a reasonable hour;

"(b) A bill drawn upon or accepted by two or more drawees, or a note signed by two or more makers, may be presented to any one of them, unless the bill or note clearly indicates otherwise;

"(c) If the drawee or the acceptor or the maker is dead, presentment must be made to the persons who under the applicable law are his heirs or the persons entitled to administer his estate;

"(d) Presentment for payment may be made to a person or authority other than the drawee, the acceptor or the maker if that person or authority is entitled under the applicable law to pay the instrument;

"(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;

"(f) An instrument which is payable on demand must be presented for payment within one year of its date;

"(g) An instrument must be presented for payment:

"(i) At the place of payment specified on the instrument; or

"(ii) If no place of payment is specified, at the address of the drawee or the acceptor or the maker indicated on the instrument; or

"(iii) If no place of payment is specified and the address of the drawee or the acceptor or the maker is not indicated, at the principal place of business or habitual residence of the drawee or the acceptor or the maker."

95. The question was raised as to the compatibility between paragraph (a) which required that presentment be made to the drawee, the acceptor or the maker and paragraph (g) (i) which required that presentment must be made at the place specified on the instrument, if so specified. It was observed that the place where the drawee, the acceptor or the maker could be found was not necessarily the place where the bill had to be presented for payment. The Group, after discussion, was of the view that there was not necessarily a contradiction between the two provisions since, in a case of a domiciled bill or note, the paying bank would be an agent of the drawee, acceptor or maker.

96. The Working Group adopted the article without change.

#### Article 54

97. 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, 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."

98. The Working Group adopted this article without change. Two representatives reserved their position in respect of paragraph 2 (a) of this article on the ground that in their view the possibility under the provision of presentment being waived on the instrument by implication was unacceptable.

#### Article 55

99. 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) 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."

100. The question was raised whether presentment for payment to the guarantor of the drawee was a condition precedent to the liability of parties secondarily liable. The Working Group was of the view that failure to present the bill to the guarantor of the drawee did not deprive the holder of his right of recourse against parties secondarily liable, on the ground that presentment for payment means presentment to the drawee or the acceptor and not presentment to the guarantor of the drawee. The undertaking of the parties secondarily liable was to pay to the holder if the bill was presented to the drawee or to the acceptor and payment was refused. It was not part of their undertaking that the bill should be presented to the guarantor of the drawee if the drawee had not accepted and not paid.

101. The Working Group adopted article 55 without change.

#### Article 56

102. 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 payment is refused upon due presentment or when the holder cannot obtain the payment to which he is entitled under this Convention.

"(b) (deleted)

"(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."

103. The Working Group adopted this article without change.

104. One representative expressed the view that an instrument should be considered as dishonoured by non-payment and, consequently, that there should be an immediate right of recourse in the case of insolvency or bankruptcy of the debtor. In this respect reference was made to article 43 of the Geneva Uniform Law on Bills of Exchange and Promissory Notes according to which the holder may exercise an immediate right of recourse against the endorsers, the drawer and the other parties liable in the event of the bankruptcy of the drawee or the acceptor and in the event of the bankruptcy of the drawer of a non-acceptable bill. In the view of this representative such a provision would be desirable in that it protected the holder.

[SECTION 3. RECOURSE]

*Articles 57, 58, 59 and 60*

105. The texts of articles 57, 58, 59 and 60 as considered by the Working Group are as follows:

*"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.

*"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."

106. The Group adopted these articles without change.

*Article 61*

107. 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 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."

108. The Working Group adopted this article subject to the following modification in paragraph (2), subparagraph (e): replace the reference to "article 49 (2)" by a reference to "article 49".

109. In respect of paragraph 2 (a), two representatives reserved their position on the ground that, in their view, the possibility under that provision of protest being waived on the instrument by implication was unacceptable.

*Articles 62, 63, 64, 65, 66 and 66 bis*

110. The texts of articles 62, 63, 64, 65, 66 and 66 bis considered by the Working Group are as follows:

*"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."

111. The Group adopted these articles without change.

*Article 67*

112. The text of article 67 as considered by the Working Group is as follows:

"(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 at the rate then 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.”

113. The Working Group adopted the article without change. The Group was agreed that the determination of the rate of interest in paragraph (2) and of the discount rate in paragraph (3) should be left to the Conference of Plenipotentiaries to be convened to conclude the Convention.

#### Article 68

114. 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 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) 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.”

115. The Working Group adopted this article without change.

#### [PART SIX: DISCHARGE]

##### [Section 1. General]

##### [SECTION 2. PAYMENT]

#### Article 70

116. 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 he pays the holder or a party subsequent to himself the amount due pursuant to articles 67 and 68:

“(a) At or after maturity, or

“(b) Before maturity, upon dishonour by non-acceptance.

“(2) Payment before maturity other than under paragraph (1) (b) of this article does not discharge the party making the payment of his liability on the instrument except in respect of the person to whom payment was made.

“(3) A party is not discharged of his liability if he 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.

“(4) (a) A person receiving payment of an instrument under paragraph (1) of this article must, unless agreed otherwise, deliver to the person making such payment the instrument, any protest, and a receipted account.

“(b) The person from whom payment is demanded may withhold payment if the person demanding payment does not deliver the instrument to him. Withholding payment in these circumstances does not constitute dishonour by non-payment.

“(c) If payment is made but the payor fails to obtain the instrument, the payor is discharged but the discharge cannot be set up as a defence against a protected holder.”

117. As to paragraph (1), the Working Group was of the view that a party was not discharged of his liability on the instrument when he paid a party subsequent to himself who was not the holder or who had not taken up and paid the instrument pursuant to articles 67 and 68. The Group, therefore, decided to insert after the words “or a party subsequent to himself” the words “who has taken up and paid the instrument and is in possession thereof.”

118. The Working Group adopted paragraph (2) without change.

119. As to paragraph (3), one observer stated that under this paragraph a party who paid a protected holder was not discharged if a third person had claimed the instrument from such holder and that, consequently, such party should be able to set up against such holder the defence of *ius tertii*. On the other hand, it followed from article 24, paragraph (3) that the defence of *ius tertii* could be raised against a protected holder. It was proposed, therefore, that the words “who is not a protected holder” in article 24, paragraph (3) should be deleted and placed in another article, for instance article 25.

120. The Working Group, after discussion, was of the opinion that paragraph (3) of article 70 should be redrafted so as to achieve the effect that a party who paid a holder who was not a protected holder was not discharged of his liability if he had a defence based on the claim of a third person to the instrument.

121. The Working Group adopted the following text of paragraph (3) of article 70:

“(3) A party is not discharged of his liability if he pays a holder who is not a protected holder and 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."

122. Paragraph (4) of article 70 was adopted without change.

#### *Article 71*

123. The text of article 71 as considered by the Working Group is as follows:

"(1) The holder is not obliged to take partial payment.

"(2) If the holder does not take partial payment, the instrument is dishonoured by non-payment.

"(3) If the holder takes partial payment from the drawee or the acceptor or the maker:

"(a) The acceptor or the maker is discharged of his liability on the instrument to the extent of the amount paid; and

"(b) The instrument is to be considered as dishonoured by non-payment as to the amount unpaid.

"(4) The drawee or the acceptor or the maker making partial payment may require that mention of such payment be made on the instrument and that a receipt therefor be given to him.

"(5) When an instrument has been paid in part, a party who pays the unpaid amount is discharged of his liability thereon. In that case, the person receiving the payment must deliver the receipted instrument and any protest to the party making the payment."

124. The Working Group adopted paragraphs (1), (2) and (3) of this article without change.

125. In respect of paragraph (4), the Working Group decided to replace the words "the acceptor or the maker" by the words "a party" so that the paragraph would apply also to an endorser or guarantor and to an endorser and guarantor who satisfied his obligation to make payment in respect of part only of the amount of the instrument. The Working Group also decided to add a subparagraph (b) to paragraph (4) as follows:

"The holder who takes partial payment must give to the drawee or the party making partial payment a certified copy of the instrument in order to enable subsequent recourse to be exercised."

126. The following texts of paragraphs (4), (5) and (6) as redrafted by the Secretariat were considered by the Working Group.

"(4) If the holder takes partial payment from a party to the instrument other than the drawee, the acceptor or the maker.

"(a) The party making payment is discharged of his liability on the instrument to the extent of the amount paid; and

"(b) The holder must give such party a certified copy of the bill, and of any authenticated protest, in order to enable subsequent recourse to be exercised.

"(5) The drawee or a party making partial payment may require that mention of such payment be made on the instrument and that a receipt therefor be given to him.

"(6) Where a party pays the unpaid amount, the person receiving the unpaid amount who is in possession of the instrument must deliver to him the receipted instrument and any authenticated protest."

127. After deliberation, the Group adopted these paragraphs.

#### *Article 72*

128. The text of article 72 as considered by the Working Group is as follows:

"(1) The holder may refuse to take payment in a place other than the place where the instrument was duly presented for payment in accordance with article 53 (g).

"(2) If payment is not then made in the place where the instrument was duly presented for payment in accordance with article 53 (g), the instrument is considered as dishonoured by non-payment."

129. The Group adopted this article without change.

#### *Article 74*

130. The text of article 74 as considered by the Working Group is as follows:

"(1) An instrument must be paid in the currency in which the amount of the instrument is expressed.

"(2) The drawer or the maker may indicate on the instrument that it must be paid in a specified currency other than the currency in which the amount of the instrument is expressed. In that case:

"(a) The instrument must be paid in the currency so specified;

"(b) The amount payable is to be calculated according to the rate of exchange indicated on the instrument. Failing such an indication, the amount payable is to be calculated according to the rate of exchange for sight drafts on the date of maturity:

"(i) Ruling at the place where the instrument must be presented for payment in accordance with article 53 (g), if the specified currency is that of that place (local currency); or

"(ii) If the specified currency is not that of that place, according to the usages of the place where the instrument must be presented for payment in accordance with article 53 (g).

"(c) If such an instrument is dishonoured by non-acceptance, the amount payable is to be calculated:

"(i) If the rate of exchange is indicated on the instrument, according to that rate;

"(ii) If no rate of exchange is indicated on the instrument, at the option of the holder, according to the rate of exchange ruling at the date of dishonour or on the date of actual payment.

“(d) If such an instrument is dishonoured by non-payment, the amount is to be calculated:

“(i) If the rate of exchange is indicated on the instrument, according to that rate;

“(ii) If no rate of exchange is indicated on the instrument, at the option of the holder, according to the rate of exchange ruling on the date of maturity or on the date of actual payment.

“(3) Nothing in this article prevents a court from awarding damages for loss caused to the holder by reason of fluctuations in rates of exchange if such loss is caused by dishonour for non-acceptance or non-payment.

“(4) The rate of exchange ruling at a certain date is the rate of exchange ruling, at the option of the holder, at the place where the instrument must be presented for payment in accordance with article 53 (g) or at the place of actual payment.”

131. The Working Group adopted this article without change.

132. With regard to the possible modification of the article to cover also instruments being drawn or made in units of account (see A/CN.9/178, paras. 37 and 38), the Working Group noted that the Study Group on International Payments, which was to consider this question, had not yet met since the eighth session of the Working Group and that the views of the Study Group would be submitted to it at the next session.

#### *Article 74 bis*

133. The text of article 74 *bis* as considered by the Working Group is as follows:

“Nothing in this Convention prevents a Contracting State from enforcing exchange control regulations applicable in its territory, including regulations which it is bound to apply by virtue of international agreements to which it is a party.”

134. The Group adopted this article without change.

#### *Article 78*

135. The text of article 78 as considered by the Working Group is as follows:

“(1) When a party is discharged wholly or partly of his liability on the instrument, any party who has a right of recourse against him is discharged to the same extent.

“(2) Payment of a bill by the drawee to the holder of the amount due in whole or in part discharges all parties to the bill to the same extent.”

136. The Group adopted this article without change.

#### *Article 79*

137. The text of article 79 as considered by the Working Group is as follows:

“(1) A right of action arising on an instrument can no longer be exercised after four years have elapsed

“(a) Against the acceptor or the maker or their guarantor, after the date of maturity;

“(b) Against the drawer or an endorser or their guarantor, after the date of protest for dishonour or, where protest is dispensed with, the date of dishonour.

“(2) (a) If a party has taken up and paid the instrument in accordance with article 67 or 68 within one year before the expiration of the period referred to in paragraph (1) of this article, such party may exercise his right of action against a party liable to him within one year after the date on which he took up and paid the instrument.

“(b) (Add subparagraph in respect of a party who pays subsequently.)”

138. With respect to paragraph (1), the Working Group was of the view that the limitation period under the article should also run against the guarantor of the drawee. Consequently, the Working Group decided that paragraph 1 (a) should read as follows:

“(1) (a) Against the acceptor or the maker or their guarantor or the guarantor of the drawee, after the date of maturity;”

139. The Working Group adopted paragraph (2) (a) without change.

140. With respect to paragraph (2) (b), it was observed that paragraph (a) only covered the case where a party had taken up and paid the instrument within one year before the expiration of the period of limitation referred to in paragraph (1). Paragraph (2) should therefore contain an additional paragraph which should deal with cases where a party had taken up and paid an instrument after the period of limitation referred to in paragraph (1) had expired.

141. The Working Group considered the desirability of a separate paragraph in respect of the limitation period for statutory rights of action which the draft convention conferred, in certain circumstances, on a party who has suffered loss or damage (articles 22, 42, 66 and 81). Under one view such limitation periods should be left to the applicable national law. Under another view it should first be examined whether there was incompatibility between the limitation periods under article 79 in respect of actions on the instrument and limitation periods in respect of actions related to an instrument but outside the instrument. The Group requested the Secretariat to examine this question and decided that, if there was no incompatibility, an additional paragraph should not be included in the draft convention.

#### *Article 80*

142. The text of article 80 as considered by the Working Group is as follows:

“(1) When an instrument is lost, whether by destruction, theft or otherwise, the person who lost the instrument has, subject to the provisions of paragraphs (2) and (3) of this article, the same right to payment which he would have had if he had been in possession of the instrument. The party from whom payment is claimed cannot set up as a defence against liability on the

instrument the fact that the person claiming payment is not in possession thereof.

"(2) (a) The person claiming payment of a lost instrument must present to the party from whom he claims payment a copy of the instrument or must state in writing to that party:

"(i) The elements of the lost instrument pertaining to the requirements set out in article 1 (2) or 1 (3);

"(ii) The facts showing that, if he had been in possession of the instrument, he would have had a right to payment from the party from whom payment is claimed;

"(iii) The facts which prevent production of the instrument.

"(b) The party from whom payment of a lost instrument is claimed may require the person claiming payment to give security in order to indemnify him for any loss which he may suffer by reason of the subsequent payment of the lost instrument.

"(c) The nature of the security and its terms are to be determined by agreement between the person claiming payment and the party from whom payment is claimed. Failing such an agreement, the Court may determine whether security is called for and, if so, the nature of the security and its terms.

"(d) If the security cannot be given, the Court may order the party from whom payment is claimed to deposit the amount of the lost instrument, and any interest and expenses which may be claimed under articles 67 and 68, with the Court or any other competent authority or institution, and may determine the duration of such deposit. Such deposit is to be considered as payment to the person claiming payment."

143. The Working Group adopted paragraph (1) of this article without change.

144. With respect to paragraph (2) (a), the Working Group considered that it should be amended to clarify that the requirement of a writing stating the elements of the lost instrument could be satisfied by a copy of the instrument. The Working Group accordingly adopted the following text of paragraph (2) (a) (i):

"(2) (a) The person claiming payment of a lost instrument must state in writing to the party from whom he claims payment:

"(i) The elements of the lost instrument pertaining to the requirements set forth in article 1 (2) or 1 (3); these elements may be satisfied by presenting to that party a copy of that instrument."

145. The Working Group adopted paragraph 2 subject to this amendment.

#### Article 81

146. The text of article 81 as considered by the Working Group is as follows:

"(1) A party who has paid a lost instrument and to whom the instrument is subsequently presented for

payment by another person must notify the person to whom he paid of such presentment.

"(2) Such notification must be given on the day the instrument is presented or on one of the two business days which follow and must state the name of the person presenting the instrument and the date and place of presentment.

"(3) Failure to notify renders the party who has paid the lost instrument liable for any damages which the person whom he paid may suffer from such failure, provided that the total amount of the damages does not exceed the amount of the instrument and any interest and expenses which may be claimed under article 67 or 68.

"(4) Delay in giving notice is excused when the delay is caused by circumstances which are beyond the control of the person who has paid the lost instrument and which he could neither avoid nor overcome. When the cause of delay ceases to operate notice must be given with reasonable diligence.

"(5) Notice is dispensed with when the cause of delay in giving notice continues to operate beyond 30 days after the last date on which it should have been given."

147. The Group adopted this article without change.

#### Article 82

148. The text of article 82 as considered by the Working Group is as follows:

"(1) A party who has paid a lost instrument in accordance with the provisions of article 80 and who is subsequently required to, and does, pay the instrument, or who loses his right to recover from any party liable to him, has the right

"(a) If security was given, to realize the security; or

"(b) If the amount was deposited with the Court or other competent authority, to reclaim the amount so deposited.

"[(2) The person who has given security in accordance with the provisions of paragraph (2) (b) of article 80, may reclaim the security when the party for whose benefit the security was given no longer has the right to realize the security under paragraph (1) and the acceptor or the maker can no longer be sued on the instrument by virtue of article 79, or when he cannot obtain payment from any party liable to him because of that party's raising a valid defence or that party's insolvency.]

"(3) If the amount was deposited with a Court or other competent authority in accordance with paragraph (2) (d) of article 80 and was not reclaimed under paragraph (1) (b) of this article within the period of time provided by article 79 during which the party who has deposited the amount and the acceptor or the maker can be sued on the instrument, the person for whose benefit the amount was deposited may request the Court which ordered the deposit to order that the amount deposited be paid out to him. The Court may grant such request upon such terms and conditions as it may require."



149. The Working Group modified paragraph 1 of the article as follows:

"(1) A party who has paid a lost instrument in accordance with the provisions of article 80 and who is subsequently required to, and does, pay the instrument, or who loses his right to recover from any party liable to him and such loss of right was due to the fact that the instrument was lost, has the right

"(a) If security was given, to realize the security; or

"(b) If the amount was deposited with the Court or other competent authority, to reclaim the amount so deposited."

150. The modification was made on the ground that a party who had paid a lost instrument under article 80 should be entitled to realize the security not only in the case where he was obliged to pay the instrument a second time but also in the case where he had lost his right to recourse against a party liable to him, and such loss of right was due to the fact that the instrument was lost.

151. The Working Group considered paragraphs (2) and (3) of this article. The paragraphs set forth rules applicable to the situation where a party had paid the lost instrument and was given security under article 80. The question then arose on what ground the person who had given security could reclaim that security. The Group was of the view that the wording of paragraphs (2) and (3) was too complex and did not sufficiently reflect the basic rule according to which security could be reclaimed when the party to whom security had been given no longer ran the risk of suffering loss because of the lost instrument. Accordingly the Working Group adopted the following general rule in replacement of paragraphs (2) and (3):

"The person who has given security in accordance with the provisions of paragraph (2) (b) of article 80 is entitled to reclaim the security when the party for whose benefit the security was given is no longer at risk to suffer loss because of the fact that the instrument is lost."

#### *Article 83*

152. The text of article 83 as considered by the Working Group is as follows:

"A person claiming payment of a lost instrument duly effects protest for dishonour by non-payment by the use of a copy of the lost instrument or a writing that satisfies the requirements of article 80, paragraph (2) (a)."

153. The Working Group deleted the words "a copy of the lost instrument or", as those words were no longer necessary as a consequence of the amendments adopted to article 80, paragraph (2) (a).

#### *Articles 84 and 85*

154. The texts of articles 84 and 85 as considered by the Working Group are as follows:

#### *"Article 84*

"A person receiving payment of a lost instrument in accordance with article 80 must deliver to the party

paying the writing required under paragraph (2) (a) of article 80 receipted by him and any protest and a receipted account.

#### *"Article 85*

"(a) A party who paid a lost instrument in accordance with article 80 has the same rights which he would have had if he had been in possession of the instrument.

"(b) Such party may exercise his rights only if he is in possession of the receipted writing referred to in article 84."

155. The Group adopted these articles without change.

### II. UNIFORM RULES APPLICABLE TO INTERNATIONAL CHEQUES

156. The Working Group, at its eighth session, requested the Secretariat to commence preparatory work in respect of uniform rules applicable to international cheques. At the present session, the Working Group had before it a note by the Secretariat setting forth proposed draft rules on international cheques (A/CN.9/WG.IV/WP.15). These rules took into account the provisions of the draft Convention on International Bills of Exchange and International Promissory Notes and the special provisions applicable to cheques found in the Geneva Uniform Law on cheques, the United Kingdom Bills of Exchange Act of 1882 and the Uniform Commercial Code.

157. The Working Group considered the draft uniform rules article by article but decided not to take any final decision in respect of these articles and to postpone any decision regarding the question whether these rules should be set forth in a separate draft Convention on International Cheques or whether they should form part of one convention dealing with international bills of exchange, international promissory notes and international cheques.

158. The Working Group, after consideration, also decided that any legal issues arising outside the cheque, such as those relating to the relationship between banks and their clients, the duty of the drawee bank to pay the cheque, and the protection afforded to the paying and collecting banker should be considered at a later stage in order to ascertain whether such issues should be covered by the proposed uniform rules.

159. The Working Group, at the present session, considered articles 1 to 30 *bis* as set forth in document A/CN.9/WG.IV/WP.15.

#### *Article 1<sup>12</sup>*

160. The text of article 1 as considered by the Working Group is as follows:

"(1) This Convention applies to international cheques.

<sup>12</sup> Each draft article of the uniform rules set forth herein is numbered to correspond to the draft article in the draft Convention on International Bills of Exchange and International Promissory Notes which relates to the same or a similar issue covered by the draft article of these uniform rules. Accordingly, when a draft article in the draft Convention has no relation to cheques, there is an interruption in the numbering sequence of the draft articles of these uniform rules, and when a draft article in these uniform rules has no relation to bills of exchange or promissory notes, it is called "Article X".

"(2) An international cheque is a written instrument which

"(a) Contains, in the text thereof, the words 'international cheque (Convention of ...)';

"(b) Contains an unconditional order whereby the drawer directs the drawee to pay a definite sum of money to the payee or to his order or to bearer;

"(c) Is drawn on a banker;

"(d) Is payable on demand;

"(e) Is dated;

"(f) Shows that at least two of the following places are situated in different States;

"(i) The place where the cheque is drawn;

"(ii) The place indicated next to the signature of the drawer;

"(iii) The place indicated next to the name of the drawee;

"(iv) The place indicated next to the name of the payee;

"(v) The place of payment;

"(g) Is signed by the drawer.

"(3) Proof that the statement referred to in paragraph (2) (f) of this article are incorrect does not affect the application of this Convention."

(2) (c) "*drawn on a banker*"

161. In respect of paragraph (2) (c), it was observed that under some legal systems a "bank" or a "banker" included institutions assimilated by law to bankers. Accordingly, the Working Group was of the view that article 5 should set forth a paragraph stating that "banker" includes the persons or institutions assimilated by the applicable law to bankers.

(2) (d) "*payable on demand*"

162. In respect of paragraph (2) (d), it was noted that under the Geneva Uniform Law on Cheques the formal requisites of a cheque did not include the requirement that the cheque state on its face that it is payable on demand. In the Geneva Uniform Law the requirement that a cheque be payable on demand is contained in chapter IV on presentment and payment. Article 28 of that law provides that the cheque is payable on sight and that any contrary stipulation shall be disregarded. Therefore, under the Geneva Uniform Law an instrument which satisfied the formal requisites set forth in article 1 but which stated on its face a future date of payment was nevertheless a cheque.

163. The Working Group was of the view that an approach along the lines of the Geneva Uniform Law would be desirable in that it would extend the application of the uniform rules. The Group was, therefore, of the opinion that the requirement that a cheque be payable on demand should not be retained among the formal requisites set forth in paragraph (2) of article 1 but should be included among the rules applicable to presentment and payment.

(2) (f) "*international elements*"

164. With regard to paragraph (2) (f), the Working Group was of the view that the requirements of internationality applicable in respect of an international bill of exchange or an international promissory note should also apply in respect of an international cheque. It was noted that in the case of a cheque drawn payable to bearer the requirement that at least two of the five places mentioned under paragraph (2) (f) be stated on the face of the cheque might not be met easily.

165. The Working Group was of the view that subparagraph (f) (ii) should provide not only for the place indicated next to the signature of the drawer but also for the place indicated next to the name of the drawer. Such an addition was reasonable in view of the fact that in some countries the name and address of the drawer were printed on cheques.

*Article 3*

166. The text of article 3 as considered by the Working Group is as follows:

"This Convention applies without regard to whether the places indicated on an international cheque pursuant to paragraph (2) (f) of article 1 are situated in Contracting States."

167. The view was expressed by an observer that the Convention should apply only when the place of payment was situated in a Contracting State. The Working Group, after discussion, was of the opinion that article 3 should be retained without change. The provision made it clear that the Convention would apply, in a Contracting State, if, for instance, the drawer of a cheque had issued it in a Contracting State and drawn it on a banker in a non-contracting State and the cheque had been dishonoured. In such a case the courts of the Contracting State in an action brought by the payee against the drawer would apply the Convention. Article 3 would also ensure the application of the Convention in a non-contracting State if, because of the application of the rules of private international law, the courts of that State applied the law of a Contracting State.

*Article 4*

168. The text of article 4 as considered by the Working Group is as follows:

"In the interpretation and application of this Convention, regard is to be had to its international character and to the need to promote uniformity."

169. No observations were made in respect of this article.

*Article 5*

170. The text of article 5 as considered by the Working Group is as follows:

"In this Convention

"(1) 'Cheque' means an international cheque governed by this Convention;

"(2) 'Drawee' means the banker on whom a cheque is drawn;

"(3) 'Payee' means the person in whose favour the drawer directs payment to be made;

"(4) 'Bearer' means a person in possession of a cheque payable to bearer or endorsed in blank;

"(5) 'Holder' means the person referred to in article 13 *bis*;

"(6) 'Protected holder' means a holder of a cheque which, when he became a holder, was complete and regular on its face and not overdue [in accordance with article 53 (f)], provided that, at that time, he was without knowledge of any claim to or defence upon the instrument referred to in article 24 [or of the fact that it was dishonoured by non-payment];

"(7) 'Party' means any person who has signed a cheque;

"(8) 'Forged signature' includes a signature which is forged by the wrongful or unauthorized use of a stamp, symbol, facsimile, perforation or other means by which a signature may be made in accordance with article 27."

(6) "*protected holder*"

171. In respect of paragraph (6) of article 5, one observer stated that the requirement that a cheque, for purposes of making a holder a protected holder, should be complete and "regular" on its face should not be retained. As to a cheque being incomplete on its face, this problem should be left to article 11. As to a cheque being "irregular" on its face, it was not immediately clear for what reasons a cheque would be irregular. However, the general view of the Working Group was that a definition of the protected holder should be identical with the one obtaining under the draft Convention on International Bills of Exchange and International Promissory Notes. The Working Group requested the Secretariat to include in a future commentary examples of cases of irregularity.

172. Objections were raised to the use of the term "overdue". The general view was that the definition should state that a holder was a protected holder if, at the time he became a holder, he did not take the cheque after the expiration of the time-limit within which the cheque must be presented for payment.

173. The Working Group was of the view that, in order to be a protected holder, a holder should also be without knowledge of the fact that the cheque had been dishonoured by non-payment.

(7) "*party*"

174. It was observed that under the proposed rules a cheque could be certified. However, a signature indicating certification should not make the person so signing a party.

Article 6

175. The text of article 6 as considered by the Working Group is as follows:

"For the purposes of the Convention, a person is considered to have knowledge of a fact if he has actual knowledge of that fact or could not have been unaware of its existence."

176. No observations were made in respect of this article.

Article 7

177. The text of article 7 as considered by the Working Group is as follows:

"The sum payable by a cheque is deemed to be a definite sum although the cheque states that it is to be paid

"(a) With interest;

"(b) According to a rate of exchange indicated on the cheque or to be determined as directed by the cheque; or

"(c) In a currency other than the currency in which the amount of the cheque is expressed."

178. Some representatives expressed the view that, since the cheque was primarily a payment instrument and not an instrument of credit, the proposed Rules should prohibit the stipulation of interest on a cheque. If the drawer wished to stipulate interest he should draw a bill of exchange. A stipulation of interest on a cheque might well induce the holder to hold on to the cheque for as long as the law permitted him.

179. Other representatives expressed the view that, though it was unlikely that the stipulation of interest on a cheque would be a frequent occurrence, the draft Uniform Rules should nevertheless permit such a stipulation. In view of the current high interest rates, such a stipulation could well serve a purpose even in cases where the cheque was presented for payment within a few days after its issue.

Article 8

180. The text of article 8 as considered by the Working Group is as follows:

"(1) If there is a discrepancy between the amount of the cheque expressed in words and the amount expressed in figures, the sum payable is the amount expressed in words.

"(2) If the amount of the cheque is expressed in a currency having the same description as that of at least one other State than the State where payment is to be made as indicated on the cheque and the specified currency is not identified as the currency of any State, the currency is to be considered as the currency of the State where payment is to be made.

"(3) If a cheque states that it is to be paid with interest, without specifying the date from which interest is to run, interest runs [from the date on which the cheque is issued].

"(4) A stipulation on a cheque stating that it is to be paid with interest is to be disregarded unless it indicates the rate at which interest is to be paid."

181. The Working Group placed paragraphs (3) and (4) of article 8 between brackets pending a final decision on the question whether the stipulation of interest on an international cheque should be allowed.

*Article 10*

182. The text of article 10 as considered by the Working Group is as follows:

“(1) A cheque may

“(a) Be drawn by the drawer on himself or be drawn payable to his order;

“(b) Be drawn by two or more drawers;

“(c) Be payable to two or more payees.

“(2) If a cheque is payable to two or more payees in the alternative, it is payable to any one of them and any one of them in possession of the cheque may exercise the rights of a holder. In any other case the cheque is payable to all of them and the rights of a holder can only be exercised by all of them.”

183. Doubts were expressed about the advisability of permitting a bank to draw a cheque payable to bearer on itself. Such a provision might be at variance with national laws governing the issuance of money. However, the general view was that the Uniform Rules should allow for the issuance of such cheques but that countries in which the law would prevent this could prohibit such issuance.

*Articles 11–20*

184. The texts of articles 11–20 as considered by the Working Group are as follows:

*“Article 11*

“(1) An incomplete cheque which satisfies the requirements set out in subparagraphs (a) and (g) of paragraph (2) but which lacks other elements pertaining to one or more of the requirements set out in paragraph (2) of article 1 may be completed and the cheque so completed is effective as a cheque.

“(2) When such a cheque is completed otherwise than in accordance with agreements entered into

“(a) A party who signed the cheque before the completion may invoke the non-observance of the agreement as a defence against a holder, provided the holder had knowledge of the non-observance of the agreement when he became a holder;

“(b) A party who signed the cheque after the completion is liable according to the terms of the cheque so completed.

*“Article 13*

“A cheque is transferred

“(a) By endorsement and delivery of the cheque by the endorser to the endorsee; or

“(b) By mere delivery of the cheque if it is drawn payable to bearer or if the last endorsement is in blank.

*“New Article*

“(1) An endorsement must be written on the cheque or on a slip affixed thereto (‘allonge’). It must be signed.

“(2) An endorsement may be made

“(a) In blank, that is, by a signature alone or by a signature accompanied by a statement to the effect that the cheque is payable to any person in possession thereof;

“(b) Special, by a signature accompanied by an indication of the person to whom the cheque is payable.

*“Article 13 bis*

“(1) A person is a holder if he is

“(a) The bearer of a cheque; or

“(b) The payee in possession of the cheque; or

“(c) In possession of a cheque

“(i) Which has been endorsed to him; or

“(ii) On which the last endorsement is in blank; and on which there appears an uninterrupted series of endorsements, even if any of the endorsements was forged or was signed by an agent without authority.

“(2) When an endorsement in blank is followed by another endorsement, the person who signed this last endorsement is deemed to be an endorsee by the endorsement in blank.

“(3) A person is not prevented from being a holder by the fact that the cheque was obtained under circumstances, including incapacity or fraud, duress or mistake of any kind, that would give rise to a claim to, or to a defence upon the cheque.

*“Article 15*

“The holder of a cheque on which the last endorsement is in blank may

“(a) Further endorse the cheque either in blank or to a specified person; or

“(b) Convert the blank endorsement into a special endorsement by indicating therein that the cheque is payable to himself or to some other specified person; or

“(c) Transfer the cheque in accordance with paragraph (b) of article 13.

*“Article 16*

“[When the drawer or an endorser has inserted in the cheque or in the endorsement such words as ‘not negotiable’, ‘not transferable’, ‘not to order’, ‘pay (X) only’, or words of similar import, the transferee does not become a holder except for purposes of collection.]

*“Article 17*

“(1) A conditional endorsement transfers the cheque irrespective of whether the condition is fulfilled.

“(2) A claim to or a defence upon the cheque based on the fact that the condition was not fulfilled may not be raised except by the party who endorsed conditionally against his immediate transferee.

*“Article 18*

“An endorsement in respect of a part of the sum due under the cheque is ineffective as an endorsement.

*"Article 19*

"Where there are two or more endorsements, it is presumed, unless the contrary is established, that each endorsement was made in the order in which it appears on the cheque.

*"Article 20*

"(1) When an endorsement contains the words 'for collection', 'for deposit', 'value in collection', 'by procuration', 'pay any bank', or words of similar import, authorizing the endorsee to collect the cheque (endorsement for collection), the endorsee

"(a) May only endorse the cheque for purposes of collection;

"(b) May exercise all the rights arising out of the cheque;

"(c) Is subject to all claims and defences which may be set up against the endorser;

"(2) The endorser for collection is not liable upon the cheque to any subsequent holder."

185. No observations were made in respect of these articles.

*Article 21*

186. The text of article 21 as considered by the Working Group is as follows:

"(1) The holder of a cheque may transfer it to a prior party in accordance with article 13; nevertheless, in the case where the transferee was a prior holder of the cheque, no endorsement is required and any endorsement which would prevent him from qualifying as a holder may be struck out.

"(2) The transfer of a cheque by endorsement to the drawee operates as a receipt [except in the case where the drawee has several establishments and the endorsement is made in favour of an establishment other than that on which the cheque has been drawn]."

187. It was noted that paragraph (2) of article 21 reflected article 15 of the Geneva Uniform Law. However, the view was expressed that the wording did not make it clear that, where a cheque was endorsed to the drawee, the drawee did not become a holder and that the endorser was not liable on the cheque.

188. The Working Group was of the opinion that the provision should be redrafted to make it clear that an endorsement to the drawee constituted only an acknowledgement that the transferor had received from the drawee the sum payable by the cheque.

189. The Working Group left open the question whether the drawee-bank should become a holder where the drawee had several establishments and the endorsement was made in favour of an establishment other than that on which the cheque had been drawn.

*Article 21 bis*

190. The text of article 21 *bis* as considered by the Working Group is as follows:

"[(1) A cheque may be transferred in accordance with article 13 after the expiration of the period of time for presentment.

"(2) The transfer of a cheque in accordance with article 13 after the expiration of the period of time for presentment or after protest operates only as an assignment.]"

191. The Working Group was of the view that paragraph (2) of article 21 *bis* should be deleted.

*Article 22*

192. The text of article 22 as considered by the Working Group is as follows:

"(1) If an endorsement is forged the person whose endorsement is forged has against the forger and against the person who took the cheque directly from the forger the right to recover compensation for any damage that he may have suffered because of the forgery.

"(2) [The drawer of the cheque has a similar right to compensation in circumstances where damage is caused to him by forgery of the signature of the payee]."

193. No observations were made in respect of this article.

*Article 23*

194. The text of article 23 as considered by the Working Group is as follows:

"(1) The holder of a cheque has all the rights conferred on him by this Convention against the parties to the cheque.

"(2) The holder is entitled to transfer the cheque in accordance with article 13."

195. Reference was made to article 20 of the Geneva Uniform Law under which the endorsement of a bearer cheque did not convert the cheque into a cheque to order. Under one view, this rule was implicit in article 13 (b).

196. It was further observed that under article 20 of the Geneva Uniform Law an endorsement on a bearer cheque rendered the endorser liable in a recourse action against him. The Working Group was of the view that the legal effects of an endorsement on a bearer cheque should be examined further in connexion with signatures on a cheque other than those of an endorser.

197. The Working Group was of the view that the endorsement of a bearer cheque should not convert the cheque into a cheque to order and that the holder of such a cheque could be a protected holder even if the endorsement was not to him.

*Article 24*

198. The text of article 24 as considered by the Working Group is as follows:

"(1) A party may set up against a holder who is not a protected holder:

"(a) Any defence available under this Convention;

"(b) Any defence based on an underlying transaction between himself and the drawer or a previous

holder or arising from the circumstances as a result of which he became a party;

“(c) Any defence to contractual liability based on a transaction between himself and the holder;

“(d) Any defence based on incapacity of such party to incur liability on the cheque or on the fact that such party signed without knowledge that his signature made him a party to the cheque, provided that such absence of knowledge was not due to negligence.

“(2) The rights to a cheque of a holder who is not a protected holder are subject to any valid claim to the cheque on the part of any person.

“(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 cheque unless

“(a) Such third person asserted a valid claim to the cheque; or

“(b) Such holder acquired the cheque by theft or forged the signature of the payee or an endorsee, or participated in such theft.”

199. One observer expressed the view that the words “who is not a protected holder” in paragraph (3) should be deleted, and placed in another article, such as article 25 *bis*.

#### Article 25

200. The text of article 25 as considered by the Working Group is as follows:

“(1) A party may not set up against a protected holder any defence except:

“(a) Defences under articles 27 (1), 28, 29 (1), 30 (2) and (3), 34 (2), 41 (1) and (2), 43 (4), 54, [55], [58], [60] and 79 of this Convention;

“(b) Defences based on the incapacity of such party to incur liability on the cheque;

“(c) Defences based on the fact that such party signed without knowledge that his signature made him a party to the cheque, provided that such absence of knowledge was not due to his negligence.

“(2) Except as provided in paragraph (3), the rights to a cheque of a protected holder are not subject to any claim to the cheque on the part of any person.

“(3) The rights of a protected holder are not free from any valid claim to, or any defence to liability upon, the cheque arising from the underlying transaction between himself and the party by whom the claim or defence is raised or arising from any fraudulent act on the part of such holder in obtaining the signature on the cheque of that party.

“(4) The transfer of a cheque by a protected holder vests in any subsequent holder the rights to and upon the cheque which the protected holder had, except where such subsequent holder participated in a transaction which gives rise to a claim to or a defence upon the cheque.”

201. The Working Group decided that the question as to which defences a party could set up against a protected holder should be examined at a later stage.

202. In respect of paragraph (3), the Working Group requested the Secretariat to explain in a future commentary that, since a cheque could not be accepted, the words “or arising from any fraudulent act on the part of such holder in obtaining the signature on the cheque of that party” would apply in the case where the signature was obtained from a guarantor.

#### Articles 26–30

203. The texts of articles 26–30 as considered by the Working Group are as follows:

#### “Article 26

“Every holder is presumed to be a protected holder, unless the contrary is proved.”

#### “Article 27

“(1) Subject to the provisions of articles 28 and 30, a person is not liable on a cheque unless he signs it.

“(2) A person who signs in a name which is not his own is liable as if he had signed it in his own name.

“(3) A signature may be in handwriting or by facsimile, perforations, symbols or any other mechanical means.\*

\*

#### “Article ...

“A Contracting State whose legislation requires that a signature on a cheque be handwritten may, at the time of signature, ratification or accession, make a declaration to the effect that a signature placed on a cheque in its territory must be executed in handwriting.”

#### “Article 28

“A forged signature on a cheque does not impose any liability thereon on the person whose signature was forged. Nevertheless, such person is liable as if he had signed the cheque himself where he has, expressly or impliedly, accepted to be bound by the forged signature or represented that the signature was his own.

#### “Article 29

“(1) If a cheque has been materially altered

“(a) Parties who have signed the cheque subsequent to the material alteration are liable thereon according to the terms of the altered text.

“(b) Parties who have signed the cheque before the material alteration are liable thereon according to the terms of the original text. Nevertheless, a party who has himself made, authorized, or assented to, the material alteration is liable on the cheque according to the terms of the altered text.

“(2) Failing proof to the contrary, a signature is deemed to have been placed on the cheque after the material alteration.

“(3) Any alteration is material which modifies the written undertaking on the cheque of any party in any respect.

*"Article 30*

"(1) A cheque may be signed by an agent.

"(2) The name or signature of a principal placed on the cheque by an agent with his authority imposes liability on the principal and not on the agent.

"(3) The signature of an agent placed by him on a cheque without authority, or with authority to sign but not showing on the cheque that he is signing in a representative capacity for a named person, or showing on the cheque that he is signing in a representative capacity but not naming the person whom he represents, imposes liability thereon on such agent and not on the person whom the agent purports to represent.

"(4) The question whether a signature was placed on the cheque in a representative capacity may be determined only by reference to what appears on the cheque.

"(5) An agent who is liable pursuant to paragraph (3) and who pays the cheque has the same rights as the person for whom he purported to act would have had if that person had paid the cheque."

204. No observations were made in respect of these articles.

*Article 30 bis*

205. The text of article 30 *bis* as considered by the Working Group is as follows:

"The order to pay contained in a cheque does not of itself operate as an assignment of a right to payment existing outside of the cheque."

206. In connexion with this article, one observer alluded to articles 32 and 33 of the Geneva Uniform Law regarding the countermanding of a cheque and the effects of the death or the incapacity of the drawer after the cheque has been drawn. The Working Group decided to take up this question at a future session.

207. The Working Group decided to continue its consideration of the draft uniform rules at its next session.

## III. FUTURE WORK

208. The Working Group noted that the budgetary provisions approved for 1980-1981 authorized the Secretariat to convene a Drafting Group for the purpose of harmonizing the language versions of the draft Convention on International Bills of Exchange and International Promissory Notes. Accordingly, the Group requested the Secretariat to convene such a Group in the summer of 1980.

209. The Working Group requested the Secretariat to establish a commentary on the draft Convention on International Bills of Exchange and International Promissory Notes.

210. The Working Group requested the Secretariat to complete the draft Uniform Rules on International Cheques, including rules on crossed cheques, and to submit a study on legal issues arising outside the cheque.

211. The Working Group decided to recommend to the Commission that the next (tenth) session of the Working Group be held in Vienna from 5 to 16 January 1981.

**C. Draft Convention on International Bills of Exchange and International Promissory Notes as adopted by the Working Group on International Negotiable Instruments at its eighth session (Geneva, 3-14 September 1979) and its ninth session (New York, 2-11 January 1980) (A/CN.9/181, annex)\***

**[Part One. Sphere of application; form]\*\****Article 1*

(1) This Convention applies to international bills of exchange and to international promissory notes.

(2) An international bill of exchange is a written instrument which

(a) Contains, in the text thereof, the words "international bill of exchange [Convention of ...]";

(b) Contains an unconditional order whereby the drawer directs the drawee to pay a definite sum of money to the payee or to his order;

(c) Is payable on demand or at a definite time;

(d) Is dated;

(e) Shows that at least two of the following places are situated in different States

(i) The place where the bill is drawn;

(ii) The place indicated next to the signature of the drawer;

(iii) The place indicated next to the name of the drawee;

(iv) The place indicated next to the name of the payee;

(v) The place of payment;

(f) Is signed by the drawer.

(3) An international promissory note is a written instrument which

(a) Contains, in the text thereof, the words "international promissory note [Convention of ...]";

(b) Contains an unconditional promise whereby the maker undertakes to pay a definite sum of money to the payee or to his order;

\* 13 March 1980.

\*\* Brackets indicate matters which have been reserved for further consideration at a later date.

- (c) Is payable on demand or at a definite time;
  - (d) Is dated;
  - (e) Shows that at least two of the following places are situated in different States
    - (i) The place where the instrument was made;
    - (ii) The place indicated next to the signature of the maker;
    - (iii) The place indicated next to the name of the payee;
    - (iv) The place of payment;
  - (f) Is signed by the maker.
- (4) Proof that the statements referred to in paragraph (2) (e) or (3) (e) of this article are incorrect does not affect the application of this Convention.

*Article 2*  
(deleted)

*Article 3*

This Convention applies without regard to whether the places indicated on an international bill of exchange or on an international promissory note pursuant to paragraph (2) (e) or (3) (e) of article 1 are situated in contracting States.

*Article 4*

In the interpretation and application of this Convention, regard is to be had to its international character and to the need to promote uniformity.

*Article 5*

In this Convention

- (1) "Bill" means an international bill of exchange governed by this Convention;
- (2) "Note" means an international promissory note governed by this Convention;
- (3) "Instrument" means an international bill of exchange or an international promissory note governed by this Convention;
- (4) "Drawee" means the person on whom a bill is drawn but who has not accepted it;
- (5) "Payee" means the person in whose favour the drawer directs payment to be made or the maker promises to pay;
- (6) "Holder" means the person referred to in article 13 *bis*;
- (7) "Protected holder" means a holder of an instrument which, when he became a holder, was complete and regular on its face and not overdue, provided that, at that time, he was without knowledge of any claim to or defence upon the instrument referred to in article 24 or of the fact that it was dishonoured by non-acceptance or non-payment;
- (8) "Party" means any party who has signed an instrument;

(9) "Maturity" means the date of payment referred to in article 9 and, in the case of a demand bill, the date on which the instrument is presented for payment;

(10) "Forged signature" includes a signature which is forged by the wrongful or unauthorized use of a stamp, symbol, facsimile, perforation or other means by which a signature may be made in accordance with article 27.

*Article 6*

For the purposes of this Convention, a person is considered to have knowledge of a fact if he has actual knowledge of that fact or could not have been unaware of its existence.

[SECTION 2. INTERPRETATION OF FORMAL REQUIREMENTS]

*Article 7*

The sum payable by an instrument is deemed to be a definite sum although the instrument states that it is to be paid

- (a) With interest;
- (b) By instalments at successive dates;
- (c) By instalments at successive dates with the stipulation on the instrument that upon default in payment of any instalment the unpaid balance becomes due;
- (d) According to a rate of exchange indicated on the instrument or to be determined as directed by the instrument; or
- (e) In a currency other than the currency in which the amount of the instrument is expressed.

*Article 8*

- (1) If there is a discrepancy between the amount of the instrument expressed in words and the amount expressed in figures, the sum payable is the amount expressed in words.
- (2) If the amount of the instrument is expressed in a currency having the same description as that of at least one other State than the State where payment is to be made as indicated on the instrument and the specified currency is not identified as the currency of any State, the currency is to be considered as the currency of the State where payment is to be made.
- (3) If any instrument states that it is to be paid with interest, without specifying the date from which interest is to run, interest runs from the date of the instrument.
- (4) A stipulation on an instrument stating that it is to be paid with interest is to be disregarded unless it indicates the rate at which interest is to be paid.

*Article 9*

- (1) An instrument is deemed to be payable on demand;
  - (a) If it states that it is payable on demand or at sight or on presentment or if it contains words of similar import; or
  - (b) If no time for payment is expressed.



(2) An instrument payable at a definite time which is accepted or endorsed or guaranteed after maturity is an instrument payable on demand as regards the acceptor, the endorser or the guarantor.

(3) An instrument is deemed to be payable at a definite time if it states that it is payable

(a) On a stated date or at a fixed period after a stated date or at a fixed period after the date of the instrument; or

(b) At a fixed period after sight; or

(c) By instalments at successive dates; or

(d) By instalments at successive dates with the stipulation on the instrument that upon default in payment of any instalment the unpaid balance becomes due.

(4) The time of payment of an instrument payable at a fixed period after date is determined by reference to the date of the instrument.

(5) The maturity of a bill payable at a fixed period after sight is determined by the date of the acceptance.

(6) [The maturity of a note payable at a fixed period after sight is determined by the date of the visa signed by the maker on the note or, if signature is refused, from the date of presentment.]

(7) Where an instrument is drawn, or made, payable at one or more months after a stated date or after the date of the instrument or after sight, the instrument matures on the corresponding date of the month when payment must be made. If there is no corresponding date, the instrument matures on the last day of that month.

#### Article 10

(1) A bill may

(a) Be drawn upon two or more drawees;

(b) Be drawn by two or more drawers;

(c) Be payable to two or more payees; or

(2) A note may

(a) Be made by two or more makers;

(b) Be payable to two or more payees.

(3) If an instrument is payable to two or more payees in the alternative, it is payable to any one of them and any one of them in possession of the instrument may exercise the rights of a holder. In any other case the instrument is payable to all of them and the right of a holder can only be exercised by all of them.

#### Article 10 bis

A bill may be drawn by the drawer on himself or be drawn payable to his order.

### [SECTION 3. COMPLETION OF AN INCOMPLETE INSTRUMENT]

#### Article 11

(1) An incomplete instrument which satisfies the requirements set out in subparagraphs (a) and (f) of paragraph (2) or (a) and (f) of paragraph (3) but which

lacks other elements pertaining to one or more of the requirements set out in paragraphs (2) or (3) of article 1 may be completed and the instrument so completed is effective as a bill or a note.

(2) When such an instrument is completed otherwise than in accordance with agreements entered into

(a) A party who signed the instrument before the completion may invoke the non-observance of the agreement as a defence against a holder, provided the holder had knowledge of the non-observance of the agreement when he became a holder;

(b) A party who signed the instrument after the completion is liable according to the terms of the instrument so completed.

### [Part Three. Transfer; holder]

#### Article 12

(deleted)

#### Article 13

An instrument is transferred

(a) By endorsement and delivery of the instrument by the endorser to the endorsee; or

(b) By mere delivery of the instrument if the last endorsement is in blank.

#### New Article

(to be inserted between article 13 and article 13 bis)

(a) An endorsement must be written on the instrument or on a slip affixed thereto ("allonge"). It must be signed.

(b) An endorsement may be made

(i) In blank, that is, by a signature alone or by a signature accompanied by a statement to the effect that the instrument is payable to any person in possession thereof;

(ii) Special, by a signature accompanied by an indication of the person to whom the instrument is payable.

#### Article 13 bis

(1) A person is a holder if he is

(a) The payee in possession of the instrument; or

(b) In possession of an instrument

(i) Which has been endorsed to him; or

(ii) On which the last endorsement is in blank

and on which there appears an uninterrupted series of endorsements, even if any of the endorsements was forged or was signed by an agent without authority.

(2) When an endorsement in blank is followed by another endorsement, the person who signed this last endorsement is deemed to be an endorsee by the endorsement in blank.

(3) A person is not prevented from being a holder by the fact that the instrument was obtained under circum-

stances, including incapacity or fraud, duress or mistake of any kind, that would give rise to a claim to, or to a defence upon the instrument.

#### Article 14

(deleted)

#### Article 15

The holder of an instrument on which the last endorsement is in blank may

- (a) Further endorse the instrument either in blank or to a specified person; or
- (b) Convert the blank endorsement into a special endorsement by indicating therein that the instrument is payable to himself or to some other specified person; or
- (c) Transfer the instrument in accordance with paragraph (b) of article 13.

#### Article 16

When the drawer, or the maker, has inserted in the instrument, or an endorser in his endorsement, such words as "not negotiable", "not transferable", "not to order", "pay (X) only", or words of similar import, the transferee does not become a holder except for purposes of collection.

#### Article 17

- (1) (deleted)
- (2) A conditional endorsement transfers the instrument irrespective of whether the condition is fulfilled.
- (3) A claim to or a defence upon the instrument based on the fact that the condition was not fulfilled may not be raised except by the party who endorsed conditionally against his immediate transferee.

#### Article 18

An endorsement in respect of a part of the sum due under the instrument is ineffective as an endorsement.

#### Article 19

When there are two or more endorsements, it is presumed, unless the contrary is established, that each endorsement was made in the order in which it appears on the instrument.

#### Article 20

(1) When an endorsement contains the words "for collection", "for deposit", "value in collection", "by procuration", "pay any bank", or words of similar import, authorizing the endorsee to collect the instrument (endorsement for collection), the endorsee

- (a) May only endorse the instrument for purposes of collection;
  - (b) May exercise all the rights arising out of the instrument;
  - (c) Is subject to all claims and defences which may be set up against the endorser.
- (2) The endorser for collection is not liable upon the instrument to any subsequent holder.

#### Article 21

The holder of an instrument may transfer it to a prior party or the drawee in accordance with article 13; nevertheless, in the case where the transferee was a prior holder of the instrument, no endorsement is required and any endorsement which would prevent him from qualifying as a holder may be struck out.

#### Article 21 bis

An instrument may be transferred in accordance with article 13 after maturity, except by the drawee, the acceptor or the maker.

#### Article 22

(1) If an endorsement is forged, any party has against the forger and against the person who took the instrument directly from the forger the right to recover compensation for any damage that he may have suffered because of the forgery.

(2) For the purposes of this article, an endorsement placed on an instrument by a person in a representative capacity without authority has the same effects as a forged endorsement.

### [Part Four. Rights and liabilities]

#### [SECTION 1. THE RIGHTS OF A HOLDER AND A PROTECTED HOLDER]

#### Article 23

- (1) The holder of an instrument has all the rights conferred on him by this Convention against the parties to the instrument.
- (2) The holder is entitled to transfer the instrument in accordance with article 13.

#### Article 24

- (1) A party may set up against a holder who is not a protected holder:
  - (a) Any defence available under this Convention;
  - (b) Any defence based on an underlying transaction between himself and the drawer or a previous holder or arising from the circumstances as a result of which he became a party;
  - (c) Any defence to contractual liability based on a transaction between himself and the holder;
  - (d) Any defence based on incapacity of such party to incur liability on the instrument or on the fact that such party signed without knowledge that his signature made him a party to the instrument, provided that such absence of knowledge was not due to negligence;
- (2) The rights to an instrument of a holder who is not a protected holder are subject to any valid claim to the instrument on the part of any person.
- (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 25

(1) A party may not set up against a protected holder any defence except:

(a) Defences under articles 27 (1), 28, 29 (1), 30 (2) and (3), 50, 55, 57, 60 and 79 of this Convention;

(b) Defences based on the incapacity of such party to incur liability on the instrument;

(c) Defences based on the fact that such party signed without knowledge that his signature made him a party to the instrument, provided that such absence of knowledge was not due to his negligence.

(2) Except as provided in paragraph (3), the rights to an instrument of a protected holder are not subject to any claim to the instrument on the part of any person.

(3) The rights of a protected holder are not free from any valid claim to, or any defence to liability upon, the instrument arising from the underlying transaction between himself and the party by whom the claim or defence is raised or arising from any fraudulent act on the part of such holder in obtaining the signature on the instrument of that party.

(4) The transfer of an instrument by a protected holder vests in any subsequent holder the rights to and upon the instrument which the protected holder had, except where such subsequent holder participated in a transaction which gives rise to a claim to or a defence upon the instrument.

#### Article 26

Every holder is presumed to be protected holder, unless the contrary is proved.

### [SECTION 2. LIABILITY OF THE PARTIES]

#### [A. General]

#### Article 27

(1) Subject to the provisions of articles 28 and 30, a person is not liable on an instrument unless he signs it.

(2) A person who signs in a name which is not his own is liable as if he had signed it in his own name.

(3) A signature may be in handwriting or by facsimile, perforations, symbols or any other mechanical means.\*

\*

#### "Article (X)"

"A Contracting State whose legislation required that a signature on an instrument be handwritten may, at the time of signature, ratification or accession, make a declaration to the effect that a signature placed on an instrument in its territory must be executed in handwriting."

#### Article 28

A forged signature on an instrument does not impose any liability thereon on the person whose signature was

forged. Nevertheless, such person is liable as if he had signed the instrument himself where he has, expressly or impliedly, accepted to be bound by the forged signature or represented that the signature was his own.

#### Article 29

(1) If an instrument has been materially altered

(a) Parties who have signed the instrument subsequent to the material alteration are liable thereon according to the terms of the altered text;

(b) Parties who have signed the instrument before the material alteration are liable thereon according to the terms of the original text. Nevertheless, a party who has himself made, authorized, or assented to, the material alteration is liable on the instrument according to the terms of the altered text.

(2) Failing proof to the contrary, a signature is deemed to have been placed on the instrument after the material alteration.

(3) Any alteration is material which modifies the written undertaking on the instrument of any party in any respect.

#### Article 30

(1) An instrument may be signed by an agent.

(2) The name or signature of a principal placed on the instrument by an agent with his authority imposes liability on the principal and not on the agent.

(3) The signature of an agent placed by him on an instrument without authority, or with authority to sign but not showing on the instrument that he is signing in a representative capacity for a named person, or showing on the instrument that he is signing in a representative capacity but not naming the person whom he represents, imposes liability thereon on such agent and not on the person whom the agent purports to represent.

(4) The question whether a signature was placed on the instrument in a representative capacity may be determined only by reference to what appears on the instrument.

(5) An agent who is liable pursuant to paragraph (3) and who pays the instrument has the same rights as the person for whom he purported to act would have had if that person had paid the instrument.

#### Article 30 bis

The order to pay contained in a bill does not of itself operate as an assignment of a right to payment existing outside of the bill.

#### Article 31

(deleted)

#### Article 32

(deleted)

#### Article 33

(deleted)

## [B. The drawer]

*Article 34*

(1) The drawer engages that upon dishonour of the bill by non-acceptance or non-payment, and upon any necessary protest, he will pay to the holder or to any party who takes up and pays the bill in accordance with article 67 the amount of the bill, and any interest and expenses which may be recovered under article 67 or 68.

(2) The drawer may exclude or limit his own liability by an express stipulation on the bill. Such stipulation has effect only with respect to the drawer.

## [C. The maker]

*Article 34 bis*

(1) The maker engages that he will pay to the holder or to any party who takes up and pays the bill in accordance with article 67 the amount of the bill, and any interest and expenses which may be recovered under article 67 or 68.

(2) The maker may not exclude or limit his own liability by a stipulation on the note. Any such stipulation is without effect.

## [D. The drawee and the acceptor]

*Article 35*

(deleted)

*Article 36*

(1) The drawee is not liable on a bill until he accepts it.

(2) The acceptor engages that he will pay to the holder or, to any party who takes up and pays the bill in accordance with article 67 or the drawer who has paid the bill, the amount of the bill, and any interest and expenses which may be recovered under article 67 or 68.

*Article 37*

An acceptance must be written on the bill and may be effected:

(a) By the signature of the drawee accompanied by the word "accepted" or by words of similar import, or

(b) By the signature alone of the drawee.

*Article 38*

(1) An incomplete instrument which satisfies the requirements set out in article 1 (2) (a) may be accepted by the drawee before it has been signed by the drawer, or while otherwise incomplete.

(2) A bill may be accepted before, at or after maturity, or after it has been dishonoured by non-acceptance or non-payment.

(3) When a bill drawn payable at a fixed period after sight, or a bill which must be presented for acceptance before a specified date, is accepted, the acceptor must indicate the date of his acceptance; failing such indication by the acceptor, the drawer, before the issue of the bill, or the holder may insert the date of acceptance.

(4) If a bill drawn payable at a fixed period after sight is dishonoured by non-acceptance and the drawee subsequently accepts it, the holder is entitled to have the acceptance dated as of the date on which the bill was dishonoured.

*Article 39*

(1) An acceptance must be unqualified. An acceptance is qualified if it is conditional or varies the terms of the bill.

(2) If the drawee stipulates on the bill that his acceptance is subject to qualification:

(a) He is nevertheless bound according to the terms of his qualified acceptance;

(b) The bill is dishonoured by non-acceptance, except that the holder may take an acceptance relating to only a part of the amount of the bill. In that case, the bill is dishonoured by non-acceptance as to the remaining part of the amount.

(3) An acceptance indicating that payment will be made at a particular address or by a particular agent is not a qualified acceptance, provided that:

(a) The place in which payment is to be made is not changed;

(b) The bill is not drawn payable by another agent.

*Article 40*

(deleted)

## [E. The endorser]

*Article 41*

(1) The endorser engages that upon dishonour of the instrument by non-acceptance or non-payment, and upon any necessary protest, he will pay to the holder or to any party who takes up and pays the bill in accordance with article 67 the amount of the instrument, and any interest and expenses which may be recovered under article 67 or 68.

(2) The endorser may exclude or limit his own liability by an express stipulation on the instrument. Such stipulation has effect only with respect to that endorser.

*Article 42*

(1) Any person who transfers an instrument by mere delivery is liable to any holder subsequent to himself for any damages that such holder may suffer on account of the fact that prior to such transfer

(a) A signature on the instrument was forged or unauthorized; or

(b) The instrument was materially altered; or

(c) A party has a valid claim or defence against him; or

(d) The bill is dishonoured by non-acceptance or non-payment or the note is dishonoured by non-payment.

(2) The damages according to paragraph (1) may not exceed the amount referred to in article 67 or 68.

(3) Liability on account of any defect mentioned in paragraph (1) is incurred only to a holder who took the instrument without knowledge of such defect.

## [F. The guarantor]

*Article 43*

(1) Payment of an instrument, whether or not it has been accepted, may be guaranteed, as to the whole or part of its amount, for the account of a party or the drawee. A guarantee may be given by any person who may or may not already be a party.

(2) A guarantee must be written on the instrument or on a slip affixed thereto ("allonge").

(3) A guarantee is expressed by the words: "guaranteed", "*aval*", "good as *aval*" or words of similar import, accompanied by the signature of the guarantor.

(4) A guarantee may be effected by a signature alone. Unless the content otherwise requires

(a) The signature alone on the front of the instrument, other than that of the drawer or the drawee, is a guarantee;

(b) The signature alone of the drawee on the front of the instrument is an acceptance; and

(c) A signature alone on the back of the instrument other than that of the drawee is an endorsement.

(5) A guarantor may specify the person for whom he has become guarantor. In the absence of such specification, the person for whom he has become guarantor is the acceptor or the drawee in the case of a bill, and the maker, in the case of a note.

*Article 44*

(1) A guarantor is liable on the instrument to the same extent as the party for whom he has become guarantor, unless the guarantor has stipulated otherwise on the instrument.

(2) If the person for whom he has become guarantor is the drawee, the guarantor undertakes to pay the bill when due.

*Article 45*

The guarantor who pays the instrument has rights thereon against the party for whom he became guarantor and against parties who are liable thereon to that party.

**[Part Five. Presentment, dishonour and recourse]****[SECTION 1. PRESENTMENT FOR ACCEPTANCE]***Article 46*

(1) A bill may be presented for acceptance.

(2) A bill must be presented for acceptance:

(a) When the drawer has stipulated on the bill that it must be presented for acceptance;

(b) When the bill is drawn payable at a fixed period after sight; or

(c) When the bill is drawn payable elsewhere than at the residence or place of business of the drawee, except where such a bill is payable on demand.

*Article 47*

(1) Notwithstanding the provision of article 46 the drawer may stipulate on the bill that it must not be presented for acceptance or that it must not be so presented before a specified date or before the occurrence of a specified event.

(2) If a bill is presented for acceptance notwithstanding a stipulation permitted under paragraph (1) and acceptance is refused, the bill is not thereby dishonoured.

(3) If the drawee accepts a bill notwithstanding a stipulation that it must not be presented for acceptance, the acceptance is effective.

*Article 47 bis*

(1) Presentment for acceptance must be made to the drawee by or on behalf of the holder.

(2) A bill drawn upon two or more drawees may be presented to any one of them, unless the bill clearly indicates otherwise.

(3) Presentment for acceptance may be made to a person or authority other than the drawee if that person or authority is entitled under the applicable law to accept the bill.

*Article 48*

A bill is duly presented for acceptance if it is presented in accordance with the following rules:

(a) The holder must present the bill to the drawee on a business day at a reasonable hour;

(b) A bill drawn upon two or more drawees may be presented to any one of them, unless the bill clearly indicates otherwise;

(c) Presentment for acceptance may be made to a person or authority other than the drawee if that person or authority is entitled under the applicable law to accept the bill;

(d) If a bill is drawn payable on a fixed date, presentment for acceptance must be made before or on the date of maturity;

(e) A bill drawn payable on demand or at a fixed period after sight must be presented for acceptance within one year of its date;

(f) A bill in which the drawer has stated a date or time-limit for presentment for acceptance must be presented on the stated date or within the stated time-limit.

*Article 49*

Presentment for acceptance is dispensed with

(a) If the drawee is dead or has no longer the power freely to deal with his assets by reason of his insolvency, or is a fictitious person or a person not having capacity to incur liability on the instrument as an acceptor, or if the drawee is a corporation, partnership, association or other legal entity which has ceased to exist;

(b) When, with the exercise of reasonable diligence, presentment cannot be effected within the time-limits prescribed for presentment for acceptance.

*Article 50*

If a bill which must be presented for acceptance is not so presented, the drawer, the endorsers and their guarantors are not liable on the bill.

*Article 51*

(1) A bill is considered to be dishonoured by non-acceptance

(a) When the drawee, upon due presentment, expressly refuses to accept the bill or acceptance cannot be obtained with reasonable diligence or when the holder cannot obtain the acceptance to which he is entitled under this Convention;

(b) If presentment for acceptance is dispensed with pursuant to article 49, unless the bill is in fact accepted.

(2) If a bill is dishonoured by non-acceptance the holder may

(a) Subject to the provisions of article 57, exercise an immediate right of recourse against the drawer, the endorsers and their guarantors;

(b) Exercise an immediate right of recourse against the guarantor of the drawee.

## [SECTION 2. PRESENTMENT FOR PAYMENT]

*Article 52*

(deleted)

*Article 53*

An instrument is duly presented for payment if it is presented in accordance with the following rules:

(a) The holder must present the instrument to the drawee or to the acceptor or to the maker on a business day at a reasonable hour;

(b) A bill drawn upon or accepted by two or more drawees, or a note signed by two or more makers, may be presented to any one of them, unless the bill or note clearly indicates otherwise;

(c) If the drawee or the acceptor or the maker is dead, presentment must be made to a person who under the applicable law are his heirs or the persons entitled to administer his estate;

(d) Presentment for payment may be made to a person or authority other than the drawee, the acceptor or the maker if that person or authority is entitled under the applicable law to pay the instrument;

(e) An instrument which is not payable on demand must be presented for payment on the date of maturity or on one of the two business days which follow;

(f) An instrument which is payable on demand must be presented for payment within one year of its date;

(g) An instrument must be presented for payment:

(i) At the place of payment specified on the instrument; or

(ii) If no place of payment is specified, at the address of the drawee or the acceptor or the maker indicated on the instrument; or

(iii) If no place of payment is specified and the address of the drawee or the acceptor or the maker is not indicated, at the principal place of business or habitual residence of the drawee or the acceptor or the maker.

*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) (deleted)

(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.

*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 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 endorser 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) 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.

### [Part Six. Discharge]

#### [SECTION 1. GENERAL]

##### *Article 69*

(deleted)

#### [SECTION 2. PAYMENT]

##### *Article 70*

(1) A party is discharged of his liability on the instrument when he pays the holder or a party subsequent to himself who has taken up and paid the instrument and is in possession thereof the amount due pursuant to articles 67 and 68:

(a) At or after maturity, or

(b) Before maturity, upon dishonour by non-acceptance.

(2) Payment before maturity other than under paragraph (1) (b) of this article does not discharge the party making the payment of his liability on the instrument except in respect of the person to whom payment was made.

(3) A party is not discharged of his liability if he pays a holder who is not a protected holder and 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.

(4) (a) A person receiving payment of an instrument under paragraph (1) of this article must, unless agreed otherwise, deliver to the person making such payment the instrument, any protest, and a receipted account.

(b) The person from whom payment is demanded may withhold payment if the person demanding payment does not deliver the instrument to him. Withholding payment in these circumstances does not constitute dishonour by non-payment.

(c) If payment is made but the payor fails to obtain the instrument, the payor is discharged but the discharge cannot be set up as a defence against a protected holder.

##### *Article 71*

(1) The holder is not obliged to take partial payment.

(2) If the holder does not take partial payment, the instrument is dishonoured by non-payment.

(3) If the holder takes partial payment from the drawee or the acceptor or the maker:

(a) The acceptor or the maker is discharged of his liability on the instrument to the extent of the amount paid; and

(b) The instrument is to be considered as dishonoured by non-payment as to the amount unpaid.

(4) If the holder takes partial payment from a party to the instrument other than the drawee, the acceptor or the maker:

(a) The party making payment is discharged of his liability on the instrument to the extent of the amount paid; and

(b) The holder must give such party a certified copy of the bill, and of any authenticated protest, in order to enable subsequent recourse to be exercised.

(5) The drawee or a party making partial payment may require that mention of such payment be made on the instrument and that a receipt therefor be given to him.

(6) Where a party pays the unpaid amount, the person receiving the unpaid amount who is in possession of the instrument must deliver to him the receipted instrument and any authenticated protest.

##### *Article 72*

(1) The holder may refuse to take payment in a place other than the place where the instrument was duly presented for payment in accordance with article 53 (g).

(2) If payment is not then made in the place where the instrument was duly presented for payment in accordance with article 53 (g), the instrument is considered as dishonoured by non-payment.

##### *Article 73*

(deleted)

##### *Article 74*

(1) An instrument must be paid in the currency in which the amount of the instrument is expressed.

(2) The drawer or the maker may indicate on the instrument that it must be paid in a specified currency other than the currency in which the amount of the instrument is expressed. In that case:

(a) The instrument must be paid in the currency so specified;

(b) The amount payable is to be calculated according to the rate of exchange indicated on the instrument. Failing such an indication, the amount payable is to be calculated according to the rate of exchange for sight drafts on the date of maturity:

(i) Ruling at the place where the instrument must be presented for payment in accordance with article 53 (g), if the specified currency is that of that place (local currency); or

(ii) If the specified currency is not that of that place, according to the usages of the place where the instrument must be presented for payment in accordance with article 53 (g).

(c) If such an instrument is dishonoured by non-acceptance, the amount payable is to be calculated:

- (i) If the rate of exchange is indicated on the instrument, according to that rate;
- (ii) If no rate of exchange is indicated on the instrument, at the option of the holder, according to the rate of exchange ruling at the date of dishonour or on the date of actual payment.

(d) If such an instrument is dishonoured by non-payment, the amount is to be calculated:

- (i) If the rate of exchange is indicated on the instrument, according to that rate;
- (ii) If no rate of exchange is indicated on the instrument, at the option of the holder, according to the rate of exchange ruling on the date of maturity or on the date of actual payment.

(3) Nothing in this article prevents a court from awarding damages for loss caused to the holder by reason of fluctuations in rates of exchange if such loss is caused by dishonour for non-acceptance or non-payment.

(4) The rate of exchange ruling at a certain date is the rate of exchange ruling, at the option of the holder, at the place where the instrument must be presented for payment in accordance with article 53 (g) or at the place of actual payment.

#### *Article 74 bis*

Nothing in this Convention prevents a Contracting State from enforcing exchange control regulations applicable in its territory, including regulations which it is bound to apply by virtue of international agreements to which it is a party.

#### *Article 75*

(deleted)

#### *Article 76*

(deleted)

#### *Article 77*

(deleted)

#### *Article 78*

(1) When a party is discharged wholly or partly of his liability on the instrument, any party who has a right of recourse against him is discharged to the same extent.

(2) Payment of a bill by the drawee to the holder of the amount due in whole or in part discharges all parties to the bill to the same extent.

#### *Article 79*

(1) A right of action arising on an instrument can no longer be exercised after four years have elapsed

(a) Against the acceptor or the maker or their guarantor or the guarantors of the drawee, after the date of maturity;

(b) Against the drawer or an endorser or their guarantor, after the date of protest for dishonour or, where protest is dispensed with, the date of dishonour.

(2) (a) If a party has taken up and paid the instrument in accordance with article 67 or 68 within one year before the expiration of the period referred to in paragraph (1) of this article, such party may exercise his right of action against a party liable to him within one year after the date on which he took up and paid the instrument.

(b) (for subsequent consideration)

#### *Article 80*

(1) When an instrument is lost, whether by destruction, theft or otherwise, the person who lost the instrument has, subject to the provisions of paragraphs (2) and (3) of this article, the same right to payment which he would have had if he had been in possession of the instrument. The party from whom payment is claimed cannot set up as a defence against liability on the instrument the fact that the person claiming payment is not in possession thereof.

(2) (a) The person claiming payment of a lost instrument must state in writing to the party from whom he claims payment:

- (i) The elements of the lost instrument pertaining to the requirements set forth in article 1 (2) or 1 (3); these elements may be satisfied by presenting to that party a copy of that instrument;
- (ii) The facts showing that, if he had been in possession of the instrument, he would have had a right to payment from the party from whom payment is claimed;
- (iii) The facts which prevent production of the instrument.

(b) The party from whom payment of a lost instrument is claimed may require the person claiming payment to give security in order to indemnify him for any loss which he may suffer by reason of the subsequent payment of the lost instrument.

(c) The nature of the security and its terms are to be determined by agreement between the person claiming payment and the party from whom payment is claimed. Failing such an agreement, the Court may determine whether security is called for and, if so, the nature of the security and its terms.

(d) If the security cannot be given, the Court may order the party from whom payment is claimed to deposit the amount of the lost instrument, and any interest and expenses which may be claimed under article 67 and 68, with the Court or any other competent authority or institution, and may determine the duration of such deposit. Such deposit is to be considered as payment to the person claiming payment.

#### *Article 81*

(1) A party who has paid a lost instrument and to whom the instrument is subsequently presented for payment by another person must notify the person to whom he paid of such presentment.

(2) Such notification must be given on the day the instrument is presented or on one of the two business days which follow and must state the name of the person presenting the instrument and the date and place of presentment.

(3) Failure to notify renders the party who has paid the lost instrument liable for any damages which the person whom he paid may suffer from such failure, provided that the total amount of the damages does not exceed the amount of the instrument and any interest and expenses which may be claimed under article 67 or 68.

(4) Delay in giving notice is excused when the delay is caused by circumstances which are beyond the control of the person who has paid the lost instrument and which he could neither avoid nor overcome. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

(5) Notice is dispensed with when the cause of delay in giving notice continues to operate beyond 30 days after the last date on which it should have been given.

#### Article 82

(1) A party who has paid a lost instrument in accordance with the provisions of article 80 and who is subsequently required to, and does, pay the instrument, or who loses his right to recover from any party liable to him and such loss of right was due to the fact that the instrument was lost, has the right

(a) If security was given, to realize the security; or

(b) If the amount was deposited with the Court or other competent authority, to reclaim the amount so deposited.

(2) The person who has given security in accordance with the provisions of paragraph (2) (b) of article 80 is entitled to reclaim the security when the party for whose benefit the security was given is no longer at risk to suffer loss because of the fact that the instrument is lost.

#### Article 83

A person claiming payment of a lost instrument duly effects protest for dishonour by non-payment by the use of a writing that satisfies the requirements of article 80, paragraph (2) (a).

#### Article 84

A person receiving payment of a lost instrument in accordance with article 80 must deliver to the party paying the writing required under paragraph (2) (a) of article 80 receipted by him and any protest and a receipted account.

#### Article 85

(a) A party who paid a lost instrument in accordance with article 80 has the same rights which he would have had if he had been in possession of the instrument.

(b) Such party may exercise his rights only if he is in possession of the receipted writing referred to in article 84.

#### Article 86

(deleted)

### D. Report of the Secretary-General: security interests, issues to be considered in the preparation of uniform rules (A/CN.9/186)\*

#### CONTENTS

	<i>Paragraphs</i>
INTRODUCTION .....	1-13
Major questions .....	10-13
OUTLINE OF SPECIFIC ISSUES TO BE CONSIDERED .....	14-58
Scope of application .....	14-17
Exclusions from the uniform rules .....	18-19
Conflict of laws .....	20-28
Formal requisites for a valid security agreement .....	29-31
Description of the claim and of the secured property .....	32-37
Actions required to protect security interest against third parties .....	38-45
Priority of security interest as against interests of third parties .....	46-50
Proceeds .....	51-54
Procedures on default .....	55-58

#### INTRODUCTION

1. At its tenth session the Commission had before it three reports on security interests.<sup>1</sup> After considering these

\* 16 May 1980.

<sup>1</sup> A study on security interests, based on a study prepared by Professor Ulrich Drobnig of the Max-Planck-Institut für Ausländisches und Internationales Privatrecht (A/CN.9/131) (Yearbook ... 1977, part two, II, A); a note by the Secretariat on article 9 of the Uniform Commercial Code of the United States of America (A/CN.9/132) (Yearbook ... 1977, part two, II, B); and a report of the Secretary-General containing information on proposals for reform and on the conclusions reached by a consultative group convened jointly by the Secretariat of the Commission and the International Chamber of Commerce (A/CN.9/130).

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.<sup>2</sup>

2. At its twelfth session, after considering the report of the Secretary-General,<sup>3</sup> the Commission requested the Secretary-General to prepare a report setting out the issues to be considered in the preparation of uniform rules on

<sup>2</sup> *Official Records of the General Assembly, Thirty-second Session, Supplement No. 17 (A/32/17)*, para. 37 (Yearbook ... 1977, part one, II, A).

<sup>3</sup> A/CN.9/165 (Yearbook ... 1979, part two, II, C).

security interests and to propose the manner in which those issues might be decided.<sup>4</sup> This report is submitted in conformity with that request.

3. The report submitted by the Secretary-General to the Commission at its twelfth session briefly discussed the possible content of uniform rules on security interests. Certain problems were isolated and various alternative methods of solving those problems were suggested.

4. The request of the Commission made at its twelfth session "to propose the manner in which [the issues to be considered in the preparation of uniform rules on security interests] might be decided" seems to call for a different approach. In order to present in a concrete form the manner in which the issues might be decided, it seems desirable to present to the Commission an outline of possible uniform rules.

5. The approach used in this report is that which found greatest favour in the Commission at its tenth session and on the basis of which the report of the Secretary-General to the twelfth session was based, namely 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 to international transactions.

6. The underlying conceptual basis for the functional approach is that the rules should be determined by the nature of the credit transaction and the economic and social policies which are deemed to be desirable. There is specifically rejected the idea that the rights of the parties should be influenced by any consideration as to whether the debtor or the creditor may happen to be the "owner" of the secured property<sup>5</sup> or by the use of other legal concepts which were not originally developed in the context of the law of security interests.

7. The use of a functional approach has been found to have the advantage that it is possible to make all forms of consensual security interests the subject of one statute. By so doing it is possible to harmonize the law in respect of all credit transactions which have the same economic function. For example the same rights might be given to (1) the unpaid seller of goods who has "reserved the title" to the goods until payment, (2) a financing institution to which the unpaid seller has transferred his claim and "reservation of title", and (3) a financing institution which has paid the seller directly, or has lent the money to the buyer to pay the seller, and has taken a security interest in the goods purchased. In all three cases the seller or the financing institution have given credit to the buyer to permit the buyer to purchase the goods.

8. The use of the functional approach to security interests also makes it easier to develop clear and coherent rules to govern those cases in which the property of the debtor is the subject of several different security interests in the course of the same credit transaction. For example, when the importation of goods has been financed under a

documentary letter of credit, the financing bank has a security interest in the goods through its possession of the bills of lading. If the buyer must sell the goods in order to repay the bank, the bank may agree to hand over the documents to the buyer so that he can take possession of the goods from the carrier and place them in a warehouse prior to resale. In some, but not all, common law countries a short-term non-possessory security interest under the designation of "trust-receipt" is available to cover the period of time until the goods have been placed in the warehouse. Once the goods are in the warehouse the bank may be able to assert a security interest in the goods through possession of the warehouse receipt, if the law of the State in question grants to warehouse receipts the characteristics of a document of title such as is granted to bills of lading. Alternatively, the bank may assert a non-possessory security interest, if that is allowed by the applicable law. Therefore, if the bank is to have a continuous security interest in the goods throughout this transaction, the law must permit of the mutation of the security interest from possessory to non-possessory and, perhaps, back to possessory. This can easily be done in a statute using the functional approach to security interests.

9. Similarly by treating all forms of security interest in one statute, it is easier to regulate conflicts in priority between different security interests in the same secured property which arise through different financing transactions. One such example is the conflict between the financier of book debts, sometimes called a factor, and the unpaid seller of goods who reserved title to the goods and claims an interest in the book debts which arose as a result of the resale of the goods.<sup>6</sup> In a case such as this it is technically difficult to devise a satisfactory solution to the conflict in priorities so long as the rights of the financier of the book debts and the unpaid seller of the goods are governed by different statutes.

### *Major questions*

10. There are six major questions to be dealt with in a law on security interests:

In what kinds of moveables can a security interest be created under the law?

What formalities, if any, must the debtor and secured creditor fulfil in order to create a valid security interest?

To what extent are the debtor and the secured creditor free to determine by agreement the terms which would govern their relationship and to what extent are the terms determined by the law?

What are the rights which the secured creditor can have against third parties claiming an interest in the secured property (purchasers from the debtor, other creditors of

<sup>4</sup> *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17 (A/34/17)*, para. 54 (Yearbook ... 1979, part one, II, A).

<sup>5</sup> Throughout this report the property which is the security for the credit transaction will be referred to as the "secured property".

<sup>6</sup> As noted in UNIDROIT Study LVIII-Doc. 7, p. 7 (Report of the Secretariat of UNIDROIT on the first session of the Study Group for the preparation of uniform rules on the contracts of factoring held in Rome on 5 and 6 February 1979), "It is a well known fact that the problem of the conflicts which may arise between the factor and the supplier's creditors when the latter has assigned the debts in question several times over has met with different solutions in the various national legal systems".

the debtor, the mass of creditors in the bankruptcy of the debtor)?

What must the secured creditor do to have these rights?

What are the procedures to be followed in case of default by the debtor?

11. This report suggests the following responses to these six questions:

All items which are classified as moveables under the law of the State in question could have a security interest created in them. However, special rules may be necessary where particular kinds of moveables present particular problems.

To create a valid security interest the secured creditor must either take possession of the secured property or there must be a written agreement or written confirmation of an oral agreement.

The security agreement may, in principle, contain any terms governing the relationship between the debtor and the secured creditor which the parties find relevant. Certain limitations on the principle of freedom of contract as it affects the relationship between the debtor and the secured creditor might be in the uniform rules themselves. Other limitations, if any, might be left to the general law on abusive contractual provisions or to the specific provisions of consumer protection law, if security interests arising out of consumer credit transactions are to be included within the uniform rules.

By doing the appropriate acts, the secured creditor should be able to acquire priority over the rights of all third parties, except certain buyers or lessees of inventory, instruments or negotiable documents. Before the secured creditor has done those acts, his security interest should be subject to the rights of most third parties who claim an interest in the secured property.

The actions to be taken by the secured creditor in order to be generally protected against the competing claims of third parties may differ depending on the nature of the secured property or on the nature of the transaction. It may also be desirable not to attempt to unify the rules in this respect but to offer certain alternatives. The problems arising in international trade could then be settled through clear rules on conflict of laws.

If the debtor is in default, the secured creditor should normally be allowed to take possession of the secured property and have it sold. If the secured property consists of commercial goods or other items of which the value can easily be determined, it should be allowed to be sold or otherwise disposed of by the secured creditor through normal commercial channels. In other cases, the disposition should be by the appropriate official of the State or person authorized by the State to conduct such sales.

12. A text embodying the functional approach to the law of security interests has been adopted or officially recommended for adoption in both civil law<sup>7</sup> and common

law legal systems.<sup>8</sup> There seems to be nothing in the basic concepts or in the techniques by which those concepts are implemented which would inhibit the adoption of a statute using the functional approach in any legal system in which it was desired to facilitate the use of secured credit.

13. Nevertheless, experience has shown that absolute identity of text in different States probably cannot be achieved because of the need for the law of security interests to be integrated with other aspects of the law. It is not thought that this need be a serious obstacle to the work of the Commission. The preparation of a model law with an indication of alternative provisions would serve to harmonize the law both within and amongst those legal systems which adopted a statute based upon the model law.

#### OUTLINE OF SPECIFIC ISSUES TO BE CONSIDERED

##### *Scope of application*

14. The provisions governing the scope of application of a law on security interests must state the types of security interests which are to be included and the kinds of moveables in which those security interests can be created.

15. It is desirable that, to the extent possible, the model law should govern all forms of security interest in all kinds of moveables.

16. In regard to most issues which arise in the law of security interests, the policies which should dictate the appropriate rule would be the same no matter what the form of the secured property. To the extent that the form of the secured property calls for a special rule in respect of one issue or another, such a rule could easily be accommodated within the uniform rules. Similarly, there are only a few differences in policy or mechanics which arise between a security interest to assure payment of the purchase price and a security interest to assure repayment of a loan.

17. The consolidation in one law of all forms of security interests in all forms of moveables makes it possible to reconcile the interests of the various claimants in an organized manner. This is not possible where the various claimants to the assets of a debtor rely upon different laws enacted at different times to meet different situations.

##### *Exclusions from the uniform rules*

18. A broad statement of scope of application as is proposed may bring within its scope certain marginal transactions which it may be thought best to exclude from the operation of the model law. By way of example, it may be thought desirable specifically to exclude from the operation of the model law:

A lien, charge or other interest given by statute or other rule of law for services or materials;

An assignment of present or future compensation for labour or personal services;

An assignment of book debts made solely to facilitate their collection for the assignor.

<sup>7</sup> Québec, Report on the Québec Civil Code, Civil Code Revision Office (1977), vol. I, Book Four, Title Five, "Security on Property".

<sup>8</sup> United States of America, Uniform Commercial Code, Article 9. Ontario, Personal Property Security Act, Stat. Ont. 1967, c. 73, as amended. For the common law provinces of Canada in general, Model Uniform Personal Property Security Act. India, Report of Banking Laws Committee on Personal Property Security Act 1977.

19. This list is illustrative only, and certainly far from exhaustive. It is likely that, even if the model law were to contain a list of excluded transactions, each State which wished to enact the model law would have to consider which transactions under its law should be specifically excluded from the application of these rules.

### *Conflict of laws*

20. In the context of international trade, the subject of conflict of laws raises some of the most important and difficult questions in respect of security interests.

21. At the tenth session of the Commission it was already noted that it would be difficult to construct rules in respect of conflict of laws so long as the basic substantive rules differed by too great an extent in the various legal systems.<sup>9</sup> However, a model law in respect of security interests which would have the effect of unifying or harmonizing the substantive law might well include rules governing conflict of laws.

22. There are three principal problems which generate questions of conflict of laws: (1) which law governs the validity of the security agreement between the debtor and the secured creditor, (2) which law governs the actions to be taken by the secured creditor in order to be protected against third parties (e.g. other creditors of the debtor, good faith purchasers of the secured property), and (3) which law governs the extent of protection to be given the secured creditor against those third parties.

23. The answers to these three questions need not necessarily be the same for all types of secured property. It might be considered desirable to have special rules governing security interests in mobile goods (such as means of transportation or self-propelled equipment, which are of such a nature that they are often used in more than one State) or in intangibles (such as book debts which have no physical manifestation and which may be recorded in a computer memory bank in a State other than that in which is located the place of business of either the debtor or the secured creditor).

24. The general rule where the secured property is neither mobile nor intangible, would probably be that the validity of the security agreement, the actions to be taken by the secured creditor in order to be protected against third parties and the degree of protection to be given against third parties would all be governed by the law of the State where the secured property was located. If the secured property was subsequently moved to a second State, the validity of the security agreement should, in principle, continue to be governed by the law of the first State. However, the second State may wish to subject the security agreement to the same requirements of formality as would otherwise be required of a security agreement concluded under the model law.

25. It is less clear what the conflict of law rule should be as to the substantive rights of the secured creditor in the secured property. In regard to the relationship between the

debtor and the secured creditor, it could be argued that the law of the first State should continue to govern. However, even between the debtor and the secured creditor some of the more important questions involve the procedure to be followed by the secured creditor in case of the debtor's default. It seems probable that the law of the second State would govern these matters and that, as a result, it would be better if the entire relationship between the debtor and the secured creditor were governed by the law of the second State.

26. Similarly, any conflict between the rights of the secured creditor and any claim to the secured property by third parties (purchasers from the debtor, other creditors of the debtor or the liquidator in the debtor's bankruptcy or other insolvency proceedings) should be governed by the law of the second State. It should also be the law of the second State which governs the actions, if any, which the secured creditor must take, such as registration of the security interest, in order for his rights to be protected against third parties. However, the model law might provide that if the secured creditor had taken the appropriate actions in the first State, the second State would recognize the effect of those actions for a restricted period of time allowing the secured creditor to be repaid or to take the appropriate actions necessary, if any, in the second State.

27. If the goods were mobile goods, it could happen that the secured property was temporarily out of the State where it would normally be located at the time the events in question took place. In this case, it might be considered desirable for the law of the State where the debtor has his place of business to be the applicable law in respect of all questions. Alternatively, if the secured property were of such a nature that its ownership were registered with the State, as in the case with automobiles and trucks, it may be thought desirable that the governing law be the law of the State of registration. This would normally be the same State as the State where the debtor has his place of business, but some debtors might own vehicles in other States as well.

28. In the case of intangibles which have no physical manifestation, the rule might be similar to that in respect of mobile goods, i.e. the governing law might be the law of the State where the debtor has his place of business.

### *Formal requisites for a valid security agreement*

29. To the extent that the security agreement is considered to be a commercial contract between the debtor and the secured creditor, there is no more reason to require that it be in writing than there is to require that a contract for a commercial sale of goods be in writing.<sup>10</sup> However, the essential purpose of a security agreement is to create rights in the secured property which will give the secured creditor a priority over the rights of third parties. Because of this, for the security agreement to be effective against third parties, it seems desirable that it be in writing, or if oral, confirmed in writing.

<sup>9</sup> See, *Official Records of the General Assembly, Thirty-second Session, Supplement No. 17 (A/32/17)*, annex II, para. 12 (Yearbook ... 1977, part one, II, A).

<sup>10</sup> E.g. United Nations Convention on Contracts for the International Sale of Goods, article 11, Vienna, 11 April 1980, provides that a contract for the international sale of goods need not be in writing (reproduced in this volume, part three, I, B, below).

30. Nevertheless, if the secured creditor takes possession of the secured property, i. e. if there is a pledge of the secured property, it may not be thought necessary that the security agreement be in writing to be effective even against third parties. As a practical matter this issue will arise in respect of commercial credit only when the secured property consists of negotiable instruments or of documents of title, such as bills of lading.

31. The advantage to requiring that the security agreement not only be in writing but that it also be authenticated is that it reduces the possibility of fraud and it makes certain the moment at which the agreement was concluded. On the other hand a requirement of authentication would make more cumbersome the process of concluding security agreements with a consequent increase in the cost. It does not seem that the extra protection against fraud is worth the cost.

#### *Description of the claim and of the secured property*

32. At the time the secured creditor attempts to enforce his security interest, it must be possible to identify the debtor and the secured creditor, the amount of the claim and the specific items of secured property. In most cases these requirements do not cause any problems. If the debtor has created a security interest in a specific item to secure repayment of the purchase price either to the seller or to a financing institution, all of these requirements will be met. Similarly, if the debtor has borrowed money and created a security interest in a specific item of property, all of these requirements will be met.

33. Difficulties arise when the secured property has been attached to immoveable property, or attached to or commingled with other moveable property, or processed to such a degree that it has changed its character. In all of these cases it seems desirable that the secured creditor not lose his security interest by virtue of the attachment, commingling or processing so long as the secured property can still be identified or traced. However, the secured creditor's rights in the secured property should be limited when exercise of those rights would seriously impair the interests of the debtor or third parties in the property to which the secured property has been attached, with which it has been commingled or into which it has been transformed.

34. The name of the secured creditor is no longer accurate when the claim for the amount still owed by the debtor accompanied by the security interest has been transferred by the original secured creditor. Therefore, the model law should provide that as regards the debtor and all third parties the original secured creditor is to be considered as the person to be paid or to be given any relevant notices unless the debtor or the third party in question has notice of the transfer or other appropriate actions to give such notice to him have been taken.

35. A different kind of problem arises under those laws on security interests which provide a means by which a security agreement can be concluded between a debtor and a secured creditor to cover a line of credit to be extended in the future. The law may provide that the security agreement specify the maximum amount of credit, but that is not

always required. To the extent that funds are advanced against the line of credit, they are automatically secured under the security agreement.

36. Similarly, some laws on security interests provide that the individual items of secured property need not be described in the security agreement itself. Under legislation of this type the security interest may be in the entire business as a going concern (e. g. the *nantissement du fonds de commerce*), it may be said to "float" over described categories of secured property until the moment of enforcement at which time it attaches to the specific items then owned by the debtor, or the security interest may be said to attach to "after-acquired property" of specific types as that property is acquired by the debtor.

37. The model law should follow these examples and provide that the amount of the claim secured need not be specified in the security agreement so long as it can be determined at the time of enforcement and that it not be necessary that the description of the secured property be so detailed that the individual items could be determined at the time of the conclusion of the security agreement so long as they can be determined at the time of enforcement.

#### *Actions required to protect security interest against third parties*

38. One of the more controversial questions in respect of the law of security interests is whether the secured creditor should have to take any action in addition to concluding a valid security agreement in order to enforce the security interest against third parties in general. Such additional actions might include notation on the bill of sale in the case of a reserved title, marking of the secured property itself, marking of the buildings within which the secured property is stored or used, or filing or registration in a public office.

39. The principle purpose of requiring such an action is to give notice of the security interest to third parties before they act in the belief that the debtor has full rights in the secured property. In addition the action may have the effect of reducing fraud by the debtor and secured creditor directed against third parties.

40. Because of differences in the structure of the economy and of the nature of the secured credit typically granted, it may be desirable for different legal systems to have different rules as to the actions to be taken, or even whether any action is necessary. Moreover, within a single legal system it may be desirable to have different rules in respect of different types of transactions or in respect of different classes of third parties.

41. For example, if the secured property is part of the debtor's inventory which it is expected will be sold in the ordinary course of his business, the model law might provide that the purchaser buys the secured property free of any security interest even if he knew of it. If such were the rule, to this extent the secured creditor could take no action which would protect him against this class of third parties. His protection, if any were to be given him, might reside in a rule that the security interest automatically shifted to the proceeds of the sale.



42. Similarly, it might be thought that no form of notice to third parties need be given if the security interest were a purchase money security interest, i.e. a title reserved by the unpaid seller or held by a bank or other financing institution which supplied the funds for the purchase of the secured property.<sup>11</sup>

43. On the other hand if the uniform rules are drafted in such a manner as to allow the use of the inventory as a whole as secured property, either by a security interest in the entire business, a "floating" charge, or an after-acquired property clause in the security agreement, it might be thought that some form of notice to other creditors should be given of that security interest.

44. If some form of notice to third parties is to be required in respect of some or all security interests in order to protect the security interest against those third parties, the form of the notice must be decided upon. Every form of notice has its disadvantages. Marking the bill of sale is of little use as a means of informing third parties who would have to inquire of the debtor in respect of each item in question. Marking the secured property itself can be effective when the secured property consists of relatively large items intended for use and not for resale, such as industrial or office equipment, but not for other types of secured property. Marking of the building in which the secured property is used or stored is effective only if a major portion of the building is devoted to such use. Notation on a certificate of title which is transferred with the item in question is useful for those forms of property for which such certificates are normally issued, but would not be particularly useful for other types of property. Public filing or registration systems are useful for all types of property and are well thought of in some legal systems. In other legal systems they are thought to be too expensive, not to give adequate notice in fact to the appropriate third parties while making public excessive business information to third parties who have no legitimate interest in having such knowledge.

45. Whether the model law should require some form of publicity and the nature of the publicity to be required are among the more difficult questions to be decided. It may be that the only adequate solution would be to leave these matters to each State but to include in the provisions on conflict of laws that secured property which has a protected status in the first State continues to have a protected status in the second State for a restricted period of time. If by the end of that period of time the secured creditor has taken the actions required by the second State, the protected status would continue. If the actions taken in the first State were also those required by the second State (for example, notation on the certificate of title which moved with the secured property or fixing of a notice to the secured property itself), no further action would need to be taken in the second State.

#### *Priority of security interest as against interests of third parties*

46. A secured creditor who attempts to enforce the security interest at the time the debtor is in default on his obligation is likely to find that the debtor is also in default

on his obligations to other parties who would also like to enforce their monetary claims by resorting to the same secured property. Therefore, the model law should state clearly the rights given to the secured creditor as against the claims of those third parties.

47. Distinctions should be drawn between different classes of secured creditors as well as between different classes of debtors. One class of secured creditor which might receive favoured status is the purchase money secured creditor. As used here the term is meant to indicate the creditor who has made available credit to the debtor to enable the debtor to purchase particular property and who has a security interest in that property to secure repayment of the credit. The purchase money secured creditor may be the unpaid seller, or may be a financing institution. Many legal systems favour unpaid sellers who reserve property in the goods sold until the price has been paid, but, except in one case, few favour the financing institution which has made the funds available. That one case is where the unpaid seller reserves title and subsequently assigns the claim and the reservation of title to the financing institution. It is suggested, however, that the financing institution should be considered to be a purchase money secured creditor even if the security interest is created by agreement between the debtor and the financing institution and not by reservation of title by the seller subsequently transferred to the financing institution.

48. Purchase money secured creditors, as described above, should be given priority over other secured creditors whose interests arise as a result of a security interest in the mass of the debtor's property.

49. Other third party creditors who may claim an interest in the secured property in conflict with the secured creditor include a party who has levied on the secured property in execution of a judgement of a court, a party who has repaired the secured property and has kept physical possession of it pending payment of the repair charges, the holder of a security interest in land to which the secured property has been attached (e.g. a machine tool which has been bolted to the floor), and the mass of creditors in bankruptcy or other insolvency proceedings. If it is decided that the secured creditor should take some action to protect himself generally against third parties, it would be necessary to decide to what extent a secured creditor who had not taken the required action would be protected against any of the third parties mentioned above.

50. In general, a secured creditor should be able to recover the secured property from a person who has purchased it from the debtor. However, if the secured property was inventory held by the debtor for resale, a purchaser of those goods should purchase free of the security interest, even if he knew of it. The secured creditor's security interest should shift automatically to the proceeds of the sale.

#### *Proceeds*

51. It is particularly appropriate that when a purchaser of inventory buys free of a security interest created in that inventory, the security interest would shift to the proceeds of the sale. However, even in those cases when the

<sup>11</sup> See also, paras. 47 and 48, below.



purchaser does not buy free of the security interest, it may still be desirable that the security interest would shift to the proceeds of any sale which might take place. If the secured property is in fact sold, even against the express provisions of the security agreement, it may be a practical impossibility for the secured creditor to recover the property from the purchaser and the proceeds of the sale may be the only feasible source of reimbursement to the secured creditor. Moreover, where the secured property has been destroyed by fire or similar disaster, any insurance reimbursement to the debtor should be available to the secured creditor to the extent of his unpaid claim, and this may be considered also to be proceeds.

52. Proceeds from the voluntary or involuntary disposition of the secured property can be of several different types. They can consist of cash, negotiable instruments, book accounts or other property of a nature similar to the original secured property. For example, if the secured property is an item of industrial equipment, it may be sold for cash plus a used piece of equipment. Both the cash and the used piece of equipment would be proceeds. If the used piece of equipment was in turn sold, the proceeds from that sale might also be considered to be proceeds of the original security interest.

53. So long as the proceeds can be identified as coming from the original security interest, it would be possible to consider them as being substituted for the original secured property. However, at some point of time, the cash received from the sale of the secured property, or received from the sale of the used piece of equipment taken in part payment in the original sale, becomes commingled with other cash and loses its specific identity. It might be thought that at that point of time the security interest in the proceeds would cease.

54. Conflicts of priorities can arise between the secured creditor who claims his interest in specific property of the debtor as proceeds and another secured creditor who claims a security interest in the same property based upon a different security agreement. For example, a business may have borrowed money from a factor and given as security all of its book debts then in existence or to come into existence during a particular period of time. During that period of time the business may sell on credit a piece of equipment subject to a security interest. The secured creditor in respect of the piece of equipment may claim a security interest in the resulting book debts as proceeds from the sale of the equipment while the factor may claim it

under his security agreement. A decision would have to be made in such a case as to which of the two secured creditors should be given priority as to that particular book debt.

#### *Procedures on default*

55. If the debtor does not pay the debt at the time it is due, the secured creditor will look to the secured property in order to reimburse himself. Some legal systems have allowed the secured creditor who still "owned" the secured property, usually because he was a seller who had reserved title until payment was complete, to retake "his property". Other legal systems have insisted that the only purpose of retention of title is to secure the unpaid price so that the debtor, and not the secured creditor, should receive the difference between the value of the secured property and the unpaid price. In order to establish the value of the secured property, these legal systems usually require the secured property to be sold.

56. Two different concerns are reflected in the methods authorized for selling secured property after default by the debtor. On the one hand the secured property should be sold at the maximum price possible. On the other hand careful control should be exercised to ensure that the secured creditor is not allowed to take undue advantage of the distressed situation of the debtor.

57. The response of many legal systems has been to favour the second of these two concerns. The sale of secured property after default by the debtor is required to be conducted by an official of the State or by a person specially authorized by the State to conduct such sales.

58. In some legal systems the secured creditor is authorized to sell the secured property himself. The justification for doing so is that he is more likely to be able to conduct the sale in a commercial manner and, thereby, to realize the normal commercial price for property of the type in question than would be the case if the sale were made by an official of the State. This is particularly so when the secured creditor was the original seller of the secured property and is, therefore, in the business of selling goods of the kind in question. If a private sale of the secured property on the default of the debtor is permitted by the model law, it should be required to be made according to certain standards so as to reduce the possibility of abuse by the secured creditor.

## IV. INTERNATIONAL COMMERCIAL ARBITRATION

### A. Draft prepared by the Secretary-General: revised draft UNCITRAL Conciliation Rules (A/CN.9/179)\*

#### APPLICATION OF THE RULES

##### *Article 1*

(1) These Rules apply to conciliation of disputes arising out of or relating to a contractual or other legal relationship where the parties seeking an amicable settlement of their dispute have agreed that the UNCITRAL Conciliation Rules apply.

(2) The parties may agree to any modification of these Rules.

#### COMMENCEMENT OF CONCILIATION PROCEEDINGS

##### *Article 2*

(1) The party initiating conciliation sends to the other party a written invitation to conciliate, briefly identifying the subject of the dispute.

(2) Conciliation proceedings commence when the other party accepts the invitation to conciliate.

(3) If the other party refuses conciliation, there will be no conciliation proceedings.

(4) If the party initiating conciliation has not received a reply within thirty days from the date on which he sent the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate. If he so elects, he informs the other party accordingly.

#### NUMBER OF CONCILIATORS

##### *Article 3*

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

#### APPOINTMENT OF CONCILIATOR(S)

##### *Article 4*

(1) (a) In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of a sole conciliator;

(b) In conciliation proceedings with two conciliators, each party appoints one conciliator;

(c) In conciliation proceedings with three conciliators, each party appoints one conciliator. The parties shall endeavour to reach agreement on the name of the presiding conciliator.

(2) Parties may enlist the assistance of an appropriate institution or person in connexion with the appointment of conciliators. In particular,

(a) A party may request such an institution or person to recommend the names of suitable individuals to act as conciliator;

or

(b) The parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.

In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or presiding conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

#### SUBMISSION OF STATEMENTS TO CONCILIATOR

##### *Article 5*

(1) Upon the appointment of the conciliator,\* each party submits to the conciliator a brief written statement describing the general nature of the dispute and the points at issue. Each party sends a copy of his statement to the other party.

(2) The conciliator may request each party to submit to him a further 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. The party sends a copy of his statement to the other party.

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

#### REPRESENTATION AND ASSISTANCE

##### *Article 6*

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

\* 7 February 1980. A commentary on these Rules may be found in document A/CN.9/180, reproduced as B, below.

\* In this and all following articles, the term "conciliator" applies to either a sole conciliator, two or three conciliators, as the case may be.

## ROLE OF CONCILIATOR

*Article 7*

(1) The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

(2) The conciliator will be guided by principles of fairness, equity and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices of the parties.

(3) 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.

(4) The conciliator may, at any stage of the conciliation proceedings, 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.

## ADMINISTRATIVE ASSISTANCE

*Article 8*

In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator after consultation with the parties, may arrange for administrative assistance by a suitable institution.

## COMMUNICATION BETWEEN CONCILIATOR AND PARTIES

*Article 9*

(1) The conciliator may invite the parties to meet with him, or may communicate orally or in writing with the parties, or with a party alone.

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

## DISCLOSURE OF INFORMATION

*Article 10*

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 will 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.

## PARTY SUGGESTIONS FOR SETTLEMENT OF DISPUTE

*Article 11*

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.

## CO-OPERATION OF PARTIES WITH CONCILIATOR

*Article 12*

The parties will 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.

## SETTLEMENT AGREEMENT

*Article 13*

(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. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

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

(3) The parties by signing the settlement agreement accept it as a final and binding settlement of their dispute.

## CONFIDENTIALITY

*Article 14*

Unless otherwise agreed by the parties or required by law, the conciliator and the parties must keep confidential all matters relating to the conciliation proceedings. Confidentiality extends also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

## TERMINATION OF CONCILIATION PROCEEDINGS

*Article 15*

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 declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

\* It is recommended that the settlement agreement contain a clause that any dispute arising out of or relating to the interpretation and performance of the settlement agreement shall be submitted to arbitration.

## RESORT TO ARBITRAL OR JUDICIAL PROCEEDINGS

*Article 16*

The parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.

## COSTS

*Article 17*

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

- (a) The fee of the conciliator which shall be reasonable in amount;
  - (b) The travel and other expenses of the conciliator;
  - (c) The travel and other expenses of any witnesses requested by the conciliator with the consent of the parties;
  - (d) The cost, travel and other expenses of any expert advice requested by the conciliator with the consent of the parties;
  - (e) The cost of any administrative assistance provided pursuant to article 8 of these Rules.
- (2) The costs, as defined above, are borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party are borne by that party.

## DEPOSITS

*Article 18*

- (1) The conciliator, upon his appointment, may request each party to deposit an equal amount as an advance for the costs referred to in article 17, paragraph (1).
- (2) During the course of the conciliation proceedings the conciliator may request supplementary deposits in an equal amount from each party.
- (3) If the required deposits under paragraphs (1) and (2) of this article are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination to the parties, effective on the date of that declaration.

(4) Upon termination of the conciliation proceedings, the conciliator renders an accounting to the parties of the deposits received and returns any unexpended balance to the parties.

## ROLE OF CONCILIATOR IN SUBSEQUENT PROCEEDINGS

*Article 19*

Unless the parties have agreed otherwise, a conciliator may not act as an arbitrator in subsequent arbitral proceedings, or as a representative or counsel of a party, or be presented 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 20*

The parties undertake not to rely on or 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 had indicated his willingness to accept a proposal for settlement made by the conciliator.

## MODEL CONCILIATION CLAUSE

*Variant A:*

Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force.

*Variant B:*

In the event of a dispute arising out of or relating to this contract, a party, before resorting to the courts or, if so provided for, to arbitration, shall invite the other party to seek an amicable settlement of that dispute by conciliation in accordance with the UNCITRAL Conciliation Rules as at present in force.

**B. Report of the Secretary-General: commentary on the revised draft of UNCITRAL Conciliation Rules (A/CN.9/180)\***

## CONTENTS

	Paragraphs		Paragraphs
INTRODUCTION . . . . .	1-4	Article 8. Administrative assistance . . . . .	56-57
I. CONCEPT AND PRINCIPLES OF CONCILIATION . . . . .	5-17	Article 9. Communication between conciliator and parties . . . . .	58-60
A. Concept and characteristics of conciliation as distinguished from other methods of dispute settlement . . . . .	5-7	Article 10. Disclosure of information . . . . .	61-63
B. Purpose and potential advantages of conciliation . . . . .	8-13	Article 11. Party suggestions for settlement of dispute . . . . .	64
C. Policy considerations underlying the draft UNCITRAL Conciliation Rules . . . . .	14-17	Article 12. Co-operation of parties with conciliator . . . . .	65
II. COMMENTS ON DRAFT ARTICLES . . . . .	18-96	Article 13. Settlement agreement . . . . .	66-69
A. Application of the Rules and initiation of conciliation . . . . .	18-31	Article 14. Confidentiality . . . . .	70
Article 1. Application of the Rules . . . . .	18-25	D. Termination of conciliation proceedings and costs . . . . .	71-81
Article 2. Commencement of conciliation proceedings . . . . .	26-31	Article 15. Termination of conciliation proceedings . . . . .	71-73
B. Number and appointment of conciliators . . . . .	32-46	Article 16. Resort to arbitral or judicial proceedings . . . . .	74-76
Article 3. Number of conciliators . . . . .	32-38	Article 17. Costs . . . . .	77-79
Article 4. Appointment of conciliator(s) . . . . .	39-46	Article 18. Deposits . . . . .	80-81
C. Conduct of conciliation proceedings . . . . .	47-70	E. Subsequent proceedings . . . . .	82-91
Article 5. Submission of statement to conciliator . . . . .	47-49	Article 19. Role of conciliator in subsequent proceedings . . . . .	82-86
Article 6. Representation and assistance . . . . .	50	Article 20. Admissibility of evidence in other proceedings . . . . .	87-91
Article 7. Role of conciliator . . . . .	51-55	F. Model Conciliation Clause . . . . .	92-96

## INTRODUCTION

1. The United Nations Commission on International Trade Law adopted at its eleventh session (30 May-16 June 1978) a new programme of work.<sup>1</sup> One of the priority items included in that programme was "Conciliation of international trade disputes and its relation to arbitration and to the UNCITRAL Arbitration Rules".<sup>2</sup> Pursuant to that decision, the Secretariat, after consultation with experts in the field of dispute settlement, prepared a preliminary draft of UNCITRAL Conciliation Rules (A/CN.9/166)\*\* and a report entitled "Conciliation of international trade disputes" (A/CN.9/167).\*\*\*

2. The Commission, at its twelfth session, considered what policy considerations should underlie conciliation rules and held an exchange of views on the preliminary draft UNCITRAL Conciliation Rules.<sup>3</sup> At that session the Commission requested the Secretary-General

"(a) To prepare, in consultation with interested international organizations and arbitral institutions,

\* 27 February 1980. The text of the revised draft UNCITRAL Conciliation Rules is contained in document A/CN.9/179, reproduced as A, above.

\*\* Reproduced as Yearbook . . . 1979, part two, III, A.

\*\*\* Reproduced as Yearbook . . . 1979, part two, III, B.

<sup>1</sup> Report of the United Nations Commission on International Trade Law on the work of its eleventh session (30 May-16 June 1978), *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17* (A/33/17), para. 69 (Yearbook . . . 1978, part one, II, A).

<sup>2</sup> *Ibid.*, para. 67 (c) (iv).

<sup>3</sup> Report of the United Nations Commission on International Trade Law on the work of its twelfth session (18-29 June 1979), *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17*, paras. 84-87 and annex I (Yearbook . . . 1979, part one, II, A).

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."<sup>4</sup>

3. Pursuant to that request, the Secretariat revised the draft Conciliation Rules, taking into account the views expressed at the twelfth session. The revised draft (A/CN.9/179)\* was the subject of discussions during consultative meetings with members of the International Council for Commercial Arbitration (1 December 1979) and of the Working Group on International Arbitration of the International Chamber of Commerce (28 January 1980). Professor Pieter Sanders (Netherlands), who had acted as a consultant to the Secretariat in the drawing up of the draft UNCITRAL Conciliation Rules, again acted as consultant in the revision of these Rules.

4. This report is divided into two parts. Part I discusses the concept and principles of conciliation on which the revised draft is based. Part II contains the commentary on each article of the revised draft.

\* Reproduced in this volume, part two, IV, A, above.

<sup>4</sup> *Ibid.*, para. 88.

## I. CONCEPT AND PRINCIPLES OF CONCILIATION

### A. *Concept and characteristics of conciliation as distinguished from other methods of dispute settlement*

5. Conciliation is one out of various methods of dispute settlement. It may be defined as a method used by parties to a dispute to reach an amicable settlement with the assistance of an independent third person or institution.

6. The objective of conciliation is to bring about the amicable settlement of a dispute. Because of its non-judicial character conciliation is thus fundamentally different from litigation before the courts or arbitration. Judges and arbitrators "decide" the case in the form of a judgement or an award which is binding on the parties. Conciliators, however, merely "recommend" or "suggest" possible settlement terms which become binding on the parties only when they have agreed to them. It is true that also during judicial or arbitral proceedings parties may settle their dispute by agreement (e.g. "*accord des parties*"), sometimes at the initiative of the judge or arbitrator. Yet, such a settlement is not typical of what are essentially adversary proceedings.

7. Assistance by an independent third person or institution is the other criterion in the definition given and distinguishes conciliation from normal party negotiations which usually are the first step in attempting to settle a dispute. The independent and impartial character of the third person marks the difference between conciliation and party negotiations conducted through counsel or agents. Such persons, when assisting or representing a party in negotiations, act in the interest of the party by whom they are retained. The conciliator, however, assists both parties in an independent, neutral and impartial manner.

### B. *Purpose and potential advantages of conciliation*

8. When a business dispute has arisen, it is advantageous to settle it without having to resort to costly and time-consuming proceedings, the outcome of which may be uncertain. Conciliation could, thus, be a possible and viable alternative to court litigation or arbitration which sometimes entails a considerable amount of time and money.

9. However, this advantage of conciliation over judicial and arbitral proceedings does not in all circumstances materialize. The conciliation attempt may fail, with the undesirable result that money and time have been spent in vain. Although this potential disadvantage cannot be disregarded, it is mitigated by the reasonable assumption that parties will only initiate conciliation proceedings if they regard an amicable settlement as possible. Moreover, if they realize during conciliation that settlement is unlikely, they will discontinue the conciliation effort and so avoid further expenses.

10. An additional advantage lies in the non-adversary, friendly character of conciliation. While some businessmen may see no reason why court litigation or arbitration should adversely affect their business relationships, others may well view amicable proceedings as conducive to, or even necessary for, the preservation of good business relationships. This latter attitude is prevalent in countries where

culture and tradition favour friendly settlement of disputes, such as in China, Japan, and some African countries. But in other regions, too, business partners with long-standing relations might prefer the "marriage counsellor" approach inherent in conciliation to the "divorce judge" approach inherent in court litigation or arbitration. Also, States and State agencies might opt for conciliation in order to avoid a binding decision imposed by a court or arbitral tribunal.

11. In addition, there are legal considerations that could be advanced in favour of conciliation. One consideration is that various procedural laws and rules discourage judges and arbitrators from promoting amicable settlements. Another consideration is that certain matters are not arbitrable under the applicable law, or parties may lack the legal capacity to arbitrate. Furthermore, reluctance to submit to litigation or arbitration may be caused by uncertainty about the applicable law.

12. Beyond that, conciliation could be of particular value where, for example in long-term contracts or non-contractual relationships, problems arise as to certain matters which are less juridical than technical.

13. Even where the dispute could be settled by a strict application of legal provisions conciliation may nevertheless be preferred for the very reason that it lessens the impact of such provisions. Parties may wish to reach a settlement "in the spirit of conciliation", i.e. a settlement which is not necessarily based on strict legal grounds but more on what they perceive as a just and a reasonable settlement based on mutual concessions. Although legal rules cannot be fully disregarded, allowance should be made for the attempt of parties to find an acceptable compromise that need not necessarily coincide with the terms of a "legally correct" decision.

### C. *Policy considerations underlying the draft UNCITRAL Conciliation Rules*

14. The potential advantages of conciliation will only materialize if the rules of conciliation reflect the considerations referred to above and are tailored to the needs and expectations of the parties. The revised draft of the UNCITRAL Conciliation Rules is based on the following policy considerations.

15. The primary consideration is to further the purpose of conciliation, namely to assist the parties in reaching an amicable settlement. Since the success of such endeavour depends entirely on the willingness of the parties to conciliate, one policy consideration underlying the draft Rules is that the parties' freedom of action is kept intact at any stage of the conciliation proceedings. This principle pertains, in particular, to the commencement and the termination of conciliation proceedings.

16. Another consideration is that, in many instances, conciliation is an attractive alternative to adversary proceedings only if the rules make speedy and inexpensive proceedings possible. This calls for flexible procedural rules. Hence, time periods for certain procedural steps, if fixed at all, must be reasonably short, with due regard to the particular features of international disputes. And whereas parties are at liberty to agree on proceedings with more than one conciliator, conciliation with a single conciliator is envisaged as the normal procedure.

17. A further policy consideration is that the conciliator should be endowed with a reasonably wide discretion. Being entrusted by the parties with the conduct of the proceedings, he should be enabled to perform his functions without any unduly impeding rules. Since his role is essentially to assist the parties, he should consult with the parties even on procedural points and take into account their views to the extent possible. In this way, the conciliation proceedings can be conducted in an informal, flexible manner and be adapted to the particular circumstances of the case at hand.

## II. COMMENTS ON DRAFT ARTICLES

### A. Application of the Rules and initiation of conciliation

#### Article 1. Application of the Rules

18. The UNCITRAL Conciliation Rules—like the UNCITRAL Arbitration Rules—have no statutory force. They become applicable by the agreement of the parties, as laid down in article 1, paragraph (1) of the Rules.

19. The agreement envisaged in article 1, paragraph (1), relates only to the application of the Rules. It is not concerned with the primary question whether a dispute shall be referred to conciliation. In particular, it does not relate to any possible previous commitment by the parties to initiate conciliation in the event of a dispute. In view of its relatively limited content, the agreement on the application of the Rules need not be in writing.

20. Of course, parties are free to stipulate in advance that, in the event of a dispute arising, they commit themselves to seeking an amicable settlement before resorting to the courts or to arbitration. In such a case, they may wish to use one of the model clauses set forth at the end of the draft Rules (and discussed below, paras. 93–96). The conciliation clause or separate conciliation agreement would, then, include the agreement of the application of the Rules envisaged under article 1, paragraph (1).

21. Therefore, it is left to the conciliation clause or separate conciliation agreement whether there is such a commitment. It is not dealt with in the Rules themselves which are based on the fundamental notion that conciliation can usefully take place only if both parties, after a dispute has arisen, are willing to seek an amicable settlement of their dispute. Consequently, article 1, paragraph (1), speaks of “parties seeking an amicable settlement of their dispute” and does not refer to, nor require, any conciliation clause or separate conciliation agreement. This accords with the view prevailing in the Commission at its twelfth session “that the concept of conciliation embodied in the UNCITRAL Conciliation Rules should stress the voluntary, non-binding nature of conciliation and any commitment thereto”.<sup>5</sup>

22. As to the scope of application, it may be noted that many existing conciliation rules 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 given region or within the jurisdiction of a given court of arbitration or similar body.

23. 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 limitation as to categories of persons, areas or subject-matters. If there is a desire to indicate 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).\*

24. While most disputes, at least in the field of international trade, arise in contractual relationships, article 1 envisages application of the Rules also for disputes in non-contractual matters. This accords with the consideration that conciliation may be used in all kinds of dispute which are capable of being settled by agreement of the parties.

25. The wide scope of application is also reflected in paragraph (2) which allows parties to modify the Rules. This enables parties to tailor the Rules according to their particular needs whenever they feel that the Rules are not in every respect suitable in the prevailing circumstances.

#### Article 2. Commencement of conciliation proceedings

26. Article 2 sets forth the initial steps which should bring about certainty as to whether conciliation proceedings will or will not take place. The first step is, according to paragraph (1), that the party initiating conciliation invites the other party to conciliate.

27. The term “party initiating conciliation” is used as there is no “claimant” or “plaintiff” in the context of conciliation. Furthermore, either party could be the one initiating conciliation, irrespective of whether he is under a contractual obligation to initiate conciliation before resorting to the courts or to arbitration. This corresponds with the idea mentioned earlier (see para. 21) that the Rules by themselves do not pre-suppose any previous commitment but are flexible enough to cover cases where a party is committed to take an initial step such as inviting the other party to conciliate (cf. variant B of the proposed model conciliation clause).

28. According to paragraph (1), the initiating party shall, in its invitation to the other party, briefly identify the subject of the dispute. The purpose of this rule is to establish, *ab initio*, a degree of certainty as to on what matter conciliation is envisaged by the inviting party. This is of particular importance in cases of complex commercial relationships. A brief identification of the matter seems sufficient at this stage when it is not yet certain whether conciliation will actually take place. Therefore, a more detailed statement is only required if and when the conciliator has been appointed (see article 5).

29. The question arises whether, in view of the relatively limited content of the invitation, there should be the

<sup>5</sup> *Ibid.*, annex I, para. 3 (Yearbook ... 1979, part one, II, A).

\* Reproduced as Yearbook ... 1977, part one, I, C.

requirement, as in article 2, paragraph (1), that the invitation be in writing. The view is taken that an invitation in writing seems preferable in terms of clarity and proof. While a party may well inquire orally about the other party's willingness to conciliate, the requirement that the invitation be in writing, laid down in paragraph (1), emphasizes the importance of the request as the first step in determining whether conciliation will take place or not. It also facilitates determining the 30-day period referred to in paragraph (4) and may serve as proof of the fact that there was an invitation to conciliate in cases where conciliation is, under the agreement of the parties, a pre-condition to arbitration or litigation.

30. Whether the initiative taken by one party will indeed lead to conciliation proceedings depends solely on the acceptance of the invitation by the other party. Article 2 adopts in respect of the commencement of the proceedings, like article 15 for their termination, the principle of the voluntary nature of conciliation in that genuine conciliation depends entirely on the willingness of the parties to conciliate. Therefore, conciliation proceedings commence only if the other party accepts the invitation to conciliate, paragraph (2). Conversely, no conciliation proceedings will take place where the other party refuses conciliation, paragraph (3).

31. Paragraph (4) deals with the eventuality that the other party does not reply within a given period of time. The normal period is 30 days; if the inviting party regards this under the circumstances as too long or too short he may in his invitation set another period. Yet, the date of expiry of such period is not to be construed as a definite cut-off date: the absence of reply during that period does not necessarily lead to the result that there will be no conciliation proceedings. Instead, it is up to the inviting party either to treat the silence of the other party as a rejection of the invitation or "to keep the door open" for some more time. If he elects to treat the absence of reply as a rejection, he must inform the other party accordingly. Although paragraph (4) does not expressly say so, it should be possible for the inviting party to indicate that decision already in the invitation (e.g.: "If I do not receive a reply from you within 30 days from the date of this letter I will assume that you do not wish to accept my invitation to conciliate").

## B. Number and appointment of conciliators

### Article 3. Number of conciliators

32. Article 3 envisages conciliation by a sole conciliator except where the parties prefer to appoint more than one conciliator. 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 be better able to conduct proceedings informally and hold confidential discussions with one or both parties. The suggested preference for a sole conciliator is, above all, supported by the need to provide for inexpensive and speedy proceedings.

33. Under certain circumstances more than one conciliator may be required. That may be the case, for example, where in a complex dispute special expertise is

needed in more than one area. Moreover, 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.

34. For such cases, article 3 does not merely mention the option of appointing "more than one conciliator", but states two specific variants, namely "two or three conciliators". This solution seems preferable on the ground that it provides guidance to the parties and allows greater precision in certain subsequent provisions of the Rules. For example, those relating to appointment. Of course, parties would still be able to agree on another number of conciliators by way of modification of the Rules under article 1, paragraph (2).

35. It should be noted that conciliation with two conciliators is conceived under the Rules to be as appropriate as conciliation with three conciliators, despite the different composition and appointment procedures (cf. article 4). It may be felt, though, that the desirable independence and impartiality is only guaranteed by a conciliator who is chosen by both parties, as is the case with the presiding conciliator in a panel of three, while in conciliation with two conciliators each party appoints one of them. However, as stated in article 7, every conciliator, irrespective of the manner in which he was appointed, is expected to conduct the proceedings in an independent and impartial manner.

36. This expectation is supported by experience gathered in international conciliation proceedings where panels of two conciliators are not uncommon. It serves to distinguish between conciliation and party negotiations which are often conducted through counsel or agents (cf. above, para. 7). The notion is reinforced, in an indirect way, by article 19 which precludes a conciliator from acting as a counsel of a party in any arbitral or judicial proceedings in respect of the same dispute. The probable effect of this provision may be that a party might not wish to appoint his counsel as conciliator.

37. Finally, it may be pointed out that an uneven number of conciliators, while facilitating the internal decision-making process, is not necessary in conciliation since the task of the conciliators is to make recommendations for a settlement and not to render binding decisions.

38. As to the internal decision-making process itself, the Rules contain no specific provisions as to how certain decisions are arrived at in a panel of two or three conciliators. This means that the conciliators have discretion to conduct the proceedings in such a manner as is appropriate in the case at issue. It is expected that the conciliators will be able to reach agreement on how to proceed, possibly after consultations with the parties. In conciliation with three conciliators, the view of the presiding conciliator should normally prevail.

### Article 4. Appointment of conciliator(s)

39. Article 4 implements, in substance, the principle of party autonomy with regard to the appointment of a conciliator. Depending on the number of conciliators to be appointed, a conciliator is appointed either by one party or jointly by both parties.



40. In conciliation proceedings with one conciliator, the parties are expected to agree on the name of a sole conciliator, article 4, paragraph (1) (a). Where the parties have agreed on conciliation proceedings with two conciliators, each party appoints one conciliator, paragraph (1) (b). If the parties have opted for conciliation proceedings with three conciliators, each party appoints one conciliator while the third ("presiding") conciliator is appointed by agreement of the parties, paragraph (1) (c). Before appointing the presiding conciliator the parties may wish to consult with the two party-appointed conciliators.

41. According to paragraph (2), parties may enlist the assistance of an appropriate institution or person in connexion with the appointment of conciliators. This assistance may be provided in two different ways which should be clearly distinguished.

42. The first way, set forth in paragraph (2) (a), is that the institution or person recommends the names of suitable individuals. Such a recommendation may be accompanied by an indication of the qualifications and experience of such individuals. In view of the non-binding character of such assistance, each party may request it without informing or consulting the other party.

43. The second way in which assistance may be enlisted, set forth in paragraph (2) (b), is that the institution or person appoints one or more conciliators. Such an appointment would, under the Rules, require a previous agreement.

44. The agreement under article 4, paragraph (2) (b), may be included in the original conciliation agreement (or clause) or may be concluded later when the need arises, possibly after the parties failed to reach agreement on the name of the conciliator. In their agreement on the appointment of conciliators by an institution or person, the parties may wish to specify the procedure to be followed. They may, for example, choose the list-procedure set out in article 6, paragraph (3) of the UNCITRAL Arbitration Rules which preserves a considerable measure of party autonomy by making it possible for parties to approve, object to, or express preference for the candidates listed.

45. Paragraph (2) of article 4 sets forth considerations that should guide the requested institution or person in selecting individuals to act as conciliator. 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 sometimes found in other 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. It may be noted that these considerations pertaining to the qualifications of conciliators are not stated as guidelines where parties appoint a conciliator without the assistance of an institution or third person (cf. paragraph (1)). However, article 7 obliges every conciliator, irrespective of the manner in which he is appointed, to act in an independent and impartial manner.

### C. Conduct of conciliation proceedings

#### Article 5. Submission of statements to conciliator

47. Once the conciliator, or a panel of conciliators, has been appointed, the conciliation proceedings enter into an active phase. Each party submits a brief written statement describing the general nature of the dispute and the points at issue, paragraph (1). Only a brief statement is required, in order to provide the conciliator with general information about the dispute at issue. To require the elaboration of extensive and detailed "pleadings" would be contrary to the idea of speedy proceedings, could put a deterring burden on the parties and might well harden adverse positions.

48. However, if the conciliator feels that he needs a broader basis for his decision on how to proceed, he may request each party to submit to him a further statement (paragraph (2)). In this additional submission, the party would specify his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that he deems appropriate. As in respect of the first submission, each party sends a copy of his statement to the other party so that both parties know each other's position and views. These statements are, thus, excluded from the general rule contained in article 10 which gives the conciliator discretion as to whether information provided by one party may be disclosed to the other party.

49. The fact that parties have submitted such a second statement does not mean that no further information is to be provided at a later stage. In particular, the content of these statements is not to be understood as determining the "terms of reference" of the conciliator (as provided for in some arbitration rules). This is clear from paragraph (3) according to which the conciliator may request additional information at any stage of the conciliation proceedings. His competence to request information from the parties is supported by article 12 which expresses the expectation that parties will in good faith endeavour to comply with requests by the conciliator.

#### Article 6. Representation and assistance

50. Article 6 is modelled after article 4 of the UNCITRAL Arbitration Rules. It allows parties to be represented or assisted by third persons. This 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 purposes of representation or of assistance is appropriate in view of the different functions of such persons, in particular, in respect of their capacity to make and accept any settlement proposals.

#### Article 7. Role of conciliator

51. Article 7 states the basic function of the conciliator and sets forth general guidelines for his conduct. His primary role is to assist the parties to reach an amicable settlement of the dispute, paragraph (1). He is obliged to act in an independent and impartial manner, irrespective of whether he is appointed by only one party, by both parties or by an outside institution or person.

53. Because the rules are intended as rules for conciliation, they do not spell out standards that would be suitable in adversary proceedings. For example, no reference is made to the law applicable to the substance of the dispute. This is justified in view of the purpose of conciliation which is to settle the dispute by agreement of the parties, not by an imposed decision. Thus, allowance is made for parties' attempts to find an acceptable compromise which does not necessarily coincide with the terms of a legally correct decision. This does not mean that relevant legal rules will not be taken into account by the conciliator: they may well have their impact on the settlement proposals which he will make. Therefore, a general reference is made to the rights and obligations of the parties, in addition to more practice-oriented considerations, such as the usages of the trade concerned and the previous business practices of the parties.

54. Paragraph (3) stresses that the conciliator may exercise his discretion in conducting the conciliation proceedings, with due regard to the parties' wishes and the need for speedy proceedings.

55. Paragraph (4) emphasizes the most important of the conciliator's actions which is to make proposals for a settlement of the dispute. In the interest of the informality of the proceedings, such proposals can be made orally and without stating the reasons therefor.

#### *Article 8. Administrative assistance*

56. Many arbitration institutions, 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.

57. It may not always be advisable to establish too close a link of conciliation proceedings with a body that may later be involved in the arbitration of the same dispute. On the other hand, there is a certain value in providing for administrative assistance. Article 8 therefore alludes to the possibility of such assistance being provided by a suitable institution. Such assistance could include registration and forwarding of communications, providing interpretation and translation services, and the making of necessary arrangements for meetings.

#### *Article 9. Communication between conciliator and parties*

58. Article 9 describes the procedural powers which enable the conciliator to carry out his function. He may communicate orally or in writing and may do so with both parties or with one party alone. He may also invite the parties to meet with him.

59. The conciliator has, in general, full discretion in deciding on how to proceed (cf. article 8, paragraph (3)). However, his discretion is somewhat limited with regard to the determination of the place of meetings with the parties; he is obliged to consult in this respect with the parties before making a decision. This seems justified in view of the possible implications of that decision in an international context.

60. The conciliator has no discretion with regard to appointing an expert or hearing a witness. The Rules do not empower him to take such action on his own initiative, but require in this respect the consent of the parties (cf. article 17, paragraph (1) (c) and (d)). It seems appropriate that parties do not incur possible high costs without prior commitment.

#### *Article 10. Disclosure of information*

61. In conciliation, the question of confidentiality of information raises two different issues. One issue relates to the desirability that the contents of the proceedings not be disclosed to outsiders. This is dealt with in article 14 (see below, para. 70). The other issue, which is the subject of article 10, concerns the flow of information between the participants of 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.

62. Existing conciliation rules deal with this delicate problem, if they do at all, in 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 it is to bring the parties together, confidentiality would be inappropriate, except, perhaps, in respect of settlement proposals made by a party with the express request for confidentiality. Where, however, the assistance by the conciliator is viewed as an active involvement in the search for an amicable settlement of the dispute, stricter confidentiality seems justified.

63. This second concept has been adopted in article 10 which, in principle, leaves the decision about confidentiality of information 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. Statements submitted under article 5, paragraphs (1) and (2), are excluded, as has been explained earlier (see above, para. 48).

#### *Article 11. Party suggestions for settlement of dispute*

64. Article 11 is designed to promote an amicable settlement based on suggestions by the parties themselves. Such suggestions will help the conciliator to make acceptable proposals for settlement and to formulate the specific terms for a possible settlement as envisaged by article 13, paragraph (1). 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" which parties are supposed to comply with according to article 12.

#### *Article 12. Co-operation of parties with conciliator*

65. Under the Rules the conciliator has a large measure of discretion in conducting the conciliation proceedings (article 7, para. (3)). In several instances, corresponding to various stages of the proceedings, the Rules amplify this authority of the conciliator and specify, though

not exhaustively, what requests the conciliator may make. Under article 12 the parties undertake to comply with such requests in good faith. Since the settlement of a dispute by conciliation depends ultimately on the will and attitude of the parties, such undertaking, though not legally enforceable, is central to the successful outcome of conciliation proceedings.

#### *Article 13. Settlement agreement*

66. Article 13, paragraph (1), invites the conciliator to formulate the terms of a possible settlement when, in his assessment, the proceedings have reached an appropriate stage. He submits them to the parties for their observations. If, in the light of these observations, he is of the view that a modification of the tentative terms is called for, he may reformulate those terms and resubmit them to the parties.

67. If the parties accept the proposed terms, the settlement agreement should be drawn up by the parties. They may request the conciliator to assist them or may ask him to draw up the agreement. The settlement agreement must be in writing, not only because it is to be signed by the parties, but also to avoid any uncertainty or dispute as to the particulars of the settlement terms. It suffices that the document to be drawn up contains the terms of the settlement; it need not contain a summary of the proceedings (as prescribed by some conciliation rules in more formal types of conciliation).

68. Paragraph (3) stresses the purpose of conciliation, namely a settlement of the dispute. Finality of the settlement is achieved when the parties have signed the agreement. Its legal effect is then that of any other binding agreement, irrespective of whether the applicable law qualifies it, for example, as a revision of the original contract or part of it or as a new contract.

69. It should be noted that the settlement agreement, in terms of enforceability, 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 as an "*accord des parties*" in arbitration proceedings would depend on the relevant arbitration rules and applicable law.

#### *Article 14. Confidentiality*

70. Article 14 deals with the second issue of confidentiality identified above (see para. 61). Subject to the agreement of the parties or mandatory law, the provision prohibits disclosure to outsiders of any matters relating to the conciliation proceedings. Such guarantee of confidentiality is conducive to reaching an amicable settlement in informal proceedings. As an exception to the general rule of confidentiality, the settlement agreement itself may be disclosed where this is necessary for purposes of its implementation and enforcement.

#### *D. Termination of conciliation proceedings and costs*

#### *Article 15. Termination of conciliation proceedings*

71. Article 15 sets out the various ways in which conciliation proceedings may be terminated and deter-

mines the effective date of the termination. Certainty as to the duration of the proceedings is of general interest to the parties and the conciliator in that they know at any time up to which point their dealings and conduct are governed by the Conciliation Rules. The particular relevance of article 15 becomes apparent if viewed together with article 16 which precludes recourse to court or arbitration proceedings before the termination of the conciliation proceedings (see below, paras. 74-76).

72. Article 15 does not adopt the approach of other conciliation rules which attach to the submission to conciliation a binding effect, e.g. an obligation to participate in the proceedings for a predetermined period of time or until a settlement proposal has been rejected. Article 15 is instead inspired by the principle of absolute freedom of the parties and is based on the premise that a policy compelling parties to continued participation in the proceedings would not, in all circumstances, lead to a genuine settlement.

73. Article 15, therefore, allows not only both parties by common agreement but also either party alone to terminate the conciliation proceedings with immediate effect (subparagraphs (c) and (d)). The conciliation proceedings may also be terminated by the conciliator if he regards the conciliation effort as having failed (subparagraph (b)). Another—one would hope most common—cause for termination is the signing of the settlement agreement (subparagraph (a)).

#### *Article 16. Resort to arbitral or judicial proceedings*

74. Article 16 deals with the delicate question whether a party may resort to court litigation or arbitration whilst the conciliation proceedings are under way, i.e. after their commencement in accordance with article 2, paragraph (2), and before their termination according to article 15. Article 16 discourages such a step but, in line with the general policy underlying the Rules, is formulated in a flexible manner.

75. Article 16 emphasizes the value of serious conciliation efforts by expressing the idea that, under normal circumstances, court or arbitration proceedings should not be initiated as they might adversely affect the prospects of an amicable settlement. However, the article also takes into account that resort to the courts or to arbitration does not necessarily indicate an unwillingness on the part of the initiating party to conciliate. In view of the fact that, under article 15 (d), an unwilling party may terminate the conciliation proceedings at any time, it may well be that, if a party initiates court or arbitral proceedings, he does so for different reasons.

76. For example, a party may want to prevent the expiration of a prescription period or must meet the requirement, contained in some arbitration rules, of prompt submission of a dispute to arbitration. Instead of attempting to set out a list of possible grounds, article 16 adopts a general and subjective formula: "... except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights". The exception is not phrased in objective terms in order to avoid controversy as to whether the initiation of adversary proceedings is justified.

*Article 17. Costs*

77. Upon termination of the conciliation proceedings, the conciliator fixes the costs of conciliation as specified in article 17. The first item concerns the fee of the conciliator which shall be reasonable in amount. In view of the varying circumstances under which conciliation may take place, no specific criteria are given for the determination of the amount of the fee. The second item consists of the travel and other expenses of the conciliator. Under both items, "conciliator" means any conciliator, whether appointed by both parties, by one party alone or by an outside institution or person.

78. The third item concerns the travel and other expenses of any witnesses requested by the conciliator with the consent of the parties. Since the conciliator is not empowered to call a witness on his own initiative (cf. above, para. 60), the parties are only obliged to bear such costs if they have agreed in advance that the witness be invited. The same restriction applies to the fourth item which concerns the engagement of experts. The last item consists of the costs incurred by having requested administrative assistance pursuant to article 8.

79. The five items listed in paragraph (1), and only those, constitute the "costs" of the conciliation. Because there is not in conciliation, whatever its outcome, a "successful" and an "unsuccessful" party, these costs are to be divided equally between the parties unless the settlement agreement provides for a different apportionment (paragraph (2)). All other expenses incurred by a party, e.g. his own travel costs or the expenses of his representative or agent, are borne by that party.

*Article 18. Deposits*

80. Article 18 is modelled after article 41 of the UNCITRAL Arbitration Rules. It empowers the conciliator to request equal deposits from each party as an advance for the costs referred to in article 17, paragraph (1). The conciliator may make his first such request upon his appointment. The amount requested would be based on an estimate of the future costs as the exact amount can only be determined upon the termination of the conciliation proceedings. If the estimate turns out to be too low or the deposits are for other reasons insufficient, supplementary deposits may be requested, paragraph (2). Where the deposits received exceed the actual cost of conciliation, the conciliator returns the unexpended balance to the parties (paragraph (4)).

81. If the deposits requested by the conciliator are not paid in full by both parties within 30 days, the conciliator may suspend or terminate the proceedings. Whether he chooses suspension or termination would depend on his assessment of the reasons for non-payment. Thus, he might prefer suspension to termination where it appears to him that payment is merely delayed for technical reasons, e.g. exchange control difficulties, and there is no indication of unwillingness of the party concerned to participate in the conciliation effort.

*E. Subsequent proceedings**Article 19. Role of conciliator in subsequent proceedings*

82. In the course of conciliation proceedings the conciliator may acquire an intimate knowledge of the dispute at issue and of the strength and weakness of the legal position of each party. Therefore, the willingness of parties to conciliate and to confide in the conciliator might well be adversely affected if it were possible for the conciliator, in subsequent arbitral or judicial proceedings, to act in a capacity where his knowledge could be prejudicial to the interests of a party. Article 19 is designed to safeguard such interests by describing the functions which a conciliator is precluded from performing whenever the dispute that was the subject of conciliation proceedings is subsequently submitted to a court or an arbitral tribunal.

83. The most obvious case is where the conciliator subsequently acts as arbitrator. While a party may challenge an arbitrator on the ground that his having acted as a conciliator in the same dispute creates doubts as to his impartiality and independence, it is not certain whether such a challenge will be sustained. Hence the necessity to include an express provision in the Rules.

84. While such a provision is contained in most conciliation rules (sometimes requiring the conciliator upon his appointment to sign a statement), it seems also reasonable to preclude the conciliator from later acting as representative or counsel of a party. The reason, here, is not so much the possible danger of bias or prejudice but the competitive advantage which the party represented by a former conciliator would have due to knowledge which the conciliator obtained during the conciliation proceedings. The result would, in particular, be undesirable with regard to confidential information received from the other party.

85. The third case is where a conciliator is a witness in subsequent proceedings. The provision precluding this is not formulated in terms of a strict prohibition since such prohibition may be invalidated by the applicable law. It merely precludes a party from presenting (or naming) the conciliator as witness.

86. The parties may of course agree to a conciliator performing the functions referred to in article 19. They may do so, for example, 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 of the proceedings without much involvement of the conciliator.

*Article 20. Admissibility of evidence in other proceedings*

87. Article 20 is designed to serve the same purpose as article 19, that is, to ensure negotiations in the conciliation proceedings unimpeded by any fear of later disadvantages. While article 19 deals with the personal aspect in terms of a later role of the conciliator, article 20 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.

88. Most existing conciliation rules deal with this problem, if at all, in general terms by stating, for instance, that "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.

89. On the other hand, such a rule seems to be too wide in that it would cover "all that has transpired". It could include, for example, 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.

90. Article 20, 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.

91. In conclusion, it may be noted here that article 20 is wider than article 19 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 element of a settlement proposal may become relevant in a different context which is the subject of other proceedings.

#### F. Model Conciliation Clause

92. As has been explained earlier (see paras. 19-21), the Rules are based on the fundamental notion that genuine conciliation can only take place if both parties, once a dispute has arisen, are willing to seek an amicable settlement of their dispute. While the Rules, accordingly, do not pre-suppose a previous commitment of the parties to take some step towards conciliation, parties are free to

stipulate in advance that they commit themselves to attempt conciliation before resorting to the courts or to arbitration. In such a case, they may use one of the two variants of the Model Conciliation Clause set forth at the end of the Rules.

93. The first model clause (variant A) is fully non-committal by making it a condition that the parties, when a dispute has arisen, wish to seek an amicable settlement of the dispute. This clause makes it clear that the parties, at the time of the conclusion of the contract, do not undertake any legal obligation to initiate conciliation in the event of a dispute. The only commitment expressed in that clause concerns the application of the Rules as envisaged under article 1, paragraph (1).

94. The second model clause (variant B) provides for a degree of commitment by obliging a party, before resorting to adversary proceedings, to invite the other party to conciliation. The purpose of such invitation is to ascertain, in the event of a dispute, whether the other party is willing to seek an amicable settlement. In view of the right of the other party to refuse conciliation, such an obligation to invite might be regarded as one-sided or even unfair. However, the same imbalance exists in other proceedings where procedural burdens are placed on the party who wishes to pursue his rights. Furthermore, the duty to invite is a relatively light burden which could be even further eased by choosing a shorter period of time for reply than the 30 days laid down in article 2, paragraph (4).

95. There is another aspect of that clause: a party could be required to send an invitation even if he himself is not willing to conciliate. This possibly undesirable result is mitigated by the fact that, as experience shows, the attitude of a party may well change in the light of a positive response by the other party. If the inviting party remains unwilling, he may wish to terminate the conciliation proceedings in accordance with article 15 (d). His right to terminate is embodied in the Rules which the parties adopt by virtue of the conciliation clause.

96. If parties prefer a stronger commitment than the mere obligation to invite, a different clause would be required and parties should modify some of the Rules, in particular, articles 2 (requirement of consent of both parties to commencement of proceedings), 15 (right to terminate at any time) and 16 (limited resort to adversary proceedings).

### C. Observations and comments by States and international organizations on the revised draft UNCITRAL Conciliation Rules (A/CN.9/187 and Add. 1 to 3)\*

#### AUSTRALIA

##### Article 2. Commencement of conciliation proceedings

It would reduce the possibility of misunderstanding if the Rules were to envisage that the acceptance of the invitation to conciliate would be in writing.

A conversational response would seem more open to the possibility, for example, of the invitor treating as an acceptance, or as a rejection, a response intended to be merely exploratory.

A written response, on the other hand, would be more likely to show whether there was agreement to conciliate—thus attracting the continued application of the Rules—or whether the invitor could proceed on the basis that there would be no conciliation.

\* 25 June and 1, 11 and 14 July 1980.

*Article 5. Submission of statements to conciliator*

The present text could be improved by providing that the parties do not see each other's statements until both statements have been received by the conciliator, who then passes them on.

This would give the conciliator the benefit of each party's view, unaffected by the view of the other, and one party could not obtain an advantage over the other by waiting to see the latter's case before putting his own.

*Article 7. Role of conciliator*

This article should merely provide that the conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement.

Any attempt to prescribe principles to which he should adhere may hinder him in his task.

*Article 16. Resort to arbitral or judicial proceedings*

The words "in his opinion" should be deleted.

The existing draft provision to the effect that a party may initiate arbitral or judicial proceedings during the conciliation where, in his opinion, such proceedings are necessary for preserving his rights, might encourage parties to do so on less than substantial grounds.

A party can, of course, at any time undertake such proceedings on any grounds, after withdrawing, pursuant to article 15, from the conciliation.

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE  
(AALCC)

(Section of report of the Sub-Committee on International Trade Law Matters, twenty-first session, 1980, Jakarta, Indonesia)

*Examination of the draft Rules on Conciliation prepared by  
the UNCITRAL Secretariat*

1. The Sub-Committee welcomed the initiative taken by UNCITRAL in preparing these Conciliation Rules. The Sub-Committee expressed the hope that the adoption of the Rules by UNCITRAL would be conducive to the expeditious settlement of disputes in international commercial transactions.

2. Although there was a general consensus that the draft Rules on Conciliation as a whole were worthy of support, there were a few divergent views on some of the provisions.

3. The first concerned article 3. Some delegates felt that the number of conciliators should never be even as this might lead to difficulty in reaching a recommendation. Others felt that the number should be one unless the parties decided otherwise.

4. The second observation related to the appointment of conciliators. Some delegates felt that the parties should agree on the appointment of the conciliator(s) because there was the underlying suspicion of the partiality or bias where each party appointed his own conciliator. This view was not shared by other delegates who thought the

underlying principle in conciliation was the impartiality of the conciliator(s). Therefore article 4 should be retained in its present form.

5. The third observation related to article 13 (3). Some delegates felt that the provision should be carefully re-examined. In the first place, to the extent that it appeared to lay down the rule that a settlement agreement was binding in the same way as any other contract, this provision stated the obvious. Secondly, the provision might be misconstrued as laying down the rule that such an agreement was enforceable in the same way as a final and binding judgement or arbitral award. Other delegates, however, thought that it was useful to retain this paragraph of article 13.

6. There was some question as to the wisdom of prohibiting the conciliator from acting as an arbitrator or witness in future arbitral or judicial proceedings as envisaged in article 19. The reason was that, first, since the conciliator was not a party to the conciliation agreement, this rule would not bind him and, secondly, these were matters regulated by the applicable procedural rules.

7. In regard to article 20, the view was expressed that the list of matters excluded from being introduced in subsequent arbitral or judicial proceedings was too restrictive, and that it should be expanded to documents prepared specifically for the purpose of the conciliation proceedings, e.g., statements submitted under article 5.

ECONOMIC COMMISSION FOR EUROPE

(Comments of the ECE Secretariat, Trade and Technology Division)

I. *General remarks*

Although it is true that conciliation, as an institution, may have some disadvantages (additional costs, time spending, fear of later risks in adversary proceedings), it is beyond doubt that conciliation should be regarded as the first stage of arbitration and as a viable alternative to arbitration and court proceedings.

The revised draft UNCITRAL Conciliation Rules is a positive contribution to the resolution of disputes that may arise in international commercial relations. If this is the purpose of the Rules, as it appears to be, then certain provisions should be made more precise, as suggested below.

II. *Remarks pertaining to specific provisions*

*Article 1*

Referring to what was said under (I) above, we believe that the scope of application of the Rules should be restricted to international commercial disputes. The statement in the Commentary (A/CN.9/180)\* that the Rules "are designed for universal application" is too vague and could lead to confusion. Will the Rules be applied between the nationals of a country in respect of a dispute arising from a support contract or a real estate contract or, finally, from a non-contractual legal relationship governed by the public law of the country concerned? We do not think so.

\* Reproduced as B, above.

It is true that this article has been drafted according to article 1 of the UNCITRAL Arbitration Rules which also lacks precision in this respect. But the shortcomings of the original rules should not be magnified by using them as a basis for the Rules.

In our opinion, it would be preferable if the application of the Rules was restricted to disputes arising from (i) contractual relationship only, whether the contract is written or oral; (ii) relationship with elements of foreignness only, i.e. from international contracts; and (iii) relationship of a commercial nature which means from commercial contracts of whatever type.

#### Articles 2-12

No comments.

#### Article 13

In the footnote to paragraph 2 of this article it is recommended that the settlement agreement contain a clause that any dispute arising out of, or relating to, the interpretation and performance of the settlement agreement shall be submitted to arbitration.

Naturally, the parties to any type of contract may agree to submit it to arbitration solely for the sake of interpretation. Hence, this possibility could be applicable also to the settlement agreement. Nevertheless, we would prefer to have the footnote deleted because an agreement on the successful completion of conciliation proceedings should not be made subject to arbitration even in respect of interpretation of its clauses. If the conciliation did result in the settlement of the dispute, then a new dispute could not arise because no interpretation problem should be possible. By the nature of things, settlement achieved in the course of conciliation excludes any further disputes. If, however, a dispute still arises, this would mean that no real settlement was reached. In such a case, the conciliation proceedings should be reinstituted or a recourse to litigation or arbitration should be made on the understanding, however, that the subject of the reinstituted conciliation or judicial or arbitral proceedings would not be "the interpretation and performance of the settlement agreement" but the *original dispute* for which the parties had agreed to seek an amicable settlement and for which they had instituted conciliation by application of the Rules.

#### Articles 14-15

No comments.

#### Article 16

We suggest that a second sentence be added to the text of this article to read: "Before initiating arbitral or judicial proceedings, such a party must first issue written declaration provided in article 15 (d)."

#### Articles 17-18

No comments.

#### Article 19

We propose that the qualification "Unless the parties have agreed otherwise" be deleted so that the sentence begins instead as follows: "A conciliation may ...".

We do not think that the reasons advanced in paragraph 86 of the Commentary (A/CN.9/180)\* could justify the performance of arbitral or other functions listed in article 19 by a conciliator. It seems highly debatable whether the conciliator's familiarity with the dispute could be regarded as an asset in subsequent arbitral proceedings.

#### Article 20

No comment.

#### Model conciliation clause—Variant A

This variant is quite acceptable.

#### Model conciliation clause—Variant B

This clause is onerous to the party initiating conciliation and therefore seems not to be in conformity with the spirit of the Rules.

#### ECUADOR (Addendum I)

1. The Government of Ecuador considers that the revised draft of the Conciliation Rules is an improved text embodying important principles and meaningful elements.

2. *Article 1.* In accordance with paragraph 23 of the commentary in document A/CN.9/180, reference should be made in the preamble of the Rules to "international commercial disputes", since that would indicate the principal field of application of these Rules.

3. *Article 2.* In view of the observations made in paragraph 31 of the above-mentioned commentary, there should be inserted in paragraph (4) of this article, before the last sentence and after the word "conciliate;", the following words: "the inviting party may indicate that decision already in the invitation". The paragraph would then continue with the sentence beginning: "If he so elects ...".

4. *Article 3.* In view of the arguments indicated in paragraph 33 of the commentary, the word "normally" should be inserted in article 3, so that this provision would read: "There shall normally be one conciliator unless the parties have agreed that there shall be two or three conciliators."

5. *Article 4.* With reference to paragraph 40 of the commentary, the following sentence should be added at the end of article 4 (1) (c): "The parties may consult with the party-appointed conciliators concerning the appointment of the presiding conciliator."

6. *Article 5.* In view of what is stated in paragraph 47 of the commentary, the word "brief" in paragraph (1) of this article should be replaced by "succinct" since this would better reflect the principle that the written statement by the parties should not be an actual pleading, an extensive statement, but a neat and concise document.

7. *Article 13.* In view of the footnote to paragraph (2) of this article, it would be desirable to add at the end of that paragraph, after the words "the settlement

\* Reproduced as B, above.



agreement", the following sentence: "The settlement agreement may contain a clause that any dispute arising out of or relating to the interpretation and performance of the settlement agreement shall be submitted to arbitration."

8. *Article 14.* There is a reference in this article to the fact that, where the obligation of the conciliator and the parties to keep confidential all matters relating to the conciliation proceedings is concerned, some different provision may be made by law. This must, of course, refer to national law, which governs the conciliation process if this question should arise. However, it can also happen that national law is silent on the subject. Although we should prefer the deletion of the words "or required by law", the reference could be made clearer, if it is considered necessary to retain it, by using the following wording: "... or required by the law applicable to the conciliation ...".

9. *Article 16.* There is a typing error in the fourth line of the Spanish text of this article, where the words "*arbitral o conciliatorio*" should read "*arbitral o judicial*". In any event, we agree with the exception made in the last part of this provision, although we should prefer the word "*protector*" instead of "*conservar*".

10. *Article 19.* In view of the observations made in paragraph 84 of the commentary, the Spanish text of this provision should be clarified by inserting the word "*abogado*" after "*representante*", so that the passage in question would read: "... *ni como representante, abogado o consejero de una parte* ...". The point is that the term "*representante*" may mean the attorney for the case but not the lawyer (*abogado*) pleading it, while a *consejero* may not always be the pleader or *abogado* but an expert who advises the *representante* or the pleader.

#### ARGENTINA (Addendum 2)

1. The fundamental purpose of the revised draft UNCITRAL Conciliation Rules is to ensure the full autonomy of the parties in conciliation proceedings. This principle, which was upheld by Argentina at the twelfth session, with the support of Austria, France and Singapore among other countries, is now more fully respected at the commencement, in the course of, and at the termination of proceedings.

2. The principle is reflected, for example, in the flexibility of the time-limit referred to in article 2, paragraph (4), which states that the party initiating conciliation may elect to treat the expiry of the time-limit as a rejection of the invitation to conciliate.

Thus the possibility of conciliation remains despite the expiry of the time-limit.

3. It is suggested that, in article 7, paragraph (2), the words "arising from the contract" should be added after the words "the rights and obligations of the parties". This wording indicates that the first consideration would be the terms established by the parties at the time of entering into the contract. This would ensure that solutions could be envisaged without the necessity of subordinating the issue to any national law which might be applicable.

4. The criterion that the settlement should be considered final and binding (art. 13, para. (3)) is also accep-

table. This is a general principle which is universally accepted in national legislations (cf. art. 850 of the Argentine Civil Code, under which settlement has the same effects as a judgement that has acquired the authority of *res judicata*). On the other hand, whether the performance of the agreement may be enforced under the procedure for the implementation of judgements is an issue that should be determined in the light of national legislation. It should be made clear, however, that the settlement may be challenged on grounds of nullity. This is a fundamental principle to be taken into consideration vis-à-vis the final and binding nature of the settlement, since the right to challenge on the ground that consent has been vitiated cannot be waived unless it is a case of relative nullity, which can be remedied.

5. Since the conciliation proceedings must be based on the full autonomy of the parties, it should be borne in mind that although it is normally appropriate for the parties to refrain from initiating any arbitral or judicial proceedings during the conciliation, recourse to such proceedings should not in itself be regarded as an obstacle to the conciliation proceedings even when the arbitral or judicial proceedings have been initiated for reasons other than the specific purpose of preserving rights, as stipulated in the exception clause in article 16. Recourse to conciliation should be possible in other circumstances as well. It is therefore suggested that there should be an express provision which would clearly envisage the possibility of recourse to conciliation during arbitral or judicial proceedings. Thus the parties would be able to pursue two parallel proceedings: arbitral or judicial proceedings, on the one hand, and conciliation proceedings, on the other. These parallel proceedings could be pursued when arbitral or judicial proceedings are temporarily suspended. Yet such suspension cannot be a prerequisite for initiating the conciliation proceedings if the parties are to be allowed full freedom in the settlement of disputes. The parties themselves can best judge whether parallel proceedings are compatible.

6. It is suggested that a special provision should be included which would envisage the possibility of the parties determining the law applicable to various questions which might give rise to disputes and which it would be inappropriate to regulate by means of specific provisions in the Conciliation Rules. The choice of the law applicable to the settlement (art. 13) is extremely important, as is agreement on the law applicable to the rendering of an accounting of the deposits received, referred to in article 18, paragraph (4).

7. As a model conciliation clause, variant A is more in keeping with the idea that conciliation proceedings may be initiated at any time, there being no requirement that the initiating party should send an invitation to the other party before resorting to arbitral or judicial proceedings.

Variant B could be interpreted as binding on the party which wishes to have recourse to an arbitrator or a judge.

Nevertheless, both clauses are based on prior and legitimate agreement between the parties and are valid possibilities within the context of the idea of autonomy of will.



UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND (Addendum 3)

1. *Article 1.1.* We consider that this paragraph should be amended so as to provide that the Rules apply to conciliation of disputes of the type mentioned where the parties have agreed *in writing* that the Rules should apply.

It is appreciated that the Rules are intended to provide a flexible means of resolving commercial disputes without unnecessary delay. Nevertheless it is considered that a requirement that the parties must enter into a written agreement that the Rules are to apply both makes it clear that this is an UNCITRAL conciliation and is of importance having regard to article 20. Such a requirement will be unlikely to cause any delay in starting the conciliation proceedings and in some cases it might save time because it will encourage parties to include a conciliation clause in the contracts before any dispute has arisen. If an oral agreement that the Rules should apply were to be sufficient the parties might wait until some time after a dispute had arisen before entering into the necessary agreement.

Her Majesty's Government does, however, consider that in the interests of a quick settlement of the dispute it is desirable that the parties should be free to modify the Rules orally, as well as in writing. They do not therefore wish to amend *article 1.2* so as to require any modification of the Rules to be in writing. However, an amendment is in our view required to this paragraph since power to modify the Rules does not seem to include power to exclude the application of any of the Rules. The parties may, for example, wish to adopt the Rules with the exception of article 6, whose adoption they might consider likely to delay a settlement. We consider that the parties should be free to adopt the Rules subject to any exclusion or variation and we suggest that article 1.2 should be amended to read as follows:

"The parties may agree to exclude or vary any of these Rules."

2. *Article 3.* We think that the proviso to the article is somewhat misleading in that it suggests that it is only possible for the parties to agree that there should be two or three conciliators instead of one. In view of the general power to modify the Rules contained in *article 1.2* it is not in our view necessary to include a proviso to this article. However, if it is thought desirable that the article should contain a qualification to the rule that there should be one conciliator, we suggest that the words

"unless the parties have agreed that there shall be a greater number"

be substituted for

"unless the parties have agreed that there shall be two or three conciliators".

3. *Article 4.1.* This will need to be amended if the proposal made above in relation to article 3 is adopted. If that proposal is adopted it is suggested that *subparagraphs (b) and (c)* be amended to read as follows:

"(b) If the parties agree that there should be an even number of conciliators, each party shall appoint an equal number;

"(c) If the parties agree that there should be an uneven number of conciliators, and more than one, each party shall appoint an equal number. The parties shall endeavour to reach agreement on the appointment of the remaining conciliator."

The expression "presiding conciliator" which is used in *article 4.1 (c) and 4.2* suggested that this conciliator is to have special functions or powers. These are not, however, provided for in the Rules although it is stated in paragraph 38 of the Commentary (A/CN.9/180) that "in conciliation with three conciliators, the view of the presiding conciliator should normally prevail". It is suggested that the use of the expression "presiding conciliator" should be avoided. If it is retained, reference to the special powers which he is to have should be made in the Rules themselves and not merely in the Commentary.

4. *Article 5. Paragraph 1* requires each party to submit a statement of his case to the conciliator and to the other party "upon the appointment of the conciliator". In order to ensure that both parties are aware that a conciliator (or conciliators) have been appointed, and that the requirement in *article 5.1* has therefore become operative, we suggest that the Rules should contain a provision requiring the conciliator(s) to notify both parties in writing of his or their appointment.

We suggest that *paragraph 1* should contain a time-limit within which a party must send his statement to the conciliator and to the other party: a party should be required to comply with the requirements of *paragraph 1* within 21 days of his receiving notice of the conciliator's appointment under the provision suggested above.

5. *Article 6A.* The Rules do not expressly provide for a party to call witnesses, including expert witnesses, to make statements before the conciliator and the other party. It is suggested that this right should be made clear in the Rules by the addition of a new article (which could be placed after article 6) in the following terms:

"(1) A party may at any stage of the conciliation proceedings request the conciliator to hear witnesses (including expert witnesses) whose evidence the party considers relevant.

"(2) Witnesses called by one party may be examined by both parties before the conciliator who may also examine the witnesses."

The effect of the second sentence of *article 17.2* will be that the party who calls the witness will be responsible for paying his travel and other expenses.

6. *Article 7.* The reference to "previous business practices of the parties" suggests that the conciliator is to have regard to the parties' previous dealings with others, as well as with each other. It would not in our view normally be appropriate in conciliation proceedings between two parties to take into account practices which one of the parties may have adopted in relation to a party who has no connexion with the dispute. We therefore suggest that the words "any business practices which the parties have previously established between themselves" should be substituted for the words "any previous business practice of the parties."

7. *Article 7A.* It is pointed out in paragraph 60 of the Commentary that the conciliator has no discretion with regard to appointing an expert or hearing a witness, and that the Rules require him to obtain the consent of the parties before either of these courses is adopted. We agree with the policy in this respect but suggest that the conciliator's power to appoint experts and call witnesses and the limitations imposed upon it should be dealt with more clearly in the Rules, instead of being dealt with somewhat obliquely in *article 17.1 (c) and (d)*.

We therefore suggest that the Rules should contain a new provision (which could be placed after article 7) in the following terms:

"The conciliator may, with the consent of the parties, appoint an expert or call a witness whose evidence he considers may be relevant."

8. *Article 8.* This article requires the conciliator to consult the parties before arranging for administrative assistance to be provided by an institution. In view of the fact that the parties will be responsible for paying the costs of the administrative assistance by virtue of *article 17.1 (e)*, we consider that article 8 should make it clear that both parties must agree to the assistance being provided.

We therefore suggest that the words "with the agreement of the parties" in *article 8* should be substituted for "after consultation with the parties".

9. *Article 9.2.* We suggest that the words "circumstances which appear to him to be relevant" should be substituted for "circumstances of the conciliation proceedings".

10. *Article 10.* We agree that the conciliator should have the discretion whether or not to disclose information provided by one party to the other party to the conciliation proceedings. However, we are concerned at the inclusion of the proviso to this article since this would enable a party to provide the conciliator with information subject to its not being made available to the other party. Such information, if it were made available to the other party, might well influence that party's decision on whether or not to agree to a settlement proposed by the conciliator, who has full knowledge of the confidential information.

We are, moreover, concerned about the qualification of the conciliator's discretion as to whether or not to disclose to one party non-confidential information provided by the other party. By directing the conciliator to have regard to "the settlement of the dispute" the Rules could be taken as encouraging the conciliator not to reveal information provided by one party which might influence the other party not to accept a settlement. It is unlikely that the discretion would be abused in this way having regard to the conciliator's duty to be guided by the principles of fairness, equity and justice imposed under *article 7.2* but we do not consider that the possibility of abuse should be suggested in article 10.

We therefore suggest that article 10 should be amended so that it provides as follows:

"The conciliator may determine the extent to which anything made known to him by a party will be disclosed to the other party."

11. *Article 14.* The first proviso to this article relating to the contrary agreement of the parties does not seem to be necessary in view of the parties' power to vary or exclude the application of any provision under article 1.2 as proposed to be amended above.

12. *Article 15 (b).* Termination of the conciliation proceedings by the conciliator is dependent upon his having consulted the parties, although *article 18.3* suggests that where the required deposits have not been paid the conciliator may terminate the proceedings without consultation.

We consider that a requirement that the conciliator must consult the parties before he can give a declaration of termination might be difficult to fulfil, and not only in cases where the parties, or one of them, have failed to pay the deposit. We therefore suggest that the conciliator should only be required to give prior notice to the parties and that *article 15 (b)* be amended to read as follows:

"By a written declaration of the conciliator, after notice to the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration."

It is not clear whether the ground for termination mentioned in *article 18.3* is intended to be in addition to those mentioned in article 15. This appears to be the case and it appears to be the intention that the conciliator should not be required to consult (or give prior notice to) the parties when he terminates on that ground although the declaration under *article 18.3*, unlike that under *article 15 (b)*, is required to be given to the parties. We think that the position should be made clear by inserting into article 15 a new paragraph (*bb*) after the existing paragraph (*b*), in the following terms:

"By a written declaration of the conciliator to the parties that the required deposits under article 18.1 and 2 have not been paid, on the date of the declaration."

13. *Article 17.2.* The proviso to the first sentence of this paragraph is unnecessary in view of the power to modify these Rules conferred by article 1.2. We suggest that it should be deleted.

14. *Article 18.3.* If the proposal made above for adding a new paragraph (*bb*) to article 15 is accepted, the following should be substituted for the words from "written declaration" to the end of paragraph 3:

"... written declaration of termination in accordance with article 15 (*bb*) above".

15. *Article 18.4.* This paragraph does not give an indication of the proportions of the unexpended balance which should be returned to each of the parties. Normally each party will be entitled to an equal share in the balance since each will have contributed an equal amount but there will not always have been an equal contribution. It is suggested that general words such as "taking into account the advance payments made by them" be added at the end of paragraph 4 since this will deal with the less usual as well as the normal case.

16. *Article 19.* The proviso to this article also appears to be unnecessary in view of article 1.2.

We note that the conciliator is prohibited from acting as

arbitrator in "subsequent arbitration proceedings" and from acting as representative etc., ... in "any arbitral or judicial proceedings" specified in the article. We wonder whether it is intended that there should be any distinction

between the arbitration proceedings mentioned in the first part of the article (*subsequent* arbitral proceedings) and those mentioned in the second part (*any* arbitral proceedings).

**D. Note by the Secretary-General: issues relating to the use of the UNCITRAL Arbitration Rules and the designation of an appointing authority (A/CN.9/189)\***

INTRODUCTION

1. The United Nations Commission on International Trade Law, at its twelfth session, considered certain issues relevant in the context of the UNCITRAL Arbitration Rules as set forth in a note by the Secretariat (A/CN.9/170).<sup>\*\*1</sup> These issues related to the use of the Rules in administered arbitration and to the designation of an appointing authority.

2. The Commission, after deliberation, decided to request 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 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."<sup>2</sup>

3. Pursuant to that request, the Secretariat had consultations with members of the International Council for Commercial Arbitration (ICCA) and representatives of the International Chamber of Commerce (ICC) at Paris in May 1980. Pertinent information was also obtained from the Secretariat of the Economic Commission for Europe.

**I. THE USE OF THE UNCITRAL ARBITRATION RULES IN ADMINISTERED ARBITRATION**

4. The Commission, at its twelfth session, considered whether it should take steps to facilitate the use of the UNCITRAL Arbitration Rules in administered arbitration and seek to prevent disparity in their use by arbitral institutions. The question had been generated by the fact, illustrated in the earlier mentioned note (A/CN.9/170, paras. 4 to 6),<sup>\*\*\*</sup> that arbitral institutions in various parts

of the world have approached the Rules in the context of administered arbitration in widely differing ways. In addition to the information provided there, the Commission may wish to note that a second regional arbitration centre was established under the auspices of the Asian-African Legal Consultative Committee (AALCC) at Cairo (Egypt) in February 1980. Like the Regional Centre for Arbitration established by the AALCC at Kuala Lumpur (Malaysia) in 1978, the Cairo Centre has adopted as its own rules the UNCITRAL Arbitration Rules and the administrative rules of the Kuala Lumpur Centre. Furthermore, in May 1980 the Spanish Arbitration Association appointed a committee to adopt the UNCITRAL Arbitration Rules for use by its centre in international cases.

5. The consultations held with ICCA and ICC confirmed the prevailing view in the Commission that the preparation of guidelines or a check-list of issues relevant to administrative services would assist arbitral institutions in formulating their administrative rules for administering arbitrations under the UNCITRAL Arbitration Rules and encourage them to leave these Rules unchanged.<sup>3</sup>

6. It is suggested that this purpose would best be served by the issuance of guidelines in the form of recommendations which could then be used by the institution concerned with due regard to local conditions and its own organizational structure. Such recommendations would invite arbitral institutions to review their administrative rules as to their compatibility with the UNCITRAL Arbitration Rules and to publicize the services available and the procedures followed.

7. It is suggested that the main advantage of guidelines is that they would promote the application of similar, if not uniform, administrative rules whenever arbitration under the UNCITRAL Arbitration Rules are administered by an arbitral institution.

8. An arbitral institution which is willing to administer arbitrations conducted under the UNCITRAL Arbitration Rules should make this fact known and supply information on the administrative services it provides. Such information should relate to the various administrative services available, such as transmission of communications, registration, arrangements for meeting rooms and interpretation and, above all, to its acting as an appointing authority. The institution may also specify the fees and state the administrative procedures or rules applied in respect of the different services. The suggested guidelines for administered arbitration are designed to assist arbitral institutions in respect of these matters.

\* 8 July 1980.

\*\* Reproduced as Yearbook ... 1979, part two, III, E.

\*\*\* Reproduced as Yearbook ... 1979, part two, III, E.

<sup>1</sup> See report of the United Nations Commission on International Trade Law on the work of its twelfth session, *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17 (A/34/17)*, paras. 57-70 (Yearbook ... 1979, part one, II, A).

<sup>2</sup> *Ibid.* para. 71.

<sup>3</sup> *Ibid.*, para. 66.

9. For the reasons stated earlier, the *raison d'être* of such guidelines is to ensure the UNCITRAL Arbitration Rules are, to the extent possible, left unchanged. Interested arbitral institutions would be invited to examine whether, under their statute, charter or organizational structure, they could administer arbitration proceedings under the UNCITRAL Arbitration Rules as they are, or whether it is necessary to draw up new administrative rules.

10. The task of reviewing administrative rules or of drawing up new rules is facilitated by the fact that the UNCITRAL Arbitration Rules do not deal with administrative issues in an extensive or strict manner. While there are detailed provisions on such special matters as appointment and challenge of arbitrators and on costs, other administrative services are referred to only in an indirect and general manner (e.g. article 38 (c) "The costs of expert advice and of other assistance required by the arbitral tribunal"; article 15 (1) "...the arbitral tribunal may conduct the arbitration as it considers appropriate...").

11. Even where an issue is explicitly regulated by the UNCITRAL Arbitration Rules, a different administrative arrangement need not necessarily be in conflict with the relevant rule. For example, according to article 15 (3) "all documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party". However, the American Arbitration Association Procedures for Cases under the UNCITRAL Arbitration Rules provide that "all oral or written communications from a party to the arbitral tribunal—except at hearings—may be directed to the AAA, which will transmit them to the arbitral tribunal and to the other party".<sup>4</sup>

12. This different arrangement can be reconciled with article 15 (3) and the underlying policy of fairness which is to prevent the arbitral tribunal from basing a decision on any information of which the other party has no knowledge. The arrangement of the AAA deviates merely in terms of the means of communication. This may not be so in respect of, for example, administrative provisions under which a party must file with the administering body a copy of all communications to the arbitral tribunal or the other party.<sup>5</sup>

13. Where an arbitral institution intends to adopt an administrative rule which differs in substance from, and is to prevail over, a provision in the UNCITRAL Arbitration Rules, it should clearly indicate that change. An appropriate way of doing so may be found in Rule 8 of the Rules for Arbitration of the Kuala Lumpur Regional Arbitration Centre. That Rule identifies the provision which it replaces: "In lieu of the provisions of article 41 of the UNCITRAL Arbitration Rules the following provisions shall apply:..."

14. Another way could be to incorporate the changes in the body of the Rules as was done, for example, by the Inter-American Commercial Arbitration Commission

(IACAC) in its Rules of Procedure. Here, several articles of the UNCITRAL Arbitration Rules have been adapted to the institutional requirements of IACAC. This fact and the specific articles and paragraphs are explicitly identified in the introductory note to the Rules.<sup>6</sup> Thus, readers and potential users are informed about the changes. In general, however, it would seem preferable, at least where an arbitral institution does not adopt the Rules as its own, not to incorporate any changes in the body of the Rules but to adapt them by suitable administrative provisions which should indicate the articles of the Rules derogated from.

15. It is suggested that the following draft guidelines, after consideration and approval by the Commission, be communicated to arbitral institutions and organizations throughout the world:

#### GUIDELINES FOR ADMINISTERING ARBITRATIONS UNDER THE UNCITRAL ARBITRATION RULES

##### *Introduction*

These guidelines are intended to assist arbitral institutions that are willing to act as appointing authorities or to provide administrative services for arbitrations conducted under the UNCITRAL Arbitration Rules. Arbitral institutions may wish to draw up administrative rules and procedures for cases under the UNCITRAL Arbitration Rules. These guidelines set forth the possible content of such rules and procedures. They are drawn up in the form of recommendations and should enable arbitral institutions to adopt rules that take account of local conditions and their own organizational structure.

Arbitral institutions are invited to make available information about the services they are prepared to provide for arbitrations under the UNCITRAL Arbitration Rules. It is recommended that administrative rules be adopted that would supplement the UNCITRAL Arbitration Rules without, however, modifying them. Nevertheless, if modifications are necessary, it is recommended that they be noted in the administrative rules by a reference to the relevant article of the UNCITRAL Arbitration Rules.<sup>7</sup>

##### *Possible content of administrative rules*

###### *(a) Offer of services<sup>8</sup>*

An arbitral institution may declare that it is prepared to provide services for arbitrations conducted under the UNCITRAL Arbitration Rules. In making such a declaration the institution may wish to include, in addition to a description of its traditional activities, information regarding the UNCITRAL Arbitration Rules; in particular, that they were adopted in 1976 by UNCITRAL, a world-wide organization in which the various legal, economic and social systems and geographic regions are represented and that the General Assembly has recommended the use of the Rules for inclusion in international commercial contracts.

As to the services provided, it is recommended that the institution state whether, in addition to offering the usual administrative services, it is prepared to act as appointing authority. If so, the institution

<sup>4</sup> See section on Administrative Services, 1. Communications, of the Procedures for Cases under the UNCITRAL Arbitration Rules of the American Arbitration Association.

<sup>5</sup> E.g. Rules 2 and 5 of the Rules for Arbitration of the Kuala Lumpur Regional Arbitration Centre.

<sup>6</sup> The pertinent footnote reads: "There are several articles of the UNCITRAL Arbitration Rules which have been adapted to the institutional requirements of IACAC." For example the term "IACAC" is substituted for "UNCITRAL" and "appointing authority" throughout the text. In addition, there are changes in the following articles to permit accommodation of the UNCITRAL Arbitration Rules by IACAC: 3, 4 (a); 6, 1; 6, 1 (a) and (b); 6, 2; 7, 2; 7, 2 (a) and (b); 12, 1; 12, 1 (a), (b) and (c); 12, 2; 38 (f); 39, 2, 3 and 4; 41, 3.

<sup>7</sup> See e.g. Rule 8 of the Kuala Lumpur Regional Arbitration Centre.

<sup>8</sup> See e.g. introductory paragraphs and model clauses of the AAA Procedures for Cases under the UNCITRAL Arbitration Rules.

should state clearly that it would act as appointing authority only if it had been so designated by the parties in the arbitration clause or in a separate agreement. Administrative services would be provided when requested by the parties or by the arbitral tribunal.

(b) *Services as appointing authority*<sup>9</sup>

An arbitral institution that is prepared to act as the appointing authority under the UNCITRAL Arbitration Rules may list the various tasks of an appointing authority envisaged by those Rules, and the manner in which it intends to carry them out:

*Appointment of arbitrators under articles 6 and 7*

The arbitral institution may indicate how it will select the arbitrator; in particular, whether it maintains a panel of arbitrators from which it would select arbitrators or whether it will use the list procedure referred to in article 6, paragraph (3).

*Decision on challenge of arbitrator under article 12*

The arbitral institution may indicate who within the organization (e.g. Director, President, a special committee) would decide on the challenge, and according to what principles.

*Replacement of an arbitrator under article 13*

*Assistance in fixing the fees of the arbitrators under article 39 (2) and (3) and any deposits under article 41 (3)*

The arbitral institution should indicate whether it has issued a schedule of fees of arbitrators in international cases which it administers, as envisaged under article 39 (2), or, in the absence of such a schedule, whether it is prepared to furnish a statement setting forth the basis for establishing fees which is customarily followed in international cases in which the institution appoints arbitrators, as envisaged under article 39 (3). The institution may offer to provide the arbitral tribunal with an estimate of the costs of arbitration, to assist in the accounting and to hold the deposits. If the institution intends to hold the deposits, based on its estimate, and to render an accounting at the close of the proceedings, this would amount to a modification of article 41 which should be clearly identified in any administrative rules.

(c) *Administrative services*<sup>10</sup>

The arbitral institution may describe the various administrative services it is prepared to provide or arrange for. The institution should specify whether the costs of any of such services are included in the general administrative fee or are charged separately. The following services may be included in the description:

- Providing meeting rooms for the arbitral tribunal;
- Assisting the arbitral tribunal in establishing the date, time, and place of hearings, and in giving advance notice to the parties;
- Arranging for stenographic transcripts of hearings;
- Arranging for interpretation at the hearings;
- Providing secretarial assistance;
- Transmitting communications of or to the arbitral tribunal or from a party to the other party;
- Assistance in filing or registering arbitral awards.

(d) *Fee schedule*

The arbitral institution may state its own fee schedule or, in the absence of such a schedule, the basis for calculating its administrative

fees. It is recommended to state separately the fees or charges for each of the following services: (i) arbitral institution acts as appointing authority and provides administrative services; (ii) arbitral institution acts only as appointing authority; (iii) arbitral institution provides only administrative services.

## II. ADVISABILITY OF ISSUING A LIST OF ARBITRAL INSTITUTIONS PREPARED TO ACT AS APPOINTING AUTHORITY

16. The second issue relating to the use of the UNCITRAL Arbitration Rules considered by the Commission at its twelfth session was whether it would be desirable and feasible to issue 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.<sup>11</sup> In the course of the consultations held by the Secretariat (*supra*, para. 3), the unanimous view was expressed that the expected advantages of issuing such a list would probably be outweighed by serious disadvantages.

17. While it was felt that such a list could assist parties in their search for appointing authorities, the following short-comings were regarded as decisive. A compilation of institutions willing to act as appointing authority could never be complete and fully accurate. Neither the Commission nor the Secretariat, even if assisted by other bodies such as the International Council for Commercial Arbitration, was in a position to judge whether an institution which applied for inclusion in the list was genuine and qualified. This was seen as particularly important 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. Such implication could not be avoided by a disclaimer since lesser qualified institutions might advertise their services "as approved by UNCITRAL". In this context it was also pointed out that under the UNCITRAL Arbitration Rules not only arbitral institutions could act as appointing authorities but also private persons.

18. In the light of these considerations, it was generally felt that it should be left to arbitral institutions themselves to declare that they are prepared to act as appointing authority. Such a course would meet the information needs of interested parties without the disadvantages inherent in a United Nations list.

19. The Commission may wish to accept this suggestion which would be in harmony with the proposals noted above concerning administrative guidelines. As proposed there (*supra*, para. 15), arbitral institutions would be invited to declare whether they are prepared to act as appointing authority and to indicate the applicable procedures.

<sup>9</sup> E.g. Rule 3 of the Kuala Lumpur Centre, and section on "Services as appointing authority" in the AAA Procedures.

<sup>10</sup> See e.g. Rules 4 and 6 of the Kuala Lumpur Centre, and the section on "Administrative Services" of the AAA Procedures.

<sup>11</sup> Report of the United Nations Commission on International Trade Law on the work of its twelfth session, *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17 (A/34/17)*, paras. 67-70 (Yearbook ... 1979, part one, II, A).

## V. NEW INTERNATIONAL ECONOMIC ORDER

### A. Report of the Working Group on the New International Economic Order on the work of its session (New York, 14-25 January 1980) (A/CN.9/176)\*

#### INTRODUCTION

1. The United Nations Commission on International Trade Law decided at its eleventh session 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 its twelfth session.<sup>1</sup>

2. At its twelfth session the Commission designated the following States as members of the Working Group: 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.

3. The mandate given to the Working Group is to examine the report of the Secretary-General entitled "New international economic order: possible work programme of the Commission" (A/CN.9/171)\* taking into account the records of the discussions of UNCITRAL on its eleventh and twelfth sessions and to make recommendations as to specific topics which could appropriately form part of the programme of work of the Commission, and as to the steps that could usefully be taken by the Commission in respect of co-ordination in the field of international trade law.

4. The Working Group held its session at United Nations Headquarters in New York from 14 January to 25 January 1980. With the exception of Nigeria, all the members of the Working Group were represented at the session. The session was attended by observers from: Austria, Belgium, Burma, Canada, Colombia, Cuba, Egypt, Finland, Guatemala, Guyana, Hungary, Italy, Netherlands, Nicaragua, Portugal, Qatar, Senegal, Sierra Leone, Spain, Thailand, Trinidad and Tobago, Uruguay, Venezuela, Yugoslavia, Zaire, and Zambia, and from the following intergovernmental and international non-governmental organizations: Centre on Transnational Corporations, Food and Agriculture Organization of the United Nations, United Nations Conference on Trade and Development, United Nations Industrial Development Organization, European Community, Hague Conference on Private International Law, International Institute for the Unification of Private Law, Organization of African Unity and Organization of American States.

\* 25 January 1980.

<sup>1</sup> 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).

5. The Working Group elected the following officers:

Chairman . . . . . Mr. Kazuaki Sono (Japan)  
Rapporteur . . . . . Mr. Gerardo Gil-Valdivia  
(Mexico)

6. The following documents were before the Working Group:

- (a) Provisional agenda (A/CN.9/WG.5/I/WP.1);
- (b) Report of the Secretary-General on the new international economic order, possible work programme of the Commission (A/CN.9/171);\*
- (c) Report of the United Nations Commission on International Trade Law on the work of its eleventh session (1978), *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17 (A/33/17)*;\*\*
- (d) Report of the United Nations Commission on International Trade Law on the work of its twelfth session (1979), *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17 (A/34/17)*;\*\*\*
- (e) Working paper by the Secretariat: Considerations of the legal implications of the new international economic order in the context of the possible work programme of the Commission (A/CN.9/WG.5/I/WP.2).

7. The Working Group adopted the following agenda:

- 1. Opening of the session
- 2. Election of officers
- 3. Adoption of the agenda
- 4. Consideration of the report of the Secretary-General on the new international economic order (A/CN.9/171)\*\*\*\* and the records of the discussions of UNCITRAL on the eleventh and twelfth sessions with a view to making recommendations;
  - (a) As to specific topics which could appropriately form part of the work programme of the Commission;
  - (b) As to the steps that could usefully be taken by the Commission in respect of co-ordination in the field of international trade law
- 5. Other business
- 6. Adoption of the report

#### DELIBERATIONS AND DECISIONS

8. The Working Group began its deliberations with a general exchange of views in respect of the mandate entrusted to it by the Commission. The Group subsequently examined the report of the Secretary-General and reached consensus on a list of topics which it proposes to the Commission for possible inclusion in its programme of

\* Reproduced as Yearbook ... 1979, part two, IV.

\*\* Reproduced as Yearbook ... 1978, part one, II, A.

\*\*\* Reproduced as Yearbook ... 1979, part one, II, A.

\*\*\*\* Reproduced as Yearbook ... 1979, part two, IV.

work (see paragraph 31 below). The Group also considered the question of priorities among the proposed topics but left the decision to the Commission. A recommendation to this effect is included in this report (see paragraph 32 below). Finally, the Group exchanged views on the important question of co-ordination in the area of international trade law. Its conclusions in this respect are set forth in paragraphs 38 and 39 below.

*Examination of the report of the Secretary-General (A/CN.9/171)\**

9. The Working Group reviewed the subject matters set forth in the Secretary-General's report separately and in turn. Its views and conclusions were as follows.

10. Divergent views are expressed as to the sphere of competence of the Commission and the interpretation of its mandate. Under one view, the Commission had accomplished valuable work in various areas within the framework of existing legal systems. However, because of the need to establish a new international economic order, the Commission should now take a broader approach to legal matters and this included the consideration of legal relationships that were of a public law character. According to this view, the Commission should consider and identify the principles of international public law that underlay the structure of international private law. Under another view, the Commission should continue with its traditional pragmatic approach and deal with specific topics concerning the harmonization, unification, and progressive development of the law of international trade. In this respect, reference was made to the observations formulated by the Asian-African Legal Consultative Committee regarding the work of the Commission in the area of the carriage of goods by sea. The resulting United Nations Convention of 1978 (Hamburg Rules), in that it established an equitable balance of interest between the rights and obligations of the shipper and the carrier, constituted an important contribution to the establishment of a new international economic order, and there was no reason why this approach could not also be followed in respect of other specific subject matters that were of particular interest to developing countries.

11. The Working Group, after discussion, was of the view that, in conformity with the mandate entrusted to it, it should select specific topics of international trade law that were relevant in the context of the new international economic order. Such topics could well have aspects of international trade law involving legal relationships between States or between States and private enterprises. The Commission, in dealing with such topics, should bear in mind the objectives set forth in such documents as the Declaration on the Establishment of a New International Economic Order and the Charter of Economic Rights and Duties of States.

*Commodities*

12. In the view of the Working Group, it would obviously not be for the Commission itself to deal with multilateral commodity agreements, which could best be

left to other United Nations bodies such as UNCTAD. However, thought could be given to the drawing up of model clauses or guidelines on some legal aspects of commodity agreements.

*Trade*

13. The view was expressed that the questions of a generalized system of preferences, most-favoured-nation treatment and trade obstacles were all matters of trade policy rather than of trade law. The Working Group, therefore, was in agreement that these questions were not appropriate for inclusion in the work programme of the Commission. Furthermore, it was noted that the International Law Commission had already prepared draft articles in respect of most-favoured-nation treatment. The view was expressed by some representatives, however, that the principle of non-discrimination in international trade, as a principle of international law, was different from most-favoured-nation treatment and that it should be the subject of work by the Commission.

14. In regard to a code on international trade law, the view was held that the preparation of such a code might serve as a basic outline for the future work of not only the Commission, but of other bodies engaged in the unification of international trade law. In this manner the code would not only serve to clarify and simplify the law, but it would also serve as a vehicle to aid in the co-ordination activities of the Commission. It was noted by the Working Group that the International Institute for the Unification of Private Law (UNIDROIT) had begun the preparation of a code of international trade law and that a group of experts had prepared the chapters on formation of contracts in general and on interpretation of contracts. The Working Group was of the opinion, however, that the preparation of a code by the Commission need not duplicate the work of UNIDROIT and could be considered in the longer run.

15. In respect of conflict of law rules the Working Group noted that, since its inception, the Commission has co-operated actively with the Hague Conference on Private International Law. The Working Group was of the opinion that this co-operation should continue, but that the Commission should inform the Hague Conference that it was imperative that in areas of universal interest, such as the international sale of goods or negotiable instruments, the Conference should enable all interested States, even if not members of the Conference, to participate in sessions convened to conclude a convention in such an area.

16. It was noted that the subject of general conditions, standard clauses and model rules had been on the work programme of the Commission since its creation. At the present time a Working Group on Contract Practices was considering the subject of liquidated damages and penalty clauses and the Commission had requested the Secretariat to study also "hardship", *force majeure*, and currency fluctuation clauses.

17. In this respect the Working Group took note of the fact that the Secretariat had, by a note verbale to all Governments and through direct contacts with the commercial community, acquired a large number of contracts currently used in international trade. However, the Secre-

\* Reproduced as Yearbook ... 1979, part two, IV.



tary of the Commission reported that the majority of the contracts which had been received had come from sources in developed countries. The Working Group took note of the desirability for more contracts to be furnished by the developing countries if the collection of contracts was to present a balanced view of the clauses in actual use.

18. The Working Group was in agreement that the subject of arbitration was important in the context of a new international economic order and that the Commission should continue its work in this field as a matter of priority. On the other hand, the Working Group was of the view that work on recognition and enforcement of judgements was not a subject which should be pursued at this time.

#### *Monetary system*

19. The Working Group noted the Commission currently had on its programme of work the subject of currency fluctuation clauses. The Group decided not to recommend to the Commission any further subjects in respect of the monetary system.

#### *Industrial development*

20. The Working Group considered subchapters E and F, Industrialization and Transfer of Technology, of the report of the Secretary-General together. The Group was of the view that industrialization should be the central theme for the Working Group's recommendation to the Commission in that the legal regulation of the various contracts relating to industrialization and transfer of technology were of importance to developing countries.

21. The Working Group, after an exchange of views, decided to recommend to the Commission as a topic for inclusion in its work programme "The harmonization, unification and review of contractual provisions commonly occurring in international contracts in the field of industrial development, such as contracts on research and development, consulting, engineering, supply and construction of large industrial works (including turn-key contracts or contracts *produit en main*), transfer of technology (including licensing), service and maintenance, technical assistance, leasing, joint venture, and industrial co-operation in general". The Working Group was of the view that the Secretary-General should be requested to carry out the necessary preliminary studies so as to enable the Commission to develop its work programme in this area in full knowledge of the issues involved.

22. The Working Group considered proposals to include a model law for investment and model clauses for investment protection agreements into its recommendation to the Commission. The view was held that a model investment law gave rise to complicated issues of administrative law and economic policy which could not successfully be solved by the Commission. According to another view, however, a study should be carried out to determine which problems existed in this field, how they could be solved, and be solved by UNCITRAL. In the absence of a clear consensus, the Working Group was agreed that certain legal aspects of investments, such as the settlement of disputes, the applicable law and jurisdiction, should be taken into account in preparing the study on the various

investment contracts referred to earlier. Furthermore a study should be carried out aimed at identifying legal issues arising in the context of foreign investment that might be suitable for consideration by the Commission.

23. The proposal was made to give consideration to an international convention on international economic co-operation. However, the Working Group was of the view that the study on general principles of international economic law which the General Assembly had asked the Secretary-General to submit to it at its next session would also deal with the economic co-operation between States and that it would consequently be premature to take any decision on this item at the present stage.

24. The Working Group was of the view that an item entitled "Study on intergovernmental bilateral agreements on industrial co-operation" should be included in the list to be recommended to the Commission. To facilitate later decisions, it was suggested to prepare, as a first step, a universal register of intergovernmental agreements on industrial co-operation, bearing in mind that the United Nations Economic Commission for Europe kept such a register only on a regional level.

25. It was generally considered that the filling of gaps in contracts was an important issue arising in the context of long-term contracts in general and in contracts on industrial co-operation in particular. Gaps could occur because the parties had not agreed on each and every clause at the time of conclusion of the contract and because changed circumstances could give rise to problems which had not been anticipated. It was noted that some of the issues involved were currently being studied by the Secretariat in connexion with its work on hardship clauses and in connexion with commercial arbitration. The Working Group, after consideration, was of the view that this issue should not be proposed to the Commission as a separate item.

26. The Working Group considered the question whether work in the areas of general conditions, standard contracts and definition of trade terms would be of relevance to the establishment of a new international economic order. There was general agreement that such was indeed the case, but that the considerable work undertaken by the Commission and its secretariat in the past had shown that the most promising approach for the time being was to concentrate work in the area of contract provisions. The Group was therefore agreed not to make any specific recommendation in respect of general conditions, standard contracts and trade terms.

#### *Transnational corporations*

27. The Working Group noted that the subject of transnational corporations was already on the work programme of the Commission.<sup>2</sup> It also noted that, pursuant to a decision of the Commission taken at its eighth session in 1975, the Chairman of the Commission had addressed a letter to the President of the Commission on Transnational Corporations indicating the willingness of the Commission to consider undertaking work in respect of any specific legal subjects which might be identified by the Commission

<sup>2</sup> The subject has previously been referred to in the work programme of the Commission as "multinational corporations".



on Transnational Corporations in the course of its work.<sup>3</sup> The Group further noted that the President of the Commission on Transnational Corporations had indicated the willingness of the Commission to forward any suggestion it might have to the United Nations Commission on International Trade Law,<sup>4</sup> but that so far no such suggestion had been made.

28. The Working Group decided that it should recommend to the Commission as a topic for possible inclusion in its programme of work the identification of concrete legal problems arising from the activities of transnational corporations, having regard, in particular, to the need for co-ordination of work with other competent bodies in the field. As a first step the Group requested the secretariat to inquire of the Centre on Transnational Corporations and the United Nations Conference on Trade and Development which legal subjects in respect of transnational corporations might be the subject of work by the Commission and to report its findings to the Commission.

#### *Natural resources*

29. In respect of the legal issues which arise in the context of natural resources, the Working Group noted that the question of permanent sovereignty over natural resources was a regular item on the agenda of the Committee on Natural Resources and that questions of permanent sovereignty formed part of the Code of Conduct on Transnational Corporations. In the light of this current work in the area, the Group was of the view that the Commission should not take up the question of permanent sovereignty over natural resources as part of its programme of work.

30. However, the Working Group was of the view that the Commission should consider the legal aspects of concession agreements and other agreements in the field of natural resources, taking into account the work carried out by other competent bodies in this area and the need for co-ordination. In particular, it was pointed out that, as part of its programme of work, the Centre on Transnational Corporations had already collected a large number of concession agreements in developing countries.

#### *List of specific topics*

31. On the basis of its deliberations and decisions, the Working Group submits to the Commission the following list of topics for possible inclusion in its work programme:<sup>5</sup>

1. Legal aspects of multilateral commodity agreements.
2. Study aimed at identifying legal issues arising in the context of foreign investment that might be suitable for consideration by the Commission.
3. Study on intergovernmental bilateral agreements on industrial co-operation.

<sup>3</sup> A/10017, para. 94 (Yearbook ... 1975, part one, II, A). The letter is reproduced as document E/C.10/7.

<sup>4</sup> The letter from the President of the Commission on Transnational Corporations has been reproduced in document A/CN.9/148.

<sup>5</sup> These topics are listed in the order of their deliberations.

4. Harmonization, unification and review of contractual provisions commonly occurring in international contracts in the field of industrial development, such as contracts on research and development, consulting, engineering, supply and construction of large industrial works (including turn-key contracts or *contrats produit en main*), transfer of technology (including licensing), service and maintenance, technical assistance, leasing, joint venture, and industrial co-operation in general.
5. Identification of concrete legal problems arising from the activities of transnational corporations, having regard to, in particular, the need for co-ordination of work with other competent bodies in this field.
6. Study on concession agreements and other agreements in the field of natural resources taking into account the work carried out by other competent bodies in this field and the need for co-ordination.

32. The Working Group is of the view that the priority to be given to the topics proposed by it is a matter for the Commission to decide in the light of its current programme of work. However, discussions in the Working Group have revealed that item 4 of the proposed list would be of special importance to developing countries and to the work of the Commission in the context of the new international economic order. The Group therefore requested the secretariat to prepare a study on this item and to submit it to the Commission at its next session so that the Commission may take its decisions in full knowledge of the issues involved.

33. The Working Group draws the attention of the Commission to the fact that the subject-matter of international commercial arbitration is not included in the above list of suggested topics, although it is of great relevance to the establishment of a new international economic order. The sole reason for this omission is that international commercial arbitration is already included in the programme of work of the Commission as a matter of priority. Nevertheless, the Group is unanimously of the view that it is in the area of international commercial arbitration that the Commission should continue its work and accord it the highest priority.

34. The Working Group noted with satisfaction the close co-operation that had been developed in this area between the Commission and the Asian-African Legal Consultative Committee (AALCC). In particular the Group welcomed the establishment by the AALCC of regional centres for arbitration and the adoption by these centres of the UNCITRAL arbitration rules.

35. The Working Group did not include in the list of suggested topics the legal regulation of the warehousing contract and the liability of terminal operators. There was, however, considerable support that the Commission should take up at some future date the study of these topics. The Group therefore requested the secretariat to submit to the Commission at a future session a study on the legal issues involved and information regarding the progress of work on these matters by UNIDROIT.

36. One observer suggested that the subject-matter of products liability be included in the list of proposed items. It was noted that the Secretariat had submitted a detailed study on this subject to the Commission but that the Commission had decided not to allocate priority to the item. However, the Commission, at its tenth session, had agreed to reconsider its decision if a State member of the Commission made a proposal to that effect. The observer therefore withdrew his proposal and reserved the right to suggest this item to the Commission at a future session.

#### Co-ordination

37. In accordance with the terms of reference given to it by the Commission the Working Group considered the question of co-ordination of work of organizations. Though it was realized that the problems which arose in this respect were of an identical nature in the area of international trade law in general and the area of the new international economic order in particular, it was generally agreed that the Commission should give particular attention to the need for co-ordination in respect of legal work relevant to the new international economic order by reason of the fact that the General Assembly had requested all United Nations organs and bodies to contribute to the establishment of a new international economic order. Therefore, the danger of duplication of efforts and work was much greater in the latter area.

38. The Working Group heard statements by the Secretary of the Commission and by the observers of the United Nations Conference on Trade and Development and the Centre for Transnational Corporations regarding the experience of the secretariats they represent in respect of co-ordination and possible steps that could be taken.

39. The Working Group was of the view that the present report should set forth the various suggestions that were made in the course of the discussions and agreed to suggest to the Commission that it should include in the agenda of its forthcoming session an item entitled "co-ordination of work". In that connexion the Working Group wishes to place the following considerations before the Commission:

(a) It is in the first instance the duty of Governments represented in United Nations bodies to exercise control over the programmes of work of these bodies and in particular to ensure that in drawing up those programmes work programmes already existing should be taken into account. In this respect attention was drawn to the usefulness of the reports on the work of other organizations in the field of international trade law which the Secretary-Gen-

eral submitted to the annual sessions of the Commission. The suggestion was made that such reports would gain in usefulness if they contained more detailed information on the scope of subject matters dealt with by these organizations and on the progress made in respect of them. It was further suggested that the Secretariat of the Commission should submit detailed reports in respect of a given subject matter similar to the report submitted to the twelfth session of the Commission regarding transport law;

(b) There should be a greater co-operation between the secretariats of the United Nations bodies concerned, in particular between those serving the Commission, the United Nations Conference on Trade and Development, the United Nations Industrial Development Organization, the Centre for Transnational Corporations and the Committee for Natural Resources. Such co-operation could be achieved by periodic meetings between the heads of the secretariats involved. Furthermore, in areas where this was relevant, the secretariat of a United Nations body dealing with a given subject related to any subject on which certain results had already been achieved by another United Nations body, should inform its body of those results. In this connexion, reference was made to the successful work of the Commission in the area of international commercial arbitration and the desirability that other United Nations bodies should be informed of that work whenever, in their own work, the question of settlement of disputes arose;

(c) It was noted that under General Assembly resolution 34/142\* the Secretary-General had been requested to take effective steps to secure a close co-ordination, especially between those parts of the Secretariat which are serving UNCITRAL, the International Law Commission, UNCTAD, UNIDO, and the Commission on Transnational Corporations. The view was expressed that there might well be an urgent need for a more rational approach by the United Nations to the legislative work of its various organs;

(d) Thought was also given to the feasibility of regular meetings of chairmen of commissions and committees.

40. While it was recognized that the Commission could not claim sole competence in all areas of international trade law the Working Group was of the view that the Commission was fully competent to co-ordinate work of other bodies in areas where it had itself carried out substantive work. Reference was made in particular to the area of international commercial arbitration.

41. The Working Group adopted this report unanimously.

\* Reproduced in this volume, part one, I, C, above.

## B. Study by the Secretary-General: international contracts in the field of industrial development (A/CN.9/191)\*

### Introduction

1. The Working Group on the New International Economic Order, at its session held in New York in January 1980, recommended to the Commission for possible inclusion in its work programme, *inter alia*:

"4. Harmonization, unification and review of contractual provisions commonly occurring in international contracts in the field of industrial development, such as contracts on research and development, consulting, engineering, supply and construction of large industrial works (including turn-key contracts or *contrats produits en main*), transfer of technology (including licensing),

\* 16 May 1980.

service and maintenance, technical assistance, leasing, joint venture, and industrial co-operation in general.”<sup>1</sup>

2. The Working Group was of the opinion that this item would be of special importance to developing countries and to the work of the Commission in the context of the new international economic order. The Group therefore requested the Secretariat to prepare a study on this item and submit it to the Commission at its next session so that the Commission may take its decisions in full knowledge of the issues involved.

3. The present study is submitted in compliance with this request. It reviews the various types of contracts used in the context of industrialization, describes their main characteristics and content and refers to the work done by other organizations and bodies. There are also submitted, for the Commission’s consideration, suggestions in respect of future work in the field at issue.

#### A. Review of contract types used in the context of industrialization

##### I. CONTRACT ON RESEARCH AND DEVELOPMENT

###### 1. Main characteristics and contents

4. Technological research and development is mainly carried out by and with industrial enterprises for their own needs and purposes. If the result of such research is transferred to others it is usually done under a contract on the transfer of technology.<sup>2</sup>

5. Research and development may be carried out by industrial enterprises or by research institutes for the benefit of and at the request of other users. In such a case the research work is usually carried out under a research contract.

6. Whereas a contract on the transfer of technology presupposes the existence of a particular technology or other pertinent know-how, a contract on research has as its main characteristic not the transfer but the search for new technology.

7. The notion “research” is used in different contexts:

(a) “Fundamental research”: research aimed at increasing the scope of science and technology without knowing at the time of the research how the result of such research could be applied (also called “scientific research”);

(b) “Applied research”: research aimed at developing innovative techniques which could consist of a patentable invention or of know-how;

(c) “Research—development”: the purpose is to use and develop the result of fundamental or applied research;

(d) “Industrial research”: the conducting of practical experimental investigations at laboratory and pilot plant levels and the provision of technical advisory services for specific practical industrial objectives.

All these different kinds of research could also be the subject of an international research contract.

<sup>1</sup> A/CN.9/176, para. 31 (reproduced as A, above).

<sup>2</sup> See *infra*, paras. 56 *et seq.*

8. Contracts on research and development are found as separate contracts and as a component part of other types of contract. Single research contracts may have as their object product development, process improvement or development, material research and development, as well as applied research and development by means of laboratory experiments, or by the use of a pilot plant.

9. In combination with other types of contract, research and development might be an element of a consulting contract<sup>3</sup> or of a contract on supply and construction of large industrial works.<sup>4</sup> Joint research and development may be found in contracts on industrial co-operation.<sup>5</sup> The most common combination, however, is the inclusion of clauses on patents and licensing in the research contract or of clauses on research in a licence contract.<sup>6</sup>

10. By a research contract one party (the researcher) undertakes to obtain a specified result or to carry out specified research and development and to convey the result of his work to the other party (the client). The client is obliged to pay remuneration.

11. One characteristic of a research contract is that its object cannot be described in detail because the research is dealing with uncertain, still unknown matters which are not easily determinable. Since the purpose of the research is to obtain new knowledge as yet not existent and available there is always the risk that there might be no solution to the problem to be solved. A detailed description of the research project or the purposes of the research and the limitation, if not exclusion, of the responsibility of the researcher for the result of the work are therefore important features of a contract on research and development.

###### 2. Existing legislation

12. The contract on research and development is generally not treated as a contract *sui generis* in national legislation. Courts usually apply provisions relating to traditional types of private law contracts such as the contract on the supply of labour and other services. As far as problems of liability and warranty are concerned courts tend to distinguish work contracts in general and contracts on research in particular.<sup>7</sup>

13. Recently the German Democratic Republic enacted special legislation on international commercial contracts including the contract on scientific technical services (article 82 *et seq.*, International Commercial Contracts Act [ICCA] of 5 February 1976) which is aimed at governing contracts on research and development. In the ICCA the contract on scientific technical services is treated as a sub-type of the contract on the carrying out of work.

<sup>3</sup> See *infra*, paras. 17 *et seq.*

<sup>4</sup> See *infra*, paras. 39 *et seq.*

<sup>5</sup> See *infra*, paras. 106 *et seq.*

<sup>6</sup> See *infra*, para. 57.

<sup>7</sup> See for instance the French and Belgian court practice referred to by Yves Reboul: “Garantie de résultat et contrat de recherche”, pp. 99 *et seq.* in “Garantie de résultat et transfert de technique”, Montpellier 1977.

### 3. Work done by other international organizations and bodies

14. In view of the importance of research and development for the industrialization of developing countries UNIDO has for many years dealt with industrial research. Examples are the following booklets:

Industrial Research Institutes (ID/30)  
Industrial Research (ID/40/10)  
Industrial Research Institutes (ID/70)  
Industrial Research Institutes (ID/161)

These publications are mainly concerned with project selection and evaluation and with the financial administration of industrial research. Only exceptionally do these publications touch on legal issues arising in the context of the drawing up of contracts on research and development between an industrial research institute and a client.<sup>8</sup>

15. Valuable work in this field is also carried out by the World Association of Industrial and Technological Research Organizations (WAITRO).<sup>9</sup> WAITRO at present has 75 members located all over the world.<sup>10</sup> WAITRO has developed training programmes and deals with co-operation between research and development organizations. It is not concerned with the legal regulation of research contracts.

### 4. Possible work to be done by UNCITRAL

16. Before considering the desirability of uniform legal rules for contracts on research and development the Commission may first wish to elaborate a guide for drawing up such contracts. Such a guide<sup>11</sup> could deal, *inter alia*, with questions concerning:

- Purpose of the contract
- Description of the object of the research
- Obligations of the researcher
- Guarantees for results
- Effectiveness
- Intellectual property rights in research results
- Transfer of results
- Relations to third parties (and third party rights)
- Secrecy
- Limitation of liability
- Obligations of the client
- Costs and payments
- Force majeure* and changed circumstances
- Revision of contract and adaptation to new conditions
- Termination and rescission
- Applicable law
- Arbitration

<sup>8</sup> See ID/30, chapter 10 and annex 3.

<sup>9</sup> See report of the founding meeting, ID/62.

<sup>10</sup> See the statement by the Secretary-General of WAITRO at UNIDO III in New Delhi.

<sup>11</sup> For existing guides see *infra*, paras. 48, 68, 103 and 136.

## II. CONSULTING CONTRACT

### 1. Main characteristics and contents

17. The term "consulting" is used in different contexts. In the field of industrialization, the term is mainly used in relation to "consulting engineering", which comprises design study, preliminary designs and design drawings, project reports, cost estimates (so-called basic engineering), submission of proposals for definitive design, detailed design study, architectural design, structural design, construction design, dimensioning calculations, technical specifications setting out the work to be accomplished, goods and services to be supplied, maintenance required etc. (so-called detailed engineering) as well as predesign, design and after-design services (so-called complete engineering).<sup>12</sup>

18. Besides consulting engineering, consulting services could also relate to economic services, management services or training services.<sup>13</sup>

19. Consulting services relating to an industrial investment project are sometimes not only referred to as consulting engineering but also as autonomous or "pure" engineering as distinguished from complex engineering or engineering in general.<sup>14</sup> The first type is dealt with in this study as the subject of a consulting contract, while the latter type is treated as the subject of an engineering contract.<sup>15</sup>

20. The contents of a consulting contract are intellectual services rendered by the consultant for agreed fees to be paid by the client. In contrast to a research contract the scope of the services as well as their content and objective can be described in detail.

21. Essential elements in consulting contracts are, *inter alia*:

Scope of assignment (definition of the scope in successive phases, specification of various services)

Obligations of the consultant: providing professional help, services and information (work schedule to be maintained, personnel to be supplied, amount of authority the consultant is to have vis-à-vis third parties)

Obligations of the client, information to be supplied to the consultant, services and personnel to be provided by the client

Copyright and ownership of documents: designs, blueprints

Financial arrangements, method of payment (types of fee, currency) for each successive stage of the project

Guarantee of performance

Liability of the consultant

Consequences of default, remedies

Settlement of disputes

<sup>12</sup> See detailed description of consulting engineering services in TRADE/GE.1/R.21, paragraphs 11 *et seq.*

<sup>13</sup> See contract on technical assistance, *infra*, paras. 79 *et seq.*

<sup>14</sup> See TRADE/GE.1/R.21, paragraph 8.

<sup>15</sup> See *infra*, paras. 29-38.

## 2. Existing legislation

22. The consulting contract does not appear to be treated as a contract *sui generis* in any legislation. Courts in various countries seem to apply private law rules governing work contracts or service contracts. In the German Democratic Republic the provisions on the contract on scientific technical services<sup>16</sup> are also applied to consulting contracts.

## 3. Work done by other international organizations and bodies

23. Uniform rules on consulting contracts have been elaborated by the International Federation of Consulting Engineers (FIDIC):<sup>17</sup>

International Model Form of Agreement between Client and Consulting Engineering and International General Rules of Agreement between Client and Consulting Engineer for Pre-Investment Studies (IGRA 1979, P.I.)

International Model Form of Agreement between Client and Consulting Engineering and International General Rules of Agreement between Client and Consulting Engineer for Design and Supervision of Construction of Works (IGRA 1979 D + S)

24. Furthermore FIDIC has published

Guide to the Use of Independent Consultants for Engineering Services

and

Guidelines for *ad hoc* Collaboration Agreements between Consulting Firms

25. The FIDIC rules were drawn up by a body representing consultants. However, another model of Contract for Consultants' Services exists drawn up by a body acting in the capacity of a client, i.e. by the World Bank acting as Participating and Executing Agency of the United Nations Development Programme/Special Fund.<sup>18</sup>

26. To provide a balance between the interests of consultants on the one hand and clients on the other hand the Economic Commission for Europe (ECE) has recently commenced work on consulting contracts. A Group of Experts on International Contract Practices in Industry, which has already prepared several guides for drawing up international contracts,<sup>19</sup> decided to prepare a guide on drawing up international contracts on consulting engineering, including related aspects of technical assistance, which should cover, *inter alia*, the following topics:<sup>20</sup>

Legal characteristics of consulting engineering contract  
Applicable technical standards

Commencement and completion of consulting services

Procedures of delivery and acceptance of documents

Completeness of documents

Obligations of the parties

Responsibilities of the engineering firm

Responsibilities of the client

Total cost of the project

Amount and methods of remuneration of the engineering firm

Ownership of documents

Repeated use of the design

Secrecy

Protection of the client by the engineering firm from any claims for infringement of patent and other proprietary rights

Settlement of disputes

Damages sustained by either party

Alteration of the contract

Suspension of the contract

Termination of the contract

Law governing the contract

27. UNIDO is concerned with the use of consultants,<sup>21</sup> and with the promotion and strengthening of national industrial consultancy capabilities,<sup>22</sup> but has dealt with consulting contracts more from a technical and economic than a legal point of view.<sup>23</sup>

## 4. Possible work to be done by UNCITRAL

28. As the ECE has already begun to deal with the legal aspects of international consulting contracts, the Commission may wish to wait for the result of this work to avoid duplication of efforts. After the publication of the ECE Guide the Commission might wish to consider the desirability of preparing General Conditions or uniform rules for consulting contracts.

## III. ENGINEERING CONTRACT

### 1. Main characteristics and contents

29. The engineering contract, as distinguished from the consulting contract, covers all project operations, i.e. intellectual services *plus* supply of equipment and civil and construction works.<sup>24</sup> In contrast to consulting engineering this is also called complex engineering or engineering in general. Complex engineering comprises preliminary studies, planning, design, construction, training and co-ordination services including technical assistance, testing and putting into operation.

30. The engineering contract is distinguished from the contract on the supply and construction of large industrial works. Despite some similarity in that the latter contract is concluded between the supplier or contractor and the client, as is the engineering contract between the engineering firm and the client, the engineering contract is no substitute for the contract on the supply and construction of large industrial works but supplementary to separate contracts with suppliers of equipment and services.

<sup>16</sup> See *supra*, para. 13.

<sup>17</sup> See also *infra*, para. 34.

<sup>18</sup> See *Guidelines for Contracting for Industrial Projects in Developing Countries*, ID/149, p. 78.

<sup>19</sup> See *infra*, paras. 48, 68, 103 and 136.

<sup>20</sup> See report of the fifteenth session, TRADE/GE.1/43.

<sup>21</sup> See *Manual on the Use of Consultants in Developing Countries*, ID/3/Rev.1.

<sup>22</sup> See UNIDO/EX.89/Rev.1.

<sup>23</sup> See chapter III. Contract between owner and consultants, in ID/149.

<sup>24</sup> See TRADE/GE.1/R.21, paragraph 8.

31. Apart from the elements of consulting and, perhaps, industrial research, the engineering contract has as its main characteristic the element of agency, because the engineering firm is acting on behalf of the client and negotiating and concluding contracts with different suppliers of machinery and other equipment as well as contracts with suppliers for various services and with the process licensor. (The characteristics of an engineering contract are not altered if the client concludes some of the necessary contracts, for instance with the licensor, himself.)

32. The content of an engineering contract is partially the same as that described in regard to contracts on research and development and the consulting contract. Additional elements comprise especially the responsibility in regard to the procurements of all major equipment, the supervisory responsibility of the engineering firm and its liability in regard to the acts and omissions of the suppliers and other contractors towards the client.

## 2. Existing legislation

33. The engineering contract is not treated as a contract *sui generis* in any national legislation. The several aspects of this contract are governed by provisions on work contracts and service contracts, including provisions for agency contracts.

## 3. Work done by other international organizations and bodies

34. FIDIC has published an International Model Form of Agreement between Client and Consulting Engineer and International General Rules of Agreement between Client and Consulting Engineer for Project Management (IGRA 1980 PM). Here the engineering firm is called the project manager who performs his services for and on behalf of the client.

35. UNIDO has dealt with engineering contracts in the framework of the transfer of technology. Its Guidelines for evaluation of transfer of technology agreements contain a chapter on the engineering services agreement.<sup>25</sup>

36. Another project of UNIDO for an engineering contract is the preparation of a "Model Form of Cost Reimbursable Contract for the Construction of a Fertilizer Plant".<sup>26</sup> In this model the engineering firm acts as a project manager who procures all necessary equipment for and on behalf of the client from qualified suppliers. The content of this model is similar to another UNIDO model of a turn-key contract<sup>27</sup> except for the question of liability and direct payment. The Model Form of Cost Reimbursable Contract for the Construction of a Fertilizer Plant will be submitted to the Third Consultation on the Fertilizer Industry (scheduled for September–October 1980) for adoption.

37. In the context of preparing rules for industrial investment projects the ECE has drafted certain provisions for engineering contracts:

Additional Clauses for Supervision of Erection of Plant and Machinery Abroad.<sup>28</sup>

## 4. Possible work to be done by UNCITRAL

38. As the work done by FIDIC is considered as the work of a non-governmental international organization representing mainly the interest of one of the parties only, and as the present work of UNIDO is confined to a particular branch of industry, the Commission may wish to consider the desirability of commencing work on engineering contracts, either by drafting a guide on drawing up international engineering contracts or by drafting general conditions for engineering contracts, taking into account the results achieved within the framework of other organizations.

## IV. CONTRACT ON SUPPLY AND CONSTRUCTION OF LARGE INDUSTRIAL WORKS

### 1. Main characteristics and contents

39. A client who wishes to construct an industrial plant may proceed in different ways. If he chooses to deal with various contractors for the various parts of a plant or with the suppliers of equipment and know-how separately, then the whole transaction is split up into several contracts such as a consulting contract, a licensing contract, various sales contracts for machinery and equipment, a work contract for the erection of the plant etc. All these contracts together do not amount to a contract on supply and construction of large industrial works.

40. The contract on supply and construction of large industrial works is a comprehensive contract between the client and *one* contractor (supplier) only. This contract comprises all the various aspects of such a transaction: design, drawings, documentation, delivery, assembly, building, installation, putting into operation, demonstration tests, controls, initial operation of the plant and taking over. Thus the main characteristic of this contract is its comprehensive nature and complexity.

41. Which, and how many, supplies and services the contractor does not provide himself but by subcontracting is irrelevant. Towards the client the contractor alone is entirely responsible.

42. The comprehensive nature of the contract does not mean, however, that the contractor is responsible for all the necessary steps of supply and construction. Usually the client participates in the construction of the plant. He provides the site for the complex, the necessary connection for power, water etc., as well as the necessary local permits and authorizations. He also provides all the necessary data and such parts of the materials which he may procure locally. Very often the client provides all civil engineering work including the construction of buildings. For the assembly and erection and for the testing and start-up of the plant the client provides the necessary personnel.

<sup>25</sup> See ID/233, p. 27.

<sup>26</sup> ID/WG.281/12, plus Add. 1: see also the third draft of 31 January 1980, ID/WG.318/3.

<sup>27</sup> See *infra*, para. 49.

<sup>28</sup> See ECE Publications, Nos. 188 E and 574 B.

43. The contract on supply and construction of large industrial works, therefore, is usually a contract which provides for a division of labour between the contractor and the client, where the responsibility of the contractor is limited in so far as the client himself is responsible for certain parts and operations.

44. If in such a comprehensive contract the contractor has the obligation to deliver an operational industrial complex to the client without active participation of the client in the various stages of the construction, the contract is called a turn-key contract (or *contrat clé-en-main*). Over and above the various aspects described earlier, the contractor must also provide for technical assistance with respect to training, operate the plant for a short initial period and assist with the marketing of the products manufactured.

45. If the contract imposes on the contractor an additional guarantee as to the quantity and the quality of the production over a longer period of time (sometimes up to two years) the "*contrat clé-en-main*" will become "*contrat produit-en-main*". It seems that there does not yet exist a widespread use of this type of contract.

## 2. Existing legislation

46. Except for the International Commercial Contracts Act of the German Democratic Republic which contains a section entitled "Erection of Plant",<sup>29</sup> national legislations do not contain provisions relating specifically to contracts for supply and construction of large industrial works, much less the "*contrat clé-en-main*" or the "*contrat produit-en-main*". One must therefore refer to the many aspects of the law of contracts involved: contracts for services, contracts for supply of labour, licensing contracts, contracts for sale etc. it may be thought that the application of various legal provisions of different types of contract to a contract like the one for supply and construction of large industrial works is not adequate to its comprehensive nature.

## 3. Work done by other international organizations and bodies

47. The ECE has published several sets of general conditions for contracts on supply and construction of large industrial works:<sup>30</sup>

General conditions for the supply of plant and machinery for export, Nos. 188 + 574

General conditions for the supply and erection of plant and machinery for import and export, Nos. 188 A + 574 A

These general conditions were drafted between 1953 and 1963 before the advent of the complex and sophisticated type of contracts which are found today. Accordingly, they do not take into account the intricate relationship existing between the parties in the light of the recent developments in this field. Besides, these general conditions were oriented on the model of relations between parties both from developed countries.

<sup>29</sup> See articles 88-97 of the ICCA.

<sup>30</sup> See also the Additional clauses for supervision of erection of plant and machinery abroad (188 B + 574 B) mentioned *supra*, para. 37. Further, the ECE has elaborated General conditions for the erection of plant and machinery abroad (188 D + 574 D).

48. The ECE has also published various guides, among them the "Guide on Drawing up Contracts for Large Industrial Works".<sup>31</sup> This guide lists the various contractual procedures which may be adopted for such works, indicating the problems which such procedures may raise and the consequences which they may entail.

49. UNIDO is in the process of preparing a "Model Form of Turn-key Lump Sum Contract for the Construction of a Fertilizer Plant".<sup>32</sup> This draft model form of contract will be submitted to the Third Consultation on the Fertilizer Industry in September-October 1980.<sup>33</sup>

50. UNIDO has dealt repeatedly with various aspects of the installation of large industrial works, especially from the point of view of economic, technical, administrative and—most important—financial considerations. Examples are:

Programming and Control of Implementation of Industrial Projects in Developing Countries<sup>34</sup>

A Guide to Industrial Purchasing<sup>35</sup>

Manual on Investment-Promotion Centres<sup>36</sup>

Contract Planning and Organization<sup>37</sup>

Subcontracting for Modernizing Economies<sup>38</sup>

Guidelines for Contracting for Industrial Projects in Developing Countries<sup>39</sup>

Guidelines for the Establishment of Industrial Estates in Developing Countries<sup>40</sup>

## 4. Possible work to be done by UNCITRAL

51. If the Commission considers the contract on supply and construction of large industrial works to be of sufficient importance to justify the commencement of work on it, there may be several courses of action open to the Commission.

52. The General Conditions prepared by ECE focus on East-West relations. The Commission could therefore consider widening the scope of these general conditions or prepare new general conditions to be included in the new types of contract used more and more frequently between developed and developing countries.

53. Since UNIDO has prepared model contracts in a special field (fertilizer production), the question arises whether such models should be prepared for each branch (or even sub-branch) of industry or whether UNCITRAL should consider preparing a model contract form for such transactions in general.

54. Another possibility would be that UNCITRAL pay special attention to certain specific clauses of these contracts (for instance clauses on liability, on guarantees, on applicable law, on settlement of disputes).

<sup>31</sup> ECE/TRADE/117.

<sup>32</sup> See ID/WG.306/2 and a second draft of 31 January 1980, ID/WG.318/1.

<sup>33</sup> See also *supra*, para. 36.

<sup>34</sup> ID/SER.L/1.

<sup>35</sup> ID/82.

<sup>36</sup> ID/102.

<sup>37</sup> ID/117.

<sup>38</sup> ID/129.

<sup>39</sup> ID/149.

<sup>40</sup> ID/220.



55. Finally, after the successful conclusion of the work on the international sale of goods, the Commission may wish to consider the desirability of a draft convention on international contracts for the supply and construction of large industrial works.

## V. CONTRACT ON TRANSFER OF TECHNOLOGY

### 1. Main characteristics and contents

56. Transfer of technology takes place in various forms—organized or incidentally, against or without payment, on the basis of separate contracts or in the framework of other, more comprehensive contracts. This study deals with contracts on the transfer of technology in their pure form as licensing contracts.

57. Licensing contracts can relate to protected or unprotected know-how. In either case the objective of the contract is the transfer of technology, i.e. the granting of the use of scientific or scientific-technical results, whether they are protected by intellectual (or industrial) property rights or not.<sup>41</sup>

58. The differences between patent licensing and know-how licensing contracts touch upon the liability of the licensor, third party rights, the duration of the contract etc. The obligations of the parties in regard to the supply of information and documentation, the granting of further licences by the licensor or of sublicences by the licensee and other aspects are basically the same in both patent and know-how licence contracts.

59. The main characteristic of a licensing contract is the sale of knowledge, i.e. the supply of incorporeal goods from the licensor to the licensee and the right to use such knowledge by the licensee. As far as the knowledge is protected by intellectual property rights these rights are usually limited to a certain territory.

60. Besides the distinction between patent and know-how licensing, international practice has developed various subtypes of licensing contracts, *inter alia*:

Exclusive and non-exclusive licensing

Licensing with a single or continuing transfer of knowledge

Licensing of inventions or innovations

Production or development licensing

61. For the payment of the licence fees (the price of the knowledge supplied, and for the right to use it) two main forms have been developed which in contract practice appear alone or in combination: the payment of a fixed price—a lump sum—or the payment of an amount calculated on the basis of a fixed percentage share of the production or sale of products by the licensee (a royalty).

### 2. Existing legislation

62. Many countries have special laws on industrial property rights which are basically not concerned with, but sometimes contain provisions on, licensing. Furthermore in

many countries—especially developing countries—there exist special legal provisions concerning administrative matters or transfer of technology policy. These laws are concerned with registration and the control and authorization of contracts on transfer of technology, and have to that extent an impact on the obligations of the parties. However, they do not regulate the licensing contract as such.

63. The licensing contract, as a relatively new type of contract, is not regulated as a contract *sui generis* in most legislations. Courts apply provisions on lease or rent when the licensing contract grants the right to use the transferred technology. The ICCA of the German Democratic Republic<sup>42</sup> contains a special section on licensing contracts.

### 3. Work done by other international organizations and bodies

64. Contracts on transfer of technology have already been considered by many international organizations. The subject is of principal interest to the World Intellectual Property Organization (WIPO) which has published *inter alia* a "Licensing Guide for Developing Countries" dealing with the legal aspects of the negotiation and preparation of industrial property licences and technology transfer agreements appropriate to the needs of developing countries.

65. After preliminary work by the United Nations Conference on Trade and Development (UNCTAD), a special United Nations Conference on an International Code of Conduct on the Transfer of Technology has been convened which has held two sessions in 1978 and 1979. It is expected that the Code will be completed at a third session in 1980. The Code will cover most of the aspects of a licensing contract.

66. UNIDO has also given considerable attention to contracts on the transfer of technology and has dealt not only with the commercial and technical but also with the legal aspects thereof. It has published "Guidelines for the acquisition of foreign technology in developing countries, with special reference to technology licence agreements".<sup>43</sup>

67. Recently UNIDO has published a series of studies on development and transfer of technology, for instance:

No. 1 National approaches to the acquisition of technology, containing a chapter on terms of licence agreements<sup>43a</sup>

No. 12 Guidelines for evaluation of transfer of technology agreements<sup>43b</sup>

68. ECE has published a "Guide for use in drawing up contracts relating to the international transfer of know-how in the engineering industry",<sup>44</sup> and is currently preparing a "Manual on licensing procedures and related aspects of technology transfer", containing chapters covering the position in each of 19 ECE member countries.

<sup>42</sup> Articles 176–186.

<sup>43</sup> ID/98.

<sup>43a</sup> ID/187.

<sup>43b</sup> ID/233.

<sup>44</sup> TRADE/222/Rev.1.

<sup>41</sup> Licensing of industrial property rights can also relate to trade marks, but this is not the transfer of technology itself and will not be dealt with here.



69. A non-governmental regional organization, the *Organisme de Liaison des Industries Métalliques Européennes* (ORGALIME), has elaborated a "Model form of Patent Licence Agreement with a foreign company".

#### 4. Possible work to be done by UNCITRAL

70. In view of the fact that WIPO is a specialized agency within the United Nations system with special competence in this area, and that there is already a considerable amount of work done by this and other organizations, the Commission may wish to conclude that it would be inappropriate to start work in this field.

### VI. CONTRACT ON SERVICE AND MAINTENANCE

#### 1. Main characteristics and contents

71. There are several types of contracts on service and maintenance, differing in their nature and objectives. Two principal types are:

(a) Contract between manufacturer (seller) and client (purchaser);

(b) Contract between manufacturer (seller) and specialized servicing firm.

72. The first type of contract is concluded for the maintenance and repair of industrial plant, aeroplanes or other sophisticated equipment, if the purchaser (operator) does not himself have enough skilled technicians for this purpose. The second type of contract is concluded for the maintenance and repair of technical consumer goods like cars, television sets etc.

73. In a contract on service and maintenance between a manufacturer and a purchaser the manufacturer undertakes to provide the services of skilled maintenance technicians on a continuous basis, maintain the necessary maintenance test gear in good working order, carry out routine preventive maintenance, ensure that adequate stocks of spare parts are available at all times and train the purchaser's staff in maintenance techniques.<sup>45</sup>

74. In a contract on service and maintenance between a manufacturer and a specialized servicing firm the servicing firm undertakes to carry out all necessary repairs and maintenance services for the goods sold by the manufacturer in a certain area both within the guarantee period stipulated by the seller and after the expiry of that period.

75. A third type of contract, also called a service contract, is concluded between national oil companies and foreign firms capable of providing the needed capital and technical expertise. Under such a service contract (also called a work contract, operations contract, association contract, or production-sharing contract) the foreign firm undertakes the actual search for, development, and at times even the marketing of the oil resources.<sup>46</sup>

<sup>45</sup> See requirements for maintenance, operation and spare parts, in *Contract Planning and Organization*, ID/117, p. 38.

<sup>46</sup> Hasan S. Zakariya, "New directions in the search for and development of petroleum resources in the developing countries", *Vanderbilt Journal of Transnational Law*, vol. 9 (1976), pp. 545 et seq.

#### 2. Existing legislation

76. On the first type, which is the most interesting in the context of industrialization, no special legal regulations are known. It is assumed that this contract is treated as a mixed contract consisting of work, service and sale. The second type is included in the ICCA of the German Democratic Republic.<sup>47</sup> The third type is sometimes governed by agreements between States and foreign enterprises and are occasionally treated as quasi-public international law agreements.

#### 3. Work done by other international organizations and bodies

77. The Council for Mutual Economic Assistance (CMEA) has elaborated "General Conditions for the Technical Servicing of Machinery, Equipment and other Items delivered between Foreign Trade Organizations of Member Countries of the Council for Mutual Economic Assistance".<sup>48</sup>

#### 4. Possible work to be done by UNCITRAL

78. Since the maintenance of modern plant and equipment is a major problem for developing countries, and work on the regulation of contracts on service and maintenance has not been undertaken by other organizations, the Commission may wish to include this type of contract in its work programme. The final form that the work should take could be decided at a later stage after initial studies of the problems involved.

### VII. CONTRACT ON TECHNICAL ASSISTANCE

#### 1. Main characteristics and contents

79. The phrase "technical assistance" is sometimes used in a broad sense to cover any of the contractual relationships dealt with in this report. In a narrow sense, however, two types of contract are named technical assistance contracts: the contract for training of personnel and the management contract.

80. In a contract for training of personnel the services of the supplier consist in the training of the client's personnel in production operations, maintenance, marketing, accounting etc.<sup>49</sup> Such training extends over a certain period of time and may take place in the supplier's country, in the client's country or even in a third country in an already operating plant.

81. Contracts on training of personnel specify the number of people to be trained, the objective of the training (the scope of the instruction), the duration of the training, the necessary level of education, the place, the living conditions (either for the people to be trained in the supplier's country or for the instructors in the client's country), the remuneration for supplier's services etc.<sup>50</sup>

<sup>47</sup> Articles 129-136.

<sup>48</sup> *Register of Texts of Conventions and other Instruments concerning International Trade Law*, vol. I, New York 1971, pp. 31-38.

<sup>49</sup> See the technical assistance agreement, in *Guidelines for Evaluation of Transfer of Technology Agreements*, ID/233, pp. 5 et seq.

<sup>50</sup> Compare, for instance, "Conditions for the provision of technical personnel abroad", prepared by ORGALIME, in *Guidelines for Contracting for Industrial Projects in Developing Countries*, ID/149, p. 167.

82. One possible way of obtaining technical services is to employ the supplier's personnel in key positions and then have them train local personnel—operators, salesmen and managers—so that, over the agreement period, the local personnel acquires all the supplier's expertise.<sup>51</sup>

83. The management contract also has as its ultimate goal the training of personnel of the client, but its immediate purpose is to start up the plant, stabilize its operations and keep it running. It is a contract under which operational control of the enterprise (or of part of it) is vested in a separate enterprise which performs the necessary managerial functions in return for a fee.<sup>52</sup> The management contract is sometimes considered as an alternative to conventional direct investment.

### 2. Existing legislation

84. Special legal rules of a private law nature for contracts on technical assistance are unknown.

85. Intergovernmental agreements which the USSR has concluded with Algeria, with Egypt, with Guinea, with Iraq, with Sri Lanka and with Syria contain General Terms of technical assistance.<sup>53</sup>

### 3. Work done by other international organizations and bodies

86. The contract on technical assistance has so far not been the subject of extensive work by any organization. A few legal aspects are covered in UNIDO's "Guidelines for Evaluation of Transfer of Technology Agreements".<sup>54</sup>

### 4. Possible work to be done by UNCITRAL

87. Since technical assistance contracts play an important role in the field of industrial development<sup>55</sup> the Commission may consider it worthwhile to start work on this subject, especially with regard to all aspects of the training of personnel. Account could be taken of existing national<sup>56</sup> and international<sup>57</sup> general conditions for contracts on technical assistance.

## VIII. LEASING CONTRACT

### 1. Main characteristics and contents

88. There are many forms of leasing contracts. However, the leasing contracts of special importance in the context of industrial development appear to be maintenance leasing and financial leasing.

89. Under a "maintenance" or "operating" lease, the owner of goods (e.g. machinery, plant or equipment)

<sup>51</sup> ID/233, p. 6.

<sup>52</sup> Peter P. Gabriel, *The International Transfer of Corporate Skills, Management Contracts in Less Developed Countries*, Boston 1967, p. 22.

<sup>53</sup> "Legal aspects of industrial co-operation between the Soviet Union and other CMEA member countries and the developing countries", *Contracts between Organizations and Firms*, ID/WG.229/7, p. 16.

<sup>54</sup> ID/233, p. 7.

<sup>55</sup> See "The acquisition and development of industrial skills by developing countries", Report for the Third General Conference of UNIDO, ID/CONF.4/8.

<sup>56</sup> See for instance Mahoumed Salem, "Les contrats d'assistance techniques", in *Transfert de technologie et développement*, Paris 1977, p. 467.

<sup>57</sup> See *supra*, para. 85.

grants the use of the goods to the other contracting party, who would pay the owner money for such use. The term of the lease is normally for less than the effective life of the goods leased (i.e. at the end of the lease, the owner could lease the goods again, or use them in some other way). The duty of keeping the goods in good repair during the lease normally falls on the owner. While the rights and duties of the parties *inter se* are determined by the terms of a written contract between them, the framework of the contract usually approximates to that of the contract of hiring known to most legal systems.

90. A "financial" lease is usually entered into under the following circumstances. A prospective user wishes to buy goods or have their use for their effective life, but does not have the money to pay the supplier for them. After agreeing with the supplier the nature and specifications of the goods required, the prospective user arranges for the necessary financing with a financier. The arrangement takes the form of a purchase of the goods by the financier from the supplier, with a subsequent leasing of the goods to the user, the ownership remaining with the financier. Under the lease, the lessee has to make periodic payments to the lessor, and the amount of the payments are so calculated that, upon completion, they reimburse the lessor-financier for the purchase price he has paid, together with his costs and interest on the price. Furthermore, upon completion of the payments, the lessee would usually have the option to purchase the goods, often for a nominal consideration. The consideration will be nominal because, in effect, the user has fully paid for the goods, and also because the effective life of the goods often has expired. Other possibilities which may be stipulated for on the completion of the lease are that the lessee has the option to enter into a new lease, or may return the goods to the lessor.

91. "Financial" leasing is therefore normally a tripartite transaction which enables the supplier to sell his goods, the financier to profit by his financing, and the lessee to get the use of the goods on financial terms which he can afford. Occasionally, however, a supplier with sufficient funds may himself finance the leasing of his own equipment.

### 2. Existing legislation

92. "Maintenance" leasing is well known to most legal systems, and special legislation often exists to balance the rights and duties of the parties in an equitable manner. A few countries have special legislation regulating "financial" leasing.<sup>58</sup> In some countries, revenue laws which determine the tax obligations of the parties to leasing transactions also influence the terms to be contained in such transactions.

### 3. Work done by other international organizations and bodies

93. The International Institute for the Unification of Private Law (UNIDROIT) is in the course of preparing uniform rules for financial leasing.<sup>59</sup>

<sup>58</sup> E.g. for France, see the law No. 66-455 of 2 July 1966 modified by the ordinance No. 67-837 of 28 September 1967.

<sup>59</sup> See the preparatory report by its Secretariat, Study LIX-Doc.1 (March 1975) and the draft uniform rules, Study LIX-Doc.8 (January 1979).

94. UNIDO has proposed the use of financial leasing at an international level to facilitate the acquisition of plant and equipment for purposes of industrial development by developing countries from developed countries.<sup>60</sup> Furthermore, a study on the advantages and disadvantages of "financial" leasing in respect of various types of equipment was presented to a Symposium on the Development of the Plastics Fabrication Industry in Latin America.<sup>61</sup>

95. Leasing was considered at the third Seminar on East-West Trade Promotion, Marketing and Business Contacts organized by the Committee on the Development of Trade of the ECE (13-15 May 1975). The view was expressed that leasing could play an important role in the framework of East-West industrial co-operation. The conclusion of the participants in the Seminar was that "leasing companies and manufacturers engaged directly in leasing, should provide more information on the entire subject ranging from costs, advantages, disadvantages, legal aspects, and services to information on finance rental systems and methods. This might best be done by governments in the form of official publications to avoid conflict of competitive interest".<sup>62</sup>

#### 4. Possible work to be done by UNCITRAL

96. In view of the wide variety in the subject-matter of "maintenance" leases, the formulation of uniform rules to govern such contracts does not appear to be practicable. The work undertaken by UNIDROIT on the formulation of draft uniform rules to govern "financial" leasing of a purely commercial character is at an advanced stage, and it is desirable that the completion of this work should be left to UNIDROIT. If the work by UNIDO on the promotion of "financial" leasing for development purposes were to proceed further, the Commission may wish to consider the possibility of contributing to the legal aspects of such work (e.g. the formulation of model leasing contracts, or performance guarantees).

### IX. JOINT-VENTURE CONTRACT

#### 1. Main characteristics and contents

97. Joint ventures are increasingly used in international economic relations in general, including relations between countries having different socio-economic systems. In particular joint ventures are used as a means of direct foreign investment in developing countries. Joint ventures involve, in varying degrees, the pooling of assets, joint management and a sharing of profits and risks according to a commonly agreed formula.<sup>63</sup>

98. The objectives of joint ventures may vary considerably: production, marketing, servicing etc., separately or in combination. Joint ventures are frequently used in the exploration and exploitation of natural resources.<sup>64</sup>

99. There are two fundamental forms of joint ventures, contractual joint ventures and equity joint ventures.<sup>65</sup> In the case of a contractual joint venture, no additional entity is established and no corporate entity is set up, the association being based entirely on a contract. In the case of an equity joint venture, a separate body corporate (incorporated mixed company) is established, in the equity capital of which both foreign and local parties have a share.

100. The contents of joint-venture contracts differ depending on the objective of a joint venture, and the form chosen. Essential elements are the percentage of the foreign ownership, the voting rights upon questions such as the appointment of directors, distribution of assets, changes in the objectives of the joint venture, changes in the capital structure etc. Many aspects have to be decided on the basis of the company laws of the host country.

#### 2. Existing legislation

101. Many countries have special laws on various types of incorporated or unincorporated entities which apply independently of the question whether or not foreign parties have an interest in such entities. Special laws on joint ventures have been enacted in some countries recently, generally aimed at controlling, and sometimes aimed at attracting, foreign capital.<sup>66</sup> Such special regulations, which are generally administrative and financial regulations (including tax regulations), are more concerned with matters of economic policy and less with private law relations between the parties.

#### 3. Work done by other international organizations and bodies

102. UNIDO has published a Manual on the Establishment of Industrial Joint-Venture Agreements in Developing Countries.<sup>67</sup> Some of the topics considered in this manual are ownership, capital structure, direction, management, marketing, financial policies, industrial property, technical assistance and know-how, settlement of disputes and partnership changes. In a number of instances legal clauses for implementing some of the approaches have been included.

103. ECE has published several case studies on joint ventures in East-West Relations. It has considered joint ventures in Western as well as in Eastern European countries.<sup>68</sup> ECE has also elaborated a "Guide for drawing up international contracts between parties associated for the purpose of executing a specific project",<sup>69</sup> a guide for drafting of consortia contracts, for groups with or without legal personality.

104. The International Chamber of Commerce (ICC) has published an "International Guide to Company Formation",<sup>70</sup> which deals also with joint ventures.

<sup>60</sup> This proposal was submitted by the UNIDO Secretariat to an *ad hoc* Expert Group Meeting on Industrial Leasing of Industrial Plants in Developing Countries (Vienna, 29-30 May 1978).

<sup>61</sup> Bogota, Colombia, 20 November-1 December 1972: document ID/WG.137/50.

<sup>62</sup> *Licensing and Leasing*, TRADE/INF.2, paras. 43-58.

<sup>63</sup> TRADE/R.373, para. 70.

<sup>64</sup> *Permanent Sovereignty over Natural Resources*, E/C.7/99, paras. 20-35.

<sup>65</sup> *Manual on the Establishment of Industrial Joint-Venture Agreements in Developing Countries*, ID/68, p. 3.

<sup>66</sup> See, for instance, the law on joint ventures of the People's Republic of China, *Droit et pratique du commerce international*, vol. 5 (1979), p. 455.

<sup>67</sup> ID/68.

<sup>68</sup> *East-West Industrial Co-operation*, ECE/TRADE/132, paras. 152 *et seq.* and annex III.

<sup>69</sup> ECE/TRADE/131.

<sup>70</sup> Brochure 263, September 1970.

#### 4. Possible work to be done by UNCITRAL

105. The research by UNIDO appears to show that it is impossible to find any joint venture that could be called typical or serve as a prototype for other agreements. The UNIDO manual speaks of the almost infinite number of combinations of possible terms and conditions within the context of a joint-venture arrangement.<sup>71</sup> In view of this finding and taking into account the work already done, the Commission may wish to conclude that, for the time being, no work should be commenced on joint-venture contracts.

### X. INDUSTRIAL CO-OPERATION CONTRACTS

#### 1. Main characteristics and contents

106. The international industrial co-operation contract, which is a relatively new phenomenon in international economic relations, has a growing importance for the industrialization of developing countries and the international division of labour.

107. According to the experience gained and the views advanced so far, the subject of industrial co-operation can include the following:

Joint research and development of scientific-technical solutions or results

Rendering of scientific-technical services, or exchange of information

Licensing of patents or know-how, and other forms of transfer of technology and of technical experience with payment in products created with the technology transferred

Co-operation in the field of investments, especially supply and erection of industrial plants and the exploitation or development of natural resources

Co-operation in the field of production, including specialization of production, subcontracting

Joint marketing of the products of industrial co-operation

108. In spite of being widely used, the term industrial co-operation has not yet found an internationally recognized definition. In the context of the activities of the ECE a wide-ranging "working definition" has been developed according to which industrial co-operation denotes the economic relationships and activities arising from:

(a) Contracts extending over a number of years which go beyond the straightforward sale or purchase of goods and services to include a set of complementary or reciprocally matching operations (in production, development and transfer of technology, marketing etc.);

(b) Contracts which have been identified as industrial co-operation contracts by governments in bilateral or multilateral agreements.<sup>72</sup>

109. Similarly the Conference on Security and Co-operation in Europe recognized that industrial co-operation covers a number of forms of economic relations which go beyond the framework of conventional trade. As

specific forms which might be useful for the development of industrial co-operation were mentioned: joint production and sale, specialization in production and sale, construction, adaptation and modernization of industrial plants, co-operation for the setting up of complete industrial installations with a view to thus obtaining part of the products from such installations, mixed companies, exchanges of "know-how", of technical information, of patents and licences, and joint industrial research within the framework of specific co-operation projects.<sup>73</sup>

110. To distinguish between co-operation at the level of governments and at the level of enterprises, recent studies of UNIDO speak of "industrial enterprise co-operation". By this term is understood "a long-term and complex industrial interaction between a developing country and a foreign enterprise with matching mutual performances, with some institutionalizing of a community of interests in a specific project and with the existence of a lasting interest in co-operation".<sup>74</sup> The complexity of such transactions is seen in particular, in that "the sale of industrial equipment and technology has been extended to include technical assistance, design of industrial complexes, civil engineering and the organization of long-term interaction".<sup>75</sup>

111. Most of the many definitions of industrial co-operation are formulated in economic terms, although some legal definitions also exist. Furthermore, many transactions have been concluded which are described as industrial co-operation agreements and contracts. An analysis of their contents shows that, although dealing with very different matters, the transactions contain special common features which distinguish them from other contracts. These special features are mainly the following:

(a) The complexity of the exchange of services and goods;

(b) The combination of preparatory organizing obligations for research and development, and for production, on the one hand, and duties for the actual performance of the exchange of goods and services on the other hand;

(c) The long duration of the relations between the parties;

(d) The community of interests between the parties;

(e) Very often, special methods for financing the operations.

112. The complexity of these transactions has economic as well as legal aspects. Of particular importance for developing countries are transactions on industrial co-operation which include whole complexes in industry or agriculture. Instances of such transactions are geological surveys and explorations, which go from research *via* design and engineering to supply and erection and include training and assistance in the management of industrial works.

<sup>73</sup> Conference on Security and Co-operation in Europe: Final Act, 1 August 1975, *International Legal Materials*, vol. 14, No. 5, September 1975, p. 1302.

<sup>74</sup> See *Methods and Mechanisms for International Industrial Enterprise Co-operation*, UNIDO/IOD. 325, p. 10.

<sup>75</sup> *Ibid.*, pp. 10-11.

<sup>71</sup> ID/68, p. 1.

<sup>72</sup> *Analytical Report on Industrial Co-operation among ECE Countries*, E/ECE/844 Rev.1, para. 3.

113. Co-operation in the areas of scientific technique and the transfer of technology has gained a certain independence. Transfer of technology, however, plays an increasingly important role in the context of the installation of industrial plants. Often special programmes of technical support are agreed in connexion with the supply of large industrial works. Sometimes even the main object of the contract appears to be the transfer of technology, while the sale of equipment appears to be accessory.

114. It is not surprising therefore that "complex engineering" is developing as a new form of co-operative relations. This complex or general engineering comprises all the necessary activities for the installation of a plant, "i.e. complete consulting engineering, carry out the civil works, deliver and assemble the plant and equipment, train the personnel of the client, and assist the latter in starting up and running-in the plant".<sup>76</sup> Such a contract becomes "co-operative" by the inclusion of the client as an active partner in many or all of the individual phases of the operation, and particularly by the use of special methods of financing the operation.

115. To a growing extent developing countries request the support of foreign enterprises in the training of technical and managerial personnel as well as of workers. The conclusion of separate contracts on the training of personnel in the framework of large co-operative transactions, either at the place where the plant is to be installed or in an already operating plant (in the buyer's country or in the supplier's country or even a third country) therefore becomes increasingly important.

116. In the contract "*produit-en-main*", moreover, assistance in commercial or economic management plays a major role. Here what is needed is not only the starting up of a plant and its transformation to permanent functioning, but its technical and economic management for a more or less lengthy period, the gradual transfer of the management to the client's personnel, and temporary assistance to be given to such personnel. For this purpose special management contracts are concluded within co-operative agreements, though for the most part in separate documents.

117. Another complex aspect is the *mutual* exchange of goods and/or services. Thus, a contract on the supply and erection of a large industrial plant on a turn-key basis where the customer has no other obligation than to pay the price is, without more, not an industrial co-operation contract. Also contracts on simple transfer of technology are not co-operation contracts. Although the "Guide on Drawing up International Contracts on Industrial Co-operation"<sup>77</sup> mentions that such contracts may contain certain elements of industrial co-operation, real co-operation starts at the stage when both parties have undertaken obligations beyond the payment of the price.

118. The complexity of industrial co-operation relates also to the legal framework involved. For a given transaction there can be one comprehensive contract, covering all elements and aspects of the transaction. Very often, however, for a single project there are several contracts,

which are more or less interrelated and interdependent and sometimes covered or embraced by a basic or frame contract. But whatever its contractual structure, industrial co-operation in its various aspects comprises traditional contracts like sales or work and labour, or service, or licence etc. These various elements may be combined in many different ways with sometimes the one and sometimes the other element dominating. But, in any event, through their combination into a new complex contract (or an interrelated series of contracts) the single elements lose to a certain extent their specific identity, and this has consequences for the performance of the parties and especially for possible remedies for breach of contract.

119. One of the characteristics of contracts on industrial co-operation already mentioned is the inclusion of obligations beyond the direct exchange of goods and services, i.e. the inclusion of obligations concerning the preparation or organization of research, development and production.

120. Because of the complexity and the long duration of industrial co-operation, such contracts contain clauses which are usually not found in simpler contracts. There is, firstly, the duty of the parties to co-operate in every respect, and to do everything possible to attain the common aim and purpose of the contract. The contract on industrial co-operation creates not only a certain community of interests, it also establishes (and is based on) a special mutual confidence which in turn increases the obligations of the parties in regard to their endeavours to prevent damage to the other party.

121. Secondly, industrial co-operation contracts usually contain clauses limiting the possibilities of termination, and excluding rescission altogether. In this connexion it has to be stressed that for industrial co-operation contracts change of circumstances is of special importance. The main question in cases of changed circumstances is, however, not the termination of the contract but the adoption of additional measures, the adaptation of the contract to the new conditions. Industrial co-operation creates a kind of interdependence between the parties which has to be protected and preserved by suitable terms and clauses.

122. Contracts on industrial co-operation therefore, as long-term contracts, very often contain clauses providing for a permanent or regular adaptation or revision of the contract according to possible changes of circumstances. Sometimes joint bodies are created whose task is to evaluate the performance of both sides continuously and to put forward suggestions for the improvement of the co-operation. Such joint bodies are frequently established if co-ordination of labour on site is involved.

123. The community of interests of the parties is reflected in special clauses regarding remedies for breach of contract often contained in industrial co-operation contracts. Usually compensation for loss is limited. Instead attention is chiefly directed to the interrelation between the numerous tasks and obligations of the parties, and the relationship between principal or basic and subsidiary or corollary obligations. The emphasis is on the endeavours of the parties to keep their co-operative transaction alive.

<sup>76</sup> *International Engineering Contracts including Related Aspects of Technical Assistance*, TRADE/GE.1/R.21, para. 73.

<sup>77</sup> ECE/TRADE/124.

124. Because of the community of interests involved in industrial co-operation, it can be stated that contracts for such co-operation border on association contracts. Contracts for the creation of consortia<sup>78</sup> are examples of especially intensive co-operation. A network of industrial co-operation could also eventually lead to, or could include, the creation of a joint venture.

125. Many industrial co-operation contracts contain special methods of financing the operations, as the traditional methods, including traditional conditions of payment and securities, do not suffice. Sometimes, the transaction would not be possible without such special methods of financing.

126. Included in the various forms of industrial co-operation are compensation or buy-back arrangements. Here one party, the contractor, supplies design and equipment, carries out or supervises the erection of the plant, transfers the necessary technical knowledge, assists in the commissioning or even management of the works whilst the client takes part in the construction and the erection of the plant and sells to the contractor part of the output of the production.

127. Such compensation contracts not only have financial aspects (e.g. as the plant is usually supplied on credit terms to the client the repayment of the credit is easier if the production of the plant can be used) but also technical and technological aspects. If the supplier of a plant agrees to buy back part of the production of this plant it is naturally in his own interest to supply an effective operating plant of high quality. The contractor in such a case will also do his best regarding the training of the personnel of the client. Compensation contracts therefore are often considered as granting an additional guarantee to the client.

## 2. Existing legislation

128. It would appear that no specific legal regulations exist in any country on industrial co-operation contracts considered as contracts *sui generis* of a complex character. Even for the various elements which such a contract might have like consulting, engineering, construction, erection, assembly, licensing, training etc. many countries do not have specific rules and provisions. Legislation in general lags behind the practice of international economic relations and what has been invented and developed in that area in the recent past.

129. To the extent that courts have to deal with international industrial co-operation contracts, they would apply rules intended to govern traditional types of contracts like sales, labour, service, lease, association etc.

130. In some countries, apart from private law, legal provisions exist in the fields of anti-trust law and taxation concerning industrial co-operation. In regard to *international* industrial co-operation some countries have rules on branches of enterprises located abroad, on transfer of profits or on investment incentives.

131. On the international level as well the situation is unsatisfactory. There are no international uniform legal rules on complex industrial co-operation contracts, or on their substantial and constituent parts. Occasionally bilateral intergovernmental agreements contain some general terms or provisions for contracts on industrial co-operation.

132. The question of the law applicable to an international industrial co-operation contract is especially important. If the parties themselves have chosen the law to be applied—and under most legal systems party autonomy permits them to do so—there is no difficulty. If, however, the parties have failed to agree or have forgotten to choose the law to be applied, the question becomes complicated, as no country has special provisions for the solution of conflict of laws in regard to international industrial co-operation contracts.

133. Under these conditions one possibility would be to split up the complex contract into its constituent parts and determine the applicable law according to general principles. Another possibility would be to search for the dominant element in the whole complex transaction, to find out which law has to be applied to this element, and then to apply this law to the whole contract.

## 3. Work done by other international organizations and bodies

134. Various international organizations have already done considerable work on international industrial co-operation contracts as a whole, and even more on their components.<sup>79</sup> Complex industrial co-operation contracts have been dealt with by the ECE, UNCTAD and UNIDO.

135. ECE has analysed existing intergovernmental agreements as well as enterprise-to-enterprise contracts in industrial co-operation. It also keeps a register of intergovernmental agreements.<sup>80</sup> As a regional organization ECE is mainly, but not exclusively, concerned with industrial co-operation between East and West Europe. In connexion with tripartite industrial co-operation it has analysed contracts between European and developing countries' enterprises.<sup>81</sup> This work has been done by ECE and the Centre on Transnational Corporations in co-operation.

136. The most relevant work on international industrial co-operation contracts was the elaboration of a "Guide on Drawing Up International Contracts on Industrial Co-operation".<sup>82</sup> This guide does not serve as a model contract but contains a compilation of problems arising in international industrial co-operation with relevant recommendations for possible solutions. This guide is in line with previous guides adopted by the ECE.<sup>83</sup> The areas covered by it are:

The different elements of industrial co-operation contracts

<sup>78</sup> See, for example, *Guide for Drawing Up International Contracts between Parties Associated for the Purpose of Executing a Specific Project*, ECE/TRADE/131.

<sup>79</sup> See *supra*, paras. 14, 23, 34, 47, 64, 77, 86, 93 and 102.

<sup>80</sup> TRADE/R.334/Rev.2 and E/ECE/844/Rev.1.

<sup>81</sup> ECE/TRADE/132.

<sup>82</sup> ECE/TRADE/124.

<sup>83</sup> See *supra*, paras. 48, 68 and 103.

Industrial co-operation affecting enterprises of third countries

Industrial co-operation agreements connected with the construction of large industrial works

Co-operation in the development of natural resources

General questions included in all international contracts in the field of industry (among them applicable law and settlement of disputes)

137. UNCTAD has considered mainly intergovernmental agreements and their role in promoting industrialization and trade.<sup>84</sup>

138. UNIDO has analysed international industrial co-operation in the framework of intergovernmental agreements<sup>85</sup> but has also dealt with contracts at the level of enterprises. As a result of this work, several guidelines and manuals<sup>86</sup> on various aspects of industrial co-operation have been issued.

#### 4. *Possible work to be done by UNCITRAL*

139. In view of the importance of international industrial co-operation and the lack of legal rules the Commission might decide to begin work on industrial co-operation contracts. Elements to be considered could possibly include:

Interdependence of the constituent parts of industrial co-operation complexes

Interdependence of the mutual obligations of the parties

Effects of non-fulfilment of parts of the contract on the matching obligations of the other party

Plurality and change of parties to a contract

Effects of *force majeure*

Effects of changed circumstances

Revision of contracts

Termination and rescission

Limitation of damages

Applicable law

Settlement of disputes

140. The results of the work of the Commission could take the form of model clauses for inclusion in contracts. Also conceivable would be the elaboration of general conditions on international industrial co-operation to be recommended for use by parties to such contracts.

## B. Conclusions

### 1. *Conclusions in regard to specific contracts*

141. The survey in part A shows that international contracts relevant to the industrialization of developing countries have been dealt with by international organiza-

tions in different contexts. The Commission might wish therefore to begin work on such contracts which, in spite of their importance, have been more or less neglected in so far as their legal regulation is concerned.

142. It would appear that contract types, on which preliminary work would justifiably be undertaken are the following:

Contracts on research and development

Contracts on service and maintenance

Contracts on technical assistance

In regard to these contracts initial studies should be conducted and the conclusions of an analysis of international contract practice could flow into a guide for drawing up such contracts.

143. Contract types in respect of which preparatory work has already been undertaken by other organizations are:

Contracts on engineering

Contracts on supply and construction of large industrial works

Contracts on industrial co-operation

In respect of these contracts further studies of international contract practice is necessary with a view to considering, taking into account the results of the work of other organizations, whether general conditions or model contracts should be drawn up.

144. Contract types which are at present on the work programmes of other international organizations include:

Contracts on consulting

Contracts on transfer of technology

Contracts on leasing

In regard to these contracts it would appear advisable to await the outcome of the work currently in progress.

145. The Commission may wish to decide which of the contracts mentioned above<sup>87</sup> were particularly relevant and in respect of which work should commence.

### 2. *Conclusions in regard to methods and instruments*

146. It is suggested that work in regard to contracts chosen by the Commission for inclusion in its work programme should begin with studies of available literature and an analysis of international contract practice.

147. Studies conducted by the Secretariat—which could be assisted by a Study Group—could form the basis for consideration by the Working Group on the New International Economic Order or the Working Group on International Contract Practices.

148. Any decision on the direction the work should take and the ultimate end product should probably be taken in stages on the basis of progress made in the course of preliminary work.

<sup>84</sup> TD/B/C.2/179, also published as UNCTAD/ST/MD/12.

<sup>85</sup> See *supra*, para. 110.

<sup>86</sup> See *supra*, paras. 27, 35, 50, 66, 67, 86 and 102.

<sup>87</sup> *Supra*, paras. 142 and 143.



### C. Note by the Secretariat: legal implications of the new international economic order (A/CN.9/193)\*

Subsequent to the meeting of the Working Group on the New International Economic Order in New York, 14-25 January 1980, the Secretariat invited the United Nations Conference on Trade and Development to comment on the recommendations of the Working Group concerning subject-matters for inclusion into UNCTAD's work programme.<sup>1</sup>

Attached to this note is the reply of the UNCTAD Secretariat concerning the legal aspects of international commodity agreements for the information of the Commission.

#### ANNEX

##### Legal aspects of international commodity agreements

The extent of the work, or rather the competence, of UNCTAD in the area of international commodity agreements is limited to preparatory work for, and the convening of, negotiating or re-negotiating conferences on particular commodities for the purpose of concluding international commodity agreements. The provisions of the Vienna Convention on the Law of Treaties relating to the conclusion of treaties, including the establishment of the text of a treaty and expression of consent to be bound by a treaty, generally govern the treaty-making process involved in the conclusion and entry into force of international commodity agreements. The issues involved at this stage are essentially procedural. The rights and obligations of the States, and in some instances intergovernmental organizations, are those of participants in treaty negotiating conferences.

After the entry into force and during the life-span of international commodity agreements concluded under its auspices, UNCTAD, in consultation with the Office of Legal Affairs, helps the international commodity organizations established by such agreements, in interpreting the provisions of the agreements. The involvement of UNCTAD and the Office of Legal Affairs is, of course, only in an advisory capacity. The final authority for the interpretation of the provisions of the agreements resides in the international commodity organizations themselves.

Although certain administrative and final clauses of international commodity agreements are similar in wording if not in substance, these agreements differ in their objectives and structure. The difference can be attributed to the peculiar nature of the problems of the individual commodities which induces consumers and producers to take joint action to tackle those problems. To solve the problem of persistent and chronic instability in the price of a particular commodity may require a buffer stocking arrangement to keep the price within an agreed range. This type of arrangement might not be the answer for the problems of another commodity. Consumers and producers of the latter commodity may prefer the institution of a system based on export and import quotas; or simply a system of consultation between the two sides. The internal legal aspects of such international commodity agreements will no doubt differ. The rights and obligations of the parties to an international commodity agreement based on a sophisticated buffer stocking arrangement (with all its attendant legal issues) would be very different from those of a consultative agreement. A clear understanding of the reasons for preferring one approach to the other would require a study of the problems affecting the commodity concerned.

Notwithstanding the above difficulties, a few words can be said about the following:

- (i) Establishment of international organizations endowed with legal personality;

- (ii) Equality of States principle;
- (iii) Headquarters Agreements;
- (iv) Dispute settlement clauses;
- (v) *Force majeure* clauses;
- (vi) Fair labour standards clauses.

##### (i) Establishment of international organizations

International commodity agreements invariably provide in their articles of agreement for the establishment of an international body responsible for their administration. This practice was given added weight in article 64 of the 1948 Havana Charter for an International Trade Organization. The "commodity councils" envisaged under the Havana Charter were not (had the Charter entered into force) to be wholly independent international organizations. They were designed to be a part of the international trade order that the Charter was intended to establish and would have come under the umbrella of the International Trade Organization.

Since the collapse of the Havana Charter, numerous international commodity organizations (they were referred to as commodity councils in the Charter) came into being. The parties to the agreements establishing these organizations endowed them with legal personality, i.e. the capacity to contract, to acquire and dispose of movable and immovable property, and to institute legal proceedings. They also granted them such privileges and immunities as are provided for in the clauses of their agreements relating to such matters. The rapidly changing nature of privileges and immunities of not only States but international organizations in public international law is gradually creeping into privileges and immunities clauses in international commodity agreements as one constantly hears States in commodity negotiating conferences speaking in favour of limited privileges and immunities.

##### (ii) Equality of States principle

The framers of the Havana Charter enshrined in that instrument (article 63 (b)) the principle of equality of States participating as producers and consumers in an international commodity agreement. It provided that producers and consumers as two groups shall have equal votes. It did not, however, lay down any formula for the distribution of the votes in each group. The commodity organizations which later came into existence adopted this principle of equal weighted voting power for the producers on the one hand and the consumers on the other. There is no standard formula for the distribution of the votes or their redistribution. Participation in international commodity agreements is generally governed by the principle of universality.<sup>a</sup>

##### (iii) Headquarters Agreements

International commodity agreements generally entrust the bodies administering them to conclude headquarters agreements with the governments of the host countries relating to the privileges and immunities of the international commodity organizations and their staff. These agreements, which have the status of treaties in international law, indeed form a part of the body of laws relating to, or emanating from international commodity agreements.

##### (iv) Dispute settlement clauses

Under the provisions of the Havana Charter the ultimate arbiter of disputes within the "commodity councils" is the International Trade Organization. This is understandable given the integrated relationship the councils had with the Organization. The articles of agreement of existing international commodity organisations, however, provide for no such arbiter. They generally provide for referral of a dispute

<sup>a</sup> When the "Vienna formula" was in currency, international commodity agreements limited their participation to those entities included in that formula. They now generally contain an "all States" clause.

\* 3 June 1980.

<sup>1</sup> See A/CN.9/176, para. 31.



relating either to the interpretation or application of the agreement to the council. In some instances the council would set up an advisory panel which would report its findings to the council. The council would thereafter decide on the dispute. That decision is binding on the parties.

On matters of interpretation of the provisions of the commodity agreements, especially for those negotiated under the auspices of UNCTAD, the organizations would normally seek the assistance of the legal services of the United Nations before taking any final decision. It is worth recalling that there is not and never has been any clause in any commodity agreement obligating the commodity organization to seek and accept the legal opinions of the United Nations concerning the interpretation of its constituent instrument.

(v) *Force majeure clauses*

Some international commodity agreements provide relief from certain or all obligations for reasons of *force majeure*, emergency or exceptional circumstances. The terms, conditions and duration of relief are stated by the Council when it is granting relief to a member which has applied for it.

(vi) *Fair labour standards clauses*

The Havana Charter in its chapter on employment and economic activity provided an article on fair labour standards which, *inter alia*, recognized as a common interest of all countries to achieve and maintain fair labour standards. This principle subsequently found its way into international commodity agreements. As in the Havana Charter, the fair labour standards clause in international commodity agreements does not create any binding obligations on the part of the parties to the agreements. Its quality is no more than declaratory. This does not, however, alter the fact that, if such a principle is binding

under the ILO conventions to which the parties to the various international commodity agreements containing fair labour standards clauses are also parties, workers in industries related to the commodities in question will be beneficiaries of such clauses. The clauses contained in commodity agreements do not (unlike the Havana Charter) make it mandatory for their members which are also members of the ILO to co-operate with that organization in giving effect to a fair labour standards clause, albeit non-binding, in the commodity agreements. Nor do international commodity organizations provide for a system of consultations with the ILO, as the Havana Charter intended, in matters relating to labour standards referred to them. It is not even clear under the various fair labour standards clauses who, if anyone, can bring a question of non-observance of the principle before the commodity organization.

The above summarizes very briefly what in our opinion would constitute the legal aspects of international commodity agreements. It does not seem useful to us for UNCITRAL to include this aspect of international law in its work programme. It seems to us also that the "drawing up of model clauses or guidelines on some legal aspects of commodity agreements"<sup>b</sup> will serve very little purpose. We thought about such an approach in order to make the task of conferences negotiating or re-negotiating commodity agreements easier. Experience has shown that delegates are not too keen on following examples which are fairly common in other commodity agreements. Where a commodity organization is already in existence, they prefer to rely on the practice established in that organization. One hears the refrain "natural rubber is different from sugar". If there is a general reluctance to accept a uniform approach in this area, it is probably better not to have any uniform approach at all.

<sup>b</sup> See document A/CN.9/176, para. 12, reproduced as A, above.

#### **D. Note by the Secretariat: legal implications of the new international economic order (A/CN.9/194)\***

The Asian-African Legal Consultative Committee at its twenty-first session in Jakarta (Indonesia) adopted, on 1 May 1980, a resolution concerning the work of UNCITRAL in respect of the new international economic order. The text of this resolution is reproduced below.

*The Asian-African Legal Consultative Committee,*

*Having considered the work of the United Nations Commission on International Trade Law (UNCITRAL) at*

\* 17 July 1980.

its twelfth session and the report of the UNCITRAL Working Group on the New International Economic Order;

*Notes with satisfaction and appreciation the progress UNCITRAL has made in considering the legal implications of the new international economic order in response to the recommendation of the Committee; and*

*Recommends that UNCITRAL should adopt the recommendations of its Working Group and implement them in all practicable ways as soon as possible.*

## 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.9/192 and Add.1 and 2)\***

### CONTENTS

	<i>Paragraphs</i>
INTRODUCTION .....	1-4
I. INTERNATIONAL CONTRACTS .....	5-14
A. Law governing international contracts .....	5-7
B. General conditions for international contracts .....	8-11
C. International trade terms .....	12
D. Model contracts and clauses .....	13-14
II. INTERNATIONAL INDUSTRIAL CONTRACTS .....	15-16
III. NEW INTERNATIONAL ECONOMIC ORDER .....	17-19
A. Industrial collaboration .....	17
B. Code of conduct on transfer of technology .....	18
C. Research .....	19
IV. INTERNATIONAL PAYMENTS .....	20-26
A. Model forms on international payments .....	20-22
B. Convention on bearer securities .....	23
C. Uniform rules on security interests .....	24-25
D. Rules for foreign exchange contracts .....	26
V. INTERNATIONAL TRANSPORT .....	27-36
A. Transport by sea .....	27-29
B. Transport over land .....	30-32
C. Transport by air .....	33
D. Customs .....	34-35
E. Status of agreements and conventions of interest to countries of the ECE region .....	36
VI. INTERNATIONAL COMMERCIAL ARBITRATION .....	37-38
A. Activities concerning specialized types of arbitration .....	37
B. Information on arbitration law and practice .....	38
VII. PRIVATE INTERNATIONAL LAW .....	39-45
A. International contracts .....	39-40
B. Consumer sales .....	41
C. International payments .....	42-43
D. Legal aid .....	44
E. Licensing agreements and know-how .....	45
VIII. DATA PROCESSING .....	46-47
A. Automatic processing of personal data .....	46
B. Research .....	47
IX. INDUSTRIAL AND INTELLECTUAL PROPERTY LAW .....	48
X. OTHER TOPICS OF INTERNATIONAL TRADE LAW .....	49-55
A. Law of agency .....	49-50
B. Consumer protection .....	51
C. Law of evidence .....	52
D. Factoring .....	53
E. Financial leasing .....	54
F. Warehousing .....	55
XI. FACILITATION OF INTERNATIONAL TRADE .....	56-60
A. Co-operation for expansion of international trade .....	56-57
B. Facilitation of international trade procedures .....	58
C. Information on international trade law developments .....	59-60

\* 22 May and 6 and 11 June 1980.

## 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 sessions of the Commission on the current work of international organizations in matters included in the programme of work of the Commission".<sup>1</sup>

2. In accordance with the above decision, reports were submitted to the Commission at the fourth session in 1971 (A/CN.9/59), at the fifth session in 1972 (A/CN.9/71), at the sixth session in 1973 (A/CN.9/82),\* at the seventh session in 1974 (A/CN.9/94 and Add.1 and 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),† at the eleventh session in 1978 (A/CN.9/151)†† and at the twelfth session in 1979 (A/CN.9/175).†††

3. This report, prepared for the thirteenth session (1980), is based on information submitted by international and other 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.<sup>2</sup> The current activities of the following international organizations are described in this report:

(a) *United Nations bodies and specialized agencies:* United Nations Conference on Trade and Development (UNCTAD) (paras. 17–18); United Nations Economic Commission for Europe (ECE) (paras. 9, 15–16, 27, 30–31, 34–36, 58, 60); United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) (paras. 11, 13, 57); United Nations Industrial Development Organization (UNIDO) (para. 17); Inter-Governmental Maritime Consultative Organization (IMCO) (paras. 28–29); International Civil Aviation Organization (ICAO) (para. 33); and International Trade Centre (ITC) (para. 59);

(b) *Other international organizations:* Council for Mutual Economic Assistance (CMEA) (paras. 8, 10, 37, 48); Council of Europe (CE) (paras. 23–24, 46–47, 51, 52); Hague Conference on Private International Law (paras. 6, 39, 41–45); and International Institute for the Unification of Private Law (UNIDROIT) (paras. 5, 7, 32, 49–50, 53–55);

(c) *International non-governmental organizations:* International Chamber of Commerce (ICC)

\* Reproduced in Yearbook ... 1973, part two, V.

\*\* Reproduced in Yearbook ... 1974, part two, V.

\*\*\* Reproduced in Yearbook ... 1975, part two, VIII.

\*\*\*\* Reproduced in Yearbook ... 1976, part two, VI.

† Reproduced in Yearbook ... 1977, part two, VI, A and B.

†† Reproduced in Yearbook ... 1978, part two, V.

††† Reproduced in Yearbook ... 1979, part two, VI.

<sup>1</sup> 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).

<sup>2</sup> 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).

(paras. 20–23, 25–26, 37–38, 40); and International Maritime Committee (CMI) (para. 37);

(d) *Other organizations:* Centre for Research on the New International Economic Order (para. 19).

4. 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

5. UNIDROIT received in early 1977 a preliminary report on quality control in the international sale of goods prepared by Dr. Jelena Vilus of the Belgrade Institute of Comparative Law. The report was subsequently transmitted to the Governments of the member States of UNIDROIT with a request for observations on the desirability of preparing uniform rules on the subject. Replies were received from a number of States and an analysis of them was submitted to the Governing Council at its fifty-ninth session in May 1980.

6. The Hague Conference on Private International Law will include in the agenda of its fourteenth session the revision of the Hague Convention of 1955 on the law applicable to the international sale of goods, taking into account the work undertaken by UNCITRAL.

7. The first session of the UNIDROIT Study Group on the progressive codification of international trade law was held from 10 to 14 September 1979. The principal item on the agenda was the examination of the two drafts relating respectively to the formation and interpretation of contracts in general. The Group decided to postpone discussion on formation of contracts in general until the outcome of the UNCITRAL draft Convention on the international sale of goods was known. On the problem of the validity of contracts in general, the Group stated that specific rules on the validity of general conditions and standard forms of contract should be added to a future Code. On the proposed chapters on performance and non-performance of contracts, the Group requested UNIDROIT to set up special sub-committees with interested institutions, such as the Centre de droit des obligations de Louvain, the Max-Planck-Institut of Hamburg, the Institut für Rechtsvergleichung of Potsdam-Babelsberg, and the Institute for comparative civil law of the University of Warsaw.

## B. General conditions for international contracts

8. In April 1979 the CMEA Standing Commission on Foreign Trade adopted a decision supplementing and amending the General Conditions of Delivery of Goods between Organizations of CMEA Member Countries and entitling this document as "General Conditions of Delivery of Goods between Organizations of CMEA Member Countries (OUP SEV 1968/1975, 1979 Version)".

9. Within ECE, the Group of Experts on International Contract Practices in Industry considered the General Conditions of Sale of Potatoes. The final text of this document was agreed at the twenty-third session of the Group of Experts on International Trade Practices in

Industry relating to Agricultural Produce (29–31 January 1979) and adopted by the thirty-fifth session of the Working Party on Standardization of Perishable Produce (3–6 July 1979). It appears as document ECE/AGI/42.

10. During 1979 the Conference of Chartering and Shipowning Organizations of member countries of CMEA drafted and approved the following documents:

A provision containing the text of the "Basic Conditions" for chartering between chartering and shipowning organizations of CMEA member countries

A reservation to the "Baltim Constanta—78" charter, concerning liability for maritime pollution, to be used for supplementary agreement between parties when concluding carriage-by-sea transactions

A "Bunker Price Fluctuation Clause 1980"

11. The International Trade Division of ESCAP is carrying out a study for the development of standard contracts and general conditions to be used in the tropical timber trade in the region.

#### C. *International trade terms*

12. ICC completed the revision of INCOTERMS which came into force on 15 March 1980 (publication No. 350).

#### D. *Model contracts and clauses*

13. The Member Countries of the Pepper Community sought the assistance from ESCAP for the project on "Formulation of a common sales contract" for pepper and pepper products. The project is likely to be implemented in 1980.

14. ICC is engaged in the preparation of model clauses relating to *force majeure* and hardship. This work is motivated by the fact that market instability, primarily due to inflation and the increasing cost of raw materials, poses serious difficulties in the performance of long-term contracts. These difficulties relate, *inter alia*, to the adaptation of such contracts to changing economic circumstances and to the computation of damages for breach of contract.

### II. INTERNATIONAL INDUSTRIAL CONTRACTS

15. Within ECE, the Group of Experts on International Contract Practices in Industry, at its fifteenth session, held from 26 to 28 November 1979, agreed that the future document on engineering should comprise consulting engineering only and that the document should closely resemble the format of a guide on drawing up international contracts in this field. A draft guide was completed in March 1980. After revision by the Secretariat it will be sent to two rapporteurs for their consideration.

16. The ECE Committee on the Development of Trade and the Senior Advisers to the ECE Governments on Science and Technology have jointly prepared a "Manual on licensing procedures and related aspects of technology transfer", containing twenty country chapters. It will be published in late 1980 by Clark Boardman Publishing House, New York.

### III. NEW INTERNATIONAL ECONOMIC ORDER

#### A. *Industrial collaboration*

17. An *Ad Hoc* UNCTAD/UNIDO Group of Experts on Trade and Trade-related aspects of Industrial Collaboration Arrangements met from 22 to 26 October 1979. The terms of reference of the *Ad Hoc* Group include an examination of the trade-related aspects of industrial collaboration which would be of benefit to developing countries in relation to international co-operation in the industrial development of developing countries. They will also bear in mind the role of governments in supporting such enterprise-to-enterprise arrangements, including the possible role of intergovernmental and other framework agreements or arrangements for promoting industrial collaboration bilaterally, trilaterally or multilaterally. In their deliberations, the experts would take into account the sectoral consultations in UNIDO referred to in paragraph 10 in section II, D of UNCTAD Conference resolution 96 (IV).

The following documents are available:

"Industrial collaboration arrangements": report by the UNCTAD Secretariat (TD/B/C.2/179)

"Industrial co-operation and collaboration arrangements in the context of industrial restructuring": report by the UNCTAD Secretariat (TD/185/Supp.3)

"Intergovernmental agreements as an instrument of industrial co-operation": note by the UNIDO Secretariat (ID/B/C.3/68)

"Report of the *Ad Hoc* UNCTAD, UNIDO Group of Experts on Trade and Trade-related Aspects of Industrial Collaboration Arrangements" (TD/B/774)

#### B. *Code of conduct on transfer of technology*

18. UNCTAD drafted an International Code of Conduct on the Transfer of Technology for submission to a United Nations Conference on an International Code of Conduct on the Transfer of Technology. The Conference met for the first time in October/November 1978. A third session of the Conference was held from 21 April to 6 May 1980. The draft Code of Conduct before the third session of the Conference can be found in document TD/CODE TOT/20.

#### C. *Research*

19. The Centre for Research on the New International Economic Order has published a study on *Law and Policy in Petroleum Development—Changing Relations between Transnationals and Governments* (1979). Another project entitled *Legal Aspects of a New International Economic Order* will be published some time in 1980.

### IV. INTERNATIONAL PAYMENTS

#### A. *Model forms on international payments*

20. ICC is engaged in preparing a standard application form for use by applicants for documentary credits. It is anticipated that the form will be ready by mid-1981. Also, a group has been established to recommend modifications to Uniform Customs and Practice.

21. ICC has set up a working group to draw up standard forms for use by banks relating to rules applicable to international collection operations. These forms will be based on the ECE layout key. It is anticipated that the forms will be finalized by mid-1981.

22. With regard to contract guarantees ICC has set up a Working Party to devise model forms for the issuing of contract guarantees subject to the Uniform Rules for Contract Guarantees. It is anticipated that the forms will be ready by the end of 1981. ICC has also set up a Working Party to undertake research in regard to problems which may arise with regard to simple demand guarantees.

#### B. *Convention on bearer securities*

23. The Convention relating to stops on bearer securities in international circulation, done at The Hague on 28 May 1970, has been ratified by Belgium, Luxembourg, Austria and France. It entered into force on 11 February 1979. The Committee of Ministers of the Council of Europe designated the "Office National des valeurs mobilières" in Brussels to assume the functions of the Central Office as provided in the Convention. The Secretary-General of the Council of Europe published a first list of securities in international circulation in December 1978 and a revised list in March 1979 containing the names of securities which must appear on the list.

#### C. *Uniform rules on security interests*

24. Within the Council of Europe, the Committee of Experts on the Rights of Creditors is considering drawing up an instrument (Convention or Recommendation) on retention of ownership clauses. A Working Party met from 28 to 31 January 1980 and examined questions relating to reservation of title. The report of the Working Party was examined by the Committee at its meeting from 21 to 25 April 1980.

25. ICC is establishing standard provisions for inclusion in international contracts of sale providing that title of goods sold shall not pass until payment of the seller in full or other collateral security interest clauses protecting the seller are concluded.

#### D. *Rules for foreign exchange contracts*

26. ICC, in co-operation with the Group of Ten Central Banks, is engaged in the preparation of Rules for Foreign Exchange Contracts. Draft Rules have been drawn up by a working party and consultations on the basis of the draft are in progress. It is anticipated that the Rules will be finalized by mid-1981.

### V. INTERNATIONAL TRANSPORT

#### A. *Transport by sea*

27. Within ECE, the Working Party on Inland Water Transport considered questions related to the resumption of work on the draft Convention on the Contract for the Carriage of Goods by Inland Waterway (CMN) within UNIDROIT. The Working Party requested UNIDROIT to prepare a revised text of the draft CMN. The Central Commission for the Navigation of the Rhine and the

UNIDROIT Committee for Governmental Experts on CMN will be reconvened with a view to a fourth session being held in either 1980 or 1981.

28. The long-term work programme of IMCO includes the revision of the 1910 Convention on Assistance and Salvage. It is envisaged that particular attention will be given to the salvage contract between the ship and the salvors.

29. It is expected that a diplomatic conference will be convened by IMCO in 1982 to consider the adoption of a convention on liability and compensation in connexion with the carriage of noxious and hazardous substances by sea. The Legal Committee of the Organization is currently elaborating draft articles for such a convention.

#### B. *Transport over land*

30. 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 to the Agreement on the International Carriage of Perishable Foodstuffs and on the special equipment to be used for such carriage.

31. The Group of Experts on the Transport of Dangerous Goods, a subsidiary body of the Inland Transport Committee of ECE, is considering the amendment of the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR) and its technical annexes.

32. UNIDROIT has prepared a preliminary study on the feasibility of preparing an international Convention relating to liability and compensation for damage caused during the carriage over land of hazardous substances. This study was submitted to the UNIDROIT Governing Council at its fifty-ninth session in May 1980.

#### C. *Transport by air*

33. The general work programme established by the Legal Committee of ICAO in May 1979, and approved by the Council on 13 June 1979, is as follows:

Study of the legal status of the aircraft commander

Study of liability of air traffic control agencies

Study of aerial collisions

Consideration of the problem of liability for damage caused by noise and sonic boom

Study of the status of the instruments of the "Warsaw System"

Study of a possible consolidation of international rules contained in the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome, 1952), the Draft Convention on Aerial Collisions and the subject of liability of air traffic control agencies

Proposed simplification of convention-making procedures to speed up the entry into force of the instruments relating to the suppression of unlawful interference with international civil aviation

Study of lease, charter and interchange of aircraft in international operations (Resolution B of the Guadalajara Conference)—problems with respect to the Tokyo Convention

#### D. Customs

34. Within ECE, the Group of Experts on Customs Questions affecting Transport continued, in 1979, the study of various aspects of extending the territorial 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 between the different existing systems of customs transit. Study of these questions will continue in 1980.

35. The above Group of Experts and other subsidiary bodies of the Inland Transport Committee made a study of the question of harmonization of conditions for exercising customs and other controls undertaken at frontiers (phytosanitary, health, veterinary and quality control, application of standards, public safety controls) and the elaboration of a draft international convention on that subject. The draft convention is being circulated for comments to ECE Governments and international organizations concerned. A special session of the Group of Experts has been convened from 20 to 24 October 1980 with the participation of experts from other competent services, as well as the international organizations concerned.

#### E. Status of agreements and conventions of interest to countries of the ECE region

36. The situation at 31 December 1979 with regard to signatures, ratifications and accessions to certain transport agreements and conventions of interest to countries of the ECE region, concluded under United Nations auspices is contained in document TRANS/R.101.

### VI. INTERNATIONAL COMMERCIAL ARBITRATION

#### A. Activities concerning specialized types of arbitration

37. The following areas are being considered by ICC: A Working Party within ICC is preparing draft additional rules to ICC Arbitration Rules, to be applied in multi-party arbitration. The research project on multi-party business disputes was the theme submitted to the Institute of International Business Law and Practice recently created by the ICC (November 1979);

A Working Party within ICC on arbitration and competition law is engaged in studying the relationships between arbitration and national and the European Economic Community legislation concerning competition. It considered the principal features of national laws affecting arbitration and competition law in a number of leading countries, approved a series of guiding principles and is currently examining a detailed outline of the draft study. The study is scheduled to be completed in late 1981;

Negotiations continued with a view to facilitating acceptance by CMEA parties of the ICC clause and by non-CMEA parties of arbitration by centres in CMEA countries. These negotiations are conducted in the framework of the *ad hoc* Working Party on Arbitration of the Commission of the ICC and the Chambers of Commerce of Socialist Countries for the development of East-West trade and Economic Co-operation;

ICC has set up in close co-operation with CMI a joint international maritime organization entitled the International Maritime Arbitration Organization (IMAO) in order to consider the needs of maritime interests for a viable alternative to costly litigation.

#### B. Information on arbitration law and practice

38. ICC has prepared a guide to arbitration law in European countries for publication in 1980. This guide will consist of a series of standardized articles summarizing the principal features of relevant legislation in seventeen European countries.

### VII. PRIVATE INTERNATIONAL LAW

#### A. International contracts

39. A commission set up by The Hague Conference on Private International Law will recommend to the fourteenth session to include the topic of the law applicable to contractual obligations on the agenda of the Conference.

40. ICC has set up a Working Party which has established draft guidelines for the determination of conflict of law rules applicable to international commercial relationships. Work is expected to be completed at the end of 1981.

#### B. Consumer sales

41. Under the auspices of The Hague Conference on Private International Law, a special commission met from 25 to 29 June 1979, and a preliminary draft of a convention on the law applicable to certain consumer sales was prepared.

#### C. International payments

42. The Hague Conference of Private International Law will include in the agenda to its fourteenth session the revision of the Convention for the Settlement of Certain Conflicts of Laws in connexion with Bills of Exchange and Promissory Notes (Geneva, 7 June 1930) and the Convention for the Settlement of Certain Conflicts of Laws in connexion with Cheques (Geneva, 19 March 1931).

43. The Hague Conference on Private International Law will consider at its fourteenth session problems posed by bankruptcy.

#### D. Legal aid

44. The Hague Conference on Private International Law will consider the question of legal aid and the revision of Chapters III to VI of The Hague Convention on Civil Procedure.

#### E. Licensing agreements and know-how

45. The Hague Conference on Private International Law has decided to keep the topic of the law applicable to licence and know-how agreements on the list of future work and to deal with it in close co-operation with other international organizations.

## VIII. DATA PROCESSING

### A. Automatic processing of personal data

46. Within the Council of Europe, a Committee has completed a draft Convention for the protection of individuals with regard to automatic processing of personal data and a draft Recommendation on regulations for automated medical data banks. Both drafts will shortly be examined by the European Committee on Legal Cooperation (CDCJ). In addition in December 1979 a Working Party of the Committee started to prepare recommendations concerning the ethics of data processing.

### B. Research

47. Within the Council of Europe, a Committee of experts on legal data processing is concerned with keeping the state of research and development in the field of legal data processing in Europe under review and to propose such harmonization measures as may be desirable in the light of future developments. The Committee has prepared a draft recommendation on teaching, research and training in the field of computers and law. It is also considering query languages in computerised legal retrieval systems and guidelines on the protection of uses of legal data processing systems and of drawing up, if appropriate, a suitable legal instrument concerning civil liability of legal data processing centres. A register of legal data available in machine-readable form is to be published soon. The sixth symposium on legal data processing will be held in Thessaloniki in 1981 on the theme "Intelligence and linguistic problems in legal data processing systems".

## IX. INDUSTRIAL AND INTELLECTUAL PROPERTY LAW

48. During 1979 the Conference of Heads of Patent Offices of Member Countries of CMEA continued work on the preparation of draft intergovernmental agreements concerning a single instrument for the protection of CMEA Member States' inventions and the reciprocal legal protection of indications of provenance and designations of products.

## X. OTHER TOPICS OF INTERNATIONAL TRADE LAW

### A. Law of agency

49. Under the auspices of UNIDROIT, a Diplomatic Conference for the adoption of the draft Convention providing a Uniform Law on Agency of an International Character in the Sale and Purchase of Goods was held in Bucharest from 28 May to 13 June 1979. The Conference adopted a series of articles corresponding to those contained in the former Chapter I (Sphere of application and definitions) and Chapter II (Establishment and scope of agency), and proceeded to an exchange of views on certain articles of the former Chapter IV (Legal effects of an act carried out by the agent on behalf of the principal). The Governing Council of the Institute decided at its fifty-ninth session in May 1980 to suspend work on this subject until a decision is taken at the sixtieth session after consultations by the Secretariat with a committee.

50. A preliminary report on the desirability and feasibility of preparing uniform rules governing the validity of

powers of attorney to be exercised abroad was considered by the UNIDROIT Governing Council at its fifty-ninth session in May 1980.

### B. Consumer protection

51. Within the Council of Europe, a Committee of experts on the legal protection of consumers is examining measures permitting public and private agencies to ensure the legal protection of the collective interests of consumers. A questionnaire on measures permitting agencies or associations to ensure the legal protection of the collective interests of consumers was adopted and will be published by the Council during the first half of 1980. A Working Party of the Committee has prepared a draft Recommendation containing a number of principles concerning consumer agencies. This text will be examined by the Committee at its next meeting in July 1980.

### C. Law of evidence

52. Within CE, a Committee of experts on reproduction and recording of documents is studying the consequences on the law of evidence of new document reproduction procedures and other methods of recording on data carriers with a view to the preparation of one or several international instruments. The Committee has finalized a draft recommendation dealing with:

The harmonization of the laws of Member States concerning the requirements of written proof for certain transactions

The evidential value of document reproduction procedures by microfilming and techniques of registration of information on computers

The period of compulsory preservation of documents and the harmonization of these time-limits

### D. Factoring

53. The UNIDROIT Study Group for the preparation of uniform rules on the factoring contract met from 5 to 6 February 1979. The Secretariat has, on the basis of the conclusions reached by the Study Group, prepared a preliminary set of draft rules on the factoring contract for consideration by the Study Group at its second session.

### E. Financial leasing

54. The UNIDROIT Study Group for the preparation of uniform rules on "financial leasing" had its second session from 1 to 2 February 1979 to consider the tentative draft set of uniform rules prepared by the Secretariat with the assistance of the Chairman of the Group in the light of the discussions of the Group at its first session. A third and probably final session of the Study Group is contemplated some time in September/October 1980.

### F. Warehousing

55. A preliminary draft Convention on the Liability of International Terminal Operations was approved by the UNIDROIT Study Group on the warehousing contract at its second session from 23 to 26 January 1979. The Governing Council at its fifty-eighth session in September 1979



endorsed the recommendations of the Study Group and, pursuant to the instructions of the Council, the Secretariat has transmitted the preliminary draft Convention to Governments and interested organizations with a request for their observations.

## XI. FACILITATION OF INTERNATIONAL TRADE

### A. Co-operation for expansion of international trade

56. On 2 November 1979 the Conference of Representatives of CMEA Member Countries on Legal Questions approved a draft model agreement concerning scientific-technical co-operation.

57. To assist ESCAP Member Countries in updating existing maritime legislation and to further its uniformity in the region, the ESCAP Secretariat, with the assistance of the Netherlands Government and the CMI, has made the necessary arrangements for undertaking a survey of existing maritime legislation in the region during 1980.

### B. Facilitation of international trade procedures

58. The various working groups within ECE made progress on the following topics:

- (i) Data elements and documentary functions—the Working Party on Facilitation of International Trade Procedures is expected to authorize publication of a Trade Data Elements Directory in the autumn of 1980. The terms included in the Directory will cover data elements in trade documents belonging to the following areas: maritime and multimodal transport, customs procedures, air, road and rail transport, forwarding, payments and some commercial documents. The Directory will be computer assisted. It will appear in the joint series of information documents, issued by the Working Party and UNCTAD's Special Programme in Trade Facilitation (FALPRO);
- (ii) Coding of terms of payment—the preparatory work on this subject is still continuing;
- (iii) Recommendation on measures to facilitate maritime transport document procedures—the Recommendation deals with the problem created by the speedier movement of goods, resulting from developments in transport technology and the continued use of the traditional negotiable transport documents. This Recommendation (No. 12) was adopted by the Working Party on Facilitation of International Trade Procedures in March 1979. The text has been published as document TRADE/WP.4/INF.61: TD/B/FAL/INF.61;
- (iv) Recommendation on authentication of trade documents by means other than signature—this Recommendation (No. 14) concerns the requirement for signature which is tied to the use of paper documents. It was adopted by the Working Party on Facilitation of International Trade Procedures in March 1979. The text has been published as document TRADE/WP.4/INF.63: TD/B/FAL/INF.63;

(v) Recommendation on facilitation of identified legal problems in import clearance procedures—this Recommendation (No. 13) seeks to encourage customs authorities to grant special facilities for the expeditious clearance of goods. This Recommendation was adopted by the Working Party on Facilitation of International Trade Procedures in March 1979. The text has been published as document TRADE/WP.4/INF.62: TD/B/FAL/INF.62;

(vi) Recommendation on simpler shipping marks—this Recommendation (No. 15) is inspired by the urgent need for concerted action to harmonize shipping marks. It was adopted by the Working Party on Facilitation of International Trade Procedures in September 1979. The text has been published as document TRADE/WP.4/INF.65: TD/B/FAL/INF.65.

### C. Information on international trade law developments

59. The International Trade Centre (ITC) is concerned with international trade law to the extent of bringing established rules and practices to the attention of exporters and trade officials in developing countries. Their advisory services include replying to *ad hoc* requests for trade information.

60. A list of primary sources of information for a future system of notification of laws and regulations concerning foreign trade and changes therein (MUNOSYST) in 18 ECE countries has been published and submitted to the twenty-eighth session of the Committee on the Development of Trade (3–7 December 1979).

## United Nations Conference on Trade and Development (UNCTAD) and United Nations Industrial Development Organization (UNIDO) (Addendum 1)

### I. UNCTAD\*

#### INTERNATIONAL SHIPPING LEGISLATION

##### A. Charter-parties

1. The UNCTAD Working Group on International Shipping Legislation, at its fourth session held from 27 January to 7 February 1975, considered a report prepared by the UNCTAD Secretariat entitled "Charter-Parties" (ID/C/C.4/ISL/13) and requested the UNCTAD Secretariat to carry out additional studies involving a comparative analysis of the principal clauses in voyage and time charter-parties. Pursuant to this request, the UNCTAD Secretariat embarked upon studies on the main clauses in voyage and time charter-parties that may be amenable to standardization, harmonization and improvement, and areas in chartering activities that may be suitable for international legislative action. Work is still in progress. The Working Group is scheduled to meet in 1981 to consider the new studies which are expected to be completed by then.

##### B. Marine insurance

2. The UNCTAD Secretariat issued a report entitled "Legal and documentary aspects of the marine insurance contract" (TD/B/C.4/ISL/27 and Add. 1) which was submitted to the sixth session of the

\* See also A/CN.9/192, III. New International Economic Order, A. Industrial collaboration; B. Code of conduct on transfer of technology.

UNCTAD Working Group on International Shipping Legislation, which met from 18 to 26 June 1979. The report analysed various legal and documentary aspects of national marine hull and cargo insurance contract forms, identifying problems caused by ambiguities, inequities or lacunae in commonly used national policy forms, and recommended the establishment of an international legal base for marine insurance contracts to be developed by an internationally representative group of marine insurance experts (including representatives of insurers and assured). After consideration of the report, the Working Group recommended the establishment of a subgroup of experts at the next session of the Working Group (tentatively scheduled to be held in December 1980) to examine the existing marine insurance policy conditions and practices used in national markets covering international business; to investigate the different legal systems governing marine insurance contracts; and in the light of these studies draw up a set of standard clauses as a non-mandatory international model.

#### TRANSPORT BY SEA

##### A. Vessel and flag of registry

3. The UNCTAD Committee on Shipping, at its eighth session held in April 1977, considered a report prepared by the UNCTAD Secretariat on the economic and legal consequences for international shipping as a result of the existence or lack of a genuine link between vessel and flag of registry as explicitly defined in international conventions in force. This report was further considered by an *Ad Hoc* Intergovernmental Working Group in February 1978. This Group recommended a continued review of this subject within UNCTAD, including the examination and, if appropriate, the formulation of the economic elements of a genuine link. The Group concluded, *inter alia*, that the expansion of the open-registry (i.e. "flag of convenience") fleets has adversely affected the development and competitiveness of the merchant fleets of developing countries. The fifth session of UNCTAD (Manila, 6 May-1 June 1979) requested the Secretary-General to reconvene the *Ad Hoc* Intergovernmental Working Group for the purpose of considering studies on phasing out of open-registry operations. These studies are contained in the following Secretariat documents: "The repercussions of phasing out open registries" (TD/B/C.4/AC.1/5) and "Legal mechanisms for regulating the operations of open-registry fleets during the phasing-out periods" (TD/C/C.4/AC.1/6). The *Ad Hoc* Group reconvened in January 1980 but was unable to reach a consensus on the issue. It adopted a decision to annex to its report (TD/B/784) a draft resolution submitted on behalf of members of the Group of 77 and the draft conclusions and recommendations submitted by a majority of States Members of Group B. The UNCTAD Trade and Development Board, in March 1980, transmitted the report of the *Ad Hoc* Intergovernmental Working Group for further consideration to the UNCTAD Committee on Shipping, scheduled to meet from 1 to 12 September 1980.

##### B. Implementation of the Convention on a Code of Conduct for Liner Conferences

4. On 6 April 1974, the United Nations Conferences of Plenipotentiaries on a Code of Conduct for Liner Conferences adopted the Convention on a Code of Conduct for Liner Conferences (TD/CODE/13/Add.1). By March 1980 46 countries had become Contracting Parties to the Convention.

5. The UNCTAD Secretariat, on the basis of information provided by the Office of Legal Affairs of the United Nations, provides on a regular basis to Member States of UNCTAD information on signatures, ratifications, acceptances, approvals of or accessions to the Convention. The UNCTAD Secretariat has also offered its services, if requested, to assist and guide States in ratifying or acceding to the Convention.

6. The status of the Convention was considered at the fifth session of UNCTAD (Manila, 6 May-1 June 1979). The representatives of a number of developed countries announced the intention of their governments of becoming Contracting Parties to the Convention. It

may therefore be expected that the Convention will enter into force this year or early in 1981. The Conference adopted a resolution which calls upon Contracting Parties to the Convention to take all necessary measures towards the early implementation of the Convention; invites States which are not yet Contracting Parties to the Convention to consider becoming Contracting Parties, and in doing so to give full consideration to the interests of the developing countries in the Convention; and requests the Secretary-General of UNCTAD to give guidance and assistance, on request, to the Governments of developing countries in putting the Code into effect.

##### C. Model rules for regional associations and joint ventures in the field of maritime transport

7. The UNCTAD Secretariat continues to study the feasibility of drawing up model rules on regional associations (ports, shippers, shipowners) and joint ventures in the field of maritime transport. The model rules, which later may possibly be published as a handbook, is intended to assist co-operation among developing countries in the field of shipping and ports.

##### D. Treatment of foreign merchant vessels in ports

8. The UNCTAD Committee on Shipping, at its seventh session held in November 1975, considered a report prepared by the UNCTAD Secretariat entitled "Treatment of foreign merchant vessels in ports" (TD/B/C.4/136). The report reviews the international rules and regulations having a bearing on the status of foreign merchant vessels in ports and examines the Convention and Statute on the International Regime of Maritime Ports of 1923. The Committee on Shipping will decide at a later date whether further work on this subject is necessary.

#### MULTIMODAL TRANSPORT

##### A. Proposed Convention on International Multimodal Transport

9. An Intergovernmental Preparatory Group on a Convention on International Multimodal Transport was established by the UNCTAD Trade and Development Board's decision 96 (XII), in pursuance of the United Nations Economic and Social Council resolution 1734 (LIV), to examine the economic, commercial, technological and social implications of multimodal transport and to prepare a draft of a convention on international multimodal transport, bearing in mind particularly the needs and requirements of developing countries.

10. The Intergovernmental Preparatory Group held six sessions between November 1973 and March 1979. At its sixth and final session the Group approved and adopted the text of a draft convention on international multimodal transport (TD/MT/CONF/1) for submission to a conference of plenipotentiaries.

11. The General Assembly, at its thirty-third session, in resolution 33/160 of 20 December 1978 decided to convene a conference of plenipotentiaries on a convention on international multimodal transport and requested the UNCTAD Trade and Development Board to determine the date of that conference.

12. The United Nations Conference on a Convention on International Multimodal Transport was convened in Geneva from 12 to 30 November 1979 to consider and adopt a convention on international multimodal transport. As it was not found possible to complete its work in the allotted time, the Conference decided that a resumed session should be held in 1980. This resumed session was held from 8 to 23 May 1980. The text of the draft convention as at the adjournment of the Conference on 30 November 1979 is contained in TD/MT/CONF/12.

##### B. International agreement on container standards

13. Pursuant to decision 6 (LVI) of the United Nations Economic and Social Council and decision 118 (XIV) of the UNCTAD Trade and Development Board the *Ad Hoc* Intergovernmental Group on Container Standards was established within UNCTAD with terms of reference which included the examination of the practicability and

desirability of drawing up an international agreement on container standards. The *Ad Hoc* Intergovernmental Group considered this question at its first and second sessions, which were held from 1 to 12 November 1976 and from 20 November to 1 December 1978 respectively.

14. Having considered the reports (TD/B/AC.20/6 and TD/B/AC.20/10) of the *Ad Hoc* Intergovernmental Group and the proposals contained therein, the UNCTAD Trade and Development Board decided in March 1980 to remit to the UNCTAD Committee on Shipping the question of container standards for regular review as well as the decision of drawing up an international agreement on container standards at an appropriate future date.

#### C. Freight forwarding

15. The UNCTAD Secretariat is circulating a report examining freight forwarding operations and services, including applicable legal régimes, in particular as they relate to the strengthening of freight forwarding in developing countries (UNCTAD/SHIP/193).

#### SEMINARS ON MARITIME LEGISLATION

16. The Maritime Legislation Section organized a seminar in Alexandria (Egypt) from 17 March to 5 April 1979 on Ocean Transportation Documentation. The Seminar was funded by the Swedish International Development Authority (SIDA) for senior level maritime officials and executives from English-speaking developing countries in Africa and Asia. Secretariat staff lectured at several seminars during the year on maritime legislation and related subjects.

#### RESTRICTIVE BUSINESS PRACTICES

##### A. Formulation of a Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices

17. Since 1976, UNCTAD has been engaged in the formulation of 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 the economic development of these countries. The Third *Ad Hoc* Group of Experts on Restrictive Business Practices, established by UNCTAD at its fourth session, held six sessions and prepared a draft of such a Set of Principles and Rules, which then formed the basis for the negotiations by the United Nations Conference on Restrictive Business Practices, convened by the General Assembly pursuant to resolution 33/153. This Conference held its first session from 19 November to 8 December 1979 but was unable to complete its work at that session on the Set of Principles and Rules. A second session of the Conference was held from 8 to 18 April 1980.

##### B. Model law on restrictive business practices

18. The third *Ad Hoc* Group of experts on Restrictive Business Practices is engaged in the elaboration of a model law or laws on restrictive business practices. At the fifth session of UNCTAD it was decided that continued action should be taken on the elaboration of the model law or laws. Relevant in this regard was the request by UNCTAD to the United Nations Conference on Restrictive Business Practices that it make recommendations through the General Assembly to the UNCTAD Trade and Development Board in respect of institutional aspects in regard to future work on restrictive business practices within the framework of UNCTAD. A first draft of the model law was prepared by the UNCTAD Secretariat in 1978 (TD/B/C.2/AC.6/16).

#### MULTILATERAL COMMODITY AGREEMENTS

19. The negotiation and re-negotiation of multilateral commodity agreements is one of UNCTAD's central functions. Its authority in this field stems from General Assembly resolution 1995 (XIX) and from numerous resolutions of the Conference. In particular, Conference resolutions 93 (IV) and 124 (V), on an Integrated Programme for Commodities, call for efforts to negotiate or re-negotiate agree-

ments on up to 18 commodities, as well as for negotiations on a Common Fund to finance buffer stocks and other measures under the Integrated Programme. In 1979, conferences were held under UNCTAD auspices to negotiate agreements on the Common Fund and on cocoa, olive oil, natural rubber and grains. These negotiations resulted in the conclusion of new legal instruments in respect of olive oil and natural rubber. The negotiations on the Common Fund, cocoa and grains were not concluded. A further session of the United Nations Negotiating Conference on a Common Fund under the Integrated Programme for Commodities was held in May and a conference to negotiate a new International Tin Agreement was held in April/May 1980. Other commodity conferences may also be convened if preparatory work reaches a sufficiently advanced stage.

## II. UNIDO

### A. System of Consultations in industrial sector

20. At the Second General Conference of UNIDO (Lima, March 1975) it was recommended that a System of Consultations be set up to promote harmonious industrial development at the global, regional and sectoral levels. The mechanism of consultations is designed to allow all parties concerned to discuss and agree to facilitate the redeployment of certain productive capacities existing in developed countries and to create new industrial facilities in developing countries. UNIDO is to serve as a forum for negotiation of agreements in the field of industry between developed and developing countries and among developing countries themselves at the request of the countries concerned.

21. At the Third Conference of UNIDO (New Delhi, January/February 1980) the System of Consultations was put on a permanent basis as a continuing and important activity of UNIDO. The scope of the System was widened to cover all industrial sectors including global consultations on industrial financing, industrial technology, manpower development and other major topics. The Conference further decided that UNIDO, through the System must serve as a forum for the negotiation of agreements in the field of industry between developed and developing countries, and among developing countries themselves.

### B. Activities pertaining to industrial projects

22. Among the more important activities currently undertaken by UNIDO are:

Preparation of model forms for the following types of contract for the construction of a fertilizer plant: (a) turn-key lump sum; (b) semi-turn-key; (c) cost reimbursable; and (d) design engineering

Preparation of different types of agreements covering long-term arrangements with suppliers of technology that would link the supply of imports of agricultural machinery to the progressive development of its local manufacturer

Examination of the nature and content of long-term contracts for the purchase of iron ore and coking coal

Examination of the form of co-operation agreement in the vegetable oils and fats industry in developing countries

Examination of (a) the licensing of know-how for the manufacture of the active ingredients of 25 selected drugs as well as for their formulation into tablets etc.; and (b) ways to obtain pharmaceutical intermediates and bulk drugs at reasonable prices

Examination of existing contractual agreements in the capital goods industry with a view to identifying those clauses essential to improving such contractual agreements from the viewpoint of the needs of developing countries and relevant to forms of co-operation appropriate to different stages of development of the engineering industry

Examination of trade and trade-related aspects of industrial collaboration arrangements (see A/CN.9/192, III. New International Economic Order, A. *Industrial collaboration*), industrial financing

and training of industrial manpower. Two of the issues on industrial financing are (a) barter-related or buy-back investment arrangements and (b) analyses and possible solutions to problems caused to industrial projects and programmes by currency fluctuations. Preparations are under way for a consultation meeting on industrial manpower training in 1981 and another one on industrial financing in 1982.

### Commission of the European Communities (CEC) (Addendum 2)

#### PRIVATE INTERNATIONAL LAW<sup>a</sup>

##### A. *International contracts*

1. The draft convention establishing uniform rules of conflict of laws in relation to contractual obligations was submitted by CEC to the Council of the European Communities (EC) on 17 March 1979. The Council then requested the governments of the Member States of EC to make their observations on the text. The text was finalised in April 1980 and is expected to be signed by the Member States of EC before the end of 1980.

##### B. *International payments*

2. A draft proposal for a directive on guarantees and indemnities aimed at harmonisation of the laws of the Member States of EC was presented to the governments of the Member States in 1980 for comment.

3. The Member States of EC are working on the harmonization of laws relating to:

The conditions applicable to the valid creation of a reservation of title in the sale of goods

The consequences of reservation of title in intra-community trade

The consequences of reservation of title in the bankruptcy/insolvency of the buyer before the purchase price has been paid in full

The group of governmental experts of the Member States met in October 1979 to continue their discussions.

#### PRODUCT LIABILITY

4. CEC submitted to the Council of EC a revised proposal for the harmonization of rules of producers' liability to personal injuries and damage to privately used property.

<sup>a</sup> See A/CN.9/192, VII. Private International Law.

#### OTHER TOPICS OF INTERNATIONAL TRADE LAW<sup>b</sup>

##### A. *Commercial agents*

5. CEC submitted to the Council of EC in January 1979 an amended proposal on the harmonization of the laws of the Member States of EC relating to the contract of commercial agency.

##### B. *Company law*

6. CEC submitted a revised proposal to the Council of EC on the creation of a new body of company law for cross-frontier mergers of European companies. It also includes rules on taxation and on the representation of employees in the European company.

7. CEC submitted to the Council of EC an amended proposal on a law relating to European Cooperation Grouping which is intended to enable co-operation to take place between firms established under the law of the various Member States of EC.

8. The competent Commission department of CEC completed the text of a proposal for a directive to co-ordinate national laws relating to links between enterprises and in particular to groups. The proposal was submitted to CEC for its approval in 1979.

9. CEC submitted to the Council of EC a second amended proposal on the harmonization of municipal rules on mergers of public limited liability companies incorporated in a single Member State of EC and certain analogous operations. The proposal was adopted by the Council on 9 October 1978. The Member States are given three years in which to enact implementing legislation.

10. CEC published a consultative document entitled "Employee participation and company structure in the European Community". The Economic and Social Committee of the EC gave its opinion on the document in February 1978. The document is now before the Legal Affairs Committee of the European Parliament.

11. CEC presented to the Council of EC an amended proposal on the harmonization of municipal rules on group accounts.

12. The amended proposal of CEC on the harmonization of municipal rules on annual accounts of limited liability companies was adopted by the Council of EC on 25 July 1978. The Member States of EC are given two years in which to enact implementing legislation.

13. CEC presented its proposal on the harmonization of municipal rules on the authorization of persons responsible for carrying out statutory audits of the annual accounts of limited liability companies to the Council of EC in April 1978. The Economic and Social Committee of EC and the European Parliament gave their opinions in April and May 1979 respectively. The competent Commission prepared an amended proposal for a directive which has been submitted to the Council of EC in December 1979.

<sup>b</sup> See A/CN.9/192, X. Other Topics of International Trade Law.

**I. TEXTS ADOPTED BY THE UNITED NATIONS CONFERENCE ON CONTRACTS  
FOR THE INTERNATIONAL SALE OF GOODS (Vienna, 10 March-11 April 1980)\***

**A. Final Act (A/CONF.97/18)**

1. The General Assembly of the United Nations, having considered chapter II of the report of the United Nations Commission on International Trade Law on the work of its eleventh session in 1978,\*\* which contained a draft Convention on Contracts for the International Sale of Goods, decided, by resolution 33/93\*\*\* of 16 December 1978, that an international conference of plenipotentiaries should be convened in 1980 at the location of the International Trade Law Branch of the Office of Legal Affairs of the United Nations, or at any other suitable place for which the Secretary-General might receive an invitation, to consider the draft Convention on Contracts for the International Sale of Goods prepared by the United Nations Commission on International Trade Law and to embody the results of its work in an international convention and such other instruments as the conference might deem appropriate. The General Assembly also decided that the conference should consider the desirability of preparing a Protocol to the Convention on the Limitation Period in the International Sale of Goods, adopted at New York on 14 June 1974, which would harmonize the provisions of that Convention with those of the Convention on Contracts for the International Sale of Goods as it might be adopted by the conference.

2. The United Nations Conference on Contracts for the International Sale of Goods was held at Vienna, Austria, from 10 March to 11 April 1980.

3. Representatives of sixty-two States participated in the Conference, namely, representatives of: Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Canada, Chile, China, Colombia, Costa Rica, Cyprus, Czechoslovakia, Denmark, Ecuador, Egypt, Finland, France, German Democratic Republic, Germany, Federal Republic of, Ghana, Greece, Hungary, India, Iran, Iraq, Ireland, Israel, Italy, Japan, Kenya, Libyan Arab Jamahiriya, Luxembourg, Mexico, Netherlands, Nigeria, Norway, Pakistan, Panama, Peru, Philippines, Poland, Portugal, Republic of Korea, Romania, Singapore, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Yugoslavia and Zaire.

4. One State, Venezuela, sent an observer to the Conference.

5. The General Assembly requested the Secretary-General to invite representatives of organizations that have received a standing invitation from the General Assembly to participate in the sessions and the work of all international conferences convened under its auspices, in the capacity of observers, to participate in the Conference in that capacity in accordance with General Assembly resolutions 3237 (XXIX) of 22 November 1974 and 31/152 of 20 December 1976; to invite representatives of the national liberation movements recognized in its region by the Organization of African Unity to participate in the Conference in the capacity of observers in accordance with General Assembly resolution 3280 (XXIX) of 10 December 1974; to invite the United Nations Council for Namibia to participate in the Conference in accordance with paragraph 3 of General Assembly resolution 32/9 E of 4 November 1977, and to invite the specialized agencies and the International Atomic Energy Agency, as well as interested organs of the United Nations and interested international organizations, to be represented at the Conference by observers. The following intergovernmental and non-governmental organizations accepted this invitation and were represented by observers at the Conference:

*Specialized agencies*

World Bank

*Other intergovernmental organizations*

Bank for International Settlements

Central Office for International Railway Transport

Council of Europe

European Economic Community

Hague Conference on Private International Law

International Institute for the Unification of Private Law

*Non-governmental organizations*

International Chamber of Commerce

6. The Conference elected Mr. Gyula Eörsi (Hungary) as President.

7. The Conference elected as Vice-Presidents the representatives of the following States: Argentina, Belgium, Brazil, Bulgaria, Canada, China, Colombia, Egypt, German Democratic Republic, Germany, Federal Republic of, Greece, Kenya, Libyan Arab Jamahiriya, Pakistan, Peru, Philippines, Republic of Korea, Romania, Spain, Sweden, Union of Soviet Socialist Republics and Zaire.

8. The following Committees were set up by the Conference:

*General Committee*

Chairman . . . . . The President of the Conference

Members . . . . . The President and Vice-Presidents of the Conference, and the Chairmen of the First and Second Committees

\* The Official Records of the United Nations Conference on Contracts for the International Sale of Goods will appear as document A/CONF.97/19.

\*\* Yearbook . . . 1978, part one, II, A.

\*\*\* Yearbook . . . 1979, part one, I, C.

*First Committee*

Chairman . . . . . Mr. Roland Loewe (Austria)  
 Vice-Chairman . . . . Mr. Peter K. Mathanjuki (Kenya)  
 Rapporteur . . . . . Mr. Shinichiro Michida (Japan)

*Second Committee*

Chairman . . . . . Mr. Roberto Luis Mantilla-Molina (Mexico)  
 Vice-Chairman . . . . Mr. Mikola P. Makarevitch (Ukrainian Soviet Socialist Republic)  
 Rapporteur . . . . . Mr. Venkataramiah Kuchibhotla (India)

*Drafting Committee*

Chairman . . . . . Mr. Warren Khoo Leang Huat (Singapore)  
 Vice-Chairman . . . . Mr. Leif Sevon (Finland)  
 Rapporteur . . . . . Mr. Ludvik Kopač (Czechoslovakia)  
 Members . . . . . Brazil, Chile, China, Czechoslovakia, Ecuador, Egypt, Finland, France, Libyan Arab Jamahiriya, Republic of Korea, Singapore, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America and Zaire

*Credentials Committee*

Chairman . . . . . Mr. Peter K. Mathanjuki (Kenya)  
 Members . . . . . Belgium, China, Ecuador, Libyan Arab Jamahiriya, Kenya, Mexico, Pakistan, Union of Soviet Socialist Republics and United States of America

9. The Secretary-General of the United Nations was represented by Mr Erik Suy, The Legal Counsel. Mr. Willem Vis, Chief of the International Trade Law Branch, Office of Legal Affairs of the United Nations, was Executive Secretary.

10. The General Assembly, by resolution 33/93 of 16 December 1978 convening the Conference, referred to the Conference, as the basis for its considerations, the draft Convention on Contracts for the International Sale of Goods approved by the United Nations Commission on International Trade Law together with a commentary (A/CONF.97/5), the text of draft provisions concerning implementation, declarations, reservations and other final clauses prepared by the Secretary-General (A/CONF.97/6), a report on the relationship of the draft Convention on Contracts for the International Sale of Goods to the Convention on the Limitation Period in the International Sale of Goods prepared by the Secretary-General (A/CONF.97/7), the comments and proposals by Governments and international organizations on the draft Convention on Contracts for the International Sale of Goods (A/CONF.97/8 and Add.1-7) and an analysis of these comments and proposals prepared by the Secretary-General (A/CONF.97/9).

11. The Conference assigned to the First Committee articles 1 to 82 of the draft Convention on Contracts for the International Sale of Goods and the article "Declarations

relating to contracts in writing" of the draft provisions concerning implementation, declarations, reservations and other final clauses of the draft Convention prepared by the Secretary-General. The Conference assigned to the Second Committee the other draft provisions concerning implementation, declarations, reservations and other final clauses of the draft Convention prepared by the Secretary-General and entrusted the Second Committee with the consideration of the draft Protocol to the Convention on the Limitation Period in the International Sale of Goods prepared by the Secretary-General.

12. On the basis of the deliberations recorded in the summary records of the Conference (A/CONF.97/SR.1 to 11), the summary records of the First Committee (A/CONF.97/C.1/SR.1 to 38) and its report (A/CONF.97/11 and Add.1 and 2), and the summary records of the Second Committee (A/CONF.97/C.2/SR.1-9) and its report (A/CONF.97/12), the Conference drew up the UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS and the PROTOCOL AMENDING THE CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS.

13. The United Nations Convention on Contracts for the International Sale of Goods, the text of which is annexed to this Final Act (Annex I), was adopted by the Conference on 10 April 1980 and was opened for signature at the concluding meeting of the Conference on 11 April 1980. It will remain open for signature at United Nations Headquarters in New York until 30 September 1981. It was also opened for accession on 11 April 1980.

14. The Convention is deposited with the Secretary-General of the United Nations.

15. The Protocol amending the Convention on the Limitation Period in the International Sale of Goods, the text of which is annexed to this Final Act (Annex II), was adopted by the Conference on 10 April 1980 and was opened for accession at the concluding meeting of the Conference on 11 April 1980, in accordance with its provisions.

16. The Protocol is deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the representatives have signed this Final Act.

DONE at Vienna, Austria, this eleventh day of April, one thousand nine hundred and eighty, in a single copy in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

*President*

*Executive Secretary*

*Signature of representatives*

**B. Convention on Contracts for the International Sale of Goods (A/CONF.97/18, annex I)**

THE STATES PARTIES TO THIS CONVENTION,

*Bearing in mind* the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order,

*Considering* that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

*Being of the opinion* that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,

*Have agreed* as follows:

**Part I. Sphere of application and general provisions****CHAPTER I. SPHERE OF APPLICATION***Article 1*

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

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

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

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

*Article 2*

This Convention does not apply to sales:

- (a) Of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such 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, hovercraft or aircraft;
- (f) Of electricity.

*Article 3*

(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substan-

tial part of the materials necessary for such manufacture or production.

(2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

*Article 4*

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

- (a) The validity of the contract or of any of its provisions or of any usage;
- (b) The effect which the contract may have on the property in the goods sold.

*Article 5*

This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.

*Article 6*

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

**CHAPTER II. GENERAL PROVISIONS***Article 7*

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

*Article 8*

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.



*Article 9*

(1) The parties are bound by any usages to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

*Article 10*

For the purposes of this Convention:

(a) If a party has more than one place of business, the place of business is 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 any time before or at the conclusion of the contract;

(b) If a party does not have a place of business, reference is to be made to his habitual residence.

*Article 11*

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

*Article 12*

Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

*Article 13*

For the purposes of this Convention "writing" includes telegram and telex.

**Part II. Formation of the contract***Article 14*

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

*Article 15*

(1) An offer becomes effective when it reaches the offeree.

(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

*Article 16*

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:

(a) If it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

(b) If it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

*Article 17*

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

*Article 18*

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

*Article 19*

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

*Article 20*

(1) A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

(2) Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.

*Article 21*

(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.

(2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.

*Article 22*

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

*Article 23*

A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.

*Article 24*

For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

**Part III. Sale of goods****CHAPTER I. GENERAL PROVISIONS***Article 25*

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee, and a reasonable person of the same kind in the same circumstances would not have foreseen, such a result.

*Article 26*

A declaration of avoidance of the contract is effective only if made by notice to the other party.

*Article 27*

Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

*Article 28*

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

*Article 29*

(1) A contract may be modified or terminated by the mere agreement of the parties.

(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

**CHAPTER II. OBLIGATIONS OF THE SELLER***Article 30*

The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

**Section I. Delivery of the goods and handing over of documents***Article 31*

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

(a) If the contract of sale involves carriage of the goods—in handing the goods over to the first carrier for transmission to the buyer;

(b) If, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place—in placing the goods at the buyer's disposal at that place;

(c) In other cases—in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

*Article 32*

(1) If the seller, in accordance with the contract or this Convention, hands the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.

(2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.

(3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must, at the buyer's request, provide him with all available information necessary to enable him to effect such insurance.

*Article 33*

The seller must deliver the goods:

(a) If a date is fixed by or determinable from the contract, on that date;

(b) If a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or

(c) In any other case, within a reasonable time after the conclusion of the contract.

*Article 34*

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

## Section II. Conformity of the goods and third party claims

*Article 35*

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) Are fit for the purposes for which goods of the same description would ordinarily be used;

(b) Are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) Possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) Are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

*Article 36*

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.

*Article 37*

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

*Article 38*

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

(3) If the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination.

*Article 39*

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years

from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

#### Article 40

The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

#### Article 41

The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42.

#### Article 42

(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:

(a) Under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or

(b) In any other case, under the law of the State where the buyer has his place of business.

(2) The obligation of the seller under the preceding paragraph does not extend to cases where:

(a) At the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or

(b) The right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

#### Article 43

(1) The buyer loses the right to rely on the provisions of article 41 or article 42 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.

(2) The seller is not entitled to rely on the provisions of the preceding paragraph if he knew of the right or claim of the third party and the nature of it.

#### Article 44

Notwithstanding the provisions of paragraph (1) of article 39 and paragraph (1) of article 43, the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.

### Section III. Remedies for breach of contract by the seller

#### Article 45

(1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:

(a) Exercise the rights provided in articles 46 to 52;

(b) Claim damages as provided in articles 74 to 77.

(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

#### Article 46

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

#### Article 47

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.

#### Article 48

(1) Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.

(4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.

#### *Article 49*

(1) The buyer may declare the contract avoided:

(a) If the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) In case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.

(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:

(a) In respect of late delivery, within a reasonable time after he has become aware that delivery has been made;

(b) In respect of any breach other than late delivery, within a reasonable time:

(i) After he knew or ought to have known of the breach;

(ii) After the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or

(iii) After the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.

#### *Article 50*

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

#### *Article 51*

(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

#### *Article 52*

(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

### CHAPTER III. OBLIGATIONS OF THE BUYER

#### *Article 53*

The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

#### Section I. Payment of the price

#### *Article 54*

The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made.

#### *Article 55*

Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

#### *Article 56*

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

#### *Article 57*

(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:

(a) At the seller's place of business; or

(b) If the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

(2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract.

#### *Article 58*

(1) If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods,

or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

#### *Article 59*

The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller.

### Section II. Taking delivery

#### *Article 60*

The buyer's obligation to take delivery consists:

(a) In doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and

(b) In taking over the goods.

### Section III. Remedies for breach of contract by the buyer

#### *Article 61*

(1) If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:

(a) Exercise the rights provided in articles 62 to 65;

(b) Claim damages as provided in articles 74 to 77.

(2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

#### *Article 62*

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

#### *Article 63*

(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.

(2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance.

#### *Article 64*

(1) The seller may declare the contract avoided:

(a) If the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) If the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or declares that he will not do so within the period so fixed.

(2) However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:

(a) In respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or

(b) In respect of any breach other than late performance by the buyer, within a reasonable time:

(i) After the seller knew or ought to have known of the breach; or

(ii) After the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 63, or after the buyer has declared that he will not perform his obligations within such an additional period.

#### *Article 65*

(1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with the requirements of the buyer that may be known to him.

(2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If, after receipt of such a communication, the buyer fails to do so within the time so fixed, the specification made by the seller is binding.

## CHAPTER IV. PASSING OF RISK

#### *Article 66*

Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

#### *Article 67*

(1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.

(2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

#### Article 68

The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

#### Article 69

(1) In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(2) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

(3) If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.

#### Article 70

If the seller has committed a fundamental breach of contract, articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.

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

#### Section I. Anticipatory breach and instalment contracts

#### Article 71

(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

(a) A serious deficiency in his ability to perform or in his creditworthiness; or

(b) His conduct in preparing to perform or in performing the contract.

(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

#### Article 72

(1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.

(2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.

(3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.

#### Article 73

(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

(2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

(3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

### Section II. Damages

#### Article 74

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

#### Article 75

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.



*Article 76*

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.

(2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

*Article 77*

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

## Section III. Interest

*Article 78*

If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.

## Section IV. Exemptions

*Article 79*

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

- (a) He is exempt under the preceding paragraph; and
- (b) The person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

*Article 80*

A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

## Section V. Effects of avoidance

*Article 81*

(1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.

(2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

*Article 82*

(1) The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) The preceding paragraph does not apply:

(a) If the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission;

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

(c) If the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.

*Article 83*

A buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 82 retains all other remedies under the contract and this Convention.

*Article 84*

(1) If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid.

(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:

(a) If he must make restitution of the goods or part of them; or

(b) If it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

#### Section VI. Preservation of the goods

##### *Article 85*

If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods are to be made concurrently, if he fails to pay the price, and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer.

##### *Article 86*

(1) If the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, he must take such steps to preserve them as are reasonable in the circumstances. He is entitled to retain them until he has been reimbursed his reasonable expenses by the seller.

(2) If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination. If the buyer takes possession of the goods under this paragraph, his rights and obligations are governed by the preceding paragraph.

##### *Article 87*

A party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

##### *Article 88*

(1) A party who is bound to preserve the goods in accordance with article 85 or 86 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party.

(2) If the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with article 85 or 86 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of this intention to sell.

(3) A party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

#### Part IV. Final provisions

##### *Article 89*

The Secretary-General of the United Nations is hereby designated as the depositary for the Convention.

##### *Article 90*

This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement.

##### *Article 91*

(1) This Convention is open for signature at the concluding meeting of the United Nations Conference on Contracts for the International Sale of Goods and will remain open for signature by all States at the Headquarters of the United Nations, New York until 30 September 1981.

(2) This Convention is subject to ratification, acceptance or approval by the signatory States.

(3) This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

(4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

##### *Article 92*

(1) A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention.

(2) A Contracting State which makes a declaration in accordance with the preceding paragraph in respect of Part II or Part III of this Convention is not to be considered a Contracting State within paragraph (1) of article 1 of this Convention in respect of matters governed by the Part to which the declaration applies.

##### *Article 93*

(1) If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to 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 declaration are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

(3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

(4) If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

#### *Article 94*

(1) Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

(2) A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States.

(3) If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph (1), provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.

#### *Article 95*

Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1) (b) of article 1 of this Convention.

#### *Article 96*

A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.

#### *Article 97*

(1) Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations are to be in writing and be formally notified to the depositary.

(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary. Reciprocal unilateral declarations under article 94 take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depositary.

(4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to 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 depositary.

(5) A withdrawal of a declaration made under article 94 renders inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that article.

#### *Article 98*

No reservations are permitted except those expressly authorized in this Convention.

#### *Article 99*

(1) This Convention enters into force, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession, including an instrument which contains a declaration made under article 92.

(2) When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the tenth instrument of ratification, acceptance, approval or accession, this Convention, with the exception of the Part excluded, enters into force in respect of that State, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

(3) A State which ratifies, accepts, approves or accedes to this Convention and is a party to either or both the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Formation Convention) and the Convention relating to a Uniform Law on the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Sales Convention) shall at the same time denounce, as the case may be, either or both the 1964 Hague Sales Convention and the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

(4) A State party to the 1964 Hague Sales Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part II of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Sales Convention by notifying the Government of the Netherlands to that effect.

(5) A State party to the 1964 Hague Formation Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part III of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

(6) For the purpose of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the 1964 Hague Formation Convention or to the 1964 Hague Sales Convention shall not be effective until such denunciations as may be required on the part of those States in respect of the latter two Conventions have themselves become effective. The depositary of this Convention shall consult with the Government of the Netherlands, as the depositary of the 1964 Conventions, so as to ensure necessary co-ordination in this respect.

#### Article 100

(1) This Convention applies to the formation of a contract only when the proposal for concluding the contract is made on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1) (a) or the Contracting State referred to in subparagraph (1) (b) of article 1.

(2) This Convention applies only to contracts concluded on or after the date when the Convention enters

into force in respect of the Contracting States referred to in subparagraph (1) (a) or the Contracting State referred to in subparagraph (1) (b) of article 1.

#### Article 101

(1) A Contracting State may denounce this Convention, or Part II or Part III of the Convention, by a formal notification in writing addressed to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at Vienna, this eleventh day of April, one thousand nine hundred and eighty, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

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

### C. Protocol amending the Convention on the Limitation Period in the International Sale of Goods (A/CONF.97/18, annex II)

THE STATES PARTIES to this Protocol,

*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,

*Considering* that the Convention on the Limitation Period in the International Sale of Goods, concluded at New York on 14 June 1974 (the 1974 Limitation Convention), to conform to the United Nations Convention on Contracts for the International Sale of Goods, concluded at Vienna on 11 April 1980 (the 1980 Sales Convention), would promote the adoption of the uniform rules governing the limitation period contained in the 1974 Limitation Convention,

*Have agreed* to amend the 1974 Limitation Convention as follows:

#### Article I

(1) Paragraph (1) of article 3 is replaced by the following provisions:

“(1) This Convention shall apply only

(a) 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; or

(b) If the rules of private international law make the law of a Contracting State applicable to the contract of sale.”

(2) Paragraph (2) of article 3 is deleted.

(3) Paragraph (3) of article 3 is renumbered as paragraph (2).

#### Article II

(1) Subparagraph (a) of article 4 is deleted and replaced by the following provision:

“(a) Of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;”

(2) Subparagraph (e) of article 4 is deleted and is replaced by the following provision:

“(e) Of ships, vessels, hovercraft or aircraft;”

#### Article III

A new paragraph (4) is added to article 31 reading as follows:

“(4) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party to a contract is located in that State, this place of business shall, for the purposes of this Convention, be considered not to be in a Contracting State unless it is in a territorial unit to which the Convention extends.”

*Article IV*

The provisions of article 34 are deleted and are replaced by the following provisions:

“(1) Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention shall not apply to contracts of international sale of goods where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

“(2) A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention shall not apply to contracts of international sale of goods where the parties have their places of business in those States.

“(3) If a State which is the object of a declaration under paragraph (2) of this article subsequently becomes a Contracting State, the declaration made shall, as from the date on which this Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph (1), provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.”

*Article V*

The provisions of article 37 are deleted and are replaced by the following provisions:

“This Convention shall not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the seller and buyer have their places of business in States parties to such agreement.”

*Article VI*

At the end of paragraph (1) of article 40, the following provision is added:

“Reciprocal unilateral declarations under article 34 shall take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the Secretary-General of the United Nations.”

## FINAL PROVISIONS

*Article VII*

The Secretary-General of the United Nations is hereby designated as the depositary for this Protocol.

*Article VIII*

(1) This Protocol shall be open for accession by all States.

(2) Accession to this Protocol by any State which is not a Contracting Party to the 1974 Limitation Convention

shall have the effect of accession to that Convention as amended by this Protocol, subject to the provisions of article XI.

(3) Instruments of accession shall be deposited with the Secretary-General of the United Nations.

*Article IX*

(1) This Protocol shall enter into force on the first day of the sixth month following the deposit of the second instrument of accession, provided that on that date:

(a) The 1974 Limitation Convention is itself in force; and

(b) The 1980 Sales Convention is also in force.

If these Conventions are not both in force on that date, this Protocol shall enter into force on the first day on which both Conventions are in force.

(2) For each State acceding to this Protocol after the second instrument of accession has been deposited, this Protocol shall enter into force on the first day of the sixth month following the deposit of its instrument of accession, if by that date the Protocol is itself in force. If by that date the Protocol itself is not yet in force, the Protocol shall enter into force for the State on the date the Protocol itself enters into force.

*Article X*

If a State ratifies or accedes to the 1974 Limitation Convention after the entry into force of this Protocol, the ratification or accession shall also constitute an accession to this Protocol if the State notifies the depositary accordingly.

*Article XI*

Any State which becomes a Contracting Party to the 1974 Limitation Convention, as amended by this Protocol, by virtue of articles VIII, IX or X of this Protocol shall, unless it notifies the depositary to the contrary, be considered to be also a Contracting Party to the Convention, unamended, in relation to any Contracting Party to the Convention not yet a Contracting Party to this Protocol.

*Article XII*

Any State may declare at the time of the deposit of its instrument of accession or its notification under article X that it will not be bound by article I of the Protocol. A declaration made under this article shall be in writing and be formally notified to the depositary.

*Article XIII*

(1) A Contracting State may denounce this Protocol by notifying the depositary to that effect.

(2) The denunciation shall take effect on the first day of the month following the expiration of twelve months after receipt of the notification by the depositary.

(3) Any Contracting State in respect of which this Protocol ceases to have effect by the application of

paragraphs (1) and (2) of this article shall remain a Contracting Party to the 1974 Limitation Convention, unamended, unless it denounces the unamended Convention in accordance with article 45 of that Convention.

*Article XIV*

(1) The depositary shall transmit certified true copies of this Protocol to all States

(2) When this Protocol enters into force in accordance with article IX, the depositary shall prepare a text of the 1974 Limitation Convention, as amended by this Protocol, and shall transmit certified true copies to all States Parties to that Convention, as amended by this Protocol.

DONE at Vienna, this day of 11 April 1980, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

## **II. UNCITRAL CONCILIATION RULES ADOPTED BY THE THIRTEENTH SESSION OF THE COMMISSION\***

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\* Reproduced in this volume, part one, II, A, para. 106, above.



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## V. CHECK LIST OF UNCITRAL DOCUMENTS

### List of documents before the Commission at its thirteenth session

<i>Title or description</i>	<i>Document reference</i>
A. GENERAL SERIES	
Legal implications of the new international economic order: report of the Working Group on the New International Economic Order on the work of its session (New York, 14-25 January 1980) . . . . .	A/CN.9/176
Report of the Working Group on International Contract Practices on the work of its first session (Vienna, 24-28 September 1979) . . . . .	A/CN.9/177
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 eighth session (Geneva, 3-14 September 1979) . . . .	A/CN.9/178
International commercial arbitration; revised draft UNCITRAL Conciliation Rules: draft prepared by the Secretary-General . . . . .	A/CN.9/179
International commercial arbitration; commentary on the revised draft UNCITRAL Conciliation Rules: report of the Secretary-General . . . . .	A/CN.9/180
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 ninth session (New York, 2-11 January 1980) . . . .	A/CN.9/181
Provisional agenda, annotations thereto and tentative schedule of meetings: note by the Secretary-General . . . . .	A/CN.9/182
United Nations Conference on Contracts for the International Sale of Goods: note by the Secretary-General . . . . .	A/CN.9/183
(Not issued) . . . . .	A/CN.9/184, 185 and 188
Security interests; issues to be considered in the preparation of uniform rules: report of the Secretary-General . . . . .	A/CN.9/186
International commercial arbitration; revised draft UNCITRAL Conciliation Rules: observations and comments by States and international organizations . . . . .	A/CN.9/187 and Add. 1-3
International commercial arbitration; issues relating to the use of the UNCITRAL Arbitration Rules and the designation of an appointing authority: note by the Secretary-General . . . . .	A/CN.9/189
International commercial arbitration; progress report on the preparation of a model law on arbitral procedure: note by the Secretariat . . . . .	A/CN.9/190
International contract in the field of industrial development: study by the Secretary-General . . . . .	A/CN.9/191

<i>Title or description</i>	<i>Document reference</i>
Current activities of international organizations related to the harmonization and unification of international trade law: report of the Secretary-General . . . . .	A/CN.9/192 and Add. 1 and 2
Legal implications of the new international economic order: note by the Secretariat . . . . .	A/CN.9/193
Legal implications of the new international economic order: note by the Secretariat . . . . .	A/CN.9/194

## B. RESTRICTED SERIES

International commercial arbitration; UNCITRAL Conciliation Rules: Text submitted by the Drafting Party . . . . .	A/CN.9/XIII/CRP.1 and Add. 1 and 2
Draft Report of the United Nations Commission on International Trade Law on the work of its thirteenth session (14-25 July 1980) . . . . .	A/CN.9/XIII/CRP.2 and Add. 1-10

## C. INFORMATION SERIES

Provisional list of participants . . . . .	A/CN.9/XIII/INF.1
--	-------------------

**Working Group on International Negotiable Instruments, eighth and ninth sessions**

## A. WORKING PAPERS

*Eighth session*

Provisional agenda . . . . .	A/CN.9/WG.IV/WP.13
------------------------------	--------------------

*Ninth session*

Provisional agenda . . . . .	A/CN.9/WG.IV/WP.14
Uniform rules applicable to international cheques: note by the Secretariat . . . . .	A/CN.9/WG.IV/WP.15
Draft Convention on International Bills of Exchange and International Promissory Notes: text of articles 5 (8-10), 9 (6), 11 (2), 70 (2, 5), 71, 72 and 74-86 as adopted by the Working Group on International Negotiable Instruments at its eighth session (Geneva, 3-14 September 1979) . . . . .	A/CN.9/WG.IV/WP.16
Draft Convention on International Bills of Exchange and International Promissory Notes: text of articles 25 (1) (a), 70, 74 bis and 78 as redrafted by the Secretariat . . . . .	A/CN.9/WG.IV/WP.17

## B. RESTRICTED SERIES

*Eighth session*

Draft text of article 70, paragraph 5 prepared by the Secretariat . . . . .	A/CN.9/WG.IV(VIII)/CRP.1
Draft Report of the Working Group on International Negotiable Instruments on the work of its eighth session (Geneva, 3-14 September 1979) . . . . .	A/CN.9/WG.IV(VIII)/CRP.2 and Add. 1-6
Proposal by Mexico . . . . .	A/CN.9/WG.IV(VIII)/CRP.3

<i>Title or description</i>	<i>Document reference</i>
<i>Ninth session</i>	
Draft Report of the Working Group on International Negotiable Instruments on the work of its ninth session (New York, 2–11 January 1980) . . . . .	A/CN.9/WG.IV(IX)/CRP.1 and Add. 1–6
Text of articles 79, 80 (2) (a), 83 as redrafted by the Secretariat . . . . .	A/CN.9/WG.IV(IX)/CRP.2
Text of articles 48, 70 (3) and 71 (4–6) as redrafted by the Secretariat . . . . .	A/CN.9/WG.IV(IX)/CRP.3
C. INFORMATION SERIES	
List of participants . . . . .	A/CN.9/WG.IV/(VIII)/INF.1 and A/CN.9/WG.IV(IX)/ INF.1

***Working Group on International Contract Practices, first session***

A. WORKING PAPER	
Provisional agenda . . . . .	A/CN.9/WG.2/WP.31
B. RESTRICTED SERIES	
Liquidated damages and penalty clauses—preliminary draft rules . . . . .	A/CN.9/WG.2/X/CRP.1
Proposal by the representative of France . . . . .	A/CN.9/WG.2/X/CRP.2
Draft report of the Working Group on International Contract practices on the work of its first session (Vienna, 24–28 September 1979) . . . . .	A/CN.9/WG.2/X/CRP.3 and Add. 1
Proposal by the representative of Czechoslovakia . . . . .	A/CN.9/WG.2/X/CRP.4
Proposal by the observer of Romania . . . . .	A/CN.9/WG.2/X/CRP.5
Proposal by the representative of Brazil . . . . .	A/CN.9/WG.2/X/CRP.6

***Working Group on the New International Economic Order, first session***

A. WORKING PAPERS	
Provisional agenda . . . . .	A/CN.9/WG.5/I/WP.1
Considerations of the legal implications of the new international economic order in the context of the possible work programme of the commission—working paper prepared by the secretariat . . . . .	A/CN.9/WG.5/I/WP.2
B. RESTRICTED SERIES	
Draft Report of the Working Group on the New International Economic Order on the work of its first session (New York, 14–25 January 1980) . . . . .	A/CN.9/WG.5/I/CRP.1 and Add. 1–4
List of subject-matters in the context of industrialization and transfer of technology for possible recommendation by the Working Group . . . . .	A/CN.9/WG.5/I/CRP.2
List of tentative specific topics for recommendation to the Commission . . . . .	A/CN.9/WG.5/I/CRP.3/Rev.1
C. INFORMATION SERIES	
List of participants—members of the Working Group . . . . .	A/CN.9/WG.5/I/INF.1/Rev.1