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Commission on
International
Trade Law**

YEARBOOK

Volume XVIII: 1987



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NOTE

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

The footnote numbering follows that used in the original documents on which this *Yearbook* is based. Any footnotes added subsequently are indicated by lower-case letters.

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INTRODUCTION

This is the eighteenth volume in the series of *Yearbooks* of the United Nations Commission on International Trade Law (UNCITRAL).¹

The present volume consists of three parts. Part one contains the Commission's report on the work of its twentieth session, which was held at Vienna from 20 July to 14 August 1987, and the action thereon by the United Nations Conference on Trade and Development (UNCTAD) and by the General Assembly.

In part two most of the documents considered at the twentieth session of the Commission are reproduced. These documents include reports of the Commission's Working Groups dealing with international payments, the new international economic order and liability of operators of transport terminals, as well as working papers that were before the Working Groups.

Part three contains the draft Convention on International Bills of Exchange and International Promissory Notes, as adopted by the Commission at its twentieth session, a comparative table of article numbers of the draft convention on international bills of exchange and international promissory notes, summary records of this session for meetings devoted to the draft Convention, a bibliography of recent writings related to the work of the Commission, a list of documents before the twentieth session as well as of other documents referred to in the present volume and reproduced in an earlier volume.

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

<i>Volume</i>	<i>Years covered</i>	<i>United Nations publication, Sales No.</i>
I	1968-1970	E.71.V.1
II	1971	E.72.V.4
III	1972	E.73.V.6
III Suppl.	1972	E.73.V.9
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
XI	1980	E.81.V.8
XII	1981	E.82.V.6
XIII	1982	E.84.V.5
XIV	1983	E.85.V.3
XV	1984	E.86.V.2
XVI	1985	E.87.V.4
XVII	1986	E.88.V.4

THE TWENTIETH SESSION (1987)

A. Report of the United Nations Commission on International Trade Law on the work of its twentieth session (Vienna, 20 July-14 August 1987)^a

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^aOfficial Records of the General Assembly, Forty-second Session, Supplement No. 17 (A/42/17) (27 August 1987) (hereinafter referred to as "Report").

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INTRODUCTION

1. The present report of the United Nations Commission on International Trade Law covers the twentieth session of the Commission, held at Vienna, from 20 July to 14 August 1987.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the Assembly and is also submitted for comments to the United Nations Conference on Trade and Development.

Chapter I. Organization of the session

A. Opening

3. The United Nations Commission on International Trade Law (UNCITRAL) commenced its twentieth session on 20 July 1987. The session was opened by Mr. Eric E. Bergsten, Secretary of the Commission.

B. Membership and attendance

4. General Assembly resolution 2205 (XXI) established the Commission with a membership of 29 States, elected by the Assembly. By resolution 3108 (XXVIII), the General Assembly increased the membership of the Commission from 29 to 36 States. The present members of the Commission, elected on 15 November 1982 and 10 December 1985, are the following States whose term of office expires on the last day prior to the beginning of the annual session of the Commission in the year indicated:¹ Algeria (1989), Argentina (1992), Australia

(1989), Austria (1989), Brazil (1989), Central African Republic (1989), Chile (1992), China (1989), Cuba (1992), Cyprus (1992), Czechoslovakia (1992), Egypt (1989), France (1989), German Democratic Republic (1989), Hungary (1992), India (1992), Iran (Islamic Republic of) (1992), Iraq (1992), Italy (1992), Japan (1989), Kenya (1992), Lesotho (1992), Libyan Arab Jamahiriya (1992), Mexico (1989), Netherlands (1992), Nigeria (1989), Sierra Leone (1992), Singapore (1989), Spain (1992), Sweden (1989), Union of Soviet Socialist Republics (1989), United Kingdom of Great Britain and Northern Ireland (1989), United Republic of Tanzania (1989), United States of America (1992), Uruguay (1992) and Yugoslavia (1992).

5. With the exception of Algeria, Central African Republic, Cyprus, Iran (Islamic Republic of), Lesotho and United Republic of Tanzania, all members of the Commission were represented at the session.

6. The session was also attended by observers from the following States: Bulgaria, Cameroon, Canada, Colombia, Costa Rica, Democratic People's Republic of Korea, Ecuador, Finland, Germany, Federal Republic of, Holy See, Indonesia, Morocco, Peru, Philippines, Poland, Republic of Korea, Romania, Sudan, Switzerland and Venezuela.

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

(a) *Specialized agencies*

International Monetary Fund (IMF)
United Nations Industrial Development Organization (UNIDO)

(b) *Intergovernmental organizations*

Asian-African Legal Consultative Committee (AALCC)
Council for Mutual Economic Assistance
Council of Europe
Hague Conference on Private International Law
International Institute for the Unification of Private Law
League of Arab States

¹Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 17 were elected by the Assembly at its thirty-seventh session on 15 November 1982 (decision 37/308) and 19 were elected by the Assembly at its fortieth session on 10 December 1985 (decision 40/313). Pursuant to resolution 31/99 of 15 December 1976 the term of those members elected by the Assembly at its thirty-seventh session will expire on the last day prior to the opening of the twenty-second regular annual session of the Commission in 1989, while the term of those members elected by the Assembly at its fortieth session will expire on the last day prior to the opening of the twenty-fifth regular annual session of the Commission in 1992.

(c) *International non-governmental organizations*

Inter-American Bar Association
 International Chamber of Commerce (ICC)
 International Council for Commercial Arbitration
 International Road Transport Union
 International Union of Marine Insurance
 Latin American Federation of Banks

C. *Election of officers*²

8. The Commission elected the following officers:

Chairman: Mrs. Ana Piaggi de Vanossi
 (Argentina)

Vice-Chairmen: Mr. Miroslav Cuker
 (Czechoslovakia)
 Mr. Gavan Griffith (Australia)
 Mr. Henry M. Joko-Smart
 (Sierra Leone)

Rapporteur: Mr. Hitoshi Maeda (Japan)

D. *Agenda*

9. The agenda of the session, as adopted by the Commission at its 358th meeting, on 20 July 1987, was as follows:

1. Opening of the session
2. Election of officers
3. Adoption of the agenda
4. International payments: draft Convention on International Bills of Exchange and International Promissory Notes
5. New international economic order
6. Operators of transport terminals
7. Co-ordination of work
8. Status of conventions
9. Training and assistance
10. General Assembly resolution on the work of the Commission
11. Future work
12. Other business
13. Adoption of the report of the Commission

E. *Adoption of the report*

10. The Commission adopted the present report at its 388th meeting, on 14 August 1987, by consensus.

²The elections took place at the 358th, 361st and 373rd meetings, on 20, 22 and 30 July 1987. 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 report of the United Nations Commission on International Trade Law on the work of its first session, *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16* (A/7216), para. 14 (*Yearbook of the United Nations Commission on International Trade Law, vol. I: 1968-1970* (United Nations publication, Sales No. E.71.V.1), part two, I, A, para. 14)).

Chapter II. *International payments: draft convention on international bills of exchange and international promissory notes*³

11. The United Nations Commission on International Trade Law, at its nineteenth session in 1986, considered the articles of the draft Convention on International Bills of Exchange and International Promissory Notes as revised by it at its seventeenth session and by the Working Group on International Negotiable Instruments at its thirteenth and fourteenth sessions.⁴ The secretariat was requested to transmit to States and interested international organizations for comment the draft Convention as revised by the Commission at its nineteenth session. In addition, the secretariat was requested to prepare and submit to the Working Group draft final clauses to be included in the draft Convention.⁵

12. The Commission decided that the draft Convention as revised at its nineteenth session would be reviewed by the Working Group in the light of the comments received from States and interested international organizations prior to the twentieth session of the Commission and would be considered and approved by the Commission at its twentieth session.⁶

13. The Working Group on International Negotiable Instruments held its fifteenth session in New York from 17 to 27 February 1987, at which time it considered the comments submitted in regard to articles 1 to 32 of the draft Convention and adopted revised texts in respect of some of those articles.

14. At its current session, the Commission had before it the report of the Commission on the work of its nineteenth session, the report of the Working Group on International Negotiable Instruments on the work of its fifteenth session (A/CN.9/288), a note by the secretariat containing the comments of Governments and international organizations on the draft Convention (A/CN.9/WG.IV/WP.32 and Add.1-10) and a note by the secretariat containing draft final clauses (A/CN.9/WG.IV/WP.33), the latter two documents having originally been submitted to the Working Group.

15. The Commission commenced its deliberations on the draft Convention on International Bills of Exchange and International Promissory Notes by examining articles 33 to 80 in the light of the comments received from States and international organizations. After completing its review of draft articles 33 to 80 of the draft Convention in the light of comments received from States and international organizations and its consideration of the draft articles 81 to 88 containing

³The Commission considered this subject at its 358th to 385th and its 388th meetings, from 20 July to 14 August 1987.

⁴Report of the United Nations Commission on International Trade Law on the work of its nineteenth session, *Official Records of the General Assembly, Forty-first Session, Supplement No. 17* (A/41/17), paras. 11-211.

⁵*Ibid.*, para. 223.

⁶*Ibid.*, paras. 213 and 220.

final clauses that had been prepared by the secretariat, the Commission referred the draft articles to a drafting group that the Commission had established. The drafting group was requested to incorporate into the text of the draft Convention the decisions taken by the Working Group at its fifteenth session in respect of articles 1 to 32 (A/CN.9/288, annex I) and the decisions taken by the Commission at its current session in respect of articles 33 to 88 and to review the draft articles in order to ensure linguistic consistency within each language version and correspondence among the different language versions.

16. The draft articles as modified and submitted by the drafting group were then reviewed by the Commission (see below, paragraphs 232 to 299). Upon completion of that review the Commission adopted the decision set out in paragraph 304, by which it submitted the draft Convention to the General Assembly with a recommendation that it should consider the draft Convention with a view to its adoption or any other action to be taken. The text of the draft Convention as submitted to the General Assembly is found in annex I to the present report. A comparative table of article numbers of the text as considered by the Commission and the text as re-numbered at the close of the session is found in annex II. The article numbers used throughout the present report are those of the text as considered by the Commission.

A. Review of articles 33 to 80 in light of comments received from States and international organizations

Article 33

17. A proposal was made to amend article 33 by inserting the words "Unless so mentioned on the instrument" at the beginning of the article. The purpose of the proposal was to clarify that a bill of exchange could contain an assignment to the payee of funds made available for payment by the drawer with the drawee. Another proposal was made to delete article 33, since it might be inferred from that article that such an assignment was not permitted.

18. In opposition to those proposals, it was noted that the article as it currently stood did not prohibit the inclusion of such an assignment in a bill; it merely provided that the order to pay contained in the bill did not in itself operate as an assignment. Under the article a bill could contain other language purporting to act as an assignment, the legal effects of which would be determined by national law. If the article were deleted, the questions addressed by it would remain unresolved. Accordingly, article 33 was retained unchanged.

Article 34

Paragraph (1)

19. The Commission retained the text of the paragraph unchanged. (See, however, later decision taken in connection with article 67, below, paragraph 176).

Paragraph (2)

20. It was proposed that paragraph (2) should be deleted so as to prevent the drawer from excluding or limiting his liability for acceptance or for payment of the bill. In support of the proposal it was said that it would go against the essence of the bill if the drawer, as the creator of the bill, would be allowed to exclude or substantially limit his obligation under the bill. An additional idea expressed in support of the proposal was that a non-accepted bill was similar to a promissory note and that the drawer should not be allowed to exclude or limit his liability for non-payment of the bill for the same reasons that the maker of a promissory note was not allowed to exclude or limit his liability (article 35(2)).

21. A more limited proposal was to allow the drawer to exclude or limit his liability for acceptance of the bill, but not for payment of the bill. Yet another proposal was to allow the exclusion or limitation of liability for payment of the bill only if the bill was accepted or if the bill was signed by a guarantor for the drawee.

22. However, the prevailing view was to retain the provision of paragraph (2) unchanged. In support of the prevailing view it was stated that the rule of paragraph (2), which reconciled positions in different legal systems, was appropriately balanced by the requirement set forth in the last sentence of the paragraph, i.e. that an exclusion or limitation of liability for payment was operative only if another party was or became liable on the bill. It was further stated that there was a commercial need to allow the drawer to disclaim his liability for acceptance as well as for payment, for example, in cases where the bill served as a vehicle for an *à forfait* transfer of a claim; it was noted that such a need was also felt in States that had adopted the Uniform Law on Bills of Exchange and Promissory Notes annexed to the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930) (hereinafter cited as Geneva Uniform Law), which in article 9 did not allow stipulations releasing the drawer from the liability for payment of the bill. With respect to such commercial need it was stated as a merit of paragraph (2) that it gave effect to stipulations on liability for acceptance or payment not only as against the drawer's immediate party, but also as against remote parties.

23. After deliberation, the Commission decided to retain paragraph (2) unchanged.

Article 35

24. The Commission retained the text of article 35 unchanged. (See, however, later decision taken in connection with article 67, below, paragraph 176).

Article 36

25. The Commission retained the text of article 36 unchanged. (See, however, later decision taken in connection with article 67, below, paragraph 176).

Article 37

26. The Commission agreed that the drawee should be able to accept a bill by placing his signature alone on the front of the bill, or by placing his signature accompanied by the words "accepted" or words of similar import on the front or the back. The Commission considered whether the drawee should also be able to accept a bill by placing his signature on the back of the instrument without accompanying it by the word "accepted" or by words of similar import. A view was expressed that it was undesirable for the Convention to permit a drawee to do so, since without such words uncertainty would exist as to the capacity in which the drawee signed (e.g. as acceptor, endorser, guarantor). The prevailing view, however, was that a drawee should be permitted to accept a bill in that manner since such a method of acceptance was the practice in some countries. To require the drawee to include words indicating that he signed as an acceptor was too formalistic. If, not knowing of such a requirement, a drawee who intended to accept a bill merely signed on the back, the signature would be given a legal effect not intended by the parties or, worse, no effect at all, resulting in the dishonour of the bill.

27. The Commission discussed the way in which the foregoing principles should be expressed in the Convention and, in particular, how the rules of presumption found in article 42, paragraph (4), should be formulated. According to one view, the Convention should establish a firm rule that the signature alone of the drawee on the back of the bill was an acceptance. Such an approach had the advantage of certainty with respect to the nature of signatures on a bill. It was important, particularly in the case of instruments which circulated internationally, for persons handling those instruments not to have to engage in speculation or interpretation as to the nature of a signature.

28. In opposition, it was stated that the foregoing approach was too rigid and was not in accord with commercial practice. For example, in some areas a drawee wishing to endorse a bill did so by placing his signature alone on the back. Accordingly, it was suggested that the Convention should provide that the signature alone of the drawee on the back of a bill was presumed to be an acceptance, but that the presumption could be rebutted by factors appearing on the instrument itself showing that the drawee had signed in some other capacity. That approach was said to accord with the international commercial practice according to which a drawee placing his signature alone on the back of a bill did so as an acceptor; but it was flexible enough to take into account other practices.

29. After deliberation, the Commission decided to adopt the firm rule that a signature alone of the drawee on the back of the bill was an acceptance and that the signature alone on the back of an instrument other than that of the drawee was an endorsement. That approach was stated to meet commercial needs, yet provide the certainty that was necessary with respect to international negotiable instruments. It was noted that the solution would not preclude the drawee from endorsing

the bill on the back of the instrument if he wished to do so, but that he had to add words indicating that it was an endorsement.

30. The Commission considered where the rules giving effect to the proposal should be placed. In that connection, a question was raised concerning the placement of subparagraphs (b) and (c) of article 42(4). According to one view, the subject matter of those provisions should be dealt with in articles 37 and 13, respectively. The provisions were out of place in article 42, which dealt primarily with guarantees. According to another view, however, the provisions were correctly located in article 42 because they concerned the interpretation of anomalously placed signatures that might in some legal systems be regarded as guarantees.

31. The decision of the Commission was to relocate subparagraph (c) of article 42(4) into article 13, and to incorporate subparagraph (b) into article 37 along the following lines:

"Article 37

"(1) An acceptance must be recorded in writing on the bill.

"(2) The signature of the drawee accompanied by the word 'accepted' or by words of similar import shall constitute acceptance whether entered on the front or the back.

"(3) The signature alone of the drawee on the front shall also constitute acceptance.

"(4) The signature alone of the drawee on the back shall constitute acceptance."

"Article 13

"(1) [Unchanged]

"(2) [Unchanged]

"(3) A signature alone on the back of the instrument other than that of the drawee is an endorsement."

(See also further decision on article 13(3), below, paragraph 250).

Article 38

32. As regards paragraph (3), objections were raised to the drawer or the holder having the faculty to insert the date of acceptance where the acceptor had not indicated the date of his acceptance. It was stated that the rule was exorbitant and might open the door for abuse and fraud.

33. Several proposals were made by the proponents of those views. One was to require protest for non-dating of the bill instead of allowing insertion of the date. Another proposal was to include in the paragraph a requirement that the insertion of the date was to be made in good faith. Yet another proposal was that, where the acceptance was not dated, the acceptance was deemed to have been given on the last day of the period

for presentment for acceptance. Noting that a failure to date a bill was often a result of an oversight or of lack of experience rather than an intentional omission, it was further proposed that an undated acceptance should be followed by a second presentment for acceptance with a specific request for insertion of the missing date and, if then the acceptor failed to indicate the date, the situation should be resolved by a protest for non-dating the bill.

34. The prevailing view was to retain the text of paragraph (3) unchanged. It was stated that a requirement for protest for non-dating a bill was too harsh a consequence, in particular since non-dating was often due to an oversight or lack of experience of the acceptor. While it was assumed that the insertion of the date of acceptance by the drawer or the holder was, according to general legal principles, always to be made in good faith, it would not be appropriate to add a reference to good faith in paragraph (3), since that might give rise to difficulties of interpretation or proof. Furthermore, it was not appropriate to establish a presumption that a non-dated acceptance was given on the last day of the period for presentment for acceptance. Such a presumption would be unduly unfavourable to the holder in the case of a bill payable at a fixed period after sight since, according to article 47(e), such a bill must be presented for acceptance within one year of its date. With such a presumption, the maturity of the instrument would be delayed for a considerable period by the failure to date the acceptance. Finally, it was argued that where the acceptance failed to indicate a date, it would not be appropriate to require a second presentment for dating the acceptance, since such a requirement might suggest that an undated acceptance did not constitute an effective acceptance.

35. After deliberation, the Commission decided not to modify paragraph (3) and retained the article unchanged.

Article 39

Paragraph (1)

36. The Commission retained the text of paragraph (1) unchanged.

Paragraph (2)

37. A proposal was made that subparagraph (a) should be deleted because it was inconsistent with paragraph (1) or that subparagraph (b) should be amended to the effect that, in the case of a qualified acceptance, the bill should be treated as dishonoured to the extent of the partial non-acceptance. During the discussion of that proposal, the view was expressed that the relationship between subparagraphs (a) and (b) was not clear in that subparagraph (b) considered a qualified acceptance as a dishonour while, according to subparagraph (a), the drawee was bound by the terms of his qualified acceptance.

38. The prevailing view was to retain the text of paragraph (2) unchanged. While admitting that there

may be conceptual difficulties in reconciling the two subparagraphs, it was stated that the solution provided in paragraph (2) was a reasonable one. Where the drawee had qualified his acceptance, the holder could choose to hold the drawee liable according to the terms of the qualified acceptance or to treat the case as a dishonour by non-acceptance, for example where a condition did not materialize. It was also noted that the rule was in essence similar to the one contained in article 26 of the Geneva Uniform Law.

39. After deliberation, the Commission decided to retain paragraph (2) unchanged.

Article 40

40. A view was expressed that article 40(2) was inconsistent with article 17(1), according to which an endorsement must be unconditional, and that one of those provisions should be deleted. The understanding of the Commission, however, was that the limitation or exclusion by an endorser of his liability under article 40(2) was not a condition within the meaning of article 17(1). Accordingly, the Commission retained article 40 without change. (See, however, later decision taken in connection with article 67, below, paragraph 176).

Article 41

41. A proposal was made to relocate article 41 after article 44 in a new section 3 titled "Liability of a person who transfers an instrument by endorsement or by mere delivery" because the title of section 2 was "Liabilities of the parties" and the person who transferred an instrument in blank was not a party. The Commission did not adopt that proposal.

42. In connection with paragraph (1)(a), a view was expressed that it would be desirable for the Convention to contain a provision similar to article 7 of the Geneva Uniform Law, which provided that if a bill of exchange contained signatures that could not bind the persons who signed the bill or the persons on behalf of whom it was signed, the obligations of the other persons who signed were nonetheless valid.

43. A proposal was made to amend paragraph (1)(c) so as to include prior endorser among those persons in respect of whom the transferor warranted that he had no knowledge of any fact that would impair the right of the transferee to payment. Support was expressed for the proposal on the grounds that the omission of prior endorser from the paragraph seemed somewhat arbitrary. Including prior endorser would not be unduly burdensome to transferors, since the obligation of the transferor was not to discover the existence of facts that might impair the rights of the transferee, but merely to disclose to the transferee such facts of which the transferor had knowledge.

44. In opposition, it was observed that, as it currently stood, paragraph (1)(c) represented a compromise reached after extensive discussions within the Working Group and that it accorded reasonable protection to

the transferee. Particularly when read in connection with the definition of knowledge in article 5, the inclusion of prior endorsers would enlarge the liability of the transferor under the paragraph. Moreover, it appeared arbitrary to include prior endorsers while certain other previous parties were excluded. After deliberation, the Commission decided not to adopt the proposal.

45. A proposal to include in paragraph (3) a reference to the discount rate in article 66(4) was not adopted since the claim under article 41 was not for the face amount of the instrument but for the amount paid by the transferee to the transferor.

46. The Commission retained article 41 without change.

Article 42

Paragraph (1)

47. A view was expressed that article 42 should deal only with a guarantee for a party to the instrument, and that the reference in paragraph (1)—and in other provisions of the draft Convention—to a guarantee for the drawee should be deleted. According to that view, a guarantee for a person such as a drawee, who had no obligation on the instrument, was without purpose and contrary to the general principles of a guarantee. Moreover, it was questioned whether such a guarantor who paid the bill would have recourse against anyone, particularly if the drawer had excluded his liability under article 34(2).

48. The prevailing view was that the paragraph should be retained in its present form since it was based on findings about commercial needs and practices in many countries. It was noted that the obligation of a guarantor for the drawee was set forth in article 43(2), under which the guarantor undertook to pay the bill at maturity. The right that a guarantor who paid the bill would have against the drawee would be governed by rules of national law outside the Convention.

49. A proposal to eliminate from the last sentence of paragraph (1) the possibility that a person who was already a party and was liable on the instrument could give a guarantee was not adopted.

50. The Commission therefore retained paragraph (1) without change.

Paragraph (2)

51. A proposal was made to amend paragraph (2) so as to permit a guarantee to be given on a document separate from the instrument. In support of the proposal it was stated that such guarantees were sometimes given in some countries for various commercial purposes, and the Convention ought to take account of that practice. It was noted that within those countries practices differed in various respects. For example, in some countries a kind of secret type of guarantee was used which, for the sake of not impairing

the creditworthiness of the person guaranteed, was not disclosed to remote parties or holders. In other countries, a reference to the separate guarantee would be made on the instrument and, thus, subsequent holders of the instrument might have rights under the guarantee.

52. The Commission, when discussing the proposal, agreed that a guarantee could be given on a separate document even if the Convention did not expressly permit it; such a guarantee would be outside the Convention, and would be governed by national rules of contract or surety law. As regards a guarantee governed by the Convention, the prevailing view was not to allow the giving of such a guarantee on a separate document. It was stated in support that the Convention would otherwise have to deal with a number of substantive issues and questions in relation to such guarantee. That was because many countries did not have legal rules dealing with such guarantees, and commercial interests in those countries who were not familiar with them would otherwise not know their legal effects and consequences. Unless the Convention clarified those matters the circulation of instruments subject to such guarantees would be impaired. Since guarantees on separate documents were not frequently used in international trade, an effort should not be made at the current stage to formulate the amendments and additions to the draft Convention that would be required for the Convention to cover separate guarantees.

53. After deliberation, the Commission decided to retain paragraph (2) without change.

Paragraph (3)

54. The Commission discussed paragraph (3) in connection with its consideration of article 43 (see below, paragraph 68).

Paragraph (4)

55. The Commission discussed paragraph (4) in connection with its consideration of article 37 and article 43 (see above, paragraphs 30 and 31, and below, paragraph 68).

Paragraph (5)

56. A proposal was made to amend paragraph (5) so as to provide that, in the absence of an indication for whom the guarantee was given or the absence of such words as "payment guaranteed" to the signature of the guarantor, the guarantee was presumed to have been given for the drawer, rather than (as currently provided in paragraph (5)) for the drawee. It was further proposed that paragraph (5) should make it clear whether the presumption stated therein was rebuttable or irrebuttable.

57. The prevailing view was that paragraph (5) in its current form corresponded with commercial practice and to the expectations of the parties and that it should be retained without change. Moreover, it was the

understanding of the Commission that the paragraph did not set forth a presumption, but rather a rule that was not subject to contrary proof.

Paragraph (6)

58. The Commission retained paragraph (6) without change.

Article 43

59. The discussion revealed that article 43 in its current form gave rise to ambiguities with respect to the liability of the guarantor and the defences available to him. Those ambiguities arose due to fundamental differences in the two major approaches to those matters in different legal systems. In some legal systems, a guarantor was liable only to the same extent as the person for whom he had become a guarantor and could raise as a defence against his liability on the instrument not only defences that were personal to him, but also any of the defences that the party for whom he had become guarantor could invoke. In other legal systems, including those that followed the Geneva Uniform Law, the liability of the guarantor, i.e. the giver of an *aval*, was independent of that of the person for whom he had become a guarantor; the guarantor could invoke only defences personal to him, and only very few of the defences available to the person for whom he had become a guarantor.

60. Since the text of article 43 had been taken from article 32 of the Geneva Uniform Law, the discussion revealed that it had been understood by participants from States whose domestic law incorporated or was based on the Geneva Uniform Law to provide for an *aval*. However, many participants from States that did not incorporate the Geneva Uniform Law understood the article to provide for the first type of guarantee described above.

61. As a result of those ambiguities as to the system of guarantee provided by article 43, it was also suggested that the draft Convention needed rules on many important issues, such as whether the guarantor could invoke personal defences and to what extent suretyship law impinged upon the law of negotiable instruments set forth in the Convention.

62. The Commission was agreed that paragraph (1) should be modified so as to establish clear and appropriate rules on the undertaking of the guarantor. It entrusted the task to an *ad hoc* working party composed of the representatives of Canada, France, Germany, Federal Republic of, Italy, Netherlands, United Kingdom and United States.

63. The *ad hoc* working party submitted to the Commission the following proposed new texts for article 42(3) and (4), article 43 and article 44(2):

"Article 42

"(1) ...

"(2) ...

"(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. For the purposes of this Convention the words 'prior endorsements guaranteed' or words of similar import do not constitute a guarantee.

"(4) A guarantee may be effected by a signature alone on the front of the instrument. A signature alone on the front of the instrument, other than that of a maker, a drawer or the drawee, is a guarantee.

"(5) ...

"(6) ...

"Article 43

"(1) The liability of a guarantor on the instrument is of the same nature as that of the party for whom he has become guarantor.

"(2) If the person for whom he has become guarantor is the drawee, the guarantor undertakes:

"(a) To pay the bill at maturity to the holder;

"(b) Upon dishonour of the bill by non-acceptance to pay it to the holder upon any necessary protest.

"(3) In respect of defences that are personal to himself, a guarantor may set up:

"(a) Against a holder who is not a protected holder only those defences which he may set up under article 25;

"(b) Against a protected holder only those defences which he may set up under paragraph (1) of article 26.

"(4) In respect of defences that may be raised by the person for whom he has become a guarantor:

"(a) A guarantor may set up against a holder who is not a protected holder only those defences which the person for whom he has become a guarantor may set up against such holder under article 25;

"(b) A guarantor who expresses his guarantee by the words 'guaranteed', 'payment guaranteed' or 'collection guaranteed', or words of similar import, may set up against a protected holder only those defences which the person for whom he has become a guarantor may set up against a protected holder under paragraph (1) of article 26;

"(c) A guarantor who expresses his guarantee by the words '*aval*' or 'good as *aval*' may set up against a protected holder only:

(i) The defence, under subparagraph (b) of paragraph (1) of article 26, that the protected holder obtained the signature on the instrument of the person for whom he has become a guarantor by a fraudulent act;

(ii) The defence, under articles 49 or 53, that the instrument was not presented for acceptance or for payment;

- (iii) The defence, under article 59, that the instrument was not duly protested for non-acceptance or for non-payment;
- (iv) The defence, under article 80, that a right of action may no longer be exercised against the person for whom he has become guarantor.

“(d) A guarantor who is not a bank or other financial institution and who expresses his guarantee by a signature alone may set up against a protected holder only the defences referred to in subparagraph (b) of this paragraph;

“(e) A guarantor which is a bank or other financial institution and which expresses its guarantee by a signature alone may set up against a protected holder only the defences referred to in subparagraph (c) of this paragraph.

“Article 44

“(1) ...

“(2) The guarantor who pays the instrument may recover the amount paid from the party for whom he has become guarantor and from the parties who are liable on it to that party.”

64. According to the proponents of the proposal, it had not proved possible to merge the two approaches described in paragraph 59, above, into a unitary system. Therefore, the approach taken in the proposal, as reflected in the proposed article 43(3) and (4), was to make both approaches available under the draft Convention. If the guarantor expressed his guarantee by the words “guarantee”, “payment guaranteed”, “collection guaranteed” or words of similar import, he would be liable only to the same extent as the person for whom he became a guarantor and could invoke against a protected holder the personal defences mentioned in article 26(1) as well as the defences mentioned in paragraph (4)(b) available to the person for whom he became a guarantor. He could not raise defences other than those specifically mentioned, such as suretyship defences under national law. If the guarantor expressed his guarantee using the words “aval” or “good as aval”, he would be able to invoke against a protected holder only the personal defences mentioned in article 26(1) and the limited defences mentioned in paragraph (4)(c) available to the person for whom he became a guarantor. Both types of guarantor could invoke against a holder who was not a protected holder the defences mentioned in paragraphs (3)(a) and (4)(a).

65. Proposed article 43(4)(d) and (e) dealt with the type of guarantee given by the signature alone of the guarantor. It provided that a guarantee given by signature alone by a bank or other financial institution would have the same legal consequences as if the word “aval” had been used; a guarantee given by signature alone by someone other than a bank or other financial institution would have the same legal consequences as if the word “guarantee” had been used.

66. In support of that distinction it was pointed out that in many States that followed the Geneva system banks frequently gave their guarantee by signature alone and they would not be surprised to find they had given the stronger *aval* form of guarantee. Banks and other financial institutions in other States could easily be educated to the distinction between the two types of guarantee and how to undertake either one of them. However, guarantors who were not banks or other financial institutions could be expected to give guarantees less often and should not be led to undertake the strong *aval* unless they clearly intended to do so by use of appropriate words.

67. With respect to other elements of proposed article 43, the proponents pointed out that the purpose of paragraph (1) was to provide that the liability of the guarantor was primary if the liability of the party for whom he became guarantor was primary, and secondary if the liability of that party was secondary. Paragraph (2) was a reformulation of the current version of article 43(2), clarifying in subparagraph (b) that the liability of the guarantor of the drawee was accelerated upon non-acceptance of the bill.

68. With respect to other features of the proposal, the proponents stated that language had been added to the current version of article 42(3) to clarify that words such as “prior endorsements guaranteed” would not constitute a guarantee under the Convention. It was noted that in the commercial practice of some countries those words were used to create a guarantee only of the validity of the signatures but not of the creditworthiness of the prior endorser. Paragraph (4) of article 42 was a reformulation of that paragraph in accordance with the decision of the Commission (see above, paragraphs 30 and 31). Article 44(2) was a clarification of the existing text of that provision.

69. Some supporters of the proposal stated that, while it was complex and therefore not an ideal solution, it was the only satisfactory way in which the liability of the guarantor could be dealt with in the Convention, given the differences in the two major approaches to the matter in different legal systems. It was not possible to merge those approaches into a unitary system, and to adopt only one or the other of those approaches would be confusing and unacceptable to those banks and traders to whom the adopted approach was unfamiliar. The proposal would enable guarantors to continue to express their guarantees in customary ways and thereby subject themselves to liability regimes that were familiar to them. The proposed system would therefore be workable and acceptable in all areas of the world. An additional point of view was expressed that the system proposed by the draft of article 43 had advantages in that it would allow the parties to choose between two different kinds of guarantee: one a guarantee of creditworthiness only, the other a guarantee of payment. Such a choice would assist the parties to allocate risks more precisely in their transactions.

70. In opposition, it was stated that the proposal was excessively complex and confusing, and did not provide

the certainty that commercial interests needed with respect to the extent of the liability of a guarantor. It was preferable for the Convention to provide only a single type of guarantee, whether it be based upon the approach in the Geneva Uniform Law or upon the other major approach. In that respect some preference was expressed for the approach in the Geneva Uniform Law, as it was already familiar in a number of countries.

71. The prevailing view was that the proposal was generally acceptable. However, various suggestions were made for amending the proposal. With respect to article 43(2)(b), the Commission decided to insert, after the words "by non-acceptance", the words "other than a bill payable on demand", in the light of the decision of the Commission that the non-acceptance of a bill payable on demand did not give rise to a right of recourse by the holder (see below, paragraph 210). In connection with a suggestion to delete the reference to protest in article 43(2)(b), the Commission decided to retain the reference since, in connection with the accelerated liability of the guarantor of the drawee resulting from dishonour by non-acceptance, it was useful to require a protest in order to prove that the bill had been dishonoured by non-acceptance. (See also decision taken in connection with article 68, below, paragraph 284).

72. A suggestion that proposed article 43(4) should be amended to clarify that it did not apply to the guarantor of a drawee was found to be unnecessary, since it was already clear from the text of the proposed article, in particular by virtue of the references to articles 25 and 26, which dealt only with defences available to a party. A suggestion to delete subparagraphs (d) and (e) from article 43(4) as being too confusing was not adopted. A further suggestion with respect to those subparagraphs was to specify with greater precision what was intended by the term "financial institution". It was stated, however, that any ambiguity concerning the meaning of that term could be resolved by interpretation, and that in any case the problem was not of practical importance since the question of whether or not a particular guarantor that had given its guarantee by signature alone was a financial institution would arise in only a few cases. Accordingly, the suggestion was not adopted.

73. The Commission decided to clarify in article 44(2) that the guarantor could recover interest, since without an express reference to interest courts in some legal systems might interpret the provision as entitling the guarantor to recover only the amount paid by him.

74. It was noted that there were linguistic difficulties in the manner in which the guarantor and the guarantee that he gives should be referred to. Especially in the Arabic, French and Spanish language versions, the use of the word *aval* to denote types of guarantee and *avaliseur* or *avalista* to denote the guarantor led to confusion as to the rights and obligations involved. The drafting group was requested to find a means to avoid that confusion and to apply it throughout the draft Convention.

Article 44

Paragraph (1)

75. A question was raised concerning the appropriateness of using the word "party" in paragraph (1). It was noted that, according to article 42(1), a guarantee may be given also for a drawee, who was not a signatory of the instrument, and that the word "party", which according to article 4(8) covered only persons who had signed the instrument, did not cover a drawee.

76. It was generally understood in the Commission that paragraph (1) dealt only with the discharge of liability on the instrument. Since the drawee was not liable on the instrument until he signed it, paragraph (1) did not purport to discharge him of that liability and the use of the word "party" was, therefore, appropriate. The Commission decided to retain paragraph (1) unchanged.

Paragraph (2)

77. Another question was whether the rights on the instrument acquired by the guarantor in accordance with paragraph (2) were subject to the condition that the payment by the guarantor was made in accordance with article 68. The Commission was of the understanding that it followed from article 44(1) that the payment under paragraph (2) had to be made in accordance with article 68 in order for it to confer on the guarantor the rights on the instrument.

78. In connection with its discussion of article 43, the Commission decided to reformulate paragraph (2) of article 44 substantially as proposed by the *ad hoc* working party (see above, paragraphs 63 and 73).

General observation on articles 45 to 67

79. A general observation was made that the drafting of articles 45 to 67 was complicated, in particular in that it contained many cross-references instead of being drafted in a self-contained style. It was suggested that an attempt should be made to simplify the drafting. It was added that a need to simplify the text also existed with respect to several other provisions of the draft Convention.

Article 45

80. A proposal was made to delete paragraph (2)(c) or, if that was not accepted, to supplement the provision by the following words "except where payment of such a bill of exchange is bank-domiciled". In support of deleting paragraph (2)(c), it was stated that there was no practical necessity for the provision, since it was normally in the holder's interest to have the bill accepted. Therefore it should be left to the holder to make arrangements to ensure payment at the agreed place. Moreover, if the drawer considered that the bill should be presented for acceptance in the case dealt with in paragraph (2)(c), he could always establish such a duty in accordance with paragraph (2)(a).

81. The prevailing view, however, was that there existed practical considerations in favour of maintaining paragraph (2)(c). It was stated that the function of the provision was to protect the drawee from being faced with a demand for payment without having been previously notified of the existence of the bill. Such a notification was important to the drawee, for example, when he had to obtain funds or foreign currency in order to effect the payment. Furthermore, such notification might also be useful to a drawee who was under an obligation to accept the bill, but who did not necessarily expect to make the payment elsewhere than at his residence or place of business. Moreover, the holder or the drawer might not take sufficient account of the drawee's interests, and so the holder might not consider it useful to present the bill for acceptance, or the drawer might not provide for an obligatory presentment for acceptance in accordance with paragraph (2)(a).

82. In the context of the discussion on the objectives of paragraph (2)(c), it was noted that even when the residence or place of business of the drawee was not far from the place of payment, such as when they were located in the same country, there might be a need for the bill to be presented for acceptance as provided in paragraph (2)(c). It was also noted that paragraph (2)(c) could not always achieve its objectives, such as when the bill was payable on a fixed date and it was presented very shortly before or on the date of maturity, which was permitted under article 47(d).

83. After consideration, the Commission decided to retain the text of article 45 unchanged.

Article 46

Paragraph (1)

84. It was observed that the right of the drawer to prohibit presentment of a bill for acceptance, as provided in the second sentence of paragraph (1), would not exist in the case where the drawer himself had stipulated on the bill that it must be presented for acceptance, as provided in article 45(2)(a). It was therefore suggested, and the Commission agreed, that the reference to article 45(2) should be limited to subparagraphs (b) and (c).

85. It was suggested that paragraph (1) should not enable the drawer to prohibit presentment for acceptance before the occurrence of a specified event. It was said that the right to present a bill for acceptance was closely related to the attainment of the bill's purpose, and that it was not appropriate to link that right to an event that might not occur. A more limited proposal was to permit the drawer to stipulate on the bill that it must not be presented for acceptance before a specified event only in those circumstances when that event was certain to occur. The Commission considered that there were cases when the drawer had a legitimate interest in precluding presentment of the bill for acceptance before certain events occurred, in particular events related to his contractual relations with the payee or the drawee,

and that, therefore, the drawer should be free to preclude presentment of the bill for acceptance before the occurrence of such events.

Paragraph (2)

86. It was observed that the guarantor of the drawee was not mentioned in paragraph (2) among the persons who were released from liability for dishonour by non-acceptance of a bill that was presented for acceptance despite a prohibition stipulated in accordance with paragraph (1). It was noted that a previous version of article 46(2), contained in A/CN.9/211, treated the situation with a more general wording by providing that the bill was not treated as dishonoured. The Commission adopted the view that the approach of the earlier version of article 46(2) was more appropriate and decided to reinstate that earlier version.

87. Accordingly, the Commission retained article 46, subject to the following modifications: In the second sentence of paragraph (1), the reference to article 45(2) was limited to "subparagraph (b) or (c) of paragraph (2) of article 45", and in paragraph (2) the words "the bill is not thereby dishonoured" were substituted for the words "the drawer, the endorser, and their guarantors are not liable for dishonour by non-acceptance".

Article 47

Subparagraph (b)

88. A view was expressed that subparagraph (b) raised a number of issues in relation to presentment of a bill to two or more drawees that should be addressed in the Convention in order to enable traders to become aware of the consequences of multiple drawees. It was observed that the settlement of those questions would depend on whether the bill was drawn on the drawees jointly or in the alternative.

89. According to another view, subparagraph (b) was sufficient as it stood, in that it addressed primarily the case of multiple drawees in the alternative but included also the case of joint drawees by its reference to a contrary indication in the bill. In either case, the questions that arose in connection with multiple drawees could be answered satisfactorily from reasonable interpretation of the current text of the draft Convention.

90. With a view to clarifying the position of multiple drawees, proposals were made for provisions dealing with bills drawn on alternative drawees and with bills drawn on joint drawees. The proposal dealing with bills drawn on alternative drawees required such a bill to be presented to all drawees in turn, unless the bill had been accepted by one of them. In opposition, it was stated that the proposal did not deal with all of the questions raised by bills drawn on alternative drawees. Moreover, the proposal would require the modification of several existing provisions of the Convention (e.g. with respect to dishonour and protest), since the consequences of a failure of a drawee to accept a bill that had been

accepted by another drawee would in some cases differ from the consequences currently provided in the Convention for failure of a single drawee to accept.

91. The proposal dealing with bills drawn on joint drawees, which also received some support, required such a bill to be presented to all of the drawees unless there had been non-acceptance in respect of one of them in accordance with article 50(1). An objection was raised to the proposal on the ground that acceptance of a bill should have to be refused by all joint drawees before it would be regarded as dishonoured. The proposal was also opposed on the ground that it seemed to require presentment to all drawees even when the holder was satisfied with the acceptance of one of them. Moreover, it was said that the proposal did not deal with other questions that arose in connection with joint drawees.

92. After discussion, the prevailing view was that, since the use of multiple drawees in practice was rare, there was no commercial need to deal with them in the Convention. To do so would require a series of extensive and detailed rules that would unnecessarily complicate the Convention. It was observed that the commercial and legal objectives that might be sought through the use of multiple drawees could also be achieved through other, more commonly used, devices. Accordingly, the Commission decided to delete subparagraph (b) and the other references to multiple drawees currently appearing in articles 9(1)(a) and 51(b).

Subparagraph (c)

93. A proposal was made to delete the reference to applicable law in subparagraph (c), since most other provisions of the draft Convention that presupposed a matter to be dealt with by the applicable law did not contain such an express reference. The prevailing view, however, was that the reference should be retained. Removing it would expand the scope of subparagraph (c) to include situations where the authority of a person to accept a bill derived from a source other than legal rules, such as an agreement between parties. Accordingly, the Commission retained subparagraph (c) unchanged.

Subparagraph (d)

94. A proposal to amend subparagraph (d) so as to require a bill payable on a fixed date to be presented for acceptance before the date of maturity was not adopted.

Subparagraph (e)

95. A proposal to delete from subparagraph (e) the reference to a bill payable on demand was not adopted.

96. Accordingly, the Commission retained article 47, subject to the modifications referred to in paragraph 92, above.

Article 48

97. Several questions were raised as to the drafting and interpretation of article 48, in particular as regards the

relationship between the rules set forth in paragraphs (1) and (3). The Commission entrusted an *ad hoc* working party composed of the representatives of Egypt, France, Italy, Switzerland, Soviet Union, and the United States with the task of reviewing the text of article 48 so as to make it more comprehensive.

98. The text proposed by the *ad hoc* working party, which served as the basis for the discussion of the Commission, was as follows:

“(1) A necessary presentment for acceptance is dispensed with when

“(a) the drawee is dead, or no longer has the power freely to deal with his assets by reason of his insolvency, or is a fictitious person, or is a person not having capacity [under the applicable law] to incur liability on the instrument as an acceptor, or

“(b) the drawee is a corporation, partnership, association or other legal entity which has ceased to exist in law or in fact.

“(2) A necessary presentment for acceptance is dispensed with when

“(a) a bill is drawn payable on a fixed date, and presentment for acceptance cannot be effected on or before the date of maturity due to circumstances which are beyond the control of the holder and which he could neither avoid nor overcome, or

“(b) the bill is drawn payable on demand or at a fixed period after sight, and presentment for acceptance cannot be effected within one year of its date due to circumstances which are beyond the control of the holder, and which he could neither avoid nor overcome.

“(3) Subject to paragraphs (1) and (2) of this article, delay in a necessary presentment for acceptance is excused, but presentment for acceptance is not dispensed with, if

“(a) the bill is drawn with a stipulation that it must be presented for acceptance within a stated time limit, and

“(b) the delay in presentment for acceptance is caused by circumstances beyond the control of the holder and which he could neither avoid nor overcome, and

“(c) the holder makes the presentment for acceptance with reasonable diligence after the cause of the delay ceases to operate.”

Paragraph (1)(a) of the proposed text

99. It was noted that the introductory phrase in paragraph (1) referred only to necessary presentment for acceptance and not to optional presentment. Under one view, it was not appropriate in situations covered by paragraph (1) to accelerate the right of recourse on a bill under which presentment for acceptance was optional. However, the view prevailed that paragraph (1) should cover also the case of optional presentment for acceptance, since in many situations dealt with in the

paragraph it was certain or probable that the holder would not be paid by the primary obligor at the date of maturity of the bill and it was preferable to allow an immediate right of recourse rather than to require the holder to wait until maturity.

100. As regards the instances covered by paragraph (1)(a), various views were expressed. As to the case of the drawee's death, one view was that paragraph (1) should not apply to it; the policy should be to require the holder to present the bill to the heirs or to the persons administering the estate and not to open an immediate right of recourse. Such a policy would be consistent with that adopted in article 51(c), which, in the analogous situation of presentment for payment, required the holder to present the instrument to the heirs of the deceased drawee, acceptor or maker or to the administrator of the estate. Moreover, there existed instances in practice where a bill was accepted by an heir of the drawee or by an administrator of the estate.

101. However, the prevailing view was that paragraph (1) should apply also to the situation where the drawee died. It was said that presentment for payment as dealt with in article 51(c) could not be compared to presentment for acceptance as dealt with in paragraph (1) of article 48. When payment of an instrument was at stake, the holder could establish relatively easily whether the heirs would pay the instrument; it was therefore considered appropriate to require the holder to make the presentment for payment to persons specified in article 51(c). However, the value of an acceptance, as a commitment to pay, depended on the creditworthiness of the acceptor. Therefore, the right to acceptance should be seen as a right against the drawee personally. When the acceptance by the drawee himself was not possible, the holder should not be compelled to present the bill to the heirs or the administrator of the estate.

102. As to the lack of power of the drawee to deal freely with his assets, an observation was made that it had to arise after the issuance of the bill, and the question was raised whether the text expressed that idea with sufficient clarity. It was understood that the question would be taken into account by the drafting group in reviewing the text of the draft Convention.

103. Concerning the case where the drawee was a fictitious person, a view was expressed that the holder should be required to prove that the drawee was fictitious before presentment for acceptance could be dispensed with. The Commission agreed with that view, but considered that the requirement was already sufficiently clear in the proposed text.

104. As to the capacity of a person to accept a bill, a view was expressed that it was for the applicable law, and not any law, to determine whether such capacity existed. Therefore, the words "under the applicable law" in paragraph (1)(a) should be retained. However, the prevailing view was that the words were either unnecessary, since they stated the obvious, or potentially misleading, in that they might be interpreted as attempting to provide a conflicts rule that was

incomplete and incapable of unifying the underlying conflicts issues.

105. Further on the issue of capacity, it was observed that it should be expressed in proposed paragraph (1)(a) that the incapacity of a person to incur liability should be taken into account only when it was established according to law. However, the prevailing view was that it was clear from the context that the capacity of the drawee to accept the bill was not an issue to be determined by the holder and that any mention of the procedure for establishing incapacity was beyond the scope of the Convention. In that context it was mentioned that a person not having capacity to incur liability might have a legal representative who might be capable of accepting the bill and that such a possibility should be taken into account in the provision. The Commission, however, considered that such a possibility should not be addressed in article 48.

Paragraph (1)(b) of the proposed text

106. It was observed that there existed many differences among legal systems as to the moment when a legal entity ceased to exist or was deemed to have ceased to exist. Since more certainty was needed in the application of the provision, and since it would be inappropriate to deal in the Convention with details providing such certainty, a proposal was made to delete subparagraph (b). The Commission, however, was of the view that the provision was necessary since it covered an important instance when presentment for acceptance should be dispensed with.

107. The Commission decided to delete the words "in law or in fact" since they were unnecessary and potentially misleading.

Paragraph (2) of the proposed text

108. A suggestion was made for the deletion from subparagraph (b) of the reference to a bill drawn payable on demand. It was stated that, while such bills might be presented for acceptance, refusal of acceptance alone, without refusal of payment, should not give rise to a right of recourse. The Commission agreed with that suggestion and decided to delete in subparagraph (b) the words "on demand or".

Paragraph (3) of the proposed text

109. It was observed that, while subparagraphs (a) and (b) stated conditions for the consequences provided in the introductory phrase, subparagraph (c) stated a rule of conduct. The Commission therefore agreed to restate the provision of subparagraph (c) as a separate rule. The implementation of that decision was referred to the drafting group.

Article 49

110. It was observed that under the current text of article 49, when a bill that had to be presented for acceptance was not so presented, the guarantor of the drawee remained liable on the bill. That was considered

to be an appropriate result since the guarantor of the drawee was a primary debtor who undertook to pay the bill at maturity. It was suggested that the rule should be made explicit by a special provision in article 49.

111. The opposing view was that it was unjust to enable the holder to make a claim on the bill against the guarantor of the drawee when the holder failed to comply with his obligation under article 45(2) to present the bill for acceptance. The result of the failure to present for acceptance was that the drawee did not become a party on the bill, the consequence of which was that the guarantor of the drawee did not have a right on the bill against him, and the parties secondarily liable were released from their liability.

112. After discussion, the Commission adopted the view that article 49 should make it clear that the failure to present the bill for acceptance did not discharge the guarantor of the drawee of liability thereon.

113. In the context of the discussion, it was observed that a bill drawn payable at a fixed period after sight constituted a somewhat special case under article 49. Under article 47(e) such a bill must be presented for acceptance within one year of its date and, if it was not so presented, the bill did not mature. Since article 43(2) linked the obligation of the guarantor of the drawee to maturity, the guarantor would not be liable on the bill.

114. The Commission decided to retain article 49 and to add a new paragraph (2) along the following lines: "Failure to present a bill for acceptance does not discharge the guarantor of the drawee of liability thereon".

Article 50

Paragraph (1)

115. The Commission retained paragraph (1) unchanged.

Paragraph (2)

116. A proposal was made to amend paragraph (2) to read as follows:

"(2)(a) If a bill is considered to be dishonoured by non-acceptance in accordance with paragraph (1)(a) the holder may exercise an immediate right of recourse against the drawer, the endorser and their guarantors, subject to the provisions of article 55 on protest;

"(b) If a bill is considered to be dishonoured by non-acceptance as a result of the dispense of presentation for acceptance in conformity with article 48, the holder may exercise an immediate right of recourse against the drawer, the endorser and their guarantors;

"(c) If a bill is considered to be dishonoured by non-acceptance in accordance with paragraph (1), the holder may exercise an immediate right against the guarantor of the drawee."

117. The purpose of the proposal was to clarify that when presentment for acceptance was dispensed with pursuant to article 48 the holder could exercise his right of recourse against parties secondarily liable without having to protest dishonour of the bill by non-acceptance, and to delineate clearly that case (subparagraph (b)) from the normal case in which the right of recourse was subject to such protest (subparagraph (a)).

118. The Commission found the proposal to be generally acceptable. However, a number of suggestions were made to improve the drafting of the proposal, which were referred to the drafting group. Subsequently, in connection with its discussion of article 43, the Commission decided to add at the end of subparagraph (c) the words "upon any necessary protest" (see above, paragraph 71). It was felt that, since the liability of the guarantor of the drawee was accelerated upon dishonour by non-acceptance, the dishonour should be proved by protest before the holder could exercise a right against the guarantor. Subject to that change and any other modifications recommended by the drafting group, paragraph (2) was adopted in accordance with the proposal.

Article 51

119. Some support was expressed for deleting subparagraph (c) since it touched upon issues of inheritance law, which should be left outside the scope of the Convention. Another reason for the deletion was that, where the person to whom the bill was to be presented died shortly before the maturity of the instrument, it might be inappropriate to compel the holder to make the presentment to the heirs or the persons entitled to administer the estate since it might take a long time before the heirs or the persons to administer the estate would be determined.

120. However, the prevailing view was that the holder should not be permitted to consider the instrument as dishonoured when the drawee, the acceptor or the maker died and that in such a case the presentment should be made to the persons succeeding the debtor; only when the situation met the requirements set forth in article 52 should the holder be excused from making the presentment.

121. It was noted that the term "heirs" may, at least in some languages, not cover all persons succeeding the deceased debtor in his rights and obligations. Subject to any appropriate reformulation of that term, which was referred to the drafting group, the Commission retained subparagraph (c).

122. There was some support for retaining the time-period for presentment for payment provided in the current text of subparagraph (e). It was stated in support that the date of maturity was an economically important date which was known in advance and should be strictly adhered to, except where it fell on a non-business day, in which case presentment should be made on the first business day that followed. The prevailing view, however, was that the time period should run for more

than one business day after the date of maturity. After discussion, the Commission decided that an instrument not payable on demand should be presented for payment on the date of maturity or on one of the two business days which followed.

123. The Commission retained article 51 subject to the decisions regarding subparagraphs (c) and (e) and to the earlier decision to delete in subparagraph (b) the reference to multiple drawees (see above, paragraph 92).

Article 52

124. The Commission retained article 52 unchanged.

Article 53

125. The Commission retained article 53 unchanged.

Article 54

Paragraph (1)(a)

126. A view was expressed that the words "or when the holder cannot obtain the payment to which he is entitled under this Convention" were superfluous and should be deleted, since that case was covered by the preceding phrase, "when payment is refused upon due presentment". The prevailing view, however, was that the words should be retained. It was noted that in some legal systems "refused" might be interpreted narrowly. Retaining the words would ensure that the paragraph covered cases that did not amount to an express and complete refusal to pay, such as where the presentment for payment was met with an equivocal response, or where the party to whom the instrument was presented offered to pay the sum due only in instalments. Accordingly, the Commission retained paragraph (1)(a) unchanged.

Paragraph (2)

127. A proposal was made to add to paragraph (2) a provision corresponding to that in article 50(2)(b), so as to clarify that the holder would be able to exercise rights against the guarantor of the drawee when the bill had been dishonoured by non-payment. A further proposal was to include in the provision a reference to the acceptor and his guarantor as well.

128. In opposition to those proposals, it was stated that it was necessary to include a reference to the guarantor of the drawee in article 50(2) in order to establish the liability of the guarantor of the drawee for accelerated payment in the event the bill was dishonoured by non-acceptance. However, a reference to the guarantor of the drawee was unnecessary in article 54(2) because, pursuant to article 43(2), he undertook primary liability to pay the bill at maturity. That liability was not conditional upon dishonour by non-payment. For the case of dishonour by non-payment it was sufficient for article 54(2) to establish the rights of the holder against parties who were secondarily liable. Accordingly, the Commission retained article 54(2) unchanged.

129. In connection with that discussion a suggestion was made that, for clarity, a reference should be added in article 43(2) to the liability of the guarantor of the drawee to pay the bill before maturity if it had been dishonoured by non-acceptance. The Commission agreed to that suggestion and referred to the drafting group the formulation of appropriate wording.

130. A view was expressed that it was inappropriate to use in the English version of article 50(2)(b) the word "recourse" to describe the right of the holder against the guarantor of the drawee in the event of dishonour by non-acceptance. In the draft Convention that word was used to describe the rights against a party who was secondarily liable, while the guarantor of the drawee was primarily liable. The Commission agreed that more appropriate wording should be used in the English version and referred the question to the drafting group.

Proposed article 54 bis

131. A proposal was made to add a new article 54 bis, which would regulate the ability of a person to intervene to prohibit payment of an instrument and which would limit that ability to cases of loss, theft, and the holder's bankruptcy or incapacity. Such a limitation was said to strengthen the character of the instrument in that it excluded all other possible reasons for prohibiting payment (e.g. fraud).

132. In opposition it was stated that the proposed new article dealt in summary fashion with a variety of situations that legal systems treated differently and often in other branches of law, including the law of procedure. For example, the proposal would touch upon the rights of those who controlled the assets of incapacitated or bankrupt persons to intervene against the payment of an instrument on which such persons were liable, or against the payment of an instrument to such persons. In addition, the Convention contained various provisions dealing with the rights of parties in relation to lost and stolen instruments, as well as with the defences a party may raise against a holder, including defences based on the fact that a third person had asserted a valid claim to the instrument. The proposal appeared to be in part inconsistent with those provisions and to some extent superfluous.

133. After deliberation, the Commission decided not to adopt the proposal.

Section 3. Recourse

134. A proposal was made for using as the title of section 3 the words "Protest and recourse" so as to reflect more accurately the issues covered by the section. By way of comment on the proposal it was said that, if any rewording was necessary, a new title should take into account that section 3 also dealt with notice of dishonour. The Commission referred the suggestion to the drafting group.

Article 55

135. The Commission retained the text of article 55 unchanged.

Article 56

136. The Commission retained the text of article 56 unchanged.

Article 57

137. It was suggested that the time-period provided in article 57 for protesting an instrument for dishonour was too short. It was noted that the steps the holder would have to take, such as identifying and approaching an authorized person as referred to in article 56(1), might require more time, in particular where the protest had to be made in a foreign country.

138. It was observed in reply that the period for protesting an instrument had traditionally been relatively short so as to protect the interests of the parties who were secondarily liable on the instrument. Where a holder presented an instrument for acceptance or for payment in a distant place, he normally did so through an agent, so that protest would often be a matter of routine. Moreover, where the holder encountered difficulties beyond his control, article 58 provided for an extension of the time-period. It was therefore suggested that, if the period in article 57 were to be extended at all, the extension should be moderate.

139. The Commission decided that protest for dishonour by non-acceptance or by non-payment must be made on the day on which the instrument was dishonoured or on one of the four business days that followed.

Article 58

140. The Commission retained the text of article 58 unchanged.

Article 59

141. The Commission retained the text of article 59 unchanged.

Article 60

142. The view was expressed that the holder's duty to give notice of dishonour under paragraphs (1) and (2) was excessive since it would require the holder to notify parties with whom he would not have dealt and whose addresses he might not know. That duty was further aggravated by the provision of article 61(3), according to which the burden of proving that notice had been duly given rested upon the holder. It was recognized that article 63 mitigated any difficulties the holder might have in meeting his duty to give notice under article 60. However, it was considered to be a source of legal uncertainty to provide for a broad duty to give notice and then to excuse that duty or to dispense with it, as did article 63.

143. Another view was that the solution of article 60 was appropriate having regard to the divergencies among legal systems as regards the duty to give notice of dishonour and the consequences of a failure to comply with that duty. Moreover, in addition to the provisions of article 63, the holder's duty was appropriately balanced by article 61(2), the essence of which was that the notice was duly given if it was appropriately dispatched, whether or not it was received by the addressee.

144. The Commission was agreed that the holder should be required to give notice of dishonour to the drawer and to the endorser immediately preceding the holder. The Commission was also agreed that the holder should have a duty to give notice of dishonour to some other prior parties. Three proposals were made as to which prior parties were to be given notice of dishonour by the holder. Under the first proposal the holder would be required to notify the parties whose addresses were indicated on the bill. Under the second proposal, the holder would be required to notify the parties whose addresses were known or could not be unknown to the holder. Under the third proposal, the holder would be required to notify the parties whose addresses the holder could ascertain on the basis of information contained on the bill.

145. The Commission adopted the third proposal, along the following lines:

"(1) The holder, upon dishonour of a bill by non-acceptance or by non-payment, must give notice of such dishonour to the drawer, the endorser immediately preceding the holder, as well as to all other endorsers and the guarantors whose addresses the holder can ascertain on the basis of information contained on the bill."

146. It was noted that the original text of paragraph (1) covered only the guarantors of the drawer and of the endorsers, whereas the adopted text covered all the guarantors on the bill, including the guarantor of the drawee.

147. The Commission was agreed that paragraph (2) should be aligned with the decision taken with respect to paragraph (1), and adopted the text of paragraph (2) along the following lines:

"(2) The holder, upon dishonour of a note by non-payment, must give notice of such dishonour to the endorser immediately preceding the holder, as well as to all other endorsers and the guarantors whose addresses the holder can ascertain on the basis of information contained on the note."

148. The Commission retained paragraphs (3) and (4) unchanged. (See, however, further decision on article 60 below, paragraphs 273 and 274).

Article 61

149. The Commission retained the text of article 61 unchanged.

Article 62

150. A proposal was made to extend the two-day period of time provided in article 62 for giving notice of dishonour to four days in order to align the time-periods in article 62 with the time-periods adopted in article 57. The proposal was also supported on the grounds that, where notices had to be sent to several addresses, or where difficulties arose in effecting international communication, the two-day period might be too short.

151. Under another view, two days were normally sufficient for giving notice, especially since the duty to give notice was satisfied under article 61(2) by sending the notice by an appropriate means. The interest of parties to be notified of the dishonour of the instrument as soon as possible overrode any considerations favouring the extension of the time-period.

152. The Commission adopted the latter view and retained the text of article 62 unchanged.

Article 63

153. The Commission retained the text of article 63 unchanged.

Article 64

154. The Commission retained the text of article 64 unchanged.

Proposed new provisions dealing with bills drawn in a set and with copies

155. A proposal was made to include in the Convention provisions dealing with bills drawn in a set and with copies. In support of including provisions dealing with bills drawn in a set, it was stated that, in some countries, parties issued bills in two or more identical counterparts for various commercial purposes, for example, to enable a party to present one counterpart to the drawee for acceptance and another counterpart to the bank for discount or negotiation. That practice sometimes occurred in connection with letters of credit. Even though the practice of issuing bills drawn in a set was not universal, it was said to be useful for the Convention to contain rules dealing with the subject since such bills might circulate in countries where they were not currently familiar and whose legal systems did not contain rules dealing with them.

156. In opposition to the proposal, it was stated that in many States the practice of issuing bills drawn in a set did not exist or was obsolete. The inclusion in the Convention of rules dealing with bills drawn in a set might encourage the drawing of such bills, which was not desirable in view of the risks connected with them, such as the possibility that counterparts might be transferred to different persons by fraud or mistake. Moreover, to deal with bills drawn in a set the Convention would have to contain detailed rules

covering various legal aspects of such bills and those rules would have to be compatible with the legal regime established by the Convention. The difficulties in formulating such rules outweighed any usefulness in dealing with bills drawn in a set.

157. In support of including in the Convention provisions dealing with copies of instruments it was stated that copies of instruments were often made in practice for various reasons, and rules regulating the use and status of copies would be useful. In opposition, it was stated that the subject of copies did not require special provisions in the Convention.

158. Supporters of including provisions dealing with bills drawn in a set and with copies proposed provisions dealing with those subjects that were modelled on provisions of the Geneva Uniform Law. The view was expressed, however, that the Geneva Uniform Law could not serve as a basis for provisions in the Convention under consideration since the concepts used in the relevant articles of the Geneva Uniform Law were not compatible with the structure and concepts of the Convention. Moreover, those articles did not address a number of important questions that would have to be dealt with, including whether the holder of a counterpart of a bill drawn in a set could be a protected holder, whether bills drawn in a set could be separated and held by different protected holders, and how acceptances of more than one counterpart should be treated. The Commission therefore agreed to entertain any further proposals that might be submitted for articles dealing with bills drawn in a set and with copies. In the absence of such further proposals, the Commission did not include in the Convention articles dealing with those subjects.

Article 65

159. A proposal was made to amend article 65 to read as follows:

“(1) All persons who have drawn, accepted, made, endorsed or guaranteed an instrument are jointly and severally liable towards the holder.

“(2) 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.

“(3) Any party who has paid the instrument has the same right in respect of parties liable to him.

“(4) Action taken against one of the liable parties does not preclude action against the others, even those subsequent to the one initially proceeded against.”

160. The purpose of the proposal was to clarify the nature of the liability of the parties to an instrument in the draft Convention, and to deal with certain consequences of that liability that were not yet addressed in the draft Convention. Paragraph (1) established that the parties were jointly and severally liable to the holder.

Paragraph (2) was the current text of article 65. Paragraph (3) applied the basic concept of article 65 in respect of the liability of parties to a party who paid the instrument, thus facilitating reimbursement of that party. Paragraph (4) clarified that a party who obtained only partial payment in an action against one party could bring an action against other parties for reimbursement of the sum remaining to be paid, without regard to the order in which they became bound on the instrument.

161. In opposition to the proposed paragraph (1) it was stated that on the one hand it was unnecessary since the basic purpose of the paragraph was already contained in article 65 and on the other hand the Convention should avoid concepts such as "joint and several liability" that had differing juridical consequences in different legal systems. The description of the liability of the parties to the holder as joint and several was an over-generalization since it implied that the parties were in all cases liable to the holder to an equal extent for the full amount of the instrument. Under the draft Convention, the parties to an instrument could be liable to differing extents and for less than the full amount of the instrument. For example, a drawer or an endorser could exclude or limit his liability, and a guarantor could guarantee only part of the amount of the instrument. Accordingly, the Commission did not adopt the proposed paragraph (1).

162. The proposed paragraph (3) was found by the Commission to be useful in clarifying that a party who paid the instrument could exercise his rights on the instrument in respect of the parties liable to him in the same manner as the holder under current article 65, i.e. proposed paragraph (2). A view was expressed that the provision might appropriately appear either in article 65 or in article 67. Paragraph (4) was also found to be a useful clarification even though its principle was already implicit in the current version of article 65.

163. The Commission decided to add paragraphs (3) and (4) to the current version of article 65. It referred the article thus amended to the drafting group for the purpose of ensuring that it was consistent with the system of liability of the parties under the Convention by taking into account the potentially differing degrees to which the parties were liable.

Article 66

164. A proposal to incorporate paragraph (2) into paragraph (1)(b)(ii) was not adopted, since paragraph (2) was referred to not only in paragraph (1)(b)(ii) but also in paragraph (3) and in article 67(b). Moreover, the present structure was easier to understand.

165. The Commission noted that in paragraph (1)(c)(i) the reference to paragraph (3) should be changed to paragraph (4).

166. A proposal was made to reverse the order of paragraphs (3) and (4), and to amend the resulting paragraph (4) to provide that nothing in paragraph (2)

or (3) would prevent a court from awarding damages or compensation for additional loss caused to the holder by reason of payment before maturity or delay in payment. In support of the proposed reference to loss arising out of payment before maturity, the example was given of a holder who borrowed funds to acquire an instrument with a fixed maturity date. The holder could suffer loss if he was required to accept payment prior to maturity, and, because of the discount provided in paragraph (1)(c)(i), the sum received by him was less than the amount he had to repay to his own lender. The proposed addition would ensure that the holder could obtain compensation for that loss. The prevailing view was that matters arising from transactions such as that were outside the scope of the Convention.

167. A view was expressed that the reference in paragraph (4) to a discount rate that was "reasonable in the circumstances" was too vague. Instead, for the case where there was no official discount rate, paragraph (4) should follow the approach in paragraph (2) and refer to the discount rate that would be recoverable in legal proceedings in the jurisdiction where the instrument was payable. In opposition, it was pointed out that in their judgement courts did not normally award discounts as a recoverable item; thus, it would not be appropriate to refer to a rate of discount recoverable in legal proceedings. It was noted that, since the question of the use of a discount rate arose in paragraph (4) only in the context of legal proceedings, the current wording of paragraph (4) would not create any uncertainty in the negotiation of an instrument.

168. Apart from the correction noted in paragraph 165, above, the Commission retained article 66 unchanged. (See, however, later decision on paragraph (1)(c)(i) below, paragraphs 276 to 280).

Article 67

169. It was observed that article 67, by referring to article 66, dealt only with the case where a party paid the holder. Article 67 thereby left outside the scope of its express regulation the right of recovery of other parties who paid a subsequent party in a recourse situation. It was also observed that article 67 did not provide expressly that the reimbursement to a party who paid the instrument was limited to the amount of the payment that had constituted discharge of liability under the Convention.

170. It was, however, also observed that the purpose and scope of article 67, and of the reference to article 66 contained in article 67, was only the specification of details concerning the calculation of the amount recoverable in recourse. It was therefore considered that article 67 not only applied to all recourse situations but also left the issue of the extent of discharge of liability, as a condition for a recourse action, to other articles of the Convention.

171. The Commission adopted the view that article 67 might be interpreted as dealing only with the case where the party who had paid the holder claimed recovery from

a preceding party, and that it should be made clear that the article applied also to other recourse situations. The Commission also adopted the view that it should follow with more clarity from article 67 that a recourse action depended on whether and to what extent the party who had paid the instrument was discharged of his liability. Several proposals were made on how those two views should be implemented.

172. According to one proposal, that should be achieved by adding in article 67 a reference to article 68 so as to make it clear that only payment constituting discharge under article 68 could be a basis for a recourse action. An additional proposal was that article 67 should also make it clear, by reference to article 69 or otherwise, that a party who made a partial payment under the instrument could recover in a recourse action only the amount actually paid. According to another proposal, the reference to article 66 should be deleted, and the opening phrase reformulated to the effect that only a party who paid an instrument and was thereby discharged in whole or in part of his liability on the instrument could recover from the parties liable to him.

173. A further proposal was to clarify that even if a party paid more than he was obliged to pay, the sum recoverable in recourse was only the sum he was obliged to pay. Yet another proposal was to include in article 67 a reference to article 79 so as to avoid any doubt as to the principle that payment of a lost instrument constituted a basis for a recourse action only if made in accordance with article 74.

174. The Commission adopted the view that there was no need to deal in article 67 expressly with the situation where a party paid more than he was obliged to pay, and with recourse actions following payment of a lost instrument.

175. After discussion, the Commission decided that article 67 should read along the following lines:

"A party who pays an instrument and is thereby discharged in whole or in part of his liability on the instrument may recover from the parties liable to him:

"(a) The entire sum which he has paid;

"(b) . . .

"(c) . . ."

176. In connection with the decision taken with respect to article 67, the Commission noted that a similar lack of clarity, as noted in paragraph 171 with respect to article 67, existed in a number of other provisions in the Convention. Such other provisions were embodied, for example, in articles 34(1), 35(1), 36(2), 40(1), 68(3) and 73(2). The Commission decided that the decision to add clarifying words to article 67 should be implemented, *mutatis mutandis*, in all such provisions. The task of formulating the necessary amendments was entrusted to the drafting group.

Article 68

Paragraphs (1) and (2)

177. It was the understanding of the Commission in connection with paragraphs (1) and (2) that the holder was not obligated to accept payment before maturity, but that he could agree to do so.

Paragraph (3)

178. Some support was expressed for paragraph (3) as it currently stood, because it set forth in an appropriate and sufficiently clear manner the cases in which an obligor who made payment would be denied discharge. Moreover, the paragraph was consistent with article 25(4) in that the situations in which payment did not result in discharge were the same as the situations that provided a defence to payment. With respect to the latter point, however, a view was expressed that such consistency was not necessary. Article 25 did not compel an obligor to raise the defences made available to him. Even if he chose not to raise a particular defence and paid the holder, it would not necessarily be inappropriate for him to be discharged by the payment.

179. The reference in paragraph (3) to the assertion by a third person of a "valid claim" was regarded by a large number of delegates and observers to be unsatisfactorily vague and ambiguous. As a substitute for that reference, a proposal was made to provide that the obligor would not be discharged if he paid the holder in contravention of a court order. That proposal received support on the ground that it provided greater certainty than the reference to the assertion of a valid claim. Moreover, to promote the commercial acceptability and circulation of international negotiable instruments, it was more appropriate that the obligor be discharged even if he paid the holder knowing of a claim to the instrument by a third person, unless that person had obtained a court order preventing the payment.

180. The prevailing view, however, was not to adopt that proposal. It was said not to be necessary since a binding court order not to pay the holder would have to be obeyed by the obligor in any event. Moreover, the reference to a court order and its contravention created a number of difficulties. For example, questions were raised as to which court orders were covered by the proposal, e.g. orders of a court at the place of payment or where the obligor had his place of business, orders of any "competent" court, or orders of any court that were binding on the obligor. Other questions related to the fact that orders of a court other than one at the place of payment, particularly interim orders, involved problems concerning recognition and enforcement of the order in the country where payment was to be effected. Further possible difficulties concerned the necessity for and the means of effecting service of the order of a foreign court upon the obligor, and the jurisdiction of a foreign court to render an order affecting the obligor.

181. It was concluded that the draft Convention could not appropriately deal with all those questions and that, therefore, the proposed reference to the contravention of

a court order was unacceptable. That conclusion was opposed on the ground that the purpose of the reference was not to regulate the legal effects of a court order, with the inherent questions of competence and recognition, but to take the existence of a court order as a mere fact that provided greater certainty than the assertion of a valid claim by a third person in that it established the assessment of the claim by a disinterested and independent body.

182. After deliberation, the Commission decided to delete the reference to the assertion of a valid claim by a third person and not to replace it by the proposed reference to the contravention of a court order. In response to a comment that deleting the reference to a valid claim in article 68(3) would necessitate the deletion of that term in other articles, such as articles 25, 25 *bis* and 26, it was stated that those articles served purposes different from article 68 and the use of the term in them remained satisfactory.

183. Views were expressed that the reference to the acquisition of the instrument by theft or forgery in paragraph (3) was too narrow, and that the reference should include, or be replaced by, a reference to acquisition by fraud or by fraudulent means. It was stated that such a reference would cover theft, forgery and similar acts generally regarded as illegal. It could be applied in an international context more readily than could theft or forgery, the meaning of which depended upon definitions in national criminal law. The prevailing view, however, was to refer only to theft and forgery, since the concept of fraud was too uncertain to be applied in a commercial context by persons who had to decide whether or not to pay an instrument.

184. The Commission decided not to adopt a proposal to provide in paragraph (3) that the obligor would not be discharged if he paid an instrument endorsed to bearer knowing that it belonged to a third person and had been found by the holder. The Commission also did not adopt a proposal to provide that a party paying an instrument would be denied discharge not only if he knew that the holder had acquired the instrument by theft or forged a signature, but also if he knew that any party prior to the holder had done so.

185. In the light of the foregoing discussion and decisions, the Commission amended paragraph (3) to read along the lines set forth below. It was the understanding of the Commission that, except in the cases referred to in the paragraph, payment to the holder of the amount due would discharge the obligor. The paragraph as amended by the Commission read as follows:

“(3) A party is not discharged of liability if he pays a holder who is not a protected holder and knows at the time of payment that the holder acquired the instrument by theft or forged the signature of the payee or an endorsee, or participated in such theft or forgery.”

(See, however, later decision reported below, paragraph 284).

Paragraph (4)

186. It was suggested that paragraph (4)(b) should be amended so as to enable the payment of an instalment to be acknowledged on a slip, or *allonge*, affixed to the instrument. The Commission agreed with the suggestion and referred its implementation to the drafting group.

187. With respect to subparagraph (b), a proposal was made to replace the words “other than payment of the last instalment” by the words “when the total amount is not paid off as a result of such payment”. The purpose of the proposal was to make it clear that it would not be possible for the payor to make a payment purporting to settle the last instalment while a previous instalment was still outstanding. Another proposal was to deal in subparagraphs (d) and (e) with partial payment. The Commission did not adopt those proposals.

188. It was observed that the current wording of paragraph (4)(e) might give rise to a misinterpretation that, if the payor paid a protected holder but did not obtain the instrument from him, the protected holder would be able to claim payment a second time. In order to avoid such a misinterpretation, the Commission decided to add, after the words “against a protected holder”, the words “to whom the instrument has been subsequently transferred”.

Article 69

189. A question was raised as to whether article 68(3) applied also in the case of a partial payment, although article 69 did not refer to article 68(3). The Commission was agreed that article 68(3) applied in that case and that there was no need for an express reference in article 69.

190. A proposal was made that the policy embodied in article 69 should be reversed in that a person claiming payment, i.e. a holder or a party who had paid the instrument and was claiming payment in recourse from a previous party, should be obliged to accept partial payment. In support of the proposal it was stated that parties liable in recourse to the person claiming payment had an interest in being discharged to the maximum extent possible. A refusal of the person claiming payment to take partial payment deprived those parties from being discharged up to the amount of the partial payment offered.

191. The proposal was opposed on the following grounds. Firstly, an obligation to take partial payment would constitute a dilution of the principle that the holder had a right to full payment in accordance with the engagement given by the parties. Secondly, the proposed solution might encourage a payor to offer only a part of the sum due. Thirdly, if a party who paid the instrument also had to accept partial payment from a party liable to him, such partial payments could occur several times in the chain of recourse claims. The resulting complications, cost and the risks involved in such recourse claims would outweigh the benefits gained by partial discharge of parties on the instrument.

192. After discussion, the Commission decided to retain the text of article 69 unchanged.

Proposed article 69 bis

193. After the discussion on article 69, a proposal was made to add a new provision after article 69 dealing with the situation where the holder failed to approach the obligor at maturity to collect the amount due. In such a situation the obligor might have an interest in paying the instrument, for example, in order to avoid further accrual of interest. The Commission was of the view that any right to and procedures for making such payment without the co-operation of the holder (e.g. by deposit with a court) should not be dealt with in the Convention.

Article 70

194. The Commission retained the text of article 70 unchanged.

Article 71

195. The Commission retained the text of article 71 unchanged.

Article 72

196. With respect to paragraph (1), a proposal was made to insert after the words "which it is bound to apply" the words "or which it may take into consideration". In support of that proposal it was stated that under certain conventions relating to the conflict of laws a Contracting State might take into consideration certain mandatory regulations of another State, while not being bound to apply them. The prevailing view was that, in the absence of examples of international agreements that permitted a State to take into account foreign exchange control and currency regulations, which was the subject of article 72(1), the proposal should not be adopted. Inclusion of the proposed wording would make it difficult for traders to plan their transactions with certainty and thus would hinder the use and acceptability of the instruments provided under the Convention. The Commission therefore retained article 72 unchanged.

Article 73

197. A proposal was made to delete the entire portion of paragraph (2) that followed the words "discharges all parties of their liability to the same extent". In support of the proposal it was stated that other parties should not remain liable on the instrument when the drawee acted improperly in paying the holder. The prevailing view, however, was that it was not justifiable for the other parties to be discharged and to deprive the rightful owner of the instrument of his rights against them. In support of that view it was pointed out that the rule of exception in article 73 was necessary in the event of a theft of a bearer instrument, although in a case of forgery an appropriate solution would be obtained from article 23.

198. The Commission agreed that the reference in paragraph (2) to the assertion by a third person of a valid claim should be deleted in order to be consistent with the decision taken with respect to article 68(3) (see above, paragraphs 179 to 182). Subject to that amendment, article 73 was retained. (See, however, later decision on article 73 and on the heading of section 2, below, paragraphs 286 to 288).

Article 74

199. A view was expressed that the system established by paragraph (2)(a) for claiming payment of a lost instrument was unsatisfactory. It was stated, in particular, that litigation would frequently ensue over facts asserted by the claimant to support his claim, such as those referred to in paragraph (2)(a)(ii) and (iii). Moreover, paragraph (2)(a)(i) enabled the claimant to present a copy of the instrument, but the Convention did not contain rules regulating such copies. It was suggested that, instead of such a system, the Convention should provide for the claimant to obtain a duplicate of the instrument from the drawer or the maker and then to reconstitute the instrument. The prevailing view was that the approach followed in paragraph (2)(a) was more satisfactory in connection with international instruments. It was pointed out, for example, that under the system suggested above the claimant's task of reconstituting the instrument by obtaining the signatures of the acceptor and all other parties would be difficult, especially since those parties might be located in different countries.

200. A proposal was made to include in paragraph (2)(c) a time-limit for an agreement to be reached as to the nature and terms of the security to be given by the person claiming payment of a lost instrument. The prevailing view was that it was not possible to set forth in the paragraph a time-limit that would be appropriate in all circumstances. Moreover, it was not necessary to specify a time-limit, since a court would interpret subparagraph (c) as enabling it to order the party from whom payment was claimed to deposit the amount of the lost instrument if an agreement had not been reached within a period of time that was reasonable in the circumstances. Accordingly, the Commission did not adopt the proposal.

201. A further proposal was made to specify that the court referred to in paragraph (2)(c) and (d) was a court in the country where payment was to be made. The prevailing view was not to specify the court of a particular country, since the rules of private international law might in some cases point to a court in a country other than that where payment was to be made.

Article 75

202. A proposal was made to change paragraph (2) so as to require the notice referred to in paragraph (1) to be given on the day the instrument was presented for payment or on one of the four business days that followed. That would be consistent with the time-periods adopted by the Commission for protest for dishonour by

non-acceptance or non-payment (article 57) (see above, paragraph 139). The prevailing view, however, was to retain the period of two business days currently provided in paragraph (2), since it was essential for a person to whom a lost instrument had been paid to be notified as soon as possible of the subsequent presentment of the instrument for payment. It was noted that a party who was unable to comply with that time-period could rely on paragraph (4) or (5). Accordingly, the Commission retained article 75 without change.

Article 76

203. A proposal was made to include in paragraph (1)(b) a reference to article 74(2)(d). The purpose of the proposal was to clarify that the ability of a party under paragraph (1)(b) to reclaim an amount deposited in court referred to an amount deposited pursuant to article 74(2)(d), and not to an amount deposited for other reasons. The prevailing view was that the current text was sufficiently clear, particularly in view of the reference to article 74 in the opening clause of paragraph (1). Accordingly, the Commission retained article 76 unchanged.

Article 77

204. It was observed that article 77 dealt only with protest for dishonour by non-payment, and did not mention dishonour by non-acceptance. The question was raised whether the article should also deal with the case where the holder who lost the instrument wanted to obtain acceptance.

205. The Commission adopted the view that article 77 properly covered only the case of dishonour by non-payment. That was in harmony with article 74, which gave rights under the lost instrument only against parties and not against the drawee, who, by definition, had not signed the bill; since he was not liable under the bill, payment by him would be at his own risk.

206. Accordingly, the Commission retained the text of the article unchanged.

Article 78

207. The Commission retained the text of article 78 unchanged.

Article 79

208. Some support was expressed for an amendment of paragraph (2) that would enable the payor to establish the fact that he had paid a lost instrument by a means other than the receipted statement referred to in article 78. It was observed that the receipted statement might be lost in circumstances beyond the control of the payor, and that in such a case the loss of the right to recourse was too harsh a consequence.

209. However, the prevailing view was that the Convention should not attempt to cover such extreme

instances of multiple loss. Accordingly, the Commission decided to retain the text of the article unchanged.

Article 80

Paragraph (1)

210. In connection with paragraph (1), the view was expressed that presentment for acceptance of a bill drawn payable on demand served no purpose, and did not correspond with practice. Normally, presentment of such bills should be for payment, although mention was also made of a practice whereby they were presented for the visa of the drawee. According to that view, the Convention should not refer to the acceptance of demand bills, and subparagraph (c) of paragraph (1) should be deleted. According to other observations, however, bills payable on demand were sometimes presented for acceptance in order to serve various commercial purposes. In the light of those observations, the prevailing view was that the Convention should take that practice into account, and that the rule set forth in subparagraph (c) should be retained. It was also agreed, however, that, if the drawee of a bill payable on demand refused to accept the bill, the bill was not thereby dishonoured by non-acceptance and the holder should not be entitled to exercise a right of recourse against parties secondarily liable. The Commission requested the drafting group to reflect that point in article 50.

211. The Commission adopted a proposal for the inclusion in subparagraph (c) of a reference to the guarantor of the acceptor.

212. It was generally agreed that paragraph (1) should contain rules relating to the commencement of the limitation period for actions against the guarantor of the drawee. With respect to bills payable at a definite time, a view was expressed that, irrespective of whether or not the bill was dishonoured by non-acceptance, the limitation period should run from the date of maturity of the bill, since such a rule was easy to apply. The prevailing view, however, was that the limitation period should run from the date of maturity or, if the bill was dishonoured by non-acceptance, from the date of dishonour. That rule would take into account the fact that the guarantor of the drawee became immediately liable on the bill when the drawee dishonoured it by non-acceptance. In addition, the rule could be applied in the case of a bill drawn payable at a fixed time after sight for which, in the absence of acceptance, no maturity date could be established. In the case of a bill drawn payable on demand, it was noted that the obligation of the guarantor of the drawee to pay did not depend upon dishonour by non-acceptance by the drawee. Therefore, it was agreed that the limitation period in respect of the guarantor of the drawee of a bill drawn payable on demand should run from the date on which the guarantor signed the bill or, if no such date was shown, from the date of the bill.

213. Accordingly, the Commission decided to insert into paragraph (1) two new subparagraphs along the following lines:

“(b bis) Against the guarantor of the drawee of a bill payable at a definite time, from the date of maturity or, if the bill is dishonoured by non-acceptance, from the date of dishonour;

“(c bis) Against the guarantor of the drawee of a bill payable on demand, from the date on which he signed or, if no such date is shown, from the date of the bill;”

(See further decision on the first new subparagraph below, paragraph 291).

Paragraph (2)

214. A question was raised concerning paragraph (2) based upon the following example. A fixed-term bill issued by the drawer to the payee is accepted by the drawee upon presentment by the payee. The payee transfers the bill to A who transfers it to B. Upon presentment for payment the bill is dishonoured by the acceptor. B, upon protesting the dishonour, exercises his right of recourse against A three and one-half years after the date of protest for dishonour. A pays B, and exercises his right of recourse against the payee nine months after the date when A paid the bill, that is, more than four years after the date of protest. The payee pays A. The question was whether the payee could then bring an action against the drawer.

215. It was observed that according to a literal reading of paragraph (2) the payee would be time-barred from bringing his action against the drawer since he did not pay the instrument within one year before the expiration of the four-year period, running from the date of protest for non-payment, provided in paragraph (1)(d). In support of that approach it was observed that, under the current wording of paragraph (2), an instrument would have a maximum period of viability of five years, that is the four-year period provided in paragraph (1) plus one additional year provided by paragraph (2) in respect of actions by parties who paid immediately before the expiration of the four-year period. It was desirable for a negotiable instrument to have a finite period of validity beyond which the instrument would be extinguished, and the maximum five-year period currently provided under article 80 satisfied commercial needs.

216. In opposition, it was stated that the current wording of paragraph (2) was unfair to parties who were not called upon to pay until after the four-year period had expired and who would therefore lose their right of action against other parties. Accordingly, a proposal was made to provide that a party making payment at any time would have one year within which to exercise his right of action against other parties. In opposition to that proposal, it was stated that under the proposal a party who paid earlier than three years after the commencement of the four-year limitation period provided in paragraph (1), and for whom more than one year of the four-year limitation period would remain, would be limited to only one year. Accordingly, it was proposed to provide that a party who paid an instrument later than one year before the expiration of the limitation period referred to in paragraph (1) might exercise his right of action within one year from the date on which he

paid, even if he paid after the expiration of the four-year period in paragraph (1). Supporters of the present wording of paragraph (2) objected to both of those proposals on the ground that, if there was a series of endorsers each of whom had a one-year period from the time he paid, a party on the instrument would remain subject to an action for an indefinite period of time.

217. After discussion, the Commission decided to provide that a party making payment at any time was to have one year in which to exercise his right of action against other parties. The drafting group was requested to formulate suitable wording to reflect that decision.

B. Consideration of draft final clauses prepared by secretariat (article 81 to 88)

Article 81

218. The Commission retained article 81 unchanged.

Article 82

219. The secretariat had prepared article 82, and placed it within square brackets, in the light of a view expressed at the nineteenth session of the Commission that one of the final clauses of the draft Convention might deal with the difficulties in becoming a party to the Convention under consideration (hereinafter referred to as the “UNCITRAL Convention”) said to be faced by States that were parties to the Convention providing for the Geneva Uniform Law and to the 1930 Geneva Convention for the Settlement of Certain Conflicts of Laws in connection with Bills of Exchange and Promissory Notes (hereinafter referred to as the Geneva Conflicts Convention). It was pointed out that that situation also occurred with respect to States parties to the Inter-American Convention on Conflict of Laws Concerning Bills of Exchange, Promissory Notes and Invoices (Panama, 1975) (hereinafter referred to as the Panama Conflicts Convention). The difficulties were said to arise from a potential conflict between those Conventions and the UNCITRAL Convention. The Geneva and Panama Conflicts Conventions provided rules for determining the law applicable to particular issues arising in connection with bills of exchange and promissory notes. Under those rules the applicable law was, depending upon the issue to be resolved, the law of a particular place relevant to the instrument (e.g., the place where the instrument was issued or the place where it was payable). On the other hand, the UNCITRAL Convention provided in article 2 that the rules of the Convention were to apply even if none of the places indicated on the instrument was situated in a Contracting State. Therefore, if an issue arose concerning an instrument drawn or made in accordance with article 1 of the UNCITRAL Convention, the Geneva or Panama Conflicts Convention might require the application of the law of a State that was not a party to the UNCITRAL Convention (e.g. a State that had adopted the Geneva Uniform Law), and whose law did not allow parties to exclude their instruments from its application. Under the UNCITRAL Convention, however, the rules of the Convention would govern the issue.

220. It was generally agreed that article 82 did not satisfactorily or appropriately deal with the problem of the potential conflict between the Geneva and Panama Conventions and the UNCITRAL Convention and should not be retained. It was stated that States parties to those Conventions could not, consistently with their obligations under them, become party to the UNCITRAL Convention under consideration if it contained a provision such as article 82, under which the UNCITRAL Convention would prevail over those Conventions. Moreover, a view was expressed that the UNCITRAL Convention should provide a parallel system to the Geneva and Panama Conventions, available for optional use by parties to an instrument, rather than purport to replace them. States that were parties to the Geneva and Panama Conventions should not be prevented from applying them in their mutual relations. According to a further view, to provide, as did article 82, that the UNCITRAL Convention prevailed over future international agreements governing negotiable instruments was extravagant.

221. A view was expressed that article 30(4) of the Vienna Convention on the Law of Treaties could be relied on to resolve any conflict between the Geneva and Panama Conventions and the UNCITRAL Convention. That solution, however, was generally regarded as unsatisfactory in the case of private law treaties governing rights under international negotiable instruments. Such instruments often involved multiple parties from different countries, and application of the Vienna Convention would result in various relationships between commercial parties being governed by different systems of law. Moreover, it would pose difficulties for traders and judges who had to determine which system of law governed a particular relationship.

222. Various possible means of dealing with the potential conflict between the Geneva and Panama Conventions and the UNCITRAL Convention were mentioned. Denunciation of the Geneva Conventions by States parties to those Conventions upon adhering to the UNCITRAL Convention was said not to be a realistic solution. To amend the UNCITRAL Convention so as to avoid a conflict with those Conventions was not regarded as a satisfactory solution, since that approach would require fundamental changes to the UNCITRAL Convention. It was generally agreed that the problem could be solved only by an agreement among the parties to the Geneva and Panama Conventions that those Conventions were not to apply to instruments drawn or made in accordance with the UNCITRAL Convention.

Article 83

223. The Commission retained article 83 unchanged.

Article 84

224. The Commission retained article 84 unchanged.

Article 85

225. A view was expressed that a State should not be prohibited from making reservations to the Convention.

In particular, a State should be allowed to declare that it would apply the Convention only if the place where the instrument was drawn or made and the place where it was to be paid were both situated in Contracting States. Greater support, however, was expressed for the view that reservations to the Convention should not be permitted. Permitting reservations would reduce the degree of unification of law governing international negotiable instruments, and would require traders to make themselves aware of the various reservations made by States parties to the Convention, making the Convention difficult to apply. However, during the subsequent consideration of article 2 in its final review of the draft Convention the Commission decided to include the reservation described above (see below, paragraphs 236 to 238 and 293 to 295).

Article 86

226. Different views were expressed as to the number of ratifications, acceptances, approvals or accessions that should be required for the Convention to enter into force. According to one view, the required number should be small (the figures five, seven and ten were mentioned) so as not to unduly delay the entry into force of the Convention. If even a small number of States wanted the Convention to apply between them, there was no reason why they should be denied that opportunity. Moreover, once the Convention entered into force and the instruments governed by it circulated internationally, additional States would be encouraged to become parties.

227. According to another view, however, the Convention should not enter into force until a relatively large number of States had accepted to be bound (figures in excess of 10, up to 20, were mentioned). Requiring a large number would impart greater international stature to the Convention. Moreover, since, in accordance with article 2, the Convention would apply even in respect of instruments issued and payable in States that were not parties, the Convention should not enter into force until a significant number of States had accepted to be bound. In response to a suggestion that the seven acceptances to be bound required in the Geneva Convention providing for the Uniform Law should be regarded as a precedent for the Convention under consideration, it was observed that there currently existed many more States than in 1930. A further view was expressed that the number of acceptances to be bound required for the Convention to enter into force should be decided by the General Assembly.

228. After deliberation, the Commission decided that the number of required ratifications, acceptances, approvals or accessions should be ten, and retained article 86 incorporating that figure.

Article 87

229. As a result of a question concerning the meaning of article 87, the Commission reached the understanding that according to that article the Convention would not apply to instruments issued before the Convention

entered into force in accordance with article 86, but that a State becoming a party to the Convention after its entry into force would have to apply the Convention to instruments issued between the time of the entry into force of the Convention and the time when that State became a party. Suggestions were made to delete article 87, as the rule expressed in it was self-evident. During the subsequent consideration of article 87 in its final review of the draft Convention, the Commission decided to delete article 87 (see below, paragraph 298).

Article 88

230. Some support was expressed for retaining the text of paragraph (3), which had been placed within square brackets, since it enabled a State denouncing the Convention to declare that it would nevertheless apply the Convention to instruments drawn or made before the denunciation took effect. In the absence of such a declaration the Convention should cease to apply in that State when the denunciation took effect even as to instruments issued prior to that time.

231. The prevailing view, however, was that, in order to give effect to the intentions of the parties to an instrument, a State should be obligated in all cases to apply the Convention to an instrument drawn or made prior to the State's denunciation of the Convention; that result should not depend upon a declaration of the State. In accordance with that view the Commission decided that article 88(3) should read along the following lines:

“(3) The Convention remains applicable to instruments drawn or made before the date at which the denunciation takes effect.”

C. Consideration of articles of draft Convention submitted by drafting group (articles 1 to 88)

232. The text of the draft Convention submitted by the drafting group incorporated into the text as approved by the Commission at its nineteenth session (A/41/17, annex I) the decisions taken by the Working Group at its fifteenth session in respect of articles 1 to 32 (A/CN.9/288, annex I) and by the Commission at its current session in respect of articles 33 to 88. The text furthermore reflected drafting changes designed to increase understanding, ensure consistency within each language version and correspondence among different language versions.

233. The following paragraphs reflect modifications made by the Commission to certain of the draft articles submitted by the drafting group. Other minor modifications, and especially those not affecting all language versions, are not specifically mentioned. Subject to those modifications, the text of the draft articles submitted by the drafting group is as set forth in annex I to this report. Subsequent to the consideration by the Commission of the text submitted by the drafting group, the articles of the draft Convention as set forth in annex I were renumbered as set forth in the table of correspondence in annex II of this report.

Articles 1, 1 bis and 1 ter

234. The Commission approved the articles as submitted by the drafting group.

Article 2

235. The Commission approved the article as submitted by the drafting group.

236. In the context of the discussion of article 2, a proposal was resubmitted that a Contracting State should be permitted to make a reservation that its courts would apply the Convention only if both the place where the instrument was drawn or made and the place of payment of the instrument were situated in Contracting States. In support of that view it was stated that the ability to make such a reservation would mitigate the vast scope of the Convention resulting from article 2, under which the Convention applied to an instrument irrespective of whether the places indicated on it were situated in Contracting States.

237. In opposition to such a reservation it was stated that the idea expressed in article 2 was an integral part of the philosophy underlying the draft Convention that the Convention should apply to an instrument wherever it might circulate. The suggested reservation was contrary to that philosophy and would weaken the Convention. It would make it more difficult for traders to apply the Convention since they would have to ascertain and apply reservations made by States to the relationships between the various parties on the instrument.

238. During the deliberations on the matter, it was noted that the proposed reservation would not affect the unified legal regime of the Convention itself, but would only narrow the scope of application of the Convention. It was also noted that the possibility of making such a reservation would increase the acceptability of the Convention for a number of States. Therefore, the Commission decided to permit such a reservation by including in the final clauses of the Convention a provision along the following lines:

“A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that its courts will apply the Convention only if both the place where the bill is drawn, or the note is made, and the place of payment of the instrument are situated in Contracting States.”

Article 3

239. The Commission approved the article as submitted by the drafting group.

Article 4

New subparagraph (7 bis)

240. Subparagraph (7 bis) had been prepared by the drafting group in response to a request of the Commission (above, paragraph 74) to find a means to

avoid the confusion caused by the use in the draft Convention of the word "guarantor" to refer in a general sense both to the person who undertook a guarantee under article 43(4)(b) and to the person who undertook a guarantee (which was in the nature of an *aval* under the Geneva Uniform Law) under article 43(4)(c). The Commission approved the subparagraph.

Subparagraph (10)

241. Subparagraph (10) as submitted by the drafting group was as follows:

"'Signature' means a handwritten signature or its facsimile, or any equivalent authentication effected by other means; 'forged signature' includes a signature by the wrongful [or unauthorized] use of such means;".

242. The Commission decided to delete the words "or unauthorized", which the drafting group had placed between brackets, since the expression "wrongful use" covered the intended meaning of the term "unauthorized use". Moreover, inclusion of the words "or unauthorized" in the definition of a forged signature might result in confusion in the light of the distinction drawn in articles 23 and 23 *bis* between a forged endorsement and an endorsement without authority.

Other subparagraphs of article 4

243. Subparagraphs (1) to (9) and (11) of article 4 were approved as submitted by the drafting group.

Articles 5 and 6

244. The Commission approved the articles as submitted by the drafting group.

Article 7

Paragraph (5)

245. Paragraph (5) as submitted by the drafting group was as follows:

"(5) A rate at which interest is to be paid may be expressed either as a definite rate or as a variable rate. For a variable rate to qualify for this purpose, it must vary in relation to one or more reference rates of interest in accordance with provisions stipulated in the instrument and each such reference rate must be published or otherwise available to the public and not be subject to determination influenced by any person who might take advantage of it in connection with the instrument."

246. A proposal was made to replace the words "and not be subject to determination influenced by any person who might take advantage of it in connection with the instrument" by the words "and not be subject, directly or indirectly, to unilateral determination by any person who is named in the instrument at the time the bill is drawn or the note is made, except a person who is named only in the reference rate provisions". It was noted that the proposed text was in accordance with the agreement

reached at the nineteenth session of the Commission, but that it significantly improved the language.

247. In support of the proposal it was stated that the word "influence" in the current text was too broad and uncertain, since such influence could come from a potentially wide variety of sources. Moreover, under the wording as submitted by the drafting group a bank that might potentially influence interest rates by its operations on the financial market would effectively be prevented from becoming a holder of an instrument if its interest rate was stipulated on the instrument. That result could be mitigated by providing that, for a variable rate provision to be disqualified, the person who could directly or indirectly determine it must have been named in the instrument at the time of its issuance. The opposing view was that a variable rate provision should be disqualified if it could be influenced by any person who might take advantage of it in connection with the instrument. After discussion, the Commission decided to adopt the proposed modification.

Other paragraphs of article 7

248. Paragraphs (1) to (4), (6) and (7) of article 7 were approved as submitted by the drafting group.

Articles 8 to 12

249. The Commission approved the articles as submitted by the drafting group.

Article 13

250. A suggestion was made to clarify in article 13 that a signature alone on the front of the instrument was not an endorsement. Such a clarification was considered to be desirable in view of article 42(4), which provided that a signature alone on the front of the instrument, other than that of a maker, a drawer or the drawee, was a guarantee. The Commission requested the drafting group to formulate wording that would provide the desired clarity. The article as reformulated by the drafting group and approved by the Commission is set forth in annex I to this report.

Article 14

Paragraphs (1) and (2)

251. The Commission approved paragraphs (1) and (2) as submitted by the drafting group.

Paragraph (3)

252. Paragraph (3) as submitted by the drafting group was as follows:

"(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 a defence against liability on, the instrument."

253. The Commission agreed that a person should not be prevented from being a holder either by the fact that the person had obtained the instrument under the circumstances referred to in paragraph (3), or by the fact that a previous holder had obtained the instrument under such circumstances. The drafting group was requested to formulate appropriate wording to give effect to that decision. The article as reformulated by the drafting group and approved by the Commission is set forth in annex I to this report.

Articles 15 to 19

254. The Commission approved the articles as submitted by the drafting group.

Articles 20 and 20 bis

255. The Commission discussed articles 20 and 20 *bis* together. The opening portion of paragraph (1) of the articles as submitted by the drafting group were as follows:

"Article 20

"(1) If 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, the endorsee:

"(a) Is a holder; . . .".

"Article 20 bis

"(1) If an endorsement contains the words 'value in security', 'value in pledge', or any other words indicating a pledge, the endorsee:

"(a) Is a holder; . . .".

256. The Commission agreed with the express statement in articles 20 and 20 *bis* that an endorsee for collection and an endorsee in pledge were holders of the instrument. Such an express statement clarified the status of those endorsers, which was particularly important with respect to the endorsement in pledge, since such an endorsement was not known or used in a number of legal systems. However, the Commission decided that the proper place for stating that those endorsees were holders was in the opening lines of articles 20(1) and 20 *bis*(1), and not in paragraph (1)(a) of those articles. The implementation of that decision was referred to the drafting group. The articles as reformulated by the drafting group and approved by the Commission are set forth in annex I to this report.

Articles 21 and 22

257. The Commission approved the articles as submitted by the drafting group.

Article 23

258. In connection with paragraphs (2) and (3), a view was expressed that the lack of knowledge of forgery

should not be qualified by reference to "good faith" and "reasonable care". Those concepts were subjective, overlapped, and were difficult to apply in the context of article 23. The Commission, however, approved the article as submitted by the drafting group, noting that the matter had already been extensively discussed within the Working Group on International Negotiable Instruments and that the concepts in question were also used in other legal texts dealing with international trade.

Articles 23 bis and 24

259. The Commission approved the articles as submitted by the drafting group.

Article 25

Paragraph(1)(b)

260. Paragraph (1)(b) as submitted by the drafting group was as follows:

"(1) A party may set up against a holder who is not a protected holder:

"(a) . . .

"(b) Any defence based on the underlying transaction between himself and the drawer or between himself and the party subsequent to himself, but only if the holder took the instrument with knowledge of such defence or if he obtained the instrument by fraud or theft or participated at any time in a fraud or theft concerning it;"

261. In connection with that paragraph the following example was given: A, the payee of an instrument, endorses the instrument in blank and delivers it to B, who delivers it to C. C takes the instrument with knowledge of a defence based on the underlying transaction between A and B, and is therefore not a protected holder. Under the current text of paragraph (1)(b), A could not invoke that defence in the action by C against him, since B is not a party. The Commission was of the view that a party should be able to invoke a defence under paragraph (1)(b) even if the defence was based upon an underlying transaction between that party and a transferee who had not signed the instrument and was, therefore, not a "party". The drafting group was requested to reformulate the paragraph. Article 25 as reformulated by the drafting group and approved by the Commission is set forth in annex I to this report.

Article 25 bis

262. The Commission approved the article as submitted by the drafting group.

Article 26

263. An observation was made that the lack of knowledge under article 26(1)(c) was qualified by a wording that was different from the wording qualifying the lack of knowledge under articles 23(2) and (3) and 23 *bis* (2) and (3). The Commission, however, was of the

view that the situations dealt with in article 26, on the one hand, and in articles 23 and 23 *bis*, on the other hand, were different and that the use of the different wording was appropriate. The Commission therefore approved the article as submitted by the drafting group.

Articles 27 to 30

264. The Commission approved the articles as submitted by the drafting group.

Article 31

265. It was suggested that paragraph (1)(b) should be altered so as to clarify that a party who signed an instrument before a material alteration was liable according to the terms of the instrument as they existed at the time of his signature. The Commission did not find such a clarification necessary since the point was sufficiently clear from the text as it stood. Article 31 was therefore approved as submitted by the drafting group.

Article 32

266. The Commission approved the article as submitted by the drafting group.

Article 33

267. A suggestion was made to clarify that the funds made available by the drawer with the drawee for payment of the instrument could be assigned by the drawer by an agreement off the instrument. The Commission did not adopt the suggestion since the point was sufficiently clear from the current text. Accordingly, the article was approved as submitted by the drafting group.

Articles 34 to 42

268. The Commission approved the articles as submitted by the drafting group.

Article 43

269. As submitted by the drafting group, subparagraphs (b) and (c) of paragraph (4) both opened with the words, "A guarantor who expresses his guarantee by the words ...". The Commission decided to change, in those languages where that was necessary, these words to "A person who expresses his guarantee by the words ...". In other respects the Commission approved the article as submitted by the drafting group.

Article 44

270. Paragraph (2) as submitted by the drafting group opened with the words, "The guarantor who pays the instrument may recover from the person ...". It was understood that the word "person" appeared in error, and should be "party". In other respects the Commission approved the article as submitted by the drafting group.

Articles 45 to 58

271. The Commission approved the articles as submitted by the drafting group.

Article 59

272. A statement was made that paragraph (2), according to which a failure to protest dishonour by non-acceptance did not discharge the guarantor of the drawee, appeared to be inconsistent with article 50(2)(c), according to which such protest was required. In response it was stated that no inconsistency existed. While a failure to protest would not discharge the liability of the guarantor of the drawee of his liability, under article 50(2)(c) the consequence of the failure was that the liability of the guarantor of the drawee would not be accelerated. Accordingly, article 59 was approved as submitted by the drafting group.

Article 60

273. Paragraphs (1)(a) and (2) as submitted by the drafting group were as follows:

"(1) The holder, upon dishonour of an instrument by non-acceptance or by non-payment, must give notice of such dishonour:

"(a) To the drawer and the endorser immediately preceding the holder, and

"(b) ...

"(2) An endorser or a guarantor who receives notice must give notice of dishonour to the party immediately preceding him and liable on the instrument."

274. A question was raised whether the words "endorser immediately preceding the holder" in paragraph (1)(a) referred only to an endorser who was the holder's transferor, or also to the last endorser on the instrument, even if a transferor by mere delivery intervened between that endorser and the holder. A similar question was raised with respect to the words "party immediately preceding him" in paragraph (2). The Commission noted that the purpose of the notice requirement in article 60 was to bring to the attention of parties against whom recourse might be sought the fact that the instrument had been dishonoured. Therefore, the Commission requested the drafting group to clarify that the person to whom notice must be given is the party who last appeared on the instrument, regardless of whether or not he was the transferor of the person who was obligated to give the notice. Article 60 as reformulated by the drafting group and adopted by the Commission is set forth in annex I to this report.

Articles 61 to 65

275. The Commission approved the articles as submitted by the drafting group.

Article 66

276. Paragraph (1)(c)(i) as submitted by the drafting group read as follows:

“(1) The holder may recover from any party liable:

“(a) . . .

“(b) . . .

“(c) Before maturity:

“(i) The amount of the instrument 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 (4) of this article;”.

277. Various proposals were made with respect to paragraph (1)(c)(i), which dealt with cases where an instrument was paid before maturity. Under one proposal, if an instrument was paid before maturity, both the principal amount of the instrument and any interest payable to the date of maturity should be reduced by applying a discount rate in respect of the time between the date of payment and the date of maturity. It was stated that that method would reflect the real value of the instrument to the holder on the date of payment. In opposition to that proposal, it was stated that a discount of the principal amount of the instrument was not justifiable and did not correspond with practice in commerce.

278. Under another proposal, if an instrument was paid before maturity, the principal should not be discounted, and the interest payable should be determined by reducing the amount of interest that would be payable to the date of maturity by applying a discount rate in respect of the time between the date of payment and the date of maturity. In opposition, it was stated that it would better reflect the expectations of the parties to provide that the interest payable was the amount of interest accrued, at the stipulated interest rate, to the date of payment. It was observed in that connection that the application of a discount rate could produce distorted results, since the discount rate could differ from the interest rate.

279. Under yet another proposal, when the instrument did not provide for interest, the amount payable should be the amount of the instrument reduced by applying a discount rate in respect of the time between the date of payment and the date of maturity. When the instrument did provide for interest, the amount payable should be the principal amount of the instrument plus interest accrued, at the stipulated interest rate, to the date of payment. It was noted that, where the instrument did not specifically provide for interest, the face amount of the instrument normally included an increment corresponding to interest to the date of maturity; therefore, if the instrument was paid earlier than the date of maturity, a discount of the amount of the instrument was justified. Where, however, the instrument provided for interest, it corresponded with the expectations of the

parties to provide that only accrued interest to the date of payment would be payable.

280. After deliberation, the Commission adopted the latter approach. The reformulation of paragraph (1)(c)(i) approved by the Commission is set forth in annex I.

281. In other respects, the Commission approved article 66 as submitted by the drafting group.

Article 67

282. The Commission approved the article as submitted by the drafting group.

Article 68

283. The text of paragraph (3) as submitted by the drafting group was as follows:

“(3) A party is not discharged of liability if he pays a holder who is not a protected holder and knows at the time of payment that the holder acquired the instrument by theft or forged the signature of the payee or an endorsee, or participated in the theft or the forgery.”

284. The Commission agreed that paragraph (3), in addition to dealing with the case of a party who paid the holder, should also deal expressly with the case of a party who paid a party who had paid a holder. The drafting group was requested to formulate appropriate language to deal with that case in article 68(3), and also in articles 43(2) and 73(2).

Articles 69 to 72

285. The Commission approved the articles as submitted by the drafting group.

Article 73

286. It was noted that some language versions of paragraph (1) submitted by the drafting group erroneously referred to a right of recourse. Therefore, the Commission agreed to amend paragraph (1) to read along the following lines:

“(1) If a party is discharged in whole or in part of his liability on the instrument, any party who has a right on the instrument against him is discharged to the same extent.”

287. In other respects, the Commission approved article 73 as submitted by the drafting group.

288. In the context of the discussion on article 73, an observation was made that the heading of section 2, reading “Discharge of a prior party”, did not accurately reflect the focus of the article, which dealt with the consequential discharge of parties who had a right of recourse against another party who had himself been discharged. The parties who were consequentially discharged by virtue of the paragraph would be

subsequent to the latter party. However, it was also noted that a subsequent party would not be discharged if he signed as a guarantor for a prior party. Therefore, the Commission agreed that the title of section 2 should be changed to: "Discharge of other parties".

Articles 74 to 79

289. The Commission approved the articles as submitted by the drafting group.

Article 80

290. Paragraph (1)(c) as submitted by the drafting group read as follows:

"(c) Against the guarantor of the drawee of a bill payable at a definite time, from the date of maturity or, if the bill is dishonoured by non-acceptance, from the date of dishonour;"

291. The Commission decided to insert, after the words "if the bill is dishonoured by non-acceptance", the words "from the date of protest or, if protest is dispensed with". The purpose of the insertion was to take into account the decision of the Commission to condition the accelerated liability of the guarantor of the drawee upon protest of dishonour by non-acceptance (see above, paragraphs 71 and 118). In other respects, the Commission approved article 80 as submitted by the drafting group.

Articles 81, 83 and 84

292. The Commission approved the articles as submitted by the drafting group.

Articles 84 bis and 85

293. Article 84 *bis* as submitted by the drafting group was as follows:

"Any State may declare at the time of signature, ratification, acceptance, approval or accession that its courts will apply the Convention only if both the place [indicated in the instrument] where the bill is drawn, or the note is made, and the place of payment [indicated in the instrument] are situated in Contracting States."

294. A view was expressed that the words within square brackets, "indicated in the instrument", should be deleted. In support of that view it was stated that the rule as to whether or not the courts of a State should apply the Convention should depend upon actual facts, and not information placed by parties on the instrument. Otherwise, a party could influence the application of the Convention by falsifying one of the places set forth on the instrument. The prevailing view, however, was that the words should be retained and the square brackets removed since the reservation in essence related to article 2 that referred to those places as they appeared on the instrument. In support of that view it was stated to be a fundamental feature of the law relating to negotiable instruments that, in order to promote the uninhibited circulation of instruments, the rights and

liabilities of the parties be established on the basis of information set forth on the instrument, rather than circumstances outside the instrument. It was noted, moreover, that national laws provided appropriate sanctions for placing false information on an instrument, such as invalidation of the instrument.

295. The Commission therefore decided to retain the words "indicated on the instrument". It also decided to incorporate the substance of article 85 into article 84 *bis* by adding a second paragraph to article 84 *bis* along the following lines:

"No other reservations are permitted."

Article 86

296. The Commission approved the article as submitted by the drafting group.

Article 87

297. Further questions were raised concerning the meaning of article 87, i.e., whether the article referred to instruments drawn or made before the Convention entered into force as a result of the deposit of the necessary number of consents to be bound, as provided in article 86(1), or whether it referred to instruments drawn or made before the entry into force of the Convention, pursuant to article 86(2), in respect of a State that deposited its consent to be bound after the time when the Convention had entered into force pursuant to article 86(1). In support of the latter interpretation, it was stated that a State should apply the Convention to an instrument drawn or made after the Convention had entered into force pursuant to article 86(1) but before it became a party, since that would accord with the expectations of the parties to an instrument drawn or made under the Convention. It was pointed out, however, that even under that interpretation a State was not necessarily obligated to apply the Convention to such instruments. In support of the former interpretation, it was stated that the latter interpretation would result in the retroactive application of the Convention, which was contrary to legal tradition.

298. A proposal was made to delete article 87. In support of the proposal it was said to be self-evident that the Convention would not apply to instruments drawn or made before it had entered into force pursuant to article 86(1). Moreover, it was said that the question of whether or not a State would apply the Convention to instruments drawn or made before it became a party seldom arose in practice; it was sufficient for the question to be left to be decided by each State for itself. After deliberation, the Commission decided to delete article 87.

Article 88

299. The Commission approved the article as submitted by the drafting group.

D. Procedure for adopting the draft Convention as a Convention

300. After completing its work on the draft Convention, the Commission considered the procedures that might be followed for the adoption of the text as a Convention. As a first choice a few delegates supported a proposal that, when the Commission transmitted the draft Convention to the General Assembly, it should recommend the convening of a diplomatic conference to review and adopt the Convention. Another proposal was that the draft articles should be adopted as a model law. Strong opposition was expressed to that proposal.

301. There was substantial support for a proposal that the Commission should recommend that the General Assembly adopt the Convention in its current form and open it for signature. In support of that view it was stated that the draft Convention was an excellent text that would make a major contribution to the unification of law dealing with international negotiable instruments. The expense of convening a diplomatic conference was not justifiable since the text, which was the culmination of over 14 years' work, had been extensively discussed and had been refined at the fifteenth session of the Working Group on International Negotiable Instruments and at the current session of the Commission, and needed no further substantive consideration. The text was highly technical and finely balanced, and it was unlikely that further consideration would significantly improve it.

302. Against that view it was suggested that the question was not an issue for the Commission to determine and that the Commission should be mindful of the need to resolve matters by consensus. After discussion, the Commission decided, as set forth in its resolution in paragraph 304, to transmit the draft Convention to the General Assembly with the recommendation that the General Assembly should consider the draft Convention with a view to its adoption or any other action to be taken.

303. The Commission expressed its appreciation to the Working Group on International Negotiable Instruments for having produced a draft of such high quality that successfully merged concepts and procedures from the two major systems of law governing negotiable instruments into a text with its own internal logic and consistency. The Commission also expressed its appreciation to the individuals who had served as Chairman of the Working Group during its preparation of the draft Convention, i.e. Mr. Mohsen Chafik (Egypt, first session), Mr. René Roblot (France, second to eleventh sessions), Mr. Willem Vis (Netherlands, thirteenth to fifteenth sessions) and who had served as Chairman of the Commission during its consideration of the draft Convention, i.e. Mr. Ivan Szász (Hungary, seventeenth session), Mr. P. K. Kartha (India, nineteenth session) and Mrs. Ana Piaggi de Vanossi (Argentina, twentieth session).

E. Decision of the Commission and recommendation to the General Assembly

304. At its 388th meeting on 14 August 1987, the Commission adopted by consensus the following decision:

The United Nations Commission on International Trade Law,

Recalling that at its fourth session in 1971, it decided to proceed with work directed towards the preparation of uniform rules applicable to a special negotiable instrument for optional use in international transactions,

Noting that the Working Group on International Negotiable Instruments devoted fourteen sessions between 1972 and 1987 to the preparation of the draft Convention on International Bills of Exchange and International Promissory Notes,

Noting further that the Commission at its seventeenth session in 1984 considered the major controversial issues in the draft Convention and that it has considered the text of the draft Convention at its nineteenth and twentieth sessions in 1986 and 1987,

Drawing attention to the fact that all States and interested international organizations were invited to participate in the preparation of the draft Convention at the fifth to fifteenth sessions of the Working Group and the seventeenth, nineteenth and twentieth sessions of the Commission, either as member or as observer with full right to speak and make proposals,

Drawing attention further to the fact that all States and interested international organizations were invited on two occasions to submit written comments on the draft Convention for consideration by the Commission at its seventeenth session in 1984 and for consideration by the Working Group at its fifteenth session and the Commission at its twentieth session in 1987,

Being aware that the General Assembly in its resolution 41/77 decided to consider the draft Convention during its forty-second session, with a view to its adoption or any other action to be taken,

1. *Submits* to the General Assembly the draft Convention on International Bills of Exchange and International Promissory Notes, as set forth in annex 1 to this report;

2. *Recommends* that the General Assembly consider the draft Convention with a view to its adoption or any other action to be taken.

305. Following the adoption of the decision, the representative of France made the following statement:

[Original: French]

"Madam Chairman,

As you will have noted, the delegation of France did not oppose the adoption by consensus of the text of our Commission's recommendation, which is to be

transmitted to the General Assembly together with the draft Convention on International Bills of Exchange and International Promissory Notes.

This positive approach primarily reflects France's desire not to impair the constructive spirit of high-level dialogue that has characterized the work of the United Nations Commission on International Trade Law since its inception.

However, in no way does it prejudice my country's position with regard to the very future of the draft Convention as it stands at the outcome of this session.

Indeed, we consider that there are still shortcomings in the text of the draft Convention, which is to be transmitted to the United Nations General Assembly. As it stands, this draft would, in our view, have adverse consequences for States not wishing to accede to the new system to be established.

I would be grateful to you, Madam Chairman, if you would see to it that the text of this statement is recorded *in extenso* in the report on the twentieth session of our Commission.

Thank you."

Chapter III. New international economic order⁷

A. Draft Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works

Introduction

306. At its eleventh session the Commission included in its programme of work the topic of legal implications of the new international economic order and considered how, having regard to its special expertise and within the context of its mandate, it could most effectively advance the objectives set forth in the General Assembly resolutions on economic development and establishment of the new international economic order.⁸

307. The Commission agreed at its thirteenth session to accord priority to work related to contracts in the field of industrial development. It requested the Secretary-General to carry out preparatory work in respect of contracts for the supply and construction of large industrial works and to submit a report to the Working Group on the New International Economic Order, which had been established by the Commission at its twelfth session.⁹

308. At its fourteenth session the Commission approved a decision of the Working Group to entrust to the secretariat the drafting of a legal guide that would

identify the legal issues involved in international contracts for the construction of industrial works and suggest possible solutions to assist parties, in particular from developing countries, in their negotiation of such contracts.¹⁰

309. The secretariat prepared draft chapters of the Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works which were discussed at the fourth, fifth, sixth, seventh and eighth sessions of the Working Group.¹¹ For the ninth session of the Working Group the secretariat revised the draft Legal Guide in the light of the discussions and decisions of the Working Group at its previous sessions.¹² After consideration of the revised draft the Working Group adopted it with changes, additions and deletions as reflected in its report to the Commission on the work of its ninth session.¹³

Discussion at the session

310. The Commission had before it the report of its Working Group on the New International Economic Order on the work of its ninth session (A/CN.9/289), as well as the draft foreword, introduction and chapters of the draft Legal Guide on Drawing up International Contracts for the Construction of Industrial Works as considered by the Working Group at its ninth session (A/CN.9/WG.V/WP.20 and Add. 1-29), and a report of the Secretary-General containing a draft index to the Legal Guide (A/CN.9/290).

311. The Commission expressed its appreciation to the Working Group and to its Chairman, Mr. Leif Sevón of Finland, for having produced such a comprehensive, complete and proficient treatment of the subject of contracts for the construction of industrial works. The Legal Guide was balanced with respect to the interests of the contractor and the purchaser, and would be of great practical value to practitioners in developed and developing countries.

312. The secretariat proposed that certain modifications be made to paragraphs 12 and 31 of chapter XIII, "Completion, take-over and acceptance", and paragraph 43 of chapter XVIII, "Delay, defects and other failures to perform". A view was expressed in opposition to those modifications. After deliberation, however, the Commission decided to adopt the modifications. The Commission also adopted modifications to paragraph 41 of chapter VII, "Price and payment conditions", paragraph 1 of chapter XII, "Inspection and tests during manufacture and construction", paragraph 13 of chapter XIII and paragraph 6(a) of chapter XVIII. Subject to those modifications, the Commission adopted the UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works as placed before it at the current session.

⁷The Commission considered this subject at its 385th, 386th and 388th meetings, on 11, 12 and 14 August 1987.

⁸Official Records of the General Assembly, Thirty-third Session, Supplement No. 17 (A/33/17), paras. 67(c), 68, 69, 71.

⁹Ibid., Thirty-fifth Session, Supplement No. 17 (A/35/17), para. 143.

¹⁰Ibid., Thirty-sixth Session, Supplement No. 17 (A/36/17), para. 84.

¹¹A/CN.9/234, A/CN.9/247, A/CN.9/259, A/CN.9/262, and A/CN.9/276.

¹²A/CN.9/WG.V/WP.20 and Add. 1-29.

¹³A/CN.9/289.

313. The Commission urged the secretariat to arrange for prompt publication of the Legal Guide in all languages, and to take measures to effectuate its widespread distribution. In particular, steps should be taken to distribute the Legal Guide to relevant Government officials, libraries and trade organizations worldwide. The importance of promoting the Legal Guide was also stressed, and the Commission expressed the view that measures should be taken in that respect not only by the secretariat, but also by Governments, particularly those of member States of the Commission. The Secretary of the Commission stated that a paper would be presented to the next session of the Commission setting forth the steps that had been taken by the secretariat with respect to the distribution and promotion of the Legal Guide, and suggesting whatever further measures might be desirable.

314. The secretariat was requested to place before the Commission proposals for revision of the Legal Guide when comments received from users of the Guide indicated that such a revision was desirable.

Decision of the Commission and recommendation to the General Assembly

315. The Commission, at its 388th meeting on 14 August 1987, adopted the following decision:

The United Nations Commission on International Trade Law,

Recalling its mandate under General Assembly resolution 2205 (XXI) of 17 December 1966 to further the progressive harmonization and unification of the law of international trade, and in that respect to bear in mind the interests of all peoples, and in particular those of developing countries, in the extensive development of international trade,

Taking into consideration the resolutions adopted by the General Assembly on economic development and the establishment of the new international economic order,

Considering that legally sound, balanced and equitable international contracts for the construction of industrial works are important for all countries, and in particular for developing countries,

Being of the opinion that a legal guide on drawing up international contracts for the construction of industrial works, identifying the legal issues to be dealt with in such contracts and suggesting solutions of those issues, will be helpful to all parties, in particular those from developing countries, in concluding such contracts.

1. *Adopts* the UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works;

2. *Invites* the General Assembly to recommend the use of the Legal Guide by persons involved in drawing up international contracts for the construction of industrial works;

3. *Requests* the Secretary-General to take effective measures for the widespread distribution and promotion of the use of the Legal Guide.

B. International procurement

316. The Commission at its nineteenth session decided to undertake work in the area of international procurement as a priority topic. At its current session, the Commission had before it a note by the secretariat reporting on the progress made by the secretariat in its preparatory work on the topic (A/CN.9/291). The Commission took note of the report and requested the secretariat to continue with that work.

Chapter IV. Liability of operators of transport terminals¹⁴

317. The Commission, at its sixteenth session in 1983, decided to include the topic of liability of operators of transport terminals in its programme of work and to assign work on the preparation of uniform rules on that subject to a working group.¹⁵ At its seventeenth session in 1984, the Commission decided to assign that work to its Working Group on International Contract Practices.¹⁶

318. The Commission had before it the report of the Working Group on International Contract Practices on the work of its tenth session (A/CN.9/287). The report set forth the deliberations and decisions of the Working Group with respect to the draft articles of uniform rules on the liability of operators of transport terminals. The Commission took note with appreciation of the report of the Working Group.

Chapter V. Co-ordination of work¹⁷

A. General co-ordination of work

319. The observer from the International Institute for the Unification of Private Law (UNIDROIT) reported that the Institute had finalized the draft Convention on International Financial Leasing and the draft Convention on International Factoring. The two draft Conventions will be submitted for adoption to a diplomatic conference to be hosted by the Canadian Government at Ottawa from 9 to 28 May 1988. It is planned that all States would be invited to participate in the Conference.

¹⁴The Commission considered the subject at its 387th meeting, on 12 August 1987.

¹⁵Report of the United Nations Commission on International Trade Law on the work of its sixteenth session, *Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 17 (A/38/17)*, para. 115.

¹⁶Report of the United Nations Commission on International Trade Law on the work of its seventeenth session, *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 17 (A/39/17)*, para. 113.

¹⁷The Commission considered this subject at its 387th meeting, on 12 August 1987.

320. He also noted that the draft Convention on Liability and Compensation for Damage Caused During the Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels had been transmitted to the Inland Transport Committee of the Economic Commission for Europe for its consideration. The first meeting had been held in July 1987 and a second meeting was scheduled for December. The first reading of the principles for international commercial contracts had been completed and a second reading would begin in the spring of 1988. Preliminary work had been undertaken on the subject of franchising and the Institute was considering a study of the internal relations in connection with agency in the international sale of goods.

321. He concluded by informing the Commission of the Congress on Uniform Law in Practice to be held at the Institute at Rome from 7 to 10 September 1987.

322. The observer from the Council for Mutual Economic Assistance (CMEA) made a detailed statement on the current activities of that organization in the area of international trade law. He mentioned in particular the adoption in December 1985 of the Comprehensive Programme of Scientific and Technical Progress for the CMEA Member States. The Programme provided for the creation, as a joint endeavour of the CMEA countries, of new forms of equipment and technology in such priority fields as the application of electronics and comprehensive automation of the economy, new materials and the technology for processing them, atomic energy and biotechnology. The Programme was open to other interested States. It was pointed out that 1986 had seen the completion of an evaluation report on the application of the Convention on the Settlement of Arbitration of Civil Law Disputes Arising from Economic, Scientific and Technical Co-operation, signed on 26 May 1972, and on the Uniform Rules for the Arbitration Courts of the Chambers of Commerce of CMEA Member States, approved in 1974. Those Rules had been revised, and a study was to be carried out in 1987-1988 on the usefulness of formulating a uniform law on arbitration for foreign trade and on the execution of foreign arbitral awards; the study was to take account of the UNCITRAL Model Law on International Commercial Arbitration. CMEA had also undertaken a revision of the General Conditions for the Delivery of Goods among the Organizations of Member States, and proposals had been adopted on the harmonization of domestic laws on inventions. Finally, an agreement on the standardization of individual legal rules on the merchant marine had been prepared; it was open for signature by all interested countries.

323. The observer from the Council of Europe made a statement on the co-operation existing between the Council and the Commission. He made reference *inter alia* to the joint effort with the European Communities to promote a European Public Campaign on world interdependence and on the need for North-South solidarity on commercial matters. Further references were made to new legal texts that had been elaborated or

were in the process of completion such as the Convention on Mutual Administrative Assistance on Tax Matters, the Convention on the Operations of Insider Trading, and the Convention on Certain Powers of Official Receivers (on bankruptcy) in a foreign country. Finally it was stated that the Council of Europe followed with particular interest the work done by the Commission on automatic data processing and electronic transfer of funds and that the Council of Europe was making progress on two studies on the so-called "computer crime" and on the protection of data in the banking system.

324. The Commission expressed its gratitude to the observer from the Hague Conference on Private International Law for his useful contributions during the discussion at the present session of the draft Convention on International Bills of Exchange and International Promissory Notes.

B. *Legal implications of automatic data processing*

325. At its nineteenth session in 1986, the Commission had before it a report of the Secretary-General describing the work of international organizations active in the field of automatic data processing and requested the secretariat to organize a meeting in late 1986 or early 1987 to which all interested intergovernmental and non-governmental international organizations might be invited (A/CN.9/279). At the current session the Commission had before it a further report on the legal implications of automatic data processing (A/CN.9/292).

326. The report was divided into two parts, the first describing the results of a meeting hosted by the Commission secretariat at Vienna on 12-13 March 1987, the second analysing information on the work undertaken by other organizations on the subject matter.

327. With regard to the results of the meeting hosted by the secretariat, which had been attended by eight organizations, it had been agreed that the exchange of information that had taken place between participants had been in itself one of the most useful forms of co-operation and that a similar meeting should be organized by the Commission in the near future depending on developments. In respect of activities of other organizations, the report contained information on the work done or to be undertaken by the International Maritime Organization (IMO), the United Nations Economic Commission for Europe (ECE), the International Chamber of Commerce (ICC), the International Rail Transport Committee (CIT), the Commission of the European Communities, the Organization for Economic Co-operation and Development (OECD) and the Council of Europe.

328. The Commission took note with appreciation of the report submitted to it and approved the course of action proposed therein.

Chapter VI. Status of conventions¹⁸

329. The Commission considered the state of signatures, ratifications, accessions and approvals of conventions that were the outcome of its work, that is, the Convention on the Limitation Period in the International Sale of Goods (New York, 1974), the Protocol amending the Convention on the Limitation Period in the International Sale of Goods (Vienna, 1980); the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) (hereinafter referred to as "the Hamburg Rules"); and the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (hereinafter referred to as "the United Nations Sales Convention"). The Commission also considered the status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), which, although it had not emanated from the work of the Commission, was of particular interest to the Commission with regard to the work of the latter in the field of international commercial arbitration. In addition the Commission took note with satisfaction of the growing number of jurisdictions that had enacted legislation or were in the process of creating legislation based on the UNCITRAL Model Law on International Commercial Arbitration. The Commission had before it a note by the secretariat on the status as of 15 May 1987 of those Conventions as well as of the UNCITRAL Model Law on International Commercial Arbitration (A/CN.9/294).

330. The Commission took note with satisfaction that the United Nations Sales Convention would enter into force on 1 January 1988, in respect of Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syrian Arab Republic, United States of America, Yugoslavia and Zambia. A number of delegations reported that progress was being made within their countries towards ratification of or accession to the Convention. In that connection it was announced that the Government of the Netherlands, as depositary of the two Hague Conventions of 1964 (i.e., the Convention relating to a Uniform Law on the International Sale of Goods of 1 July 1964 and the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods of 1 July 1964), had invited the States parties to those Conventions to a meeting to be held on the penultimate day of the Commission's session to discuss the possibility of adopting a common attitude with regard to the Hague Conventions in view of the entry into force of the United Nations Sales Convention and its expected widespread adoption.

331. The Commission also noted recent positive developments with regard to the Hamburg Rules. A number of delegations reported that their Governments were studying the desirability of ratifying the Convention. It was also reported that, at an informal International Chamber of Commerce/UNCTAD

meeting on the Hamburg Rules at Geneva on 1 June 1987, the shipper interests had shown a strong and organized desire for prompt ratification of the Hamburg Rules. That was recognized to be a new factor that could change in a positive manner the likelihood of ratification of the Convention in a number of countries.

Draft resolution for the General Assembly

332. In considering further ways and means of promoting a widespread adherence to the Conventions emanating from its work, the Commission decided to recommend to the General Assembly the adoption of the following resolution:

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law, with the object of promoting the progressive harmonization and unification of international trade law,

Recalling its belief that the interests of all peoples, and particularly those of developing countries, demand the betterment of conditions favouring the extensive development of international trade,

Noting that three Conventions and a Protocol have emanated from the work of the United Nations Commission on International Trade Law,

Expressing its satisfaction that the United Nations Convention on Contracts for the International Sale of Goods will enter into force on 1 January 1988,

Noting that the Convention on the Limitation Period in the International Sale of Goods will come into force upon the deposit of one additional ratification or accession,

Being aware that the United Nations Convention on the Carriage of Goods by Sea, 1978, was prepared at the special request of developing countries,

Being convinced that widespread adherence to the Conventions emanating from the work of the United Nations Commission on International Trade Law would benefit the peoples of all States,

1. *Requests* those States that have not yet done so to consider ratifying or acceding to the following Conventions:

(a) Convention on the Limitation Period in the International Sale of Goods;

(b) Protocol amending the Convention on the Limitation Period in the International Sale of Goods;

(c) United Nations Convention on the Carriage of Goods by Sea, 1978;

(d) United Nations Convention on Contracts for the International Sale of Goods;

2. *Requests* the Secretary-General to submit to the General Assembly at its forty-fourth session a report concerning the status of the Conventions.

¹⁸The Commission considered this subject at its 387th meeting, on 12 August 1987.

Chapter VII. Training and assistance¹⁹

333. The Commission had before it a report of the Secretary-General on training and assistance (A/CN.9/293). The report set out the seminars and symposia on international trade law in which members of the secretariat had participated as speakers. The report also described a symposium organized in co-operation with the Latin American Federation of Banks (FELABAN) at Mexico City (1 to 3 June 1987) that had dealt with the Commission's texts on international payments. It further noted that since the nineteenth session of the Commission three interns received training with the UNCITRAL secretariat, and were associated with current projects of the Commission.

334. The Commission noted that, by its resolution 41/77 of 3 December 1986 on the report of the Commission on the work of its nineteenth session, the General Assembly had reaffirmed the importance, in particular for developing countries, of the work of the Commission concerned with training and assistance in the field of international trade law and the desirability for it to sponsor symposia and seminars, especially those organized on a regional basis, to promote such training and assistance in the field of international trade law. The Assembly had also expressed its appreciation to those regional organizations and institutions that had collaborated with the secretariat of the Commission in organizing regional seminars and symposia in the field of international trade law and had welcomed the initiatives undertaken by the secretariat to collaborate with other organizations and institutions in the organization of regional seminars. The Assembly had further invited Governments, international organizations and institutions to assist the secretariat of the Commission in financing and organizing regional seminars and symposia, in particular in developing countries, and invited Governments, relevant United Nations organs, organizations, institutions and individuals to make voluntary contributions for the award of fellowships on a regular basis to candidates from developing countries to enable them to participate in such symposia and seminars.

335. The discussion in the Commission was conducted in conjunction with the discussion on the Medium Term Plan (see below, paragraphs 338-341). It was noted that training and assistance was an important activity of the Commission and should be given a higher priority than it had in the past. It was suggested that an attempt should be made to obtain a regular budget allocation for such activities. It was further suggested that efforts should be made to obtain financing from other extra-budgetary sources.

336. A general view was expressed that regional seminars and symposia were important and that in some cases such activities could be held in collaboration with regional economic groupings. It was noted that such symposia and seminars were of great value to young lawyers and government officials from developing

countries. Several statements were made recalling with satisfaction the seminars in 1975 and 1981 on the activities of the Commission that had been held in connection with an annual session of the Commission and at which the majority of the participants had been from developing countries. A view was expressed that similar activities should be organized in the future.

Chapter VIII. Relevant general assembly resolutions and future work²⁰

A. General Assembly resolution on the work of the Commission

337. The Commission took note with appreciation of General Assembly resolution 41/77 of 3 December 1986 on the report of the Commission on the work of its nineteenth session.

B. Medium Term Plan for 1990-1995

338. The Commission considered the draft Medium Term Plan for 1990-1995 as presented to it in a conference room paper. The Commission noted that the purpose of the Plan was to provide the framework for the programme budgets for that period of time and, in that respect, was a document oriented to the activities of the secretariat. However, the Commission also noted that in respect of the Programme "Progressive Harmonization and Unification of the Law of International Trade", any discussion of priorities in respect of the secretariat necessarily involved a discussion of priorities of the work of the Commission itself.

339. It was stated that a general discussion of the future of the Commission would be appropriate, now that it had been in existence for twenty years, especially in view of the fact that in each of the past three years the Commission had had a major legal text before it for consideration and it had not had the time to consider its future course of action except in regard to the undertaking of specific new projects. It was noted that no legal text would be before the Commission at its twenty-first session in 1988 and that the session would be devoted to a review of the Commission's programme of work and of its working methods.

340. In respect of the draft Medium Term Plan, the Commission was in agreement that an increased priority should be given to efforts by the secretariat to promote the adoption and use of the texts emanating from the work of the Commission. Related to that would be the need to find a means to collect and to disseminate information on the interpretation given by courts and arbitral tribunals to the conventions emanating from the work of the Commission as they came into force. At the same time, it was recognized that the secretariat's efforts to date in that regard had been undertaken at the

¹⁹The Commission considered this subject at its 386th meeting, on 12 August 1987.

²⁰The Commission considered this subject at its 386th and 387th meetings, on 12 August 1987.

expense of such training and assistance activities as the organization of the international trade law seminars for young lawyers from developing countries that had been held in 1975 and 1981 on the occasion of the Commission's eighth and fourteenth sessions. The great value of such seminars was underscored by one delegate who had participated in the most recent seminar on a fellowship. The Commission was of the strong opinion that, in addition to the promotion of its texts, priority should also be given to such training and assistance activities. The Commission noted that the increased priority it believed should be given to the promotion of adoption of its legal texts and to training and assistance activities was not meant to suggest that the preparation of new legal texts on subjects of international trade law were of diminished importance.

341. The Commission expressed its concern that the need to devote increased resources to promotion activities had arisen at a time when the Commission's secretariat had a 35 per cent vacancy rate. It requested the relevant authorities to authorize recruitment of qualified staff to fill the four vacant professional posts. The Commission also requested the secretariat to explore the possibility of securing additional funds for those activities from extra-budgetary sources if an increase in funds from the regular budget was not possible.

C. Programme Performance Report

342. The Commission noted that the applicable portions of the Programme Performance Report for 1984-1985 (A/41/318 and Add.1), together with the comments of the Committee on Programme Planning and Co-ordination (A/41/38), had been made available to it.

D. Suggestions as to procedures and future agenda

343. Arising out of the discussion of the Medium Term Plan several suggestions were made as to the procedures that might be followed in the future. One suggestion was that between sessions the secretariat should consult with the bureau of the previous session of the Commission for guidance in preparing the agenda of the forthcoming session. In opposition it was stated that such a procedure would be awkward to implement and that the Commission should leave the preparation of the forthcoming sessions to the judgment of the secretariat as it had in the past. It was agreed that the secretariat should prepare a report for the twenty-first session that would serve as the basis for a general discussion of the work of the Commission for the medium term future. It was also agreed that the Commission should discuss the means by which information on the interpretation of the United Nations Convention on Contracts for the International Sale of Goods by courts and arbitral tribunals could be collected and disseminated.

344. In respect of the working methods of the Commission, the Commission decided that at the twenty-first session consideration should be given to

requesting the General Assembly to increase the membership of the Commission. Furthermore, there should be a review of the policy in regard to membership of the working groups of the Commission.

E. Date and place of the twenty-first session of the Commission

345. It was decided that the Commission would hold its twenty-first session from 11 to 22 April 1988 in New York.

F. Sessions of the working groups

346. It was decided that the Working Group on International Payments would hold its sixteenth session from 2 to 13 November 1987 at Vienna. It was decided that the Working Group might hold two meetings in 1988, one in the first half of the year and one in the second half of the year, at dates to be determined by the secretariat if, in the judgment of the Working Group, its progress in respect of the preparation of Model Rules on electronic funds transfers so warranted.

347. It was decided that the Working Group on International Contract Practices would hold its eleventh session from 18 to 29 January 1988 in New York. The Commission agreed that the Working Group might hold its twelfth session at Vienna in the second half of 1988, if such a session was found necessary in respect of the draft Uniform Rules on the Liability of Operators of Transport Terminals.

348. It was decided that the Working Group on the New International Economic Order would hold its tenth session from 17 to 28 October 1988 at Vienna.

ANNEX I

Draft Convention on International Bills of Exchange and International Promissory Notes

[Annex reproduced in part three, I, of this volume.]

ANNEX II

Comparative table of article numbers of draft Convention on International Bills of Exchange and International Promissory Notes

[Annex reproduced in part three, II, of this volume.]

ANNEX III

List of documents of the session

[Annex reproduced in part three, V, A, of this volume.]

**B. United Nations Conference on Trade and Development (UNCTAD):
extract from report of the Trade and Development Board
(thirty-fourth session) (A/42/15)**

*"Progressive development of the law of
international trade: twentieth annual report
of the United Nations Commission
on International Trade Law*

"(Agenda item 7(b))

"8. At its 716th meeting, on 9 October 1987, the Board took note of the twentieth annual report of the United Nations Commission on International Trade Law (A/42/17)."

C. General Assembly: report of the Sixth Committee (A/42/836)

I. INTRODUCTION

1. The item entitled "Report of the United Nations Commission on International Trade Law on the work of its twentieth session" was included in the provisional agenda of the forty-second session of the General Assembly pursuant to paragraph 11 of General Assembly resolution 41/77 of 3 December 1986.

2. At its 3rd plenary meeting, on 18 September 1987, the General Assembly, on the recommendation of the General Committee, decided to include the item in its agenda and to allocate it to the Sixth Committee.

3. In connection with the item, the Sixth Committee had before it the report of the Commission,¹ which was introduced by the Chairman of the Commission at the 3rd meeting of the Sixth Committee, on 22 September 1987.

4. The Sixth Committee considered the item at its 3rd to 6th meetings, from 22 to 25 September, and its 55th and 58th meeting on 23 and 25 November. The summary records of those meetings (A/C.6/42/SR.3-6, 55 and 58) contain the views of the representatives who spoke on the item.

**II. CONSIDERATION OF DRAFT RESOLUTIONS
A/C.6/42/L.9 AND A/C.6/42/L.15**

5. At the 55th meeting, on 23 November, the representative of Austria introduced draft resolution A/C.6/42/L.9. The draft resolution was sponsored by Argentina, Australia, Austria, Brazil, Czechoslovakia, Finland, France, German Democratic Republic, Germany, Federal Republic of, Guyana, Italy, Libyan Arab Jamahiriya, Netherlands and Yugoslavia, later joined by Canada, Cyprus, Egypt, Greece, Hungary, India, Japan, Sweden and Turkey.

6. At the same meeting, the Committee adopted draft resolution A/C.6/42/L.9 without a vote (see para. 14 below).

7. A statement in explanation of position was made by the representative of Mexico.

8. Also at the 55th meeting, the representative of Austria introduced draft resolution A/C.6/42/L.15. The draft resolution was sponsored by Argentina, Australia, Austria, Canada, Finland, Germany, Federal Republic of, Japan, Netherlands, Sweden and United States of America, later joined by Cyprus. The draft resolution reads as follows:

*Draft Convention on International Bills of Exchange
and International Promissory Notes*

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it created the United Nations Commission on International Trade Law, with the object of promoting the progressive harmonization and unification of the law of international trade,

Reaffirming its conviction that divergencies arising from the laws of different States in matters relating to international trade constitute one of the obstacles to the development of world trade,

Being aware that the Commission, at its fourth session in 1971, decided to proceed with work directed towards the preparation of uniform rules applicable to a special negotiable instrument for optional use in international transactions in order to overcome the divergencies arising out of the existence of two main systems of law governing negotiable instruments,

Recalling that in resolution 41/77 of 3 December 1986 the General Assembly requested the Commission to complete its work on the draft Convention on International Bills of Exchange and International

¹Official Records of the General Assembly, Forty-second Session, Supplement No. 17 (A/42/17).

Promissory Notes² at its twentieth session and decided to consider the draft Convention during its forty-second session with a view to its adoption or other appropriate action,

Taking note of the unanimous adoption of the draft Convention by the Commission at its twentieth session,³

Recognizing that Governments should be given sufficient time to study the draft Convention,

1. *Expresses its appreciation* for the work achieved by the United Nations Commission on International Trade Law in preparing the text of a draft Convention on International Bills of Exchange and International Promissory Notes;

2. *Decides* to consider and adopt the draft Convention on International Bills of Exchange and International Promissory Notes, as elaborated by the United Nations Commission on International Trade Law at its forty-third session, and to open the Convention for signature on 1 January 1989.

9. At the 58th meeting, on 25 November, the representative of France introduced amendments to draft resolution A/C.6/42/L.15 (A/C.6/42/L.21), on behalf of Brazil, Burkina Faso, Central African Republic, Chad, Côte d'Ivoire, Egypt, France, Guinea, Mali, Mauritania, Morocco, Niger, Portugal, Rwanda, Senegal, Spain and Togo. These amendments read as follows:

(a) Modify the fifth preambular paragraph as follows:

"Taking note of the draft Convention, adopted by the Commission at its twentieth session";

(b) Insert the following new operative paragraph 2:

"Requests the Secretary-General to draw the attention of all States to the draft Convention, to ask them to submit the observations and proposals they wish to make on the draft Convention before 30 April 1988 and to circulate these observations and proposals to all Member States before 30 June 1988";

(c) Replace the present paragraph 2 with the following paragraph 3:

"Decides to consider, at its forty-third session, the draft Convention on International Bills of Exchange and

International Promissory Notes, with a view to its adoption at that session, and to create to this end, in the framework of the Sixth Committee, a working group that will meet at the beginning of the session, in order to consider the observations and proposals made by States".

10. Also at the 58th meeting, statements in explanation of vote were made by the representatives of Australia, United States of America, Union of Soviet Socialist Republics, Netherlands, Austria and United Kingdom of Great Britain and Northern Ireland.

11. At the same meeting, the amendments to the draft resolution (see para. 9) were adopted as follows:

Amendment (a) was adopted by a vote of 66 to 33, with 20 abstentions;

Amendment (b) was adopted by a vote of 71 to 33, with 19 abstentions;

Amendment (c) was adopted by a vote of 68 to 36, with 20 abstentions.

12. Following the adoption of the amendments contained in document A/C.6/42/L.21, *Netherlands, Germany, Federal Republic of, Canada, Austria, Sweden, Finland, United States of America, Argentina, Australia, Japan and Cyprus* withdrew their co-sponsorship of draft resolution A/C.6/42/L.15 as amended and *Rwanda and Egypt* became co-sponsors of draft resolution A/C.6/42/L.15 as amended.

13. Draft resolution A/C.6/42/L.15 as amended was adopted by a vote of 80 to none, with 46 abstentions (see para. 14).

III. RECOMMENDATIONS OF THE SIXTH COMMITTEE

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

[Texts not reproduced in this section. The draft resolutions that were adopted, with editorial changes, as General Assembly resolution A/RES/42/152 and General Assembly resolution A/RES/42/153, appear in sections D and E, below.]

D. General Assembly resolution 42/152 of 7 December 1987

42/152. *Report of the United Nations Commission on International Trade Law on the work of its twentieth session*

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it created the United Nations Commission on International Trade Law with a

mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, and in particular those of developing countries, in the extensive development of international trade,

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

²Ibid., Forty-first Session, Supplement No. 17 (A/41/17), annex I.

³Ibid., Forty-second Session, Supplement No. 17 (A/42/17).

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 interest 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 and unifying international trade law,

Stressing the value of participation by States at all levels of economic development, including developing countries, in the process of harmonizing and unifying international trade law,

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

Considering that legally sound, balanced and equitable international contracts for the construction of industrial works are important for all countries,

Being of the opinion that the Legal Guide on Drawing up International Contracts for the Construction of Industrial Works adopted by the Commission at the twentieth session,² which identifies the legal issues to be dealt with in such contracts and suggests solutions of those issues, will be helpful to all parties in concluding such contracts,

Noting that the Convention on the Limitation Period in the International Sale of Goods, 1974, will come into force upon the deposit of one additional ratification or accession,

Being aware that the United Nations Convention on the Carriage of Goods by Sea, 1978, was prepared at the request of developing countries,

Being convinced that widespread adherence to the conventions emanating from the work of the Commission would benefit the peoples of all States,

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

2. *Commends* the Commission for the progress made in its work and for having reached decisions by consensus;

3. *Calls upon* the Commission 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 sixth³ and seventh⁴ special sessions;

4. *Reaffirms* the mandate of the Commission, as the core legal body within the United Nations system in the field of international trade law, to co-ordinate legal activities in this field in order to avoid duplication of

effort and to promote efficiency, consistency and coherence in the unification and harmonization of international trade law, and, in this connection, recommends that the Commission, through its secretariat, should continue to maintain close co-operation with the other international organs and organizations, including regional organizations, active in the field of international trade law;

5. *Reaffirms also* the importance, in particular for developing countries, of the work of the Commission concerned with training and assistance in the field of international trade law and the desirability for it to sponsor seminars and symposia, in particular those organized on a regional basis, to promote such training and assistance, and, in this connection:

(a) Expresses its appreciation to those regional organizations and institutions which have collaborated with the secretariat of the Commission in organizing regional seminars and symposia in the field of international trade law;

(b) Welcomes the initiatives being undertaken by the Commission and its secretariat to collaborate with other organizations and institutions in the organization of regional seminars;

(c) Invites Governments, international organizations and institutions to assist the secretariat of the Commission in financing and organizing regional seminars and symposia, in particular in developing countries;

(d) Invites Governments, the relevant United Nations organs, organizations, institutions and individuals to make voluntary contributions to allow the resumption of the programme of the Commission for the award of fellowships on a regular basis to candidates from developing countries to enable them to participate in such seminars and symposia;

6. *Takes note with appreciation* of the completion by the Commission of the draft Convention on International Bills of Exchange and International Promissory Notes;⁵

7. *Notes with particular satisfaction* the completion and adoption by the Commission of the Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works;

8. *Recommends* that all efforts should be made so that the Legal Guide becomes generally known and available;

9. *Invites* those States which have not yet done so to consider ratifying or acceding to the following conventions:

(a) Convention on the Limitation Period in the International Sale of Goods, of 12 June 1974;

(b) Protocol amending the Convention on the Limitation Period in the International Sale of Goods, of 11 April 1980;

(c) United Nations Convention on the Carriage of Goods by Sea, of 31 March 1978;

¹Official Records of the General Assembly, Forty-second Session, Supplement No. 17 (A/42/17).

²Ibid., chap. III, A.

³Resolutions 3201 (S-VI) and 3202 (S-VI).

⁴Resolution 3362 (S-VII).

⁵Official Records of the General Assembly, Forty-second Session, Supplement No. 17 (A/42/17), annex I.

(d) United Nations Convention on Contracts for the International Sale of Goods, of 11 April 1980;

10. *Requests* the Secretary-General to make increased efforts to promote the adoption and use of the texts emanating from the work of the Commission and to submit to the General Assembly at its forty-fourth session a report concerning the status of the conventions;

11. *Recommends* that the Commission should continue its work on the topics included in its programme of work;

12. *Expresses its appreciation* for the important role played by the International Trade Law Branch of the Office of Legal Affairs of the Secretariat, as the substantive secretariat of the Commission, in assisting in the structuring and implementation of the work programme of the Commission, and invites the Secretary-General to consider taking whatever measures may be necessary, within existing resources, to provide the Commission with adequate substantive secretariat support.

94th plenary meeting
7 December 1987

E. General Assembly resolution 42/153 of 7 December 1987

42/153. *Draft Convention on International Bills of Exchange and International Promissory Notes*

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it created the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade,

Reaffirming its conviction that divergencies arising from the laws of different States in matters relating to international trade constitute one of the obstacles to the development of world trade,

Being aware that the Commission, at its fourth session in 1971, decided to proceed with work directed towards the preparation of uniform rules applicable to a special negotiable instrument for optional use in international transactions in order to overcome the divergencies arising out of the existence of two main systems of law governing negotiable instruments,¹

Recalling that in resolution 41/77 of 3 December 1986 it requested the Commission to complete, at its twentieth session, the work on the draft Convention on International Bills of Exchange and International Promissory Notes² and decided to consider the draft

Convention during its forty-second session with a view to its adoption or other appropriate action,

Taking note of the draft Convention adopted by the Commission at its twentieth session,³

Recognizing that Governments should be given sufficient time to study the draft Convention,

1. *Expresses its appreciation* for the work achieved by the United Nations Commission on International Trade Law in preparation of the draft Convention on International Bills of Exchange and International Promissory Notes;

2. *Requests* the Secretary-General to draw the attention of all States to the draft Convention, to ask them to submit the observations and proposals they wish to make on the draft Convention before 30 April 1988 and to circulate these observations and proposals to all Member States before 30 June 1988;

3. *Decides* to consider, at its forty-third session, the draft Convention on International Bills of Exchange and International Promissory Notes, with a view to its adoption at that session, and to create to this end, in the framework of the Sixth Committee, a working group that will meet for a maximum period of two weeks at the beginning of the session, in order to consider the observations and proposals made by States.

94th plenary meeting
7 December 1987

¹Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17 (A/84/17) chap. III, sect. A.

²*Ibid.*, Forty-first Session, Supplement No. 17 (A/41/17), annex I.

³*Ibid.*, Forty-second Session, Supplement No. 17 (A/42/17), annex I.

I. INTERNATIONAL PAYMENTS

International negotiable instruments

1. Report of the Working Group on International Negotiable Instruments on the work of its fifteenth session (New York, 17-27 February 1987) (A/CN.9/288)^a

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^aFor consideration by the Commission, see Report, chapter II, (part one, A, above).

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INTRODUCTION

1. The United Nations Commission on International Trade Law, at its nineteenth session, held in New York, from 23 June to 11 July 1986, considered the articles of the draft Convention on International Bills of Exchange and International Promissory Notes as revised by it at its seventeenth session and by the Working Group at its thirteenth and fourteenth sessions as contained in document A/CN.9/274.¹ As regards its future course of action, the Commission requested the Secretariat to transmit to all States for comment the draft Convention as revised by the Commission at its nineteenth session and as set forth in annex I to its report.²

2. The mandate of the Working Group was to revise the draft Convention on International Bills of Exchange and International Promissory Notes for the consideration of the Commission at its twentieth session.³ At its nineteenth session the Commission was agreed that the Working Group, at its fifteenth session, should consider the comments received from Governments on the draft Convention and should make recommendations to the Commission as to how any concerns expressed in those comments might be satisfied. It should examine the draft Convention with a view to discovering any inconsistencies among its provisions or any lacunae. The Working Group should also be at liberty to suggest improvements to the draft Convention.⁴

3. The Working Group on International Negotiable Instruments was established at the fifth session of the United Nations Commission on International Trade Law.⁵ The Working Group held its fifteenth session at New York from 17 to 27 February 1987. The membership of the Working Group was expanded, at the nineteenth session of the Commission, to include all States members of the Commission.⁶ These are: Algeria, Argentina, Australia, Austria, Brazil, Central African Republic, Chile, China, Cuba, Cyprus, Czechoslovakia, Egypt, France, German Democratic Republic, Hungary, India, Iran (Islamic Republic of), Iraq, Italy, Japan, Kenya, Lesotho, Libyan Arab Jamahiriya, Mexico, Netherlands, Nigeria, Sierra Leone, Singapore, Spain, Sweden, Union of Soviet Socialist Republics, United

Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay and Yugoslavia. All members of the Working Group attended the session except: Brazil, Central African Republic, Iran (Islamic Republic of), Kenya, Lesotho, Libyan Arab Jamahiriya, Sierra Leone, United Republic of Tanzania and Uruguay. The session was also attended by observers from the following States: Bahrain, Bangladesh, Bulgaria, Burma, Burundi, Canada, Côte d'Ivoire, Democratic People's Republic of Korea, Finland, Germany, Federal Republic of, Guatemala, Holy See, Malta, Morocco, Oman, Peru, Poland, Republic of Korea, Romania, Rwanda, Saudi Arabia, South Africa, Switzerland, Thailand, Turkey, Venezuela, Yemen and Zaire, as well as observers from the following international organizations: International Monetary Fund, United Nations Industrial Development Organization, Hague Conference on Private International Law, International Chamber of Commerce and Latin-American Federation of Banks.

4. The Working Group elected the following officers:

Chairman: Mr. Willem VIS (Netherlands)

Rapporteur: Mr. Victor MOORE (Nigeria)

5. The Working Group had before it the following documents:

(a) Provisional agenda (A/CN.9/WG.IV/WP.31);

(b) Draft Convention on International Bills of Exchange and International Promissory Notes: comments of Governments and international organizations: note by the secretariat (A/CN.9/WG.IV/WP.32 and Add.1 to 6);

(c) Draft Convention on International Bills of Exchange and International Promissory Notes: draft final clauses: note by the secretariat (A/CN.9/WG.IV/WP.33);

(d) Report of the United Nations Commission on International Trade Law on the work of its nineteenth session, *Official Records of the General Assembly, Forty-first Session, Supplement No. 17* (A/41/17).

DELIBERATIONS AND DECISIONS

6. The Working Group considered the comments submitted in regard to articles 1 to 32 and adopted new texts in respect of those articles where it deemed it appropriate. The revised articles adopted by the Working Group are contained in the annex to this report.

¹Official Records of the General Assembly, Forty-first Session, Supplement No. 17 (A/41/17), paras. 15-211.

²*Ibid.*, para. 223.

³*Ibid.*, paras. 212-224.

⁴*Ibid.*, para. 222.

⁵*Ibid.*, Twenty-seventh Session, Supplement No. 17 (A/8717), para. 61.

⁶*Ibid.*, Forty-first Session, Supplement No. 17 (A/41/17), para. 221.

7. As a result of in-depth discussions on some of the key features of the draft Convention, the Working Group was not able to consider the comments made by Governments and international organizations on articles other than articles 1 to 32. The Working Group was however of the view that the remaining comments on the draft Convention could appropriately be discussed by the Commission in plenary session and that no further session of the Working Group was required.

**DRAFT CONVENTION ON INTERNATIONAL
BILLS OF EXCHANGE AND
INTERNATIONAL PROMISSORY NOTES:
CONSIDERATION OF COMMENTS BY
GOVERNMENTS AND INTERNATIONAL
ORGANIZATIONS**

In general

8. One representative expressed the view that, although the current text of the draft Convention was the result of prolonged efforts, in its present state it was not acceptable. It was noted that the Commission, at its nineteenth session, had called on the Working Group to examine the draft Convention with a view to suggesting improvements. There were two separate types of improvement needed by the present draft Convention: those related to form and those related to substance. The draft still contained serious lacunae in that it did not envisage endorsement in pledge, sets of identical parts of an instrument, or the establishment of copies. The representative concluded his observations by stating that it was imperative for the draft Convention and the Geneva Convention to be made compatible. The present tendency in the draft in favour of the common law legal system should be corrected into a fair compromise between civil law and common law. The Working Group and the Commission should take all the time that was necessary to achieve this end.

Article 1

Paragraphs (2) and (3)

9. The view was expressed that the reference to the words "International bill of exchange (Convention of . . .)" both in the heading and in the text of an international bill of exchange and similar wording in the heading and text of an international promissory note, as provided in articles 1(2)(a) and 1(3)(a), was unnecessary and repetitive and that a single reference to those words in the first paragraph of the text of an instrument was preferable. This view was not accepted. The current draft, by requiring the words both in the heading and in the text, increased the likelihood that the international instruments would be recognized as such by personnel handling them in banks.

10. The view was expressed that, although articles 1(2)(b) and 1(3)(b) qualified the order or promise to pay contained in an international instrument as "unconditional", the authority to stipulate on a bill that it must not be presented for acceptance before a certain date or

before the occurrence of a certain event given by article 46(1) and the use of an acceleration clause in a case of default permitted by article 6(c), constituted conditions to the order or promise to pay contained in the instrument. The prevailing view, however, was that these provisions did not make the order or promise conditional.

11. A proposal was made to delete subparagraph (c) from articles 1(2) and 1(3) as being potentially misleading and unnecessary since article 8(1)(b) provides that an instrument is deemed to be payable on demand if no time for payment is expressed. It was stated, in reply, that the requirement expressed in subparagraph (c) was necessary in order to exclude, in particular, instruments payable at an indefinite stage. An alternative proposal was that the two paragraphs should read "contains the indication of maturity", which would bring them closer to the Geneva system. The Working Group decided to retain the current text.

Paragraph (4)

12. The view was expressed that paragraph (4), which provides that proof that the statements referred to in articles 1(2)(e) or 1(3)(e) are incorrect does not affect the application of the Convention, raised problems when read in connection with the preceding paragraphs of article 1. It was recalled that those problems had been discussed at the seventeenth session of the Commission in 1984 and that, at that time, it had been concluded that "there was a need to revise the criterion contained in article 1(4) so as to limit the application of the Convention to genuinely international instruments".⁷ It was stated that the above-mentioned paragraph could be interpreted in two ways: (a) by keeping strictly to the letter of the provision and reading it only in conjunction with paragraphs (2)(e) and (3)(e); (b) by interpreting the paragraph as directly affecting paragraph (1), which would then give the drawer or maker of an instrument freedom to exclude a purely domestic instrument from the régime of the applicable national law. It was stated that the second interpretation was contrary to the aim of the draft Convention and that the first interpretation, which was suggested to be the correct one, should be expressly stated in the draft Convention by means of a proposal that would read as follows:

"Proof that the statements referred to in paragraphs (2)(e) or (3)(e) of this article are incorrect does not affect the application of this Convention, provided the international character of the negotiable instrument, as defined in the preceding paragraphs of this article, is maintained."

13. On the one hand, this proposal was supported in so far as it reduces the possibility of a fraud on the law. On the other hand, it was resisted in so far as it forces parties to inquire whether the statements on the instrument as to the places indicated were accurate or not and, if not, whether the instrument retained its international character because of contacts with places not mentioned on the instrument. It was suggested by way of

⁷*Ibid.*, Thirty-ninth Session, Supplement No. 17 (A/39/17), para. 41.

compromise that no proof that the statements were incorrect should be possible against a protected holder. The Working Group decided to maintain the current text.

Paragraph (5)

14. A proposal was made that the words "this Convention does not apply to cheques" should be qualified by the words "although in some countries cheques are regarded as a type of bill of exchange". Although the proposal was found to be correct, it was not adopted by the Working Group on the ground that the countries concerned had no objection to the current text.

Division of article 1

15. A proposal was made by France and the United States to divide article 1 into two or three articles so as to separate the requirements needed to make an instrument international in character from the formal requisites of a bill of exchange or a promissory note. The Working Group agreed to this proposal. The new text of articles 1, 1 *bis* and 1 *ter* is set forth in the annex to this report.

Article 2

16. The Working Group considered various proposals which aimed at limiting the scope of application of the Convention as envisaged in article 2. One proposal was to require that two of the places listed in article 1, paragraph (2)(e) or (3)(e), be situated in Contracting States. Another proposal was to require that the place where the bill is drawn, or the note is made, and the place of payment be situated in Contracting States. Yet another proposal was to allow any Contracting State to introduce this latter requirement by way of a reservation.

17. In support of these proposals, it was stated that the current article 2 was exorbitant in that it declared the Convention to be applicable irrespective of whether the places indicated on the instrument were situated in Contracting States. The courts of Contracting States would thus apply the Convention even to acts or situations in non-Contracting States. Moreover, parties who issued or took an instrument purportedly governed by the Convention ran the risk in any forum of a non-Contracting State that another legal régime would regulate their rights and obligations. Above all, the wide scope envisaged in article 2 was contrary to the rules of private international law as found, for example, in the 1930 Geneva Convention for the Settlement of Certain Conflicts of Laws in Connection with Bills of Exchange and Promissory Notes or the Inter-American Convention on Conflict of Laws Concerning Bills of Exchange, Promissory Notes, and Invoices (Panama, 1975). It was stated that no State adhering to any such Convention could ratify or accede to the Convention under consideration if article 2 remained unchanged.

18. The prevailing view in the Working Group was not to adopt any of the proposals for limiting the scope of application envisaged in article 2. In support of this

view, it was stated that the idea expressed in article 2 was an integral part of the philosophy underlying the system of the draft Convention. The introduction of any of the limitations proposed would unduly restrict the use and usefulness of the new optional instrument created by the Convention. There was not only the formal effect of restricting the application to instruments made and payable in Contracting States but also the more far-reaching practical obstacle to circulation arising from the need to inquire whether certain countries were parties to the Convention. Significant difficulties would be created if the proposed reservation were allowed. All this would be contrary to the important principle of negotiable instruments law that parties should be able to gain certainty from what is between the four corners of the instrument. It was more appropriate in this field where a network of rights and obligations was created by the circulation of the instrument to have one legal régime, originally chosen and expressed in the instrument, follow that instrument. While the present system was not free from possible difficulty or uncertainty as to what would happen in the forum of a non-Contracting State, there was similar doubt as to whether any of the proposed restrictions would lead to a higher degree of certainty.

19. The Working Group, after deliberation, adopted the prevailing view and decided to retain article 2 in its current form, without a reservation clause. As regards the possible conflict between the draft Convention and the 1930 Geneva Convention, the Working Group was agreed that it could not, at this stage, usefully consider this issue, which was essentially one for the States Parties to that Convention.

Article 3

20. A proposal was made to delete the words "the observance of good faith in international transactions". It was stated that the meaning of the words was not clear. They were a criterion for the behaviour of the parties without any significance when addressed to a judge who had to interpret legal provisions that were formal in character and that demanded certainty and uniformity of interpretation. Uniformity could not be obtained with concepts that had a different meaning in different legal systems. According to another view, the words should be maintained in the text of article 3 since they were to be found in other conventions on international trade law, in particular in article 7(1) of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980).

21. The Working Group decided to retain the current text of article 3.

Article 4

22. It was suggested that the list of definitions might be supplemented for the sake of comprehensiveness by the concepts mentioned in articles 8 and 12. The Working Group decided to keep the current list of definitions in article 4 without any additions.

Paragraphs (6) and (7)

23. The view was expressed that the definitions of "holder" and "protected holder" were still not satisfactory. In particular, the technique of drafting by reference to other articles raised considerable uncertainties of interpretation. It was suggested that the definition in article 4(7), apart from being incomprehensible, was misplaced. A proposal was made that the requirements for being a protected holder should be contained in a new article 25 *bis* and that article 4(7) should provide that "'Protected holder' means a holder who meets the requirements of article 25 *bis*". It was suggested that with such a proposal the concept of "protected holder" would logically appear in the part of the Convention where the rights of the holder and the protected holder were regulated.

24. The Working Group agreed to the proposed organizational change.⁸

Paragraph (10)

25. A view was expressed that the draft Convention should contain a clear definition of the word "signature" to include the name of the signer. It was observed that under articles 1(2)(f) and 1(3)(f) the signature of the drawer or maker was an indispensable element for the Convention to apply to an instrument. Without a clear definition of signature there was no certainty that a signature would be valid in States where the instrument might be negotiated or sued upon. A second suggestion was to insert after the words "handwritten signature" in paragraph (10) the words "even if it is illegible but corresponds to that of its author". It was stated that the proposed addition would obviate the need for the courts to decide whether an "illegible signature" was a signature. The prevailing view was that both of these problems could be easily decided by the courts by reference to the words "handwritten signature". It was noted that other international instruments such as the Geneva Uniform Law for Bills of Exchange and Promissory Notes contained no definition of "signature".

26. A third suggestion was that categorizing "any other means of effecting the equivalent authentication" as a signature was superfluous and the words should be deleted. It was stated that they permitted too wide a range of potential means of authentication, including authentication by symbols or by electronic means. It was suggested that the latter category, in particular, should not be included in the draft Convention since that might imply that an instrument need not be on paper.

27. However, the prevailing view was that these words reflected the practice of several countries to authenticate an instrument by means of symbols and that they provided flexibility in regard to future means of authenticating commercial documents. As a result, the Working Group decided to maintain the current text without change.

⁸The discussion and decision on new article 25 *bis* are set forth below, paras. 130-137.

Article 5

28. It was suggested that the words "or could not have been unaware of its existence" could be deleted or, if not deleted, at least clarified. It was difficult to prove that a person could not have been unaware of the existence of a certain fact. The wording implied a presumed knowledge, which might lead to the objectionable conclusion that the person concerned had the burden of proving his ignorance. Furthermore, that wording, and in fact the entire article 5, was not necessary in view of the fact that the element of knowledge or lack of knowledge was qualified by the concept of negligence in all those provisions where that was appropriate. The concept of negligence, although different interpretations might be given to it in civil law and in common law countries, certainly embraced the idea that the person "could not have been unaware of the existence of a fact".

29. The prevailing view, however, was to retain article 5 in its current form. While the wording of its second part was not as felicitous as it might be, no better wording had been found after extensive discussions. For those provisions where the element of negligence for good reasons was not added, it was necessary to define knowledge as covering somewhat more than actual knowledge so as to allow a court to imply knowledge where cogent reasons led to the conclusion that a person, despite his denial, had knowledge or had deliberately closed his eyes. Accordingly, the Working Group retained article 5 without change.

*Article 6**Subparagraph (c)*

30. The Working Group considered a proposal to delete article 6(c). The reasons advanced by the proponents of that proposal included the following. A stipulation on the instrument that upon default in payment of any instalment the unpaid balance became due was inconsistent with the requirement of an unconditional order or promise to pay as laid down in article 1, paragraphs (2)(b) and (3)(b). If the sole purpose of article 6(c) was to declare that an instrument bearing an acceleration clause met the requirement of "definite sum", there was no need to retain this provision in view of the existence of article 6(b), which covered all instruments payable by instalments at successive dates.

31. Above all, the envisaged sanction for default that the full unpaid balance became due was too harsh and was objectionable in certain circumstances, such as intervening events beyond the control of the debtor, e.g. imposition of foreign exchange controls. If the deletion of article 6(c) was not acceptable, one should at least restrict the provision to certain types of default, such as non-payment due to insolvency. In more general terms, the concern was expressed that acceleration clauses might operate unfairly against debtors and that, therefore, article 6(c) would not be in the best interest of countries with large foreign debts.

32. The prevailing view was in favour of retaining article 6(c). It was stated in support of that view that the

Convention should not disregard current practices in many countries reflecting commercial needs. To exclude instruments with acceleration clauses would not necessarily be to the advantage of countries in need of foreign capital since it might adversely affect the availability of long-term credit or lead creditors to require, for example, a series of demand instruments instead. Above all, it was felt that the above concerns and any possible response to them lay outside the scope of article 6(c), which merely dealt with the issue whether an instrument bearing an acceleration clause could be a negotiable instrument. On that point, it was desirable to provide certainty as regards such clauses.

33. Article 6(c) was viewed as neutral in that it merely took into account the possibility of two parties agreeing on an acceleration clause and in that it did not pre-empt the application of any rule that might come to the relief of the debtor. In appropriate circumstances, relief might be obtained, for example, through article 72 of the Convention or from any mandatory provisions of public policy designed to protect weaker parties.

34. The Working Group, after deliberation, adopted the prevailing view and decided to retain article 6(c) in its current form. It was noted that the question of provisions preventing abuse and protecting parties was an issue of wider application, which the Commission might wish to consider thus in a wider context.

Subparagraphs (d) and (e)

35. The Working Group referred to a future drafting group the proposal to add the substance of subparagraph (d) to the provision of subparagraph (e).

Article 7

Paragraph (1)

36. It was pointed out that the amount on an instrument might be expressed more than once in figures or in words and that there might be a discrepancy between those figures or words. It was suggested that the draft Convention should contain a rule similar to that contained in article 6 of the Geneva Uniform Law that in case of such a discrepancy the lower amount would be deemed to be correct. In case of conflict between the amount expressed in words and the amount expressed in figures as so determined, the current rule in article 7(1) that the amount in words would be deemed to be correct would govern. It was suggested that that proposal would lead to an excessively rigid rule since the intention of the parties on a different amount might be clear. The Working Group noted, however, that the rule would have its primary effect when an instrument had circulated, since the intention of the parties could always be shown between immediate parties. Therefore, the Working Group decided to add the following sentence:

"When the amount payable by an instrument is expressed more than once in words or more than once in figures, and there is a discrepancy, the smaller amount is the relevant one."

Paragraph (5)

37. A view was expressed that there should be no limitation in the Convention on the type of variable interest rate that would qualify under article 7(5). The prevailing view was that the compromise reached in the Commission was appropriate, but the drafting of the provision was too complicated. In that regard it was suggested that the end of article 7(5) should be redrafted as follows:

"... each such reference rate must be published or otherwise available to the public and not be subject to determination influenced by any person who might improperly take advantage of it in connection with the instrument."

38. Although there was some support for the view that the current text more clearly set out the parties who were not to have the power to determine the variable rate, the prevailing view was that the proposed text should be adopted. It was stated that the word "improperly" was not needed since the holder had the right to charge interest.

39. The Working Group, after deliberation, decided to adopt the proposed text without the word "improperly".

Article 8

Paragraph (1)

40. A proposal was made to delete, in subparagraph (a), the words "or if it contains words of similar import" on the ground that they were superfluous and might create difficulties of interpretation. The Working Group did not accept the proposal for the reason that the words served a useful purpose by covering the various other possible expressions that banks and businessmen might use to indicate that an instrument was payable on demand.

Paragraph (2)

41. A proposal was made to delete paragraph (2). A second proposal was to restrict its application to endorsement after maturity by deleting references to acceptance and guarantee after maturity. It was stated in support that the maturity date was an important cut-off date after which only payment or dishonour with any consequent right of recourse should be envisioned. It was neither current practice nor of practical value to accept overdue instruments or to give a guarantee after maturity. Moreover, it was inappropriate to allow such acts after maturity without clearly regulating their legal consequences. It was, for example, not clear whether presentment or protest was necessary with regard to an endorser after maturity, whether such endorser was liable to parties subsequent to himself, and what the date was from which the time-limit for presentment for payment or the limitation period would run.

42. The proposals were opposed on the ground that the Convention should regulate the effects of such acts as endorsement, acceptance and guarantee after maturity. It was stated that those actions occurred in practice in

certain countries, including countries following the Geneva Uniform Law which prohibits acceptance after maturity. The fact that the practice was not known or not regarded as useful in all countries did not justify its exclusion from the Convention.

43. As regards the questions concerning the legal consequences of such acts, it was felt, after deliberation, that the Convention provided answers in an appropriate way. In particular, it was agreed that the general rule requiring presentment for payment and protest in case of dishonour would apply to an instrument that had been endorsed after maturity. That solution was adequate since otherwise the liability of such an endorser would come close to that of a guarantor of the drawee. As regards other legal consequences, it was understood that article 8(2) by its very terms did not convert the instrument into a demand instrument in all respects but made it payable on demand merely as regards the person who accepted, endorsed, or guaranteed it after maturity.

44. After deliberation, the Working Group decided to retain article 8(2) in its current form and concluded that there was no need to add further provisions on the legal consequences of an acceptance, endorsement or guarantee after maturity.

Paragraph (5)

45. A proposal was made to add at the end of this provision the words "or the date on which the instrument is presented for acceptance and is dishonoured". The purpose of this addition was to cover the case where a bill was not accepted, since even for that case it was necessary to determine the maturity date of a bill payable at a fixed period after sight.

46. Doubts were expressed as to whether there was a real need to determine the maturity date in the case of dishonour since in that case the holder had no right against the drawee but had an immediate right of recourse. It was noted, however, that the maturity date was needed to determine the amount of interest due in accordance with article 66(1)(b).

47. As regards the substance of the proposed addition, it was stated that the date of presentment for acceptance might be less certain than the date of protest and that the latter date was the one used in that context by article 35(1) of the Geneva Uniform Law. Where protest was dispensed with, the relevant date should be that of dishonour. The same solution was provided in article 80(1)(d) of the draft Convention for the purpose of calculating the limitation period.

48. Accordingly, the Working Group decided to add to paragraph (5) the words "or, where the bill is dishonoured, by the date of protest for dishonour by non-acceptance or, where protest is dispensed with, by the date of dishonour".

Paragraph (7)

49. In considering the case where the maker refuses to sign the visa, it was noted that the Convention, while

containing a set of rules on non-acceptance of bills payable at a fixed period after sight and on its consequences, contained no comparable provisions dealing with refusal of visa for notes payable at a fixed period after sight. The question was raised how presentment could be proven in view of the fact that the Convention did not require protest in such circumstances.

50. In the light of this situation and based on the view that notes payable at a fixed period after sight were not used in practice, a suggestion was made to delete paragraph (7). It was stated, in reply, that such notes were sometimes used in certain countries and that proof of refusal to sign the visa was secured there, for example, by some public verification procedure or by requiring protest in an analogous application of the rules on after-sight bills.

51. The Working Group, after deliberation, decided to retain paragraph (7) in its current form. In the context of the discussion of the rules on refusal to accept an after-sight bill, consideration would need to be given to the appropriateness of special rules for refusal of visa or, possibly, of a general rule to the effect that the rules on refusal to accept would apply accordingly.

Article 9

52. The view was expressed that more than one person were rarely, if ever, found on instruments as drawer, maker or drawee. Even plurality of payees was not common. It was therefore suggested that article 9 should be deleted or, at least, restricted to payees. The view prevailed, however, that since the practice of multiple drawers, drawees, makers and payees was known in some countries it should be reflected in the draft Convention.

53. It was stated that the draft Convention provided no answers to the various legal questions arising from the plurality of drawers, makers, drawees or payees. For example, as regards obligors it was unclear whether they were jointly or separately liable on the instrument. It was noted in that connection that the draft Convention, in articles 47(b) and 51(b), regulated the presentment for acceptance or for payment of bills drawn on two or more drawees. As regards payees, it was asked, for example, whether they could individually transfer the instrument and whether their protection could differ in that only one was a protected holder.

54. In general, it was suggested that the answers would depend on the relationships as reflected on the instrument and that satisfactory solutions could be found in most cases by way of a reasonable construction of the rules of the Convention. If a need were felt for adding special rules relating to such issues as liability, presentment, protest or recourse, this could be considered during the discussion on the provisions dealing with those issues.

55. With that understanding, the Working Group decided to retain article 9 in its current form.

Article 10

56. No comments were made on this article.

Article 11

57. A proposal was made to amend paragraph (1) of this article as follows:

“(1) An incomplete instrument which satisfies the requirement set out in subparagraph (a) of paragraph (2) of article 1 and bears the signature of the drawer or the acceptance of the drawee, or which satisfies the requirements set out in subparagraphs (a) and (f) of paragraph (3), but which lacks other elements pertaining to one or more of the requirements set out in paragraph (2) or (3) of article 1 may be completed and the instrument so completed is effective as a bill or a note.”

58. It was noted that different meanings were given to the term “incomplete instrument” in article 11 and in article 38(1). Under article 11, an incomplete instrument was one that satisfied the requirements of subparagraph (a) of article 1(2) or 1(3) that the instrument contained in its text the words of internationality, and of subparagraph (f) that it be signed by the drawer or maker, but that failed to satisfy one or more of the other requirements set out in article 1(2) or 1(3). Under article 38(1), however, a bill of exchange that satisfied only the requirements of article 1(2)(a) was regarded as an incomplete instrument that might be accepted by the drawee. It was pointed out that the Commission, after deliberation at its nineteenth session, had amended article 38(1) by adding a new sentence that provided that, in such case, the provisions of article 11 applied accordingly to the signing of the drawer and any further completion by the drawer or another person.

59. The current proposal was to delete the sentence that had been added and to amend instead article 11(1) to introduce that concept into it. The proposal was found to be satisfactory and was adopted by the Working Group.

60. A view was expressed that the article should state that the completion of an incomplete instrument was lawful only if there was agreement between the parties, since that agreement alone could legitimize the completion. The proposal was not accepted on the ground that a subsequent holder could not know whether the instrument had been completed in accordance with authority or not.

61. Finally, a proposal was made to add to article 11 the idea that a holder may complete an instrument only before the instrument had matured. It was stated that if, at the date of maturity, an instrument was not complete in accordance with article 1, it could not be regarded as covered by the Convention. It was noted, however, that the Convention provided for an instrument to be transferred after maturity. Thus, it should be possible to complete an instrument after maturity. For those reasons the proposal was not adopted.

Article 12

62. No comments were made on this article.

Article 13

63. After noting that comments had been submitted on this article, the Working Group retained the article unchanged.

Article 14

64. In connection with article 14, a proposal was made to introduce provisions governing instruments issued in a set of two or more identical parts. It was pointed out that such instruments were used in some countries and were found in those countries to be of value. The Working Group agreed in principle to the proposal; it did not consider the possible content and drafting of such provisions.

65. The Working Group decided to retain, for the time being, article 14 unchanged.

Article 15

66. No comments were made on this article.

Article 16

67. After noting that comments had been submitted on this article, the Working Group retained the article unchanged. In connection with article 16, a proposal was made to add to the draft Convention a new article 20 *bis* covering endorsements in pledge (see below, paras. 72-75).

Article 17

68. It was observed that paragraph (2) used the expression “is deemed not have been written” while article 35(2) used the expression “is without effect”. It was agreed that the inconsistency in formulation, together with the many other drafting suggestions made by Governments in their comments, should be considered by a drafting group in conjunction with the twentieth session of the Commission.

Article 18

69. After noting that comments had been submitted on this article, the Working Group retained the article unchanged.

Article 19

70. No comments were made on this article.

Article 20

71. The Working Group decided, for the sake of clarification, to modify paragraph (1)(c) as follows: “(c) Is subject only to the claims and defences which may be set up against the endorser”.

New article 20 bis

72. It was proposed to add to the draft Convention a new article 20 *bis* as follows:

“When an endorsement contains the statements ‘value in security’ (“*valeur en garantie*”), ‘value in pledge’ (“*valeur en gage*”), or any other statement implying a pledge, the endorsee:

“(a) Is a holder by virtue of article 4(6) and (7) and article 28;

“(b) May exercise all the rights arising out of the instrument;

“(c) May only endorse the instrument for purposes of collection;

“(d) Is subject to claims and defences which may be set up against the endorser only in the cases specified in articles 25 and 26.

“Such an endorsee, having endorsed for collection, is not liable upon the instrument to any subsequent holder.”

73. It was stated, in support of the proposal, that the draft Convention would be incomplete if it did not cover endorsements in pledge, which were used in practice and served a useful purpose. Although such endorsements were not known in all countries and were no longer used in certain countries, the Working Group decided to include them in the draft Convention so as to accommodate the practice where it existed.

74. Various questions were raised relating, in particular, to the legal status of an endorsee in pledge in comparison with that of other endorsees covered by the Convention. After discussion, it was understood that the endorsee in pledge was a holder in his own right like any other transferee except the endorsee for collection, who was essentially an agent of his endorser. The endorsee in pledge could be a protected holder or a holder who was not a protected holder or a holder in whom the rights of protected holder were vested pursuant to article 27. Accordingly, he was subject, and subject only, to those claims and defences specified in article 25 or 26, whichever the case may be, unlike the endorsee for collection, who was subject to all the claims and defences available against his endorser (see article 20(1)(c)). Like the endorsee for collection, however, he was not entitled to transfer the instrument except for purposes of collection.

75. Accordingly, the following suggestions for modifying the proposed draft text were made and adopted. Subparagraph (a) should state that the endorsee is a holder as referred to in article 14. As proposed by an *ad hoc* working party composed of the representatives of Egypt, France, Netherlands and United Kingdom and the observers of Canada and Switzerland, subparagraph (d) should read as follows: “(d) Is subject only to claims and defences specified in article 25 or 26”. The text of new article 20 *bis* as adopted by the Working Group is set forth in the annex to this report.

Article 21

76. After noting that comments had been submitted on this article, the Working Group retained the article unchanged.

Article 22

77. After noting that comments had been submitted on this article, the Working Group retained the article unchanged.

*Article 23**Paragraph (1)*

78. A proposal was made to redraft subparagraph (b) as follows: “The person who received the instrument directly from the forger, having knowledge thereof”. The addition of the requirement of knowledge, which was also proposed for the parallel provision in article 23 *bis*, was said to be necessary for the following reasons. It was wrong to presume, as the current text apparently did, that there was collusion between the forger (or the agent without authority) and the person to whom the instrument was directly transferred. The policy of this provision contradicted the rule in article 14(1)(b), according to which the transferee became a holder even if the last, or any previous, endorsement was forged. Above all, the effect of this provision would be to impede the negotiability and thus the circulation of instruments.

79. The Working Group did not adopt this proposal for the following reasons. The provision of paragraph (1)(b) constituted a vital part of a basic compromise solution, which had been agreed upon after extensive deliberations during various sessions of the Working Group and the Commission. The compromise essentially consisted in combining the Geneva rule as laid down in article 14(1)(b) of the draft Convention with the common law rule that a forged endorsement is not an endorsement for purposes of negotiation. There was no evidence to suggest that the operation of this rule in common law countries had in any way impeded the circulation of negotiable instruments.

Paragraphs (2) and (3)

80. As regards paragraph (2)(a), it was stated that the expression “He pays the principal” was not wholly felicitous in that the same verb was used here as in other cases of payment which were different in substance (e.g., payment by acceptor, maker or a party secondarily liable). It was realized, however, that no better expression had been found which was easily translatable into all six official languages.

81. A proposal was made to delete in paragraphs (2) and (3) of article 23, and of article 23 *bis*, the words “provided that such absence of knowledge was not due to his negligence”. It was stated, in support of this proposal, that the concept of negligence was a subjective one which was inappropriate in the context of negotiable instruments law and was difficult to apply. The

difficulties were aggravated by the fact that the relationship to article 5 was not absolutely clear, due to the uncertain scope of that article. Moreover, there was a need for simplifying the system of the draft Convention, which in some of its provisions used the element of lack of knowledge without qualifying it by negligence and in others with that qualification. Above all, retention of the element of negligence in respect of acts by bankers would place too heavy a burden on them by requiring, for example, inquiries or investigations or, at least, the keeping of records about the state of knowledge at the time of the acts in question. This in turn would impede the circulation of instruments.

82. The prevailing view was that liability should not be excluded in all cases of lack of knowledge. The additional requirement of non-negligence, or a similar notion, was the result of a compromise found after extensive discussions and was an appropriate solution. It would be wrong to take into account only the interests of endorsees for collection or parties or drawees who paid the instrument and to disregard the interests of the other persons involved. As regards any fear of imposing too heavy a burden on banks, it was stated that banks in common law countries had long operated under the less favourable rule of strict liability and that, under the draft Convention, the burden of proof was on the plaintiff claiming compensation.

83. The Working Group was agreed, however, that it was not necessary to retain the term "negligence" itself. Instead, other expressions were suggested for establishing appropriate standards, e.g., "normal diligence", "reasonable commercial standards" and "ordinary banking practice". It was noted, in particular, that the ICC Uniform Rules for Collections (1979), which were followed by banks around the world, provided in article 1 that "banks must act in good faith and exercise reasonable care".

84. An *ad hoc* working party, composed of the representatives of Australia, Austria, Germany, Federal Republic of and United States of America, proposed the following wording: "unless the absence of knowledge is due to his failure to act in good faith or exercise reasonable care". The Working Group decided to substitute this wording in paragraphs (2) and (3) of articles 23 and 23 *bis* for the words "provided that such absence of knowledge was not due to his negligence".

Article 23 bis

85. A proposal was made to add to article 23 *bis* the following new paragraph:

"(3 *bis*) Also, the person to whom the instrument was directly transferred by the agent shall not be liable under paragraph (1) towards the principal if, at the time of the transfer, he was without knowledge that the endorsement did not bind the principal, provided that such absence of knowledge was not due to his negligence."

86. It was stated in support of that proposal that the situation dealt with in article 23 *bis* differed considerably

from that covered by article 23 and that it was unjust to subject, as the draft Convention did, both situations to the same legal régime. The person to whom the instrument was directly transferred by an agent without authority should be liable to the purported principal only if he had, or ought to have had, knowledge of the lack of authority. The risk of loss should not be shifted from the purported principal to an endorsee in good faith since, in most cases where the transferee was in good faith, there existed some kind of relationship between the purported principal and the unauthorized agent. Moreover, it was often difficult for an outsider to ascertain precisely the existence and scope of authority, in particular in an international context.

87. The prevailing view, however, was not to adopt the proposal. The current text, which treated the case of an endorsement by an unauthorized agent like that of a forged endorsement, was the result of extensive discussions and provided an appropriate solution. It was often difficult to draw a precise dividing line between the two cases, in particular since the relevant legal rules differed from one legal system to another. It was further stated that the scope of application of article 23 *bis* was narrower than might appear at first sight since it would not apply in cases of apparent or implied authority which all legal systems, although using differing concepts, recognized in substance.

88. The Working Group, after deliberation, decided not to alter the legal régime laid down in article 23 *bis*. It retained the text of the article, except for the modifications of the last part of paragraphs (2) and (3) referred to in paragraph 84 above.

Article 24

89. No comments were made on this article.

Article 25

90. The view was expressed that the current text contained equivocal and ambiguous cross-references, that some of its provisions were inconsistent with one another and that other provisions were duplications. As a result, the article needed to be completely restructured.

91. A proposal for a new text of article 25 was presented to the Working Group by France. It was stated that, while the proposal eliminated some of the original text as being inconsistent with or a duplication of other text, no change in substance had been intended or was thought to have occurred. The proposed text is as follows:

"Article 25

"A party may set up or assert against a holder who is not a protected holder:

"(a) Any defence available under this Convention;

"(b) The exceptions set out in article 26(1)(a);

"(c) Any defence based on the underlying transaction between himself and the drawer or

between himself and the party subsequent to himself, but only if the holder took the instrument with knowledge of such defence or if he obtained the instrument by fraud or theft or participated at any time in a fraud or theft concerning it;

“(d) Any defence arising from the circumstances as a result of which he became a party, but only if the holder took the instrument with knowledge of such defence or if he obtained the instrument by fraud or theft or participated at any time in a fraud or theft concerning it;

“(e) The claims which may be validly made on the instrument by any other person, but only if the holder took the instrument with knowledge of such claims or if he obtained the instrument by fraud or theft or participated at any time in a fraud or theft concerning it;

“(f) Any defence resulting from the underlying transaction between himself and the holder;

“(g) Any other transaction between himself and the holder that would be available as a defence against contractual liability;*

“(h) 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 his negligence.”

92. The Working Group acknowledged the necessity of having a new text for the article. It expressed its gratitude to the French delegation for its efforts. It recognized that the French draft was an improvement in terms of presentation, but that it also introduced some substantive changes.

93. Inspired by the French drafting approach, another proposal was made by the United States of America. It was suggested that this text did not contain any substantive changes or any omissions with regard to the current draft of the article. The text proposed by the United States reads as follows:

“Article 25

“(1) A party may set up against a holder:

“(a) Any defence available under this Convention;

“(b) Any defence based on the underlying transaction between himself and the drawer or between himself and the party subsequent to himself, but only if the holder took the instrument with knowledge of such defence or if he obtained the instrument by fraud or theft or participated at any time in a fraud or theft concerning it;

“(c) Any defence arising from the circumstances as a result of which he became a party, but only if the holder took the instrument with knowledge of such

*The limitation concerning transactions between the party claiming payment and the holder which could serve as defences against contractual liability is open to criticism and should be restricted.”

defence or if he obtained the instrument by fraud or theft or participated at any time in a fraud or theft concerning it;

“(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 his negligence;

“(e) Any defence upon the instrument to which his transferor is subject, if the holder took the instrument after the expiration of the time-limit for presentment for payment;

“(f) Any defence resulting from any transaction between himself and the holder;

“(g) Any defence resulting from any transaction between himself and the holder not referred to in paragraph (1)(f) that would be available as a defence against contractual liability.

“(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, but only if he took the instrument with knowledge of such claim or if he obtained the instrument by fraud or theft or participated at any time in a fraud or theft concerning it. However, a holder who takes the instrument after the expiration of the time-limit for presentment for payment is subject to any claim to the instrument to which his transferor is subject.

“(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 or forgery.”

94. The Working Group decided to consider both the French and the United States proposals with a view to formulating a new text for article 25.

Reference to defences available under article 26(1)(a)

95. It was noted that the French draft contained the addition of the words “the exceptions set out in article 26(1)(a)”. Such an addition was said to be justified on the ground that a party may set up against a holder who was not a protected holder also any defence specified in article 26(1)(a) that could be set up against a protected holder. Since the current text of the article was equivocal and did not clarify whether defences available under article 26(1)(a) were also available against a holder who was not a protected holder, a special reference to them was found to be necessary. According to another view the addition of such words was superfluous since the general statement contained in article 25(1)(a) of the current draft was broad enough to include the proposed addition. However, one might consider redrafting subparagraph (a) as follows: “(a) Any defence available against a protected holder and any other defence available under this Convention”.

Underlying transaction between obligor and drawer or subsequent party

96. The Working Group noted that the two versions were identical, except for a minor discrepancy in French, and that they were based upon paragraph (1)(b) and the first sentence of paragraph (3) in the original text. The Working Group agreed to the formulation.

Circumstances of becoming a holder

97. The Working Group noted that the two versions were based upon the remaining portions of paragraph (1)(b) and the first sentence of paragraph (3) in the original text, and contained the same minor discrepancy in French. The Working Group agreed to the formulation.

Claims to the instrument

98. The Working Group considered subparagraph (e) of the proposal of France which was intended to replace paragraph (2) of article 25 of the current draft Convention and the rule of exception laid down in paragraph (3). It was noted that the second sentence of paragraph (3) concerning a transferee after maturity was not incorporated in the French proposal while it was set forth twice in the proposal of the United States, namely in paragraph (1)(e) relating to defences and in paragraph (2) relating to claims.

99. In support of the French proposal, it was stated that the second sentence of paragraph (3) had not been retained since it was incompatible with article 4(7)(b), which prevented the transferee of an overdue instrument from becoming a protected holder. Moreover, the drafting approach of the United States was said not to be convincing since it led to duplication and repetition by distinguishing between defences and claims—a distinction which was unnecessary in view of the fact that a valid claim to the instrument constituted a defence against the holder.

100. The prevailing view, however, was that the rule laid down in the second sentence of paragraph (3) should be retained. There was no inconsistency between this rule and article 4(7)(b), which merely regulated the question whether the transferee could become a protected holder in his own right. Not only was there room for the shelter rule of article 27 to apply, but there was also a need to regulate the rights of the holder who took an overdue instrument and was not a protected holder. It was recalled that this additional rule had become necessary when the Commission introduced the requirement of knowledge as a restriction to the availability of claims and certain defences. It was noted that the rule correctly reflected the policy of treating the transferee of an overdue instrument in substance as an assignee.

101. As regards the distinction between claims and defences, the Working Group was agreed that it was sound and that it would facilitate the understanding if it were made throughout the article. As reflected in the

United States proposal, the first part would set forth the defences, followed by a second part dealing with claims. On the basis of this organizational agreement, a suggestion was made to regulate the rights of a transferee after maturity in a separate paragraph covering both defences and claims.

Underlying or other transaction between obligor and holder

102. The Working Group retained the rule laid down in paragraph (1)(c)(i) of article 25, which allows any defence resulting from the underlying transaction between the holder and the party from whom payment is sought. This rule was incorporated without change in the proposals of France (subparagraph (f)) and the United States (paragraph (1)(f)).

103. It was noted that the rule laid down in paragraph (1)(c)(ii) of article 25, which allows defences resulting from any other transaction between these persons which would be available as defences against contractual liability, was incorporated in both proposals (subparagraph (g) of the French draft and paragraph (1)(g) of the United States draft). However, as indicated in the comments of France, there were doubts as to the appropriateness of the restriction to “defences against contractual liability”. Various views were expressed on this point.

104. Under one view, the rule was too narrow in that it did not allow the obligor to invoke by way of a set-off any claim he may have against the holder, whether or not based on contract. It was felt that the draft Convention should clearly recognize this right, which legal systems tended to grant to any person obliged to pay a sum of money.

105. Under another view, the draft Convention should not allow any defences arising from transactions other than the underlying one. Accordingly, the entire paragraph (1)(c)(ii) should be deleted. It was stated that it was contrary to the purpose of a negotiable instrument, which should be similar to “cash”, to allow defences that were unrelated to the issue or transfer of the instrument. Moreover, one should distinguish between the question whether under negotiable instruments law there should be a defence to liability, taking into account the possible consequences for other parties, and the question whether payment could in fact be avoided or substituted by a set-off, which was normally governed by the general law of obligations and often subject to special procedural rules.

106. Yet another view, which the Working Group adopted after deliberation, was to modify somewhat the current rule by expressly recognizing any set-off of a contractual nature. Thus, the party from whom payment was sought could raise this defence to his liability if the claim to be set-off originated in a transaction, i.e., a contractual relationship, between himself and the holder.⁹

⁹As to the drafting of this rule, see below, para. 128.

Incapacity and "non est factum"

107. The Working Group noted that the proposals by France and the United States were identical to one another and to paragraph (1)(d) of the original text.

108. The Working Group agreed to the portion of the provision dealing with incapacity. Different views were expressed about the remaining portion of the provision allowing a defence that the 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.

109. Under one view, this portion of the provision should be deleted. It was stated that this was a defence that was unknown in a number of legal systems and that it would be dangerous to permit it against instruments that were intended to circulate internationally. Even if this defence was deleted, between the original parties the obligor could raise the defence as one arising out of the underlying transaction. For those cases where fraud was involved or where the holder had knowledge of the defence, i.e., the ignorant signing, there was no need for a special rule since this was already covered by the rule of paragraph (1)(b) of article 25, which allowed any defence arising from the circumstances as a result of which the obligor became a party. It was stated that this provision contained the appropriate limitations, namely knowledge or fraud.

110. Under another view, the defence was widely known. It was stated to be of particular importance in international transactions where a party may be requested to sign papers in a foreign language he cannot read and whose characters he may not recognize. Those papers may be international instruments even though he had no reason to believe they were. In most cases where negligence was not involved, the signing was induced by fraud.

111. As regards the possible coverage under paragraph (1)(b) of article 25, it was stated that no comparable provision existed in article 26 and that, therefore, the defence of *non est factum* should be treated on its own in both articles. If this defence was deleted from article 25 as a defence available against a holder who was not a protected holder, it would also have to be deleted from article 26 as a defence available against a protected holder. It was pointed out, however, that the availability of this defence against a protected holder had been part of a compromise by which two of the common-law "real" defences were available under the draft Convention.

112. It was suggested that the occurrence of the facts on which this defence was based was rare, in particular, since the rule excluded instances of negligence. To that extent it was not very important whether the provision was retained or deleted. Since it had been stated that the facts leading to the defence which were worthy of being covered would normally arise out of fraud, it was agreed that the defence be limited to such cases.

"Ius tertii"

113. It was noted that the proposal of France, unlike that of the United States (paragraph (3)), did not incorporate the "*ius tertii*" rule laid down in paragraph (4) of article 25.

114. In support of the French proposal, it was stated that paragraph (4) of current article 25 had not been retained since it was redundant and in part incompatible with other provisions. It was redundant in that the assertion of a valid claim (paragraph (4)(a)) was already covered by subparagraph (e) of the French proposal, which incorporated the substance of current paragraph (2) of article 25, and in that the instances of forgery or theft (paragraph (4)(b)) were already covered by subparagraph (d) of the French proposal, which incorporated the substance of current paragraph (1)(b) of article 25 (i.e., defences arising from circumstances as a result of which he became a party). Paragraph (4)(a) was not consistent with paragraph (2) of article 25 and articles 68(3) and 73(2), all of which incorporated the requirement of knowledge.

115. It was stated in reply that the provision laying down the *ius tertii* rule was not redundant. Paragraph (2) of article 25 dealt with the question whether a claim to the instrument could be made against the holder and not whether a party could raise as a defence the assertion of a claim by a third party. Paragraph (1)(b) of article 25 did not cover those instances of forgery or theft committed by a holder who was not a party, for example, where a person stole a note from the payee and, after forging the payee's signature, demanded payment from the maker. As regards the comparison with articles 68(3) and 73(2), it was pointed out that the knowledge required there was that of the person paying and not that of the holder. However, as regards the comparison with paragraph (2) of article 25, there was some support for the view that the requirement of the holder's knowledge of the claim could usefully be incorporated into paragraph 4(a) of article 25.

116. While the Working Group was agreed on the need for retaining a *ius tertii* rule, divergent views were expressed as to what the content of such a rule should be. Under one view, the rule as laid down in article 25(4) should be retained unchanged, although it was realized that the words "asserted a valid claim" in subparagraph (a) were not abundantly clear and precise. However, no other formulation had been found to date which was clearer and provided a more acceptable solution balancing the interests of the holder and those of the party from whom payment was sought.

117. Under another view, there was a need for more certainty, taking into account the interests of the holder and the dilemma of the obligor who was faced at the same time with a demand for payment by a holder and the assertion of a claim by a third party. It was stated that the difficulties of the obligor related not only to the question whether the third party had in fact a valid claim but also to the question whether or not the holder was a protected holder. Various proposals were made in this respect.

118. One proposal was to prevent the obligor from paying the holder if the third party had notified him and demanded that he not pay the holder. Since the obligor in such case was willing to pay but did not know whom to pay, it was inappropriate to speak of a defence to liability. However, based on the law and practice in some countries, it was suggested to add to the Convention a new article 54 *bis* which would admit garnishment to stop payment only in the case of loss or theft of the instrument or the legally established insolvency or legally established incapacity of the holder. The proposal was opposed on the ground that, despite this limitation, the rule was too rigid in that a mere notification by a third party operated as an automatic blocking of payment and that this would unduly weaken the position of the holder of a negotiable instrument.

119. Various other suggestions were aimed at securing in one way or another judicial protection. For example, it was proposed to provide for payment into court, as was done in the similar case of a lost instrument in article 74(2)(d) of the draft Convention. It would then be up to the holder and the adverse claimant to obtain a court decision as to who is entitled to payment as the true owner. The proposal was opposed on the grounds that the draft Convention should not contain any more procedural rules or indirectly require adhering States to establish new procedural rules and that the solution to the obligor's dilemma of depositing the amount with the court was in any event available in practice in most countries even if the draft Convention did not provide therefor.

120. Another proposal was to require, instead of an informal assertion of a valid claim, the assertion of a claim in proceedings before a court or another competent authority. It was stated in support of that proposal that it would provide a greater degree of precision and of the likelihood that the assertion was not fraudulent or frivolous. The proposal was supplemented by a second instance which would entitle the obligor to refuse payment, namely where the holder had been requested, but had refused, to issue a guarantee against the asserted claim. It was stated that the device of requesting a guarantee under these circumstances was often used in practice and that the holder could obtain payment by providing such security.

121. While there was considerable support for this proposed modification of subparagraph (a) of paragraph (4), the Working Group, after deliberation, did not adopt it. It was felt that the assertion in judicial proceedings did not provide certainty about the validity of the claim and that the other part of the rule concerning refusal of a guarantee weakened the position of the holder. From a more general point of view, it was felt that the proposed rule did not provide the flexibility needed in a commercial context and that it created difficulties concerning questions of liability for delay in payment, in particular as regards the interest payable under article 66(1)(b).

122. Accordingly, the Working Group decided to retain paragraph (4) of article 25 unchanged.

123. In connection with the discussion on article 25(4), the Working Group considered the appropriateness of the parallel *ius tertii* rule in the article on discharge, i.e. article 68(3). A proposal was made to reword this provision along the following lines:

“(3) A party is discharged of liability even if he knows at the time of payment that a third person has asserted a claim to the instrument, unless the third person has asserted the claim to the instrument in judicial proceedings or before another competent authority or unless the third person has provided indemnity satisfactory to the obligor.”

124. It was stated in support of this proposal that it was not necessary and in fact wrong to maintain parallelism between article 25(4) and article 68(3). While the former dealt with the ability of the obligor to defend a refusal of payment, the latter was concerned with the duty of the obligor and, in this context, it was necessary to restrict considerably the exceptions to the principle so as to protect the obligor. In this vein, one could restrict the above proposal even further by requiring a court order instead of assertion in judicial proceedings, and by leaving out the instance of sufficient indemnity by the adverse claimant. It was stated that the proposal did not distinguish between a protected holder and a holder who was not a protected holder since this determination was normally difficult and often impossible for the obligor to make.

125. The proposal was opposed on the following grounds. It was not consistent with the principle that payment to a protected holder constituted discharge. It was not easily reconciled with the provisions setting forth the defences and claims available against a holder. In particular, it did not limit the exception from discharge to those cases where the obligor knew that the holder was not a protected holder and, thereby, it neglected the impact of the presumption in article 28; it was stated in reply to this point that article 28 addressed the question as to who had the burden of proof. The policy underlying the second part of the proposed rule, i.e., sufficient indemnity by the adverse claimant, was not regarded as convincing. Moreover, the proposal omitted the instance of payment with knowledge of a forgery or theft on the part of the holder.

126. After noting that there was not sufficient time left for a detailed consideration of, and possible amendments to, the proposal, the Working Group decided not to adopt the proposed modification.

Adoption of revised text of article 25

127. Following the discussion, a new draft text, based on the proposal set out in paragraph 93, was submitted by an *ad hoc* working party.

128. It was noted that the provision covering defences resulting from non-underlying transactions between the holder and the party from whom payment was sought was worded as follows: “Any other defence resulting from a contract between himself and the holder”. This

wording was opposed on the grounds that it did not expressly mention set-offs, that the qualification of a claim as contractual differed from one legal system to another and that it was not immediately clear whether claims for breach of contract were covered. It was stated in reply that an express reference to set-offs would equally raise the problem of different qualifications in different legal systems and that the requirement of a contractual origin of the defence was intended to exclude defences or set-offs originating, for example, from tort (or delict). The Working Group, after deliberation, adopted the following wording: "Any defence which may be raised against an action in contract between himself and the holder not referred to in paragraph 1(e)".

129. The text of article 25 as revised by the Working Group is set forth in the annex to this report.

New article 25 bis

130. In its discussion of article 4(7) the Working Group had agreed that a new article 25 *bis* should be drafted based upon the current text of article 4(7) (see above, paras. 23-24). The Working Group had before it two proposals. The first proposal was submitted by France as follows:

Proposal 1

"The holder may be a protected holder or a holder who is not a protected holder.

"The expression 'protected holder' means the holder of an instrument which, when he took it, was complete or, if an incomplete instrument within the meaning of paragraph (1) of article 11, was completed in accordance with authority given:

- "(a) Provided that, when he became a holder:
 - He was without knowledge of a defence available under this Convention (article 25(1)(a));
 - He was without knowledge of a defence based on an underlying transaction between the party from whom payment is claimed and the drawer, or between the party from whom payment is claimed and the party subsequent to himself, or arising from the circumstances as a result of which he became a party (article 25(1)(b));
 - He was without knowledge of any defence based on incapacity of the party from whom payment is claimed 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 such party's negligence (article 25(1)(d));
 - He was without knowledge of valid claims to the instrument of any other person (article 25(1)(d));
 - He was without knowledge of any non-acceptance or non-payment (article 4(7)(a));

- "(b) And provided that, when he became a holder:
 - The time-limit provided by article 51 for presentation of the instrument for payment had not expired;

- "(c) And provided that:
 - He did not obtain the instrument by fraud or theft or participate at any time in a fraud or theft concerning it.

"A holder who does not fulfil these conditions shall be a holder who is not a protected holder."

131. A second proposal was submitted by the United States as follows:

Proposal 2

"'Protected holder' means the holder of an instrument which was complete when he took it or which was incomplete within the meaning of article 11(1) and was completed in accordance with authority given, provided that when he became a holder:

- "(a) He was without knowledge of a defence upon the instrument referred to in article 25, paragraphs (1)(a) through (1)(f);

- "(b) He was without knowledge of a valid claim to the instrument of any person;

- "(c) He was without knowledge of the fact that it was dishonoured by non-acceptance or non-payment;

- "(d) The time-limit provided by article 51 for presentation of that instrument for payment had not expired; and

- "(e) He did not obtain the instrument by fraud or theft or participate at any time in a fraud or theft concerning it."

132. The Working Group noted that the cross-references to article 25 in the first proposal referred to the paragraphs in the current text and those in the second proposal referred to the paragraphs in the United States draft proposal (see above, para. 93).

133. The Working Group discussed which of the two proposals to follow in terms of their basic structure. In favour of the French proposal, it was pointed out that it set forth in more detail the elements that would keep a holder from being a protected holder. This was stated to have the advantage that it was not necessary to refer to another article in order to determine whether a holder was a protected holder, as it was in both the United States proposal and the current definition of protected holder in article 4(7). Furthermore, as a matter of principle, it was inappropriate to define a protected holder in terms of a holder.

134. In favour of the United States proposal, it was stated that it was more concise and easier to read. Setting forth in full the elements necessary for the holder to be a protected holder as in the French proposal was repetitious and unnecessary. It was stated that the reference to consecutive subparagraphs in the article immediately preceding this article did not cause the same

problems as occurred in article 26, which cross-referenced to a series of non-consecutive articles. After discussion, the Working Group decided to adopt this approach to the drafting of the article.

135. As regards subparagraph (a) of the proposed draft of article 25 *bis*, it was decided to delete the words "upon the instrument" since some of the defences referred to here were defences outside the instrument. It was noted that knowledge of a defence resulting from a transaction between the holder and the party from whom payment was sought prevented the holder from becoming a protected holder if the transaction was the underlying one but not if it was any other transaction. The Working Group, after deliberation, decided to retain this solution, which was taken over from the previous definition of protected holder in article 4(7).

136. The Working Group adopted subparagraphs (b) through (e), subject to the deletion in subparagraph (e) of the words "at any time". This deletion was intended to make it clear that, in line with the principle that the status of protected holder was determined at the time at which he became a holder, any act of fraud or theft committed after that decisive point of time would not take away from the holder the protected holder status. It was understood that a party from whom payment was sought may set up a defence resulting from such act against such protected holder (article 26(1)(b)).

137. The text of new article 25 *bis* as adopted by the Working Group is set forth in the annex to this report.

Article 26

138. The Working Group was presented two proposals by France and by the United States for a new wording of the current draft of article 26. It was noted that the French proposal avoided the eight cross-references by setting out the defences that could be set up against a protected holder. The United States proposal followed the style of the French proposal in that each defence was listed separately with a summary description of it. It followed the style of the current text in that article 26 incorporated the defences by cross-references.

139. According to one view, the French proposal was not satisfactory in that it was too detailed, to the point of duplicating the articles dealing with defences set out in other parts of the draft Convention. It was also pointed out that the proposal did not reproduce in its entirety the complete text of the provisions to which it referred and that this disparity of texts could create problems of interpretation for the courts. According to another view, the United States proposal would be satisfactory only with some drafting improvements, while according to still another view the proposal was not presented in a form compatible with other provisions in the draft Convention.

140. The prevailing view was in favour of retaining the current structure of article 26.

Paragraph (1)(a)

141. The view was expressed that article 68 should be added to the list of defences available against a protected holder. This defence would then be available when an instrument was paid to a protected holder, the party paying failed to obtain the instrument and the party paid, being a protected holder, presented it again for payment. It was noted that paragraph (1) of article 68 provided for a discharge of liability on the instrument when a party paid the holder, and that paragraph (4)(e) provided that a discharge could not be set up as a defence against a protected holder if payment was made but the person paying failed to obtain the instrument. The view was expressed that neither of these provisions clearly resolved the example under consideration.

142. Various views were expressed in regard to the proposal. All were agreed that the party paid, whether or not a protected holder, should not be able to present the instrument a second time for payment. According to one view, that result was already stated in article 68(1). It was also suggested that the fact of payment was not a defence to liability; the liability had been discharged. According to another view, a protected holder who was paid was no longer a protected holder. However, it was noted that the status of protected holder was acquired, if at all, when receiving the instrument and that that status was not lost by subsequent events. According to still another view, it was appropriate to adopt a drafting change of one form or another to make the desired solution clear, and several suggestions were made. The prevailing view was that it was not necessary to change the text to achieve the desired result.

Paragraphs (1)(b) and (2)

143. Suggestions were made to delete the words "or arising from any fraudulent act on the part of such holder in obtaining the signature on the instrument of that party" from both paragraph (1)(b) and paragraph (2). It was stated that a party who received an instrument by fraud would not be a protected holder. While this was recognized, it was pointed out that a protected holder might by fraud induce a person to sign an instrument as guarantor. Therefore, it was useful to keep the words in paragraph (1)(b).

144. In regard to paragraph (2), the Working Group could think of no example where a person could be a protected holder and be subject to a claim to the instrument, as distinguished from a defence on the instrument, arising out of such a fraudulent act. Although there was some support for retaining the words for the eventuality that some such example might exist, the prevailing view was to delete the words from paragraph (2).

Paragraph (1)(c)

145. The Working Group decided to add the words "and provided that he was fraudulently induced so to sign" to the end of the subparagraph in the light of the decision to add them to the equivalent provision in article 25 (see above, para. 112).

146. The text of article 26 as revised by the Working Group is set forth in the annex to this report.

Article 27

147. A proposal was made to reintroduce a former paragraph which the Working Group had deleted at its fourteenth session in 1985, as follows:

“If a party pays an instrument in accordance with article 66 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.”

148. The Working Group noted that it had deleted the paragraph as unnecessary by reason of the fact that an instrument is not transferred to a party who pays it and such party does not become a holder of it.

149. A proposal was made to amend paragraph (2)(a) by adding the words “if, when the instrument was transferred to him, he had knowledge of a transaction which gives rise to a claim to, or defence upon, the instrument”. The Working Group decided not to accept this proposal on the ground that a restriction of the shelter rule of article 27 in respect of persons who had knowledge of a claim or defence when they took the instrument, but who themselves had not participated in the events leading to that claim or defence, would unduly impair the transferability of the instrument.

Article 28

150. No comments were made on this article.

Article 29

151. No comments were made on this article.

Article 30

152. A proposal was made to add to the end of article 30 the words “according to the terms of such acceptance or representation”. The proposal was intended to recognize that a person whose signature had been forged may accept the forged signature or represent that it was his own only towards particular holders. The Working Group did not adopt this proposal since it would weaken the protection of other holders and might thus adversely affect the transferability of the instrument.

153. The Working Group retained article 30 unchanged, subject to replacing in the English-language version the words “has accepted to be bound” by the words “has consented to be bound”.

Article 31

154. After noting that comments had been submitted on this article, the Working Group retained the article unchanged.

Article 32

Paragraph (5)

155. A proposal was made to delete paragraph (5). In support of this, it was stated that the paragraph would give an undue benefit to an agent who signed without authority or who exceeded his authority at the expense of the person he purported to represent.

156. In response, it was stated that an agent who signed an instrument without authority or who exceeded his authority in signing, and not the party he purported to represent, was responsible to pay the instrument under paragraph (3). Paragraph (5) completed the scheme by placing such an agent who was required to pay the instrument in the same position as the person he purported to represent. This view prevailed and the paragraph was retained.

157. It was suggested that article 32 should not refer to an agent in those cases in which he had signed without authority or had exceeded his authority, since such a person was not an agent. The Working Group did not have the time to consider this question and decided that the matter should be raised in the Commission if, on further reflection, such consideration seemed appropriate.

Annex

Text of articles as revised by the Working Group at its fifteenth session

Article 1

(1) This Convention applies to an international bill of exchange when it contains the heading “International bill of exchange (Convention of . . .)” and also contains, in the text thereof, the words “International bill of exchange (Convention of . . .)”.

(2) This Convention applies to an international promissory note when it contains the heading “International promissory note (Convention of . . .)” and also contains, in the text thereof, the words “International promissory note (Convention of . . .)”.

(3) This Convention does not apply to cheques.

Article 1 bis

(1) An international bill of exchange is a bill of exchange which specifies at least two of the following places and indicates that any two so specified are situated in different States:

- (a) The place where the bill is drawn;
- (b) The place indicated next to the signature of the drawer;
- (c) The place indicated next to the name of the drawee;
- (d) The place indicated next to the name of the payee;
- (e) The place of payment.

(2) An international promissory note is a promissory note which specifies at least two of the following places and indicates that any two so specified are situated in different States:

- (a) The place where the note is made;
- (b) The place indicated next to the signature of the maker;
- (c) The place indicated next to the name of the payee;
- (d) The place of payment.

(3) Proof that the statements referred to in paragraph (1) or (2) of this article are incorrect does not affect the application of this Convention.

Article 1 ter

(1) A bill of exchange is a written instrument which:

- (a) Contains an unconditional order whereby the drawer directs the drawee to pay a definite sum of money to the payee or to this order;
- (b) Is payable on demand or at a definite time;
- (c) Is dated;
- (d) Is signed by the drawer.

(2) A promissory note is a written instrument which:

- (a) Contains an unconditional promise whereby the maker undertakes to pay a definite sum of money to the payee or to his order;
- (b) Is payable on demand or at a definite time;
- (c) Is dated;
- (d) Is signed by the maker.

Article 2

This Convention shall apply without regard to whether the places indicated on an international bill of exchange or on an international promissory note pursuant to paragraph (1) or (2) of article 1 *bis* are situated in Contracting States.

Article 4(7)

(7) "Protected holder" means a holder who meets the requirements of article 25 *bis*.

Article 7(1), (5)

(1) If there is a discrepancy between the amount of the instrument expressed in words and the amount expressed in figures, the amount of the instrument is the amount expressed in words. When the amount payable by an instrument is expressed more than once in words or more than once in figures, and there is a discrepancy, the smaller amount is the relevant one.

...

(5) A rate at which interest is to be paid may be expressed either as a definite rate or as a variable rate. For a variable rate to qualify for this purpose, it must vary in relation to one or more reference rates of interest in accordance with provisions stipulated in the instrument and each such reference rate must be published or otherwise available to the public and not be subject to determination influenced by any person who might take advantage of it in connection with the instrument.

Article 8(5)

(5) The maturity of a bill payable at a fixed period after sight is determined by the date of the acceptance or, where the bill is dishonoured, by the date of protest for dishonour by non-acceptance or, where protest is dispensed with, by the date of dishonour.

Article 11(1)

(1) An incomplete instrument which satisfies the requirements set out in paragraph (1) of article 1 and bears the signature of the drawer or the acceptance of the drawee, or which satisfies the requirements set out in paragraph (2) of article 1 and subparagraph (d) of paragraph (2) of article 1 *ter* but which lacks other elements pertaining to one or more of the requirements set out in articles 1 *bis* and 1 *ter* may be completed and the instrument so completed is effective as a bill or a note.

Article 20(1)(c)

(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:

...

(c) Is subject only to the claims and defences which may be set up against the endorser;

Article 20 bis

When an endorsement contains the words "value in security", "value in pledge", or any other words indicating a pledge, the endorsee:

- (a) Is a holder as referred to in article 14;
- (b) May exercise all the rights arising out of the instrument;
- (c) May only endorse the instrument for purposes of collection;
- (d) Is subject only to claims and defences specified in article 25 or 26.

Such an endorsee, having endorsed for collection, is not liable upon the instrument to any subsequent holder.

Article 23(2), (3)

(2) However, an endorsee for collection shall not be liable under paragraph (1) if, at the time at which:

- (a) He pays the principal or advises the principal of the receipt of the proceeds of the instrument, or
- (b) He receives the proceeds of the instrument,

whichever comes later, he is without knowledge of the forgery, unless the absence of knowledge is due to his failure to act in good faith or exercise reasonable care.

(3) Also, a party or the drawee who pays an instrument shall not be liable under paragraph (1) if, at the time he paid the instrument, he was without knowledge of the forgery, unless the absence of knowledge is due to his failure to act in good faith or exercise reasonable care.

Article 23 bis (2), (3)

(2) However, an endorsee for collection shall not be liable under paragraph (1) if, at the time at which:

(a) He pays the principal or advises the principal of the receipt of the proceeds of the instrument, or

(b) He receives the proceeds of the instrument,

whichever comes later, he is without knowledge that the endorsement does not bind the principal, unless the absence of knowledge is due to his failure to act in good faith or exercise reasonable care.

(3) Also, a party or the drawee who pays an instrument shall not be liable under paragraph (1) if, at the time he paid the instrument, he was without knowledge that the endorsement did not bind the principal, unless the absence of knowledge is due to his failure to act in good faith or exercise reasonable care.

Article 25

(1) A party may set up against a holder who is not a protected holder:

(a) Any defence that may be set up against a protected holder;

(b) Any defence based on the underlying transaction between himself and the drawer or between himself and the party subsequent to himself, but only if the holder took the instrument with knowledge of such defence or if he obtained the instrument by fraud or theft or participated at any time in a fraud or theft concerning it;

(c) Any defence arising from the circumstances as a result of which he became a party, but only if the holder took the instrument with knowledge of such defence or if he obtained the instrument by fraud or theft or participated at any time in a fraud or theft concerning it;

(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 his negligence and provided that he was fraudulently induced so to sign;

(e) Any defence resulting from the underlying transaction between himself and the holder;

(f) Any defence which may be raised against an action in contract between himself and the holder not referred to in paragraph 1(e);

(g) Any other defence available under this Convention.

(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, but only if he took the instrument with knowledge of such claim or if he obtained the instrument by fraud or theft or participated at any time in a fraud or theft concerning it.

(3) A holder who takes the instrument after the expiration of the time-limit for presentment for payment is subject to any claim to or defence upon the instrument to which his transferor is subject.

(4) 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 or forgery.

Article 25 bis

"Protected holder" means the holder of an instrument which was complete when he took it or which was incomplete within the meaning of article 11(1) and was completed in accordance with authority given, provided that when he became a holder:

(a) He was without knowledge of a defence upon the instrument referred to in subparagraphs (a) through (e) and (g) of paragraph (1) of article 25;

(b) He was without knowledge of a valid claim to the instrument of any person;

(c) He was without knowledge of the fact that it was dishonoured by non-acceptance or non-payment;

(d) The time-limit provided by article 51 for presentment of that instrument for payment had not expired; and

(e) He did not obtain the instrument by fraud or theft or participate in a fraud or theft concerning it.

Article 26

(1) A party may not set up against a protected holder any defence except:

(a) Defences under articles 29(1), 30, 31(1), 32(3), 49, 53, 59 and 80 of this Convention;

(b) Defences based on the underlying transaction between himself and such holder or arising from any fraudulent act on the part of such holder in obtaining the signature on the instrument of that party;

(c) Defences based on the 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 his negligence and provided that he was fraudulently induced so to sign.

(2) The rights to an instrument of a protected holder are not subject to any claim to the instrument on the part of any person, except a valid claim arising from the underlying transaction between himself and the person by whom the claim is raised.

Article 38(1)

(1) An incomplete instrument which satisfies the requirements set out in paragraph (1) of article 1 may be accepted by the drawee before it has been signed by the drawer, or while otherwise incomplete.¹⁰

Article 74(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 paragraph (1) or (2) of articles 1, 1 *bis* and 1 *ter*; for this purpose the person claiming payment of the lost instrument may present to that party a copy of that instrument;

¹⁰The decision to delete the second sentence of this paragraph was taken in connection with the amendment of article 11(1) (see above, paras. 58-59).

**2. Draft Convention on International Bills of Exchange and International Promissory Notes:
comments of Governments and international organizations: note by the secretariat
(A/CN.9/WG.IV/WP.32 and Add. 1-10)**

[A/CN.9/WG.IV/WP.32]

1. The Commission, at its nineteenth session, requested the secretariat to transmit the draft Convention as finalized at that session to all States as soon as possible after the conclusion of the session, with a request that comments on the draft Convention be submitted to the secretariat by 15 November 1986. To the extent that time constraints permitted the preparation of the necessary documentation and translation, the documents received should be submitted to the Working Group in the official languages of the Commission.¹

2. This note sets forth, with minimal editorial modifications, the first comments received from Governments and international organizations. Any further comments will, upon receipt by the secretariat, be included in an addendum to this note.

CUBA

[Original: Spanish]

Final revision of the draft Convention

With the exception of some imprecisions and points of drafting in certain articles, which should be cleared up without altering the substance and content, we feel that a sufficiently broad consensus was achieved at the last session of the Commission for the draft Convention to be submitted for consideration by the General Assembly with a view to its subsequent adoption.

The Working Group, which is to meet again in January 1987, should work on the basis that the draft Convention should not be subject to substantive amendments which might render its subsequent approval difficult. In other words, the Group should concentrate on matters of style and drafting and should not become involved in questions of substance which might modify the consensus achieved at the last session of the Commission.

Article 4(10)

Although we are not opposed to the definition given of the term "signature", we do consider it to be somewhat premature, for as long as authentication by mechanical means is not a part of general commercial practice, many countries will undoubtedly continue to apply domestic regulations in this area. We believe that this is a clause whose utility will come to the fore in a few years time.

¹Report of the United Nations Commission on International Trade Law on the work of its nineteenth session (1986), *Official Records of the General Assembly, Forty-first Session, Supplement No. 17* (A/41/17), para. 223.

Article 57. Time limits for making a protest

In respect of this article we prefer to maintain the reservation that time limits for making a protest should continue to be regulated by the laws of the country in whose territory the protest is to be made. This formula would also be valid for article 62.

NORWAY

Article 23 bis

The person to whom the instrument was directly transferred by the unauthorized agent should not be liable towards the purported principal under paragraph (1) of article 23 *bis*, unless he had or ought to have had knowledge of the lack of authority. The risk of loss should not be transferred from the purported principal to the endorsee in good faith, because, in most cases where the transferee is in good faith, there will exist some kind of relationship between the purported principal and the unauthorized agent. Thus, it seems more equitable and better public policy to let the purported principal, and not a transferee in good faith, bear the risk of unauthorized transfers by someone purporting to have authority as an agent. We would therefore like to propose a new subparagraph (3 *bis*) in article 23 *bis*:

"(3 *bis*) Also, the person to whom the instrument was directly transferred by the agent shall not be liable under paragraph (1) towards the principal if, at the time of the transfer, he was without knowledge that the endorsement did not bind the principal, provided that such absence of knowledge was not due his negligence."

Article 27

The "shelter rule" in article 27 obviously goes too far, cf. example C in the commentary to that article in document A/CN.9/213. There are no good reasons why the person C in the example should obtain the rights of a protected holder. As one way to avoid such a consequence, we suggest a new subparagraph (c) in paragraph (2):

"(c) He had knowledge of a claim to or a defence upon the instrument which could have been raised against the person who transferred the instrument to the subsequent holder."

Article 77

In article 77, protest for dishonour by non-acceptance is not mentioned. This seems to be a mistake, cf. paragraph (1) in the commentary to that article in document A/CN.9/213.

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (PERMANENT BUREAU)

[Original: French]

Article 1, paragraph 4

Paragraph 4 of article 1 provides that "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". The relationship between this provision and the preceding paragraphs of article 1 is not clear and raises problems. The ambiguity of this paragraph 4 was discussed during the seventeenth session of UNCITRAL and the report of that session (*Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 17 (A/39/17)*) concluded this discussion in the following manner: "it was also pointed out that there was a need to revise the criterion contained in article 1(4) so as to limit the application of the Convention to genuinely international instruments" (paragraph 41 *in fine*).

Paragraph 4 of article 1 can in fact be interpreted in two ways:

A. One possibility is to keep strictly to the letter of the provision and to read it only in conjunction with subparagraphs (e) of paragraphs (2) and (3), without in any way affecting the condition stated in paragraph (1) of article 1. In other words, an error on a bill of exchange or promissory note in the indications referred to in subparagraphs (e) of paragraphs (2) and (3) would not affect the application of the Convention, provided the instrument retained its international character, a condition imposed in paragraph (1).

If this is indeed what paragraph (1) of article 4 means—and in the view of the Permanent Bureau, this would be a reasonable interpretation—it should be expressly stated and the Permanent Bureau therefore suggests that the following clarification should be added at the end of the provision, which would then read as follows:

"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, provided the international character of the negotiable instrument, as defined in the preceding paragraphs of this article, is maintained."

B. The other possibility is to interpret the provision in paragraph (4) of article 1 as directly affecting paragraph (1), which would then give the drawer of an instrument freedom, on his own initiative alone, arbitrarily to exclude the bill of exchange or promissory note from application of the regime of national law normally applicable. In other words, a wholly "national" bill of exchange could be made not subject to the legal régime normally applicable to it and made subject to the draft Convention, even if, to take a hypothetical case, the country incorrectly indicated on the instrument was not a party to the Convention.

The Permanent Bureau takes the view that such a result is not only contrary to the intended aim of the

draft Convention, namely to establish a special, and optional, régime for *international* bills of exchange and promissory notes, but also creates a difficult problem in the area of conflict of laws. Let us suppose that a convention on conflict of laws in respect of commercial negotiable instruments, perhaps prepared under the auspices of the Hague Conference on Private International Law, were to adopt a single régime under whose terms the law of the place of payment would be applicable to a negotiable instrument. Let us further take the case of a wholly French bill of exchange on which, however, the drawer incorrectly indicated a bank in Geneva as the place of payment. In such a case, what course should be adopted by the judge, whether he be a judge of the country of "nationality" of the bill of exchange (France in this hypothetical case) or a judge of a third country? Should the judge of a third State party to the draft Convention, respect the provision in paragraph (4) of article 1, in other words should he apply the draft Convention to this purely national instrument, even though in our example neither France nor Switzerland are parties to the Convention envisaged? If he notes that neither Switzerland or France are parties to the draft Convention and the latter therefore cannot be applied, should he nevertheless respect the incorrect indication on the negotiable instrument and apply Swiss law to a purely French bill of exchange, applying the normal conflict rule?

It will be seen that the result of this second possible interpretation of paragraph (4) of article 1 raises serious problems which, in the opinion of the Permanent Bureau of the Hague Conference, were perhaps not sufficiently discussed during the preparatory work on the draft Convention. A re-examination of this problem would seem to be necessary and, in particular, it would seem reasonable to adopt a restrictive interpretation, along the lines developed in A.

Article 2

Throughout the work on the draft Convention, the observer from the Hague Conference repeatedly objected to the exorbitant character of article 2, which may not only lead to unpredictable situations in practice, but is a source of difficulties in the area of conflict of laws. His arguments in favour of attempting to root the draft Convention in a legal order, by requiring that the place where the bill is drawn and the place of payment be situated in contracting States, always received a sympathetic hearing from delegates, but never succeeded in convincing.

The Permanent Bureau has no intention of repeating those arguments here. However, it does wish to make an observation and put forward a suggestion:

A. The Permanent Bureau takes the view that, as things stand at present and in view of the wording of article 2, it is not possible for a State party to the Geneva Conventions concerning bills of exchange and promissory notes to ratify, or even sign the draft Convention. (The same applies moreover to States parties to the Inter-American Convention on Conflict of Laws Concerning Bills of Exchange, Promissory Notes, and Invoices, signed in Panama City on 30 January 1975.)

It seems absolutely necessary, therefore, before the draft Convention is again submitted to a session of UNCITRAL, for there to be consultation among the States parties to the Geneva Conventions and that they find a system which would enable them to accept the draft Convention. The Permanent Bureau considers that the difficulty cannot be resolved in a convention on conflict of laws alone. It is necessary for the draft Convention itself to contain an article that makes it possible, in one way or another, to resolve the difficulty.

B. The underlying philosophy of article 2 under discussion is strangely reminiscent of that which presided over the preparation of the two Hague Conventions of 1964 relating to a uniform law on the international sale of goods. These two Conventions also had an exorbitant character, since they purported to apply independently of recourse to private international law.

During the Diplomatic Conference which adopted these two Conventions, the delegates realized that this exorbitant character could have a negative effect and be a hindrance to ratification of the Convention. Consequently, a number of reservations were allowed in order to temper the rigour of the fundamental principle. It is worth noting that, with the exception of one country, Israel, all the States which ratified the 1964 Hague Conventions did so utilizing one or other of the reservations provided for.

The Permanent Bureau fears that an identical result will be reached with the present draft Convention and that it will encounter serious obstacles to its ratification by certain States if an arrangement such as that allowed at the Hague in 1964 is not provided for in the present case. It is for this reason that the Permanent Bureau wishes to suggest that a *reservation* be allowed under the draft Convention, the wording of which might be as follows:

"Any State may, at the time of signature, ratification... etc., declare that its courts will apply the Convention only if the place where the bill of exchange or promissory note is drawn and the place of payment of the instrument are both situated in Contracting States."

The conciliatory aspect of this reservation should be noted: by restricting it to the non-application of the Convention by courts of the State making the reservation, it still allows the parties to the instrument and the banks to take a risk by negotiating or discounting the instrument. The reservation will come into play only if the bill of exchange or promissory note gives rise to litigation in the courts of the State making the reservation.

[A/CN.9/WG.IV/WP.32/Add.1]

This addendum to document A/CN.9/WG.IV/WP.32 sets forth, with minimal editorial modifications, the comments received between 15 and 21 November 1986 from the following States: Canada, Japan, Sierra Leone and Spain. Any further comments will, upon receipt by the secretariat, be included in a later addendum.

CANADA

The Government of Canada, having completed its consultations concerning the draft Convention, considers the draft Convention to be satisfactory in its present form and hopes that it will be adopted by UNCITRAL at its twentieth session.

JAPAN

I. Introduction

It will be very meaningful to establish a new system of bills of exchange or promissory notes to be issued only for international transactions, while there already exist negotiable instruments governed by conventions and domestic laws. The Japanese Government supports the idea of adopting a new multilateral convention which will regulate the said instrument. The present text of the draft Convention on International Bills of Exchange and International Promissory Notes, which is the product of discussions in the United Nations Commission on International Trade Law at its nineteenth session, provides an excellent basis for achieving a good compromise between the Anglo-American system and the Geneva system. Therefore, the Japanese Government considers the basic principles under which the present text is drafted acceptable. The Japanese Government appreciates the strenuous efforts of the Commission, and it hopes the Commission will complete its examination of the draft Convention at its twentieth session in 1987. The Japanese Government, however, believes that some provisions in the present text remain to be improved. Japan's comments and proposals regarding these problematic provisions are as follows.

II. Comments on individual provisions

1. Payable on demand (article 8(2))

(1) Article 8(2) is modelled on the Anglo-American System. In fact, the United Kingdom has the provision corresponding to article 8(2) in section 10(2) of the Bills of Exchange Act, 1882 (BEA). As for the United States, it did have a similar provision in the final sentence of section 7 of the Uniform Negotiable Instruments Law (UNIL). However, that sentence has not been retained in section 3-108 of the Uniform Commercial Code (UCC) which reworded section 7 of the UNIL, on the grounds that the sentence served no meaningful purpose, or rather resulted in trapping the unwary. Thus the UCC provides in section 3-501(4) that neither presentment nor notice of dishonor nor protest is necessary as to endorsers after maturity.

(2) Article 8(2) is the most problematic provision, since it is not clear what the legal effects of the rule contained in article 8(2) will be. For instance, it is not clear whether presentment or protest is necessary with regard to an endorser after maturity (that is, whether articles 53(1), (2) and 59(1), (2) are applied to overdue paper), and whether an endorser after maturity is liable to parties subsequent to himself (article 20 of the 1930 Geneva

Convention providing a Uniform Law for Bills of Exchange and Promissory Notes denies the liability of the endorser after maturity towards those parties). Neither is it clear whether the time-limit of presentment for payment ("one year of its date"—see article 51(f) is to be reckoned from the date of the instrument or from the date of maturity, nor from what time the period of prescription referred to in article 80(1) is reckoned.

Therefore, as for article 8(2), at least its legal effects should be clarified in the course of discussions.

2. *Valid claim* (articles 25(2), (4)(a), 26(2) and 68(3))

The word "valid", which is found in articles 25(2), (4)(a), 26(2) and 68(3), should be retained in order to prevent a party from raising a *ius tertii* defence that is palpably false. If the word "valid" is deleted, a party will be easily discharged of liability on the instrument by simply raising a defence that a third person is asserting a claim, which may be false or fabricated by conspiracy of a party and a third person. Needless to say, such a result is unjustifiable in view of the status of a holder who is presumed to be a protected holder unless the contrary is proved (article 28).

3. *Shelter rule* (article 27)

The former article 27(2),¹ which the Working Group on International Negotiable Instruments deleted at its fourteenth session in 1985, should be introduced again into the draft Convention.

Example X: A makes a note payable to the payee, B. The note is stolen from B. C, the thief, transfers it to D, a protected holder. If D exercises a right of recourse against C and C pays the note, does C have the rights on the note?

In this Example, C should not have the rights on the note. However, it is not clear whether such conclusion can be drawn from the present wording of article 27(2) (b), since C is not a holder but a party (article 67).

4. *Unauthorized signature* (article 32(5))

Article 32(5) is modelled on article 8 of the 1930 Geneva Convention providing a Uniform Law for Bills of Exchange and Promissory Notes, but such provision is found neither in the BEA nor in the UCC.

It necessarily follows from article 32(5) that an agent who signed without authority or exceeding his authority will benefit at the expense of the person whom he purported to represent. For instance, if C transfers the note to D by signing in a representative capacity for B in the aforementioned example X, under article 32(5) C acquires the same rights as B, and is able to exercise the rights on the note against A. Such conclusion is not acceptable; C should not gain, through his theft, a benefit to the detriment of B.

¹It reads as follows:

"(2) If a party pays the instrument in accordance with article 66 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."

The right conclusion in the said case as compared with the case in which C transfers the note to D by signing as a principal (see para. 3) is that C is liable but has no rights on the note.

Accordingly, article 32(5) should be deleted.

5. *Discharge by payment* (article 68(3))

In the example X described above, if A pays C knowing at the time of payment that C acquired the note by theft, A should not be discharged of liability. However, it is not clear whether such conclusion can be drawn from the present wording of article 68(3), since C is not a holder but a party (article 67). Therefore, article 68(3) should be amended so as to read as follows:

"A party is not discharged of liability if he pays a holder who is not a protected holder *or a party subsequent to himself who has paid the instrument and is in possession thereof* and knows at the time of payment that a third person has asserted a valid claim to the instrument or that the holder *or the party* acquired the instrument by theft or forged the signature of the payee or an endorsee, or participated in such theft or forgery."

6. *Discharge of a prior party* (article 73(2))

Article 73(2) was amended by the Commission at its nineteenth session because of the inconsistency between article 68(3) and Article 73(2). As a result of the amendment, a proviso was added. If the above-mentioned proposal concerning article 68(3) (see para. 5) is adopted, the proviso of article 73(2) should also be amended so as to read as follows:

"except where the drawee pays a holder who is not a protected holder *or a party subsequent to himself who has paid the instrument and is in possession thereof* and knows at the time of payment that a third person has asserted a valid claim to the instrument or that the holder *or the party* acquired the instrument by theft or forged the signature of the payee or an endorsee, or participated in such theft or forgery."

7. *Acquirement of rights by payment* (articles 67 and 44(2))

(1) Article 67 provides that a party who pays an instrument in accordance with article 66 may recover a certain amount of money from the parties liable to him. Article 67, however, should not be applied to the case in which a party who pays an instrument knows at the time of payment that the holder acquired the instrument, for instance, by theft and, in accordance with article 68(3), is not discharged of liability.

Example Y: A makes a note payable to the payee, B. B transfers it to C. The note is stolen from C. D, the thief, exercises a right of recourse against B. If B pays the note knowing at the time of payment that D acquired the note by theft, B should not be allowed to exercise the rights provided for in article 67 against A.

Accordingly, article 67 should be amended so as not to be applicable to the said case.

(2) If the above-mentioned proposal concerning article 67 is adopted, article 44(2) should also be amended so as not to be applicable to the case in which the guarantor knows at the time of payment that the holder acquired the instrument, for instance, by theft.

Example Z: A makes a note payable to the payee B. The note is stolen from B. D, the thief, exercises a right of recourse against C, the guarantor for B. If C pays the note knowing at the time of payment that D acquired the note by theft, C should not be allowed to exercise the rights thereon against A and B.

SIERRA LEONE

Article 4(10)

This paragraph should, immediately after the last word "means", omit the semicolon and add the following: "with the intention that such signature should be taken as genuine." The additional words distinguish a forged signature from one put on an instrument without a fraudulent motive. See, for example, article 14(1)(b) which clearly distinguishes between the two categories of signature.

Article 4; suggested new paragraphs

A new paragraph should be inserted in this article defining "drawer" as follows: "Drawer means a person who by himself or his agent duly authorised draws a bill". The need for this paragraph is highlighted by articles 32(1) and 11(2)(a) the cumulative effect of which is that, while they make it possible for an agent to draw a bill or note, a drawer in the ordinary sense of the term may only be liable if the instrument was drawn with his authority.

For the same reason as stated above, a paragraph should be inserted defining a maker as meaning "a person who by himself or his agent duly authorised makes a note".

Although article 12 describes the method by which an instrument is transferred from the drawer or maker to the payee which in some legal systems is known as the issue of the instrument, this article may not be the appropriate place to put a definition reflecting such a transfer, as the article deals with endorsed instruments only. It is therefore suggested that article 12 should be deleted and the word "transfer" be defined in a new paragraph in article 4 as follows:

"'Transfer' means:

"(a) The first delivery of an instrument by the drawer or maker to a person who takes it as holder; or

"(b) The endorsement and delivery of the instrument by the endorser to the endorsee; or

"(c) Mere delivery of the instrument if the last endorsement is in blank."

It is to be noted that the draft Convention has used the term "transfer" instead of "negotiation" which words do not carry the same meaning in some legal systems.

Article 7(3)

This paragraph should omit the last three words "of the instrument" and add "on which the instrument matures". As the paragraph now stands it makes interest on instruments the capital of which is payable at a definite date (see article 8(3)(a)) payable even before the obligation to pay the capital arises, i.e. on the date that the instrument matures.

Article 8(5)

The full stop at the end of the sentence should be deleted and the following words added: "or the date on which the instrument is presented for acceptance and is dishonoured". The additional words take care of the situation where the bill is not accepted on presentment for acceptance. If the present text remains as it is, such a bill will not mature unless it is subsequently accepted, which may never happen.

For a similar provision for a note see article 8(7).

Article 13

Since article 13(2) is dealing with the definition of the various types of endorsement, this article is the appropriate place where reference should be made to the other types of endorsement for collection and to conditional endorsement even though the latter is prohibited under article 17(1). The following paragraphs should therefore be added to article 13(2):

"(c) For collection, in accordance with article 16(2);

"(d) Conditional, where a condition is placed upon the payment of the bill or note or the incurring of liability on the instrument."

Article 14(3)

After the last word "instrument" in the paragraph the following words should be added: "unless he is a party to any fraud, duress or mistake". A person should not be a holder acquiring rights to an instrument if he himself has obtained such instrument by dubious means.

Article 16

For the purpose of coherence and continuity, article 20(1) and (2) should be transferred to article 16 as article 16(3) and (4) respectively.

Article 23

After the word "forgery" in the second line of paragraph (1) insert the following: "but who adopts it in accordance with article 30 or who becomes aware of the forgery after the instrument has been transferred by him and does not notify his immediate transferee". The basis of this addition is that forgery ought to break the chain of transferability, "negotiability" as the expression is usually termed, so that the person whose endorsement is forged and those who have signed the instrument before the forgery but are unaware of it and do not adopt it would not become liable to any party who took the

instrument after the forgery. If this view is upheld then the question of compensation to such persons will not arise as they would not have suffered any damage. A person who is likely to suffer damage is the one who is envisaged in article 30 or the one whose endorsement is forged and who does not notify a subsequent holder in the event of learning about the forgery or a subsequent signatory of the instrument placed in a similar situation.

Article 23 bis

The following words in the second and third lines of article 23 *bis* (1) should be deleted: "or any party who signed the instrument before such endorsement". Such a person ought not to be affected by the conduct of an agent who is not his agent but who endorses the instrument before it reaches the hands of that agent.

There that party cannot incur liability for the agent's conduct for which he can suffer damage. Even in the case of a principal, responsibility for his agent's authorised act should arise only if he adopts it or estoppel is pleaded against him.

Article 25

Delete from the article the following: "who is not a protected holder" immediately coming after the word holder in paragraphs (1) to (4). This qualification is unnecessary as the terms "holder" and "protected holder" are clearly defined in article 4, paragraphs (6) and (7) respectively.

Article 39

Either paragraph (2)(a) should be deleted because it is inconsistent with paragraph (1), or it should be retained but paragraph (2)(b) should be amended to read as follows: "The bill is dishonoured to the extent of the partial non-acceptance."

Article 40

Paragraph (2) of this article is inconsistent with article 17(1), either of which should be deleted.

Article 42

The last sentence of paragraph (1) should be amended to read as follows: "A guarantee may be given by any person who may not already be a party". It is inconceivable how a person already liable on an instrument can guarantee another person also liable on the same instrument when in the case of dishonour recourse will have to be made to the "guarantor" on his own liability. If the intention of the paragraph is to enable a drawer or endorser, who excludes his liability under article 34(2) or article 40(2) respectively but who is nevertheless a party to the instrument, to guarantee, then the sentence should be recast in order to reflect this. The following wording is therefore suggested: "A guarantee may be given by any person who may not already be a party or who may be a party who has excluded his liability as drawer or endorser".

Article 48

In the third line of paragraph (2) delete the words "or is a fictitious person" and substitute the words "or is a fictitious or non-existing person". In most common law countries, the words "fictitious" and "non-existing" when applied to persons, though having the same effect, do not carry the same meaning in the law of bills of exchange.

Article 52

Paragraph (2)(d): The same comment as in article 48 for the addition of the words "or non-existing" immediately before the first "person" in the third line of this paragraph.

Article 66

Paragraph (1)(c): Add after the words "Before maturity" the words "upon dishonour by non-acceptance". Surely, this article is intended to deal with a bill payable at a fixed date after sight, which requires presentment for acceptance in order to fix the date of maturity, and not a bill payable on demand. Where a non-demand bill has been so dishonoured, the holder need not wait for the date of maturity which may never come. However, in the case of a demand bill which does not need a presentment for acceptance before presentment for payment and where the maturity date is prescribed under article 51(f), with the existing text there is nothing to prevent a holder from recovering from prior parties even before he has presented the bill for payment. (See a similar provision in the case of discharge by payment under article 68(1)(b)).

SPAIN

[Original: Spanish]

1. Methodology

The observations contained in this document are divided into two main groups: those of a general nature and those on points of detail. The general observations provide an assessment of the draft as a whole, viewed as a single regulatory text requiring a comprehensive analysis. The detailed observations concern specific precepts of the draft Convention.

The two types of observation are included under different headings in this document.

A further observation on the methodology should be made at the outset: in issuing these observations, the Spanish Government does so bearing in mind the observations drawn up in 1983 in response to the request of the Commission at its fifteenth session.

The new observations contained in this document take as a starting-point those already formulated in 1983 and their comparison with the work carried out by the Commission on the various occasions between then and now when it has examined the draft in question. The Spanish Government reiterates the observations it formulated at that time.

2. General observations

One

The Spanish Government takes a generally positive view of the efforts directed by UNCITRAL, over a long period of time, to establishing international legislation which will subject international bills of exchange and promissory notes to uniform rules. This legislative policy objective continues to be of great legal interest and the economic importance of the realities covered by these rules continues or has even increased. International trade continues to require the establishment of means of credit and of facilitating payment of contracted obligations, and it is desirable that these means should be formally recognized as international and should be subject to legal rules which are equally international and uniform, with the widest possible scope.

For these reasons the Spanish Government reiterates its favourable opinion of the work being carried out by UNCITRAL in this area, which is currently taking concrete form in the draft Convention considered here.

Two

With a view to the achievement of concrete practical results, the Spanish Government has always considered what it called in 1983 the "spirit of compromise" which had characterized the preliminaries and initial work on international bills of exchange and promissory notes to be an instrument of great political significance and enormous legal utility. This "spirit of compromise" has guided the efforts devoted to drawing up the draft Convention by countries belonging to the world's two major groups as regards the legal doctrine on matters relating to negotiable instruments, namely countries belonging to the common law system and those belonging to the system of the Geneva Conventions, either as parties or in so far as they are influenced by specific solutions.

The search for an intermediate, balanced formula between the two legal systems which guided the efforts of the Commission for many years appears to have been to some extent abandoned following the last session this year, 1986, to be replaced by a process of constant adjustments to the draft whose effect is to incline it progressively towards solutions, particularly with regard to the technique for formulating and drafting norms, more appropriate to the common law system than to the above-mentioned "spirit of compromise" between common law and the Geneva system. The most palpable expressions of this are the marked increase in the casuistic nature and literary or descriptive character of the norms and, parallel to this, a growing disregard—functional, at least—for the fundamental concepts of the continental system.

Three

Concurrently with the previous observation, the Spanish Government takes the view that the text of the draft Convention is becoming increasingly difficult to read and understand. This gives grounds to fear future difficulties concerning its uniform understanding, application and interpretation.

This defect, which was already evident in 1983, may even have worsened during the most recent sessions of the Working Group and the Commission. Examples of the grounds for this observation are the increase in the quantity of definitions and cross-references and a great proliferation of enumerated instances of application or exclusion from application of the general rules. The Spanish Government is of the view that a final effort should be made to strip the draft of excessive enumerations and proliferating cross-references in order to produce a text with an equitable balance of simply formulated general rules. This will appreciably improve the understanding and interpretation of the future Convention.

The general structure of the draft and the clarity of its rules have not, in the judgement of the Spanish Government, been improved during the most recent working sessions. There has rather been a deterioration due to the accumulation of the above-mentioned factors.

Four

The "Spanish original" of the draft, following the most recent working sessions, shows a very considerable improvement compared with its original wording. A host of terms, generally anglicisms, quite alien to Spanish legal-terminological tradition and reality have disappeared, and been replaced by appropriate substitutes. The same has happened to expressions or turns of phrase resulting from literal translations into Spanish from the language in which the draft was originally prepared.

While noting this very appreciable improvement, the Spanish Government nevertheless believes that it would be possible to improve the linguistic purity of the "Spanish original", particularly in the second half of the text (from, approximately, article 45).

Five

The text of the draft still has two gaps which in the view of the Spanish Government could lead to serious difficulties in the future concerning the practical application of the rules being prepared. These gaps were already pointed out by the Spanish Government in its observations made in 1983, and their foreseeable practical implications reveal, in an indelible manner, dogmatic shortcomings in the draft. The gaps in question are the following:

1. The draft still contains no procedural rules. Traditionally, on the continent, the fortunes of media of exchange and commercial paper in general have been based on the privileged régime of the legal exercise of rights incorporated in the instruments. Legislative texts on negotiable instruments continue to maintain specific procedural rules in virtue of which creditors holding bills and notes benefit from a rapid and expeditious procedure for the satisfaction of claims incorporated in negotiable instruments.

The UNCITRAL draft does not take into account this tradition, which is shared by many States members of the Commission, and leaves the regulation of procedural matters to the national legislation. In the view of the

Spanish Government the draft should contain at least an indication of the privileged, rapid and expeditious character of the procedure for the legal exercise of the rights mediated by an international bill of exchange or promissory note. It would be even better if the rules for this legal procedure were incorporated in the actual text of the draft Convention and formed part of it.

2. The draft still does not contain comprehensive regulations covering the relations between the transaction of issuing an international bill of exchange and, in general, the documentary transaction on the one hand and the transaction underlying the instrument on the other. Since the latter transaction is the reason for which the bill of exchange or the promissory note is created by the drawer or maker, it is desirable to lay down some brief, specific and precise rules to determine the reciprocal influences established between the underlying transaction and the instrumental relationship as a result of the putting into circulation of an international bill of exchange or promissory note.

In the absence of such regulations, the legal security of the causal or underlying debtor is threatened even in the case of payment for his account of the instrumental debt. This danger is only the most conspicuous of those incurred if there are no rules governing the range of relationships between the underlying transaction and the transaction with the negotiable instrument: other dangers, of lesser consequence, exist throughout the draft text.

Six

The Spanish Government reiterates its reservations concerning the draft's provisions regarding the "protected holder". Despite this, it realizes that they may constitute a point of equilibrium and meeting point between the two major world systems in relation to negotiable instruments.

With this consideration in mind, it appreciates the improvements introduced in the legal rules concerning the so-called "protected holder" throughout the most recent working sessions of the Commission.

Seven

The economic and legal importance of the draft text, and of the media of exchange regulated by this document, make it advisable that the final discussion and definitive formulation of the text of the Convention should take place in the context of a diplomatic conference, independent of the problems raised by the financial questions involved in this solution.

The maintenance of this position is advisable also in the light of the fact that due to its content, poised between the different world systems in relation to negotiable instruments, it can be foreseen that the regulatory solutions incorporated in the draft will contrast markedly with the tradition in these matters of the majority of the States concerned. The solution of this dichotomy must, without any doubt, be resolved at a diplomatic conference. Moreover, through such a means of finalizing the work, the Convention would acquire a particular weight which would be unattainable by any

other procedure for approval or final drafting. It is essential that the draft should carry great weight, if it is to be successful and widely accepted by the various States.

3. Detailed observations

Articles 1(2)(b) and 46

The qualification of "unconditional" which article 1(2)(b) gives to the order to pay contained in the bill of exchange is difficult to reconcile with the content of article 46, according to which it is permitted by agreement to attach conditions, even if indirectly, to the order contained in the instrument.

Article 5

In article 5 it would be desirable to make clear the régime applicable to the hypothesis of actual ignorance of the fact in question.

Article 11

It is not made sufficiently clear in article 11 that completion of the blank bill must take place before its maturity, which is a logical requirement of the system, since a bill which matures incomplete is not a bill, if the missing elements are essential requisites.

In order to clarify this chronological situation it would be desirable to mention the point expressly in article 11.

Articles 25 and 27

In articles 25 and 27 it would be desirable to make clear the regime applicable to transfer of a bill of exchange following maturity and whether the new holder acquires the status of protected holder.

Article 46(1)

In article 46(1), first sentence, it is proposed that the phrase "or before the occurrence of a specified event" should be deleted, since it may open the door to the introduction, even if indirectly, of a condition affecting a transaction closely related to the successful attainment of the bill's purpose, in other words its acceptance.

Article 73(2)

Both in its drafting and its content article 73(2) gives rise to difficulties of understanding. In particular, the discharging effect of the payment by the drawee in respect of the liabilities to pay of antecedent parties to an instrument should be indicated.

[A/CN.9/WG.IV/WP.32/Add.2 and Corr.1]

This addendum to document A/CN.9/WG.IV/WP.32 sets forth, sometimes in considerably shortened form, the comments received between 24 and 28 November 1986 from the following States: Argentina, France,

Germany, Federal Republic of, and Mexico. Despite the late date of submission and the stringent control and limitation of United Nations documentation, the secretariat hopes to be able to translate and publish this addendum in time for the fifteenth session of the Working Group. However, in order to achieve this, it was unfortunately necessary to shorten considerably the more extensive comments received from the French Bankers' Association, referred to in the comments of France, and from Mexico. The secretariat, using its best judgement, selected those portions of the comments which propose new wording of articles or parts thereof since a meaningful discussion of those proposals requires that delegates have the text before them in their respective language. Thus not reproduced here are those portions of the comments which contain explanations of the proposals or which suggest the deletion of a provision or a part thereof. These kinds of comments may be made orally by the proposing delegations, although, of course, it would have been preferable to include them in this addendum. Copies of the full comments in their original language will be made available during the session. The secretariat wishes to express its regrets for this emergency measure and to ask all delegations, in particular those whose comments had to be shortened, for their understanding.

ARGENTINA

[Original: Spanish]

1. On the basis of the results achieved, it appears that the draft put forward has not taken into account either the need for technical perfection in legal texts or the need for the elaboration of uniform norms that are acceptable to the international community.

The draft still contains inconsistencies which will probably necessitate its revision, not only as far as substantive aspects are concerned, but also with regard to the technical terminology of negotiable instruments and even grammatical drafting. In particular, the Spanish version still suffers from defects which betray the fact that it was originally drafted in another language, and shortcomings in the translation. It lacks conciseness, clarity and technical correctness.

2. It would be desirable to eliminate the abundance of definitions, as well as unnecessary and obvious provisions for special cases, sometimes alien to negotiable instruments law.

The same could be said concerning the legislative casuistry afflicting the draft.

3. The approach of not listing the defences that may be set up in each case and of referring to other articles or paragraphs, or to the Convention itself in general (e.g. article 25, paragraph 1(a)), is inconvenient. This approach may be the reason why the defence of payment (*defensa de pago*) has been omitted.

4. Argentina considers that the adoption of an international convention on international bills of exchange and promissory notes will be useful and viable

in so far as the structure and solutions adopted facilitate the interpretation of their characteristics and do not lead to an increase in doubtful situations.

Argentina also believes that the experience of over half a century in using the Geneva rules must not be ignored and that an appropriate solution to possible conflicts should be found.

5. The importance of the "typicity" (*tipicidad*) of the document must be borne in mind. The negotiable instrument has the "typicity" inherent in its necessity, abstraction, literality (*literalidad*) and autonomy or else it does not have this and, in that case, it will not be a bill of exchange or a promissory note because it will not be a negotiable instrument.

Some provisions in the draft indicate a lack of consistency with the doctrine and objective of negotiable instruments. This statement is based on the observation that the instruments dealt with lack viability to circulate with the character of *abstraction* from or independence of the fundamental relationship or underlying transaction which generated them.

6. Some of the provisions in the draft are detrimental to the general structure of the instruments.

7. The future Convention represents an attempt to provide an instrument of integration to facilitate international transactions. Without an appropriate collection procedure, this functional criterion would be inconsistent, above all because there is a great divergence between member countries in the matter of procedures. It would perhaps be desirable to incorporate in the draft the provisions needed to make debt collection effective.

8. The proposal has various inconsistencies; see, for example, article 1, paragraphs (2)(b) and (3)(b). If both the international bill of exchange and the international promissory note contain an unconditional order to pay a definite sum of money to the payee or to his order, this means that they must contain an unconditional promise to pay a certain sum of money. However, if one accepts the acceleration clause and there is a case of default, as provided for in article 6, subparagraph (c), there will have to be a frequently lengthy and disputed investigation to fix the maturity date (if this is invoked).

It thus seems improbable that, in such instances, it can be maintained that we have here an unconditional promise, necessary for the document to retain its "abstract" character. And if we refer to these instruments as promissory notes or bills of exchange, without paying attention to their "typicity", we will be introducing a serious confusion which should be avoided.

9. The drafting of parts of the document is faulty, e.g. article 18. Other articles in the Spanish version are unintelligible, e.g. articles 25, 26 and 27.

10. In its current form, the draft is still not calculated to remedy the existing divergences between the legislations of member States.

11. Argentina hopes that the foregoing proposals and recommendations will be useful for the deliberations of the Working Group and in improving the final text of the draft.

FRANCE

[Original: French]

In its present state, the draft Convention is not considered acceptable in France.

It has been noted that the Commission, at its nineteenth session (report A/41/17, paragraph 222), laid down that the Working Group, to meet in Vienna in January 1987, would be at liberty to suggest any improvements to the draft Convention and should, in particular, examine it with a view to remedying any "inconsistencies" and "lacunae" which might be found.

As it stands, since it may otherwise not be adopted, the draft should be examined thoroughly, not only to bring about a substantial improvement in the drafting and to clarify it, but also to bring the substantive rules it sets out into line with the requirements of international practice. A number of mutually incompatible rules should be carefully revised. Some serious gaps should be filled.

* * *

In the first place it is absolutely imperative to ensure that the present draft Convention and the Geneva Convention are compatible. The comments made by the representative of the Hague Conference on Private International Law regarding article 2 of the draft cannot be ignored.

* * *

It is no less essential that the draft should be readable and understandable, particularly with regard to the definition and status of the "holder". The holder is the central character in any legislation regarding bills of exchange and promissory notes, since he receives them as a substitute for money. In this connection it is inadvisable, in article 4, paragraph (7), to define the protected holder in relation to the definition of the non-protected holder (article 25). It is important that the protected holder should be clearly defined. It is equally important that the status of protected holder, as set out in article 26, should not be based on a reference to eight articles. Article 26 must also be written in plain language. An attempt to do this will reveal that the current wording gives rise to serious inconsistencies. Article 25, concerning the status of the non-protected holder, must also be rewritten in the interests of clarification and simplification.

The French delegation has drawn up new draft versions for articles 4(7), 25 and 26.

Similarly, the rules governing acceptance (article 36 and following articles) and those governing the case of presentment for acceptance being dispensed with (articles 48, 50(1)(b), 50(2), 55 and 56-58) are frightfully complex. It is essential that an effort should be made to clarify them.

* * *

The French delegation notes that the draft is not sufficiently precise with regard to the rights and obligations of the persons linked by a negotiable instrument. A good negotiable instrument is one that uses "hallowed" formulae which require no interpretation. A simple, formal examination must enable any holder or endorsee to ascertain the extent of his rights and obligations. However, the draft Convention obliges the holder or endorsee to consider how much he knows or his own degree of involvement in relations between the signatory and successive holders, and then to investigate, inform himself or make checks. In short, the draft does not give the holder security and, in any case, does not give him security equivalent to that provided by the Geneva Convention. This is extremely worrying to France and the French banks.

* * *

The draft still contains serious lacunae. It does not envisage endorsement in pledge, sets of identical parts of an instrument, or the establishment of copies, whereas provisions relating to these matters are particularly likely to find application in international trading operations.

The French delegation has prepared drafts on all these points. It has reintroduced the proposal submitted at the Commission's session in July 1986 because it did not understand how the President could conclude that the Commission did not wish to adopt its proposal, whereas Austria, Germany, Federal Republic of, Iraq, Switzerland, United States of America and Uruguay had indicated their support for it, and only Egypt, German Democratic Republic, Mexico and the Union of Soviet Socialist Republics had opposed it (summary record A/CN.9/SR.350, paragraphs 46-70).

* * *

The French delegation has also submitted particular comments regarding articles 1, 2, 5, 6, 7(1) and (5), 8(2), 9, 14, 16(2), 23, 23 *bis*, 27, 30, 33, 41(1), 42, 43, 45, 46(1), 46(2), 47, 48 and following, 49, 50, 51(6), 51(c), (d), (e), 52(2)(d), 53(3), 54 *bis*, 57(1), 58, 59(3), 64 *bis* and following (to be added), 65, 66(4), 68(3), 68(4)(e) and 73. Draft wording has been suggested for many of these articles.

* * *

The French Bankers' Association sent the UNCITRAL secretariat a detailed note setting out its comments before the 15 November deadline.

Excerpts from comments of the French Bankers' Association referred to in the comments of France*

Article 1 (draft text)

(1) This Convention applies to an international bill of exchange when it contains the words "international bill

*As indicated in the introductory note to this addendum, only those portions of the comments are reproduced here which propose new wording of articles or parts thereof.

of exchange (Convention of . . .)" and indicates that at least two of the following places are situated in different States:

- (a) The place where the bill is drawn;
- (b) The place indicated next to the signature of the drawer;
- (c) The place indicated next to the name of the drawee;
- (d) The place indicated next to the name of the payee;
- (e) The place of payment.

(2) This Convention applies to an international promissory note when it contains the words "international promissory note (Convention of . . .)" and indicates that at least two of the following places are situated in different States:

- (a) The place where the note is made;
- (b) The place indicated next to the signature of the maker;
- (c) The place indicated next to the name of the payee;
- (d) The place of payment.

(3) Proof that the indications referred to in this article are incorrect does not affect the validity of the bill of exchange or of the promissory note when two of the places indicated in paragraphs 1 and 2 above are situated in different States.

New article 1 bis (draft text)

(1) An international bill of exchange is a written instrument which:

- (a) Contains an unconditional order whereby the drawer directs the drawee to pay a definite sum of money to the payee or to his order;
- (b) Is payable on demand or at a definite time;
- (c) Is dated;
- (d) Is signed by the drawer.

(2) An international promissory note is a written instrument which:

- (a) Contains an unconditional promise whereby the maker undertakes to pay a definite sum of money to the payee or to his order;
- (b) Is payable on demand or at a definite time;
- (c) Is dated;
- (d) Is signed by the maker.

Article 2 (draft text)

This Convention shall apply when the place where the bill of exchange is drawn or the promissory note made and the place of payment are Contracting States.

(Another less good wording which may give rise to a reservation:

This Convention shall apply when at least two of the States indicated in paragraphs 2 and 3 of (present) article 1 are Contracting States.)

Article intended to replace the provisions of the present article 4(7)

The holder may be a protected holder or a holder who is not a protected holder.

The expression "protected holder" means the holder of an instrument which, when he took it, was complete or, if an incomplete instrument within the meaning of paragraph (1) of article 11,¹ was completed in accordance with authority given.

(a) Provided that, when he became a holder:

- He was without knowledge of a defence available under this Convention (article 25(1)(a));
- He was without knowledge of a defence based on an underlying transaction between the party from whom payment is claimed and the drawer, or between the party from whom payment is claimed and the party subsequent to himself, or arising from the circumstances as a result of which he became a party (article 25(1)(b));²
- He was without knowledge of any defence based on incapacity of the party from whom payment is claimed 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 such party's negligence (article 25(1)(d));
- He was without knowledge of valid claims to the instrument of any other person (article 25(1)(d));
- He was without knowledge of any non-acceptance or non-payment (article 4(7)(a));

(b) And provided that, when he became a holder:

The time-limit provided by article 51 for presentation of the instrument for payment had not expired;³

(c) And provided that:

He did not obtain the instrument by fraud or theft or participate at any time in a fraud or theft concerning it.

¹That is to say, an instrument which contained, in the text thereof, the words "international bill of exchange (Convention of . . .)" and was signed by the drawer . . ., but which lacked the other elements corresponding to one or more requirements of paragraph 2 of article 1, i.e. which lacked the indication regarding the unconditional order to pay given by the drawer to the drawee, or the indication regarding the maturity, or the date, or the indication of the two places situated in different States, reflecting the international character of the instrument.

²The present article 25(1)(b) reads: "Except as provided in paragraph (3) of this article . . .". This is ambiguous. It should read: "Subject to the provisions of paragraph (3) of this article . . .".

³However, it will be noted that article (25)3, to which the present article 4(7) refers, limits the enforceability of claims and defences, in the event of presentation for payment *after expiry of the time-limits*, to claims and defences to which the transferor of the instrument to the holder is subject. This is an inconsistency.

A holder who does not fulfil these conditions shall be a holder who is not a protected holder.

(This article would take the place of the present article 4(7) or could be situated between article 25 and article 26, becoming article 25 *bis*. Article 4(7) would then read:

“Protected holder” means a person in possession of an instrument in accordance with article 25 *bis*”).

New article 20 bis to be inserted after article 20 (draft text)

When an endorsement contains the statements “value in security” (“*valeur en garantie*”), “value in pledge” (“*valeur en gage*”), or any other statement implying a pledge, the endorsee

(a) Is a holder by virtue of article 4(6) and (7) and article 28;

(b) May exercise all the rights arising out of the instrument;

(c) May only endorse the instrument for purposes of collection;

(d) Is subject to claims and defences which may be set up against the endorser only in the cases specified in articles 25 and 26.

Such an endorsee, having endorsed for collection, is not liable upon the instrument to any subsequent holder.

Articles 23(1)(b) and 23 bis (1)(b)

In order to specify the conditions under which there is a presumption of collusion, as set out in articles 23(1)(b) and 23 *bis* (1)(b), it would be desirable to word these two subparagraphs as follows:

“The person who received the instrument directly from the forger, having knowledge thereof”;

“The person who received the instrument directly from the agent, having knowledge of the absence of authority”.

Article 25

A new wording of article 25 is absolutely essential. The following is a proposed wording.

Article 25 (draft text)

A party may set up or assert against a holder who is not a protected holder:

- Any defence available under this Convention;
- The exceptions set out in article 26(1)(a);
- Any defence based on the underlying transaction between himself and the drawer or between himself and the party subsequent to himself, but only if the holder took the instrument with knowledge of such defence or if he obtained the instrument by fraud or theft or participated at any time in a fraud or theft concerning it;

- Any defence arising from the circumstances as a result of which he became a party, but only if the holder took the instrument with knowledge of such defence or if he obtained the instrument by fraud or theft or participated at any time in a fraud or theft concerning it;
- The claims which may be validly made on the instrument by any other person, but only if the holder took the instrument with knowledge of such claims or if he obtained the instrument by fraud or theft or participated at any time in a fraud or theft concerning it;
- Any defence resulting from the underlying transaction between himself and the holder;
- Any other transaction between himself and the holder that would be available as a defence against contractual liability;⁴
- 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 his negligence.

Article 26

It is proposed that article 26 should be worded as follows; a new wording is absolutely essential.

Article 26 (draft text)

(1) In principle, a party may not set up any defence against a protected holder.

However, he may plead:

- That (article 29(1)) no one is liable on an instrument if he has not signed it, unless (article 30) a person whose signature has been forged has accepted to be bound by that forged signature;
- That (article 31(1)), if an instrument has been materially altered,
 - Parties who have signed the instrument subsequent to the material alteration are liable thereon according to the terms of the altered text;
 - Parties who signed the instrument before the material alteration are liable thereon according to the terms of the original text;
- That (article 32(3)) the person purported to be represented is not liable on an instrument signed:
 - By a person as agent but without authority to sign or exceeding his authority;
 - By an agent with authority to sign who has not indicated that he is signing in a representative capacity, without naming the person whom he represents;

⁴The limitation concerning transactions between the party claiming payment and the holder which could serve as defences against contractual liability is open to criticism and should be restricted.

- That (article 49) a bill of exchange which should have been presented for acceptance has not been so presented (this defence being pleaded by the drawer, the endorsers and their guarantors);
- That (article 53) the bill has not been presented for payment (this defence being pleaded by the drawer, the endorsers and the guarantors);
- That (article 59) the protest for non-acceptance or for non-payment which should have been made has not been made (this defence being pleaded by the drawer, the endorsers and their guarantors and not by the acceptor and his guarantor);
- That (article 80) the limitation period for exercising the right of action arising on the instrument has elapsed.

(2) A party may also set up against a protected holder defences based on the underlying transaction between himself and such holder.

Article 27(2)(a)

It would be desirable to amend article 27(2)(a) as follows: "if, when the instrument was transferred to him, he had knowledge of a transaction which gives rise to a claim to, or a defence upon, the instrument".

Article 33

It is regrettable that the draft Convention does not recognize the automatic transmission of ownership to successive holders of the bill of exchange of the funds made available for payment by the drawer.

Failing this, it would be desirable for the possibility of envisaging this to be at least expressly recognized. With this in mind, article 33 could be supplemented as follows: "Unless so mentioned on the instrument, the order to pay . . . (etc.)".

Article 41(1)(c)

It is desirable that the words "and the previous endorsers" should be added after the words "... the acceptor" and again after the words "... the drawer".

Article 43(2)

The second paragraph of article 43 does not make the guarantor's liability for payment of the bill dependent on presentation thereof to the drawee.

Such a provision transforms the guarantee (*aval*) into an independent guarantee to pay on first request, which is doubtless not very desirable. If the text should be retained, it would be advisable to add that the guarantor must pay "... even in the absence of the drawee's acceptance".

Article 45(2)(c)

It is requested that article 45(2)(c) should be deleted.

If not, the text of paragraph (c) should be supplemented by the following words: "... except where payment of such a bill of exchange is bank-domiciled".

Article 46(1)

The second sentence of this paragraph should refer only to (b) of paragraph 2 of article 45, since:

- The drawer cannot stipulate both that the bill must be presented (article 45(2)(a)) and that it must not be presented for acceptance (article 46(1)).

Deletion of paragraph (c) of article 45(2) was requested above.

Article 46(2)

It is suggested that the previous wording (1982) should be re-established. It envisaged that, when acceptance is refused, "the bill is not thereby dishonoured".

Article 47(b)

It is suggested that paragraph (b) should be amended as follows: "A bill drawn upon two or more drawees may be presented to one of them only . . ." (French version: "... peut n'être présentée qu'à l'une quelconque . . .").

Article 49

It would be desirable to supplement article 49 as follows:

"Failure to present an instrument for acceptance does not discharge the guarantor of the drawee of liability thereon".

New article 54 bis (draft text)

Garnishment to stop payment is admitted only in the case of loss or theft of the instrument or the legally established insolvency or legally established incapacity of the holder.

Articles 64 bis-64 sexies to be added

C. Parts of a set, and copies

I. Parts of a set

Article 64 bis

A bill of exchange can be drawn in a set of two or more identical parts.

These parts must be numbered in the body of the instrument itself, and the total number of sets drawn must be mentioned; in default, each part is considered as a separate bill of exchange.

Any holder of a bill which does not specify that it has been drawn as a sole bill may, at his own expense, require the delivery of two or more parts. For this purpose he must apply to his immediate endorser, who is bound to assist him in proceeding against his own endorser, and so on in the series until the drawer is

reached. The endorsers and guarantors are bound to reproduce their endorsements and guarantees on the new parts of the set.

Article 64 ter

Payment made on one part of a set operates as a discharge, even if there is no stipulation that this payment annuls the effect of the other parts. Nevertheless, the acceptor is liable on each accepted part which he has not recovered.

An endorser who has transferred parts of a set to different persons, as well as subsequent endorsers, are liable on all the parts bearing their signature which have not been restored.

Article 64 quater

A party who has sent one part for acceptance must indicate on the other parts the name of the person in whose hands this part is to be found. That person is bound to give it up to the lawful holder of another part.

If he refuses, the holder cannot exercise his right of recourse until he has had a protest drawn up specifying:

- (1) That the part sent for acceptance has not been given up to him on his demand;
- (2) That acceptance or payment could not be obtained on another of the parts.

II. Copies

Article 64 quinquies

Any holder of an instrument has the right to make copies of it.

A copy must reproduce the original exactly, with the endorsements and all other statements to be found therein. It must specify where the copy ends.

It may be endorsed and guaranteed in the same manner and with the same effects as the original.

Article 64 sexies

A copy must specify the person in possession of the original instrument. The latter is bound to hand over the said instrument to the lawful holder of the copy.

If he refuses, the holder may not exercise his right of recourse against the persons who have endorsed the copy or guaranteed it until he has had a protest drawn up specifying that the original has not been given up to him on his demand.

If the original instrument, after the last endorsement before the making of the copy, contains the clause "commencing from here an endorsement is only valid if made on the copy" or some equivalent formula, a subsequent endorsement on the original is null and void.

Article 65 (to be supplemented)

Although the joint liability of the parties to a bill of exchange seems implied by the spirit of the Convention, it is not expressly provided for.

It seems desirable to remove all uncertainty in this area and to amend article 65 as follows:

"All persons who have drawn, accepted, made, endorsed or guaranteed an instrument are jointly and severally liable towards the holder.

"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.

"Any party who has paid the instrument has the same right in respect of parties liable to him.

"Action taken against one of the liable parties does not preclude action against the others, even those subsequent to the one initially proceeded against."

Article 68(3)

This paragraph should be worded as follows:

"A party is not discharged of liability if he pays a holder who is not a protected holder and knows at the time of payment that a person has validly asserted a claim on the instrument and that the holder had knowledge of such claim when he came into possession of the instrument or he obtained the instrument by fraud or theft or he participated at any time in a fraud or theft concerning it."

Article 73(2)

The following wording is proposed:

"Payment by the drawee of the whole or a part of the amount of a bill of exchange to the holder, or to any party who has paid in accordance with article 66, discharges all parties of their liability to the same extent, except where the drawee pays a holder who is not a protected holder and knows at the time of payment that a person has validly asserted a claim on the instrument and that the holder had knowledge of such claim when he came into possession of the instrument or he obtained the instrument by fraud or theft or he participated at any time in a fraud or theft concerning it."

* * *

FEDERAL REPUBLIC OF GERMANY

The Federal Government welcomes the fact that UNCITRAL has given Governments the opportunity of submitting observations on the draft Convention on International Bills of Exchange and International Promissory Notes—drawn up at the nineteenth session—and thus of facilitating revision of this draft by the working party. The Federal Government is pleased to be able to make use of this opportunity, but attaches importance to the declaration that its observations on individual questions of a technical nature do not signify support for the draft as a whole. In the opinion of the Federal Government, it has not been shown that it is necessary or even only expedient—either in terms of economic needs or in terms of legal considerations—to draw up a Convention restricted to bills of exchange and promissory notes in international trade.

The Federal Government is of the opinion that in some of its provisions the draft requires a thorough linguistic revision. This seems necessary in some cases for the sake of linguistic clarification of what is meant and in other cases for the sake of avoiding differences in wording covering the same meaning. Thus, for instance, as discussions have shown, the meaning of the words "asserted a valid claim" (e.g. in article 25, paragraph (4)(a)) is not unequivocal. Also, it is, for example, not clear why in regard to the same legal consequence the words "is deemed not have been written" have been selected in article 17, paragraph (2), second sentence, whereas the words "is without effect" have been selected in article 35, paragraph (2), second sentence.

Further, there should be an examination as to whether the catalogue of definitions in article 4 ought not to be supplemented—for the sake of comprehensiveness—by the concepts mentioned in article 8 ("drawer", "maker", "acceptor", "endorser" and "guarantor").

With regard to individual provisions of the draft Convention the following suggestions are made:

Article 20(1)(c)

It is suggested that in article 20, paragraph (1)(c) the word "only" be inserted after the word "subject". This change amounts to a clarification; it corresponds to article 18, paragraph (2) of the Geneva Convention.

Article 31(1)(b)

In article 31, paragraph (1)(b), second sentence, it must be made clear that the liability of a party who has assented to the alteration shall be governed not by the terms of the altered text but by the terms of the original text where the alteration has been made for the benefit of that party. It is suggested that this sentence be supplemented by the following words: "or, at the option of the holder, to the terms of the original text".

Article 41(3)

In article 41, paragraph (3) there should, in addition to the reference made to interest calculated in accordance with article 66, be a reference to the discount in article 66, paragraph (4). It might otherwise incorrectly be concluded that on payment before maturity interest shall in all events be calculated according to the rate laid down in paragraph (2) and not according to the discount rate, for the discount rate is not a "rate of interest" in the strict sense of the term. Hence, it is suggested that the words "or discount, whichever is appropriate" should be inserted after the word "interest".

Article 66(3)

In article 66, paragraph (3) it should be made clear that the possibility of demanding further compensation in addition to interest shall also apply to payment before maturity where this causes loss to the holder (for instance as a result of the higher costs of refinancing). Paragraph (3) should therefore follow the present paragraph (4) and should be given the following wording as the new paragraph (4):

"Nothing in paragraphs (2) and (3) prevents a court from awarding damages or compensation for additional loss caused to the holder by reason of payment before maturity or delay in payment".

Article 68

In article 68, paragraph (4)(b) it should be made clear—in correspondence with article 13, paragraph (1) and article 42, paragraph (2)—that payment of an instalment may also be acknowledged on a slip affixed to the instrument concerned where the space available thereon is insufficient. Hence, it is suggested that, at the end of the sentence, the words "or on a slip affixed thereto ("allonge")" should be inserted after the word "instrument".

Consideration should, moreover, be given to clarification in article 68 to the effect that a holder is not obliged to accept payment before maturity of the instrument. Such clarification would correspond with article 69, paragraph (1) of the draft.

New article on pledge endorsement

The draft should be supplemented by a provision on pledge endorsement. In this respect reference is made to the working document (A/CN.9/XIX/CRP.7) submitted by the French delegation at the nineteenth session of UNCITRAL.

Relationship of the Convention to the stamp laws

It might be advisable for there to be inclusion in the Convention of a provision corresponding with Article 1 of the Geneva Convention of 1930 on the stamp laws in connection with bills of exchange and promissory notes. This provision should stipulate that the validity of obligations arising out of a bill of exchange or a promissory note or the exercise of the rights that flow therefrom shall not be subordinated to the observance of the provisions concerning the stamp.

* * *

MEXICO

[Original: Spanish]

As will be recalled, prior to the thirteenth session of the Working Group on International Negotiable Instruments, Mexico submitted comments on the draft Convention on International Bills of Exchange and International Promissory Notes. Consequently, the Mexican Government will limit its comments on this occasion to those articles which were the subject of important observations or amendments during the seventeenth and nineteenth sessions of the United Nations Commission on International Trade Law (UNCITRAL) and the thirteenth and fourteenth sessions of the Working Group mentioned above. Reference will also be made to other articles which are considered important.

*Article 1(2)(a) and (3)(a)**

The following wording is proposed:

(2) An international bill of exchange is a written instrument which:

(a) Contains in the text of its first paragraph the words "international bill of exchange (Convention of . . .)";

...

(3) An international promissory note is an instrument which:

(a) Contains in the text of its first paragraph the words "international promissory note (Convention of . . .)";

...

Article 1, new paragraph (5)

The insertion of a paragraph (5) is proposed, which could consist of one of the two following alternatives:

"(5) The elements required pursuant to paragraphs (2) and (3) above must appear on the first sheet of the document. Any additional clause which it is desired to stipulate legally may be included afterwards, and this may be done on additional sheets."

Or:

"(5) When the document consists of several pages, these must be identified with reference to each other in such a way that they show without any possibility of doubt that they constitute a single document."

The existing paragraph (5) would become paragraph (6).

The concept of "knowledge" (articles 3, 5, 23, 25 and 26)

The Convention refers to:

(a) *Good faith* and, as a necessary consequence, its opposite, *bad faith* (article 3);

(b) *Knowledge* (article 5);

(c) *Deliberate ignoring* (article 5);

(d) *Absence of knowledge due to negligence* (articles 23, paragraphs (2) and (3), 23 *bis*, paragraphs (2) and (3), 25, paragraph (2)(d), and 26, paragraph (1)(c));

The draft would be greatly simplified, without any diminution of security for the parties, if the requirement concerning negligence in the articles indicated above, and any other article where it appears, were eliminated. It is true that in civil law systems there is a certain inclination to make negligence equivalent to guilt; but negligence in common law seems to have a different meaning from guilt in civil law.

If the suggestion made here were adopted, the result would be:

(a) The establishment of a system which would facilitate uniform international interpretation, in line with article 3 and other instruments of UNCITRAL and instruments governing private international law;

(b) The definition in article 5 would correspond to the system applied in the Convention.

Consequently, it is proposed that the reference to negligence should be eliminated in article 23, paragraphs (2) and (3), article 23 *bis*, paragraphs (2) and (3), article 25, paragraph (2)(d), and article 26, paragraph (1)(c).

Article 4(7)

This text is rather difficult to read; the difficulty is increased by the fact that, in subparagraph (a), the order of reference is inverted. It would be clearer to say: "other than in paragraph (1), subparagraph (c)(ii), thereof". But even then, it would still be difficult to read.

The following text of subparagraph (a), which would mean the same, would probably be more acceptable:

"(a) He was without knowledge of the fact that its transferor was an unprotected holder and that at least one of the parties could assert or set up against that holder a claim or defence that would be available as a defence against contractual liability".

Article 4(10)

(10) "Signature" means a handwritten signature, even if it is illegible but corresponds to that of its author, or a facsimile thereof [in the Spanish version: *o la impresa en facsímile*], or any other means of effecting the equivalent authentication, and "forged signature" includes a signature by the wrongful or unauthorized use of such means;

Article 6(b)

The following wording is proposed:

"(b) By instalments at successive dates, provided that the amount of each partial payment is stated in the text of the instrument".

Articles 11 and 38

Article 38, paragraph (1), was amended at the nineteenth session of the United Nations Commission on International Trade Law.

In order to promote the use of the documents referred to in the Convention, by giving more legal security to those who acquire them, through consistency between the provisions of the Convention and clarity in its text, it is proposed that article 38, paragraph (1), should be left as it was, and that article 11, paragraph 1, should be amended to read as follows:

"(1) An incomplete instrument which satisfies the requirement set out in subparagraph (a) of paragraph (2) of article 1 and bears the signature of the drawer or the acceptance of the drawee, or which satisfies the requirements set out in subparagraphs (a) and (f) of paragraph (3), but which lacks other elements pertaining to one or more of the requirements set out

*As indicated in the introductory note to this addendum, only those portions of the comments are reproduced here which propose new wording of articles or parts thereof.

in paragraph (2) or (3) of article 1 [Spanish version: *en los párrafos 2) o 3) del artículo 1*] may be completed and the instrument so completed is effective as a bill or a note.

Article 20(3)*

It is not clear whether the endorsee of documents with the "not negotiable" or other equivalent clause has the power to endorse such a document for collection. The following drafting is proposed:

"... the instrument may not be transferred again, and any endorsement of the document that is made shall give the endorsee the powers of an endorsee for collection".

Articles 25(1)(d) and 26(1)(c)

The hypothesis that someone might sign a document without knowing that he is becoming a party to an instrument in accordance with the Convention is one which should disappear. To allow this defence only complicates matters and reduces the security of the instruments put into circulation in accordance with the Convention. To maintain this possibility will create incomprehensibility and suspicions, which, as has been pointed out, may prove an obstacle for the ratification or accession of the various countries.

It is proposed that this defence should be eliminated. This will give the additional advantage of eliminating the reference to the concept of negligence (see what has been said on the subject of knowledge). If this proposal is not accepted, at least it should be made clear that the burden of proof of the absence of negligence should be on the person who pleads the defence, so that the text would read as follows:

"... based ... *provided that such party proves that such absence of knowledge was not due to his negligence*".

Article 41

It is proposed that, in chapter IV, a section 3 should be introduced entitled "*The liability of a person who transfers an instrument by endorsement or by mere delivery*", to go at the end of the chapter, after the present article 44, and article 41 should be moved there with the necessary changes in the numbering of the articles.

Article 48(2)

In Mexican law, and in the law of some European countries, the *sociedad colectiva* is one specific type of business enterprise. Thus, in Spain, for example, there is the *sociedad en nombre colectivo* (general partnership), commonly known as a *sociedad colectiva*, etc. It is therefore suggested that in the Spanish text, at any rate, the following wording should be used:

*Note by the secretariat: Article 20, paragraph (3), which the Commission at its nineteenth session transferred to article 16 as its new paragraph (2) in modified form, has erroneously been retained in the Spanish version of the draft Convention.

["... or if the drawee is] *una empresa, sociedad o asociación civil o comercial*, [or other legal entity which has ceased to exist."] (Literal translation: "an enterprise or civil or commercial society" [or "company" or "partnership"] "or association".)

The same problem is encountered in other articles, for example in article 52, paragraph (2).

Article 66(1)(c)(i)

The following text is suggested:

"(i) The amount of the bill with interest to the date of payment, at the rate stipulated, and if no rate has been stipulated it shall be calculated in accordance with paragraph (4)".

Article 68(4)

It is suggested that, in subparagraph (a), the phrase "unless agreed otherwise" should be deleted.

The following new wording is suggested for subparagraphs (b), (c), (d) and (e):

"(b) In the case of an instrument payable by instalments at successive dates, the drawee or a party making a payment, when the total amount is not paid off as a result of such payment, may require that mention of such payment be made on the instrument and that a receipt therefor be given to him.

"(c) If an instrument payable by instalments at successive dates is dishonoured by non-acceptance or non-payment as to any of its instalments [Spanish version: *En el caso de un título pagadero a plazos en fecha sucesivas si hay falta de aceptación o pago en cualquiera de sus vencimientos*] and a party pays the instalment, the holder, in addition to giving a receipt for the partial payment and making mention thereof on the instrument, must give the party a certified copy of the instrument and any necessary authenticated protests in order to enable such party to exercise a right on the instrument.

"(d) The person from whom payment is demanded may withhold payment if the person demanding payment does not deliver the instrument to him. If the payment in question is a partial payment, the person from whom payment is demanded may withhold payment if the mention on the instrument or the receipt or the certified copy referred to in subparagraphs (b) and (c) of this paragraph are not made or given to him. Withholding payment in these circumstances does constitute dishonour by non-payment under article 54.

"(e) If payment is made but the person paying, other than the drawee, fails to obtain the instrument if the payment in question is a total payment, or mention of the payment on the document in the case of a partial payment, such person is discharged but the discharge cannot be set up as a defence against a protected holder."

Article 71(3)(b)

The text should read:

"(b) The amount payable is to be calculated according to the rate of exchange indicated on the

instrument. Failing such indication, the amount payable is to be calculated according to the bank rate having the greatest resemblance to that for payment of instruments on the date of maturity."

* * *

[A/CN.9/WG.IV/WP.32/Add.3]

This addendum to document A/CN.9/WG.IV/WP.32 sets forth, sometimes in summarized or otherwise shortened form, the comments received between 1 and 5 December 1986 from the following States: Bangladesh, Czechoslovakia, Italy, Netherlands and Yugoslavia.

BANGLADESH

Article 4(7)

In addition to the existing stipulations, the requirement of being a holder for valuable consideration should exist for a holder to be a "protected holder".

Article 14(1)(b)

The definition of "holder" should not include stipulation covering holding of an instrument against a forged endorsement.

Article 23(2) and (3)

Exemption from liability as afforded under article 23(2) and (3) should be available only where the payment has been made to a protected holder.

Article 31(1)(b)

Parties who have signed an instrument before a material alteration made without their consent should stand discharged from their liabilities under the instrument whether according to the altered text or to the original text of the instrument.

Article 38

A bill of exchange which is not signed by the drawer cannot be treated as an instrument and the question of acceptance of an instrument by the drawee even before its signature by the drawer should not arise. Article 38(1) should be reformulated to delete the stipulation of acceptance before the signature of the instrument by the drawer.

Article 47(b)

The stipulation of the article should be reversed to provide that a bill drawn upon two or more drawees must be presented to each of them unless the bill clearly indicates otherwise.

Article 51(f)

The time-limit for presentation for payment of an instrument payable on demand should be stated as a reasonable time not exceeding one year in any case.

Article 74

The holder of a lost bill should be entitled to a duplicate bill from the drawer subject to furnishing necessary security/indemnity. The holder of the lost bill should also be required to notify the incidence of loss to all parties.

Article 80(1)

For the words "four years" the words "three years" should be substituted.

CZECHOSLOVAKIA

The Government of the Czechoslovak Socialist Republic supports the efforts of the United Nations Commission on International Trade Law aimed at the unification and harmonization of the law of international trade and is of the opinion that such unification and harmonization can significantly contribute to the development of international trade and to the establishment of the new international economic order. For this reason, the Czechoslovak Socialist Republic also welcomed the commencement of the work on the Convention on International Bills of Exchange and International Promissory Notes and took an active part during the whole time in preparing the draft Convention.

In considering the draft Convention the Government of the Czechoslovak Socialist Republic takes into account that the draft serves the purpose of a worldwide unification of the rules regulating bills of exchange and promissory notes which has been furthered by UNCITRAL. In this respect the submitted draft Convention appears to be a well-balanced compromise between the rules based on the system of the Geneva Convention and the rules of the Anglo-American systems of law regulating bills of exchange and promissory notes.

The Government of the Czechoslovak Socialist Republic appreciates the fact that the draft Convention is not expected to replace the present legislation of the individual States regulating bills of exchange and promissory notes and that the parties have a choice between the application of the municipal rules and the rules of the Convention. This approach may increase the willingness of States to accede to the Convention.

The Government of the Czechoslovak Socialist Republic believes that the proposed rules of the Convention correspond to the needs of international trade as well as international payment and credit transactions and that they are a contribution to the commercial and banking practice. Therefore, the Government of the Czechoslovak Socialist Republic has no specific comments on the draft Convention on International Bills of Exchange and International Promissory Notes.

ITALY

General observations

As has repeatedly been stressed in the previous sessions of the Commission, the Italian Government follows the work undertaken to create a uniform set of rules for international bills of exchange and promissory notes with considerable interest, and considers that it can still constitute a useful instrument in international trade despite the existence of more modern techniques for international payments. The Italian Government furthermore appreciates the considerable effort made to elaborate compromise solutions between existing systems and confirms that it intends to contribute to this effort in order to permit the reaching of results of an even more satisfying nature than those reached so far.

In fact, at a general level the project now examined does not appear as yet to correspond to its aims and purposes and requires to be further improved, above all in order to meet the need for certainty felt in particular in international transactions (especially in a field such as that of bills of exchange and promissory notes). In this respect attention must be called to two aspects in particular:

(a) The method followed for the drafting of the uniform rules appears to suffer excessively from the drafting style of the common law tradition and could, therefore, cause considerable problems when the text is submitted for interpretation to civil law judges who are unfamiliar with this technique. Above all, the excessive use of cross-references from one article to another is disputable, the reading of the text being as a consequence rendered difficult, with the additional danger of contradictions and uncertainties in interpretation;

(b) At a more substantial level it must be noted that on numerous points the draft appears to offer transactions involving international bills of exchange less protection than would be desirable: definitely less than that offered by the Geneva Convention, and this despite the international scope of application of the new instrument which would rather require more protection.

Both a simplification of the drafting style and a reconsideration of those aspects where the protection of the transferee of an international bill of exchange still appears to be inadequate would, therefore, be desirable.

Observations on individual provisions

Article 3

The meaning of "good faith in international transactions" as a criterion for the interpretation of the draft Convention is not clear. It is, in fact, a criterion which may be used as a norm for the behaviour of the parties, but it does not have great meaning when it is addressed to a judge who has to interpret the legal provision. Such a criterion could in reality implicate an elasticity of interpretation lacking consistence with the need for certainty and with the formal principles which are basic for the matter in hand.

Article 4(6) and (7)

The definitions of "holder" and "protected holder" are still not satisfactory. Indeed they form a particularly clear example of the technique of drafting by means of references and would appear to be able to create considerable uncertainties of interpretation: the provisions examined in fact appear incomprehensible without the consideration of numerous others, with the result that they do not even facilitate the task of the interpreter, revealing themselves furthermore to be lacking any normative content in themselves.

The question could instead be raised whether it would not be simpler to avoid such definitions altogether, in particular considering that a factual approach which regulates the exceptions which may be set up in the different cases against the holder of the instrument would without doubt be more suitable for a set of rules to be applied at an international level.

Lastly, at a more technical level, the relationship created by article 4(7) between the protection of the holder of the instrument and the problems resulting from the circulation of an incomplete instrument does not appear to be satisfactory.

It would certainly be preferable in this respect to overcome the theoretical preconception according to which, in such a case, the document would lack any real negotiability; it would be preferable to recognize a protection for all the data contained in the instrument, with the exclusion, therefore, only of that so far left out. It would, for example, appear to be unjustified that the fact that the date of issuance has been left out may condition the protection of the transferee of the instrument even as regards the sum indicated in it from the beginning.

Article 6(c)

The possibility, unknown to the Geneva Convention, of an instrument payable by instalments with an acceleration clause such as the one considered here may place an excessive burden upon the debtor. Moreover, one should not neglect the uncertainties which could result from this provision for the circulation of the instrument—uncertainties which in particular refer to the rights which it confers at any given moment.

Article 11

It may be appropriate to state with greater clarity that the completion of an incomplete instrument is possible only if there is an agreement between the parties which confers authority of completion, in order to eliminate the doubt, which is probably unfounded but which has often arisen in the interpretation of the Geneva Convention, that such authority may derive *ipso jure* from the mere possession of an incomplete instrument. It would also serve the purpose of drawing in the draft Convention the fundamental distinction between the two different forms of incomplete instrument, i.e. the instrument "*in blanco*" and the instrument "*incompleto*" strictly speaking, a distinction which would also be useful for the solution of the problems indicated above of coordination with article 4(7).

Articles 23 and 23 bis

While the rule of article 23 for the case of forged endorsement may be considered an acceptable compromise between the diverging legal traditions on this point, considerable reserve must be reiterated as regards the equation article 23 *bis* institutes with endorsement by an agent without authority (*falsus procurator*). In this latter case, the legal situation appears to be considerably different: suffice it to consider that while forgery of an endorsement constitutes a material fact which can be ascertained more or less easily, lack of authority requires, in order to be demonstrated, an evaluation of a legal nature which may well be extremely difficult. This difficulty is furthermore accentuated in an international context where the differences between the legal systems with reference to agency in general and agency regarding negotiable instruments in particular may render such an ascertainment even harder.

A solution which *in concreto* distinguishes between the two cases, and which requires lack of good faith for the liability of a transferee who acquires the instrument from a *falsus procurator*, is therefore to be recommended.

Articles 25 and 26

Beyond the basic reservations expressed in the general observations, it would appear to be necessary to reconsider at least the provision of the real (i.e. available against any kind of holder) defence *non est factum* contained in article 25(1)(d) and above all in article 26(1)(c) which may, in fact, have serious consequences for international transactions, particularly when considering the possibility of an instrument drafted in a language different from that of the person who has signed and the consequent possibility that the defence may unjustifiedly burden successive holders of the instrument with a *Sprachrisiko* which the need for certainty requires to be imposed upon the person who has signed.

Article 30

The Italian delegation has already repeatedly expressed its doubts as regards the cases regulated in this article of acceptance or representation by the person whose signature was forged. While the reservations remain, it notes with satisfaction that every reference to behaviour by implication has been eliminated.

A further improvement of the provision considered is, however, possible. It may above all be useful to clarify the exact meaning of acceptance or representation, specifying in particular whether it in each and every case must implicate a liability from the instrument, that is to say a liability *erga omnes*, or whether instead there may not be cases in which such a liability operates only in favour of the party with respect to whom the relevant behaviour is adopted. The wording of article 30 would appear to suggest the first alternative—a solution which appears indiscriminate and unsuitable to regulate the diversity of cases which *in concreto* may occur.

The wording proposed by the *ad hoc* working party at the nineteenth session of the Commission (A/CN.9/XIX/CRP.13) which stressed that the liability con-

sidered must be understood “according to the terms of such acceptance or representation” would, therefore, appear to be preferable.

Article 42

Doubts may be expressed with reference to article 42(1), which provides for the possibility of a guarantee for the benefit of the drawee, even where the latter is not liable under the instrument, this all the more so when it is considered that the necessity of more persons being liable may just as well be satisfied by other means, for example, by an endorsement on the instrument.

The provision of article 42 may further create serious problems of interpretation in connection with the principle of article 43, e.g. by giving rise to the doubt of whether in the case considered the guarantee of the guarantor exists also in the case of non-acceptance by the drawee.

Article 68

Without reiterating the doubts which the rule of article 68(3) may raise for the legal systems adhering to the Geneva Convention, it is hoped that the possibility of strengthening the protection of the person liable for the instrument be reconsidered, in order to reduce the risk of a non-discharging payment on his part by restricting it to the sole case of bad faith or gross negligence.

NETHERLANDS

Articles 42-44: the guarantor

In view of the increasing use of forfaiting, under which bills of exchange or promissory notes, bearing the aval or guarantee of a third party (usually a bank), are discounted, articles 42-44 concerning the guarantor take on a special importance. It is therefore desirable that the rights and obligations of the guarantor on an international instrument be construed in a uniform manner. One major factor giving rise to non-uniform interpretation is that of the relationship of the applicable law of suretyship to the rules concerning the guarantor in the proposed Convention.

The question whether and, if so, to what extent suretyship law impinges upon the law of negotiable instruments is a troublesome one in both civil and common law systems. In particular, the question whether defences available to the surety or guarantor may be derived from suretyship principles has been resolved differently in various jurisdictions. Approaches range from allowing a guarantor to raise suretyship defences in certain situations (see, e.g., section 3-415(3) of the U.S. Uniform Commercial Code) to providing an exhaustive listing of the guarantor's defences in the negotiable instruments law itself (as in the Geneva Uniform Law). However, even under the last approach instances are known where the courts have admitted

typical suretyship defences resulting in the discharge of the giver of the "aval".*

In the view of the Netherlands, articles 42-44 of the draft Convention are not specific enough on the issue just raised. Must it be assumed that suretyship defences are not available to a guarantor? Or that such defences are not available against a protected holder or a holder who was without knowledge of such defences when he took the instrument? It is suggested that the draft Convention should be unequivocally clear on this point. The Netherlands would obviously prefer that the rights and obligations of the guarantor be governed exclusively by the provisions of the proposed Convention.

Article 42(4)

(4) "... Unless the content otherwise requires ..." should read "... Unless the context otherwise requires ...".

The Working Group introduced the words "Unless the context otherwise requires ..." into the text of paragraph (4) at its sixth session (see A/CN.9/147, paragraph 87). Unfortunately, the annex to the Working Group's report, setting forth the text of the articles as adopted by the Working Group at its sixth session, shows the word "content", an obvious misprint which has since figured in subsequent versions of the draft Convention.

Article 42(4)(c)

There is no trace in the reports of the Working Group as to why and how this provision found its way into the text of article 42(4). It appears for the first time in the report of the Working Group on the work of its ninth session (A/CN.9/181) in a text of article 43 "as considered by the Working Group."

It is not immediately clear what the effect of the provision of paragraph (4)(c) is if the signature alone on the back of the instrument is that of the drawee. Paragraph (4)(b) states that the signature alone of the drawee on the front of the instrument is an acceptance. Presumably (because of article 37) the signature alone of the drawee on the back of the instrument is also an acceptance. Yet, the way in which article 42(4) is drafted could lead to an interpretation, obviously not intended, that it is not an acceptance but a guarantee.

It is suggested that paragraph (4)(c) be reconsidered. It is noted that, under the Geneva Uniform Law, a signature alone of a person who was then not the holder of the instrument is not, as under paragraph (4)(c), an endorsement. Paragraph (4)(c), if retained, could result in an interrupted series of endorsements (because of article 14(1)(b)), in which case the last person in possession could not be a holder although the instrument was in fact regularly transferred under article 12.

*E.g., according to the French *Cour de Cassation*, the giver of an *aval* is discharged, under article 2037 of the *Code Civil*, if he establishes that he cannot be subrogated to the rights of the holder, in order to exercise his rights against the person for whom he has become guarantor, because of fault on the part of the holder. See *Roblot, Les Effets de Commerce*, at 215-216.

Article 42(5)

The Netherlands would prefer a rule according to which, in the absence of an indication for whom the guarantee is given, the presumption is that the guarantee is given for the drawer of a bill, unless the signature of the guarantor is accompanied by such words as "payment guaranteed".

In general, however, and whatever text is adopted in this respect, paragraph (5) should make clear whether the presumption stated in that paragraph is rebuttable or irrebuttable. If the presumption is rebuttable, the further question arises whether proof to the contrary may be adduced only from what appears on the instrument itself, or also from facts or elements outside the instrument. It is noted that the reports of the Working Group contain no indication of the Working Group's view on this point but that the commentary to the draft Convention (A/CN.9/213, article 42, commentary on paragraph 5) states that the presumption is irrebuttable.

In the view of the Netherlands, the holder who takes an instrument on which the guarantor has failed to specify the person for whom he has become guarantor should be entitled to rely on the legal presumption of paragraph (5), unless he had knowledge of the fact that the guarantee was given for a person other than the acceptor of the drawee. Such knowledge could be imputed in cases where the context in which the signature of the guarantor appears on the instrument (e.g. the guarantor's signature appears next to the name or signature of a person other than the presumed person under paragraph (5)) clearly indicates the intention of the parties.

In view of the divergent interpretations given by the courts in respect of article 31(4) of the Geneva Uniform Law (a provision corresponding to that of article 42(5) of the draft Convention), it would seem imperative to state specifically in the proposed Convention whether the legal presumption is rebuttable or irrebuttable and, if rebuttable, on which grounds.

Article 43(1)

Under paragraph (1) the guarantor may set up as defences to his liability defences that are available to the party for whom he has become guarantor. The paragraph is silent on the question whether the guarantor may also set up defences that are personal to himself.

Article 43(2)

The guarantor of the drawee also undertakes to pay the bill before maturity if the bill is dishonoured by non-acceptance. This follows from article 50(2)(b) but should be added to article 43(2).

Article 44(2)

Under this provision, "the guarantor who pays the instrument has rights thereon against the party for whom he became guarantor ...". It is suggested that the words "has rights thereon" be replaced by the words "has a right of recourse thereon". An alternative suggestion is to specify that "rights thereon" means a right to recover, e.g.: "The guarantor who pays the

instrument may recover from the party for whom he became guarantor or from the parties who are liable thereon to that party the entire sum paid by him and interest on that sum at the rate specified in article 66(2) from the date on which he made payment”.

Article 49

This article does not give a solution as regards the guarantor for the drawee of a bill which must be presented for acceptance. If the bill is not presented for acceptance, should the guarantor of the drawee be considered as discharged?

YUGOSLAVIA

I. General remarks

1. The Socialist Federal Republic of Yugoslavia considers that the draft Convention as revised by the United Nations Commission on International Trade Law (UNCITRAL) at its nineteenth session is better than the previous ones and that it constitutes a solid basis for a successful regulation of this matter on international level.

2. Yugoslavia considers that the existing (inadequate) national regulations could be modified by the adoption of the UNCITRAL Convention. Namely, it should be emphasized that the 1930 Geneva Conventions were ratified with numerous reservations so that no real unification of European bills of exchange law was achieved. However, the fact is that the international banking practice was lately oriented towards the adoption of some institutions of Anglo-American bills of exchange law which, irrespective of the text of the UNCITRAL draft Convention, make it necessary, in the opinion of numerous lawyers and bankers, to revise and adapt the Geneva Conventions to the practice which has been developing beyond them. Therefore, it is considered that the adoption of the draft Convention would have a positive effect on the revision of the existing national regulations and their harmonization with contemporary international banking practice.

3. Careful reading of the text of the draft Convention leads us to the conclusion that it protects more the drawers than the drawees but that has always been the main characteristic of bills of exchange; in addition, all States represent both drawers and drawees so that it is difficult to request the modification of the provisions providing for the consistent implementation of this basic principle in the draft. Perhaps some provisions could still be reformulated so as to ensure equal protection of both drawers and drawees.

4. The main difficulty Yugoslav lawyers have as regards the draft Convention is related to the concept of “protected holder” as an institution of the common law system, which is absolutely unfamiliar to European lawyers. Since, by its many characteristics, the “protected holder” of the bill of exchange resembles the “responsible holder”, there is a danger that the

“protected holder” would be viewed in the countries of the Geneva system as the “responsible holder” which may create confusion and doubt. In order to avoid this, Yugoslavia considers that it will be necessary:

(a) To work out a glossary of the Convention similar to that made by the Commission’s secretariat in 1982 (A/CN.9/213) which was very useful for the understanding of certain provisions of the draft;

(b) To publish in an UNCITRAL bulletin or magazine (similar to corresponding UNIDROIT publications) court judgements or arbitration awards rendered on the basis of the Convention since there is a danger that different standards will be applied in its interpretation which may hamper and slow down the process of unification of this significant matter.

II. Comments on individual provisions

Articles 4(7) and 28

The new definition of “protected holder” is better than previous ones. The important principle stipulated in article 28 should be emphasized by placing it immediately after article 4 as a separate article.

Article 5

The words at the end of article 5 could be deleted. If this is not acceptable, one should attempt to find new wording which would eliminate to a certain extent the difficulties arising from the interpretation of the second part of article 5. It is obvious that it is difficult to prove that a person could not have been unaware of the existence of a certain fact.

Article 7(5),(6) and (7)

Although the efforts of the *ad hoc* working party in formulating the provisions on the determination of a variable rate should be welcomed, it would be necessary to reconsider carefully the provisions of paragraphs (5), (6) and (7) since they appear not to be consistent with the provisions of articles 66 and 71 relating to similar issues.

The formulation of article 7(5) is considered as very successful and should remain in the final version of the Convention. Perhaps it could be improved by stipulating that certain variable rates are not inconsistent with the usual pegging practices (a certain stock or other international money market). It is also suggested that, in addition to the comment on this article, some examples from practice should be mentioned in order to assist contracting parties in determining variable interest rates.

Article 8

The definition of article 8 does not define precisely what date is in question. Therefore, it is suggested that the words “after the date” should be deleted or that the words “which is not fixed” should be added.

Article 9

At the end of paragraph (1)(a), the following words should be added: "but not in the alternative".

Articles 23 and 23 bis

By referring to negligence in articles 23 and 23 bis, the security of the bill is weakened since a subjective criterion is introduced which is in practice difficult to prove.

Articles 25 and 26

It is suggested that the following words be deleted in articles 25(1)(d) and 26(1)(c): "or on the fact that such party signed the instrument without knowledge that his signature made him a party to the instrument, provided that such absence of knowledge was not due to his negligence". It is hard to conceive that in international banking traffic involving professionals someone signs the instrument by error (such a situation could probably occur in internal traffic).

Article 32

In paragraph (1), in the English language, the word "agent" is used while in paragraph (3) reference is made to a person who signed the instrument in a representative capacity (the same term is used also in the French and Russian texts). In order to avoid ambiguities and difficulties in translating these terms into other languages, the text should be clarified as to whether two different persons are in question or only one agent.

Article 56(3)

Although the formulation of article 56(3) facilitates the process of making protest, we would like to propose that, in the interest of safety of the instrument, the possibility of making protest to the court be also considered.

Article 66

As already mentioned, it is proposed that the provisions of article 66, particularly paragraphs (2), (3) and (4), be compared with the provisions of article 7(5), (6) and (7). It should be underlined that in article 7 the starting point is the principle of autonomy of the will of the contracting parties while in article 66(2) it is the *lex fori*. If this was the intention, then both articles may remain unchanged; but if it is necessary to take the same position than some corrections are inevitable. Perhaps it would be better to link the determination of interest rates to some international stock or other known international money market which will be the one nearest to the one where the instrument is payable.

Article 69

Article 69(1) should be made more flexible and the drawee be entitled to make partial payment of the instrument, provided that the holder may always make a

subsidiary claim for any outstanding part. The drawee may find it convenient to make the payment of an instrument in instalments so that the categorical provisions in article 69 should be softened. If such modifications were introduced, the position of the drawee would be improved which would require changes in other provisions of article 69 as well as articles 66 and 67 which explicitly provide for the right of the holder to request the entire sum (together with the interest).

Article 80

The general period of prescription of four years is too long particularly in view of the fact that different calculations are made for different persons whereby the already long period can be prolonged which may cause uncertainty and does not correspond to the interests of international traffic.

A/CN.9/WG-IV/WP-32/Add.4

This addendum to document A/CN.9/WG-IV/WP-32 sets forth the comments of the United States of America, received on 31 December 1986.

UNITED STATES OF AMERICA

General comments

The United States still generally approves of the draft of the Convention on International Bills of Exchange and International Promissory Notes dated 10 July 1986 and set forth in document A/CN.9/XIX/CRP.16 and annex I to the UNCITRAL Report on the work of its nineteenth session.

The United States regarded the 1982 draft of the Convention, developed by the UNCITRAL Working Group under the chairmanship of a universally recognized French expert in this field, as a workable compromise having a conceptual balance between the fundamentally different approaches of several legal systems. Since 1982, two types of change have been made to that draft. One type of change has shifted the conceptual balance toward the Geneva system and away from the British Bills of Exchange Act and American Uniform Commercial Code. Although this may have created a conceptual imbalance, the present draft may still represent a workable compromise. However, in the interest of the acceptability of the convention as adopted to countries having many different types of legal systems it is hoped that there will be no further shift in the conceptual balance.

The second type of change is the refinement of analysis and drafting of many individual sections of the draft Convention. In this regard, the United States believes that UNCITRAL has greatly improved the 1982 draft. Our review of the 1986 draft indicates that, with minor exceptions, it is technically sound and in sufficiently good form for final action by UNCITRAL. Our suggestions for future drafting are therefore few and, although bothersome, are not crucial.

*Article-by-article comments**Article 4(7)*

The cross-reference to article 25 is still ambiguous. A definition not using such a cross-reference should be drafted, so that the Working Group can make a conscious comparison and choice.

Articles 23 and 23 bis

The use of the word "pays" in paragraphs (2)(a) of each these articles creates confusion because it does not refer to the payment of an instrument by the maker, acceptor or drawee. Instead, it refers to the remittance of funds for the instrument by an endorsee for collection. The United States would prefer to amend the language of both paragraphs (2)(a), and keep and clarify the present substantive concept.

Article 30

The use of the word "accepted" in "accepted to be bound" creates confusion because the word "accepted" also has a technical meaning in negotiable instruments law. The United States proposes substitution with the words "consented to be bound" to avoid confusion and retain the meaning of the concept.

Article 68

Article 68 discharges *parties* who pay an instrument, but this does not include the drawee. Of course, the drawee, as such, has no liability on the instrument, but the drawee does have two types of potential liability arising out of the payment of the instrument. First, there is the drawer-drawee relationship — has the drawee properly discharged its obligation to the drawer by payment? Second, there is the liability to third party claimants of the instrument. Such claimants may seek damages through conversion actions against the drawee who pays an instrument to someone other than those claimants.

Although drawee-drawer relations are generally outside the scope of the draft Convention, there is at least one instance in which this "gap" could prove troublesome if left entirely to local law. If the payee's necessary endorsement is "forged" (i.e., the payee's name is written on the back of the instrument by someone other than the payee), a subsequent person in possession can still be a holder. If such a subsequent holder presents the instrument, he is entitled to payment. However, if the drawee pays, nothing in the present draft of the Convention protects the drawee in its relation to the drawer. In legal systems in which such payment now would not be proper, the drawee could be exposed to loss either to the drawer or to the person who suffered loss, unless the concepts in article 68 are expanded to cover the drawee.

Article 79

Article 79(1) provides a payor of a lost instrument with the rights of a payor in possession of a paid

instrument, but paragraph (2) requires such a party to be in possession of the receipted writing referred to in article 78 in order to obtain those rights. There is no explanation as to why the Convention requires actual possession of a particular piece of paper, rather than mere proof by the payor of his payment of a lost instrument. The requirement of actual possession imposes too harsh a penalty on the payor who loses or misplaces the receipted writing. The United States therefore proposes that article 79(2) be amended to require only that the payor of a lost instrument prove his payment in order to have the rights of a payor, and that possession of the receipted writing be presumptive proof of such payment.

[A/CN.9/WG.IV/WP.32/Add.5]

This addendum to document A/CN.9/WG.IV/WP.32 sets forth, in somewhat modified and sometimes shortened form, the comments received between 22 December 1986 and 12 January 1987 from Brazil and Turkey as well as a brief note by the secretariat concerning a communication received from Uruguay.

BRAZIL*General observations*

1. The draft Convention is intended to be an acceptable compromise between the Common Law systems and the Civil Law systems on negotiable instruments, which would be made through mutual concessions. Of course, a complete unification of negotiable instruments law covering both international and domestic bills of exchange and promissory notes would no doubt be ideal. However, such a goal would be difficult to attain, as all representatives supporting further work on the draft Convention agree. Therefore, a simpler approach would be desirable, i.e., the preparation of a uniform law concerning the international bills of exchange and international promissory notes for optional use that might coexist side by side with the mandatory legislation.

2. As has been noted, the existence of divergent legal systems concerning international bills of exchange and international promissory notes had not given rise to serious problems in respect of international negotiable instruments used in international payment and financing transactions, as evidenced by the paucity of relevant case law. Consequently, it was feared that the creation of an additional system of international bills of exchange and international promissory notes would lead to serious complications in that different sets of rules would apply to similar types of instruments. Of course, it is a nonsense to assert that the present draft Convention is giving birth to new negotiable instruments which have nothing to do with the traditional bills of exchange and promissory notes.

3. For us the creation of a special legal régime for international instruments would not be the most appropriate way to unify the law. That unification would truly be served only if applicable to negotiable instruments in both their domestic and international settings. We agree that the Geneva Convention providing a Uniform Law for Bills of Exchange and Promissory Notes (1930) is outdated in some respects, and revision of this document (and of the Geneva Convention providing a Uniform Law for Cheques (1931)) would be desirable. It seems to us that the proper solution would be a revision of these Geneva Conventions and not the drafting of a new and competing Convention on the same subject.

4. Furthermore, we have doubts whether countries that had ratified the 1930 and 1931 Geneva Conventions would be able to ratify the proposed draft Convention without violating their obligations under the former Conventions. It is felt that the 20 countries that ratified the Geneva Conventions must denounce them before ratifying the new one.

5. Otherwise, it seems to us that the draft Convention, although presenting a compromise between competing universes, would not encourage circulation of the international instruments "created" by it since it does not favour sufficiently the position of the holder for the following reasons: (a) the proposed draft text is too complex and often difficult to understand because the provisions — which include 80 articles with 10 paragraphs each totalling thus more than 800 legal commands — frequently contain references to other provisions in the draft instead of dealing with an issue in a self-contained provision; (b) it is deemed unlikely that the Convention would command wide support.

6. Finally, we insist that the natural procedure for the adoption of the draft Convention as a convention is to recommend to the General Assembly of the United Nations to convene a diplomatic conference for the eventual adoption of the draft Convention.

Specific observations on individual articles

Article 1

The parts of the definition contained in paragraphs (2) and (3) are the formal requirements for the instrument. The list (excessive in our view) should reflect this, and not be formulated in the definition style used in the present draft, specifying the essential formal requirements. Furthermore, both paragraphs state that a qualifying bill or note must be a "written instrument", but the term "written" is not defined in the Convention.

According to subparagraphs (2)(a) and (3)(a) the words "international bill of exchange (Convention . . .)" or "international promissory note (Convention . . .)" must appear in the text of the instrument. In the practical handling of the instruments it is important that these words are easily recognized: when the drawer of a bill (or the maker of a note) uses the words "international bill of exchange (Convention . . .)" he

thereby indicates a choice of legal régime in compliance with the Convention. However, the required formalities may be buried in a mass of printed terms and may not be conspicuous.

Article 2

According to this article the Convention would be applicable without regard to whether the places indicated on an international bill of exchange or on an international promissory note were situated in Contracting States. Obviously, this would cause difficulties in cases where such instruments were brought before courts in a non-contracting State.

Article 3

This provision seems malapropos and concerns more the objective to guide interpretation than the criteria to govern it.

Article 4

This article gives a long list of definitions. The procedure is not usual in civil law statutes but may be accepted in the case of an international convention. However, some of the definitions appear obvious and unnecessary.

Article 5

According to this provision, "knowledge" is considered to be present not only in the case of positive knowledge but also in the case where a person could not have been unaware of the existence of a fact. According to the Commentary, this wording implies a presumed knowledge. This might lead to the objectionable conclusion that the person concerned has the burden to prove his ignorance.

Article 6

At some length, articles 6 and 7 establish the rule that instruments may be paid with interest. Such provision exists in the Geneva system, but in a more restricted form.

Article 8

Article 8 is generally acceptable. However, paragraph (2) is not sufficiently clear as regards the endorser. It is unclear whether or not this provision imposes a secondary liability on an endorser making an endorsement after maturity.

Article 11

An incomplete instrument is often used in international transactions and it is commendable that the provisions relating to such an instrument were included in the draft Convention. But the distinction between an incomplete instrument and an ineffective instrument is not clear. The Convention should stipulate that in the

case of an incomplete instrument one or more essential elements are deliberately omitted so that they may be completed later by an authorized person.

Article 16

The intent of article 16 is not clear. This article combines and confuses two situations: that in which the drawer or maker issues an instrument which does not have the normal transfer characteristics of negotiability, and that in which an endorser makes a restrictive endorsement.

Article 17

A condition attached to an endorsement is ineffective but it does not invalidate the endorsement. This provision would appear debatable in this article and in conflict with article 18.

Article 21

The draft Convention does not contain a general provision on cancelling endorsements and on the effects of such cancellation.

Article 22

This provision is vague on whether transfer after maturity is invalid.

Article 23

The formulation of article 23, which would certainly be one of the essential provisions of the Convention, is acceptable as a compromise between Civil Law and Common Law.

Articles 25 and 26

One of the main reasons for the lack of clarity and the complexity of the system is the differentiation between holder and protected holder, because this differentiation has the result that there are two different groups of defences. According to the rules suggested, in practice all imaginable defences may be invoked against the holder of a bill of exchange who is not a protected holder. However, a holder does not become a protected holder for the mere reason that due to gross negligence he lacked knowledge of a defence. That restriction of trade protection as opposed to the Geneva system will impair the negotiability of the international bill of exchange substantially.

Article 32

The draft Convention lacks a rule concerning signature by juridical persons, especially commercial corporations.

Article 39

This article introduces a concept which is both intricate and impractical. Partial acceptance must be regarded as non-acceptance.

Article 42

The objections raised against the possibility of partial liability for an instrument apply here also. In the case of partial performance, how are the parties to divide the instrument?

Article 46

The provision in article 46 that the drawer may "stipulate on the bill that it must not be presented for acceptance" seems badly worded.

Article 50

The range of cases classed as dishonour by non-acceptance seems too wide; this makes the position of prior parties insecure.

Article 54

As we are dealing with international rules it would seem appropriate to lay down rules specifying when non-payment has taken place.

Article 57

In order to determine clearly the time-limits for making protest it seems to be more appropriate to include a provision similar to Article 44 of the Geneva Convention.

Article 60

The suggested extension of the duties to give notice as compared to those under the Geneva system seems hardly to be practicable.

Article 70

The provisions of article 70 are too severe and should perhaps be qualified somewhat.

Article 74

With respect to the possibility that the obligation on an instrument is paid in instalments, it will be useful that duplicates and copies of an instrument may be drawn or made.

Article 80

It might be useful to add a provision to this article on possible interruption of the period of limitation.

TURKEY

The draft Convention on International Bills of Exchange and International Promissory Notes has been examined from the viewpoint of its conformity with the

Turkish legislation and the following conclusions were drawn:*

General observations

1. The draft Convention contains some unnecessary repetitions and details from a systematical viewpoint, resulting at places in the loss of coherence in the text. For example, "*force majeure*" has been treated separately in articles 48, 52, 63 and 75. Likewise, dispensation from protest and notice of dishonour are dealt with in articles 52(2), 58(2) and 63(2) respectively.

It is believed that a more appropriate approach would be, as adopted in the Turkish legal system and the subjacent Geneva Conventions, to handle all these matters in a single article, see Article 643 of the Turkish Code of Commerce (TCC).

2. Some definitions are missing from the text. For example, the "drawer", "maker", "endorser", "guarantor" and "acceptor" have not been defined.

3. There is no clarity as to which national law will be applied to situations for which there is no provision in the Convention.

Comments on individual articles

Article 2

Article 2 of the draft Convention does not confine the enforceability of the Convention to the Contracting States. This may create certain complications.

Article 4

The provision of article 4(7), which establishes a correlation between the protection of the protected holder and the time-limit for presentment, gives rise to certain hesitations.

Article 6

This article states that it is possible to insert an interest clause irrespective of the nature of the term of the promissory note or to make remittances thereunder in instalments. This is clearly in contradiction with Articles 587 and 615(ultimo) of the TCC, although efforts seem to have been made in article 64(4)(b) and (c) to alleviate the extent of the problems likely to arise from the remittance by instalments of the amount of the promissory note.

Article 8

The provision of article 8(2) that the acceptance or endorsement or giving of a guarantee after maturity

renders the instrument into one payable upon demand is somewhat alien and contradictory to our legal system, where an endorsement after maturity results in the assignment of the claim. This provision of the draft Convention is somewhat ambiguous.

Article 8(5) and (7) must be completed by including "acceptance" and "refusal of acceptance".

Article 13

Contrary to the provisions of Article 595(II) ultimo of TCC, the requirement of entering a blank endorsement on the back of the instrument is not contained in article 13(2) but introduced instead in article 42(4). It would be more appropriate to insert this requirement into article 13(2).

Article 14

The legal consequences that may accrue from the application of article 14(3) are not clear. It is believed that the requirement of good faith should be included here.

Article 16

Where the drawer forbids endorsement, such instruments become registered certificates according to our legal system. Yet, according to article 16 of the draft Convention instruments bearing this restriction may be endorsed solely for the purpose of collection. According to Article 593(II) of the TCC such instruments may be endorsed only via assignment of the claim. Likewise, the element of "assignment" should also be clearly introduced into article 16.

Article 22

This article, governing endorsement after maturity, has been viewed with some concern since it is felt that a time-limit should be specified for such endorsements. The clause "except by the drawee, the acceptor or the maker" does not figure in our law. Furthermore, the failure to establish a correlation with protests under this article and the absence of provisions covering endorsements after maturity are considered as a shortcoming.

Articles 23 and 23 bis

Article 23(1)(b) does not protect the person acquiring the instrument from a forger even if the former acts in good faith. The same is also true for persons acquiring instruments from unauthorised persons under article 23 bis (1)(b).

Article 25

The term "protected" as used here is somewhat new for the Continental European law systems and it is believed that it should be replaced by the concept of good faith. The provisions introduced by article 25(1)(d) seem to be capable of restricting the instrument's circulation and to be misused against its holder.

*Not reproduced here are those portions of the comments which state differences between the draft Convention and the Turkish legislation without indicating in some way any doubt or objection to the draft Convention.

Article 26

The provisions of article 26(1)(b) contradict the "protected holder" concept introduced in article 4(7). Likewise, the holder should no longer be considered "protected" where a defence exists arising from any fraudulent act on his part in obtaining the party's signature on the instrument. The use of the same defence in article 26(1) against both *bona* and *mala fide* holders has been found incoherent. Likewise, the person defined in article 26(2) should no longer be a protected holder.

Article 34

Under article 591 of the TCC, the drawer cannot relieve himself of the responsibility for non-payment while article 34(2) of the draft Convention grants the drawer the possibility, albeit limited, of sidestepping this responsibility. However, it may be contended that the rights of the holder are still upheld to some extent since this discharge is made contingent upon the establishment of someone else's liability.

Article 37

It would be appropriate to introduce a provision into article 37(b) to the effect that the signature of the drawee should be made on the front of the instrument. This article can also be combined with article 42(4)(b).

Article 38

We do not believe that a significant practical benefit may be derived from article 38(2), which provides for acceptance and thus for presentment for acceptance, subsequent to refusal of acceptance or payment. The holder does not have any interest in obtaining an acceptance after maturity. However, the consideration in the text of this possibility will not cause an undue problem.

Where a bill drawn payable at a fixed period after sight is accepted and the acceptor fails to indicate the date of acceptance, the drawer or the holder may insert the date. The precondition of protest, provided in our commercial law, for the commencement of the time-period may well better serve to preserve and protect the holder's rights.

Article 41

Article 41(1) envisages certain warranties toward the holder by an endorser who merely delivers the instrument. However, for those cases where the transferor may not be traced, it would be more to the point to introduce a practical approach to the questions of proof.

Article 50

Article 50(1)(b) appears superfluous in view of the existence of article 58(2)(d) providing for exemption from protest.

Article 51

The provision of article 51(e), which requires that an instrument which is not payable on demand be paid by the end of the working day following the date of maturity, restricts the possibilities of obtaining a remittance. The Turkish legislation allows two working days after maturity. A longer period may be envisaged in international payments.

Article 53

Article 53(3) states that the responsibility of the guarantor of the drawee will continue also in cases where the instrument is not presented for payment. This provision cannot be sustained under law. The same also applies for article 59(3).

Article 66

Article 66(1) fails to mention the 0.3 % commission referred to in Article 637(4) of the TCC. It may nevertheless be claimed that this point falls within the ambit of article 66(3). Similarly, there is no mention of a 0.2 % commission due to the drawee remitting payment under article 67 (cf.: Article 638(4) of TCC).

Article 69

Article 69(1) states that the holder is not obliged to take partial payment while Article 621(II) of TCC indicates that such holder is not entitled to reject it. The refusal of partial payment in the draft Convention which at the same time allows instalment remittances is deemed as a contradiction.

Article 74

Article 74 is totally different from the system introduced by the TCC since, according to this article, the holder is not required to obtain a court decision in case of loss or cancellation of the instrument. Although the system of the draft Convention apparently introduces some advantages, the establishment of a link between the cancellation mechanism and a court decision would offer greater security to the parties involved. Finally, it is felt that it would be appropriate to determine the duration of any security which the court may order under article 74(2)(c), as is done in article 74(2)(d) for the case of a deposit.

URUGUAY

Note by the secretariat: Uruguay transmitted to the secretariat a copy of a report prepared by Professor Dr. Delfino Cazet who had represented Uruguay at the nineteenth session of the Commission. It is suggested therein that Uruguay would not submit any comments on the draft Convention since the draft text is generally considered to be of high quality and to provide acceptable solutions. However, during future deliberations of the Working Group and the Commission, Uruguay may make suggestions for improving in certain respects the consistency, balance, completeness and style of the text.

[A/CN.9/WG.IV/WP.32/Add.6]

This addendum to document A/CN.9/WG.IV/WP.32 sets forth the comments of China, prepared by the Bank of China, received on 19 January 1987.

CHINA

[Original: Chinese/English]

Article 1

Paragraph (5) of article 1 states: "This Convention does not apply to cheques." But for "cheques" there is no clear definition. In the text of U.C.C. of the United States of America and the Bills of Exchange Act, 1882, of the United Kingdom, cheques are defined as a kind of bills of exchange. Therefore, in the absence of a definition of cheques in this Convention, it seems impossible to prevent such States as the United States and the United Kingdom from applying the Convention to cheques also.

In view of the differences in regard to cheques in the legislations of various countries, it is suggested that at the end of paragraph (5) the following phrase should be added: "in spite of the fact that cheques are considered as a kind of bill of exchange in some States."

Article 38

The words "incomplete instrument" as used in the first sentence of article 38 have a different meaning from the "incomplete instrument" mentioned in paragraph (1) of article 11. It is proposed that the term "incomplete instrument" in paragraph (1) of article 38 should be replaced by another term.

Article 47(e)

It seem unnecessary for a bill which is payable on demand to be presented for acceptance. Since it is already stipulated in article 51(f) that an instrument which is payable on demand must be presented for payment within one year of its date, it is suggested that the words "on demand or" should be deleted.

Article 49

The words "so presented" do not seem very clear. It is proposed that article 49 should be redrafted as follows:

"Except for the cases described in article 48, if a bill which must be presented for acceptance is not presented for acceptance in accordance with the provisions of articles 45 and 47, the drawer, the endorsers and their guarantors are not liable on the bill."

Article 46

The term "specified event" as used in paragraph (1) needs to be further clarified. A so-called "specified event" may or may not occur. The term "specified event" implies a kind of uncertainty, and if the drawer

should make the occurrence of such an event a prerequisite for the presentation of the bill for acceptance, the bill would be defective when it is drawn, and it is likely that it would be returned for dishonour by non-acceptance; this would be contrary to the objective of this Convention, which is to promote negotiable instruments.

Suggestion: after the words "specified event" add: "which is certain to happen."

Article 23(3) in relation to article 68(3)

The views expressed on this issue during discussions at the nineteenth session and the position taken by the Working Group are duly noted.

It is still considered that there is some inconsistency between article 23(3) and article 68(3), and that this inconsistency would affect the concrete application of this Convention. According to article 23(3), a party or the drawee who pays an instrument shall not be liable if, at the time he paid the instrument, he was without knowledge of the forgery, provided that such absence of knowledge was not due to his negligence. However, he is to be held liable if such absence of knowledge was due to his negligence. Paragraph (3) of article 68 states that a party is not discharged of liability if he pays a holder and knows at the time of payment that the holder acquired the instrument by theft or forged the signature of the payee or an endorsee, or participated in such theft or forgery. On the contrary, a party is discharged of liability if he was without knowledge of the theft or forgery, whether or not such absence of knowledge was due to his negligence.

The key issue is how the word "know" in article 68(3) is to be interpreted. According to the draft formulations of this Convention, the meaning of the word "know" in paragraph (3) of article 68 must be interpreted in accordance with article 5.

It is observed that the words "to have knowledge" can be interpreted as including two aspects of meaning:

(a) The party has actual knowledge of the fact in question;

(b) He could not have been unaware of it, but he deliberately feigns ignorance of it.

Thus the provisions of article 5 as mentioned above are found to be different from the concept of negligence as recognized under civil law in various countries. According to national legislation, the concept of negligence covers feigned ignorance as well as ignorance due to negligence by the party. The wording of article 5 fails to express clearly the concept of a party's not having knowledge due to negligence.

There are two options for eliminating this inconsistency:

(a) Article 68(3) should be redrafted so as to have the word "know" clearly defined, or a provision might be added to the effect that the party shall also not be discharged of liability if he was without knowledge due to his own negligence;

(b) There should be a revision or further explanation of the concept of knowledge in article 5 in order to express clearly the idea that ignorance by the party due

to negligence should be construed as having knowledge. We are inclined to favour the revision of this article. To make it more clear, it is proposed that there should be a clear provision, such as the following: the word "know" or "knowledge" mentioned anywhere in this Convention should be interpreted in accordance with the provisions of article 5.

[A/CN.9/WG.IV/WP.32/Add.7]

This addendum to document A/CN.9/WG.IV/WP.32 sets forth the comments of Iraq and Mali received on 10 March and 3 February 1987 respectively. It may be noted that the Working Group at its fifteenth session considered the comments submitted by Governments and international organizations in regard to articles 1 to 32 and expressed the view that the comments on the remaining articles could appropriately be discussed by the Commission in plenary session.¹

IRAQ

[Original: Arabic]

Article 1

This article determines the conditions which must be fulfilled for a bill of exchange to be considered international. The most important requisites are contained in paragraph (a)—an international bill of exchange must contain the words "international bill of exchange"—and in paragraph (e)—it must specify 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.

Paragraph (e) above makes an instrument international if at least two of the places indicated therein are situated in different States. That means that it would be quite easy for a payee to make an instrument international if he made it out in a country other than his own. For example, an Iraqi merchant can make an instrument in France, i.e. the place where the bill is drawn, and indicate next to his own name (the drawer) his address in Iraq. Accordingly, an instrument becomes international even if the place of payment is in Iraq and both the drawee and the payee are also in Iraq. Thus such an instrument is considered international because it indicates in the text thereof that it is an international bill of exchange and because the place where the bill is

drawn and the place indicated next to the name of the drawer are situated in different States.

The fact is that this criterion is not sufficient for a bill of exchange to be considered international, because, as in the example given above, a drawer can deliberately take the bill of exchange out of the scope of application of national law, by making it an international bill of exchange and hence avoid the requirement that the bill of exchange should be subject to the provisions of national law.

We therefore suggest that an additional requisite should be added to the effect that an international bill of exchange must be drawn in order to pay a debt arising from an international commercial transaction. In that manner we would have achieved the objective of making bills of exchange relating to international trade subject to the provisions of the Convention under consideration.

Article 6

This article introduces a new principle with regard to commercial instruments, namely payment of the amount of a bill of exchange by instalments (subparagraphs (b) and (c) of the said article).

We believe that the payment of the amount of a bill of exchange by successive instalments at successive dates is completely incompatible with the nature of a commercial instrument as well as with the text of the second paragraph of article 1 of the draft convention, which states that a bill of exchange "Is payable on demand or at a definite time".

To allow the amount of a bill of exchange to be paid by instalments at different dates would make the right to a bill of exchange uncertain and impede acceptance of such bill of exchange for circulation.

We therefore suggest that subparagraphs (b) and (c) of article 6 should be deleted.

Article 7

Paragraph 5 of this article provides for the possibility of making the rate of interest on the amount of the bill of exchange either a definite rate or variable. However, with regard to commercial instruments, the principle of accepting a variable rate of interest makes the debt indicated in the instrument unknown in advance, and therefore puts the debtor in a position where he does not exactly know the extent of his liability. This would, accordingly, affect the acceptance of such a commercial instrument for commercial transactions. In addition, the calculation of a variable rate of interest, provided for by the above-mentioned paragraph, cannot be easily applied in practice, or in the same manner in the various States. Furthermore, such a provision would place a heavy burden on some developing countries, particularly as the majority of these countries are at present faced by a major problem, namely the payment of their debts with high interest.

Article 13

Paragraph (2) of this article introduces two types of endorsement, namely special endorsement and endorsement in blank. However, what is described in

¹Report of the Working Group on International Negotiable Instruments on the work of its fifteenth session (New York, 17-27 February 1987), A/CN.9/288, paras. 6-7.

subparagraph (a) of this paragraph is, in fact, an endorsement to bearer rather than an endorsement in blank; the two have different forms.

The form referred to in the text as an endorsement 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 a person in possession thereof", is that of an endorsement to bearer, as contained in most legislations which derive the provisions on commercial instruments from the Geneva Uniform Law. These include the Iraqi Trade Law No. 149 of 1984 and the legislations of the Arab States.

We therefore suggest that there should be a statement that there are two types of endorsement—that is, a special endorsement and an endorsement to bearer.

Article 74

This article deals with the payment of an instrument when the instrument is lost. In subparagraphs 2(c) and 2(d), it refers to measures adopted by the competent court, but without identifying the competent court. In order to avoid problems of conflict of laws and conflict of jurisdiction, we therefore suggest that in such cases the competent court should be the court of the place of payment of the commercial instrument.

MALI

[Original: French]

The Malian Government supports the draft Convention on International Bills of Exchange and International Promissory Notes, whose purpose it is to promote commerce throughout the world.

Nevertheless, in view of the increasing concern of banking circles to reduce the risks confronting them, the competent Malian authorities would welcome, as accompanying measures, any provisions designed to prevent the uncontrollable circulation of signatures. The question is essentially one of limiting the zones within which negotiable instruments may be circulated in order to afford better protection to the signatories, who are no longer able to control the uses to which their signatures may be put.

[A/CN.9/WG.IV/WP.32/Add.8]

This addendum to document A/CN.9/WG.IV/WP.32 sets forth a letter of the Secretary-General of the International Chamber of Commerce received on 10 July 1987. It may be noted that the Working Group at its fifteenth session considered the comments submitted by Governments and international organizations in regard to articles 1 to 32 and expressed the view that the comments on the remaining articles could appropriately be discussed by the Commission in plenary session.¹

¹Report of the Working Group on International Negotiable Instruments on the work of its fifteenth session (New York, 17-27 February 1987), A/CN.9/288, paras. 6-7.

INTERNATIONAL CHAMBER OF COMMERCE

[Original: English/French]

The International Chamber of Commerce (ICC), through its Commission on Banking Technique and Practice, has followed UNCITRAL's work on a draft Convention on International Bills of Exchange and Promissory Notes for a number of years. We note that the draft Convention aims, *inter alia*, to establish a system of law for negotiable instruments which harmonizes both civil and common law and appreciate the efforts made over the years to accommodate different national viewpoints and systems of law.

The ICC attends UNCITRAL sessions in its capacity as an observer. Our representatives have regularly followed meetings of the Working Group on International Negotiable Instruments and have kept the Banking Commission informed of discussions and progress.

UNCITRAL Working Group members have expressed in private conversation with the ICC observers the hope that, in view of its integrity and wide representation, the Banking Commission could become instrumental in putting forward international banking community opinion on the draft Convention. Members of the Commission therefore requested me at their last meeting to make their views on the subject known to UNCITRAL in preparation for the next session in July 1987.

The draft Convention has been discussed for some time. The Banking Commission has been made aware of comments on its content, both in support and in disagreement. The representative of France, for example, has presented the ICC with both written and oral comments which were noted at a recent Banking Commission meeting.

It would seem there is a certain degree of probability that the Convention will be ratified as it is already supported by a certain number of countries. Banks will therefore ultimately be called to handle negotiable instruments under the terms of the Convention even if their own Governments have not ratified it. The ICC believes that banks should therefore be made aware of and take an interest in the contents of the draft.

Although such a Convention may not be required when instruments circulate within specific national or legal systems which function well internally, once there are cross-border contacts or circulation of such instruments between different legal systems then a new international convention could be appropriate to regulate their use. The value of the Convention would also depend greatly upon its wide adoption.

The different existing systems do not in all respects provide users with flexibility and options (such as currency and interest rate references for example) which can arise from new and continually changing transaction patterns. The UNCITRAL proposal will, therefore, assist those users who wish to do so, to incorporate obligations arising from instruments provided for in the draft Convention.

One potential problem which could hinder ratification of the UNCITRAL Convention is that many countries already adhere to the terms of the Geneva Convention. At the present time many countries feel they could not ratify the draft Convention without the modification or

adjustment of the Geneva Convention. The ICC would support an initiative by an appropriate existing international body to tackle such a complex problem which is inherent to the decision to ratify the UNCITRAL Convention or not.

There is more detail in the draft Convention than in the Geneva Convention, but less than in common law statutes such as, for example, the Uniform Commercial Code. Whilst wishing to preserve the present level of detail as a compromise in drafting style, we feel that the text could be improved if it were nevertheless possible to limit the number of cross-references. So many cross-referenced articles create the impression that the text is too complicated and difficult to understand. We would suggest that the text could become more readable if the articles were drafted in a self-contained style reducing the cross-references to a minimum.

With regard to forfeiting, we would appreciate clarification to ensure that an *aval* is subject only to the terms of the draft Convention and not subject to extraneous suretyship defences which could arise under local suretyship law.

Finally, with regard to article 68(3) (as per the draft of the nineteenth session in June-July 1986) the ICC would hope that the present provisions on discharge could be reconsidered and amended so as to allow a bank which pays a holder to be discharged of liability so long as there is no court order to the contrary.

The ICC urges UNCITRAL to bear the foregoing comments in mind when considering the draft Convention at its next meeting in Vienna in July. It is necessary to ensure that the draft Convention is as clear, balanced and precise as possible so that all interested parties can find it both acceptable and valuable.

[A/CN.9/WG.IV/WP.32/Add.9]

This addendum to document A/CN.9/WG.IV/WP.32 sets forth the comments of Egypt received on 20 July 1987. It may be noted that the Working Group at its fifteenth session considered the comments submitted by Governments and international organizations in regard to articles 1-32 and expressed the view that the comments on the remaining articles could appropriately be discussed by the Commission in plenary session.¹

EGYPT

[Original: French]

Article 33

The meaning of this article is unclear. As worded, it only excludes the possibility that the order to pay may "of itself" transfer ownership of funds made available for payment to the payee, but does not exclude the possibility that such transfer may be made by an "agreement" indicated on the instrument. If this is the meaning of the text, it would be advisable to say so more

clearly. If the text is intended to convey the opposite meaning, it would then be necessary to delete the words "of itself", so that the rule may apply to both situations.

Article 34(2)

It would be advisable to delete this paragraph, which gives the drawer the possibility of evading the obligation to pay the instrument. The drawer, as the creator of the instrument and the principal obligor thereof, should not be given any possibility of evading his responsibility, even if he provides a serious guarantee or if the instrument already bears the signature of another party liable on it. It should be noted that the Geneva Uniform Law affirms this principle, virtually a moral one, in article 9, which declares any clause whereby the drawer may evade the guarantee to pay to be inapplicable. In the present draft convention, article 35, paragraph 2, forbids the maker of a promissory note, who is—up to a point—in a similar situation to the drawer, from evading his obligation to pay and makes any stipulation along those lines inapplicable. Would it not be logical to apply the same rules to both situations?

Article 37

Amend subparagraph (b) of this article to specify that only a signature "on the front" of the bill of exchange may express the drawee's acceptance.

If this proposal is adopted, it will then be necessary to delete paragraph 4(b) of article 42.

Article 38(3)

The right granted by this text to the drawer and the holder, when the drawee refuses to insert the date of acceptance in the cases in question, is excessive and likely to create difficulties in practice. It would be more advisable to adopt a solution which deems such refusal to be a refusal to accept and give the holder the right to have the omission recorded by means of a protest in order to retain his rights of recourse.

Article 41(3)

This paragraph gives the transferee, where the responsibility of the transferor is involved, the right to "recover, even before maturity, the amount paid by him to the transferor". This is a form of recourse before maturity available to the transferee, but against whom? Only against the transferor? Or against him and all other parties liable, including prior endorsers? The text does not tell us, but it ought to make it clear.

Note: The same ambiguity exists in paragraph 1(c) of the same article.

Article 42

Paragraph 2

This text states that "a guarantee must be written on the instrument or on a slip affixed thereto (*'allonge'*)".

Banking practice in several countries, including Egypt, frequently means that the bank gives a guarantee on a

¹Report of the Working Group on International Negotiable Instruments on the work of its fifteenth session (New York, 17-27 February 1987), A/CN.9/288, paras. 6-7.

separate document covering several instruments which are clearly specified. It would be advisable to add this form of guarantee.

Paragraph 4(b) and (c)

These two provisions are not in the right place. They have been included in a section concerning guarantees, although one relates to acceptance and the other to endorsement. It would be preferable to put them where they belong. We have already suggested the deletion of subparagraph (b) as a result of our proposal concerning the amendment of article 37(b). As regards subparagraph (c), it should be moved to chapter III (Transfer). All that would then remain of paragraph 4 would be the introductory part and subparagraph (a), which should be combined in a single text as follows:

"A guarantee may be effected by a signature alone. Unless the content otherwise requires, a signature alone on the front of the instrument, other than that of the drawer or the drawee, is a guarantee."

Article 45

Delete paragraph 2(c).

Article 46(1)

The reference in the second sentence of this text to article 45, paragraph 2, should be restricted to subparagraphs (b) and (c)—if subparagraph (c) is retained. Subparagraph (a) should be excluded because it supposes that the bill bears a stipulation that it must be presented for acceptance. It would be strange if the bill were to bear two contradictory stipulations, one that it must be presented for acceptance and the other forbidding this.

Article 51

Subparagraph (c)

This text may cause difficulties in practice, particularly if death occurs only a few days before the date of maturity, when the heirs or the persons entitled to administer the estate are not yet known. A proposal to delete this subparagraph would dispose of the matter.

Subparagraph (e)

This text requires an instrument which is not payable on demand to be presented for payment on the date of maturity or on the business day which follows. That is too short a period, particularly for an international instrument. It would be desirable to extend it. Under the Geneva Uniform Law, the period is two days. In our opinion, it should be still longer—three or four days.

Article 54 bis

Proposal

Add an article 54 bis forbidding opposition to payment, except in exceptional cases, such as loss, theft, or the holder's bankruptcy or incapacity.

Article 55 bis

Recommendation

Add a new provision to the convention making the instrument itself an "executory instrument", while leaving it to the applicable law to regulate the consequences of its having that status. This would make recourse easier for the holder, since he would no longer be obliged to bring proceedings to obtain a judgement or order.

If this recommendation is accepted by the Commission, the new article could be included in chapter V, section 3, before or after article 55.

Article 57

The period allowed under this article for making a protest for dishonour by non-acceptance or non-payment (the day on which the bill or instrument is dishonoured or one of the two business days which follow) is too short. In view of the severity of the penalty incurred by failing to meet this deadline (loss of all recourse), it would be desirable to allow a longer period.

Article 60

The holder's obligation to give notice to all parties (drawer, endorsers and guarantors) is excessive. Often the holder only knows the party immediately preceding him, from whom he received the instrument; he does not know the other parties and may not even know their addresses. How, then, can he give them notice in good time, particularly if they are scattered over various countries?

It might be asked whether the holder will be able, if this difficulty arises, to invoke article 64, paragraph 1 (excusability of delay in giving notice), or paragraph 2 (notice of dishonour dispensed with).

Article 65

Proposal

Add a new paragraph 2 as follows:

"Recourse against one of the parties liable on the instrument does not prevent the holder from acting against the other parties liable even if they are subsequent to the party first proceeded against."

This provision, which is necessary in order to safeguard the rights of a holder who in his recourse does not follow the order in which the parties have become bound does not appear anywhere in the convention. It should. It is to be found in the Geneva Uniform Law (article 47). In the present draft convention, article 65 would be the best place for it.

Article 68(4)(e)

The meaning is clear, but the wording is ambiguous.

Article 69(1)

There are no good grounds for giving the holder the right to refuse partial payment. It is not in the interests

of the holder, who, logically, should accept the partial payment offered and then exercise his right of recourse for the rest. This right is above all detrimental to the other parties liable on the instrument, since it deprives them of partial discharge.

On this point it would be desirable to go back to the rule in article 39 of the Geneva Uniform Law, which does not allow the holder to refuse partial payment.

Article 73(2)

Delete the last phrase, beginning with the words "except where the drawee".

A drawee who does not pay properly should bear all the consequences himself, remaining liable *vis-à-vis* a third person who has asserted a valid claim to the instrument or to the legitimate holder of the instrument who is a victim of theft or forgery. The other parties may be presumed to be in good faith and should not have to pay for the drawee's dishonesty.

Articles 74-79

It may be asked whether these articles still serve any purpose, given that it is common practice all over the world to photocopy documents. Would it not be more to the point to rewrite these articles to take account of progress in electronics?

[A/CN.9/WG.IV/WP.32/Add.10]

This addendum to document A/CN.9/WG.IV/WP.32 sets forth the comments of Morocco received on 29 July 1987. The Working Group at its fifteenth session considered the comments submitted by Governments and international organizations in regard to articles 1-32

and expressed the view that the comments on the remaining articles could appropriately be discussed by the Commission in plenary session.¹

MOROCCO

[Original: French]

1. The question of the drawer or the party on whose behalf the bill of exchange is drawn having the funds available at maturity was not dealt with in the draft text, although UNCITRAL noted that this question was one of the most important problems not settled by the Geneva Conventions.

2. The draft Convention does not indicate whether a bill of exchange must be made in one original copy only or in several identical copies, nor does it provide for the making of duplicates.

Should it be necessary or possible to provide for more than one original or more than one duplicate, relevant rules should be laid down.

Should this not be the case, it would be more appropriate to include in the draft Convention a provision expressly stipulating that international bills of exchange and international promissory notes must be drawn up in a single original.

3. While the draft Convention deals with the problem of discrepancy between the amount expressed in words and the amount expressed in figures on the bill, it does not raise the question of a discrepancy in the expression of the amount of the bill when it is expressed several times, either in words or in figures.

¹Report of the Working Group on International Negotiable Instruments on the work of its fifteenth session (New York, 17-27 February 1987), A/CN.9/288, paras. 6-7.

3. Draft Convention on International Bills of Exchange and International Promissory Notes: draft final clauses: note by the secretariat: (A/CN.9/WG.IV/WP.33)

1. The Commission, at its nineteenth session,¹ requested the secretariat to submit to the Working Group draft final clauses to be included in the draft Convention. This note has been prepared pursuant to that request.

2. The draft final clauses set forth in this note are modelled on the final provisions of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980). Some draft provisions or parts thereof have been placed between square brackets so as to invite special attention and consideration by the Working Group.

Draft final clauses to be included in the draft Convention on International Bills of Exchange and International Promissory Notes

Chapter IX. Final provisions

Article 81

The Secretary-General of the United Nations is hereby designated as the depositary for this Convention.

[Article 82]

This Convention prevails over any international agreement which has already been or may be entered into and which contains provisions concerning the

¹Report of the United Nations Commission on International Trade Law on the work of its nineteenth session (1986), *Official Records of the General Assembly, Forty-first Session, Supplement No. 17* (A/41/17), para. 223.

matters governed by this Convention, including issues of conflict of laws.²

Article 83

(1) This Convention is open for signature at the signing ceremony of the United Nations General Assembly on . . . and will remain open for signature by all States at the Headquarters of the United Nations, New York until [31 December 1988].

(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 84

(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 declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

(3) 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 85]

No reservations are permitted to this Convention.]

Article 86

(1) This Convention enters into force on the first day of the month following the expiration of twelve months after the date of deposit of the [. . .] instrument of ratification, acceptance, approval or accession.

(2) When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the [. . .] instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State on the first day of the month following the expiration of twelve months after the date of deposit of its instrument of ratification, acceptance, approval or accession.

[Article 87]

This Convention does not apply to instruments drawn or made before the date at which the Convention enters into force.]

Article 88

(1) A Contracting State may denounce this 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 six 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.

[(3) A Contracting State may declare in the notification that the Convention remains applicable to instruments drawn or made before the date at which the denunciation takes effect. In such case, the Contracting State may specify the period of time during which, or indicate the extent to which, the Convention remains applicable.]

DONE at . . . , this . . . day of . . . , one thousand nine hundred and eighty-seven 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.

²This tentative draft article has been included as a reminder of the view expressed by the Commission that one of the draft final clauses might reflect the results of consultations between States that were parties to the 1930 Geneva Convention providing a Uniform Law for Bills of Exchange and Promissory Notes and the 1930 Geneva Convention for the Settlement of Certain Conflicts of Laws in connection with Bills of Exchange and Promissory Notes as to the procedures to be followed by those States in becoming parties to the draft Convention (*ibid.*, para. 223). Such consultations, which had been informally commenced on the occasion of the nineteenth session of the Commission, are expected to be held in a formal manner shortly before or after the fifteenth session of the Working Group.

II. NEW INTERNATIONAL ECONOMIC ORDER

A. UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works

1. Report of the Working Group on the New International Economic Order on the work of its ninth session (New York, 30 March-16 April 1987) (A/CN.9/289)^a

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INTRODUCTION

1. At its eleventh session (1978) the United Nations Commission on International Trade Law decided to include in its work programme a topic entitled "The legal implications of the new international economic order" and established a Working Group to deal with this subject.¹ The Working Group is composed of all States members of the Commission.² Its present composition is, therefore: Algeria, Argentina, Australia, Austria, Brazil, Central African Republic, Chile, China, Cuba, Cyprus, Czechoslovakia, Egypt, France, German

Democratic Republic, Hungary, India, Iran (Islamic Republic of), Iraq, Italy, Japan, Kenya, Lesotho, Libyan Arab Jamahiriya, Mexico, Netherlands, Nigeria, Sierra Leone, Singapore, Spain, Sweden, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay and Yugoslavia.

2. At its first session, in 1980, the Working Group recommended to the Commission for possible inclusion in its programme of work the harmonization, unification and review of contractual provisions commonly occurring in international contracts in the field of industrial development.³ The Commission, at its thirteenth session agreed to accord priority to work related to those contracts and requested the Secretary-General to undertake a study concerning contracts for the supply and construction of large industrial works.⁴

3. The study prepared by the secretariat⁵ was examined by the Working Group at its second and third sessions, in 1981 and 1982 respectively.⁶ At its third

^aThe Report of the Working Group contains the changes, additions to and deletions from the draft chapters of the *UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works* (A/CN.9/WG.V/WP.20 and Add. 1-29) agreed to by the Working Group at its ninth session. Due to the length of these draft chapters, neither they nor the changes, additions or deletions agreed to by the Working Group are reproduced in this *Yearbook*. The *UNCITRAL Legal Guide* has been published by the United Nations under sales number E.87.V.10, document A/CN.9/SER.B/2.

¹Report 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.

²See Report of the United Nations Commission on International Trade Law on the work of its thirteenth session, *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17* (A/35/17), para. 143.

³A/CN.9/176, para. 31.

⁴See footnote 2, above.

⁵A/CN.9/WG.V/WP.4 and Add.1-8, and A/CN.9/WG.V/WP.7 and Add.1-6.

⁶A/CN.9/198 and A/CN.9/217.

session, the Working Group requested the secretariat, pursuant to a decision of the Commission at its fourteenth session,⁷ to commence the drafting of a legal guide on contractual provisions relating to contracts for the supply and construction of large industrial works.⁸ The Legal Guide was to identify the legal issues involved in such contracts and to suggest possible solutions to assist parties, in particular from developing countries, in their negotiations.⁹

4. The secretariat prepared draft chapters of the Legal Guide and submitted them for the consideration of the Working Group.¹⁰ The Working Group considered the draft chapters at its fourth¹¹, fifth¹², sixth¹³, seventh¹⁴, and eighth¹⁵ sessions.

5. The Working Group held its ninth session in New York from 30 March to 16 April 1987. All members of the Working Group were represented with the exception of Iraq, Kenya, Libyan Arab Jamahiriya, Sierra Leone, Singapore and United Republic of Tanzania.

6. The session was attended by observers from the following States: Barbados, Bulgaria, Burma, Cameroon, Canada, Democratic People's Republic of Korea, Ecuador, Finland, Germany, Federal Republic of, Guatemala, Holy See, Honduras, Jordan, Mozambique, Oman, Panama, Philippines, Poland, Republic of Korea, Saudi Arabia, Switzerland, Syrian Arab Republic, Trinidad and Tobago, Turkey, Venezuela and Yemen.

7. The session was also attended by observers from the following international organizations:

(a) *Specialized agency*

United Nations Industrial Development Organization

(b) *International non-governmental organizations*

International Bar Association
International Chamber of Commerce
International Federation of Consulting Engineers

8. The Working Group elected the following officers:

Chairman: Mr. Leif Sevón (Finland)*

Rapporteur: Mr. Fabio Konder Comparato (Brazil)

*The Chairman was elected in his personal capacity.

⁷Report of the United Nations Commission on International Trade Law on the work of its fourteenth session *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 17 (A/36/17)*, para. 84.

⁸A/CN.9/217, para. 130.

⁹See footnote 7, above.

¹⁰A/CN.9/WG.V/WP.9 and Add.1-8; A/CN.9/WG.V/WP.11 and Add.1-9; A/CN.9/WG.V/WP.13 and Add.1-6; A/CN.9/WG.V/WP.15 and Add.1-10; A/CN.9/WG.V/WP.17 and Add.1-9.

¹¹A/CN.9/234.

¹²A/CN.9/247.

¹³A/CN.9/259.

¹⁴A/CN.9/262.

¹⁵A/CN.9/276.

9. The Working Group had before it the following documents:

(a) Provisional agenda (A/CN.9/WG.V/WP.18);

(b) Draft chapters of the Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works, as revised by the secretariat in the light of the discussions and decisions of the Working Group at its previous sessions (A/CN.9/WG.V/WP.19; A/CN.9/WG.V/WP.20 and Add.1-29);

(c) Proposals of the secretariat concerning changes and additions to the draft Legal Guide (A/CN.9/WG.V/IX/CRP.1);

(d) Index to the draft Legal Guide (A/CN.9/WG.V/IX/CRP.2).¹⁶

10. The Working Group decided to proceed in accordance with the policy established at its eighth session that, in examining the draft chapters at its present session, it would restrict itself to determining whether decisions taken by it during its previous sessions had been reflected in the draft chapters.¹⁷

11. After considering document A/CN.9/WG.V/IX/CRP.1, the Working Group agreed that, in preparing the final text of the Legal Guide for publication, the secretariat should be authorized to correct typographical errors, to make any corrections in terminology needed to ensure consistency of usage throughout the Guide (e.g. "installation of equipment" instead of "erection of equipment") and to make minor changes and additions to the text to improve the clarity of the presentation without changing its substance. The Working Group also requested the secretariat to make any changes to the summaries of the draft chapters necessitated by changes and additions to and deletions from the text of the draft chapters agreed to at the present session.

I. AGREED CHANGES, ADDITIONS TO AND DELETIONS FROM THE DRAFT GUIDE

12. The Working Group agreed to the changes, additions to and deletions from the draft Legal Guide set forth below.^b

* * *

Index to the Guide

13. The index was found to be generally satisfactory. The Working Group agreed that a statement should be inserted at the beginning of the index that the references given therein were to chapters and paragraphs of the Guide. It also agreed that references to paragraphs containing definitions of terms should be included not only under the entry "Meaning of terms" but also under the individual entry for each term.

^bSee footnote a/ above.

¹⁶For technical reasons, only excerpts of this document could be presented to the Working Group in Arabic, Chinese, French, Russian and Spanish.

¹⁷A/CN.9/276, para. 210.

14. The Working Group requested the secretariat to reconsider the present use of hyphens in the index. In addition, it was noted that the distinction between certain entries in the index was unclear (e.g. "arbitration" and "arbitral proceedings"), and the secretariat was requested to reconsider such entries.

15. It was observed that, for technical reasons, it had not been possible to issue the index for the current session in all six working languages of the Working Group; accordingly, the Working Group had before it the entire index only in English, although excerpts of the index had been made available in the other five working languages. In view of those circumstances, the Working Group requested the secretariat to arrange for the entire index, in its current form, to be issued and distributed in the other five working languages as soon as possible. Member States and observers were requested to submit to the secretariat any comments they might have on the index in sufficient time to enable the secretariat to inform the Commission what changes, if any, it recommended be made to the index in the light of the comments. In addition, the Working Group requested the secretariat to consider, after receiving those comments, whether it was desirable or feasible to prepare for the Commission a document setting forth the comments received.

II. PRINTING, DISTRIBUTION, PROMOTION AND POSSIBLE REVISION OF THE LEGAL GUIDE

16. The Working Group requested delegates and observers to communicate to the secretariat any errors in the translation of the draft chapters of the Guide in the various language versions.

17. The Working Group stressed that, given the nature of the footnotes in the Guide, nearly all of which

contained illustrative provisions, it was important for the understanding and use of the Guide that, in the final printed text, the footnotes appear at the bottom of the relevant pages, rather than at the end of each chapter.

18. The secretariat was urged to take whatever actions were possible to assure that the Legal Guide would be published in all languages as soon as possible after its adoption by the Commission. The Working Group noted that timely publication would be an important factor in the eventual impact the Legal Guide would have. The Working Group also urged its publication in sufficient quantities to ensure its availability to all interested readers.

19. The Working Group stressed the importance of achieving a widespread distribution of the Guide, and recommended that the Commission seek the co-operation of all States in that regard. In particular, it was desirable for the Guide to be distributed to relevant government officials, libraries and trade associations. The support of interested organizations might also be enlisted to promote distribution. It was further noted that the potential readership of the Guide included not only lawyers, but also persons interested in the construction of industrial works and in industrial development, and it was suggested that activities promoting the Guide should be directed to those categories of readers. The secretariat was requested to consider whether it would be useful to submit to the Commission a document setting forth proposals for the distribution and promotion of the Legal Guide.

20. The Working Group recommended to the Commission that it consider the desirability of revising the Legal Guide at an appropriate time in the future, and possible procedures in that regard. A suggestion was made to include in the Guide an invitation to readers to communicate to the secretariat suggestions for revising the Guide.

2. Revised draft Legal Guide on Drawing Up International Contracts for Construction of Industrial Works: report of the Secretary-General (A/CN.9/WG.V/WP.19)

1. At its second session the Working Group on the New International Economic Order decided to request the secretariat to commence the preparation of a legal guide on contracts for the supply and construction of large industrial works.¹ The Commission at its fourteenth session approved this decision by the Working Group and decided that the guide should identify the legal issues involved in such contracts and suggest possible solutions to assist parties, in particular from developing countries, in their negotiations.²

¹A/CN.9/198, para. 92.

² Report of the United Nations Commission on International Trade Law on the work of its fourteenth session, *Official Records of the General Assembly Thirty-sixth session, Supplement No. 17* (A/36/17), para. 84.

2. The secretariat prepared two studies on clauses related to contracts for the supply and construction of large industrial works³ and the Working Group considered these studies at its second and third sessions.⁴ In its second session the Working Group agreed to request the secretariat to commence drafting the legal guide.

3. In the light of the discussion on the studies the secretariat prepared draft chapters of the guide and submitted them for the consideration of the Working

³A/CN.9/WG.V/WP.4 and Add. 1-8 and A/CN.9/WG.V/WP.7 and Add. 1-6.

⁴A/CN.9/198 and A/CN.9/217.

Group.⁵ The Working Group considered the draft chapters submitted by the secretariat at its fourth⁶, fifth⁷, sixth⁸, seventh⁹ and eighth¹⁰ sessions.

4. At its eighth session the Working Group asked the secretariat to revise the Introduction and all draft chapters of the Guide and submit them to a further session of the Working Group.¹¹ In accordance with this mandate the secretariat has revised the Introduction and draft chapters of the Guide in the light of the discussion of the Working Group during previous sessions. The Foreword and Introduction as revised are found in document A/CN.9/WG.V/WP.20 and draft chapters I to XXIX are found in Add. 1 to 29 of that document.

5. The contents of the revised draft Guide are as follows:

Foreword and Introduction

Chapter I:	Pre-contract studies
Chapter II:	Choice of contracting approach
Chapter III:	Procedure for concluding contract

⁵A/CN.9/WG.V/WP.9 and Add. 1-8; A/CN.9/WG.V/WP.11 and Add. 1-9; A/CN.9/WG.V/WP.13 and Add. 1-6; A/CN.9/WG.V/WP.15 and Add. 1-10; A/CN.9/WG.V/WP.17 and Add. 1-9.

⁶A/CN.9/234.

⁷A/CN.9/247.

⁸A/CN.9/259.

⁹A/CN.9/262.

¹⁰A/CN.9/276.

¹¹A/CN.9/276, para. 209.

Chapter IV:	General remarks on drafting
Chapter V:	Description of works
Chapter VI:	Transfer of technology
Chapter VII:	Price and payment conditions
Chapter VIII:	Supply of equipment and materials
Chapter IX:	Construction on site
Chapter X:	Consulting engineer
Chapter XI:	Subcontracting
Chapter XII:	Inspections and tests during manufacture and construction
Chapter XIII:	Completion, take over and acceptance
Chapter XIV:	Passing of risk
Chapter XV:	Transfer of ownership of property
Chapter XVI:	Insurance
Chapter XVII:	Security for performance
Chapter XVIII:	Delay, defects and other failures to perform
Chapter XIX:	Liquidated damages and penalty clauses
Chapter XX:	Damages
Chapter XXI:	Exemption clauses
Chapter XXII:	Hardship clauses
Chapter XXIII:	Variation clauses
Chapter XXIV:	Suspension clauses
Chapter XXV:	Termination of contract
Chapter XXVI:	Supply of spare parts and services after construction
Chapter XXVII:	Transfer of contractual rights and obligations
Chapter XXVIII:	Choice of law
Chapter XXIX:	Settlement of disputes

3. Draft Legal Guide on Drawing Up International Contracts for Construction of Industrial Works: report of the Secretary-General (A/CN.9/WG.V/WP.20)^a

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FOREWORD*

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Foreword

^aThis document contains the draft Foreword and Introduction to the *UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works* considered by the Working Group on the New International Economic Order at its ninth session (see this *Yearbook*, part two, II, A, 1). Due to their length, the remaining draft chapters of the *UNCITRAL Legal Guide* considered by the Working Group (A/CN.9/WG.V/WP.20/Add. 1-29) are not reproduced in this *Yearbook*. The *UNCITRAL Legal Guide* has been published by the United Nations under Sales No. E.87.V.10, document A/CN.9/SER.B/2.

*The issues dealt with in the Foreword and Introduction were previously dealt with in the Introduction (A/CN.9/WG.V/WP.17/Add.1). They were considered by the Working Group at its eighth session (A/CN.9/276, paras. 12-21).

The preparation of this Guide was carried out within the Working Group on the New International Economic Order of the United Nations Commission on International Trade Law (UNCITRAL), which is composed of all 36 member States of UNCITRAL. In drafting chapters of the Guide for consideration by the Working Group, the secretariat consulted with practitioners and other experts in the field of international works contracts. In addition, the secretariat consulted numerous materials, including books, articles and other

textual materials, as well as model forms of contract, general conditions of contract and actual contracts between parties. Such materials are too numerous to be able to acknowledge them individually; however, recognition is hereby given to the contributions made by these resources in the preparation of the Guide.

After being approved by the Working Group, the Guide was adopted by UNCITRAL at its twentieth session in August 1987.¹

INTRODUCTION

A. Origin, purpose and approach of the Guide

1. In 1974 and 1975, the United Nations General Assembly adopted a number of resolutions dealing with economic development and the establishment of a new international economic order.² As one of the organs of the United Nations, UNCITRAL was called upon by the General Assembly to take account of the relevant provisions of those resolutions. It responded by including in its programme of work the topic of the legal implications of the new international economic order,³ and considered how, having regard to its special expertise, and within the context of its mandate, it could most effectively advance the objectives set forth in the General Assembly resolutions. In doing so, it also took into account a recommendation of the Asian-African Legal Consultative Committee (AALCC) that the Commission should deal with the topic.⁴

2. To assist it in defining the nature and scope of possible work in this area, in 1978 the Commission established a Working Group on the New International Economic Order and charged it with the task of making recommendations as to specific topics which could appropriately form part of the programme of work of

the Commission.⁵ The Working Group reported to the Commission its conclusion that a study of contractual provisions commonly occurring in international industrial development contracts would be of special importance to developing countries, in view of the role of industrialization in the process of economic development.⁶ Based upon the discussions and conclusion of the Working Group, the Commission decided in 1980 to accord priority to work related to contracts in the field of industrial development. In 1981 it instructed the Working Group to prepare a Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works.⁷

3. Contracts for the construction of industrial works are typically of great complexity, with respect both to the technical aspects of the construction and to the legal relationships between the parties. The obligations to be performed by contractors under these contracts normally extend over a relatively long period of time, often several years. In these and other ways, contracts for the construction of industrial works differ in important respects from traditional contracts for the sale of goods or the supply of services. Consequently, rules of law drafted to govern sales or services contracts may not settle in an appropriate manner many issues arising in contracts for the construction of industrial works. It may be desirable or advisable for the parties to settle these issues through contract provisions.

4. The preparation of this Guide was largely motivated by an awareness that the complexities and technical nature of this field often make it difficult for purchasers of industrial works, particularly those from developing countries, to acquire the necessary information and expertise required to draw up appropriate contracts. The Guide has therefore been designed to be of particular benefit to those purchasers, while seeking at the same time to take account of the legitimate interests of contractors.

5. The Guide seeks to assist parties in negotiating and drawing up international contracts for the construction of industrial works by identifying the legal issues involved in those contracts, discussing possible approaches to the solution of the issues, and, where appropriate, suggesting solutions which the parties may wish to incorporate in their contract. The discussion in the Guide and the suggested solutions are written in the light of the differences between the various legal systems

¹Report of the United Nations Commission on International Trade Law on the work of its twentieth session, *Official Records of the General Assembly, Forty-second Session, Supplement No. 17 (A/42/17)*, para. 315.

²See Charter of Economic Rights and Duties of States, General Assembly resolution 3281 (XXIX), *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 31 (A/9631)*; also, Resolutions adopted by the General Assembly during its Sixth Special Session, *Official Records of the General Assembly, Sixth Special Session, Supplement No. 1 (A/9559)*; Resolutions adopted by the General Assembly during its Seventh Special Session, *Official Records of the General Assembly, Seventh Special Session, Supplement No. 1 (A/10301)*.

³Report 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)*, paras. 67(c)(vi), 68, 69 (*Yearbook of the United Nations Commission on International Trade Law* (hereinafter referred to as "*UNCITRAL Yearbook*"), Volume IX: 1978, Part One, II, A, paras. 67(c)(vi), 68, 69 (United Nations publication, Sales No. E.80.V.8)).

⁴This recommendation is set forth in Recommendations of the Asian-African Legal Consultative Committee: note by the Secretary-General, A/CN.9/155, Annex (*UNCITRAL Yearbook*, Volume IX: 1978, Part Two, IV, B); see, also, Legal implications of the new international economic order: note by the secretariat, A/CN.9/194 (*UNCITRAL Yearbook*, Volume XI: 1980, Part Two, V, D (United Nations publication, Sales No. E.81.V.8)).

⁵Report of the United Nations Commission on International Trade Law on the work of its eleventh session, fn. 3, above, para. 71; 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 (*UNCITRAL Yearbook*, Volume X: 1979, Part One, II, A, para. 100 (United Nations publication, Sales No. E.81.V.2)).

⁶Report of the Working Group on the New International Economic Order on the work of its session, A/CN.9/176, paras. 31 and 32 (*UNCITRAL Yearbook*, Volume XI: 1980, Part Two, V, A, paras. 31 and 32).

⁷Report of the United Nations Commission on International Trade Law on the work of its fourteenth session *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 17 (A/36/17)*, para. 84 (*UNCITRAL Yearbook*, Volume XII: 1981, Part One, A, para. 84 (United Nations publication, Sales No. E.82.V.6)).

in the world. It is hoped that one result of the Guide will be to promote the development of an international common understanding as to the identification and resolution of issues arising in connection with those contracts.

6. As conceived in this Guide, an industrial works is an installation which incorporates one or more major pieces of equipment and a technological process to produce an output. Examples of industrial works include petrochemical plants, fertilizer plants and hydroelectric plants. The Guide deals with contracts in which the contractor assumes the obligation to supply equipment and materials to be incorporated in the works, and either to erect the works or to supervise such erection by others. For brevity, these contracts are referred to in the Guide as "works contracts". In addition to the obligations just mentioned, which are the essence of a works contract, a contractor often assumes other important obligations, such as the design of the works, the transfer of technology, and the training of the purchaser's personnel. Works contracts may therefore be distinguished from other types of contracts from which one or more of the elements mentioned above are absent, for example, contracts exclusively for building or for civil engineering.

7. The term "works contract" is used in this Guide merely to indicate the type of contract to which the discussion in the Guide is directed, rather than to delimit precisely the scope of application of the Guide. Although certain parts of the discussion in the Guide may be irrelevant to or inappropriate for contracts other than works contracts (for example, the discussion of performance tests in chapter XII, "Inspection and tests during manufacture and construction", may be irrelevant for contracts exclusively for building), persons involved in the negotiation and drafting of contracts other than works contracts may also derive some assistance from the Guide.

8. The Guide has been designed to be of use to persons involved at various levels in negotiating and drawing up works contracts. It is intended for use by lawyers representing the parties, as well as non-legal staff of and advisers to the parties (e.g., engineers) who participate in the negotiation and drawing up of the contracts. The Guide is also intended to be of assistance to persons who have overall managerial responsibility for the conclusion of works contracts, and who require a broad awareness of the structure of those contracts and the principal legal issues to be covered by them. Such persons may include, for example, high-level officials of a Government ministry under the auspices of which the works is being constructed. It is emphasized, however, that the Guide should not be regarded by the parties as a substitute for obtaining legal and technical advice and services from competent professional advisers.

9. The Guide does not have an independent juridical status; it is intended merely to assist parties in negotiating and drafting their contract. The various solutions to issues discussed in the Guide will not govern the relationship between the parties unless they expressly

agree upon such solutions and provide for them in the contract, or unless the solutions result from legal rules under the applicable system of law. In addition, the Guide is intended only to assist the parties in negotiating and drafting their contract; it is not intended to be used for interpreting contracts entered into before or after its publication.

B. *Arrangement of the Guide*

10. The Guide is arranged in two parts. Part One deals with certain matters arising prior to the time when the contract is drawn up. These include the identification of the project and its parameters through feasibility studies (chapter I); the various contracting approaches which the parties may adopt (chapter II); the possible procedures for concluding the contract (i.e., tendering, or negotiation without prior tendering), and the form and validity of the contract (chapter III). The discussion of these subjects has two aims: to direct the attention of the parties to important matters which they should consider prior to commencing to negotiate and draw up a works contract, and to provide a setting for the discussion of the legal issues involved in the contract.

11. Particular notice may be taken of the discussion in chapter II, "Choice of contracting approach". The settlement of certain issues in the contract may depend upon the contracting approach which is adopted by the parties. Throughout the Guide, whenever appropriate, the discussion points out that different situations or solutions may apply under different contracting approaches.

12. Part Two of the Guide deals with the drawing up of specific provisions of a works contract. It discusses the issues to be addressed in those provisions and in many cases suggests approaches to the treatment of those issues (see paragraph 16, below). Part Two is thus the core of the Guide. Each chapter in Part Two deals with a particular issue which may be addressed in a works contract. To the extent possible, the chapters have been arranged in the order in which the issues dealt with in those chapters are frequently addressed in works contracts.

13. An analytical index is included at the end of the Guide. In addition to serving the usual functions of an index, this index has been designed in particular to enable the reader to locate the meanings of terminology used in the Guide. Where terms are expressly defined in chapters of the Guide, the index refers the reader to those definitions. In some cases, however, terms do not lend themselves to concise definitions; rather, the significance and scope of the terms must be gained from the entire chapters in which they are discussed. In those cases, the reader will be assisted by the index in locating the various aspects of the discussions relating to the terms.

C. *Chapter summaries*

14. Each chapter of the Guide is preceded by a summary. The summaries are designed to serve the needs

of non-legal management or other personnel who need to be aware of the principal issues covered by a particular type of contract clause, but who do not require a discussion of the issues in the depth or detail contained in the main text of a chapter. Those readers might obtain information which they require about the settlement of issues arising in the contract as a whole or in particular types of clauses by reading the summaries alone. To assist such readers who find that they would like further information on particular points, cross-references are provided to paragraphs in the main text of the chapter where points referred to in the summary are discussed. Persons directly involved in drawing up works contracts, for whom the main text of each chapter is principally designed, might find that reading the summaries provides a useful overview of the subject-matter and issues covered by each chapter. They might also use the summaries as a check-list of issues to be addressed in negotiating and drawing up contractual provisions.

D. "General remarks"

15. The main text of each chapter begins with a section entitled "General remarks". This is intended to serve as an introduction to the subject-matter of the chapter, and to cover certain matters which are applicable to the chapter as a whole so as to avoid repeating them in each section of the chapter where they are relevant. In some cases, the section also deals with points which do not easily fit elsewhere within the structure of the chapter. The section often refers readers to the other chapters where related issues are discussed.

E. Recommendations made in the Guide

16. Where appropriate, the Guide contains suggestions as to ways in which certain issues in a works contract might be settled. Three levels of suggestion are used. The highest level is indicated by a statement to the effect that the parties "should" take a particular course

of action. It is used only when that course of action is a logical necessity or is legally mandated. This level is used sparingly in the Guide. An intermediate level is used when it is "advisable" or "desirable", but not logically or legally required, that the parties adopt a particular course of action. A formulation such as "the parties may wish to provide", "the parties may wish to consider", or the contract "might" contain a particular provision, is used for the lowest level of suggestion. Occasionally, the wording used to denote a particular level of suggestion is, for editorial reasons, varied somewhat from that just indicated; however, it should be clear from that wording which level is intended.

F. Illustrative provisions

17. Some chapters contain one or more "illustrative provisions" set forth in footnotes. They are included in order to make issues discussed in the text of a chapter easier to understand. They also serve to illustrate how certain solutions discussed in the text might be structured, particularly those that are complex or may otherwise present difficulties in drafting. *It is emphasized, however, that illustrative provisions should not necessarily be regarded as models of provisions which should be included in particular contracts.* The precise content of a clause and language to be used in it may vary with each contract. In addition, there is usually more than one possible solution to an issue, even though only one of those possible solutions is presented in an illustrative provision. The illustrative provisions have been designed to fit within the overall scheme followed and approaches taken in the Guide. It is therefore important that parties who draft a provision for their contract based upon an illustrative provision carefully consider whether the provision fits harmoniously within their own contract. In general, illustrative provisions have not been included where an understanding of an issue and guidance to drafting is clearly obtainable from the text of the chapter, or where a provision dealing with an issue cannot be drafted in isolation from the particular contract in which it is to appear.

4. Draft Legal Guide on Drawing Up International Contracts for Construction of Industrial Works: report of the Secretary-General (A/CN.9/290)^a

1. For the ninth session of the Working Group on the New International Economic Order,¹ the secretariat was requested to prepare an analytical index for the draft Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works. The secretariat prepared the index for that session; however, for technical reasons, it was not possible to issue the index in all six languages of the Working Group. Accordingly, the Working Group had before it the entire index only in

English, although excerpts of the index were made available in the other five languages.

2. In view of those circumstances, the Working Group requested the secretariat to arrange for the entire index, in its then present form, to be issued and distributed in the other five languages as soon as possible.²

3. The Working Group agreed that certain changes to the index should be made, namely that a statement should be inserted at the beginning of the index that the references given therein were to chapters and paragraphs of the Guide, and that references to paragraphs in the

^aThe annex to this document contains the draft index to the UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works. It is not reproduced in this Yearbook. The UNCITRAL Legal Guide has been published by the United Nations under Sales No. E.87.V.10, document A/CN.9/SER.B/2.

¹The report of the Working Group on its ninth session is contained in A/CN.9/289.

²A/CN.9/289, para. 15.

Guide containing definitions of terms should be included not only under the entry "Meanings of terms" but also under the individual entry for each term. In addition, the Working Group requested the secretariat to reconsider the use of hyphens in the index, and to reconsider certain entries in the index which were unclear.³

³A/CN.9/289, paras. 13 and 14.

4. In accordance with the request of the Working Group the index to the Guide is reproduced as an annex to the present document in the form in which its English version was presented to the Working Group. The decisions of the Working Group with respect to the Guide and any decisions of the Commission will be implemented when the Guide is submitted for publication.

B. International procurement

International procurement: note by the secretariat (A/CN.9/291)

1. At its nineteenth session (1986) the Commission had before it a note by the secretariat (A/CN.9/277) setting forth possible topics that the Commission might undertake in anticipation of the completion of the UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works. After considering that note, the Commission decided to give priority to work in the area of international procurement.¹ It was implicit in the decision of the Commission that the preparatory work on this topic would be carried out by the Working Group on the New International Economic Order.

2. In order to engage in the necessary research and study the secretariat has been collecting materials on international procurement from a wide variety of sources. These include national procurement laws and regulations, legal texts emanating from international organizations, and guidelines issued by national and international financing institutions. Gratitude is expressed to those sources that have already made materials available to the secretariat. In order to ensure that its collection is as complete and balanced as possible, the secretariat would be grateful to receive any additional materials that Governments or institutions may wish to provide.

3. The secretariat is in the process of analyzing the materials with a view towards preparing for the tenth session of the Working Group a study of the major issues arising in international procurement along the lines set forth in document A/CN.9/277, paragraph 56. The issues to be considered will include the scope of application of national regulations governing international procurement (e.g., with respect to the types of entities and the objects of procurement covered by the regulations), the choice of procurement methods (e.g., tendering, negotiation) and the procedural and other matters involved in implementing a particular method (e.g., solicitation of tenders or offers, prequalification, documentation, specifications and standards, tender guarantees, period of validity of tenders or offers,

opening of tenders, evaluation of tenders or offers, obligations of parties during negotiations, postqualification, entering into contract). The study will include a comparison of how those issues are dealt with in the law and practice of various countries, and will consider the approaches taken by financing institutions. The study will also discuss various possible objectives that might be sought by national procurement laws and ways in which they might be addressed.

4. It is intended that the study will enable the Working Group to determine what further work, if any, would be desirable in the area of international procurement (e.g., the preparation of a model procurement code) and will provide useful background material for carrying out that work. Even if it is decided not to engage in further work for the time being, the study may itself assist parties participating in international procurement as purchasers and as suppliers by clarifying for them the issues and practices in this area. It will also provide a framework within which parties may assess their policies and practices with respect to international procurement and, if desirable, re-formulate those policies and practices, or formulate policies where none presently exist.

5. The field of international procurement is highly specialized, and one in which practice plays a significant role. In order to ensure that the study by the secretariat is sound and complete, both conceptually and practically, the secretariat intends to obtain the assistance of a group of experts in the field of international procurement. The group will be composed of persons who are conversant with the interests of purchasers, suppliers and financing institutions, respectively.

6. A meeting of the group of experts has been scheduled for 7 to 11 December 1987. The task of the group at that meeting will be to assist the secretariat in determining the precise scope of the study and in identifying and analyzing the significant issues in connection with international procurement. The secretariat will then prepare a draft of the study taking into account the discussions at the meeting of the group of experts. A second meeting of the group might be convened during the first half of 1988 in order to review the draft. The study will then be finalized by the secretariat for presentation to the Working Group.

¹Report of the United Nations Commission on International Trade Law on the work of its nineteenth session, *Official Records of the General Assembly, Forty-first Session, Supplement No. 17* (A/41/17), para. 243.

7. In view of the scheduling of the meetings of the group of experts, and taking into account the shortage of personnel within the secretariat resulting from measures taken in response to the financial crisis of the United Nations, it is not expected that the study will be ready for presentation to the Working Group before the second half of 1988.

Conclusion

8. The Commission may wish to take note of the foregoing note and to decide that the tenth session of the Working Group on the New International Economic Order should take place at Vienna during the second half of 1988 at dates to be established by the secretariat.

III. LIABILITY OF OPERATORS OF TRANSPORT TERMINALS

A. Report of the Working Group on International Contract Practices on the work of its tenth session (Vienna, 1-12 December 1986) (A/CN.9/287)

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INTRODUCTION

1. At its sixteenth session in 1983, the Commission decided to include the topic of liability of operators of transport terminals in its programme of work, to request the International Institute for the Unification of Private Law (UNIDROIT) to transmit its preliminary draft

Convention on that topic to the Commission for its consideration, and to assign work on the preparation of uniform rules on that topic to a working group.¹

¹Report of the United Nations Commission on International Trade Law on the work of its sixteenth session, *Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 17* (A/38/17), para. 115.

2. In response to the request at the sixteenth session, UNIDROIT transmitted its preliminary draft Convention to the Commission. At its seventeenth session, the Commission decided to assign to the Working Group on International Contract Practices the task of formulating uniform legal rules on the subject. It further decided that the mandate of the Working Group should be to base its work on the UNIDROIT preliminary draft Convention and the Explanatory Report thereto prepared by the secretariat of UNIDROIT, and on the study of the UNCITRAL secretariat on major issues arising from the UNIDROIT preliminary draft Convention, which was before the Commission at its seventeenth session (A/CN.9/252), and that the Working Group should also consider issues not dealt with in the UNIDROIT preliminary draft Convention, as well as any other issues that it considered to be relevant.²

3. The Working Group commenced its work on the topic at its eighth session by engaging in a comprehensive consideration of the issues arising in connection with the liability of operators of transport terminals (A/CN.9/260). At its ninth session, the Working Group engaged in an initial discussion of all of the draft articles of uniform legal rules on the liability of operators of transport terminals that had been prepared by the secretariat (A/CN.9/WG.II/WP.56). It also prepared texts of draft articles 1, 2, 3 and 4, with accompanying notes, to serve as a basis for further consultations by delegations and for the future work of the Working Group (A/CN.9/275). The Working Group has decided to settle the form that the uniform rules should take after it establishes the substance and content of the rules (A/CN.9/260, paragraph 13).

4. The Working Group consists of all 36 States members of the Commission: Algeria, Argentina, Australia, Austria, Brazil, Central African Republic, Chile, China, Cuba, Cyprus, Czechoslovakia, Egypt, France, German Democratic Republic, Hungary, India, Iraq, Iran (Islamic Republic of), Italy, Japan, Kenya, Lesotho, Libyan Arab Jamahiriya, Mexico, Netherlands, Nigeria, Sierra Leone, Singapore, Spain, Sweden, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay and Yugoslavia.

5. The Working Group held its tenth session at Vienna from 1 to 12 December 1986. All members were represented except Algeria, Australia, Central African Republic, Chile, Cuba, Cyprus, Hungary, Iraq, Lesotho, Libyan Arab Jamahiriya, Sierra Leone, Singapore, United Republic of Tanzania and Uruguay.

6. The session was attended by observers from the following States: Canada, Colombia, Democratic People's Republic of Korea, Germany, Federal Republic of, Guatemala, Holy See, Indonesia, Oman, Poland, Republic of Korea, Switzerland and Thailand.

²Report of the United Nations Commission on International Trade Law on the work of its seventeenth session, *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 17 (A/39/17)*, para. 113.

7. The session was also attended by observers from the following international organizations:

(a) *Specialized agency*

United Nations Industrial Development Organization

(b) *Intergovernmental organizations*

Central Commission for the Navigation of the Rhine

Commission of the European Communities

Hague Conference on Private International Law

International Institute for the Unification of Private Law

League of Arab States

Central Office for International Railway Transport

(c) *International non-governmental organizations*

International Air Transport Association

International Chamber of Commerce

International Civil Airports Association

International Forest Products Transport Association

International Law Association

International Maritime Committee

International Road Transport Union

International Union of Marine Insurance

8. The Working Group elected the following officers:

Chairman: Mr. Michael Joachim Bonell (Italy)

Rapporteur: Mr. Suresh Chandra Chaturvedi (India)

9. The following documents were placed before the session:

(a) Provisional agenda (A/CN.9/WG.II/WP.57);

(b) Liability of operators of transport terminals: revised draft articles 5 to 15 and new draft articles 16 and 17 of uniform rules on the liability of operators of transport terminals (A/CN.9/WG.II/WP.58).

10. The Working Group adopted the following agenda:

1. Election of officers

2. Adoption of the agenda

3. Formulation of uniform legal rules on the liability of operators of transport terminals

4. Other business

5. Adoption of the report.

DELIBERATIONS AND DECISIONS

I. Method of work

11. The Working Group decided to commence its work at the current session by considering revised draft articles 5 to 15 and new draft articles 16 and 17 of uniform rules on the liability of operators of transport terminals, which had been prepared by the secretariat

(A/CN.9/WG.II/WP.58), and, thereafter, to return to a consideration of draft articles 1 to 4, for which texts had been prepared by the Working Group at its ninth session.³

II. Consideration of draft articles of uniform rules on the liability of operators of transport terminals

12. A view was expressed that the rules being formulated by the Working Group should not be too complex. Legal texts designed to achieve harmonization of law were more successful if they were simple in structure and did not attempt to deal with every conceivable question that might arise in connection with the issues addressed by them.

13. The following paragraphs reflect the substance of the discussion with respect to each of the draft articles considered by the Working Group.

Article 5

Paragraph (1)

14. The Working Group generally agreed with the approach taken by paragraph (1), which was based on the principle of presumed fault or neglect. That approach was appropriate as it was consistent with the basis of liability established in the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg)⁴ (hereinafter referred to as the "Hamburg Rules") and the United Nations Convention on International Multimodal Transport of Goods (1980)⁵ (hereinafter referred to as the "Multimodal Convention"), and reflected the current trend in the field of transport law. A view that the basis of liability under the uniform rules should be aligned with the basis of liability under the international convention governing maritime transport that, at the time of adoption of the rules, had the most parties was not accepted.

15. There was general agreement with the provision of article 1 that the liability of an operator should not be absolute. Examples given were that an operator should not be liable for loss, damage or delay resulting from *force majeure*. He should also not be liable to the extent that the acts or omissions of a person for whom he was not responsible contributed to the loss, damage or delay. It was also suggested that the provision concerning the basis of the operator's liability should take into account the existence, if any, of insurance covering the goods. However, it was stated that the effect, if any, of insurance on the liability of the operator would be resolved by applicable rules of national law.

16. A view was expressed that the word "loss" in its first use in the opening words of paragraph (1), "The operator is liable for loss resulting from loss of or damage to the goods . . .", could be interpreted to include consequential loss. Exposure of the operator to liability for consequential loss would render the extent of his liability uncertain. Therefore, that usage of the word "loss" should be deleted. According to another view, the meaning of the word should be clarified. It was pointed out, however, that, whether or not the word was deleted, the question of whether a claimant could recover consequential loss in a particular case would be resolved by the rules of the applicable legal system. It was also noted that the wording in question appeared in the Hamburg Rules and in the Multimodal Convention, and it was stated that it was not desirable to change it. Finally, it was observed that the operator's liability for consequential loss would, in any case, be subject to limits under draft article 6. Accordingly, the prevailing view was to retain the word.

17. A view was expressed that it was unclear to whom the phrase "other persons of whose services the operator makes use . . ." referred, and it was questioned whether the reference to such persons, in addition to servants and agents of the operator, was necessary. It was pointed out that, in some legal systems, certain categories of persons engaged by the operator for the performance of the operations undertaken by him, e.g. stevedores, might not be categorized as either servants or agents, and that such persons should also be included within the requirements of paragraph (1). It was generally agreed to retain the reference to such persons.

18. A view was expressed that the operator should not be liable for loss, damage or delay that arose from acts of persons engaged by him (i.e., his servants or agents, or other persons of whose services he made use) performed outside the scope of their employment. It was stated that the operator would be able to insure at lower rates if he was not responsible for loss, damage or delay that arose from such acts. Furthermore, such an approach would be consistent with the approach taken in the Multimodal Convention. The prevailing view, however, was that the operator should be liable for loss, damage or delay caused by persons engaged by him, even if they acted outside the scope of their employment. It was observed in that connection that, even if the uniform rules did not expressly exclude the operator's liability when persons engaged by him acted outside the scope of their employment, such a result might nevertheless be achieved in legal systems that recognized such an exclusion.

Paragraph (2)

19. There was general agreement that paragraph (2) was superfluous, and should be deleted. According to a contrary view, however, the paragraph was useful and should be retained, perhaps in an amended form, in order to ensure that the liability of the operator was not absolute.

³A/CN.9/275, paras. 16-58.

⁴A/CONF.89/13, annex I. See *Official Records of the United Nations Conference on the Carriage of Goods by Sea*, United Nations publication, Sales No. E.80.VIII.1.

⁵TD/MT/CONF/16.

Paragraph (3)

20. It was generally agreed that paragraph (3) should be retained in its current form. It was noted that the paragraph provided a uniform solution for the situation when loss, damage or delay was caused by factors for which the operator was responsible, as well as by other factors, a situation that was treated differently in different national legal systems. In further support of the paragraph, it was pointed out that the paragraph required the operator to prove the amount of loss not attributable to him or to persons engaged by him, which was consistent with the principle of presumed fault or neglect reflected in paragraph (1). A view was expressed, however, that the paragraph should not require the operator to prove the amount of loss not attributable to him or to persons engaged by him, since he might find it difficult to do so.

Paragraph (4)

21. It was generally agreed that the uniform rules should deal with the liability of the operator for delay in handing over the goods, and that paragraph (4) should be retained in its current form. It was stated that if the rules did not deal with delay, an operator would be subject to differing liability régimes for delay under national legal systems. Dealing with liability for delay in the rules could protect operators whose liability for delay was extensive under national legal systems. It would also protect carriers seeking recourse against operators who, under national law, could greatly restrict their liability for delay. Another view, however, favoured deleting paragraph (4), since operators sometimes found it difficult to insure against liability for delay and since delay in handing over goods was not a significant problem in practice.

Paragraph (5)

22. The Working Group agreed with the general approach of paragraph (5). A view was expressed, however, that the phrase, "a person entitled to make a claim for the loss of the goods" was unclear, and the paragraph should be amended so as to avoid the use of that phrase, perhaps by substituting the words "the claimant", or by deleting the reference to such a person and stating, simply, that the goods may be treated as lost.

23. With respect to the period of time after which the goods may be treated as lost, the prevailing view favoured a period shorter than 60 days, e.g. 30 days. A view was expressed, however, that the time period should reflect the circumstances existing in some countries with respect to the storage and handling of goods that, in some cases, might make a period such as 60 days appropriate.

*Article 6**Paragraph (1)*

24. The Working Group considered the four alternatives for paragraph (1) presented in A/CN.9/WG.II/WP.58. Views were expressed in favour of a single limit

of liability (i.e., alternative 1), rather than either having one limit apply to goods that were carried to or from the terminal by sea and another limit apply to goods that were not so carried (i.e., alternative 2), or linking the limit to the limit applicable to the carrier of the goods to or from the terminal (i.e., alternatives 3 and 4). In support of a single limit, it was stated that alternatives 2, 3 and 4 would create uncertainties as to which limit would apply in particular cases since the operator might not always know by what mode of transport the goods had been carried to the terminal or would be carried from it. In addition, if a claim were brought before the goods left the terminal, it would be difficult to apply alternative 2 or 3, which referred to the mode of transport by which the goods had been carried from the terminal. Furthermore, goods that were carried to a terminal in a unitized manner (e.g., in a container or on a pallet) might be broken into smaller units and carried from the terminal by different modes of transport, with the result that different limits might apply to the different units. It was also pointed out that, under many international conventions and national laws relating to the carriage of goods, parties to a contract of carriage could agree upon higher limits than those contained in the convention or law, thus increasing the uncertainty as to which limits were to apply to the operator. It was stated that uncertainties such as those could lead to higher insurance costs.

25. The views favouring a single limit of liability also favoured fixing the amount of that limit at or slightly higher than the limit contained in the Hamburg Rules. That would be the simplest and most appropriate approach, particularly in view of the fact that most goods were carried by sea.

26. A view was expressed that the uniform rules should apply only to sea terminals. In that event, a single limit, based upon the Hamburg Rules, should apply.

27. Views were also expressed in favour of alternative 2. It was stated that it was appropriate to distinguish, as that alternative did, between cases where the goods were involved in carriage by sea and cases where they were carried by modes of transport other than by sea carriage. In addition, a single limit equal to or slightly higher than the limit contained in the Hamburg Rules would result in inadequate compensation to persons with interests in goods lost or damaged in an air terminal, or to air carriers who were held liable to shippers and sought recourse against air terminals, since goods carried by air were usually of a high value. Alternative 2 would take that into account. In that connection, however, it was noted that, under paragraph (5), an operator could agree to higher limits of liability. Therefore, even if the rules were to provide a single limit, air carriers and shippers of goods by air might be able to negotiate a higher limit with the operator of the terminal if the single limit was inadequate.

28. Proponents of alternative 3 stated that subjecting the operator to the same limits as those applicable to the carrier of the goods to or from the terminal would benefit carriers in recourse actions against terminals. It

was also stated that, in some countries, it was customary for terminals to apply the limits that were applicable to the modes of transport they served. In those situations, when the goods were carried to and from the terminal by two different modes, it was not difficult for an operator to determine when the goods ceased to be governed by a régime applicable to one mode and fell under the régime governing the other.

29. After a discussion of alternatives 1, 2 and 3, a proposal was made to adopt a solution along the following lines:

“The liability of the operator for loss resulting from loss of or damage to goods under this [Law] [Convention] is limited to an amount not exceeding [920] units of account per package or other shipping unit or [2.75] units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher. However, if the goods are involved in international carriage which does not, according to the contract of carriage, include carriage of goods by sea or by inland waterways, the liability of the operator shall be limited to an amount not exceeding [8.33] units of account per kilogramme of gross weight of the goods lost or damaged.”

It was noted that the proposal generally corresponded with the approach taken in the Multimodal Convention. (See, however, paragraphs 34 and 35, below.)

30. Support was expressed for that proposal as an acceptable compromise. In opposition, it was stated that the limits that would apply when carriage by sea was not involved would result in inadequate compensation for carriers or persons with interests in goods carried by air. It also was observed that, under the proposal, the limit applicable to the operator would depend upon the contract of carriage, to which the operator was not a party. In addition, the operator would, in many cases, not know whether or not the goods had been or would be carried by sea and, therefore, would not know whether he was subject to the lower or higher limit. In response to that point, it was stated that the question of whether the lower or higher limit was to apply in respect of a particular consignment of goods would arise only after damage had occurred and a claim was brought. The question would not arise in connection with the operator's insurance, since he would obtain blanket insurance covering his overall liability, rather than his liability in respect of each particular consignment. When damage occurred and a claim was brought, it would be for the claimant to prove that the goods were not involved in carriage by sea and that the higher limit should apply.

31. At the close of the discussion on that issue, some delegations preferred a single limit, others supported the proposal set forth in paragraph 29, above, and still others held the view that the limit applicable to an operator should depend to a greater degree upon the mode of transport by which the goods were carried to or from the terminal, e.g. by providing, in addition to the limits contained in the proposal, a separate limit to apply when the goods were involved in carriage by air.

32. The decision of the Working Group was to adopt provisionally the proposal set forth in paragraph 29, above. It was agreed, however, that the decision would not preclude the Working Group from returning to a consideration of that issue at a later time. It was also agreed that the amounts of the limits set forth in the proposal were to be regarded as provisional, and would be kept in square brackets. The forum that adopted the uniform rules would consider those amounts, and their adequacy for carriers of various modes and for persons with interests in goods carried by those modes.

33. In subsequent discussion, a view was expressed that, in cases where loss of or damage to goods in a consignment impaired the value of other goods in the consignment that were not lost or damaged, the limit of liability should be based on all of the goods, and not only on the goods that were lost or damaged. Article 22(2)(b) of the Convention for Unification of Certain Rules Relating to International Carriage by Air (Warsaw, 1929) as amended by the Hague Protocol of 1955 was suggested as a model. It was observed, however, that the desired result could be reached under the wording suggested in paragraph 29, above, which corresponded with that of other transport conventions.

34. During its consideration of paragraph (4), the Working Group considered whether the limit of liability based upon the number of packages or shipping units should be retained in the provision set forth in paragraph 29, above. It was observed that the question of what constituted a package or shipping unit raised considerable problems in practice. While paragraph (4) attempted to address some of those problems, such a provision, in itself, might not be sufficient. It might also be necessary to include in the uniform rules certain provisions with respect to the document to be issued by the operator, e.g. provisions dealing with such issues as including in the document a statement concerning the number of packages or shipping units, and the legal effects of including such a statement. It was also pointed out that an operator would not know and would not be able to verify how many packages were in a container. Therefore, the uniform rules might also have to contain provisions dealing with the legal effects of reservations included by the operator in the document when the statement concerning the number of packages and shipping units was based on information given to the operator by his customer that the operator could not verify. Including such provisions would complicate the document to be issued by an operator, which should be kept as simple as possible. In addition, it was stated that the practical importance of a limit based on the number of packages or shipping units was not that great.

35. Accordingly, it was generally agreed not to retain the limit based on the number of packages or shipping units, and to delete the references to such a limit from the provision set forth in paragraph 29, above.

Paragraph (2)

36. According to one view, before deciding on the amount of the limit of the operator's liability for delay,

further consideration should be given to commercial factors relevant to the question in order to arrive at an acceptable and appropriate amount. It was noted, however, that the scope and extent of loss resulting from delay was different from that of loss resulting from loss of or damage to the goods, and that the choice of a particular limit for loss resulting from delay would of necessity be relatively arbitrary. Moreover, the amount of the limit of liability for delay was not of great importance, particularly since, after delay for a specified period of time, the operator would be liable for the loss of the goods. Nevertheless, it was desirable to set some limit to liability for delay. The view was expressed that it would be satisfactory to set the limit at the same level as that of a carrier under the Hamburg Rules and the Multimodal Convention, i.e., 2 1/2 times the charges payable to the operator for his services in respect of the goods delayed. After discussion, that limit was accepted by the Working Group as a basis for its further work.

37. The Working Group considered whether the operator's liability for delay should be subject to the further limitation that it should "not [exceed] the total of such charges payable to the operator pursuant to his contract or agreement with his customer". According to one view, such a limitation was unnecessary and could result in complications in application. According to another view, such a limitation was desirable, and it might be based on the total charges payable to the operator by his customer. It was noted that, in some cases, an operator's contract with his customer covered several independent consignments of goods over a relatively long period of time. It was generally agreed that the overall limitation should not be based upon the total charges under such a contract; rather, it should be based on the charges in respect of goods more immediately connected with the delay. A proposal was made to express the overall limitation by deleting the last phrase currently appearing in paragraph (2) ("but not exceeding the total of such charges payable to the operator pursuant to his contract or agreement with his customer"), and replacing it with a phrase such as, "but not exceeding the total of such charges relating to the goods requested for delivery." It was observed, however, that the delay in delivery of part of a consignment might impair the value of the entire consignment. A view was expressed, therefore, that the limit should be based on the charges in respect of the entire consignment. After discussion, the prevailing view was to replace the phrase in paragraph (2) referred to above with a phrase such as "but not exceeding the total of such charges in respect of the consignment of which the goods were a part."

Paragraph (3)

38. Paragraph (3) was found to be acceptable.

Paragraph (4)

39. It was agreed that, in view of the decision not to retain a limit based on the number of packages or shipping units, paragraph (4) was unnecessary.

Paragraph (5)

40. A view was expressed that the idea that the operator could agree to higher limits of liability was also implicit in article 13(2), and that paragraph (5) should be deleted. According to another view, however, there would be value in stating separately the idea expressed in paragraph (5). Accordingly, it was decided to retain paragraph (5).

Paragraph (6)

41. The Working Group agreed that, in view of article 16, paragraph (6) was unnecessary.

Article 7

Paragraph (1)

42. The Working Group found paragraph (1) to be acceptable.

Paragraph (2)

43. A view was expressed that a person engaged by the operator (i.e., a servant, agent or other person of whose services the operator made use) should be able to avail himself of the defences and limits under the uniform rules even if he did not act within the scope of his employment. The prevailing view, however, was that he should be able to do so only if he proved that he acted within the scope of his employment.

44. An observation was made that it might not be appropriate to describe the relationship between an operator and a person other than a servant or agent, of whose services the operator made use, as "employment". It was suggested that the reference in the paragraph to the scope of employment might be changed to read, for example, "if he proves that he acted within the performance of his contract."

Paragraph (3)

45. A question was raised as to whether paragraph (3) was needed, since the result sought to be achieved by it was implicit in paragraphs (1) and (2). The prevailing view, however, was that the paragraph was useful and should be retained.

46. A view was expressed that the reference to the exceptions to paragraph (3) should mention not only the situations dealt with in article 8 of the uniform rules, but also the situations dealt with in articles 6(5) and 13(2). According to another view, however, the current wording of paragraph (3) followed closely the wording of the Hamburg Rules and the Multimodal Convention, and should not be changed. It was not necessary to refer specifically to articles 6(5) and 13(2). Accordingly, it was generally agreed to retain paragraph (3) as it stood.

Article 8

Paragraph (1)

47. A view was expressed that an operator should lose the benefit of the limits of liability under the uniform

rules only if it was proved that the operator himself acted intentionally or recklessly; therefore the reference to the operator's servants in paragraph (1) should be deleted. In support of that view, it was stated that the operator was often not in a position to prevent intentional or reckless acts by people in his employment and that, therefore, he should not be exposed to unlimited liability for those acts. Moreover, the limits of liability should be relatively certain and should be breakable only in restricted cases. Double insurance could result from uncertainty in the application of the limits of liability, since the operator would have to cover his possible liability in excess of the limits, and the cargo interest would have to insure the goods for possible losses exceeding the limits. It was also noted that enabling the limits to be broken only if the operator himself acted intentionally or recklessly would conform to the approach taken in the International Convention for the Unification of Certain Rules relating to Bills of Lading (Brussels, 1924) as amended by the Protocol done at Brussels on 23 February 1968 (the Hague-Visby Rules), the Hamburg Rules and the Multimodal Convention.

48. According to a second view, the operator should lose the benefit of the limits of liability not only if he acted intentionally or recklessly but also if his servants did so. In support of that view, it was stated, firstly, that an operator was usually organized as an independent legal entity. In such a case, only the acts of senior management of the operator would be regarded as acts of the operator. In most cases, however, loss or damage was caused by acts of employees who actually performed handling operations. Therefore, a provision that the limits could be broken only if the operator himself acted intentionally or recklessly would be of no effect. In opposition to that view, it was stated that there were cases in which loss or damage could arise from intentional or reckless acts of senior management. Secondly, it was stated that the international conventions dealing with maritime transport in which the carrier did not lose the benefit of the limit of liability due to acts of his servants should not be followed in the uniform rules, since a sea carrier could control the acts of the master of the ship and other servants to a much lesser degree than a terminal operator could control the acts of his servants. Thirdly, it was stated that if the operator were to lose the benefit of the limit of liability due to the acts of his servants, he would be encouraged to exercise greater care in the choice of servants.

49. According to a third view, the operator should lose the benefit of the limit of liability not only if his servants acted intentionally or recklessly but also if his agents and other persons of whose services he made use did so. If a distinction were made between servants and other persons engaged by the operator, the claimant would have the difficult task of proving which person had acted intentionally or recklessly.

50. A majority of the views expressed were in accordance with the second or third view. Due to the importance and complexity of the question, it was decided not to take a final decision at the current session, but to leave paragraph (1) as it stood, and to consider the question again at the next session.

Paragraph (2)

51. A view was expressed that paragraph (2) should be deleted. It was stated that the paragraph could expose the operator to unlimited liability in the case of intentional or reckless acts of persons engaged by him, which would not be appropriate if it were ultimately decided in connection with paragraph (1) to enable the limit of liability to be broken only where the operator himself acted intentionally or recklessly. That would occur, for example, where an action was brought against a person engaged by the operator for damage caused by intentional or reckless acts of that person, who would therefore not be entitled to limit his liability, and the operator indemnified the person for damages he was required to pay. It was observed, however, that, in some legal systems, a person who acted intentionally or recklessly would not have recourse against his employer and such conduct would not affect the right of the employer to limit his liability. Furthermore, it was stated that paragraph (2) was unnecessary since, in most cases, a claimant brought his action against the operator, rather than against a person engaged by him.

52. According to another view, paragraph (2) should be retained. It was stated that the paragraph was necessary in view of the overall relationship between article 7 and article 8. In an action by a claimant against the operator, the operator could limit his liability pursuant to articles 6 and 7(1). However, article 8(1) allowed the limits of liability to be broken in certain cases. If an action were brought directly against a person engaged by the operator, article 7(2) entitled him to the limit of liability and to the defences available to the operator under the uniform rules. Article 8(2) was necessary in order to complete that scheme, by allowing the limits of liability available to that person to be broken in certain cases.

53. According to an additional view, the provisions of article 8 should be merged with article 7. In opposition, it was observed that the structure of articles 7 and 8 was consistent with that of the Hamburg Rules and the Multimodal Convention. However, in rebuttal, it was noted that article 8 of the Hamburg Rules resulted from a package of compromises resulting in the elimination of the defence of negligent navigation for carriers and the approach taken in that article might not be appropriate in the uniform rules on the liability of operators of transport terminals; thus, it would be necessary to review the entire policy of unbreakable limits before a decision could be taken on article 8 of the uniform rules.

54. A further view was expressed that the decision with respect to paragraph (2) depended upon what was ultimately decided with respect to paragraph (1). That is, to the extent that servants, agents and other persons of whose services the operator made use were excluded from paragraph (1), they should be covered in paragraph (2).

55. Yet another view was expressed that, since the operator was responsible for acts of persons engaged by him, the uniform rules should enable a claim to be brought only against the operator.

56. The Working Group decided to maintain paragraph (2) as it stood. It noted, however, that, due to the interrelationship between paragraphs (1) and (2), it might become necessary to reconsider paragraph (2), depending upon the decision that was ultimately taken with respect to paragraph (1).

Article 9

57. The Working Group generally agreed that the uniform rules should contain provisions dealing with dangerous goods. Moreover, it agreed in principle that, if dangerous goods were handed over to an operator without his being properly informed of their dangerous character, he should be able to take any precautions the circumstances might require in order to prevent the goods from endangering property or persons, including providing special handling or storage facilities, and destroying or disposing of the goods in an emergency. In such a case, the operator should not be required to pay compensation for the damage or destruction of the goods. In addition, he should be compensated for his losses resulting from the dangerous goods, including his costs in taking those precautions. Views were divided, however, as to the extent to which the uniform rules should deal with those matters.

58. The Working Group considered the two alternative versions of article 9 contained in document A/CN.9/WG.II/WP.58. Support was expressed for alternative 1, because it was compatible with many international transport conventions, and corresponded closely with analogous articles in the Hamburg Rules and the Multimodal Convention. According to another view, however, alternative 1 was not acceptable, because it imposed various obligations on the shipper, including obligations with respect to the marking, labelling, packaging and documentation of dangerous goods. It also provided that the shipper was to be liable to the operator for all his losses resulting from the dangerous goods. Imposing obligations and liability on the shipper was not appropriate because, in many cases, there existed no contractual relationship between the shipper and the operator, and they were often factually remote from each other in the chain of transport. Moreover, it was not necessary for the uniform rules to deal with those matters. Obligations of a shipper with respect to the marking, labelling, packaging and documentation of dangerous goods were imposed by international conventions dealing with transport and with dangerous goods; the liability of a shipper for loss resulting from dangerous goods was also dealt with by such conventions, as well as by national law.

59. The general preference of the Working Group was for the approach taken in alternative 2, since it was less complex than alternative 1 and it did not impose obligations or liability on the shipper. It had the advantage of inducing the shipper properly to mark, label, package and document dangerous goods without directly obligating him to do so.

60. A suggestion was made that the substance of paragraph (2) of alternative 1 should be incorporated

into alternative 2. In that connection, the Working Group considered the following proposal:

"If dangerous goods are handed over to an operator without being marked, labelled, packaged or documented in accordance with any applicable international, national or other rule of law or regulation relating to dangerous goods, and if, at the time the goods are handed over to him, the operator does not otherwise know of their dangerous character, he is entitled:

"(a) To take all precautions the circumstances may require, including [when the goods pose an actual danger to any person or property,] destroying the goods, rendering them innocuous, or disposing of them by any other means, without payment of compensation for damage to or destruction of the goods resulting from such precautions; and

"(b) To receive compensation for all loss resulting from such goods including, but not limited to, damage to property of the operator, costs to the operator of taking the measures referred to in sub-paragraph (a), and any liability of the operator to another person arising from loss or damage caused by the dangerous goods."

61. A view was expressed that the proposal was too imprecise in that it referred to obligations to mark, label, package and document dangerous goods and to compensate the operator for loss resulting from those goods, without specifying to whom those obligations applied. The prevailing view, however, was that the general approach followed by the proposal was acceptable.

62. With respect to subparagraph (a) of the proposal, it was generally agreed that the words within square brackets should be retained. With retention of those words, the right of the operator to destroy or dispose of the goods without paying compensation will be limited to those situations when such measures were necessary.

63. It was suggested that the words "any applicable international, national or other rule of law" should be reconsidered. In the context of the proposal the usage of those words conflicted with the usage of the words "applicable law" elsewhere in the uniform rules, since the latter usage referred to rules applicable to the relationship between the operator and his customer. A further suggestion was that the words in the proposal should be changed to, "any law applicable to the parties". However, subject to changing the words "actual danger" to "imminent danger", subparagraph (a) was found to be acceptable in its current form.

64. A view was expressed that subparagraph (b) should be deleted, since the question of compensation payable to the operator should be left to be settled by national law. The prevailing view, however, was that the subparagraph should be retained, perhaps in an amended form.

65. After discussion, it was generally agreed that the subparagraph should only entitle the operator to receive "reimbursement for all costs to the operator of taking the measures referred to in subparagraph (a)", and that the reference to compensation for other types of losses should be deleted. It was emphasized, however, that the deletion did not imply that the operator should not be compensated for those losses; rather that question should be settled by the applicable law. Opposition was expressed to the deletion of the reference to compensation for other types of losses incurred by the operator.

Article 10

Paragraph (1)

66. It was generally agreed that the uniform rules should give the operator a right of retention over the goods for costs and claims relating to the services performed by him in respect of those goods. A view was expressed that the right of retention should extend only to the goods to which the costs and claims related and not to other goods of the same customer to which those costs and claims did not relate. Another view was that extension of the right of retention to those other goods should be permitted with the agreement of the customer. It was observed, however, that an agreement by the parties to extend the operator's right of retention could conflict with national laws that restrict such an agreement, such as laws dealing with contracts of adhesion. The prevailing view was that the operator and his customer should be able to extend by agreement the operator's right of retention if such an agreement was valid under the applicable national law. Accordingly, it was agreed that the second sentence of paragraph (1) should be amended along the following lines: "However, nothing in this Convention shall affect the validity under national law of any contractual arrangements extending the operator's security in the goods."

Paragraph (2)

67. Paragraph (2) was found to be acceptable.

Paragraph (3)

68. It was generally agreed that the operator should have a right to sell goods over which he exercised the right of retention. A view was expressed that, in order to achieve uniformity, the uniform rules should give that right to the operator in all cases. It was observed, however, that the right of sale did not exist in some national legal systems. The prevailing view was that the operator should have the right of sale only to the extent permitted by the law of the place where his services were performed. In that connection, mention was made of problems that could arise in federal States where competence over the regulation of commercial matters was divided between the national government and the federal units.

69. It was observed that the definition of goods contained in the text of article 1 prepared by the

Working Group at its ninth session⁶ included containers, trailers, chassis, barges and similar articles of transport or packaging. Such articles were frequently owned by parties other than the owners of the goods transported in the articles. For example, a large proportion of the containers used in transport were owned by private leasing companies. It was also observed that railway wagons were sometimes taken over by operators, and a question was raised whether they were covered by the definition of goods and therefore subject to the right of sale.

70. It was generally agreed that the owners of articles of transport or packaging should be protected when the right of sale was exercised by the operator. According to one view, those articles should be excluded from the operation of article 10. According to another view, the operator should not be permitted to exercise the right of sale in respect of an article unless its owner consented to the sale. The prevailing view, however, was that the operator should be required to give the owner of the article notice of the intended sale, in order to enable the owner to take steps to protect his interests. In that connection, it was suggested that the second sentence of paragraph (3), which required the operator to make reasonable efforts to notify the owner of goods intended to be sold, should be amended so as to require the operator also to make reasonable efforts to notify the owner "of the article of transport or packaging, such as a container, in which the goods are transported or stored." A view was expressed, however, that it was not necessary to refer specifically to the owner of the article in addition to the owner of the goods, since the article was included in the definition of "goods" as drafted by the Working Group at its ninth session. Rather, it was sufficient to change the word "owner" which currently appeared in the second sentence of paragraph (3) to "owners". That suggestion, however, was not accepted.

71. It was observed that it might not always be possible for the operator to identify and give notice to the owner of goods intended to be sold. In addition, in many cases, there might be persons other than the owner who had economic interests in the goods. Therefore, a view was expressed that the operator should be required to give notice of the intended sale not only to the owner of the goods, but also to the person from whom the operator received the goods. According to a further view, the operator should also be obligated to notify the person who had a right to receive the goods from the operator. Concern was expressed, however, that expanding the categories of persons to whom notice must be given would increase the burden to the operator, as well as increase the risk that he might fail to notify a person who should have been notified, thus inhibiting the operator from exercising the right of sale. After discussion, it was generally agreed that the operator should be required to make reasonable efforts to notify the owner of the goods, the person from whom the operator received them, and the person entitled to receive them from the operator.

⁶A/CN.9/275, para. 30.

72. It was generally agreed that the operator should account for the proceeds of the sale. It was pointed out, however, that, in some legal systems, sales were conducted by judicial authorities, and it was those authorities, rather than the party for whose benefit the goods were sold, who distributed the proceeds. With respect to the question of the persons to whom the operator must account, a view was expressed that that question should be left to be settled by national law. After discussion, it was decided that the third sentence of paragraph (3) should be amended to read along the following lines: "The operator shall account appropriately for the balance of the proceeds of the sale in excess of the sums due to the operator plus the reasonable costs of the sale."

73. With respect to the final sentence of paragraph (3), a question was raised whether the uniform rules should provide for the right of sale to be conducted in accordance with procedures under national law. A view was expressed that, if the rules did not so provide, they would have to set forth detailed procedures for the conduct of a sale, which was not desirable. It was preferable for the rules merely to establish, as in the final sentence of paragraph (3), a choice-of-law rule for determining the legal system whose rules were to govern the procedures for the exercise of the right of sale. A view was expressed that that result had already been achieved in the first sentence, which provided that the right of sale was to be exercised "in accordance with" the law of the place where the operator's services were performed, and that the final sentence should be deleted. After discussion, it was decided to retain the final sentence, and to delete the words "and in accordance with" from the first sentence.

74. In accordance with the foregoing discussion, it was generally agreed that the square brackets around paragraph (3) should be removed, and that the paragraph should read along the following lines:

"(3) In order to obtain the amount necessary to satisfy his claim, the operator is entitled to sell the goods over which he has exercised the right of retention provided in this article to the extent permitted by the law of the place where the [safekeeping and operations] were performed. Before exercising any right to sell the goods, the operator shall make reasonable efforts to give notice of the intended sale to the owner of the goods, the person from whom the operator received them, and the person entitled to receive them from the operator. The operator shall account appropriately for the balance of the proceeds of the sale in excess of the sums due to the operator plus the reasonable costs of the sale. The right of sale shall in other respects be exercised in accordance with the law of the place where the [safekeeping and operations] were performed."

Article 11

Paragraph (1)

75. A view was expressed that the time specified in paragraph (1) by which notice of apparent loss or

damage must be given to the operator (i.e., not later than the working day after the day when the goods were handed over to the person entitled to take delivery of them) might be too short in some cases, and that a period of three working days was preferable. The Working Group, however, found paragraph (1) to be acceptable in its current form.

Paragraph (2)

76. A view was expressed that the period of time for notifying the operator of non-apparent loss or damage should commence on the day when the goods were handed over to the person entitled to take delivery of them. That would enable the operator to know when the notice period expired and the *prima facie* effect of a failure to give notice became effective. That certainty would not exist if the notice period commenced on the day when the goods reached their final destination, since the operator would not always know when that occurred.

77. The prevailing view, however, was that the notice period should commence on the day when the goods reached their final destination. In support of that view, it was stated that it was only then that the goods would be inspected, and that loss or damage could be discovered and notified to the operator. It was agreed that the length of the notice period should be seven days.

78. In order to protect the operator in cases where the goods did not reach their final destination until a considerable time after they left the operator's terminal, notice should, in any case, be given within a longer period of time, e.g., 45 days, commencing on the day when the goods were handed over to the person entitled to receive them. That would provide the operator with some certainty as to when the *prima facie* effect of a failure to give notice became effective. However, opposition was expressed to providing such an overall notice period.

79. The Working Group agreed to delete the final sentence of paragraph (2), contained within square brackets.

80. The text of paragraph (2) as agreed to by the Working Group was as follows:

"(2) Where the loss or damage is not apparent, the provisions of paragraph (1) apply correspondingly if notice is not given within seven consecutive days after the day when the goods reached their final destination, but in no case later than 45 consecutive days after the day when the goods were handed over to the person entitled to take delivery of them".

81. It was observed that the length of the notice periods agreed to did not correspond with the notice periods in the Warsaw Convention as amended by the Hague Protocol.

Paragraphs (3) and (4)

82. Paragraphs (3) and (4) were found to be acceptable.

Paragraph (5)

83. It was generally agreed that the uniform rules should require that the operator be given notice of delay in handing over the goods. It was also generally agreed that the rules should provide that no compensation for loss resulting from delay was to be payable by the operator unless notice of the delay was given to him within the required period of time.

84. A view was expressed that the period of time within which notice of delay must be given should commence on the day when the goods reached their final destination, in order to be consistent with the approach taken in paragraph (2). The prevailing view, however, was that the period should commence on the day when the goods were handed over to the person entitled to take delivery of them. In support of that view, it was observed that it was logical for the notice period for delay in handing over the goods to begin at the time of handing over, and not when the goods reached their final destination.

85. With respect to the length of the notice period for delay, a view was expressed that the 60 day period contained in the Hamburg Rules and the Multimodal Convention should be adopted in the uniform rules. The prevailing view, however, was that, due to the static nature of goods in a terminal, a shorter period of 21 days was justified.

Paragraph (6)(a)

86. The Working Group agreed that the provision of paragraph (6)(a) concerning the form of notice should be made applicable to all notices to be given and requests to be made under the uniform rules, and that a provision of such general application should be included in article 1. However, that decision was reconsidered when the Working Group discussed article 1 (see paragraphs 136 to 140, below).

Paragraph (6)(b)

87. The Working Group agreed to delete the provision of paragraph (6)(b) since it dealt with issues that were beyond the scope of the uniform rules.

*Article 12**Paragraph (1)*

88. It was observed that, in some legal systems, a limitation period could be interrupted by means other than the initiation of judicial or arbitral proceedings. Accordingly, it was suggested that the uniform rules should provide for the limitation period provided in paragraph (1) to be interrupted in accordance with the applicable national law. The prevailing view, however, was that the paragraph should be retained in its current form so that a uniform rule would be established with respect to the means by which the limitation period could be interrupted.

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

89. Paragraphs (2), (3) and (4) were found to be acceptable.

Paragraph (5)

90. A view was expressed that paragraph (5) was unnecessary and should be deleted. The prevailing view, however, was that, since a carrier or other person might remain exposed to actions by cargo interests after the limitation period provided in paragraph (1) for actions against the operator had expired, the paragraph was necessary in order to permit him to institute a recourse action against the operator notwithstanding the lapse of that limitation period.

91. A view was expressed that the 90 day period referred to in paragraph (5) should commence when the carrier or other person seeking recourse was served with process in the action against himself. That would give the carrier or other person time to initiate a separate recourse action against the operator, or to include the operator in the action brought against him, if either was permitted under applicable procedural rules of national law. If the 90 day period did not commence until the person seeking recourse had been held liable, the operator could remain exposed to recourse actions for too long a period of time. According to another view, however, it would be acceptable for the 90 day period to commence when the carrier or person seeking recourse was held liable in the action against him, or settled the claim upon which the action was based, if the operator was given reasonable notice that the action had been instituted against the person seeking recourse. In opposition to such a notice requirement, it was observed that non-specialist lawyers representing a carrier or other person against whom a claim was brought and who might seek recourse against an operator might not be aware of the necessity to notify the operator of the claim.

92. After discussion, it was agreed to retain paragraph (5), including the words within square brackets, to change the words "or person" to "or other person", and to add language along the following lines to the end of the paragraph:

"... provided that reasonable notice shall be given to the operator whenever any claim is filed against a carrier or other person that may result in a recourse action against the operator."

93. The Working Group agreed that the reference in paragraph (5) to the time of settlement of the claim upon which the action against the person seeking recourse was based referred to a settlement of the claim after the action had been initiated.

Article 13

94. Article 13 was found to be acceptable.

95. It was observed that ground handling operations were often performed for airlines by other airlines or by

ground handlers at an airport under contracts in which the party performing the ground handling operations indemnified the airline in the event of a claim against the latter by a cargo interest. Under those contracts, the limits of liability of the party giving the indemnity were the same as the limits in the Warsaw Convention system. It was noted that such arrangements would not conflict with the uniform rules. Even if the party performing the ground handling operations would, under article 6 of the uniform rules, be subject to lower limits of liability than the limits set forth in his contract with the airline, he would be permitted under article 13(2) to subject himself to higher limits.

96. In connection with paragraph (2), it was observed that the operator could not reduce any of his obligations or liabilities under the rules, even if he increased other obligations or responsibilities.

97. A view was expressed that paragraph (2) should be deleted because, by not also permitting a carrier to increase his responsibilities, the paragraph did not treat operators and carriers equally. It was pointed out, however, that carriers could increase their responsibilities under the international conventions applicable to them.

Article 14

98. A view was expressed that article 14 was not a sufficient means to pursue uniformity in the interpretation of the uniform rules. It was stated that the article should also provide that the reports of the Working Group and the Commission dealing with the elaboration of the uniform rules should be used as a guide to their interpretation. In opposition, it was stated that the *travaux préparatoires* of a legal text constituted only one guide to interpretation, and their role varied among legal systems. After discussion, it was generally agreed that article 14 was acceptable in its current form if the uniform rules were to be adopted in the form of a convention.

99. A view was expressed that it would also be desirable to devise a mechanism to promote uniformity if the uniform rules were adopted in the form of a model law. It was generally agreed that the report of the session of the Commission at which the model law was adopted should recommend that, in implementing the model law, States should have regard to its international character and to the desirability of promoting international uniformity with respect to the treatment of the issues dealt with in the model law.

Article 15

100. A view was expressed that, if the uniform rules were adopted in the form of a convention, the words "or any law of [this State] [such State] relating to the international carriage of goods" should be deleted, since, if a conflict existed between a provision of the convention and national law, national law should be subordinate to the convention. In opposition, it was stated that the words should be retained, since, in some legal systems, the provisions of international conven-

tions on the limitation of liability of sea carriers were incorporated into national law by legislation, and those provisions should prevail over the uniform rules. The Working Group decided to place the words within square brackets.

Article 16

101. Article 16 was found to be acceptable.

Article 17

102. It was suggested that the uniform rules should not only provide a procedure for amending the limits of liability but should also contain a general revision clause. The Working Group generally agreed, however, that, for the time being, the rules should only provide a procedure for amending the limits of liability.

103. It was generally agreed not to retain the version of article 17 that was designed for inclusion in a model law, since national legislatures adopted different approaches to the amendment of limits of liability. Nevertheless, it was suggested that, if adopted as a model law, the rules should in some manner draw the attention of States to the desirability of adjusting the limits periodically.

104. It was generally agreed that, if the uniform rules were adopted as a convention, the limits of liability should be amended by a revision procedure, and not by means of an automatic price index. Therefore, alternative 1 of the version of article 17 designed for a convention should be deleted. In considering how to structure a revision procedure, the Working Group took account of the approaches adopted in alternative 2 of the provision of article 17 designed for a convention, as well as the Protocol of 1984 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969. The features of the revision procedure agreed to by the Working Group are set forth in the following paragraphs.

105. The Commission should serve as the organ within which the procedures for amending the limits of liability would take place. The Secretary-General should place upon the agenda for the following session of the Commission a proposal to amend the limits of liability upon the request of one-fourth of the Contracting States, or when the limits of liability in an international transport convention specified in the uniform rules (e.g. the Hamburg Rules, Multimodal Convention, Warsaw Convention, and conventions dealing with rail and road transport) were revised. A concern was expressed, however, that the latter criterion might result in the limits in the uniform rules being revised too frequently. It was generally agreed that the provision contained in paragraph (1)(b) of the version of alternative 2 of article 17 designed for a convention should not be adopted.

106. In addition to members of the Commission, Contracting States who were not members should be entitled to participate in the meetings to amend the limits. However, only Contracting States should be allowed to vote on the proposal to amend the limits.

107. The uniform rules should contain a non-exhaustive list of criteria to be taken into account in determining the amount by which the limits should be adjusted. Those criteria should include, for example, the amount by which the limits in an international transport convention had changed; the value of goods handled by operators; the cost of labour and relevant services; insurance rates, including rates for insurance covering job-related injuries to workmen; the average level of damages awarded against operators and the costs of electricity, fuel and other utilities. The costs referred to should be determined on an international basis. Assistance in that regard might be obtained from relevant international organs or trade organizations.

108. A proposal to amend the limits should be adopted if supported by a two-third majority of the Contracting States present and voting.

109. An amendment adopted by the foregoing procedure should be deemed to have been accepted at the end of a period of 18 months after it had been notified to Contracting States by the Secretary-General unless, within that period, not less than one-third of the States that were Contracting States at the time of the adoption of the amendment communicated to the Secretary-General that they did not accept the amendment. It was stated that the 18 months time period was necessary in order for the amendment to be considered by national Parliaments. An amendment deemed to have been accepted in that manner should enter into force for all Contracting States 18 months after its acceptance.

110. The Working Group also accepted paragraphs (5) and (6) of alternative 2 of the version of article 17 designed for a convention, with 12 months substituted for the six months which appeared within square brackets in paragraph (6).

111. No amendment of the limits should be considered less than five years from the date on which the Convention was opened for signature.

112. The Secretary of the Commission stated that he would consult with the appropriate authorities within the United Nations to ensure that no problems arose from the role to be played by the Commission under the foregoing revision procedure, and that he would report to the Working Group at its next session.

Article 1

Definition of "operator"

113. A view was expressed that the definition of "operator" should not be based upon concepts such as "safekeeping" or "care, custody and control", as were the three alternative formulations of the definition drafted by the Working Group at its ninth session.⁷ Firstly, the meaning of those concepts was unclear. Secondly, they tended to describe the legal régime applicable to an operator, and it was unsatisfactory to define the subject of a legal régime by reference to the

regime itself. Rather than incorporating such concepts, the definition should be based upon the factual characteristics of a terminal operator and the functions performed by him.

114. According to another view, however, while the definition of operator should not refer to safekeeping or care, custody and control as the primary obligations of an operator, it should indicate that such concepts were implied in the transport-related services performed by the operator.

115. Yet another view was that the definition should refer to care, custody and control as the primary obligation of the operator, and to the provision or procurement of transport-related services as a secondary obligation. In opposition, it was stated that the definition should not refer to primary and secondary obligations. Moreover, if the concept of care, custody and control implied storage of the goods, it was inaccurate to regard that as a primary obligation of an operator. Modern transport terminals often performed services that did not primarily involve storage of the goods.

116. A view was expressed that the definition of an operator should refer to the contractual relationship between the parties, for example, by referring to an agreement or undertaking by the operator with respect to the goods.

117. It was suggested that the definition should include the notion that an operator took goods into his charge, and also refer to the place where the operator provided his services; otherwise, the scope of the uniform rules would be too broad. That should include an area under the operator's control. According to a further view, it should also include an area in respect of which the operator had a right of access or use, since an operator sometimes provided services in an area over which he did not have control, such as where he undertook to perform services for his customer, and entered into a sub-contract with another person who would actually perform the services.

118. A view was expressed that the definition of "operator" should exclude the mere transfer of the goods between a carrier and another person or between two carriers. Opposition to that view was expressed.

119. It was stated that the uniform rules should apply only in respect of goods involved in international carriage. Such a restriction should be included in the definition of "operator". According to another view, however, the rules should apply whether or not the goods were involved in international carriage. In that connection, it was noted that, when goods were deposited in a terminal to await their sale, it might not be known whether or not they were to be transported to another country. In addition, in some areas, the originally anticipated destination might be changed while the goods were in transit, changing the international character of the carriage. Those cases illustrated the undesirability of regarding the question of

⁷A/CN.9/275, para. 30.

whether or not the goods were involved in international carriage as a criterion for the application of the rules.

120. It was noted that the requirement that the goods must be involved in international carriage was contained in article 2(1)(b). Opinions were divided as to whether the requirement needed to be included both in the definition of "operator" in article 1 and in article 2. A view was expressed that it was not desirable to include the requirement twice. In favour of including it in article 1, it was stated that it was useful for the definition of "operator" to include the essential factors relating to the scope of application in the uniform rules. It was preferable for the requirement to appear in article 1 rather than in article 2, in order to separate it from the territorial requirement expressed in article 2(1)(a). According to another view, whether or not the requirement was included in article 1, it should be included in article 2, since it would be more clearly expressed in article 2. Yet another view was that the requirement should appear only in article 2.

121. It was suggested that, in the definition of "operator", the intention to refer only to persons who performed terminal operations as a professional or commercial activity should be made clear.

122. The Working Group convened a drafting group, composed of the representatives of France; Germany, Federal Republic of; China and the United States of America, for the purpose of drafting a definition of "operator", taking account the views that had been expressed. The drafting group submitted the following proposed definition to the Working Group:

"Operator" means a person who, in the course of his business, undertakes to take in charge goods involved in international carriage in order to provide or to procure transport-related services with respect to the goods in an area under his control or in respect of which he has a right of access or use. However, a person shall not be considered an operator [:

"(a) In respect of goods that he transfers between a carrier and another person or between two carriers, without storage; or

"(b)] To the extent that he is responsible for the goods as a carrier or multimodal transport operator under applicable rules of law governing carriage."

123. In view of the differences of opinion as to whether the requirement that the goods be involved in international carriage should be included in article 1 or in article 2, it was decided to place square brackets around the words "involved in international carriage", and to add a footnote to those words to the effect that the existence of the brackets was intended only to call attention to the question as to the most appropriate location for those words.

124. It was agreed to retain subparagraph (a) in square brackets, due to the difference of opinion as to whether or not the persons referred to in that subparagraph should be excluded from the definition of "operator". It was also agreed to add the words, "or from one means of

transport to another", after the words "between two carriers", in order to cover the case where goods were transferred from a mode of transport belonging to a person to another mode of transport belonging to the same person.

125. It was understood by the Working Group that, under subparagraph (a), the transfer of goods without interruption would be excluded from the operation of the rules. Several delegations were of the view that the rules should not apply in the case where goods were unloaded from a means of transport and placed on the ground for a short period of time, merely to await the arrival of the means of transport to which they were to be transferred, if "storage" was not involved. According to another view, however, the direct trans-shipment (transfer) of goods without interruption should be included in the operation of the rules.

126. The purpose of subparagraph (b) was to exclude a person from the definition of "operator" to the extent that his services were subject to legal rules governing carriage. A view was expressed that the reference to a multimodal transport operator should be deleted. It was generally agreed, however, to retain that reference, since a multimodal transport operator who was subject to legal rules governing that form of carriage should not be subject to the uniform rules.

127. The Working Group otherwise found the proposal to be acceptable.

Definition of "transport-related services"

128. It was generally agreed that the definition of "transport-related services" should be as follows:

"Transport-related services" includes such services as storage, warehousing, loading, unloading, stowage, trimming, dunnaging and lashing."

Definition of "goods"

129. It was generally agreed that the definition of "goods" should be as follows:

"Goods" includes any container, trailer, chassis, barge, pallet, railway wagon or similar article of transport or packaging, if not supplied by the operator."

130. A suggestion to change the words "if not supplied by the operator" to "if supplied by the customer" was not accepted. According to another suggestion, the words should be changed to "which are not the property of the operator", since operators sometimes supplied for use by their customers containers owned by container leasing companies; the words "if not supplied by the operator" could be interpreted so as to prevent the rules from applying in respect of those containers. The Working Group did not accept that suggestion.

Definition of "international carriage"

131. The Working Group considered the following definition of "international carriage", which was prepared by the Working Group at its ninth session:⁸

"'International carriage' means any carriage in which the place of departure and the place of destination are located in two different States [; however, if and to the extent that the carriage of the goods is to be performed in separate stages which are the subject of individual transport contracts, 'international carriage' shall cover only those parts of the carriage in respect of which the place of departure and the place of destination are situated in different States]."

132. Differing views were expressed as to the meaning of the words "any carriage in which the place of departure and the place of destination are located in two different States". Under one interpretation, carriage was international if the actual place of destination was in a different State from the place of shipment. It was stated that, so interpreted, the words were not acceptable. It would not be known whether the carriage was international until the goods arrived at their destination and, therefore, the operator would be uncertain as to whether or not he was subject to the uniform rules.

133. Under another interpretation, carriage was international if, under the contract of carriage, the place of departure and the place of destination were situated in two different States. A view was expressed that, so interpreted, the definition could conflict with the definitions of "international carriage" under international transport conventions. It was preferable for the uniform rules to refer to those definitions rather than to set forth its own definitions.

134. A view was expressed that the portion of the definition contained within square brackets should be retained in order to clarify that, in the case of segmented transport, goods in a terminal would be regarded as involved in international carriage only if, according to the individual contract for the segment by which the goods were carried to or from the terminal, the place of departure and the place of destination for the segment were located in two different States. According to another view, that portion should be deleted, as it unnecessarily complicated the definition. Moreover, the operator would in many cases not know what places of departure and destination were provided in the contracts of carriage for each segment. The prevailing view was to delete that portion of the definition.

135. A suggestion was made that the definition might be clarified and made more acceptable by providing only that goods were to be regarded as involved in international carriage if the operator could determine when he took the goods over that the places of departure and destination were located in two different States. It was observed that, in the majority of cases, the destination of the goods would be known by the time they arrived at the terminal, and the operator would

usually be able to determine from the documents accompanying the goods or from markings on the goods whether or not goods were involved in international carriage. The Working Group generally agreed with that approach, and decided to adopt a definition along the following lines:

"'International carriage' means any carriage in which the place of departure and the place of destination are identified as being located in two different States when the goods are taken in charge by the operator."

Form of notice or request

136. The Working Group considered the following provision proposed for inclusion in article 1:

"Any notice given or request made pursuant to this [Law] [Convention] may be given or made in any form which provides a record of the information contained therein."

137. A view was expressed that the requirement concerning the form of a notice and request should apply to all notices and requests under the uniform rules and that the proposed provision was acceptable. According to another view, however, no particular form should be required for certain notices and requests, such as notice of apparent loss of or damage to the goods under article 11(1), and a request for delivery of the goods, referred to in article 5(4). It should be possible for those notices to be given orally. Other notices should be subject to the requirement as to form, such as a notice of the sale of the goods under article 10(3) and a notice of delay under article 11(5). Accordingly, it was suggested that, rather than including in article 1 a requirement of general application as to the form of notice and request, each reference to a notice or request in the uniform rules should indicate whether it must be given in a particular form. According to another view, the question of the form of notice was relevant only to notices under article 11, and it should be dealt with in that article; no particular form should be required for any other notice or request under the uniform rules.

138. It was observed that the wording used to refer to notices should be consistent throughout the uniform rules.

139. A suggestion was made to consider the possibility of including in the uniform rules a provision establishing whether a notice was considered to have been given upon dispatch or upon receipt.

140. After discussion, the Working Group decided to retain the proposed provision for article 1, but to change the words "may be given or made in any form" to "shall be given or made in a form", and to provide that the provision was not to apply to notice of apparent loss or damage under article 11(1). It also decided to place the provision within square brackets, with a view towards considering the matter further. The secretariat was requested to consider the possibility of amending article 11(1) in order to clarify that oral notice was sufficient for apparent loss or damage, if it was given immediately.

⁸A/CN.9/275, para. 30.

Article 2

141. There was a general preference for alternative 2 of article 2 as prepared by the Working Group at its ninth session.⁹ It was observed that a question arose under alternative 1 as to the time when the goods had to be located within the territory of a Contracting State.

142. The question was raised whether there was to be discussion of a provision whereby a State would undertake to recognize and enforce the uniform rules only against those of its terminal operators who undertook to abide by the rules and were recognized as international terminal operators. It was pointed out that if such a mechanism were adopted it might influence States' thinking on some of the substantive rules. It was agreed that such a provision would be discussed at a later stage.

Paragraph (1)

143. A suggestion was made that, if the uniform rules were adopted as a convention, the convention should apply only if both the operator and his customer were from Contracting States. That suggestion was not adopted.

144. The Working Group's discussion with respect to subparagraph (b) is contained in paragraphs 120, 122, and 123, above. In the light of that discussion, it was decided to place square brackets around subparagraph (b).

Paragraph (2)

145. In view of the decision of the Working Group that, for the uniform rules to apply, the goods must be involved in international carriage when they were taken in charge by the operator, it was generally agreed that the portion of paragraph (2) dealing with the case where goods became involved in international carriage after they were taken over should not be retained.

146. A view was expressed that the presumption provided in paragraph (2) for the case where goods in a terminal ceased to be involved in international carriage was useful. It would help resolve the problems that would arise if it was not clear whether the loss or damage occurred before or after the goods ceased to be involved in international carriage. Moreover, a presumption broadly of the nature provided in paragraph (2) was also contained in the Warsaw Convention.

147. The prevailing view, however, was that paragraph (2) should be deleted in its entirety. It was stated that, if goods were subject to the uniform rules when taken in charge by the operator, they should remain subject to the rules, even if they later ceased to be involved in international carriage. If the paragraph was retained, a customer would be able to change the legal régime to which the goods were subject by changing the

destination of the goods. Moreover, the matter dealt with by the paragraph should be resolved by national courts and not by the uniform rules.

Paragraph (3)

148. A view was expressed that paragraph (3) should be deleted. It was not needed, in light of the decision taken with respect to the definition of "international carriage". Moreover, in the usual case of an operator organized as an independent legal entity, it raised questions as to which personnel's knowledge was relevant in determining whether or not the operator had knowledge that the goods were involved in international carriage.

149. According to another view, the paragraph should be retained in order to protect an operator who could not have known that the goods were involved in international carriage.

150. After discussion, it was decided to retain paragraph (3), amended to read along the following lines:

"However, this [Law] [Convention] shall not apply where the operator proves that he did not know and could not have known that the goods were involved in international carriage."

Article 3

151. The Working Group considered article 3 as prepared by the Working Group at its ninth session.¹⁰

Paragraph (1)

152. It was stated that an operator who undertook to perform services for his customer and subcontracted for the performance of those services would be covered by the words "has taken [the goods] in charge".

153. It was agreed that paragraph (1) should read as follows:

"The operator shall be responsible for the goods from the time he has taken them in charge until the time he has handed them over or made them available to the person entitled to take delivery of them."

Paragraph (2)

154. A question was raised as to whether paragraph (2) was necessary in view of the definitions of "operator" and "transport-related services" adopted by the Working Group.

155. After discussion, it was agreed to delete paragraph (2).

Article 4

156. Due to a lack of time, the Working Group was unable to consider article 4.

⁹A/CN.9/275, para. 41.

¹⁰A/CN.9/275, para. 45.

III. Other business and future work

157. The Secretary of the Commission recalled the decision reached by the Commission at its nineteenth session, that the eleventh session of the Working Group "should be held in 1987 at a date to be set by the secretariat that would enable the transmission to Governments for their comments of the text of the uniform rules on the liability of operators of transport terminals expected to be finalized at that session and the receipt of the comments in sufficient time to be placed before the Commission at its twenty-first session, in 1988".¹¹ The Secretary noted that, in order to conform to that mandate, the eleventh session of the Working Group could be held no later than October 1987.

158. A view was expressed that the eleventh session should be held in May or June, 1987. Opposition was expressed to holding the session during those months since it would not give sufficient time for delegations to

¹¹Report of the United Nations Commission on International Trade Law on the work of its nineteenth session, *Official Records of the General Assembly, Forty-first Session, Supplement No. 17 (A/41/17)*, para. 272.

engage in necessary consultations with Government and industry circles.

159. Stronger support was expressed for holding the session in September or October 1987. It was stated, however, that, if the session were held then, Governments would not be able to formulate and submit comments on the text finalized by the Working Group in time for consideration by the Commission at its twenty-first session.

160. The strongest support was expressed for holding the eleventh session in January 1988. It was noted that, in such a case, the Commission could not consider the text finalized by the Working Group until its twenty-second session in 1989. It was observed that the lapse of such a long period between the time when the text was finalized and the time when it was considered by the Commission was not desirable.

161. After discussion, the Working Group decided to recommend to the Commission that the eleventh session of the Working Group should be held in January 1988, in New York.

B. Revised draft articles 5 to 15 and new draft articles 16 and 17 of uniform rules on the liability of operators of transport terminals: note by the secretariat (A/CN.9/WG.II/WP.58)

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INTRODUCTORY NOTE

1. At its ninth session (1986), the Working Group on International Contract Practices engaged in an initial discussion of the draft articles of uniform rules on the liability of operators of transport terminals, which had

been prepared by the secretariat (A/CN.9/WG.II/WP.56; see Report of the Working Group on International Contract Practices on the work of its ninth session, A/CN.9/275). The Working Group prepared texts of draft articles 1 to 4 of the uniform rules with comments to serve as a basis for future consultations by

delegations and for the future work of the Working Group on those draft articles (A/CN.9/275, paras. 13, 14, and 16-58).

2. The present document contains revisions of draft articles 5 to 15, and new draft articles 16 and 17, which take into account the discussions of the Working Group at its ninth session. In general, the revisions to the draft articles as they appeared in A/CN.9/WG.II/WP.56 (hereinafter referred to as the "original draft") reflect matters upon which the Working Group was in general agreement or upon which a prevailing view emerged during the discussions. The revised draft articles also take into account suggestions at the ninth session for clarifying or improving the drafting of certain draft articles. Other drafting changes of that nature have been made upon the initiative of the secretariat. Changes in substance which have been made upon the initiative of the secretariat have been identified as such in the notes accompanying the provisions in question.

3. In view of the decision of the Working Group to decide on the form of the uniform rules after it had established the substance and content of the rules, the revision of the draft articles and the new draft articles have been prepared from the perspective of both a convention and a model law, and differences in drafting and in substance are indicated, where appropriate.

Revised draft articles 5 to 15 and new draft articles 16 and 17 of uniform rules on the liability of operators of transport terminals

Article 5: Basis of liability¹

(1) The operator is liable for loss resulting from loss of or damage to the goods, as well as for delay in handing over the goods to a person entitled to receive them,² if the occurrence which caused the loss, damage or delay took place during the period of the operator's responsibility for the goods as defined in article 3 of this [Law] [Convention], unless he proves that he, his servants, agents, or other persons of whose services the operator makes use for the performance of the [safekeeping and operations]³ referred to in article 3 of this [Law] [Convention],⁴ took all measures that could reasonably be required to avoid the occurrence and its consequences.⁵

[(2) In determining what measures could reasonably be required to avoid the occurrence and its consequences due regard shall be had to all of the circumstances of the

¹For the discussion of the Working Group on article 5, see A/CN.9/275, paras. 59-71.

²With respect to delay, see A/CN.9/275, paras. 59 and 60.

³In this and in subsequent articles, these words have been placed in square brackets pending the outcome of the discussion on article 3.

⁴As to the "other person of whose services the operator makes use", see A/CN.9/275, para. 61.

⁵Pursuant to A/CN.9/275, para. 65, the bracketed sentence at the end of paragraph 1 in the original draft of this paragraph has been deleted.

case, including, *inter alia*, the nature of the goods and the nature of the operations to be performed by the operator.]⁶

(3) Where a failure on the part of the operator, his servants, agents or other persons of whose services the operator makes use for the performance of the [safekeeping and operations] referred to in article 3 of this [Law] [Convention] to take the measures referred to in paragraph (1) of this article combines with another cause to produce loss, damage or delay, the operator is liable only to the extent that the loss resulting from such loss, damage or delay is attributable to that failure, provided that the operator proves the amount of the loss not attributable thereto.

(4) Delay in handing over the goods to a person entitled to receive them occurs when the operator fails to hand them over to such person within the time expressly agreed to by the operator or, in the absence of such agreement, within a reasonable time after receiving a request for the goods by such person.⁷

(5) If the operator does not hand over the goods to a person entitled to receive them within a period of []⁸ consecutive days following the date agreed to by the parties for handing over the goods, or, in the absence of such an agreement, following the date of the request of such person, a person entitled to make a claim for the loss of the goods may treat them as lost.⁹

Article 6: Limits of liability¹⁰

(1) [Alternative 1] The liability of the operator for loss of or damage to goods under this [Law] [Convention] is limited to [] units of account per package or other shipping unit, or [] units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.¹¹

[Alternative 2] [As alternative 1, plus the following:] However, if the goods were transported to or from the terminal by sea, the limits of liability applicable to the operator are the limits provided in [an international convention] [the law] applicable to the carriage by sea. [If no international convention is applicable, the limits

⁶Paragraph (2), amended as suggested in A/CN.9/275, para. 66, has been kept in square brackets because of the differing views in the Working Group on the usefulness of the paragraph.

⁷Incorporates drafting improvement suggested in A/CN.9/275, para. 68.

⁸See A/CN.9/275, para. 71.

⁹See A/CN.9/275, paras. 69 and 70. The Working Group may wish to note that, under paragraph (5), if a person entitled to receive the goods requests that they be handed over, but the operator does not hand them over, another person who may be entitled to make a claim for the loss of the goods would be able to treat them as lost.

¹⁰For the discussion of the Working Group on article 6, see A/CN.9/275, paras. 72-78.

¹¹See A/CN.9/275, para. 74. For the definition of the unit of account, see article 16, below, and A/CN.9/275, para. 72. For revision of the limits of liability, see article 17, below, and A/CN.9/275, para. 73.

of liability applicable to the operator are those set forth in the first sentence of this paragraph.^{12, 13}

[Alternative 3] The liability of the operator for loss of or damage to goods under this [Law] [Convention] is subject to the limits provided in [an international convention] [the law] applicable either to the mode of transport by which the goods were delivered to the operator or the mode of transport by which they were taken away from him, whichever are higher. [If no international convention is applicable, the liability of the operator is limited to [] units of account per package or other shipping unit, or [] units of account per kilogramme of gross weight of the good lost or damaged, whichever is the higher].^{12, 13}

[Alternative 4] [As alternative 1, plus the following:] However, if a carrier who claims recourse against an operator for loss of or damage to the goods was, in the action against himself, subject to limits of liability higher than the amounts provided in the preceding sentence, the limits of liability applicable to the carrier shall apply to the operator in the recourse action by the carrier.¹³

(2) The liability of the operator for delay in handing the goods over according to the provisions of article 5 of this [Law] [Convention] is limited to an amount equivalent to [] times the charges payable to the operator for his services in respect of the goods delayed, but not exceeding the total of such charges payable to the operator pursuant to his contract or agreement with his customer.¹⁴

(3) In no case shall the aggregate liability of the operator under both paragraphs (1) and (2) of this article exceed the limitation which would be established under

paragraph (1) for total loss of the goods in respect of which such liability was incurred.

(4) For the purpose of calculating which amount is the higher in accordance with paragraph (1), the following rules apply:

(a) Where a container, trailer, chassis, barge, pallet or similar article of transport or packaging is used to consolidate goods, the packages or other shipping units enumerated in a document signed or issued by the operator pursuant to article 4 of this [Law] [Convention]¹⁵ as packed in such article of transport or packaging, are deemed to be packages or shipping units. Except as aforesaid the goods in such article of transport or packaging are deemed to be one shipping unit.¹⁶

(b) In cases where the article of transport or packaging itself has been lost or damaged, that article, if not owned or otherwise supplied by the operator, is considered to be one separate shipping unit.

(5) The operator may agree to limits of liability exceeding those provided in paragraphs (1), (2) and (3).

(6) Unit of account means the unit of account mentioned in article 16.

¹⁵Under article 4 as drafted by the Working Group at its ninth session, in addition to issuing a document, the operator may acknowledge receipt of the goods by signing a document produced by his customer (see A/CN.9/275, para. 58). The reference in this and subsequent articles to a document "signed" by the operator takes into account that possibility.

¹⁶See A/CN.9/275, para. 77. Under the Hamburg Rules, article 15(1)(a), and the Multimodal Convention, article 8(1)(a), the carrier or multimodal transport operator (MTO) must include in the document issued by him (i.e., the bill of lading or multimodal transport document, respectively), *inter alia*, the number of packages or pieces in accordance with such particulars as are furnished by the shipper or consignor. Under article 16(1) and article 9(1), respectively, the carrier or MTO may insert a reservation in the document if he knows or has reasonable grounds to suspect that the particulars as furnished by the shipper or consignor are not accurate or if he had no reasonable means of checking them (e.g., in the case of a sealed container stated by the shipper or consignor to contain a certain number of packages). The effect of entering such a reservation is, pursuant to article 16(3) and article 10, respectively, to negate the *prima facie* evidentiary effect of the statements in the document. Under article 6(2) and article 18(2), respectively, the per-package limit of liability is based upon the number of packages enumerated in the document.

The Working Group may wish to consider adopting a comparable approach in the uniform rules. It will be noted that article 4 as drafted by the Working Group at its ninth session (A/CN.9/275, para. 58) does not require the operator to insert in the document particulars as furnished by his customer (see *ibid.*, para. 58, article 4(1)(a) and (b)), and, consequently, does not provide for reservations to such particulars to be inserted; nor does it provide any evidentiary effect with respect to the information contained in the document, although the Working Group generally agreed that the provision concerning such evidentiary effect contained in the previous draft of article 4 was acceptable (*ibid.*, para. 51). If the Working Group agrees that those elements should be incorporated in article 4, the effect of article 6(4) as set forth above would be, comparably to the Hamburg Rules and the Multimodal Convention, to base the per-package limit of liability upon the number of packages enumerated in a document signed or issued by the operator even if the particulars concerning the number of packages were furnished by his customer. Article 6(4) could so provide whether the operator was obligated to issue a document in all cases, or only when requested to do so by his customer (see *ibid.*, para. 47). In the latter case, if the customer wished to benefit from the per-package limitation, he could request the operator to issue a document, and furnish him with the particulars concerning the number of packages that were included in the consignment.

¹²See A/CN.9/275, paras. 74 and 75. Alternatives 2 and 3 seek to address the point that different types of terminals handle cargo of different average values. For example, the cargo handled at an air terminal usually has a significantly higher average value than cargo handled at a bulk goods terminal. To some extent, the limits of liability established under the various international transport conventions reflect the relative values of goods customarily carried by the modes of transport covered by the conventions. It has been suggested that linking the limits of liability applicable to a terminal operator to those applicable to the relevant mode of transport would tend to make the operator similarly subject to limits which were appropriate for the value of the goods handled by him. A somewhat comparable approach has been taken in the Multimodal Convention (article 18(3); see, also, article 30(1)).

The bracketed references to an international convention may be chosen if it is desired to refer only to limits contained in international conventions, and not to those under national law, which may provide for, or enable the parties to agree upon, lower limits. In that case, the article will have to establish limits to apply when the carriage is not governed by an international convention, as in the sentence within square brackets at the end of the paragraph.

¹³In addition to the reason mentioned in note 12, above, another reason for linking the limits of liability of the operator to those applicable to a carrier is to protect recourse by a carrier against an operator. Alternative 4 might achieve this more completely and efficiently than alternative 3.

¹⁴This paragraph contains no change in substance from article 6(2) of the original draft. In some cases, a contract between an operator and his customer may cover several shipments of goods. The Working Group may wish to clarify whether the last phrase of the paragraph ("but not exceeding the total of such charges payable to the operator pursuant to his contract or agreement with his customer") should refer to the total contract charges, or only the charges in respect of the shipment of which the delayed goods were a part.

Article 7: Application to non-contractual claims¹⁷

(1) The defences and limits of liability provided for in this [Law] [Convention] apply in any action against the operator in respect of loss of or damage to the goods for which he is responsible under this [Law] [Convention], as well as delay in delivery of such goods, whether the action is founded in contract, in tort or otherwise.

(2) If such an action is brought against a servant or agent of the operator, or another person of whose services the operator makes use for the performance of the [safekeeping and operations] referred to in article 3 of this [Law] [Convention],¹⁸ such servant, agent or person [, if he proves that he acted within the scope of his employment,¹⁹] is entitled to avail himself of the defences and limits of liability which the operator is entitled to invoke under this [Law] [Convention].

(3) Except as provided in article 8 of this [Law] [Convention], the aggregate of the amounts recoverable from the operator and from any servant, agent or person referred to in paragraph (2) of this article shall not exceed the limits of liability provided for in this [Law] [Convention].

Article 8: Loss of right to limit liability²⁰

(1) The operator is not entitled to the benefit of the limit of liability provided for in article 6 of this [Law] [Convention] if it is proved that the loss, damage or delay resulted from an act or omission of the operator himself or his servants²¹ done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

(2) Notwithstanding the provision of paragraph (2) of article 7 of this [Law] [Convention], a servant or agent of the operator or another person of whose services the operator makes use for the performance of the [safekeeping and operations] referred to in article 3 of this [Law] [Convention] is not entitled to the benefit of the limit of liability provided in article 6 of this [Law] [Convention] if it is proved that the loss, damage or delay resulted from an act or omission of such servant, agent or person done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

¹⁷For the discussion of the Working Group on article 7, see A/CN.9/275, paras. 79 and 80.

¹⁸See A/CN.9/275, para. 79.

¹⁹See A/CN.9/275, para. 80.

²⁰For the discussion of the Working Group on article 8, see A/CN.9/275, para. 81.

²¹In accordance with the prevailing view in the Working Group (A/CN.9/275, para. 81), the words "himself or his servants" are intended to make it clear that the operator should not lose the benefit of the limit of liability as a result of the acts of his agents or other persons of whose services he made use. If the Working Group thought it desirable, that intention could be specified in paragraph (1).

**Article 9: Special rules on dangerous goods²²
[Alternative 1]²³**

(1) The shipper of dangerous goods to be taken over by an operator shall mark or label the goods in a suitable manner and in accordance with any applicable international, national or other rule of law or regulation relating to dangerous or hazardous goods. If he packs dangerous goods, he shall do so in a suitable manner and in accordance with any such rule of law or regulation.

(2) When the shipper hands over dangerous goods to the operator or any person acting on his behalf, the shipper shall inform the operator of the dangerous character of the goods and, if necessary, any special handling requirements and precautions to be taken. If the shipper fails to do so and the operator does not otherwise have knowledge of their dangerous character when he takes the goods over:

(a) The shipper shall be liable to the operator for all loss resulting from such goods, including, but not limited to, damage to property of the operator, costs to the operator of taking the measures referred to in paragraph (2)(b) of this article, and any liability of the operator to another person arising from loss or damage caused by the dangerous goods; and

(b) The goods may at any time be destroyed, rendered innocuous or disposed of by other means, as the circumstances may require, without payment of compensation.

(3) The provisions of subparagraphs (a) and (b) of paragraph (2) of this article may be invoked by any operator who is responsible for the goods under this [Law] [Convention] whether or not he took over the goods from the shipper, unless the operator had knowledge of the dangerous character of the goods when he took them over.

(4) If dangerous goods become a[n] [actual]²⁴ danger to life or property in cases where the provisions of paragraph 2(b) of this article do not apply or may not be invoked, they may be destroyed, rendered innocuous or disposed of by other means, as the circumstances may require. The operator is liable for loss arising from the taking of such measures in accordance with the provisions of article 5 of this [Law] [Convention].²⁵

²²For the discussion of the Working Group on article 9, see A/CN.9/275, paras. 82-86.

²³This alternative follows the approach taken in the original version of article 9 (see A/CN.9/275, para. 83), with changes as suggested in or agreed to by the Working Group (A/CN.9/275, paras. 83-86).

²⁴The word "actual" is contained in the analogous provisions of the Hamburg Rules (article 13(4)) and the Multimodal Convention (article 23(4)). The Working Group may wish to consider whether the word adds anything of substance, or whether it may be omitted from the present draft text.

²⁵Paragraph (4) (modelled on article 13(4) of the Hamburg Rules and article 23(4) of the Multimodal Convention) has been added pursuant to a suggestion made in the Working Group that the operator should be permitted to destroy the goods or render them innocuous even if he knew of their dangerous character at the time he took them over (A/CN.9/275, para. 84). Under this paragraph, the operator would be liable to pay compensation for loss arising from the taking of such measures unless, pursuant to article 5, he proved that he, his servants, agents, or other person of whose services he made use, took all measures that could reasonably be required to avoid the danger and the necessity to take the measures.

[Alternative 2]²⁶

If dangerous goods handed over to the operator become a[n] [actual]²⁷ danger to life or property, the operator may destroy them, render them innocuous, or dispose of them by other means, as the circumstances may require. The operator shall not be liable pursuant to article 5 of this [Law] [Convention]²⁸ to pay compensation for loss arising from the taking of such measures unless:

(a) The goods were marked, labelled, packaged and documented as dangerous or hazardous goods in accordance with the legal rules²⁹ which were applicable in respect of the transport of the goods to the terminal, or which apply in respect of goods in the terminal, and such documentation was delivered to the operator at the time of or prior to the handing over of the goods to him; or

(b) At the time the goods were handed over to the operator, he otherwise knew or should reasonably have known of the dangerous character of the goods and any special handling needs or precautions to be taken with respect to them.

Article 10: Rights of security in goods³⁰

(1) The operator has a right of retention over the goods for costs and claims relating to the [safekeeping and operations] performed by him in respect of the goods

²⁶This alternative is presented in the light of two views expressed in the Working Group. According to the first view, the article should not impose upon the consignor obligations with respect to the identification and packaging of the goods, since he would often not be in a contractual relationship with the operator and may be far removed from the operator in the chain of transport. According to the second view, the purpose of the rules was to regulate the liability of the operator for loss of or damage to goods taken in charge by him and should not deal with obligations owed to him by another person (A/CN.9/275, para. 82).

Alternative 2 is designed to accord with these views by focusing upon the right of the operator to destroy or otherwise deal with goods which pose a danger, and by providing that the operator is not liable to pay compensation for the resulting loss or damage unless the goods were identified, packed and documented as required by applicable laws, or unless he otherwise had knowledge of the dangerous character of the goods and the necessary precautions to be taken. It would be in the interest of the shipper to make sure that the goods were properly identified, packed and documented in order to protect his right to compensation in the event of the loss or damage of the goods, although the article itself would not obligate him to do so. This alternative does not deal with the liability of the shipper or of the operator's customer to the operator for loss caused by the dangerous goods (cf. alternative 1, para. 2(a)).

²⁷See note 24, above.

²⁸The intended effect of the words "pursuant to article 5 of this [Law] [Convention]" is the following: if the goods were not properly marked, labeled, packaged and documented and the operator did not otherwise know of their dangerous character, the operator would not be liable to pay compensation for loss of or damage to the goods arising from destroying or otherwise dealing with them. If the goods were properly marked, labeled, packaged or documented, or if the operator did know of their dangerous character, he would be liable unless, pursuant to article 5, he proved that he took all reasonable measures to avoid having to destroy or otherwise deal with them.

²⁹The applicable "legal rules" are intended to include rules under international conventions and national laws, as well as officially promulgated regulations of the terminal.

³⁰For the discussion of the Working Group on article 10, see A/CN.9/275, paras. 87 and 88. This article reflects various views expressed in the Working Group.

during the period of his responsibility for them. However, nothing in this [Law] [Convention] prevents the operator and his customer from extending by agreement the right of retention of the operator, or affects the validity or effect of any right of security otherwise available under the law of [this State] [the State where the [safekeeping and operations] were performed].³¹

(2) The operator is not entitled to retain the goods if a sufficient guarantee for the sum claimed is provided or if an equivalent sum is deposited with a mutually accepted third party or with an official institution in [this State] [the State where the [safekeeping and operations] were performed].

[(3) In order to obtain the amount necessary to satisfy his claim, the operator is entitled to sell the goods over which he has exercised the right of retention provided in this article [to the extent permitted by and in accordance with the law of the place where the safekeeping and operations] were performed].³² [Before exercising any right to sell the goods, the operator shall make reasonable efforts to notify the owner of the goods of the intended sale. The operator shall account to the customer for the balance of the proceeds of the sale in excess of the sums due to the operator plus the reasonable costs of the sale.] [The right of sale shall in other respects be exercised in accordance with the law of the place where the [safekeeping and operations] were performed].³³

Article 11: Notice of loss, damage or delay³⁴

(1) Unless notice of loss or damage, specifying the general nature of the loss or damage, is given to the operator not later than the working day after the day when the goods were handed over to the person entitled to take delivery of them, the handing over is *prima facie* evidence of the handing over by the operator of the goods as described in the document signed or issued by the operator pursuant to article 4 of this [Law] [Convention], or, if no such document was signed or issued, in good condition.

(2) Where the loss or damage is not apparent, the provisions of paragraph (1) apply correspondingly if

³¹The choice between the wording in the two sets of brackets would depend upon whether the rules were adopted as a model law or a convention.

³²The bracketed wording, "to the extent permitted by . . .", might be included if the rules are adopted as a convention. In the case of a model law, the enacting State may wish to insert the conditions under which the right of sale may be exercised. See, e.g., the following bracketed wording ("Before exercising any right to sell the goods . . .") and note 33, below.

³³In the case either of a convention or a model law, without the bracketed wording "Before exercising any right to sell the goods . . .", the exercise of the right of sale would be subject to the procedures, if any, established under national law. Including that wording would ensure that the exercise of the right of sale would be subject at least to the minimum requirements set forth therein. A State would, however, be free to impose more detailed requirements, so long as the right of sale was not abrogated. In the case of a convention, this wording, plus the final bracketed sentence, might be substituted for the bracketed wording referred to in note 32, above ("to the extent permitted by . . .").

³⁴For the discussion of the Working Group on article 11, see A/CN.9/275, paras. 89 and 90.

notice is not given within [] consecutive days after the day when the goods [were handed over to the person entitled to take delivery of them] [reached their final destination [, but in no case later than [] consecutive days after the day when the goods were handed over to the person entitled to take delivery of them]]. [However, if the claimant had no opportunity to discover the loss or damage within the said period of time, the provisions of paragraph (1) apply correspondingly if notice is not given within [] consecutive days after the claimant had an opportunity to discover the loss or damage, but in no case later than [] consecutive days after the day when the goods were handed over by the operator.]

(3) If the operator participated in a survey or inspection of the goods at the time when they were handed over to the person entitled to take delivery of them, notice need not be given to the operator of loss or damage ascertained during that survey or inspection.

(4) In the case of any actual or apprehended loss or damage, the operator and the person entitled to take delivery of the goods must give all reasonable facilities to each other for inspecting and tallying the goods.

(5) No compensation shall be payable for loss resulting from delay in handing over the goods unless notice has been given to the operator within 60 consecutive days after the day when the goods were handed over to the person entitled to take delivery of them.

(6) (a) Notice required to be given by this article may be given in any form which provides a record of the information contained therein.

(b) For the purpose of this article, notice given to a person acting on the operator's behalf is deemed to have been given to the operator.

*Article 12: Limitation of actions*³⁵

(1) Any action under this [Law] [Convention] is time-barred if judicial or arbitral proceedings have not been instituted within a period of two years.

(2) The limitation period commences on the day on which the operator hands over the goods or part thereof to a person entitled to take delivery of them, or, in cases of total loss of the goods, on the day the operator notifies the person entitled to make a claim that the goods are lost, or, if no such notice is given, on the day that person may treat the goods as lost in accordance with article 5 of this [Law] [Convention].

(3) The day on which the limitation period commences is not included in the period.

(4) The operator may at any time during the running of the limitation period extend the period by a declaration in writing to the claimant. The period may be further extended by another declaration or declarations.

(5) A recourse action by a carrier [or another person]³⁶ against the operator may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs if instituted within [90] days after

³⁵For the discussion of the Working Group on article 12, see A/CN.9/275, paras. 91-93.

³⁶The other person referred to might include, for example, another operator.

the carrier [or person] has been held liable in an action against himself [or has settled the claim upon which such action was based].

*Article 13: Contractual stipulations*³⁷

(1) Unless otherwise provided in this [Law] [Convention], any stipulation in a contract [for the safekeeping of goods] concluded by an operator or in any document signed or issued by the operator pursuant to article 4 of this [Law] [Convention]³⁸ is null and void to the extent that it derogates, directly or indirectly, from the provisions of this [Law] [Convention]. The nullity of such a stipulation does not affect the validity of the other provisions of the contract or document of which it forms a part.

(2) Notwithstanding the provisions of paragraph (1) of this article, the operator may agree to increase his responsibilities and obligations under this [Law] [Convention].

*Article 14: Interpretation of this Convention*³⁹

In the interpretation and application of the provisions of this Convention, regard shall be had to its international character and to the desirability of promoting international uniformity with respect to the treatment of the issues dealt with in this Convention.

*Article 15: International transport conventions*⁴⁰

This [Law] [Convention] does not modify any rights or duties which may arise under an international convention relating to the international carriage of goods which is binding on [this State] [a State which is a party to this Convention] or any law of [this State] [such State] relating to the international carriage of goods.

*Article 16: Unit of account*⁴¹

[For Model Law]

The unit of account referred to in article 6 of this Law is the Special Drawing Right as defined by the Inter-

³⁷For the discussion of the Working Group on article 13, see A/CN.9/275, paras. 94-96.

³⁸The phrase "document evidencing such a contract" in the original draft of article 13 has been changed to "document signed or issued by the operator pursuant to article 4 of this [Law] [Convention]" upon the initiative of the secretariat, since the document as envisaged in the Working Group at its ninth session would not necessarily evidence the contract between the parties (see A/CN.9/275, paras. 46-58).

³⁹In accordance with the agreement of the Working Group as reflected in A/CN.9/275, para. 97, this provision would not appear in a model law.

⁴⁰For the discussion of the Working Group on article 15, see A/CN.9/275, para. 98.

⁴¹For the decision of the Working Group that the limits of liability should be expressed in a unit of account referring to the Special Drawing Right, see A/CN.9/275, para. 72. Both versions of article 16 are modelled on the unit of account provisions adopted by the Commission in 1982 (see Report of the United Nations Commission on International Trade Law on the work of its fifteenth session (1982), *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 17* (A/37/17 and Corr. 1 and 2 (English only)), para. 63 (*Yearbook of the United Nations Commission on International Trade Law* (1982), part one, A)); the use of the provisions was endorsed by the General Assembly in resolution 37/107 of 16 December 1982 (*Yearbook of the United Nations Commission on International Trade Law* (1982), part one, D).

national Monetary Fund. The amounts mentioned in article 6 are to be expressed in [the national currency] according to the value of [the national currency] at the date of judgment or the date agreed upon by the parties. [For States members of the International Monetary Fund:] The equivalence between [the national currency] and the Special Drawing Right is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. [For States which are not members of the International Monetary Fund:] The equivalence between [national currency] and the Special Drawing Right is to be calculated in the following manner [indicate a manner of calculation which expresses in the national currency as far as possible the same real value for the amounts in article 6 as is expressed there in units of account].

[For Convention]

(1) The unit of account referred to in article 6 of this Convention is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in article 6 are to be expressed in the national currency of a State according to the value of such currency at the date of judgment or the date agreed upon by the parties. The equivalence between the national currency of a Contracting State which is a member of the International Monetary Fund and the Special Drawing Right is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The equivalence between the national currency of a Contracting State which is not a member of the International Monetary Fund and the Special Drawing Right is to be calculated in a manner determined by that State.

(2) The calculation mentioned in the last sentence of paragraph (1) is to be made in such a manner as to express in the national currency of the Contracting State as far as possible the same real value for amounts in article 6 as is expressed there in units of account. Contracting States must communicate to the Depositary the manner of calculation at the time of signature or when depositing their instrument of ratification, acceptance, approval or accession and whenever there is a change in the manner of such calculation.

Article 17: Revision of limits of liability⁴²

[For Model Law]

The amounts set forth in article 6 of this Law shall be linked to [a specific price index which might be considered appropriate for this Law]. Those amounts

shall be adjusted on the first day of July of each year following the adoption of this Law by an amount, rounded to the nearest whole number, corresponding in percentage to the increase or decrease in the level of the index for the year ending on the last day of the previous December over its level for the prior year. The amounts shall not, however, be increased or decreased if the increase or decrease in the index does not exceed [] per cent. Where no adjustment was made in the previous year because the change was less than [] per cent, the comparison shall be made with the level for the last year on the basis of which an adjustment was made.

[For Convention]

[Alternative 1]

(1) The amounts set forth in article 6 shall be linked to [a specific price index which might be considered appropriate for this Convention]. On coming into force of this Convention, the amounts set forth in article 6 shall be adjusted by an amount, rounded to the nearest whole number, corresponding in percentage to the increase or decrease in the index for the year ending on the last day of December prior to which this Convention came into force over its level for the year ending on the last day of December [of the year in which the Convention was opened for signature]. Thereafter, they shall be adjusted on the first day of July of each year by an amount, rounded to the nearest whole number, corresponding in percentage to the increase or decrease in the level of the index for the year ending on the last day of the previous December over its level for the prior year.

(2) The amounts set forth in article 6 shall not, however, be increased or decreased if the increase or decrease in the index does not exceed [] per cent. Where no adjustment was made in the previous year because the change was less than [] per cent, the comparison shall be made with the level for the last year on the basis of which an adjustment was made.

(3) By the first day of April of each year the Depositary shall notify each Contracting State and each State which has signed the Convention of the amounts to be in force as of the first day of July following. Changes in the amounts shall be registered with the Secretariat of the United Nations in accordance with General Assembly regulations to give effect to Article 102 of the Charter of the United Nations.

[For Convention]

[Alternative 2]

(1) The Depositary shall convene a meeting of a Committee composed of a representative from each Contracting State to consider increasing or decreasing the amounts in article 6:

(a) Upon the request of at least [] Contracting States; or

(b) When five years have passed since the Convention was opened for signature or since the Committee last met.

⁴²For the discussion of the Working Group on mechanisms for the revision of limits of liability, see A/CN.9/275, para. 73. The version of article 17 designed for a model law is modelled on the sample price index provision adopted by the Commission in 1982, and endorsed by the General Assembly, while alternative 1 of the version designed for a convention follows that provision (see Report of the United Nations Commission on International Trade Law on the work of its fifteenth session (1982), para. 63, and General Assembly resolution 37/107 of 16 December 1982, both cited in note 41, above). Alternative 2 of the version designed for a convention follows the sample amendment procedure for limit of liability adopted by the Commission in 1982, and endorsed by the General Assembly (references as above).

(2) If the present Convention comes into force more than five years after it was opened for signature, the Depositary shall convene a meeting of the Committee within the first year after it comes into force.

(3) Amendments shall be adopted by the Committee by a [] majority of its members present and voting.*

(4) Any amendment adopted in accordance with paragraph (3) of this article shall be notified by the Depositary to all Contracting States. The amendment shall be deemed to have been accepted at the end of a period of [6] months after it has been notified, unless within that period not less than [one-third] of the States that were Contracting States at the time of the adoption of the amendment by the Committee have communicated to the Depositary that they do not accept the amendment. An amendment deemed to have been

accepted in accordance with this paragraph shall enter into force for all Contracting States [12] months after its acceptance.

(5) A Contracting State which has not accepted an amendment shall nevertheless be bound by it, unless such State denounces the present Convention at least one month before the amendment has entered into force. Such denunciation shall take effect when the amendment enters into force.

(6) When an amendment has been adopted by the Committee but the [6] month period for its acceptance has not yet expired, a State which becomes a Contracting State to this Convention during that period shall be bound by the amendment if it comes into force. A State which becomes a Contracting State to this Convention after that period shall be bound by any amendment which has been accepted in accordance with paragraph (4).

*The Conference of Plenipotentiaries may wish to insert a list of criteria to be taken into account by the Committee.

IV. AUTOMATIC DATA PROCESSING

Legal implications of automatic data processing: report of the Secretary-General (A/CN.9/292)

1. The Commission at its seventeenth session in 1984 decided to place the subject of the legal implications of automatic data processing to the flow of international trade on its programme of work as a priority item.¹ In doing so, it took note of a report of the Working Party on Facilitation of International Trade Procedures, which is jointly sponsored by the Economic Commission for Europe and the United Nations Conference on Trade and Development, suggesting that, since the legal problems arising in this field were essentially those of international trade law, the Commission as the core legal body in the field of international trade law appeared to be the appropriate central forum to undertake and co-ordinate the necessary action.²

I. Meeting hosted by commission secretariat

2. At its nineteenth session in 1986, the Commission had before it a report of the Secretary-General describing the work of international organizations active in the field of automatic data processing (A/CN.9/279). The Commission approved the suggestion contained in the report that it might undertake leadership in the co-ordination of activities in this field by requesting the secretariat to organize a meeting in late 1986 or early 1987 to which all interested intergovernmental and international non-governmental organizations might be invited.³

3. The criterion used for inviting organizations to the meeting held at Vienna on 12-13 March 1987 was to invite all those mentioned in the report plus those known to be interested in the matter, i.e.:

Central Office for International Rail Transport
Council of Europe
Customs Co-operation Council
Economic Commission for Europe
European Communities, Commission of
Hague Conference on Private International Law
International Air Transport Association

International Bureau for Informatics
International Chamber of Commerce
International Civil Aviation Organization
International Law Association
International Maritime Organization
International Rail Transport Committee
Organization for Economic Co-operation and Development

4. The following organizations attended:

Central Office for International Rail Transport
Council of Europe
Economic Commission for Europe
European Communities, Commission of
Hague Conference on Private International Law
International Maritime Organization
Organization for Economic Co-operation and Development
United Nations Commission on International Trade Law

5. All of the organizations that had been invited, including those that were not able to attend, expressed their appreciation to the Commission for taking leadership in organizing co-operation between the organizations active in this field. Appreciation was also expressed for the fact that in the Commission's invitation it had been stressed that the Commission was specifically not attempting to interfere with the internal decision-making process of any organization and that no decision could come out of the meeting that would require an organization to undertake certain topics or to desist from other topics.

6. It was recognized at the meeting that co-operation was both important and, in some respects, difficult. It was important because the introduction of automatic data processing in international trade, through the use of computers and their inter-connection by telecommunications, created legal problems that could seldom be solved by any one organization. Therefore, co-operation was necessary, not only to ensure that organizations were not working in conflict with one another, but because certain problems can be solved only through efforts taken from several points of view. It was, however, acknowledged that co-operation was sometimes difficult to achieve because of the differences in the organizations as reflected in their fundamental concerns, approach to legal problems, membership and working methods.

¹Report of the United Nations Commission on International Trade Law on the work of its seventeenth session, *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 17 (A/39/17)*, para. 136.

²The report of the Working Party is reproduced in A/CN.9/238, annex.

³Report of the United Nations Commission on International Trade Law on the work of its nineteenth session, *Official Records of the General Assembly, Forty-first Session, Supplement No. 17 (A/41/17)*, para. 261.

7. At the end of the meeting there was general agreement that the exchange of information that had taken place between the participants was in itself one of the most useful forms of co-operation as it would permit the organizations to carry out their individual programmes of activity in a manner that was most likely to lead to consistent results.

8. The hope was expressed that a similar meeting would be organized by the Commission within the next year or two, depending on developments. It was hoped that additional inter-governmental and international non-governmental organizations that might be interested in the legal problems arising out of the use of automatic data processing in the field of international trade would be in contact with the Commission's secretariat so that their activities could be reflected in future reports and so that they may be invited to future meetings.

II. Activities of other organizations

9. The information on the work of other organizations was largely, though not exclusively, made available at or in conjunction with the co-ordination meeting.

A. *International Maritime Organization (IMO)*

10. The main activity of the IMO related to legal problems arising out of the use of automated data processing is in respect of the Convention on Facilitation of International Maritime Traffic (London, 9 April 1965, as amended). As noted in the report of the Secretary-General submitted to the nineteenth session of the Commission (A/CN.9/279, para. 30), a number of amendments to the Convention designed to permit the use of automatic data processing techniques entered into force on 1 October 1986.

11. It was pointed out that the Facilitation Convention did not purport to establish binding legal rules. Instead, it established standards that the international community agreed would facilitate international maritime traffic, requiring each Contracting State to indicate which of the standards it was not prepared to implement. Therefore, the entry into force of the recent amendments to the Convention does not necessarily mean that data processing techniques will be used for the documentation required in States parties to the Convention. Nevertheless, the entry into force of the amendments was expected to lead to wider acceptance of such documentation.

B. *United Nations Economic Commission for Europe (ECE)*

12. The ECE Working Party on Facilitation of International Trade Procedures is currently engaged in studies aimed at replacing paper documents by modern methods of data transmission. Universal syntax rules for "Electronic Data Interchange for Administration, Commerce and Transport" (EDIFACT) were recently

approved by the Working Party; they are now circulated as a draft Standard of the International Organization for Standardizations (ISO). Although of a technical nature, some of the components of the syntax rules (e.g. the United Nations Trade Data Elements Directory, UNTED) might contribute to the harmonization and unification of international trade law by providing internationally agreed, precise trade "data elements".

13. Other studies concerning new methods of data transmission include the utilization of microcircuit ("smart") cards in various sectors, for instance to replace traditional paper bills of lading. Under the auspices of the ECE Inland Transport Committee, a feasibility study is being undertaken on the utilization of such a device for the facilitation of road transport procedures. Trials might be undertaken in the near future to replace TIR Carnets (which cover customs transit of goods carried by road vehicles or in containers) by a microcircuit card which would provide a link between trade data electronically interchanged and the physical transport operation.

14. Another field of research covers the replacement of negotiable documents, more specifically the bill of lading, by non-negotiable instruments more suitable for automatic data transmission because they would overcome the legal problems associated with the "symbolic" value of bills of lading. In the course of its efforts to promote the use of sea waybills instead of bills of lading, the ECE Working Party found that some problems of liability and the incorporation of general conditions of transport hampered their utilization in practice. This issue is now under study in the framework of the Comité Maritime International.

C. *International Chamber of Commerce (ICC)*

15. At the request of the ECE Working Party on Facilitation of International Trade Procedures, ICC had undertaken to prepare Uniform Rules for Communication Agreements (UNCA). Those Uniform Rules were intended to provide legal rules available for voluntary adoption by parties to international trade transactions using open communication systems.

16. During the year since the preparation of A/CN.9/279, the Uniform Rules had been significantly revised and had been renamed Uniform Rules of Conduct for Interchange of Trade Data by Teletransmission (UNCID). UNCID was intended to apply only to the procedure for the interchange of trade data effected by teletransmission and not to the substance of the trade data messages interchanged. Although the earlier drafts of UNCA were intended to provide legal rules, it had proven difficult to contemplate how they might become binding on communicating parties except as a result of a prior agreement. Furthermore, it appeared that the needs of communicating parties might differ sufficiently in different environments so that a uniform set of rules was not desirable. Therefore, UNCID is now intended as a code of conduct establishing minimum standards of conduct in the matters it governs.

17. Nevertheless, several user groups had used the draft UNCID in the preparation of rules governing the user group.

18. The current draft of UNCID has been distributed for comment and a meeting has been scheduled for 4 June 1987 to consider the comments. The draft contains provisions on the obligation of the parties to follow agreed interchange standards, duty of care in respect of correctness of transmissions, identification of transmissions, acknowledgment of transmissions, confirmation of content, protection of trade data and storage of data.

D. *International Rail Transport Committee (CIT)*

19. In February 1987 CIT sent to the principal international associations of railroad users in Europe, to international organizations having competence in customs matters and to other organizations interested in the work of CIT a copy of the draft general conditions (*cahier des charges*) for an electronic replacement for the rail consignment note CIM.

20. In the accompanying circular letter CIT pointed out that the desired goal would be for the electronic replacement to be acceptable to banks for use in documentary letters of credit under the Uniform Customs and Practice for Documentary Credits (ICC publication No. 400) and to banks in the States members of the Council for Mutual Economic Assistance (CMEA), where the duplicate of the rail consignment note must always be presented to the bank. For the electronic replacement of the rail consignment note to be practicable, it must also be acceptable to customs officials, with whom CIT is also in contact.

21. At the co-ordination meeting convened by the UNCITRAL secretariat, it was noted that the problems faced by the railroad authorities in establishing an electronic replacement for the rail consignment note acceptable to banks and customs officials would seem to be identical to the problems that would be faced by air and sea carriers in replacing their current paper-based transport documents. The railroad authorities seem likely to be the first to solve these problems. They have authority under the version of COTIF in force since 1 May 1985 to replace the paper-based rail consignment note by an electronic replacement, while the air transport industry must await the coming into force of Montreal Protocol No. 4. They also constitute a smaller and more cohesive group of parties than is available in the sea transport industry and therefore may be better placed to establish the necessary new procedures with the banking industry and with customs officials.

22. It is envisaged that in the beginning the new system will extend to some ten member States of the Convention Concerning International Transport by Rail (COTIF), (Berne, 1980) in Western Europe.

23. Because of the interest in having common solutions to the use of electronic versions of transport documents in banking and customs applications, the Commission's secretariat undertook to bring these developments in respect of the rail consignment note to the attention of

the appropriate authorities of the other modes of transport.

E. *European Communities, Commission of*

1. *Trade data interchange systems*

24. On 1 December 1986 the Commission of the European Communities submitted a Communication to the Council containing a proposal for a Council regulation introducing the preparatory phase of a Community programme on trade electronic data interchange systems (TEDIS) (COM(86) 662 final). The proposal envisages an extensive programme to develop TEDIS throughout the Communities, listing fourteen aims of the preparatory phase. In respect of legal questions, article 3 of the proposed regulation states that the aim is:

"(7) Solving of legal problems that might inhibit the development of trade electronic data interchange and ensuring that restrictive telecommunications regulations cannot hamper the development of trade electronic data interchange;"

25. No action in respect of this proposal can be undertaken until the Council has acted.

2. *Indirect taxation*

26. For the last several years the Commission has been working on plans to link trade circles with tax authorities by data transmission. In developing the administrative requirements for such matters as authentication of messages, retention of electronic documents (especially those of a commercial nature necessary for audit purposes) and evidence, it became evident that the concerns of the tax authorities were essentially the same as those of the trade parties in regard to their messages between themselves. The principal difference was that the administrative authorities could not take all of the risks that commercial parties could take and, therefore, required a higher degree of legal security.

27. In order to determine with more precision the legal situation in the member States of the Communities, a study was expected to be undertaken, with the aid of national experts, on such matters as evidentiary requirements in civil and administrative litigation and rules of law requiring the use of paper-based documents. In the latter category, special mention was made of the requirements for the retention of paper-based commercial documents for audit purposes by administrative authorities. One example given was the requirement in one country of a paper-based invoice in commercial sales.

28. In the co-ordination meeting it was recognized that this study would constitute a practical application of the UNCITRAL recommendation made by the Commission at its eighteenth session in 1985 on the legal value of computer records.⁴ The study, once completed, would be

⁴ Report of the United Nations Commission on International Trade Law on the work of its eighteenth session, *Official Records of the General Assembly, Fortieth session, Supplement No. 17 (A/40/17)*, para. 360.

of great interest to all future users of trade data transmission within the twelve States of the Communities. It was also recognized that the study would have indicative value to parties outside the Communities, since it would give an indication of the matters they might look for in their own law.

3. *New payment cards*

29. On 12 January 1987 the Commission of the European Communities sent to the Council a Communication on New Payment Cards (COM (86) 754 final). The Communication proposes an initiative to lead to the inter-operability throughout the member States of the Community of payment cards that incorporate magnetic stripes or microcircuits, or both, and that can be used to draw cash from cash dispensers or make payments via terminals installed at points of sale.

30. The initiative deals largely with technical compatibility. In addition, the initiative deals with freedom of cross-frontier payments, competition rules, and certain rules relating to use of cards (role of traders who accept cards; consumer protection). Questions of consumer protection policy in respect of electronic funds transfers are also being studied pursuant to the Council's resolution of 6 May 1986, para. 34 and point 10 of its proposed calendar of actions.

F. *Organization for Economic Co-operation and Development (OECD)*

31. Although OECD is not, as such, involved in legal problems arising out of trade data interchange, it is interested in the work of other organizations in this field. It could consider endorsing the work of other organizations as a means of promoting efforts to reduce legal obstacles to trade data interchange.

32. In 1985, a Declaration on Transborder Data Flows was adopted by the OECD Ministerial Council, in which member Governments declared their intention to:

(a) Promote access to data and information and related services, and avoid the creation of unjustified barriers to the international exchange of data and information;

(b) Seek transparency in regulations and policies relating to information, computer and communications services affecting transborder data flows;

(c) Develop common approaches for dealing with issues related to transborder data flows and, when appropriate, develop harmonized solutions; and

(d) Consider possible implications for other countries when dealing with issues related to transborder data flows.

They also agreed to undertake further work on issues emerging from:

- (a) Flows of data accompanying international trade;
- (b) Marketed computer services and computerised information services;
- (c) Intra-corporate data flows.

The OECD's Committee for Information, Computer and Communications Policy is at present working on some of these issues.

33. In December 1987 a high-level meeting of the OECD's Committee on Information, Computer and Communications Policy will be held that will consider, among other themes, the need for improving international rules of the game in the area of information and communications policy. Under this theme, issues dealing with trade in computer and communication services, privacy protection, trade secrets and other related legal issues including intellectual property protection will be discussed.

G. *Council of Europe*

34. Under article 19 of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, which came into force on 1 October 1985 for the present five contracting States (France, Germany, Federal Republic of, Norway, Spain and Sweden) a consultative committee was to meet within one year of the entry into force of the Convention, i.e. before 1 October 1986. The committee, composed of representatives of the Contracting States and observers from non-contracting States, held its first meeting in June 1986.

35. According to article 19 the committee is to make proposals with a view to facilitating or improving the application of the Convention, make proposals for the amendment of the Convention and to formulate its opinion on proposals for amendment of the Convention forwarded to it, and, at the request of a party, to express an opinion on any question concerning the application of the Convention.

36. Following elaboration of the Convention in 1981 an inter-governmental committee of experts on data protection has drawn up four non-binding recommendations addressed to the Governments of the member States that interpret the requirements of the Convention in the light of particular problems specific to data processing in a particular sector. The four recommendations adopted to date are:

(a) Recommendation No. (81) (1) on regulations for automated medical data banks;

(b) Recommendation No. (83) 10 on the protection of personal data used for purposes of scientific research and statistics;

(c) Recommendation No. (85) 20 on the protection of personal data used for purposes of direct marketing;

(d) Recommendation No. (86) 1 on the protection of personal data used for social security purposes.

37. The inter-governmental committee of experts is currently studying the data protection problems in the police sector, the employment sector, the data protection of the new technologies and, in the banking sector, the use of microcircuit cards and point-of-sale transfer of funds.

V. STATUS OF CONVENTIONS

Status of conventions: note by the secretariat (A/CN.9/294)

1. At its thirteenth session the Commission decided that it would consider, at each of its sessions, the status of conventions that were the outcome of work carried out by it.^a

2. The present note is submitted pursuant to that decision. The annex hereto sets forth the state of signatures, ratifications, accessions and approvals as of 15 May 1987 to the following conventions: Convention on the Limitation Period in the International Sale of Goods (New York, 1974); Protocol amending the

Convention on the Limitation Period in the International Sale of Goods (Vienna, 1980); United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg); United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980); and Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). The latter convention, which has not emanated from the work of the Commission, has been included because of the close interest of the Commission in it, particularly in connection with the Commission's work in the field of international commercial arbitration. In addition, the annex sets forth those jurisdictions that have enacted legislation based on the UNCITRAL Model Law on International Commercial Arbitration.

^aReport of the United Nations Commission on International Trade Law on the work of its thirteenth session, *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17)*, para. 163.

ANNEX

1. *Convention on the Limitation Period in the International Sale of Goods* (New York, 1974)

State	Signature	Ratification	Accession
Argentina			9 October 1981
Brazil	14 June 1974		
Bulgaria	24 February 1975		
Byelorussian SSR	14 June 1974		
Costa Rica	30 August 1974		
Czechoslovakia	29 August 1975	26 May 1977	
Dominican Republic			23 December 1977
Egypt			6 December 1982*
German Democratic Republic	14 June 1974		
Ghana	5 December 1974	7 October 1975	
Hungary	14 June 1974	16 June 1983	
Mongolia	14 June 1974		
Nicaragua	13 May 1975		
Norway	11 December 1975	20 March 1980	
Poland	14 June 1974		
Ukrainian SSR	14 June 1974		
USSR	14 June 1974		
Yugoslavia			27 November 1978
Zambia			6 June 1986

Signatures only: 10; ratifications: 4; accessions: 5

Ratifications and accessions necessary to bring Convention into force: 10

*By virtue of accession to Protocol Amending the Convention on the Limitation Period in the International Sale of Goods (Vienna, 1980) (article VIII(2) of the Protocol).

Declarations and reservations

Upon signature Norway declared that in accordance with article 34 the Convention would not govern contracts of sale where the seller and the buyer both had their relevant places of business within the territories of the Nordic States (i.e. Norway, Denmark, Finland, Iceland and Sweden).

**2. Protocol amending the Convention on the Limitation Period
in the International Sale of Goods (Vienna, 1980)**

Since the other requirements for entering into force will have been met, the Protocol will enter into force on the day on which the Convention on the Limitation Period in the International Sale of Goods (New York, 1974) enters into force.

<i>State</i>	<i>Accession</i>
Argentina	19 July 1983
Egypt	6 December 1982
Hungary	16 June 1983
Zambia	6 June 1986

3. United Nations Convention on the Carriage of Goods by Sea (Hamburg 1978)

<i>State</i>	<i>Signature</i>	<i>Ratification</i>	<i>Accession</i>
Austria	30 April 1979		
Barbados			2 February 1981
Brazil	31 March 1978		
Chile	31 March 1978	9 July 1982	
Czechoslovakia	6 March 1979		
Denmark	18 April 1979		
Ecuador	31 March 1978		
Egypt	31 March 1978	23 April 1979	
Finland	18 April 1979		
France	18 April 1979		
Germany, Federal Republic of	31 March 1978		
Ghana	31 March 1978		
Holy See	31 March 1978		
Hungary	23 April 1979	5 July 1984	
Lebanon			4 April 1983
Madagascar	31 March 1978		
Mexico	31 March 1978		
Morocco			12 June 1981
Norway	18 April 1979		
Pakistan	8 March 1979		
Panama	31 March 1978		
Philippines	14 June 1978		
Portugal	31 March 1978		
Romania			7 January 1982
Senegal	31 March 1978	17 March 1986	
Sierra Leone	15 August 1978		
Singapore	31 March 1978		
Sweden	18 April 1979		
Tunisia			15 September 1980
Uganda			6 July 1979
United Republic of Tanzania			24 July 1979
United States of America	30 April 1979		
Venezuela	31 March 1978		
Zaire	19 April 1979		

Signatures only: 23; ratifications: 4; accessions: 7

Ratifications and accessions necessary to bring Convention into force: 20

Declarations and reservations

Upon signing the Convention the Czechoslovak Socialist Republic declared in accordance with article 26 a formula for converting the amounts of liability referred to in paragraph (2) of that article into the Czechoslovak currency and the amount of the limits of liability to be applied in the territory of the Czechoslovak Socialist Republic as expressed in the Czechoslovak currency.

4. United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)

The Convention will enter into force on 1 January 1988 in respect of Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syrian Arab Republic, United States of America, Yugoslavia and Zambia.

<i>State</i>	<i>Signature</i>	<i>Ratification of approval (A)</i>	<i>Accession</i>
Argentina			19 July 1983
Austria	11 April 1980		
Chile	11 April 1980		
China	30 September 1981	11 December 1986 (A)	
Czechoslovakia	1 September 1981		
Denmark	26 May 1981		
Egypt			6 December 1982
Finland	26 May 1981		
France	27 August 1981	6 August 1982	
German Democratic Republic	13 August 1981		
Germany, Federal Republic of	26 May 1981		
Ghana	11 April 1980		
Hungary	11 April 1980	16 June 1983	
Italy	30 September 1981	11 December 1986	
Lesotho	18 June 1981	18 June 1981	
Netherlands	29 May 1981		
Norway	26 May 1981		
Poland	28 September 1981		
Singapore	11 April 1980		
Sweden	26 May 1981		
Syrian Arab Republic			19 October 1982
United States of America	31 August 1981	11 December 1986	
Venezuela	28 September 1981		
Yugoslavia	11 April 1980	27 March 1985	
Zambia			6 June 1986

Signatures only: 14; ratifications: 6; accessions: 4; approval: 1.

Declarations and reservations

Upon signing the Convention the Governments of Denmark, Finland, Norway and Sweden declared in accordance with article 92(1) that they would not be bound by Part II of the Convention (Formation of the Contract).

Upon ratifying the Convention the Government of Hungary declared that it considered the General Conditions of Delivery of Goods between Organizations of the Member Countries of the Council for Mutual Economic Assistance to be subject to the provisions of article 90 of the Convention.

Upon ratifying the Convention the Governments of Argentina and Hungary stated, in accordance with articles 12 and 96 of the Convention, that any provision of article 11, article 29 or Part II of the Convention that allowed 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, did not apply where any party had his place of business in their respective States.

Upon approving the Convention the Government of China declared that it did not consider itself bound by subparagraph (b) of paragraph (1) of article 1 and article 11 as well as the provisions in the Convention relating to the content of article 11.

Upon ratifying the Convention the Government of the United States of America declared that it would not be bound by subparagraph (1)(b) of article 1.

**5. Convention on the Recognition and Enforcement of Foreign Arbitral Awards
(New York, 1958)**

The Convention entered into force on 7 June 1959 in respect of Egypt, Israel, Morocco and Syrian Arab Republic; in respect of States becoming parties subsequent thereto the Convention entered into force 90 days after deposit of their instruments of ratification or accession.

<i>State</i>	<i>Signature</i>	<i>Ratification</i>	<i>Accession</i>
Argentina	26 August 1958		
Australia			26 March 1975
Austria ¹			2 May 1961
Belgium ¹	10 June 1958	18 August 1975	
Benin			16 May 1974
Botswana ^{1, 2}			20 December 1971
Bulgaria ^{1, 2}	17 December 1958	10 October 1961	
Burkina Faso			23 March 1987
Byelorussian SSR ^{1, 3}	29 December 1958	15 November 1960	
Canada ⁴			12 May 1986
Central African Republic ^{1, 2}			15 October 1962
Chile			4 September 1975
China ^{1, 2}			22 January 1987
Colombia			25 September 1979
Costa Rica	10 June 1958		
Cuba ^{1, 2, 3}			30 December 1974
Cyprus ^{1, 2}			29 December 1980
Czechoslovakia ^{1, 3}	3 October 1958	10 July 1959	
Democratic Kampuchea			5 January 1960
Denmark ^{1, 2}			22 December 1972
Djibouti			14 June 1983
Ecuador ^{1, 2}	17 December 1958	3 January 1962	
Egypt			9 March 1959
El Salvador	10 June 1958		
Finland	29 December 1958	19 January 1962	
France ^{1, 2}	25 November 1958	26 June 1959	
German Democratic Republic ^{1, 2, 3}			20 February 1975
Germany, Federal Republic of ¹	10 June 1958	30 June 1961	
Ghana			9 April 1968
Greece ^{1, 2}			16 July 1962
Guatemala ^{1, 2}			21 March 1984
Haiti			5 December 1983
Holy See ^{1, 2}			14 May 1975
Hungary ^{1, 2}			5 March 1962
India ^{1, 2}	10 June 1958	13 July 1960	
Indonesia ^{1, 2}			7 October 1981
Ireland ¹			12 May 1981
Israel	10 June 1958	5 January 1959	
Italy			31 January 1969
Japan ¹			20 June 1961
Jordan	10 June 1958	15 November 1979	
Kuwait ¹			28 April 1978
Luxembourg ¹	11 November 1958	9 September 1983	
Madagascar ^{1, 2}			16 July 1962
Malaysia ^{1, 2}			5 November 1985
Mexico			14 April 1971
Monaco ^{1, 2}	31 December 1958	2 June 1982	
Morocco ¹			12 February 1959
Netherlands ¹	10 June 1958	24 April 1964	
New Zealand ¹			6 January 1983
Niger			14 October 1964
Nigeria ^{1, 2}			17 March 1970
Norway ^{1, 5}			14 March 1961
Pakistan	30 December 1958		
Panama			10 October 1984
Philippines ^{1, 2}	10 June 1958	6 July 1967	

<i>State</i>	<i>Signature</i>	<i>Ratification</i>	<i>Accession</i>
Poland ^{1, 2}	10 June 1958	3 October 1961	
Republic of Korea ^{1, 2}			8 February 1973
Romania ^{1, 2, 3}			13 September 1961
San Marino			17 May 1979
Singapore ^{1, 3}			21 August 1986
South Africa			3 May 1976
Spain			12 May 1977
Sri Lanka	30 December 1958	9 April 1962	
Sweden	23 December 1958	28 January 1972	
Switzerland ¹	29 December 1958	1 June 1965	
Syrian Arab Republic			9 March 1959
Thailand			21 December 1959
Trinidad and Tobago ^{1, 2}			14 February 1966
Tunisia ^{1, 2}			17 July 1967
Ukrainian SSR ^{1, 3}	29 December 1958	10 October 1960	
USSR ^{1, 3}	29 December 1958	24 August 1960	
United Kingdom ¹			24 September 1975
United Republic of Tanzania ¹			13 October 1964
United States of America ^{1, 2}			30 September 1970
Uruguay			30 March 1983
Yugoslavia ^{1, 2, 6}			26 February 1982

Signatures only: 4; ratifications: 21; accessions: 52

Declarations and reservations

(Excludes territorial declarations and certain other reservations and declarations of a political nature)

¹State will apply the Convention to recognition and enforcement of awards made in the territory of another Contracting State.

²State will apply the Convention only to differences arising out of legal relationships whether contractual or not which are considered as commercial under the national law.

³With regard to awards made in the territory of non-Contracting States, State will apply the Convention only to the extent to which these States grant reciprocal treatment.

⁴The Government of Canada has declared (1) that Canada will apply the Convention only to differences arising out of legal relationships whether contractual or not which are considered as commercial under the national law of Canada, and (2) that with respect to the Province of Alberta, it will apply the Convention only to the recognition and enforcement of awards made in the territory of another Contracting State. The Government has informed the secretariat that it intends to amend its declaration with respect to point (1), by excepting the case of the Province of Quebec, and with respect to point (2), by changing "Alberta" to "Saskatchewan".

⁵State will not apply the Convention to differences where the subject matter of the proceedings is immovable property situated in the State, or a right in or to such property.

⁶The State will apply the Convention only to those arbitral awards which were adopted after the coming of the Convention into effect.

6. UNCITRAL Model Law on International Commercial Arbitration

Legislation based on the UNCITRAL Model Law on International Commercial Arbitration has been enacted in the following States:

Canada (by the Federal Parliament and by Parliaments of the following Provinces and Territories: Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Northwest Territories, Nova Scotia, Prince Edward Island and Quebec).

Cyprus

* * *

VI. TRAINING AND ASSISTANCE

Training and assistance: report of the Secretary-General (A/CN.9/293)

1. The symposia and seminars with which the secretariat has been associated since the date of the report on training and assistance presented to the nineteenth session of the Commission (A/CN.9/282) continue to reflect the considerable interest shown in the work of the Commission, and, as noted at the nineteenth session of the Commission,¹ especially in its work in the field of international commercial arbitration.

2. In its resolution 41/77 of 3 December 1986 on the report of the Commission on the work of its nineteenth session, the General Assembly:

“9. *Reaffirms* also the importance, in particular for developing countries, of the work of the Commission concerned with training and assistance in the field of international trade law and the desirability for it to sponsor symposia and seminars, in particular those organized on a regional basis, to promote such training and assistance, and, in this connection:

“(a) Expresses its appreciation to those regional organizations and institutions that have collaborated with the secretariat of the Commission in organizing regional seminars and symposia in the field of international trade law;

“(b) Welcomes the initiatives being undertaken by the Commission and its secretariat to collaborate with other organizations and institutions in the organization of regional seminars;

“(c) Invites Governments, international organizations and institutions to assist the secretariat of the Commission in financing and organizing regional seminars and symposia, in particular in developing countries;

“(d) Invites Governments, relevant United Nations organs, organizations, institutions and individuals to make voluntary contributions to allow the resumption of the programme of the Commission for the award of fellowships on a regular basis to candidates from developing countries to enable them to participate in such symposia and seminars;”.

3. The main activities undertaken in this field since the date of the report on training and assistance presented to the nineteenth session of the Commission (A/CN.9/282) are set forth below in the chronological order in which they have occurred or are expected to occur.

¹Report of the United Nations Commission on International Trade Law on the work of its nineteenth session, *Official Records of the General Assembly, Forty-first Session, Supplement No. 17 (A/41/17)*, para. 268.

4. The UNCITRAL secretariat:

(a) Participated in the IXth Inter-American Conference on International Arbitration (30 April-2 May 1986, Miami, Florida), organized by the Inter-American Commercial Arbitration Commission and the International Commercial Dispute Resolution Center (of Florida). The Conference was attended by lawyers from most Latin American States and from Canada and the United States of America. Among the main topics discussed were the UNCITRAL Arbitration Rules and the UNCITRAL Model Law on International Commercial Arbitration;

(b) Participated in the conference “East Meets West: Resolution of International Commercial Disputes in the Pacific Rim” (12-13 May 1986, Vancouver, British Columbia) organized by the Faculty of Law, University of British Columbia, and the Government of British Columbia. The Conference was attended by lawyers from Canada, the United States of America and various Far Eastern countries. Among the main topics discussed was the UNCITRAL Model Law on International Commercial Arbitration;

(c) Participated in a conference on the work of UNCITRAL and the unification of international trade law (22 May 1986, Valencia, Spain), organized by the Chamber of Commerce, Industry and Navigation of Valencia. The conference was attended by lawyers, professors and businessmen. The main topics of the discussion were the work of UNCITRAL in the area of international payments and the UNCITRAL Model Law on International Commercial Arbitration;

(d) Participated in a seminar “Trade Data Transmission: A Uniform Code” (3-5 September 1986, Cambridge, England), organized by the University of Cambridge. The seminar was organized to discuss the legal problems in trade data transmission that might be ameliorated by a code of conduct for parties involved in such transmissions;

(e) Participated in the 21st Biennial Conference of the International Bar Association (15-19 September 1986, New York), which was attended by lawyers from many countries of the world. Among the topics discussed were the UNCITRAL Model Law on International Commercial Arbitration, the draft uniform rules on the liability of operators of transport terminals and the draft legal guide on drawing up international contracts for the construction of industrial works;

(f) Participated in a conference on computer aided trade (15-17 September 1986, Paris, France), sponsored

by the Economic Commission for Europe, Commission of the European Communities, National Trade Facilitation Organizations of the European Communities, International Article Numbering Association, and Paris Chamber of Commerce and Industry. The conference was attended by lawyers and businessmen. Among the topics dealt with at the conference were the activities of UNCITRAL relevant to computer aided trade;

(g) Participated in a seminar on legal aspects of foreign trade (13-17 October 1986, New Delhi), organized by the International Trade Centre UNCTAD/GATT in co-operation with the UNCITRAL secretariat. The participants were from ministries, trade promotion organizations, chambers of commerce and state trading organizations of India and neighbouring countries. Among the main topics were the United Nations Convention on Contracts for the International Sale of Goods and UNCITRAL's texts on dispute settlement;

(h) Participated in a seminar on a possible reform of the arbitration law of the Federal Republic of Germany (7 November 1986, Bonn), organized by the German Institute for Arbitration. The seminar was attended by lawyers, professors and businessmen. The main topic was the UNCITRAL Model Law on International Commercial Arbitration;

(i) Participated in the Asian Regional Workshop on Industrial Co-operation and Trade Expansion through Buy-back Arrangements (12-16 January 1987, Bangkok, Thailand), jointly organized by the United Nations Conference on Trade and Development (UNCTAD), the Economic and Social Commission for Asia and the Pacific (ESCAP), the International Association of State Trading Organizations of Developing Countries (ASTRO) and the International Center for Public Enterprises in Developing Countries (ICPE). The Workshop was attended by officials and businessmen from Asian countries. Among the subjects discussed were legal aspects of buy-back arrangements;

(j) Participated in a conference on arbitration in Quebec, on the occasion of the inauguration of the Quebec National and International Commercial Arbitration Centre (15-16 January 1987, Quebec). The conference was attended by government officials, lawyers, professors and businessmen. Among the main topics was the UNCITRAL Model Law on International Commercial Arbitration;

(k) Continued to co-operate with law professors of the University of Vienna and the Economic University of Vienna in the organization of a lecture series under the title "Forum for International Trade Law/*Forum für internationales Wirtschaftsrecht*". The topics of the lectures by scholars and experts, including representatives at UNCITRAL meetings and members of the secretariat, were subject-matters dealt with by the Commission and other issues of international trade law. The lectures were attended by lawyers, professors, businessmen and legal officers residing in Austria and, where held at the time of an UNCITRAL meeting, representatives and observers from other countries. In the period covered by the present report, the secretariat contributed a lecture on the UNCITRAL Legal Guide on Electronic Funds Transfers (29 January 1987);

(l) Participated in a seminar on international contracts concluded by electronic means (3-4 March 1987, Madrid, Spain), organized by the Chamber of Commerce and Industry of Madrid in collaboration with the Institute of International Business Law and Practice of the International Chamber of Commerce. Among the main topics discussed was the work of UNCITRAL and of the United Nations in general leading to uniform practices in this field;

(m) Participated in a conference entitled "Electronic Banking: Tomorrow's Banks and Yesterday's Laws: Bridging the Gap" (9-10 March 1987, Brussels, Belgium). The conference was attended by bankers and lawyers from the region. Among the topics discussed was the legal framework for electronic banking, based upon the work in the UNCITRAL Legal Guide on Electronic Funds Transfers;

(n) Will participate at the XXVI Conference of the Inter-American Bar Association (9-15 May 1987, Buenos Aires, Argentina). The Conference is expected to be attended by many hundreds of lawyers from South and North America. Among the topics to be dealt with are the UNCITRAL Model Law on International Commercial Arbitration and the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980);

(o) Is co-operating with the Latin American Federation of Banks (Federación Latinoamericana de Bancos, FELABAN) in the organization of a symposium dealing with UNCITRAL texts on international payments which will take place from 1 to 3 June 1987 in Mexico City. The symposium will be attended by banking lawyers and law teachers from many Latin American countries. The subjects discussed will be the UNCITRAL draft Convention on International Bills of Exchange and International Promissory Notes, the UNCITRAL Legal Guide on Electronic Funds Transfers and the work to be undertaken on the preparation of model rules for electronic funds transfers.

5. On occasions, members of the UNCITRAL secretariat gave lectures at Vienna to groups of law students or lawyers on topics related to the work of the Commission. The secretariat also contributed articles to legal periodicals on various aspects of the Commission's work.

6. Since the nineteenth session of the Commission, three interns received training with the UNCITRAL secretariat, and were associated with current projects of the Commission.

7. The UNCITRAL secretariat thanks the organizers of the conferences, seminars and meetings mentioned above for inviting the secretariat to participate in the conferences, seminars and meetings. On most occasions the expenses of the secretariat in participating were met in whole or in part by the organizers. The secretariat intends to keep in touch with Governments and organizations with a view to collaborating with them in organizing symposia and seminars.

I. DRAFT CONVENTION ON INTERNATIONAL BILLS OF EXCHANGE AND INTERNATIONAL PROMISSORY NOTES

(As adopted by the United Nations Commission on International Trade Law at its twentieth session, Vienna, 20 July-14 August 1987)

Chapter I. Sphere of application and form of the instrument

Article 1

(1) This Convention applies to an international bill of exchange when it contains the heading "International bill of exchange (Convention of . . .)" and also contains in its text the words "International bill of exchange (Convention of . . .)".

(2) This Convention applies to an international promissory note when it contains the heading "International promissory note (Convention of . . .)" and also contains in its text the words "International promissory note (Convention of . . .)".

(3) This Convention does not apply to cheques.

Article 2

(1) An international bill of exchange is a bill of exchange which specifies at least two of the following places and indicates that any two so specified are situated in different States:

- (a) The place where the bill is drawn;
- (b) The place indicated next to the signature of the drawer;
- (c) The place indicated next to the name of the drawee;
- (d) The place indicated next to the name of the payee;
- (e) The place of payment.

(2) An international promissory note is a promissory note which specifies at least two of the following places and indicates that any two so specified are situated in different States:

- (a) The place where the note is made;
- (b) The place indicated next to the signature of the maker;
- (c) The place indicated next to the name of the payee;
- (d) The place of payment.

(3) Proof that the statements referred to in paragraph (1) or (2) of this article are incorrect does not affect the application of this Convention.

Article 3

(1) A bill of exchange is a written instrument which:

- (a) Contains an unconditional order whereby the drawer directs the drawee to pay a definite sum of money to the payee or to his order;
- (b) Is payable on demand or at a definite time;

- (c) Is dated;
- (d) Is signed by the maker.

(2) A promissory note is a written instrument which:

- (a) Contains an unconditional promise whereby the maker undertakes to pay a definite sum of money to the payee or to his order;
- (b) Is payable on demand or at a definite time;
- (c) Is dated;
- (d) Is signed by the maker.

Article 4

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 (1) or (2) of article 2 are situated in Contracting States.

Chapter II. Interpretation

Section 1. General provisions

Article 5

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 transactions.

Article 6

In this Convention:

- (a) "Bill" means an international bill of exchange governed by this Convention;
- (b) "Note" means an international promissory note governed by this Convention;
- (c) "Instrument" means a bill or a note;
- (d) "Drawee" means a person on whom a bill is drawn and who has not accepted it;
- (e) "Payee" means a person in whose favour the drawer directs payment to be made or to whom the maker promises to pay;
- (f) "Holder" means a person in possession of an instrument in accordance with article 16;
- (g) "Protected holder" means a holder who meets the requirements of article 30;

(h) "Guarantor" means any person who undertakes an obligation of guarantee under article 47, whether governed by subparagraph (b) ("guaranteed") or subparagraph (c) ("aval") of paragraph (4) of article 48;

(i) "Party" means a person who has signed an instrument as drawer, maker, acceptor, endorser or guarantor;

(j) "Maturity" means the time of payment referred to in paragraphs (4), (5), (6) and (7) of article 10;

(k) "Signature" means a handwritten signature, its facsimile or an equivalent authentication effected by any other means; "forged signature" includes a signature by the wrongful use of such means;

(l) "Money" or "currency" includes a monetary unit of account which is established by an intergovernmental institution or by agreement between two or more States, provided that this Convention shall apply without prejudice to the rules of the intergovernmental institution or to the stipulations of the agreement.

Article 7

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 8

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 a stipulation in the instrument that upon default in payment of any instalment the unpaid balance becomes due;
- (d) According to a rate of exchange indicated in the instrument or to be determined as directed by the instrument; or
- (e) In a currency other than the currency in which the sum is expressed in the instrument.

Article 9

- (1) If there is a discrepancy between the sum expressed in words and the sum expressed in figures, the sum payable by the instrument is the sum expressed in words.
- (2) If the sum is expressed more than once in words, and there is a discrepancy, the sum payable is the smaller sum. The same rule applies if the sum is expressed more than once in figures only, and there is a discrepancy.
- (3) If the sum 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 in the instrument, and the specified currency is not identified as the currency of any particular State, the currency is to be considered as the currency of the State where payment is to be made.
- (4) If an instrument states that the sum is to be paid with interest, without specifying the date from which interest is to run, interest runs from the date of the instrument.

(5) A stipulation stating that the sum is to be paid with interest is deemed not to have been written on the instrument unless it indicates the rate at which interest is to be paid.

(6) A rate at which interest is to be paid may be expressed either as a definite rate or as a variable rate. For a variable rate to qualify for this purpose, it must vary in relation to one or more reference rates of interest in accordance with provisions stipulated in the instrument and each such reference rate must be published or otherwise available to the public and not be subject, directly or indirectly, to unilateral determination by a person who is named in the instrument at the time the bill is drawn or the note is made, unless the person is named only in the reference rate provisions.

(7) If the rate at which interest is to be paid is expressed as a variable rate, it may be stipulated expressly in the instrument that such rate shall not be less than or exceed a specified rate of interest, or that the variations are otherwise limited.

(8) If a variable rate does not qualify under paragraph (6) of this article or for any reason it is not possible to determine the numerical value of the variable rate for any period, interest shall be payable for the relevant period at the rate calculated in accordance with paragraph (2) of article 71.

Article 10

- (1) An instrument is deemed to be payable on demand:
 - (a) If it states that it is payable at sight or on demand or on presentment or if it contains words of similar import; or
 - (b) If no time of 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 in 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 time of payment of a bill payable at a fixed period after sight is determined by the date of acceptance or, if the bill is dishonoured by non-acceptance, by the date of protest or, if protest is dispensed with, by the date of dishonour.
- (6) The time of payment of an instrument payable on demand is the date on which the instrument is presented for payment.
- (7) The time of payment 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 his visa is refused, by the date of presentment.
- (8) If an instrument is drawn, or made, payable one or more months after a stated date or after the date of the instrument or after sight, the instrument is payable on the corresponding date

of the month when payment must be made. If there is no corresponding date, the instrument is payable on the last day of that month.

Article 11

(1) A bill may be drawn:

- (a) By two or more drawers;
- (b) Payable to two or more payees.

(2) A note may be made:

- (a) By two or more makers;
- (b) Payable to two or more payees.

(3) If an instrument is payable to two or more payees in the alternative, it is payable to any one of them and any one of them in possession of the instrument may exercise the rights of a holder. In any other case the instrument is payable to all of them and the rights of a holder may be exercised only by all of them.

Article 12

A bill may be drawn by the drawer:

- (a) On himself;
- (b) Payable to his order.

Section 3. Completion of an incomplete instrument

Article 13

(1) An incomplete instrument which satisfies the requirements set out in paragraph (1) of article 1 and bears the signature of the drawer or the acceptance of the drawee, or which satisfies the requirements set out in paragraph (2) of article 1 and subparagraph (d) of paragraph (2) of article 3, but which lacks other elements pertaining to one or more of the requirements set out in articles 2 and 3, may be completed, and the instrument so completed is effective as a bill or a note.

(2) If such an instrument is completed without authority or otherwise than in accordance with the authority given:

(a) A party who signed the instrument before the completion may invoke such lack of authority as a defence against a holder who had knowledge of such lack of authority 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.

Chapter III. Transfer

Article 14

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.

Article 15

(1) An endorsement must be written on the instrument or on a slip affixed thereto ("*allonge*"). It must be signed.

(2) An endorsement may be:

(a) 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 a person in possession of it;

(b) Special, that is, by a signature accompanied by an indication of the person to whom the instrument is payable.

(3) A signature alone, other than that of the drawee, is an endorsement only if placed on the back of the instrument.

Article 16

(1) A person is a holder if he is:

(a) The payee in possession of the instrument; or

(b) In possession of an instrument which has been endorsed to him, or on which the last endorsement is in blank, and on which there appears an uninterrupted series of endorsements, even if any endorsement was forged or was signed by an agent without authority.

(2) If 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 by him or any previous holder under circumstances, including incapacity or fraud, duress or mistake of any kind, that would give rise to a claim to, or a defence against liability on, the instrument.

Article 17

The holder of an instrument on which the last endorsement is in blank may:

(a) Further endorse it either by an endorsement in blank or by a special endorsement; or

(b) Convert the blank endorsement into a special endorsement by indicating in the endorsement that the instrument is payable to himself or to some other specified person; or

(c) Transfer the instrument in accordance with subparagraph (b) of article 14.

Article 18

(1) If the drawer or the maker has inserted in the instrument such words as "not negotiable", "not transferable", "not to order", "pay (X) only", or words of similar import, the instrument may not be transferred except for purposes of collection, and any endorsement, even if it does not contain words authorizing the endorsee to collect the instrument, is deemed to be an endorsement for collection.

(2) If an endorsement contains the words "not negotiable", "not transferable", "not to order", "pay (X) only", or words of similar import, the instrument may not be transferred further except for purposes of collection, and any subsequent endorsement, even if it does not contain words authorizing the endorsee to collect the instrument, is deemed to be an endorsement for collection.

Article 19

(1) An endorsement must be unconditional.

(2) A conditional endorsement transfers the instrument whether or not the condition is fulfilled. The condition is ineffective as to those parties and transferees who are subsequent to the endorsee.

Article 20

An endorsement in respect of a part of the sum due under the instrument is ineffective as an endorsement.

Article 21

If there are two or more endorsements, it is presumed, unless the contrary is proved, that each endorsement was made in the order in which it appears on the instrument.

Article 22

(1) If 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, the endorsee is a holder who:

- (a) May exercise all rights arising out of the instrument;
- (b) May endorse the instrument only for purposes of collection;
- (c) Is subject only to the claims and defences which may be set up against the endorser.

(2) The endorser for collection is not liable on the instrument to any subsequent holder.

Article 23

(1) If an endorsement contains the words "value in security", "value in pledge", or any other words indicating a pledge, the endorsee is a holder who:

- (a) May exercise all rights arising out of the instrument;
- (b) May endorse the instrument only for purposes of collection;
- (c) Is subject only to the claims and defences specified in article 29 or 31.

(2) If such an endorsee endorses for collection, he is not liable on the instrument to any subsequent holder.

Article 24

The holder of an instrument may transfer it to a prior party or to the drawee in accordance with article 14; however, if the transferee has previously been a 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 25

An instrument may be transferred in accordance with article 14 after maturity, except by the drawee, the acceptor or the maker.

Article 26

(1) If an endorsement is forged, the person whose endorsement is forged, or a party who signed the instrument before the forgery, has the right to recover compensation for any damage that he may have suffered because of the forgery against:

- (a) The forger;
- (b) The person to whom the instrument was directly transferred by the forger;
- (c) A party or the drawee who paid the instrument to the forger directly or through one or more endorsees for collection.

(2) However, an endorsee for collection is not liable under paragraph (1) of this article if he is without knowledge of the forgery:

- (a) At the time he pays the principal or advises him of the receipt of payment, or
 - (b) At the time he receives payment, if this is later,
- unless his lack of knowledge is due to his failure to act in good faith or to exercise reasonable care.

(3) Furthermore, a party or the drawee who pays an instrument is not liable under paragraph (1) of this article if, at the time he pays the instrument, he is without knowledge of the forgery, unless his lack of knowledge is due to his failure to act in good faith or to exercise reasonable care.

(4) Except as against the forger, the damages recoverable under paragraph (1) of this article may not exceed the amount referred to in article 71 or 72.

Article 27

(1) If an endorsement is made by an agent without authority or power to bind his principal in the matter, the principal, or a party who signed the instrument before such endorsement, has the right to recover compensation for any damage that he may have suffered because of such endorsement against:

- (a) The agent;
- (b) The person to whom the instrument was directly transferred by the agent;
- (c) A party or the drawee who paid the instrument to the agent directly or through one or more endorsees for collection.

(2) However, an endorsee for collection is not liable under paragraph (1) of this article if he is without knowledge that the endorsement does not bind the principal:

- (a) At the time he pays the principal or advises him of the receipt of payment, or
 - (b) At the time he receives payment, if this is later,
- unless his lack of knowledge is due to his failure to act in good faith or to exercise reasonable care.

(3) Furthermore, a party or the drawee who pays an instrument is not liable under paragraph (1) of this article if, at the time he pays the instrument, he is without knowledge that the endorsement does not bind the principal, unless his lack of knowledge is due to his failure to act in good faith or to exercise reasonable care.

(4) Except as against the agent, the damages recoverable under paragraph (1) of this article may not exceed the amount referred to in article 71 or 72.

Chapter IV. Rights and liabilities*Section 1. The rights of a holder and of a protected holder**Article 28*

(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 may transfer the instrument in accordance with article 14.

Article 29

(1) A party may set up against a holder who is not a protected holder:

(a) Any defence that may be set up against a protected holder in accordance with paragraph (1) of article 31;

(b) Any defence based on the underlying transaction between himself and the drawer or between himself and his transferee, but only if the holder took the instrument with knowledge of such defence or if he obtained the instrument by fraud or theft or participated at any time in a fraud or theft concerning it;

(c) Any defence arising from the circumstances as a result of which he became a party, but only if the holder took the instrument with knowledge of such defence or if he obtained the instrument by fraud or theft or participated at any time in a fraud or theft concerning it;

(d) Any defence which may be raised against an action in contract between himself and the holder;

(e) Any other defence available under this Convention.

(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, but only if he took the instrument with knowledge of such claim or if he obtained the instrument by fraud or theft or participated at any time in a fraud or theft concerning it.

(3) A holder who takes an instrument after the expiration of the time-limit for presentment for payment is subject to any claim to, or defence against liability on, the instrument to which his transferor is subject.

(4) 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) The third person asserted a valid claim to the instrument; or

(b) The holder acquired the instrument by theft or forged the signature of the payee or an endorsee, or participated in the theft or the forgery.

Article 30

“Protected holder” means the holder of an instrument which was complete when he took it or which was incomplete within the meaning of paragraph (1) of article 13 and was completed in accordance with authority given, provided that when he became a holder:

(a) He was without knowledge of a defence against liability on the instrument referred to in subparagraphs (a), (b), (c) and (e) of paragraph (1) of article 29;

(b) He was without knowledge of a valid claim to the instrument of any person;

(c) He was without knowledge of the fact that it had been dishonoured by non-acceptance or by non-payment;

(d) The time-limit provided by article 56 for presentment of that instrument for payment had not expired; and

(e) He did not obtain the instrument by fraud or theft or participate in a fraud or theft concerning it.

Article 31

(1) A party may not set up against a protected holder any defence except:

(a) Defences under articles 34(1), 35, 36(1), 37(3), 54, 58, 64 and 85 of this Convention;

(b) Defences based on the underlying transaction between himself and such holder or arising from any fraudulent act on the part of such holder in obtaining the signature on the instrument of that party;

(c) Defences based on his incapacity to incur liability on the instrument or on the fact that he signed without knowledge that his signature made him a party to the instrument, provided that his lack of knowledge was not due to his negligence and provided that he was fraudulently induced so to sign.

(2) The rights to an instrument of a protected holder are not subject to any claim to the instrument on the part of any person, except a valid claim arising from the underlying transaction between himself and the person by whom the claim is raised.

Article 32

(1) The transfer of an instrument by a protected holder vests in any subsequent holder the rights to and on the instrument which the protected holder had.

(2) Those rights are not vested in a subsequent holder if:

(a) He participated in a transaction which gives rise to a claim to, or a defence against liability on, the instrument;

(b) He has previously been a holder, but not a protected holder.

Article 33

Every holder is presumed to be a protected holder unless the contrary is proved.

*Section 2. Liabilities of the parties**A. General provisions**Article 34*

(1) Subject to the provisions of articles 35 and 37, a person is not liable on an instrument unless he signs it.

(2) A person who signs an instrument in a name which is not his own is liable as if he had signed it in his own name.

Article 35

A forged signature on an instrument does not impose any liability on the person whose signature was forged. However, if he consents to be bound by the forged signature or represents that it is his own, he is liable as if he had signed the instrument himself.

Article 36

(1) If an instrument is materially altered:

(a) A party who signs it after the material alteration is liable according to the terms of the altered text;

(b) A party who signs it before the material alteration is liable according to the terms of the original text. However, if a party makes, authorizes or assents to a material alteration, he is liable according to the terms of the altered text.

(2) A signature is presumed to have been placed on the instrument after the material alteration unless the contrary is proved.

(3) Any alteration is material which modifies the written undertaking on the instrument of any party in any respect.

Article 37

(1) An instrument may be signed by an agent.

(2) The signature of an agent placed by him on an instrument with the authority of his principal and showing on the instrument that he is signing in a representative capacity for that named principal, or the 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) A signature placed on an instrument by a person as agent but who lacks authority to sign or exceeds his authority, or by an agent who has authority to sign but who does not show on the instrument that he is signing in a representative capacity for a named person, or who shows on the instrument that he is signing in a representative capacity but does not name the person whom he represents, imposes liability on the person signing and not on the person whom he 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) A person who is liable pursuant to paragraph (3) of this article 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 38

The order to pay contained in a bill does not of itself operate as an assignment to the payee of funds made available for payment by the drawer with the drawee.

B. The drawer

Article 39

(1) The drawer engages that upon dishonour of the bill by non-acceptance or by non-payment, and upon any necessary protest, he will pay the bill to the holder, or to any endorser or any endorser's guarantor who takes up and pays the bill.

(2) The drawer may exclude or limit his own liability for acceptance or for payment by an express stipulation in the bill. Such a stipulation is effective only with respect to the drawer. A stipulation excluding or limiting liability for payment is effective only if another party is or becomes liable on the bill.

C. The maker

Article 40

(1) The maker engages that he will pay the note in accordance with its terms to the holder, or to any party who takes up and pays the note.

(2) The maker may not exclude or limit his own liability by a stipulation in the note. Any such stipulation is ineffective.

D. The drawee and the acceptor

Article 41

(1) The drawee is not liable on a bill until he accepts it.

(2) The acceptor engages that he will pay the bill in accordance with the terms of his acceptance to the holder, or to any party who takes up and pays the bill.

Article 42

(1) 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.

(2) An acceptance may be written on the front or on the back of the bill.

Article 43

(1) An incomplete bill which satisfies the requirements set out in paragraph (1) of article 1 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 by non-payment.

(3) If 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 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 44

(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 in 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.

(3) An acceptance relating to only a part of the sum payable is a qualified acceptance. If the holder takes such an acceptance, the bill is dishonoured by non-acceptance only as to the remaining part.

(4) 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.

E. The endorser

Article 45

(1) The endorser engages that upon dishonour of the instrument by non-acceptance or by non-payment, and upon any necessary protest, he will pay the instrument to the holder, or to any subsequent endorser or any endorser's guarantor who takes up and pays the instrument.

(2) An endorser may exclude or limit his own liability by an express stipulation in the instrument. Such a stipulation is effective only with respect to that endorser.

F. *The transferor by endorsement or by mere delivery**Article 46*

(1) Unless otherwise agreed, a person who transfers an instrument, by endorsement and delivery or by mere delivery, represents to the holder to whom he transfers the instrument that:

(a) The instrument does not bear any forged or unauthorized signature;

(b) The instrument has not been materially altered;

(c) At the time of transfer, he has no knowledge of any fact which would impair the right of the transferee to payment of the instrument against the acceptor of a bill or, in the case of an unaccepted bill, the drawer, or against the maker of a note.

(2) Liability of the transferor under paragraph (1) of this article is incurred only if the transferee took the instrument without knowledge of the matter giving rise to such liability.

(3) If the transferor is liable under paragraph (1) of this article, the transferee may recover, even before maturity, the amount paid by him to the transferor, with interest calculated in accordance with article 71, against return of the instrument.

G. *The guarantor**Article 47*

(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. For the purposes of this Convention, the words "prior endorsements guaranteed" or words of similar import do not constitute a guarantee.

(4) A guarantee may be effected by a signature alone on the front of the instrument. A signature alone on the front of the instrument, other than that of a maker, a drawer or the drawee, is a guarantee.

(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.

(6) A guarantor may not raise as a defence to his liability the fact that he signed the instrument before it was signed by the person for whom he is a guarantor, or while the instrument was incomplete.

Article 48

(1) The liability of a guarantor on the instrument is of the same nature as that of the party for whom he has become guarantor.

(2) If the person for whom he has become guarantor is the drawee, the guarantor engages:

(a) To pay the bill at maturity to the holder, or to any party who takes up and pays the bill;

(b) If the bill is payable at a definite time, upon dishonour by non-acceptance and upon any necessary protest, to pay it to the holder, or to any party who takes up and pays the bill.

(3) In respect of defences that are personal to himself, a guarantor may set up:

(a) Against a holder who is not a protected holder only those defences which he may set up under paragraphs (1), (3) and (4) of article 29;

(b) Against a protected holder only those defences which he may set up under paragraph (1) of article 31.

(4) In respect of defences that may be raised by the person for whom he has become a guarantor:

(a) A guarantor may set up against a holder who is not a protected holder only those defences which the person for whom he has become a guarantor may set up against such holder under paragraphs (1), (3) and (4) of article 29;

(b) A guarantor who expresses his guarantee by the words "guaranteed", "payment guaranteed" or "collection guaranteed", or words of similar import, may set up against a protected holder only those defences which the person for whom he has become a guarantor may set up against a protected holder under paragraph (1) of article 31;

(c) A guarantor who expresses his guarantee by the words "*aval*" or "good as *aval*" may set up against a protected holder only:

(i) The defence, under subparagraph (b) of paragraph (1) of article 31, that the protected holder obtained the signature on the instrument of the person for whom he has become a guarantor by a fraudulent act;

(ii) The defence, under article 54 or 58, that the instrument was not presented for acceptance or for payment;

(iii) The defence, under article 64, that the instrument was not duly protested for non-acceptance or for non-payment;

(iv) The defence, under article 85, that a right of action may no longer be exercised against the person for whom he has become guarantor;

(d) A guarantor who is not a bank or other financial institution and who expresses his guarantee by a signature alone may set up against a protected holder only the defences referred to in subparagraph (b) of this paragraph;

(e) A guarantor which is a bank or other financial institution and which expresses its guarantee by a signature alone may set up against a protected holder only the defences referred to in subparagraph (c) of this paragraph.

Article 49

(1) Payment of an instrument by the guarantor in accordance with article 73 discharges the party for whom he became guarantor of his liability on the instrument to the extent of the amount paid.

(2) The guarantor who pays the instrument may recover from the party for whom he has become guarantor and from the parties who are liable on it to that party the amount paid and any interest.

Chapter V. Presentment, dishonour by non-acceptance or non-payment, and recourse

Section 1. Presentment for acceptance and dishonour by non-acceptance

Article 50

- (1) A bill may be presented for acceptance.
- (2) A bill must be presented for acceptance:
 - (a) If the drawer has stipulated in the bill that it must be presented for acceptance;
 - (b) If the bill is payable at a fixed period after sight; or
 - (c) If the bill is payable elsewhere than at the residence or place of business of the drawee, unless it is payable on demand.

Article 51

- (1) The drawer may stipulate in the bill that it must not be presented for acceptance before a specified date or before the occurrence of a specified event. Except where a bill must be presented for acceptance under subparagraph (b) or (c) of paragraph (2) of article 50, the drawer may stipulate that it must not be presented for acceptance.

- (2) If a bill is presented for acceptance notwithstanding a stipulation permitted under paragraph (1) of this article 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 52

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) 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;
- (c) If a bill is payable on a fixed date, presentment for acceptance must be made before or on that date;
- (d) A bill payable on demand or at a fixed period after sight must be presented for acceptance within one year of its date;
- (e) 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 53

- (1) A necessary or optional presentment for acceptance is dispensed with if:
 - (a) The drawee is dead, or no longer has the power freely to deal with his assets by reason of his insolvency, or is a fictitious person, or is a person not having capacity to incur liability on the instrument as an acceptor; or
 - (b) The drawee is a corporation, partnership, association or other legal entity which has ceased to exist.
- (2) A necessary presentment for acceptance is dispensed with if:
 - (a) A bill is payable on a fixed date, and presentment for acceptance cannot be effected before or on that date due to

circumstances which are beyond the control of the holder and which he could neither avoid nor overcome; or

- (b) A bill is payable at a fixed period after sight, and presentment for acceptance cannot be effected within one year of its date due to circumstances which are beyond the control of the holder and which he could neither avoid nor overcome.

- (3) Subject to paragraphs (1) and (2) of this article, delay in a necessary presentment for acceptance is excused, but presentment for acceptance is not dispensed with, if the bill is drawn with a stipulation that it must be presented for acceptance within a stated time-limit, and the delay in presentment for acceptance is caused by circumstances which are beyond the control of the holder and which he could neither avoid nor overcome. When the cause of the delay ceases to operate, presentment must be made with reasonable diligence.

Article 54

- (1) 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.
- (2) Failure to present a bill for acceptance does not discharge the guarantor of the drawee of liability on the bill.

Article 55

- (1) A bill is considered to be dishonoured by non-acceptance:
 - (a) If the drawee, upon due presentment, expressly refuses to accept the bill or acceptance cannot be obtained with reasonable diligence or if 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 53, unless the bill is in fact accepted.
- (2) (a) If a bill is dishonoured by non-acceptance in accordance with subparagraph (a) of paragraph (1) of this article, the holder may exercise an immediate right of recourse against the drawer, the endorsers and their guarantors, subject to the provisions of article 60.
 - (b) If a bill is dishonoured by non-acceptance in accordance with subparagraph (b) of paragraph (1) of this article, the holder may exercise an immediate right of recourse against the drawer, the endorsers and their guarantors.
 - (c) If a bill is dishonoured by non-acceptance in accordance with paragraph (1) of this article, the holder may claim payment from the guarantor of the drawee upon any necessary protest.
- (3) If a bill payable on demand is presented for acceptance, but acceptance is refused, it is not considered to be dishonoured by non-acceptance.

Section 2. Presentment for payment and dishonour by non-payment

Article 56

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 note signed by two or more makers may be presented to any one of them, unless the 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 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 in 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;

(h) An instrument which is presented at a clearing-house is duly presented for payment if the law of the place where the clearing-house is located or the rules or customs of that clearing-house so provide.

Article 57

(1) Delay in making presentment for payment is excused if 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 the 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 a guarantor has expressly waived presentment; 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 by reason of his insolvency, or is a fictitious person or a person not having capacity to make payment, or if the drawee, the maker or the acceptor is a corporation, partnership, association or other legal entity which has ceased to exist;

(e) If there is no place at which the instrument must be presented in accordance with subparagraph (g) of article 56.

(3) Presentment for payment is also dispensed with as regards a bill, if the bill has been protested for dishonour by non-acceptance.

Article 58

(1) If an instrument is not duly presented for payment, the drawer, the endorsers and their guarantors are not liable on it.

(2) Failure to present an instrument for payment does not discharge the acceptor, the maker and their guarantors or the guarantor of the drawee of liability on it.

Article 59

(1) An instrument is considered to be dishonoured by non-payment:

(a) If payment is refused upon due presentment or if the holder cannot obtain the payment to which he is entitled under this Convention;

(b) If presentment for payment is dispensed with pursuant to paragraph (2) of article 57 and the instrument is unpaid at maturity.

(2) If a bill is dishonoured by non-payment, the holder may, subject to the provisions of article 60, 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 60, exercise a right of recourse against the endorsers and their guarantors.

Section 3. Recourse

Article 60

If an instrument is 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 61 to 63.

A. Protest

Article 61

(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 in that respect 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 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) of this article is a protest for the purpose of this Convention.

Article 62

Protest for dishonour of an instrument by non-acceptance or by non-payment must be made on the day on which the instrument is dishonoured or on one of the four business days which follow.

Article 63

(1) Delay in protesting an instrument for dishonour is excused if 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 the delay ceases to operate, protest must be made with reasonable diligence.

(2) Protest for dishonour by non-acceptance or by non-payment is dispensed with:

(a) If the drawer, an endorser or a guarantor has expressly waived protest; 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 the delay in making protest referred to in paragraph (1) of this article 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) If presentment for acceptance or for payment is dispensed with in accordance with article 53 or paragraph (2) of article 57.

Article 64

(1) If an instrument 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 on it.

(2) Failure to protest an instrument does not discharge the acceptor, the maker and their guarantors or the guarantor of the drawee of liability on it.

B. Notice of dishonour

Article 65

(1) The holder, upon dishonour of an instrument by non-acceptance or by non-payment, must give notice of such dishonour:

(a) To the drawer and the last endorser; and

(b) To all other endorsers and guarantors whose addresses the holder can ascertain on the basis of information contained in the instrument.

(2) An endorser or a guarantor who receives notice must give notice of dishonour to the last party preceding him and liable on the instrument.

(3) Notice of dishonour operates for the benefit of any party who has a right of recourse on the instrument against the party notified.

Article 66

(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 duly given if it is communicated or sent to the party to be notified by means appropriate in the circumstances, whether or not it is received by that party.

(3) The burden of proving that notice has been duly given rests upon the person who is required to give such notice.

Article 67

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 day of receipt of notice of dishonour.

Article 68

(1) Delay in giving notice of dishonour is excused if the delay is caused by circumstances which are beyond the control of the person required to give notice, and which he could neither avoid nor overcome. When the cause of the delay ceases to operate, notice must be given with reasonable diligence.

(2) Notice of dishonour is dispensed with:

(a) If, after the exercise of reasonable diligence, notice cannot be given;

(b) If the drawer, an endorser or a guarantor has expressly waived notice of dishonour; 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;

(c) As regards the drawer of the bill, if the drawer and the drawee or the acceptor are the same person.

Article 69

If a person who is required to give notice of dishonour fails to give it to a party who is entitled to receive it, he is liable for any damages which that party may suffer from such failure, provided that such damages do not exceed the amount referred to in article 71 or 72.

Section 4. Amount payable

Article 70

(1) The holder may exercise his rights on the instrument against any one party, or several or all parties, liable on it and is not obliged to observe the order in which the parties have become bound. Any party who takes up and pays the instrument may exercise his rights in the same manner against parties liable to him.

(2) Proceedings against a party do not preclude proceedings against any other party, whether or not subsequent to the party originally proceeded against.

Article 71

- (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 to be paid after maturity, interest at the rate stipulated, or in the absence of such stipulation, interest at the rate specified in paragraph (2) of this article, calculated from the date of presentment on the sum specified in subparagraph (b)(i) of this paragraph;
 - (iii) Any expenses of protest and of the notices given by him;
 - (c) Before maturity:
 - (i) The amount of the instrument with interest, if interest has been stipulated for, to the date of payment; or, if no interest has been stipulated for, subject to a discount from the date of payment to the date of maturity, calculated in accordance with paragraph (4) of this article;
 - (ii) Any expenses of protest and of the notices given by him.
- (2) The rate of interest shall be the rate that would be recoverable in legal proceedings taken in the jurisdiction where the instrument is payable.
- (3) Nothing in paragraph (2) of this article prevents a court from awarding damages or compensation for additional loss caused to the holder by reason of delay in payment.
- (4) 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 such rate as is reasonable in the circumstances.

Article 72

A party who pays an instrument and is thereby discharged in whole or in part of his liability on the instrument may recover from the parties liable to him:

- (a) The entire sum which he has paid;
- (b) Interest on that sum at the rate specified in paragraph (2) of article 71, from the date on which he made payment;
- (c) Any expenses of the notices given by him.

Chapter VI. Discharge**Section 1. Discharge by payment***Article 73*

(1) A party is discharged of liability on the instrument when he pays the holder, or a party subsequent to himself who has paid the instrument and is in possession of it, the amount due pursuant to article 71 or 72:

- (a) At or after maturity; or
- (b) Before maturity, upon dishonour by non-acceptance.

(2) Payment before maturity other than under subparagraph (b) of paragraph (1) 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 liability if he pays a holder who is not a protected holder, or a party who has taken up and paid the instrument, and knows at the time of payment that the holder or that party acquired the instrument by theft or forged the signature of the payee or an endorsee, or participated in the theft or the forgery.

(4) (a) A person receiving payment of an instrument must, unless agreed otherwise, deliver:

- (i) To the drawee making such payment, the instrument;
- (ii) To any other person making such payment, the instrument, a receipted account, and any protest.

(b) In the case of an instrument payable by instalments at successive dates, the drawee or a party making a payment, other than payment of the last instalment, may require that mention of such payment be made on the instrument or on a slip affixed thereto ("*allonge*") and that a receipt therefor be given to him.

(c) If an instrument payable by instalments at successive dates is dishonoured by non-acceptance or by non-payment as to any of its instalments and a party, upon dishonour, pays the instalment, the holder who receives such payment must give the party a certified copy of the instrument and any necessary authenticated protest in order to enable such party to exercise a right on the instrument.

(d) 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 under article 59.

(e) If payment is made but the person paying, other than the drawee, fails to obtain the instrument, such person is discharged but the discharge cannot be set up as a defence against a protected holder to whom the instrument has been subsequently transferred.

Article 74

- (1) The holder is not obliged to take partial payment.
- (2) If the holder who is offered partial payment does not take it, the instrument is dishonoured by non-payment.
- (3) If the holder takes partial payment from the drawee, the guarantor of the drawee, or the acceptor or the maker:
 - (a) The guarantor of the drawee, or 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 acceptor, the maker or the guarantor of the drawee:
 - (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 instrument and any necessary authenticated protest in order to enable such party to exercise a right on the instrument.
- (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) If the balance is paid, the person who receives it and who is in possession of the instrument must deliver to the payor the receipted instrument and any authenticated protest.

Article 75

(1) The holder may refuse to take payment at a place other than the place where the instrument was presented for payment in accordance with article 56.

(2) In such case if payment is not made at the place where the instrument was presented for payment in accordance with article 56, the instrument is considered to be dishonoured by non-payment.

Article 76

(1) An instrument must be paid in the currency in which the sum payable is expressed.

(2) If the sum payable is expressed in a monetary unit of account within the meaning of subparagraph (l) of article 6 and the monetary unit of account is transferable between the person making payment and the person receiving it, then, unless the instrument specifies a currency of payment, payment shall be made by transfer of monetary units of account. If the monetary unit of account is not transferable between those persons, payment shall be made in the currency specified in the instrument or, if no such currency is specified, in the currency of the place of payment.

(3) The drawer or the maker may indicate in the instrument that it must be paid in a specified currency other than the currency in which the sum payable 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 in the instrument. Failing such indication, the amount payable is to be calculated according to the rate of exchange for sight drafts (or, if there is no such rate, according to the appropriate established rate of exchange) on the date of maturity:

- (i) Ruling at the place where the instrument must be presented for payment in accordance with subparagraph (g) of article 56, 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 subparagraph (g) of article 56;

(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 in the instrument, according to that rate;
- (ii) If no rate of exchange is indicated in the instrument, at the option of the holder, according to the rate of exchange ruling on the date of dishonour or on the date of actual payment;

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

- (i) If the rate of exchange is indicated in the instrument, according to that rate;
- (ii) If no rate of exchange is indicated in 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.

(4) 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 by non-payment.

(5) 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 subparagraph (g) of article 56 or at the place of actual payment.

Article 77

(1) Nothing in this Convention prevents a Contracting State from enforcing exchange control regulations applicable in its territory and its provisions relating to the protection of its currency, including regulations which it is bound to apply by virtue of international agreements to which it is a party.

(2) (a) If, by virtue of the application of paragraph (1) of this article, an instrument drawn in a currency which is not that of the place of payment must be paid in local currency, the amount payable is to be calculated according to the rate of exchange for sight drafts (or, if there is no such rate, according to the appropriate established rate of exchange) on the date of presentment ruling at the place where the instrument must be presented for payment in accordance with subparagraph (g) of article 56.

(b) (i) If such an instrument is dishonoured by non-acceptance, the amount payable is to be calculated, at the option of the holder, at the rate of exchange ruling on the date of dishonour, or on the date of actual payment.

(ii) If such an instrument is dishonoured by non-payment, the amount is to be calculated, at the option of the holder, according to the rate of exchange ruling on the date of presentment or on the date of actual payment.

(iii) Paragraphs (3) and (4) of article 76 are applicable where appropriate.

Section 2. Discharge of other parties

Article 78

(1) If a party is discharged in whole or in part of his liability on the instrument, any party who has a right on the instrument against him is discharged to the same extent.

(2) Payment by the drawee of the whole or a part of the amount of a bill to the holder, or to any party who takes up and pays the bill, discharges all parties of their liability to the same extent, except where the drawee pays a holder who is not a protected holder, or a party who has taken up and paid the bill, and knows at the time of payment that the holder or that party acquired the instrument by theft or forged the signature of the payee or an endorsee, or participated in the theft or the forgery.

Chapter VII. Lost instruments

Article 79

(1) If an instrument is lost, whether by destruction, theft or otherwise, the person who lost the instrument has, subject to the provisions 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. 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 of the instrument.

(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 paragraph (1) or (2) of articles 1, 2 and 3; for this purpose the person claiming payment of the lost instrument may present 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 sum of the lost instrument, and any interest and expenses which may be claimed under article 71 or 72, 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 80

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

(2) Such notice 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 give notice 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 damages do not exceed the amount referred to in article 71 or 72.

(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 the 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 day on which it should have been given.

Article 81

(1) A party who has paid a lost instrument in accordance with the provisions of article 79 and who is subsequently required to, and does, pay the instrument, or who, by reason of

the loss of the instrument, then 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 an amount was deposited with the court or other competent authority or institution, to reclaim the amount so deposited.

(2) The person who has given security in accordance with the provisions of subparagraph (b) of paragraph (2) of article 79 is entitled to obtain release of 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 82

For the purpose of making protest for dishonour by non-payment, a person claiming payment of a lost instrument may use a written statement that satisfies the requirements of subparagraph (a) of paragraph (2) of article 79.

Article 83

A person receiving payment of a lost instrument in accordance with article 79 must deliver to the party paying the written statement required under subparagraph (a) of paragraph (2) of article 79, receipted by him, and any protest and a receipted account.

Article 84

(1) A party who pays a lost instrument in accordance with article 79 has the same rights which he would have had if he had been in possession of the instrument.

(2) Such party may exercise his rights only if he is in possession of the receipted written statement referred to in article 83.

Chapter VIII. Limitation (prescription)

Article 85

(1) A right of action arising on an instrument may no longer be exercised after four years have elapsed:

(a) Against the maker, or his guarantor, of a note payable on demand, from the date of the note;

(b) Against the acceptor or the maker or their guarantor of an instrument payable at a definite time, from the date of maturity;

(c) Against the guarantor of the drawee of a bill payable at a definite time, from the date of maturity or, if the bill is dishonoured by non-acceptance, from the date of protest for dishonour or, where protest is dispensed with, from the date of dishonour;

(d) Against the acceptor of a bill payable on demand or his guarantor, from the date on which it was accepted or, if no such date is shown, from the date of the instrument;

(e) Against the guarantor of the drawee of a bill payable on demand, from the date on which he signed the bill or, if no such date is shown, from the date of the bill;

(f) Against the drawer or an endorser or their guarantor, from the date of protest for dishonour by non-acceptance or by non-payment or, where protest is dispensed with, from the date of dishonour.

(2) A party who pays the instrument in accordance with article 71 or 72 may exercise his right of action against a party liable to him within one year from the date on which he paid the instrument.

Chapter IX. Final provisions

Article 86

The Secretary-General of the United Nations is hereby designated as the depositary for this Convention.

Article 87

(1) This Convention is open for signature at the signing ceremony of the United Nations General Assembly on . . . and will remain open for signature by all States at the Headquarters of the United Nations, New York until [31 December 1988].

(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 88

(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 declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

(3) 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 89

(1) Any State may declare at the time of signature, ratification, acceptance, approval or accession that its courts will apply the Convention only if both the place indicated in the instrument where the bill is drawn, or the note is made, and the place of payment indicated in the instrument are situated in Contracting States.

(2) No other reservations are permitted.

Article 90

(1) This Convention enters into force 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.

(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 enters into force in respect of that State on the first day of the month following the expiration of twelve months after the date of deposit of its instrument of ratification, acceptance, approval or accession.

Article 91

(1) A Contracting State may denounce this 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 six 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. The Convention remains applicable to instruments drawn or made before the date at which the denunciation takes effect.

DONE at . . . , this . . . day of . . . , one thousand nine hundred and eighty-seven 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.

II. COMPARATIVE TABLE OF ARTICLE NUMBERS OF DRAFT CONVENTION ON INTERNATIONAL BILLS OF EXCHANGE AND INTERNATIONAL PROMISSORY NOTES

Number of articles		Number of articles	
<i>As considered by Commission at its twentieth session (annex of A/41/17 and A/CN.9/288; and A/CN.9/WG.IV/WP.33)</i>	<i>Of final text (annex I of A/42/17)</i>	<i>As considered by Commission at its twentieth session (annex of A/41/17 and A/CN.9/288; and A/CN.9/WG.IV/WP.33)</i>	<i>Of final text (annex I of A/42/17)</i>
1	1	43	48
1 <i>bis</i>	2	44	49
1 <i>ter</i>	3	45	50
2	4	46	51
3	5	47	52
4	6	48	53
5	7	49	54
6	8	50	55
7	9	51	56
8	10	52	57
9	11	53	58
10	12	54	59
11	13	55	60
12	14	56	61
13	15	57	62
14	16	58	63
15	17	59	64
16	18	60	65
17	19	61	66
18	20	62	67
19	21	63	68
20	22	64	69
20 <i>bis</i>	23	65	70
21	24	66	71
22	25	67	72
23	26	68	73
23 <i>bis</i>	27	69	74
24	28	70	75
25	29	71	76
25 <i>bis</i>	30	72	77
26	31	73	78
27	32	74	79
28	33	75	80
29	34	76	81
30	35	77	82
31	36	78	83
32	37	79	84
33	38	80	85
34	39	81	86
35	40	82	—
36	41	83	87
37	42	84	88
38	43	84 <i>bis</i>	89(1)
39	44	85	89(2)
40	45	86	90
41	46	87	—
42	47	88	91

III. SUMMARY RECORDS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW FOR MEETINGS DEVOTED TO THE DRAFT CONVENTION ON INTERNATIONAL BILLS OF EXCHANGE AND INTERNATIONAL PROMISSORY NOTES^a

Summary record (partial)* of the 378th meeting

Thursday, 6 August 1987, 9.30 a.m.

[A/CN.9/SR.378**]

Chairman: Mrs. PIAGGI de VANOSI (Argentina)

The discussion covered in the summary record began at 11.35 a.m.

International payments: draft convention on international bills of exchange and international promissory notes

Discussion of draft final clauses (A/CN.9/WG.IV/WP.33)

1. Mr. BERGSTEN (Secretary of the Commission) said that there were two articles which might require particular discussion, articles 82 and 86.

2. As regards the first, the draft Convention on International Bills of Exchange and International Promissory Notes had been intended, in the understanding of the secretariat, to be a self-contained body of law which was to be outside any other law of negotiable instruments. Article 82 had been drafted with that in mind but placed in square brackets, with a footnote, on the understanding that the informal consultations referred to in the footnote would be validated by formal consultations between States parties to the 1930 Geneva Convention providing a Uniform Law for Bills of Exchange and Promissory Notes and the Geneva Convention for the Settlement of Certain Conflicts of Laws.

3. Article 86 specified the number of States which would be required to accede to the Convention for it to come into force.

4. Mr. PELICHET (observer for the Hague Conference on Private International Law) said that, in addition to articles 82 and 86, he would like to draw attention to article 87, also in square brackets, which raised a number of sensitive issues.

5. In regard to article 82, he said that brief consultations had indeed been held in New York between States parties to the

Geneva Convention, as stated in footnote 2, but had not been successful; a proposal for further consultations had not been accepted. Footnote 2 should accordingly be regarded as non-existent and article 82 read as it stood. If article 82 were kept in its present form, he did not believe that States parties to the Geneva Convention on Bills of Exchange and Promissory Notes would be in a position to sign the present draft Convention. It had been suggested informally that States parties might accordingly withdraw from the Geneva Convention, even though the present draft Convention had in fact been intended as a parallel instrument, or that they might withdraw from the Geneva Convention, but retain the Geneva system for their domestic law. That appeared hardly feasible in the light of the law of treaties.

6. He had drawn attention earlier to a lack of internal logic in the terms of reference of the Working Group, which had been reflected in the draft Convention. The optional nature of the draft Convention had not been sufficiently stressed. In its present form the draft Convention took precedence over the Geneva Convention, and against that background the optional nature of article 82 would be difficult to maintain.

7. Mr. SEVON (observer for Finland) said that a conflict between the present draft Convention and the Geneva Convention on Bills of Exchange and Promissory Notes was inevitable, since the requirements stated in article 1 for bills of exchange and promissory notes to be subject to the draft Convention also made them subject to the Geneva Convention. There appeared to be only three ways of resolving that conflict. The first possibility—for States parties to withdraw from the Geneva Convention on ratification of the present instrument—was hardly likely to encourage such ratification. Secondly, the text of article 1 of the draft Convention could be altered so as to devise a formula to which the Geneva Convention would not be applicable, possibly by substituting another set of words for the words “international bill of exchange” throughout the draft Convention. Apart from other objections, that would certainly involve a number of linguistic problems. There was a third possible solution, which was not, however, within the competence of the Commission, namely for States parties to the Geneva Convention to adopt a formal protocol whereby the provisions of the Geneva Convention would not be applicable to bills or notes covered by the present

^aThe summary records contained in this volume include the corrections requested by the delegations and such editorial changes as were considered necessary.

*No summary record was prepared for the meeting before 11.35 a.m.

**No summary records were prepared for the 358th to 377th meetings during which the consideration of the draft Convention as revised by the Commission at its nineteenth session, which had been undertaken by the Working Group on International Negotiable Instruments at its fifteenth session (New York, 17-27 February 1987), was continued by the Commission beginning with article 33.

draft Convention. Although outside the competence of the Commission, that course was the most promising approach to resolving the conflict and should accordingly be pursued.

8. In regard to article 86, it was clear that a considerable number of States were sufficiently interested in the draft Convention to wish to see it brought into force. Experience had shown that insisting on a large number of ratifications meant that ten years or more might well elapse before a convention came into force. If, however, there was a genuine interest in ratification, States which displayed less interest did not in general pose any problem. His delegation would accordingly opt for a smaller number of ratifications, such as five or even fewer.

9. Mr. GANTEN (observer for the Federal Republic of Germany) said that he entirely shared the view of the observer for Finland that the draft convention was in conflict with the Geneva Convention providing a Uniform Law for Bills of Exchange and that no more than three alternative solutions were possible. Of those alternatives, the idea of denouncing the Geneva system was questionable. That system went far beyond States parties to the Convention in question. It might be possible to apply it only in cases to which the UNCITRAL Convention would not apply, but such a solution was by no means ideal.

10. The second proposed solution might be feasible in theory, but would be difficult to apply in practice, firstly because of the time that would be needed to change the draft Convention in order to make it compatible with the Geneva system and secondly because the necessary changes would be so fundamental as to alter the entire character of the draft Convention and make it incapable of achieving the desired results.

11. The third proposed solution—to adopt an appropriate protocol to the Geneva Convention—was theoretically the best, but there were still some problems. Firstly, there was no longer a convening party for revision of the Geneva Convention. That difficulty might be overcome, but a further problem was that it would be necessary for all States parties to the Geneva Convention to ratify the protocol, and that might not prove possible.

12. His country's decision as to whether or not to ratify the UNCITRAL Convention, if adopted, would depend on its chances of entering into force, which in turn depended on the second issue raised by the observer for Finland. In deciding upon the number of instruments of ratification or accession required for such entry into force, the considerable problems for countries belonging to the Geneva system must be borne in mind. It would be worthwhile going into the problems and endeavouring to solve them only if there could be a guarantee that the UNCITRAL Convention would become globally acceptable. He was therefore unable to agree that five ratifications or accessions would be sufficient. That was far below the minimum number that his delegation could accept.

13. Mr. VIS (Netherlands) said that his delegation, which agreed with many of the comments made by the delegations of Finland and the Federal Republic of Germany, would be unable to accept article 82 in existing circumstances. A protocol to the Geneva Convention would be necessary to enable it to do so. Freedom of contract in the area of negotiable instruments was not generally recognized in his country, the terms of the contract being governed by law. For example, the maker of a note could not stipulate any exclusion or limitation of his liability if the law ruled otherwise. Such a stipulation would at most be effective between the maker and

his transferee and could certainly not be enforced against remote parties. His country was therefore unable, under its own laws, to allow persons to select the Convention as their legal régime when assuming liability on an international bill or note. It was bound by the Geneva Convention and was also bound to other contracting parties to that Convention, which it could not denounce.

14. The phrase "including issues of conflict of laws" in draft article 82 should be deleted. If the Geneva Conventions remained in force in his country, as they presumably would, there could obviously be a conflict of laws between them and the UNCITRAL Convention, if ratified, and that conflict would always exist unless all countries accepted the draft Convention as their only instrument. The contracting parties to the Geneva Conventions would have to agree among themselves as to whether they were prepared to make an exception to their obligation under the Geneva Conventions to apply the Geneva Uniform Law.

15. He had no instructions as to the number of ratifications or accessions that should be required for the draft Convention to enter into force, but his country's view would probably be that there should be a large number.

16. Mr. GUEST (United Kingdom) said that while his country was not a party to either of the two Geneva Conventions, the provisions of article 82 of the draft Convention seemed to it to be extravagant. His delegation would like to see a possibility of ratification of the draft Convention by States that had ratified the Geneva Convention, but the method indicated in article 82 did not appear to be the best solution, and his delegation would not be in favour of including that article in the final provisions.

17. Mr. MAEDA (Japan) said that, as he understood it, the conflict between the Geneva Conventions and the UNCITRAL draft Convention could be solved on the basis of the principle that the later specific law prevailed over the former general law—a principle codified clearly in article 30, paragraph 4, of the Vienna Convention on the Law of Treaties, which read:

"(4) When the parties to the later treaty do not include all the parties to the earlier one:

(a) As between States parties to both treaties the same rule applies as in paragraph (3);

(b) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations."

18. If, for example, State A and State B were parties to both the new UNCITRAL Convention and the Geneva Conventions, State C was a party only to the new UNCITRAL Convention and State D only to the Geneva Conventions, then, as between State A and State B, the UNCITRAL Convention would be applied predominantly and the Geneva Conventions only to the extent that their provisions were compatible with those of the UNCITRAL Convention; as between State A and State C, only the new UNCITRAL Convention would be applied; and as between State A and State D only the Geneva Conventions would be applied.

19. His delegation therefore had no problem with respect to the relationship between the Geneva Conventions and the new UNCITRAL Convention.

20. Mr. DUCHEK (Austria) said that he agreed with the suggestion to delete article 82, for the reasons given by other speakers.

21. The question arose whether a conflict existed between the system embodied in the UNCITRAL draft Convention and the system of the 1930 Geneva Convention providing a Uniform Law for Bills of Exchange and Promissory Notes. The answer depended on whether the Geneva system really excluded the autonomy of the parties with regard to bills of exchange and promissory notes. As far as the UNCITRAL draft Convention was concerned, it allowed the parties a choice of law; its optional system enshrined the doctrine of party autonomy. If that system was allowed by the 1930 Geneva Convention, no conflict would arise. If not, the resulting conflict would require some solution. Clearly, the present draft Convention could not solve that problem; it would be for the parties to the 1930 Geneva Convention to take the appropriate action elsewhere.

22. In view of those considerations, the proposed article 82 was out of place in the present instrument. As for the solution proposed by the Japanese representative, on the basis of article 30, paragraph (4) of the 1969 Vienna Convention on the Law of Treaties, he did not believe it would provide a convenient solution in the present instance. It would not be possible to separate the application of the two sets of rules in the manner suggested. Thus, if the drawer and the acceptor were in countries which had ratified the UNCITRAL Convention, the relationships between them would be governed by that Convention. If, however, the endorsee or the holder was in a country which was not party to the UNCITRAL Convention but was party to the 1930 Geneva Convention, that Convention would apply as far as he was concerned. He felt it was essential to find a solution common to all the parties. As he saw it, all the States which were parties to the 1930 Geneva Convention would have to accept the same approach.

23. Mr. BERAUDO (France) said that article 82 was a surprising provision, in that it purported to do away with all other conventions concluded on the same subject and to prevent the conclusion of new ones. It formed part of the draft final clauses prepared by the secretariat and, if adopted, it would seem to have the effect of repealing the 1930 Geneva Convention providing for a Uniform Law for Bills of Exchange and Promissory Notes, and also the regional Convention signed at Panama and binding upon 11 Latin American States. Article 82 would have the effect of preventing the States parties to those treaties from applying the provisions thereof in their mutual relations. There appeared to be no valid reason for proposing such a solution.

24. With regard to the future, the effect of article 82 would be to prevent the conclusion of any future agreement on the subject. It would, for example, stand in the way of the preparation by the European Economic Community of a future directive on the subject of negotiable instruments. There again, he saw no valid reason for proposing such a formula. In fact, whether in respect of past or future agreements, he found it difficult to believe that the results he had described were really intended.

25. As he saw it, the future UNCITRAL Convention should leave it open to its parties to continue to adhere in their mutual relations to the existing Conventions.

26. As for the formula put forward by the Japanese representative on the basis of article 30 of the 1969 Vienna Convention on the Law of Treaties, he considered that the provision in question was more suitable for the Judges of the International Court of Justice at The Hague than for the judges of domestic commercial courts. It was essential to regulate the matter by means of a clear provision, drafted in precise and habitual terms.

27. Lastly, he pointed out that the 1930 Geneva Convention for the Settlement of Certain Conflicts of Laws in connection with Bills of Exchange and Promissory Notes would apply in certain instances to States not parties, or to parties to a bill of exchange not domiciled in a State party.

28. In conclusion, article 82 should be couched in exactly the opposite terms: the UNCITRAL Convention should not prevail over any international agreement entered into already and containing provisions concerning the same matters; nor should the UNCITRAL Convention prevent the conclusion of any new international agreement containing such provisions.

29. Mr. BERGSTEN (Secretary of the Commission) explained that the secretariat did not feel that article 82 was necessary at all. Any conflict which might arise lay in article 1 of the draft Convention, which stated that the future Convention applied to an "international" bill of exchange or promissory note when it contained the heading "International bill of exchange [promissory note] (Convention of . . .)" and, in its text, the same words.

30. It was article 1 that created a potential conflict with the basic 1930 Geneva Convention providing a Uniform Law for Bills of Exchange and Promissory Notes, and not article 82. The representative of The Hague Conference had drawn attention to that problem from the outset of the discussion on the present issue.

31. Another potential conflict could arise with the 1930 Geneva Convention for the Settlement of Certain Conflicts of Laws in connection with Bills of Exchange and Promissory Notes.

32. The basic policy of the present draft Convention was that, once an instrument was issued under it in the form set out in article 1, and the requisite two places were specified, it followed that the régime of the Convention would follow the instrument wherever it went. Accordingly, if an instrument was endorsed in a State which was not a party to the future Convention, the endorsement would nevertheless be governed by the Convention.

33. That being so, a conflict would be possible with the 1930 Geneva Convention for the Settlement of Certain Conflicts of Laws, since that Convention might designate some other law as governing the rights and obligations of the endorser and endorsee.

34. It was the secretariat's understanding that the difficulties arose from the inherent nature of the draft Convention under discussion. They were not created by article 82, nor could they be solved by it.

35. The fact of the matter was that the secretariat had been asked to draft a final clause relevant to the conflict with the Geneva Convention and had accordingly prepared the clause set forth in article 82, which it had placed between square brackets. The terms of that clause reflected the policy underlying the text of the draft Convention.

36. That being said, he pointed out that if article 82 were to become part of the final Convention, it would not prohibit any group of States—such as those belonging to the European Economic Community—from passing regulations relating to negotiable instruments, with the exception of the limited class of bills of exchange and promissory notes clearly labelled "International bill of exchange" or "International promissory note" in the form set out in article 1 and falling under the present draft Convention.

37. In conclusion, he stressed that, as it stood, article 82 would implement the underlying policies of the draft Convention as the secretariat understood them; the text thus submitted was intended to facilitate discussion of the issue. In the secretariat's view, the difficulties which had arisen could

only be solved in the context of the 1930 Geneva Conventions themselves and not in the context of the present draft Convention.

The meeting rose at 12.35 p.m.

Summary record (partial)* of the 379th meeting

Thursday, 6 August 1987, 2 p.m.

[A/CN.9/SR.379]

Chairman: Mrs. PIAGGI de VANOSI (Argentina)

The meeting was called to order at 2.10 p.m.

International payments: draft convention on international bills of exchange and international promissory notes (continued)

Discussion of draft final clauses (continued)
(A/CN.9/WG.IV/WP.33)

1. The CHAIRMAN noted that at the end of the preceding meeting there had appeared to be little support for maintaining draft article 82.

2. Mr. DE HOYOS GUTIERREZ (Cuba) said that he agreed with draft article 82 in so far as it provided that the Convention should prevail over any international agreement which had already been entered into and which contained provisions concerning the matters governed by the Convention, including issues of conflict of laws. The provision did not imply that States parties to the Geneva Convention providing a Uniform Law for Bills of Exchange and Promissory Notes had to denounce that Convention, but only that in matters with regard to which a conflict of laws might arise it was the new (UNCITRAL) Convention that would prevail. The other provision of article 82, to the effect that the Convention should prevail over any international agreement concerning the matters governed by it which might be entered into in the future, was more debatable; it was a possible source of future conflict and should not, in his opinion, be maintained. With regard to article 86, he agreed with previous speakers that the minimum number of ratifications required should not be so large as to defer indefinitely the entry into force of the draft Convention; on the other hand, a very small number would not be practical and would not make for the universality which was one of UNCITRAL's main objectives.

3. Mr. CRUZ FABRES (Chile) expressed agreement with the Chairman's opening remark. The arguments advanced at the preceding meeting by the representatives of Austria and Japan were interesting but he feared that States parties to the Geneva Convention for the Settlement of Certain Conflicts of Laws in connection with Bills of Exchange and Promissory Notes would find that they could not subscribe to article 82 without serious difficulty. With regard to article 86, he shared the views expressed by the observer for Canada. He pointed out, moreover, that since the draft Convention, once it was ratified, would immediately become applicable to transactions involving non-parties as well as parties thereto, it was important that the number of instruments of ratification required to bring it into force should be as large as possible.

4. Mr. ABASCAL (Mexico) also favoured the deletion of article 82. UNCITRAL was surely not the forum where the

problems to which the article gave rise could be settled; the solution would have to await future meetings of States parties to the Geneva and Panama Conventions. As for the issues raised by article 86, he was inclined to agree with the observer for Finland that a small minimum number of ratifications would be preferable.

5. Mr. SPANOGLE (United States of America) agreed with previous speakers that realistic solutions of possible conflicts created by the draft Convention lay outside the scope of the instrument and of the Commission itself. The States parties to the Geneva Conventions would, of course, be specially motivated to address the problem if it appeared that the UNCITRAL Convention was in fact going to enter into force. Bankers in States considering ratification would look, among other things, for some certainty as to the way in which instruments covered by the draft Convention would be treated in States already parties to the Geneva Conventions which would become parties to the present draft Convention, as well as in those which would not become parties. In view of the very considerable resources which UNCITRAL had already devoted to the preparation of the new Convention, it was greatly to be hoped that the States parties to the Geneva Conventions which were members of the Commission would address the issue in the fairly near future, without waiting for the draft Convention's entry into force.

6. Mr. CHAFIK (Egypt) said that, in view of the difficulty which arose in connection with article 82, he would prefer to see it deleted. If, however, a majority of members wished the article to be retained, he would insist on its being amended to make it clear that regional conventions already in existence or which might be entered into in the future would be respected. Secondly, the point made by the Secretary of the Commission at the preceding meeting, namely, that once the draft Convention entered into force it would prevail even in the case of transactions involving non-parties, would have to be clearly spelled out.

7. Mr. YEPEZ (Observer for Venezuela) said he doubted that the Commission was the proper forum for consideration of the final clauses of an international convention. Such clauses involved issues which were political in nature and should, in his view, be considered by the General Assembly or by a plenipotentiary conference. Since, however, the majority of members appeared to deem it appropriate that the Commission should consider the final clauses in the present instance, his delegation would refrain from raising a formal objection. With regard to article 82, while he recognized the need for some drafting improvements, he felt that the substance of the provision should be maintained. An international convention such as the draft now under consideration should undoubtedly

*No summary record was prepared for the meeting after 4.30 p.m.

prevail over regional agreements, whether existing or future. As for article 86, it was desirable to strike a balance between a minimum number of ratifications that was too high and one that was too low. He wondered whether a minimum of 20 ratifications might not be generally acceptable.

8. The CHAIRMAN, summing up the discussion on draft article 82, said that there appeared to be a clear majority in favour of its deletion. She therefore proposed that the Commission should adopt a decision to that effect.

9. *It was so decided.*

10. Mr. SAMI (Iraq) welcomed the decision just taken with regard to draft article 82. Concerning article 86 he thought that the number of ratifications required to bring the draft Convention into force should be as large as possible in order to ensure the Convention's success.

11. Mr. BERAUDO (France) said that draft article 85 should be deleted or, if not, amended. Drawing attention to the comments by the Permanent Bureau of the Hague Conference on Private International Law appearing on the last page of document A/CN.9/WG.IV/WP.32, he said that, in view of the unusual character of the provisions of article 2 of the draft Convention, a reservation to the effect that any State might declare that its courts would apply the Convention only if the place where the bill of exchange or promissory note was drawn or made and the place of payment of the instrument were both situated in Contracting States would surely have to be allowed. Turning to article 86, he said that implementation of the draft Convention would be assured only if the Convention was widely accepted; for that reason, the number to be inserted in paragraph (2) of article 86 should be the highest possible. Lastly, he proposed the removal of the square brackets from draft article 87 as he believed the provision in the article could not give rise to any objection.

12. Mr. GRIFFITH (Australia) said that he agreed with the views expressed at the previous meeting by the observer for Finland concerning draft article 86. The adoption of a small minimum number of ratifications—5, 7 or 10—would facilitate the early entry into force of the Convention and consequently pave the way for its widespread acceptance. Thus the aim of those who advocated a larger minimum number would, in his view, be served best by adopting the contrary course of action.

13. Mr. CHAFIK (Egypt) said that he shared the view of the Australian representative. However, he wondered whether it might not be left to the General Assembly to decide on the numbers to be inserted in the text of article 86. On article 87, he agreed with what the French representative had said.

14. Mr. GUEST (United Kingdom) also expressed agreement with the Australian representative's view and suggested that something like 10 would be an appropriate number for insertion in article 86.

15. The CHAIRMAN, referring to draft article 86, recalled past practice in other international instruments and in the Geneva Conventions in particular. She suggested, as a compromise, that the number to be inserted should be 7 or 10.

16. Ms. DAJO (Nigeria) said that 10 would be acceptable to her. She was in favour of deleting article 87 because it was superfluous. It was self-evident that the Convention could not apply to instruments existing before its entry into force.

17. Mr. JOKO-SMART (Sierra Leone), agreeing with the Chairman's suggestion, said that if the number of ratifications required was too low the Convention's international character

would be impaired, and that if it was too high the Convention would never enter into force. On the basis of past experience it was essential to ensure that the Convention would enter into force, in order to encourage subsequent accessions, and seven was an acceptable number in that respect. With regard to draft article 85, he considered that no reservations should be permitted; otherwise the Convention would be weakened.

18. Mr. DUCHEK (Austria) said that five ratifications might be too low a requirement but to require 20 would doom the Convention. Ten ratifications was the number usually required by UNCITRAL, but the Chairman's reference to the Geneva Conventions, which required only seven was very interesting. He favoured the latter number.

19. Mr. BERAUDO (France) said that account should be taken of the fact that the situation had changed considerably since the adoption of the Geneva Conventions and that the United Nations now had over 150 Members. The minimum number of ratifications required should be roughly equivalent to 10 per cent of the Organization's membership, i.e. 15 to 20 countries. If entry into force was subject to seven ratifications only, the new Convention would merely disorganize the rules governing bills of exchange.

20. Ms. TRAHAN (observer for Canada) said that she supported the proposal that a minimum of five ratifications should be required. However, seven was also acceptable. With regard to article 87, she was in favour of removing the square brackets from the text, as proposed by the representative of France. She considered that paragraph (3) of draft article 88 should be deleted, because of the practical difficulties it would pose.

21. Mr. GANTEN (observer for the Federal Republic of Germany) said that although the representative of Sierra Leone had been right to recall the earlier UNCITRAL Conventions, he had drawn the wrong conclusions. Experience with the United Nations Sales Convention had shown that a minimum of 10 ratifications was not too high. Moreover, the minimum of seven provided for in the Geneva Conventions was not really relevant because there had been far fewer independent States in the 1930s when that Convention had been drawn up. In the circumstances 10 was therefore an absolute minimum.

22. Mr. YEPEZ (observer for Venezuela) said that since so many States had very specific, divergent views as to the minimum number of ratifications which should be required, the matter should be left to the General Assembly because that body represented the international community to which the Convention was ultimately addressed.

23. Draft article 85 should be deleted in order to allow States to consider such reservations as they might wish to enter. While the provision in draft article 87 was self-evident, his delegation was prepared to follow the majority in deciding whether it should be retained or deleted.

24. Mr. PFUND (United States of America) said that the Convention should be given the same chance of entering into force as the Geneva Conventions had had. He considered that the brackets around draft article 85 should be removed. Because denunciation should not be allowed to affect the situation of parties to instruments in a way which they would be unable to anticipate, the square brackets should also be removed from paragraph (3) of draft article 88, which should be amended to read "(3) The Convention remains applicable to instruments drawn or made before the date at which the denunciation takes effect".

25. Mr. LIU (China), referring to draft article 86, said that the minimum number of ratifications should be set at 10 in order to maintain the international character of the Convention.

26. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that he too favoured a minimum of 10 ratifications. The retention of draft article 87, which had been patterned on article 2 of the Geneva Convention, was in his view fully justified.

27. Mr. SAMI (Iraq) said that draft article 85 should be deleted in order to allow member States to express relevant reservations according to their national legislation. It was also important that a majority of States should ratify the Convention. With regard to draft article 86, it was true that the situation had changed radically since the 1930s; there were now more than twice as many independent countries and the number of ratifications required must therefore be at least 10. If no agreement could be reached, the matter should be referred to the General Assembly or to a diplomatic conference.

28. Article 87 was unnecessary and should therefore be deleted, because such truisms were not normally embodied in conventions. Paragraph (3) of draft article 88 should also be deleted because the deletion of article 85 would allow States to enter reservations.

29. Mr. GRIFFITH (Australia), recalling that the purpose of UNCITRAL was to secure agreement by reaching reasonable, fair results that were generally acceptable to all or almost all, said that in the light of the discussion which had taken place, 10 ratifications appeared to be a generally acceptable requirement. He therefore supported that number.

30. Mr. GUEST (United Kingdom) said that the word "enters" should be replaced by "shall enter" in the first line of article 86, paragraph (1), and in the third line of article 86, paragraph (2). He supported the amendment to article 88, paragraph (3), proposed by the representative of the United States.

31. Mr. SEVON (observer for Finland) said that, notwithstanding his earlier proposal, he was prepared to accept a requirement for 10 ratifications in draft article 86. With regard to draft article 85, if the Convention did not expressly limit reservations, the States parties to it could, under the Vienna Convention, enter any reservations whatsoever. However, from the point of view of the practice of private law as covered by the Convention, it would be almost impossible for those dealing in instruments to keep track, at all stages, of all the reservations that could be made. Therefore, draft article 85 should not be deleted. States insisting on the need for reservations should envisage beforehand the reservations they might wish to enter, so as to limit their future scope. That was very important from a practical, operational point of view.

32. Mr. GRIFFITH (Australia) agreed with the observer for Finland that article 85 should be retained.

33. Mr. PELICHET (observer for the Hague Conference on Private International Law) said that he did not share the view that the provision in draft article 87 was so self-evident as to admit no possibility of controversy. The question at issue was the initial implementation of the Convention. If, for example, 10 States (or whatever number of ratifications was established as the minimum for entry into force), all of them in Latin America, were to ratify the Convention, the implication of article 2 would be that the Convention was equally in force in,

say, France or the Federal Republic of Germany. Such an implication would not necessarily, however, be drawn from the existing wording of article 87, which should be redrafted to indicate that entry into force meant the initial entry into force of the Convention. Such a procedure was specific and unique to the present draft Convention, and was in contrast to most international conventions, which normally entered into force in a State when that State ratified the convention concerned.

34. He believed it would be dangerous simply to delete draft article 85, thus affording States an opportunity to enter whatever reservations they might wish. The Commission might consider the possibility of specifying in draft article 2 the reservation to that article which could be allowed.

35. Mr. BERAUDO (France) said that he agreed with the observer for Finland that to allow too much scope for reservations would be to make the Convention vulnerable to ambiguous and conflicting interpretations. It would be appropriate to redraft article 85 along the lines suggested by the observer for the Hague Conference on Private International Law, perhaps in the form of the following wording: "No reservation other than as specified in article 2 is permitted to this Convention."

36. With regard to draft article 87, he did not share the interpretation put forward by the observer for the Hague Conference, in that he could not regard instruments drawn or made prior to ratification by a Contracting State as being subject in that State to the provisions of the Convention.

37. Mr. LIM (Singapore) said that, because of the linkage between the various provisions of the Convention, the scope in draft article 85 for reservations should be minimal.

38. Draft article 87 should be retained and clarified in order to indicate the applicability of the article to States ratifying the Convention after its entry into force.

39. The CHAIRMAN noted that, while most delegations would prefer the text of draft article 85 to remain unchanged, there appeared to be some differences of view regarding the scope of draft article 87, which might be further discussed when the Commission resumed consideration of draft article 2.

40. In the case of draft article 86, there appeared to be a consensus in favour of 10 ratifications as the number required for the Convention to enter into force.

41. While some delegations had advocated retention of the existing text of paragraph (3) of draft article 88, the representative of the United States had proposed an amendment which might appropriately be referred to the Drafting Group.

42. Mr. PELICHET (observer for the Hague Conference on Private International Law) said that he could not reconcile the French representative's interpretation of draft article 87 with the provision contained in article 2. According to that interpretation, if an instrument were to be drawn or made in a State which had not ratified the Convention, that instrument would have no legal validity in another State which had also not ratified the Convention. In his view, such a limitation was inadmissible. Draft article 87 should be understood as referring to the initial entry into force of the Convention, in accordance with the intention behind article 2.

43. Mr. DUCHEK (Austria) said that the text of article 87 was satisfactory, and that only the brackets should be deleted.

44. The CHAIRMAN said that, in the absence of objection, she would take it that the Commission wished to adopt the text of article 87, deleting the square brackets.

45. *It was so decided.*

46. Mr. SEVON (observer for Finland) said that the issue raised by article 88 was a matter of substance, and should therefore be considered by the Commission in plenary session rather than by the Drafting Group.

47. The CHAIRMAN recalled that the representative of the United States had proposed that paragraph (3) of article 88 should be abbreviated to read: "The Convention remains applicable to instruments drawn or made before the date at which the denunciation takes effect". The last sentence of the paragraph would be deleted.

48. Mr. DE HOYOS GUTIERREZ (Cuba), Mr. GANTEN (observer for the Federal Republic of Germany), Ms. TRAHAN (observer for Canada) and Ms. ADEBANJO (Nigeria) expressed support for the United States proposal.

49. Mr. JOKO-SMART (Sierra Leone) said that the amendment was useful, since the existing text would give rise to difficulties in connection with instruments which were still in circulation at the date of denunciation.

50. Mr. LIM (Singapore) said that he would reserve his position on the United States amendment, since he was not clear whether the intention was that any instrument made or drawn before the date of denunciation would continue to be governed by the Convention even though the State concerned had denounced the Convention.

51. Mr. CHAFIK (Egypt) said that, shorn of its last sentence, the paragraph would lose its *raison d'être*. He therefore opposed the United States amendment.

52. Mr. SPANOGLE (United States of America), replying to the representative of Singapore, said that the intention behind his delegation's amendment was to specify that the operative date was the date on which the denunciation took effect, and not the date of the denunciation itself.

53. In reply to the representative of Egypt, he said that to leave the first sentence of paragraph (3) as it stood would be to imply that the Convention might no longer apply to instruments drawn or made on the assumption that the Convention would be applicable to them. The implication of the words "may declare" was that a Contracting State might choose not to declare in its notification that the Convention remained applicable: the purpose of his amendment was to

make clear that the denunciation did not affect instruments drawn or made before the denunciation took effect.

54. Mr. BERAUDO (France) said that, if the date on which the Convention entered into force had no effect on instruments drawn or made prior to that date the same logic applied *a fortiori* to instruments drawn or made before a denunciation took effect: a State which denounced the Convention would no longer apply it. The time-elements common to both draft article 87 and paragraph (3) of draft article 88 should not be understood as affecting the application or non-application of the Convention.

55. Mr. GUEST (United Kingdom) said that any perceived symmetry between draft article 87 and paragraph (3) of draft article 88 depended on one's interpretation of draft article 2, in which connection he found himself in agreement with the views expressed by the observer for the Hague Conference. As to the United States amendment, he felt that the revised version of paragraph (3) was specific and consistent with the principle of the draft Convention that, once an instrument was drawn or made under the Convention, it continued to be governed by the Convention throughout its active life.

56. Mr. PELICHET (observer for the Hague Conference on Private International Law) said that the approach of the representative of France was logical, but that the end result would be the same whether the article was retained in its existing form or modified in accordance with the United States proposal.

The meeting was suspended at 4 p.m. and resumed at 4.20 p.m.

57. Mr. SAMI (Iraq) said that in his view, the amendment did not serve the purposes of the Convention. He would prefer to avoid any provision which would impose application of the Convention to instruments drawn or made prior to denunciation. It would be better to delete paragraph (3), but if the Commission decided to retain it, the wording should not be changed.

58. Mr. CUKER (Czechoslovakia), Ms. OLIVEROS (Argentina) and Mr. KARTHA (India) expressed their support for the United States amendment.

59. The CHAIRMAN said that, in the absence of objection, she would take it that the Commission wished to adopt the text of draft article 88, amended as proposed by the United States representative.

60. *It was so decided.*

The part of the meeting covered by the summary record ended at 4.30 p.m.

Summary record (partial)* of the 381st meeting

Friday, 7 August 1987, 2 p.m.

[A/CN.9/SR.381**]

Chairman: Mrs. PIAGGI de VANOSI (Argentina)

The discussion covered in the summary record began at 2.55 p.m.

International payments: draft convention on international bills of exchange and international promissory notes (continued) (A/41/17; A/CN.9/288; A/CN.9/XX/CRP.9)

1. The CHAIRMAN invited the Commission to proceed to the second reading of the draft Convention (A/CN.9/XX/CRP.9).

Articles 1, 1 bis and 1 ter

2. The CHAIRMAN said that, if she heard no objections, she would take it that the Commission wished to adopt articles 1, 1 bis and 1 ter.

3. *It was so decided.*

4. Mr. BERAUDO (France) said that his delegation's failure to oppose the decision just taken should not be construed as tacit approval, but rather as a reflection of its reluctance to reiterate objections it had raised before. The same would apply in similar circumstances throughout the second reading.

Article 2

5. The CHAIRMAN noted that, at its fifteenth session held in New York in February 1987, the Working Group had decided to retain the text of article 2 as drafted at the nineteenth session of the Commission and reproduced in the annex to the report of that session (A/41/17). However, some delegations had proposed that certain clarifications should be introduced into the article.

6. Mr. PELICHET (observer for the Hague Conference on Private International Law) said that a proposal for a provision in article 2 to the effect that at least two of the places stipulated in article 1 bis (preferably the place of payment and the place indicated next to the signature of the drawer) should be situated in Contracting States had been put forward some four or five years previously, but had not been accepted. The reservation provision suggested by his organization (A/CN.9/WG.IV/WP.32) reflected concern at the exorbitant nature of article 2 as drafted, which would give rise to difficulties in the area of private international law. If article 2 were not amended to allow such a reservation, a number of States might be reluctant to ratify the Convention.

7. Another point was that the proposed reservation provision was conciliatory in intent, since it was restricted to the non-application of the Convention by courts of the State making the reservation, so that the parties to the instrument and the banks would none the less be able to assume a risk by negotiating or discounting the instrument. The reservation would only operate if the bill or note were to give rise to litigation in the courts of the State making the reservation.

8. Mr. BERAUDO (France) said that article 2 was unusual in that it did not contain any specific criteria with respect to the

geographical scope of application of the Convention. In its existing form the article was unacceptable to his country, which therefore supported the provision suggested by the Hague Conference on Private International Law, by which a State ratifying the Convention could declare that its court would apply the Convention only if the place where the bill of exchange or promissory note was drawn and the place of payment of the instrument were both situated in Contracting States. Obviously the reservation would only concern States which had ratified the Convention. It would not eliminate the drawback which arose from articles 1 and 2 taken together, namely, that for States wishing to remain outside the new system, there would be repercussions with regard to makers, drawees, guarantors and drawers domiciled in their territory, and the resulting situation would be exorbitant from the point of view of both private and public international law. As a partial remedy some States ratifying the Convention might therefore decide to apply it only in cases in which the drawee and the drawer were situated in the territory of Contracting States. The reservation would have advantages for a State which ratified the Convention and which was also a party to the Geneva Convention: such a State could continue to apply the Geneva Convention with respect to instruments for which the place of payment and the place where the instrument was drawn were situated in States which were parties to the Geneva Convention but not to the new Convention. The reservation would thus represent a first step towards reconciling the two systems and, though very limited, was accordingly indispensable.

9. Mr. DUCHEK (Austria) said that certain countries evidently found it very difficult to accept the draft Convention in its existing form. He therefore thought it would be appropriate for the Commission to adopt a more flexible approach to the question of reservations, which might be crucial for the delegations concerned. With that consideration in mind, his delegation would be prepared to support the proposal by the representative of France.

10. Mr. SAMI (Iraq) said that article 2 could lead to problems of conflict of laws, in that a State party to the Geneva Convention could not be expected to implement the rules of the new Convention in respect of a bill of exchange which was invalid or incomplete under its own domestic law. For that reason, he agreed with the proposal made by the observer for the Hague Conference and the representative of France.

11. Mr. EYZAGUIRRE (Chile), Mr. VIS (Netherlands), Mr. CHAFIK (Egypt) and Mr. YEPEZ (observer for Venezuela) said that they were in favour of the proposed reservation.

12. Mr. GANTEN (observer for the Federal Republic of Germany) and Mr. LOJENDIO (Spain) said that, while reservations to the content of the Convention should be discouraged, the reservation advocated by France and the observer for the Hague Conference related solely to its applicability and was therefore acceptable in the interests of ensuring a greater number of ratifications of the Convention.

*No summary record was prepared for the meeting before 2.55 p.m.

**No summary record was prepared for the 380th meeting.

13. Mr. CRAWFORD (observer for Canada) said that, as he understood it, the proposed reservation would stipulate that the place of drawing and the place of payment should be in Contracting States; it was argued that, without that reservation, the courts would not be able to enforce the Convention against parties domiciled in those States. He wondered, however, whether the reservation would in fact solve the problems of conflict of laws which would arise: might it not also be necessary, for example, to stipulate that every endorser should be situated in a Contracting State? By what criteria were courts to determine that they were to apply the rules of the Convention rather than those of national law? He felt that the effect of the proposed reservation would be to weaken the Convention considerably, and he would strongly oppose its inclusion in the draft.

14. Mr. SPANOGLE (United States of America) said that the effect of the reservation would be to require courts in all jurisdictions to resolve highly complex conflicts of law arising from the Convention itself. Supposing, for example, that State A ratified the Convention without reservation, while State B ratified it with the proposed reservation, and State C did not ratify it at all: (*Mr. Spanogle, United States of America*) if a bill drawn in State B and payable in State C came before the courts in State A, the Convention would not apply under the rules of either State C or State B, and it might be difficult to explain to the courts of State A that they should ignore the Convention despite the fact of its ratification by that State. A second hypothetical source of conflict arose from the retention of paragraph (3) of article 1 *bis* in its existing form. In short, the proposed reservation would generate more problems than it would resolve, and it was not appropriate to attempt in the new Convention to unravel all the difficulties confronting States parties to the Geneva Convention.

15. Mr. VIS (Netherlands) said, in connection with the example given by the representative of the United States, that if there were to be no reservation, and the bill of exchange were drawn by the drawer in a Contracting State, the Convention would not be applicable in a court of a non-Contracting State in the event of a dispute. The reservation was not intended to resolve all potential conflicts of law: it merely restricted the scope of application of the Convention. He understood that there had been discussion of the possibility that the Hague Conference on Private International Law would draw up a new convention on conflicts of law which would take into account specific problems created by the Convention on International Bills of Exchange and International Promissory Notes. He felt that the proposed reservation would not in itself lead to any new conflicts of law.

16. Mr. PELICHET (observer for the Hague Conference on Private International Law) said that he fully agreed with the previous speaker. The aim of the reservation was to limit the scope of the Convention's application, which article 2 rendered both vast and intractable. The Hague Conference did indeed have on its agenda a project for a new convention on the conflict of law in respect to negotiable instruments in general.

17. Mr. GUEST (United Kingdom) said that his delegation would prefer to keep the existing text of article 2, but that the proposed amendment would be acceptable if its inclusion would enable certain States which had been less than enthusiastic about the draft Convention to overcome their reluctance to ratify it.

18. The CHAIRMAN, replying to a question from the representative of Egypt, said that the reservation, if adopted, would be included in the final clauses of the Convention.

19. She said that if she heard no objection she would assume that the Commission wished to adopt article 2, as well as a provision concerning the possibility of reservation proposed by the representative of France and the observer for the Hague Conference. The article, as amended, would be transmitted to the Drafting Group.

20. *It was so decided.*

Article 3

21. *Article 3 was adopted.*

Article 4

22. The CHAIRMAN asked whether the Commission wished to keep or delete the words "or unauthorized" in article 4, paragraph (10).

23. Mr. HERRMANN (International Trade Law Branch), in reply to an inquiry by Mr. MAEDA (Japan), stated that the majority opinion of the Drafting Group had been that it was sufficient to use the words "by the wrongful use of such means". However, considering that as the matter might be one of substance, it had wished to draw the Commission's attention to the words "or unauthorized". The aim had been to arrive at a clearer distinction of what was included under "forged signature". He also referred members to articles 23 and 23 *bis* concerning forgery and an agent acting without authority.

24. Mr. GRIFFITH (Australia) supported the deletion of the words "or unauthorized".

25. Mr. MAEDA (Japan) was in favour of keeping the text as it stood, including the words "or unauthorized".

26. Mr. SAMI (Iraq) referred to the discussions in the Drafting Group on unauthorized signature (where the person affixing the signature had no authority) and forged signature (where the signature of another person was used by a party who was not the lawful owner thereof). In view of the difference between the two, he was in favour of keeping the words "or unauthorized".

27. Ms. ADEBANJO (Nigeria) and Mr. de HOYOS GUTIERREZ (Cuba) supported the retention of those words.

28. Mr. VIS (Netherlands) pointed out that the Convention contained other articles to cover forged endorsements and agents without authority (articles 23 and 23 *bis*). His first reaction was therefore in favour of deleting the words.

29. Mr. BERAUDO (France) said that he was in favour of keeping the words.

30. Mr. CRAWFORD (observer for Canada) favoured deleting the words, because it was too restrictive to link unauthorized use with wrongful uses of mechanical means of reproducing signatures. The circumstances of each case were different, and it would be advisable not to label all instances as forgeries, but rather to allow courts latitude to decide on the degree of wrong and to determine whether forgery was indeed involved or whether doctrines of ostensible or apparent authorization might be applied.

31. Mr. DUCHEK (Austria) echoed the observations made by the representative of the Netherlands. He referred to articles 23, 23 *bis* and 68(4) to support his preference for the deletion of the words.

32. Mr. MAEDA (Japan) referred to the provisions of article 32(3) in support of his view that the words should be kept.

33. Mr. SEVON (observer for Finland) thought that there was a broader problem in the new wording of subparagraph (10). Did the words "such means" at the end of the paragraph refer only to "equivalent authentication effected by other means" and not to "handwritten signature or its facsimile", and was that change intentional? If so, the words should be kept, since they were in line with articles 23 and 23 *bis*. If not, there might be some confusion.

34. Mr. LIM (Singapore) proposed that the words should be deleted because their retention might raise questions regarding rules of agency. For example, officers of a corporation might be authorized to sign for a bill up to a given money ceiling; a signature for a bill in excess of the ceiling might then not be wrongful, but would be unauthorized.

35. Mr. JOKO-SMART (Sierra Leone) said that, in view of articles 23 and 23 *bis*, the words "or unauthorized" should be deleted. The important point was to establish whether or not there was an intention to defraud.

36. Mr. SPANOGLE (United States of America) said that the definition had made sense in the 1982 text, when article 23 had covered both forgery and agents acting without authorization. Article 23 had subsequently been divided into two parts, but the definition of forgery in article 4(10) had not been revised.

37. He felt that the Drafting Group might have made an unintentional substantive change in streamlining the definition of "signature", but leaving "such means" indefinite.

38. If some systems required proof of intent in order to establish wrongfulness, it might be better to leave the wording of article 4(10) untouched since the definition of forgery had not been designed to require proof of wrongful intent. If the words were retained, it might be advisable to recombine articles 23 and 23 *bis*.

The meeting was suspended at 4.10 p.m. and resumed at 4.30 p.m.

39. Mr. KARTHA (India) and Mr. SPANOGLE (United States of America) supported the deletion of the words "or unauthorized".

40. Mr. CHAFIK (Egypt) felt that the words should be kept because forgery and unauthorized use were different concepts.

41. Mr. BARRERA GRAF (Mexico) said that, since articles 23 and 23 *bis* dealt separately with forgery and agents acting without authority, there was now no need for a definition of "forged signature".

42. The CHAIRMAN felt that there was a majority in favour of article 4 as drafted without the words "or unauthorized" in subparagraph (10).

43. *It was so decided.*

Articles 5 and 6

44. *Articles 5 and 6 were adopted.*

Article 7

45. The CHAIRMAN drew the meeting's attention to the change introduced by the Working Group, as embodied in paragraph 1 *bis*.

46. Mr. SPANOGLE (United States of America) reminded the Commission of a change in article 7, paragraph (5), which had been approved by the Working Group on the last day of its session, and requested that the text before the Commission should be revised accordingly. At the nineteenth session of the Commission, in 1986, there had been general agreement on the fact that interest rates could be variable provided that the reference rate was publicly announced or available and not subject to unilateral determination by any party or person named in the instrument at the time it was issued. However, it had later been realized that the person controlling or announcing the reference rate would be named in the instrument, and the Drafting Group had therefore been invited to draw up a list of all persons who might be named in the instrument outside the reference-rate clause itself. The list as adopted at the nineteenth session had included payee, drawee, actual or prospective party and other holder. The Working Group had been uneasy about it, however, because the notion of "prospective party or other holder" was unclear and no longer focused on the central criterion of persons named in the instrument at the time of issue. That approach had consequently been abandoned and the existing provision drafted instead. However, the word "influenced" still posed problems because it was too broad: almost anyone could be thought of as having an influence on the reference rate. He therefore wished to suggest an improved version of the 1986 text, reading "The reference rate must not be subject, directly or indirectly, to unilateral determination by any person who is named in the instrument at the time the bill is drawn or the note is made". The focus would then be on the person named in the instrument and it was indeed important that there should be no connection with the persons named therein, i.e. mainly the parties or the drawee. However, since the person announcing the reference rate would be named in the instrument, it was necessary to provide for an exception and add "except a person who is named only in the reference-rate provisions".

47. Mr. VIS (Netherlands) pointed out that the persons named in the instrument at the time the bill was drawn or the note was made would include the drawer, the drawee, the payee and possible guarantors, but not subsequent parties. For example, if the payee negotiated or transferred a bill or note to holders who were not initial parties to the instrument, such holders would not be covered by the suggested provision. He wished to know whether that was deliberate.

48. Mr. SPANOGLE (United States of America) replied that under the 1986 draft, for a reference rate to be disabled, the person who could determine the rate directly or indirectly had to be named in the instrument at the time it was issued. In that respect the present wording contained no substantive change. However, the clause "at the time the bill is drawn or the note is made" in the 1986 draft had been placed later in order to make it clear that the person must be named in the instrument at the time it was issued.

49. Mr. VIS (Netherlands) said that that depended on the interpretation of the 1986 provision, and more specifically on whether the phrase "or actual or prospective party or other holder" was still governed by the clause "at the time the bill is drawn or the note is made". That question had not been settled. The Working Group's provision (A/CN.9/288), was broader and covered future holders as well.

50. Mr. ABASCAL (Mexico) said that the proposal made by the representative of the United States was faithful to the 1986 agreement, whereby the persons prohibited from directly or indirectly influencing the rate were those named in the instrument. However, if, for example, a bank interest rate or the rate of a group of banks was used as reference, the bank(s) in question would automatically be prevented from acquiring the instrument. The Working Group's wording was ambiguous, and his delegation therefore supported the United States proposal because it was more precise and fully reflected the substance of the 1986 agreement.

51. Mr. BERAUDO (France) said that the proposal made by the representative of the United States was too narrow. The existing wording could cover a wider range of situations, including cases in which banks or major companies owning smaller ones or subsidiaries which had issued instruments might act on the market to influence interest rates. Such situations could arise not only in free-market countries but also in planned-economy countries, where the State, as the owner of public enterprises, might try to influence interest rates. The existing wording was therefore preferable, at least in French, where the meaning of "influence" was very clear and implied that if it could be established that the interest rate had changed a few days before presentment or maturity because of action on the part of banks or companies with an interest in the company issuing the instrument, the previous rate would be applied. It would indeed be dangerous to restrict the prohibition of influence to persons named in the instrument, excluding other market operators. The existing text would deter them from changing the interest rate to their advantage. It was therefore to be hoped that article 7, paragraph 5, would remain as it stood.

52. Mr. GANTEN (observer for the Federal Republic of Germany) disagreed with the representative of France and supported the United States amendment, because the term "influence" was indeed too broad and would make the provision practically inoperable. The representatives of the

United States and Mexico had interpreted the 1986 wording correctly and any other interpretation would entail considerable problems, including the prohibition of certain operators from subsequently acquiring the instruments.

53. Mr. GUEST (United Kingdom) said that since the proposal was acceptable to Mexico, which had introduced the qualification in the first place, and for the reasons stated by the observer for the Federal Republic of Germany, he preferred the United States proposal to the existing text, because it added certainty, without which the article would be inoperable.

54. Mr. LIM (Singapore) supported the United States proposal for the same reasons as the observer for the Federal Republic of Germany. Regarding the interpretation of the 1986 version of article 7, paragraph 5, the place of the verb in the sentence made it clear that the "prospective or other holder" was to be named in the instrument, as the text would have otherwise read "any person who is".

55. Mr. CHAFIK (Egypt) pointed out that the existing text had been drafted in the interests of the developing countries, to protect them from any persons who, in bad faith, might take advantage of their situation in determining interest rates. It would therefore be preferable to maintain the existing text.

56. Mr. VIS (Netherlands) associated himself with the statement made by the representative of Singapore and supported the proposal by the representative of the United States, which was clearer than the Working Group's provision.

57. The CHAIRMAN, noting broad support for the proposal, suggested that article 7, paragraph 5, should be adopted with the amendment put forward by the representative of the United States.

58. *It was so decided.*

The meeting rose at 5.10 p.m.

Summary record of the 382nd meeting

Monday, 10 August 1987, 9.30 a.m.

[A/CN.9/SR.382]

Chairman: Mrs. PIAGGI de VANOSI (Argentina)

The meeting was called to order at 9.45 a.m.

International payments: draft convention on international bills of exchange and international promissory notes
(continued) (A/41/17; A/CN.9/288; A/CN.9/XX/CRP.9)

Article 7

1. The CHAIRMAN invited the Commission to continue its consideration of the draft articles of the Convention on International Bills of Exchange and International Promissory Notes, as revised by the Drafting Group, taking up first draft article 7. The Commission had already adopted paragraphs (1), (1 bis) and (5)—the last-mentioned paragraph amended as proposed by the United States of America—but paragraphs (2), (3), (4), (6) and (7) still remained to be considered. Noting that there appeared to be no comment on those paragraphs, she said that, in the absence of objection, she would take it that the Commission decided to adopt them.

2. *It was so decided.*

Article 8

3. The CHAIRMAN invited the Commission to consider draft article 8, paragraph (5) of which had been amended by the Working Group by the addition of the following: "or, where the bill is dishonoured by non-acceptance, by the date of protest or, if protest is dispensed with, by the date of dishonour" (A/CN.9/288, para. 48). Noting that there appeared to be no comment on the article, she said that, in the absence of objection, she would take it that the Commission decided to adopt it, as amended.

4. *It was so decided.*

Articles 9 and 10

5. The CHAIRMAN invited the Commission to consider draft articles 9 and 10, which had undergone no substantive change. Noting that there appeared to be no comment on the

articles, she said that, in the absence of objection, she would take it that the Commission decided to adopt them.

6. *It was so decided.*

Article 11

7. The CHAIRMAN invited the Commission to consider draft article 11, which the Working Group had amended in order to make it consistent with the provisions of article 38 (see A/CN.9/288, paras. 58 and 59). She noted that there appeared to be no comment on the article and said that, in the absence of objection, she would take it that the Commission decided to adopt it, as amended.

8. *It was so decided.*

Article 12

9. The CHAIRMAN invited the Commission to consider draft article 12, whose text had undergone no substantive change. Noting that there appeared to be no comment on the article, she said that, in the absence of objection, she would take it that the Commission decided to adopt it.

10. *It was so decided.*

Article 13

11. Mr. SAMI (Iraq) observed that paragraph (2), subparagraph (a), of article 13 was not consistent with the text of article 42, paragraph (4), as set out in document A/CN.9/XX/CRP.11, which the Commission had adopted. Under article 13, a signature alone constituted an endorsement, whereas article 42, paragraph (4), provided that a guarantee might be effected by a signature alone on the front of the instrument. It was therefore necessary to clarify the provision in paragraph (2), subparagraph (a), of article 13.

12. Mr. BERAUDO (France) said that the point of the representative of Iraq was well taken. He had some doubts about the provisions of article 42. They constituted, in his view, a legal oddity inasmuch as they established a dual guarantee for the protected holder, a full one if the signature was that of a bank, and a more limited one if the signature was that of an individual or body corporate. His delegation considered that the provisions of article 13, which were based on a centuries-old rule of exchange market law, should take precedence over those of article 42, because a signature alone could constitute only endorsement.

13. Mr. DUCHEK (Austria) said that, in his view, the matter was simply one of drafting. Article 13 should be amended to specify that a signature alone on the back of the instrument was an endorsement.

14. The CHAIRMAN suggested that paragraph (3) of article 13 should be referred to the Drafting Group with the request that it produce a clearer version in the light of the comments made in the Commission.

15. *It was so decided.*

Article 14

16. The CHAIRMAN invited the Commission to consider draft article 14, which had not been amended.

17. Mr. HERRMANN (International Trade Law Branch) pointed out that paragraph (3) of the article might give rise to

two interpretations, a narrow one which would make it apply only to the holder and a broader one which would extend the provision's scope to any person involved prior to the holder. He invited the Commission to make a choice between those two interpretations.

18. Mr. BERAUDO (France) proposed, in order to eliminate any ambiguity, that the words "even if the instrument was obtained by a third party" should be added to paragraph (3) of article 14.

19. Mr. CRAWFORD (observer for Canada) and Mr. MAEDA (Japan) found the text of paragraph (3) sufficiently clear. However, they would not object to its being modified if that was necessary.

20. The CHAIRMAN said that she herself found the text of paragraph (3) clear enough. However, she thought it might be referred to the Drafting Group for such action as might be deemed appropriate. Paragraphs (1) and (2), on the other hand, to which there had been no objection, could be considered adopted by the Commission.

21. *It was so decided.*

Articles 15, 16, 17, 18 and 19

22. The CHAIRMAN invited the Commission to consider draft articles 15, 16, 17, 18 and 19 which had been the subject of no substantive amendment. In the absence of objection she would take it that the Commission decided to adopt those draft articles.

23. *It was so decided.*

Articles 20 and 20 bis

24. Mr. HERRMANN (International Trade Law Branch) said that a new subparagraph (a) reading "Is a holder;" had been added to article 20 by the Drafting Group, principally in order to align the text with that of article 20 bis.

25. Mr. BONELL (Italy), Mr. GRIFFITH (Australia) and Mr. SAMI (Iraq) considered that subparagraph (a) was unnecessary in both articles because "holder" was already defined in article 14.

26. Mr. DUCHEK (Austria) thought it necessary to specify that the endorsers of a particular type referred to in the articles were holders. He therefore favoured the retention of subparagraph (a) in articles 20 and 20 bis.

27. Mr. BERAUDO (France) proposed, as a compromise, that subparagraph (a) of articles 20 and 20 bis should be moved to the end of the introductory part, which would then read: "... the endorsee is a holder who:".

28. The CHAIRMAN noted that the French representative's proposal was acceptable to the Commission. In the absence of objection she would take it that the Commission decided to adopt articles 20 and 20 bis, as thus amended.

29. *It was so decided.*

Articles 21 and 22

30. The text of draft articles 21 and 22, as they appeared in document A/CN.9/XX/CRP.9, was adopted without discussion.

Articles 23 and 23 bis

31. Mr. HERRMANN (International Trade Law Branch), said that the Drafting Group had modified paragraph (2) of articles 23 and 23 *bis*, by moving the phrase "he is without knowledge of the forgery". In addition, in subparagraph (a) of paragraph (2) of both articles, the words "proceeds of the instrument" in the English text had been replaced by the word "payment", which was more readily translatable into other languages. Lastly, for purposes of clarity, the words "whichever comes later" had been replaced by the words "if this is later" inserted at the end of subparagraph (b) of paragraph (2).

32. Mr. BONELL (Italy) said he did not think it very appropriate to introduce the concept of good faith into articles 23 and 23 *bis*. He wondered whether it might not be possible simply to use the phrase "unless his lack of knowledge is due to his failure to exercise reasonable care". It was true that the concept of good faith was mentioned in the ICC's Uniform Rules for the Collection of Commercial Paper, but that was in a different context.

33. The CHAIRMAN drew attention to the fact that the new wording had been adopted in February 1987 by the Drafting Group owing to the problem created by the words "provided that such absence of knowledge is not due to his negligence".

34. Mr. SAMI (Iraq), referring in particular to paragraph (3) of articles 23 and 23 *bis*, expressed support for the Italian representative's proposal as, in his view, those paragraphs should be interpreted as meaning that the person paying an instrument should exercise reasonable care or make sure that there was no forgery. He also pointed out that there was a discrepancy between the French and Arabic texts which should be dealt with.

35. The CHAIRMAN said that if the Italian proposal was not supported by any other delegation she would take it that the texts of draft articles 23 and 23 *bis*, as they appeared in document A/CN.9/XX/CRP.9, were adopted.

36. *It was so decided.*

The meeting was suspended at 11.25 a.m. and resumed at 11.45 a.m.

Article 24

37. The text of draft article 24, as contained in document A/CN.9/XX/CRP.9, was adopted without discussion.

Article 25

38. Mr. HERRMANN (International Trade Law Branch) said that the Drafting Group had deleted subparagraphs (d) and (e) of paragraph (1) which mentioned defences that were also enumerated in paragraph (1) of article 26. It had deemed those subparagraphs unnecessary since subparagraph (a) of paragraph (1) referred to "Any defence that may be set up against a protected holder" and a reference to article 26 had been added. As a consequential change, the reference in subparagraph (d), the former subparagraph (f), to the former subparagraph (e) had been deleted.

39. Mr. MAEDA (Japan) considered the use, in subparagraph (b) of paragraph (1) of the words "the party subsequent to himself" to be inappropriate. He gave the following example: A drew an instrument in favour of B, who endorsed it in blank to C, who in turn transferred it to D,

without endorsing it. In that case C was not a party and D was a holder. If B had against C a defence based on the underlying transaction between them and if D had obtained the instrument with knowledge of such defence, D was not a protected holder. If, in the event of dishonour by non-acceptance, D took action against B, could the latter set up against him the same defence as he could set up against C? With the existing wording of paragraph (1) the answer to that question was no, since C was not the drawer. It was illogical that the situation of D should vary according to whether C had endorsed the instrument or had transferred it without endorsing it. It was therefore necessary to modify the expression "the party subsequent to himself". The term "previous holder" used in the original text might be more appropriate.

40. Mr. HERRMANN (International Trade Law Branch) said that he believed the term "previous holder" had been replaced because it was not clear and lent itself to misinterpretation. He suggested that a term such as "subsequent holder" should be used. The question was a matter of substance on which the Commission might wish to take a decision, which the Drafting Group could then implement.

41. Mr. CRAWFORD (observer for Canada) proposed that the words "the party subsequent to himself" should be replaced by the words "his transferee".

42. Mr. DUCHEK (Austria), supported by Mr. SAMI (Iraq), expressed doubt as to the appropriateness of any change, for the change would be substantive, as all persons who had merely transferred an instrument would be treated in the same way as the endorsers whose name appeared on it.

43. Mr. CRAWFORD (observer for Canada) explained that the amendment he had proposed would not affect transactions between subsequent holders who were not signatories, as subparagraph (b) of paragraph (1) dealt only with defences based on an underlying transaction between a party and his transferee and not between holders who might possibly not be parties. The question was therefore simply a matter of drafting.

44. Mr. BERAUDO (France) noted that the Commission had embarked on an extremely complex discussion of a provision central to the draft Convention. He felt that such a discussion should take place only among specialists in the question involved. The experts of many delegations had already left Vienna, as the time-table had provided for consideration of international bills of exchange and international promissory notes during the early part of the session. The Japanese representative's proposal deserved to be considered, having regard to that representative's undeniable authority in the matter, but he himself was unable to participate usefully in the discussion or to take a decision on an important point which might have major substantive implications. He therefore wondered whether the Commission should pursue its consideration of the draft Convention on international bills of exchange and international promissory notes and, by so doing, neglect other items on its agenda.

45. The CHAIRMAN said that she did not share the view of the French representative. UNCITRAL was a technical commission, all of its members were experts and technicians and it was the responsibility of Governments to make the necessary arrangements for their delegations to be able to follow the work effectively.

46. Mr. BERAUDO (France) thought it unrealistic to assume that any one person could be a specialist in all the matters included in the Commission's agenda. States assigned their

representatives on the basis of the time-table supplied to them. He himself was more particularly responsible for questions relating to the Draft Legal Guide on Drawing Up International Contracts for Construction of Industrial Works and to the question of Operators of Transport Terminals, two items on the agenda of the current session.

47. Mr. SPANOGLE (United States of America) said that he shared the view of the Japanese representative concerning subparagraph (b) of paragraph (1) of article 25. As the Canadian representative had proposed, the words "the party subsequent to himself" should be replaced by the words "his transferee" or words having the same meaning. The subparagraph should therefore be referred to the Drafting Group.

48. Mr. SEVON (Finland) said that he agreed with the representative of Japan.

49. Mr. GRIFFITH (Australia) agreed with the representative of France that there was a problem related to the organization of the Commission's work. States adjusted the composition of their delegations on the basis of the questions schedule for consideration. He noted, however, that the text of subparagraph (b) of paragraph (1) of article 25 was the same as the one adopted by the Working Group in February 1987 (A/CN.9/288). Delegations having doubts regarding proposed amendments could therefore request that that text, which their Governments had already had time to study, should be retained. He, for his part, supported the proposals of the Japanese and Canadian representatives.

50. Mr. KHAN (United Kingdom) said that he agreed with the representative of Japan.

51. The CHAIRMAN, noting that a majority of the members of the Commission shared the views of the representative of Japan and supported the Canadian proposal to replace, in article 25, paragraph (1), subparagraph (b), the words "the party subsequent to himself" by the words "his transferee", said that the subparagraph would be referred to the Drafting Group to be amended accordingly.

52. Mr. MAEDA (Japan) said that subparagraph (e) of paragraph (1) of draft article 25 presented a problem for his delegation. He gave the following example: A drew an instrument in favour of B and paid the instrument to B without B delivering the instrument to him. B endorsed the instrument to C, who endorsed it to D. A defence existed in the relations between B and C. D, having knowledge of that defence when he obtained the instrument, was therefore not a protected holder. But D did not know that A had paid the instrument to B without the instrument having been delivered to him. He considered that in that case A should not be able to set up the defence referred to in article 68, paragraph (4), subparagraph (e), as article 25, paragraph (1), subparagraph (e), currently allowed him to do. He therefore proposed that the words "but only if the holder took the instrument with knowledge of such defence or if he obtained the instrument by fraud or theft or participated at any time in a fraud or theft concerning it" in subparagraphs (b) and (c) of paragraph (1) should be added to subparagraph (e) of that paragraph.

The meeting rose at 12.37 p.m.

Summary record of the 383rd meeting

Monday, 10 August 1987, 2 p.m.

[A/CN.9/SR.383]

Chairman: Mrs. PIAGGI de VANOSSO (Argentina)

The meeting was called to order at 2.05 p.m.

International payments: draft convention on international bills of exchange and international promissory notes (continued)
(A/41/17; A/CN.9/288; A/CN.9/XX/CRP.9)

Articles 25 and 25 bis (A/CN.9/XX/CRP.9)

1. The CHAIRMAN said that the representative of Japan had withdrawn his earlier observations on paragraph (1)(e) of article 25.

2. *Articles 25 and 25 bis were adopted.*

Article 26 (A/CN.9/XX/CRP.9)

3. Mr. BONELL (Italy) inquired about the difference between the formulation in article 26, paragraph (1)(c), reading "provided that his lack of knowledge was not due to his negligence", and the corresponding formulation in paragraph (2) of articles 23 and 23 bis, which read "unless his lack of knowledge is due to his failure to act in good faith or to exercise reasonable care". If there was no reason for the difference in wording, it would perhaps be preferable to find a standard phrase that could be used in both cases.

4. Mr. HERRMANN (International Trade Law Branch) said that the difference in wording referred to by the representative of Italy had been deliberately maintained by the Working Group after a long discussion as to whether a standard formulation should be used in all references to negligence.

5. Mr. BONELL (Italy) still objected to the idea of using different wordings where there was no substantive reason for doing so.

6. Mr. GRIFFITH (Australia) said that although it was logical to seek consistency in wording, it was not appropriate at the present juncture to debate issues that had already been discussed at length at the fifteenth session of the Working Group. The decisions of the Working Group should be upheld unless they really made no sense at all, and that was not the case.

7. *Article 26 was adopted.*

Article 27 (A/CN.9/XX/CRP.9)

8. Mr. HERRMANN (International Trade Law Branch) said that, in the interests of accuracy, the Drafting Group had, in

article 27, paragraph (2)(a), substituted the phrase "or a defence against liability on" for the former phrase reading "or a defence upon".

9. *Article 27 was adopted.*

Articles 28-30 (A/CN.9/XX/CRP.9)

10. *Articles 28-30 were adopted.*

Article 31 (A/CN.9/XX/CRP.9)

11. Mr. SAMI (Iraq) said that paragraph (1)(b) of article 31 was ambiguous. Previous parties must be bound by everything on the instrument at the time of its signature, but the existing wording did not make that clear, because changes were likely to occur on the instrument itself at various times. He therefore proposed that the text should be amended to read "A party who signs it before the material alteration is liable according to the terms of the original text at the time it is signed."

12. Mr. CRAWFORD (observer for Canada) assumed that the concern expressed by the representative of Iraq stemmed from the possibility of multiple alterations, his proposal being aimed at expanding the existing formulation to make each party liable on the instrument in the form that it bore at the time of his signature. Yet the same result could be achieved with the existing text by interpreting "the original text" as referring to the text existing before each material alteration. Furthermore, the likelihood of such multiple alterations was very slight, and he therefore hoped that the representative of Iraq would not press his amendment.

13. The CHAIRMAN, noting that there was no support for the amendment proposed by the representative of Iraq, invited the Commission to approve the article as it stood.

14. *Article 31 was adopted.*

Article 32 (A/CN.9/XX/CRP.9)

15. *Article 32 was adopted.*

Article 33 (A/CN.9/XX/CRP.9)

16. Mr. SAMI (Iraq) questioned the usefulness of the article if the funds owned by the drawee were not assigned to the payee. Moreover, if such amounts were to be assigned to the payee in the event of the bankruptcy of the drawee, the funds would be transferred to the payee and would be at his disposal.

17. The CHAIRMAN pointed out that the text of article 33 had remained unchanged since 1982 and that document A/CN.9/213 contained comments on the matter.

18. Mr. CHAFIK (Egypt) stated that there was no reason for not mentioning that the funds could also be transferred to the beneficiary on the basis of an agreement between the parties. That had already been pointed out much earlier by the representative of France and himself, but the text had not been amended accordingly.

19. Mr. DUCHEK (Austria) said that there had been a common feeling in previous discussions that the existing formulation should not be interpreted as excluding the possibility of assignment by agreement, but that the matter should be governed by the applicable law. It would therefore not be advisable to insert a specific clause on the subject, since

it was entirely up to the applicable law to determine whether or not such agreements could effect assignment; and the existing formulation did not preclude that.

20. Mr. CHAFIK (Egypt) associated himself fully with the comments made by the representative of Austria. However, without changing the meaning of the article it would be possible to state simply that such agreements were not prohibited.

21. Mr. BERAUDO (France) asked whether the representative of Egypt would be satisfied by the insertion at the end or at the beginning of the article of the phrase "subject to any different agreement between the parties".

22. Mr. CHAFIK (Egypt) said that he would.

23. Mr. SPANOGLE (United States of America) reminded the Commission that at the time of the earlier debate, it had already been pointed out that the existing text did not in any way preclude side agreements, since it merely stipulated that the order did not of itself operate as an assignment.

24. Mr. LIM (Singapore) associated himself with the statements made by the representatives of the United States and Austria. Moreover, in the Commission's draft report (A/CN.9/XX/CRP.1/Add.1) it was recorded that the Commission had decided to retain the text of article 33 unchanged.

25. *Article 33 was adopted.*

Article 34 (A/CN.9/XX/CRP.9)

26. Mr. HERRMANN (International Trade Law Branch) said that the Drafting Group had made some changes in paragraph (1) of article 34, together with similar changes in a number of other articles, such as articles 35, 36 and 40. Those changes had been introduced in accordance with a decision taken by the Commission in the context of the decision on article 67, in which the reference to article 66 and payment by a party to the holder had been found to be too limited, and it had been decided that the text should also cover situations in which a party paid another party who had paid the holder and then wished to recover from a previous party. It had therefore been decided that, in addition to the changes in article 67, appropriate changes should also be made in all other relevant articles which provided for the engagements of parties or which used the limited formulation. In implementing that decision, however, the Drafting Group had not used the same formulation throughout; it had proceeded article by article. In a general effort to minimize the number of cross-references in the draft Convention, it had then been decided not to retain the references to the amount of the bill and any interest and expenses recoverable under articles 66 and 67. However, the Drafting Group had not yet made the necessary adjustments in articles 43 and 68, which would be dealt with in due course either by the Commission or by the Drafting Group.

27. Mr. GRIFFITH (Australia) congratulated the Drafting Group for simplifying the text and, referring to the comments of ICC on page 3 of document A/CN.9/WG.IV/WP.32/Add.8, said that the overall text had definitely been improved by the reduction in the number of cross-references.

28. *Article 34 was adopted.*

Articles 35-39 (A/CN.9/XX/CRP.9 and Add.1)

29. *Articles 35-39 were adopted.*

Article 40 (A/CN.9/XX/CRP.9/Add.1)

30. Mr. VOLKEN (observer for Switzerland) noted that in some articles the French version did not always correspond to the English. For example, in article 40, why did the English expression "take up" have no equivalent in any other language? Such discrepancies also occurred in other articles.

31. Mr. HERRMANN (International Trade Law Branch) said that the "taking up" of an instrument was a legal term well known in the common-law systems. It had been used in the English language version of the Geneva Convention while the word "*rembourser*" had been used in French, without creating any difficulties during the past 50 years. It had therefore been assumed that it could safely be retained. However, the French drafters had replaced "*rembourser*" by "*payer*" in the text before the Commission.

32. Article 40 was adopted.

Article 41 (A/CN.9/XX/CRP.9/Add.1)

33. Article 41 was adopted.

Articles 42 and 43 (A/CN.9/XX/CRP.9/Add.3)

34. Mr. CRAWFORD (observer for Canada) said that, while he felt a certain diffidence about commenting on the French version of the draft articles, he had noted that the Drafting Group had kept in mind in its deliberations the fact that the word "*rembourser*" had been used in the Geneva Convention for more than 50 years without giving rise to misapprehensions. Despite that, it had been decided in the new draft Convention to substitute the verb "*payer*": he wondered whether a court comparing the two Conventions might not conclude that some substantive change was implied.

35. The CHAIRMAN said that the question would be discussed in connection with article 47.

36. Mr. HERRMANN (International Trade Law Branch) said that the question raised by the observer for Canada should be answered by the French-speaking experts in the Drafting Group.

37. He drew the Commission's attention to the inclusion in article 4 of an additional definition which would apply in article 42. The Drafting Group had proposed the new definition, of "guarantor", in response to the language problems created by the decision to adopt a two-tier system of guarantee. It had been noted earlier in the Commission's discussions that it was difficult or impossible in some languages to arrive at specific terminology for a "non-aval guarantor" (who undertook a kind of "weaker" obligation of guarantee); on the other hand, it was equally hard to find an umbrella term to cover both the "weaker" and "stronger" types of guarantor. One solution would be to use both expressions ("*garant ou avaliseur*" in the French version) throughout the Convention. The Drafting Group, however, agreed that in the English version "guarantor" should be used *passim*, while in French the term "*garant*" was chosen, despite its relative unfamiliarity in the context of the law concerning negotiable instruments, because of the conviction prevailing in the Drafting Group that the "*avaliseur*" might be taken as relating solely to the "stronger" or *aval*-type guarantee embodied in the Geneva Convention. The definition in article 4 ought to make it clear, firstly, that the term "guarantor" would cover either category unless otherwise specified, as was the case in paragraph (4) of article 43; and secondly, that in the French

version "*garant*" was being used in a very specific sense. The Drafting Group had tried to alert the reader of the Convention to the subparagraphs which indicated the essential differences between the two forms of guarantee in respect of the defences that a guarantor might set up against a protected holder, that being the sole area in which those differences arose.

38. Mr. PELICHET (observer for the Hague Conference on Private International Law) said that, while he could understand the Drafting Group's concern to arrive at a neutral term in French for "guarantor", he wondered why similar efforts had not been made to find an English equivalent for "*aval*". Paragraphs (1) to (4) of article 42 in the French text referred consistently to "*aval*", the term used in the English version being "guarantee", although what was intended was both "*aval*" and "guarantee": article 43 made it clear that the two terms were by no means equivalent, since the régime of liability was determined by which of the terms was used. As drafted, paragraphs (1) to (4) of article 42 were incompatible with article 43.

39. Mr. BERAUDO (France) said that the observer for the Hague Conference was quite right. Article 42 did not reflect the view expressed in the Drafting Group that, in the French text, "*garant*" should be used generally to designate a person and "*garantie*" to denote the obligation undertaken by that person: it was only in paragraph (4)(c) of article 43 that the term "*aval*" was to be understood as having a special meaning in both the English and French texts.

40. Mr. CRAWFORD (observer for Canada) said that the concern of the Drafting Group had been to find a French term which would encompass two forms of obligation: "*garant*" was regarded as an acceptable general term which could include a person giving a "classic" *aval* within the terms of article 43, paragraph (4)(c), and a person who gave the less rigorous guarantee described in the preceding subparagraph.

41. In the English text before the Commission there were two types of obligation, namely, "*aval*", which was strict, and "guarantee", which was less so. It was not necessary to arrive at a compendious term which would cover both those aspects. The scope of "*aval*" was clear from paragraph (4)(c), and he saw no difficulty in reconciling the provisions of article 42 with those of article 43.

42. Mr. SPANOGLE (United States of America) said that he understood that the appropriate changes had been made in article 43, but not in the French version of article 42. If the article, duly amended in the French version, were taken in conjunction with the proposed additional definition in article 4, the problem would be resolved.

43. Mr. BERAUDO (France) said that, in the amended French text of article 42, "*aval*" would be replaced throughout by "*garantie*", except where it was enclosed in quotation marks.

44. In paragraph (4)(b) and (c) of article 43, the words "*le garant qui exprime son aval*" should be replaced by "*la personne qui exprime sa garantie*", for reasons of style, and in paragraph (4)(d) "*son aval*" should be replaced by "*sa garantie*"; it should, however, be noted that in subparagraph (e) "*aval*" was used correctly and should not be changed.

45. Mr. PELICHET (observer for the Hague Conference on Private International Law) said that article 4 should also include, in a paragraph (7) *ter*, a definition of "guarantee" in order to avoid misinterpretation of article 42. Such a definition would begin "'Guarantee' means an undertaking by any person of an obligation of guarantee" and would continue with the same wording as paragraph (7) *bis*.

46. Mr. BERAUDO (France) said that the additional definition would not cause difficulties for his delegation.

47. Mr. SPANOGLE (United States of America) felt he should point out that the obligation of the guarantee was already indirectly defined in article 42, which was why no definition of the term was included in article 4. Moreover, he saw no reason why "guarantor" should not be consistently rendered by "*avaliseur*", in the interests of avoiding confusion and ambiguity.

48. Mr. BERAUDO (France) said that the intention in articles 42 and 43 was to distinguish between two types of guarantee by using two different words. It would also be regrettable and misleading to imply, by referring to an "*avaliseur*" in a context in which that term was inappropriate, that parallels were to be drawn with the Geneva Convention.

49. Ms. TRAHAN (observer for Canada) said that the proposed amendment was a positive contribution towards resolving a difficult problem, but that it would be better in paragraph (4)(b) and (c) of article 43 to keep the words "*le garant*" rather than replace them by "*la personne qui exprime sa garantie*".

50. Mr. BERAUDO (France) said that, apart from considerations of style, the purpose of avoiding the term "*le garant*" in the proposed French text of the subparagraphs was to highlight the fact that "*garantie*" and "*aval*" were to be used in different senses.

51. The CHAIRMAN said that "*la personne qui exprime sa garantie*" could be rendered in Spanish by "*la persona que exprese su garantía*".

52. Mr. BONELL (Italy) said that, like the representative of the United States, he would have preferred to see "*avaliseur*" used as the equivalent of "guarantor" throughout, and he would favour keeping of the existing wording of paragraph (4)(b) and (c) of article 43. He would not, however, labour what was after all a minor point.

53. The CHAIRMAN said that, if she heard no objection, she would assume that delegations wished to adopt the draft articles with the amendments to the French version proposed by France and their equivalents in the Spanish text.

54. *It was so decided.*

Article 44 (A/CN.9/XX/CRP.9/Add.3)

55. Mr. HERRMANN (International Trade Law Branch) drew the Commission's attention to the reference to interest at the end of paragraph (2) and emphasized that it was a general reference, without any indication of the rate of interest.

56. Mr. MAEDA (Japan) asked why the present draft of article 44, paragraph (2), used the words "from the person for whom" instead of "from the party for whom" as in document A/CN.9/XX/CRP.11.

57. Mr. HERRMANN (International Trade Law Branch) stated that the Drafting Group's intention had been to cover the guarantor of a drawee and that the drawee was not a party.

58. Mr. DUCHEK (Austria) considered that there had been a consensus that an action by the paying guarantor of the drawee *vis-à-vis* the drawee for whom he had made his guarantee was an action off the instrument, which might derive from the applicable law, but should not be an action under the law of

bills of exchange. In his opinion, therefore, the present text represented a change of substance. He would prefer to return to the term "party".

59. Mr. VOLKEN (observer for Switzerland) stated that the first version had covered more than the text revised by the Drafting Group, which only covered the amount paid. In document A/CN.9/213, article 44 had covered a broader range of rights. The present text involved a substantive change, to which he could not agree.

60. Mr. BONELL (Italy) also saw problems in the use of the term "person" if it was intended to include the drawee. It would be better to use the term "party".

61. Mr. CRAWFORD (observer for Canada) thought that the term "person" might have been used in the text by mistake. Document A/CN.9/213 covered rights of recourse by the guarantor of the drawee, rights which were not dealt with in the Convention. He thought it advisable to return to the use of the word "party".

62. Mr. HERRMANN (International Trade Law Branch) stated that the present wording of article 44, paragraph (2), was based on document A/CN.9/XX/CRP.11 and that all that the Drafting Group had done was to add the idea of interest and to change the term "party" to "person".

63. Mr. MAEDA (Japan), Mr. GRIFFITH (Australia), Mr. SEVON (observer for Finland), Mr. SAMI (Iraq), Mr. YBAÑEZ BUENO (Spain), Mr. GANTEN (observer for the Federal Republic of Germany) and Mr. ABASCAL (Mexico) expressed their support for the use of the term "party".

64. Mr. SPANOGLE (United States of America) indicated his preference for the term "person".

65. The CHAIRMAN suggested that in view of the substantial support for the use of the term "party", that term should be adopted.

66. *It was so decided.*

67. *Article 44, as amended, was adopted.*

*The meeting was suspended at 4.05 p.m.
and resumed at 4.30 p.m.*

Article 45 (A/CN.9/XX/CRP.9/Add.1)

68. *Article 45 was adopted.*

Article 46 (A/CN.9/XX/CRP.9/Add.1)

69. Mr. LIU (China) referred to the words "before the occurrence of a specified event" and asked what would happen if that event did not occur.

70. The CHAIRMAN referred to document A/CN.9/213, which indicated that in such circumstances the bill would not be presented.

71. Mr. CRAWFORD (observer for Canada) said that the position was also clarified in the other paragraphs of article 46.

72. *Article 46 was adopted.*

Articles 47-49 (A/CN.9/XX/CRP.9/Add.1)

73. Articles 47-49 were adopted.

Article 50 (A/CN.9/XX/CRP.9/Add.3)

74. Mr. DUCHEK (Austria) pointed out that, in paragraph (2) (a), the reference to "article 55" should be to "article 56", since this was now the first article dealing with protest.

75. Mr. HERRMANN (International Trade Law Branch) said that in the French and Spanish texts the heading "Protest" should appear before article 56, not before article 55.

76. Article 50, as amended, was adopted.

Articles 51 and 52 (A/CN.9/XX/CRP.9/Add.3)

Articles 53-58 (A/CN.9/XX/CRP.9/Add.1)

77. Articles 51-58 were adopted.

Article 59 (A/CN.9/XX/CRP.9/Add.1)

78. Mr. BERAUDO (France), referring specifically to the French text, stated that the term "*avaliseur*" should be replaced in paragraph (1) by the term "*garant*" and that the same change should be made throughout the Convention.

79. Mr. MAEDA (Japan), referring to article 50, paragraph (2)(c), inquired whether article 59, paragraph (2), meant that failure to protest for dishonour by non-acceptance discharged the guarantor of the drawee.

80. Mr. SAMI (Iraq) felt that article 59, paragraph (2), should be made consistent with article 50, paragraph (2)(c).

81. Mr. CRAWFORD (observer for Canada) thought that the requirement of protest had been retained as a protection for the guarantor of the drawee, but not with a view to discharging him in the absence of protest.

82. Mr. SPANOGLE (United States of America) felt that a clear distinction should be drawn between protest as a condition of recovery and the discharge of the guarantor in the event of the absence of protest.

83. Mr. DUCHEK (Austria) thought that it had been decided that there could be recourse against the guarantor of the drawee in the event of non-acceptance only if there was protest. Non-acceptance involved an acceleration of the obligation of the guarantor, which should be proved by protest. There was no discharge in the case of non-acceptance if there was no protest, and the guarantor remained liable for his obligations on the bill.

84. Mr. CHAFIK (Egypt) supported the view put forward by the representative of Austria. In his opinion, articles 50, paragraph (2)(c), and 59, paragraph (2), were complementary. Recourse against the guarantor of the drawee had to be supported by protest, but he was not discharged in the absence of protest.

85. Mr. MAEDA (Japan) confirmed that his question had been answered.

86. Article 59 was adopted.

The meeting rose at 5.20 p.m.

Summary record of the 384th meeting

Tuesday, 11 August 1987, 9.30 a.m.

[A/CN.9/SR.384]

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

The meeting was called to order at 9.35 p.m.

International payments: draft convention on international bills of exchange and international promissory notes (*continued*)
(A/41/17; A/CN.9/288; A/CN.9/XX/CRP.9 and Add.1 and 2, CRP.13, CRP.14, CRP.15/Rev.1)

Article 60 (A/CN.9/XX/CRP.9/Add.1)

1. Mr. HERRMANN (International Trade Law Branch) said that the Drafting Group had merged the first two paragraphs of article 60 into a single one covering instruments in general and added wording based on variant III in document A/CN.9/XX/CRP.5, in accordance with the decision taken by the Commission. The paragraph had been divided into two subparagraphs, the first concerning the drawer and the endorser immediately preceding the holder and the second all other endorsers whose addresses could be ascertained on the basis of information contained in the instrument. With regard to the phrase "the endorser immediately preceding the holder", the Drafting Group had not decided between the two possible interpretations given during the Commission's consideration

of the question, namely, the endorser actually preceding the holder, provided he was not merely a transferor, or the last endorser of the instrument, even if he did not immediately precede the holder in the sequence. There was a similar ambiguity in paragraph (2), where a decision also had to be reached as to the party immediately preceding a guarantor. The Drafting Group considered that it was for the Commission to settle those matters.

2. Mr. CRAWFORD (observer for Canada) said that the solution might be to concentrate on the function of the notice, which was to draw the attention of the person expected to pay to the fact that the instrument had been dishonoured by non-acceptance or by non-payment. Notice must therefore be given to the last endorser, i.e. the last party to the instrument, whether or not he directly preceded the person requesting him to guarantee payment.

3. Mr. GRIFFITH (Australia) supported the proposal made by the observer for Canada.

4. The CHAIRMAN said that if there were no objections she would take it that the Commission had decided, as proposed by the observer for Canada, to refer to the "last endorser" and wished to adopt article 60 as worded in document A/CN.9/XX/CRP.9/Add.1. on the basis of that interpretation.

5. *It was so decided.*

Articles 61 and 62 (A/CN.9/XX/CRP.9/Add.1)

6. *Articles 61 and 62 were adopted.*

Article 63 (A/CN.9/XX/CRP.9/Add.1)

7. Mr. HERRMANN (International Trade Law Branch) pointed out that, in paragraph (1), the Drafting Group had replaced the term "holder" by the phrase "the person required to give notice" in order to cover all the cases provided for in article 60.

8. *Article 63 was adopted.*

Article 64 (A/CN.9/XX/CRP.9/Add.1)

9. *Article 64 was adopted.*

Article 65 (A/CN.9/XX/CRP.9/Add.1)

10. Mr. HERRMANN (International Trade Law Branch) pointed out that the first sentence of article 65 had been taken from the former text, which was in line with paragraph (2) of the proposal submitted by France. In addition, the substance of paragraph (3) of the French proposal had been rendered in the form of a second sentence added to the first paragraph, the link with the first sentence being established by the phrase "in the same manner". Lastly, paragraph (4) of the French proposal had been reproduced in substance in paragraph (2) of the text now before the Commission.

11. *Article 65 was adopted.*

Article 66 (A/CN.9/XX/CRP.9/Add.2)

12. Mr. HERRMANN (International Trade Law Branch) pointed out that in paragraph (1)(c)(i), the term "bill" had been replaced by the word "instrument" and the reference to paragraph (3) by a reference to paragraph (4). In attempting to clarify that paragraph, the Drafting Group had identified an ambiguity, and the resulting disagreement was reflected in documents A/CN.9/XX/CRP.13, 14 and 15/Rev.1. The matter was one of substance and would have to be considered by the Commission.

13. Mr. SPANOGLE (United States of America) said that the aim of the proposal in document A/CN.9/XX/CRP.13 concerning paragraph (1)(c)(i) was to provide two alternative methods of calculation in respect of instruments presented for payment before the date of maturity. Thus, where the instrument stipulated for interest, interest to the date of payment was to be added to the amount of the instrument, and where the instrument did not stipulate for interest, a discount was to be deducted in accordance with paragraph (4) of article 66.

14. Mr. LIU (China) said that an instrument reaching maturity on a certain date would not be worth the amount indicated on it until that date. If the instrument was presented for payment before maturity, its value would be less.

Therefore, where an instrument was transferred to another party before maturity, a deduction should be made. That discount should apply to the interest, if it was stipulated for, as well as to the amount of the instrument, since the two types of instruments (with or without stipulation for interest) were not essentially different. The proposal made by China along those lines was aimed at protecting the rights of the holder, without, however, giving him anything extra. The proposal by the United Kingdom, whereby the principal was to be paid in full irrespective of the date of payment, the interest alone being subject to a discount, went against the principle upheld by his own delegation. As to the proposal by Canada, Mexico and the United States, it was closer to China's; although it was different in its treatment of interest, where interest was stipulated for, it also provided for the deduction of a discount from the amount of the instrument if there was no stipulation for interest.

15. Mr. KHAN (United Kingdom) said that the purpose of his delegation's proposal had initially been to clarify the situation by specifying that the discount mentioned in paragraph (4) of article 66 applied only to the rate of interest. Admittedly, if that proposal was considered on its own and added to paragraph (1)(c)(i) it might lead to injustice in respect of instruments with a specified date of maturity but not stipulating for interest, since there would no longer be any discount in the event of payment before maturity. However, the proposal by Canada, Mexico and the United States offered a better solution to the problem than the one by China, which appeared to provide for a discount not only on the interest but also—and unjustifiably—on the amount of the instrument.

16. Mr. LIM (Singapore) said that the Commission should refer to banking practice in such matters and expressed a reservation as to the proposal put forward by China, because he wondered whether it was appropriate to apply a discount to the amount of the instrument if it stipulated for interest.

17. Mr. AMAMTCHIAN (Union of Soviet Socialist Republics) drew the Commission's attention to international practice in the matter, according to which the discount was applicable to the total amount payable at maturity, namely, interest and the amount of the instrument. The proposals under consideration did not really take account of that practice. He therefore suggested that the text should be left as it stood except that the word "payment" in the second line of paragraph (1)(c)(i) should be replaced by the word "maturity".

18. Mr. VOLKEN (observer for Switzerland) and Mr. GRIFFITH (Australia) supported the proposal by Canada, Mexico and the United States.

19. Mr. MAEDA (Japan) said he was inclined to support the proposal by China and thought that the proposal made by the Soviet Union did not really differ from it in substance.

20. Mr. CRAWFORD (observer for Canada) said that although the Chinese proposal was strictly logical, it departed from established banking practice. From the point of view of treatment, there was a distinction between trade bills used to pay for goods and instruments used on the money markets for investment purposes. The latter were traded at a value to produce a yield; it was therefore to be expected that the principal should be subject to discount. However, the Chinese proposal disregarded the fact that instruments had two functions and would therefore be difficult to support. As to the proposal made by the Soviet Union, to the effect that the date of payment should be replaced by the date of maturity, although it was a possible solution, it introduced a completely uncontrollable element, because the rate of discount could be

neither predicted nor controlled by the parties. He considered that the proposal in document A/CN.9/XX/CRP.13 would ensure the least possible interference in the business of the parties and reflect banking practice in respect of the two types of instruments just mentioned.

21. Mr. CHAFIK (Egypt) supported the proposal in document A/CN.9/XX/CRP.13, because it was the most in line with established banking practice.

22. Mr. ABASCAL (Mexico), following up the statement made by the observer for Canada, pointed out that in his country, for example, where inflation was very high, the purpose of the interest was to provide not only a return on the principal but also protection against inflation. Interest rates were therefore very high and local discount rates higher still. It would therefore be preferable to allow the parties to decide on the interest rate by reference to the financial markets. From that point of view, the proposal in document A/CN.9/XX/CRP.13 was the best suited to the conditions prevailing on the financial markets.

23. The CHAIRMAN, noting that the majority of participants appeared to be in favour of the proposal by Canada, Mexico and the United States, said that, if there were no objections, she would take it that the Commission had decided to adopt draft article 66, as amended by the proposal in document A/CN.9/XX/CRP.13.

Article 67 (A/CN.9/XX/CRP.9/Add.2)

24. Mr. HERRMANN (International Trade Law Branch) said that the Drafting Group had amended article 67, *inter alia*, by omitting any reference to articles 68 or 69 because discharge by payment was now a clearly defined concept in the draft Convention.

25. The CHAIRMAN said that if there were no objections she would take it that the Commission decided to adopt draft article 67.

26. *It was so decided.*

Article 68 (A/CN.9/XX/CRP.9/Add.2)

27. Mr. HERRMANN (International Trade Law Branch) pointed out that the Drafting Group had carried out three of the Commission's decisions concerning article 68 by amending paragraphs (3), (4)(b) and (4)(e). However, it had not yet given effect to the decision concerning payment to the holder and the right of recourse of the party paying the holder. That matter could be settled by inserting the phrase "or a party who has paid the instrument," after the word "holder" in the first line of paragraph (3), and the phrase "or that party," after the word "holder" in the second line of that paragraph, in order to expand the scope of article 68.

28. Mr. MAEDA (Japan) said that the same problem arose in paragraph (2) of article 73, which should also be amended to that effect, not just in one place, as had already been done, but at two other points in the text.

29. The CHAIRMAN considered that the proposed amendments to the text could be referred to the Drafting Group and said that if there were no objections she would take it that the Commission decided to adopt draft article 68, with the amendment in paragraph (3), which would be referred to the Drafting Group.

30. *It was so decided.*

*The meeting was suspended at 11.15 a.m.
and resumed at 11.30 a.m.*

Articles 69 to 72 (A/CN.9/XX/CRP.9/Add.2)

31. The CHAIRMAN said that if there were no objections she would take it that those articles, as worded in document A/CN.9/XX/CRP.9/Add.2, were adopted without amendment.

32. *It was so decided.*

Article 73 (A/CN.9/XX/CRP.9/Add.2)

33. Mr. MAEDA (Japan) inquired about the use of the expression "right of recourse" in the second line of paragraph (1) of the English version. A right of recourse could be exercised against a secondary obligor, but not against a primary obligor. If A made a note in favour of B, B endorsed it in favour of C and A paid C, A was discharged of liability, and B should also be discharged. However, B would not enjoy a right of recourse, but a right against the maker, i.e. the primary obligor. He would not therefore be covered by paragraph (1).

34. Mr. PELICHET (observer for the Hague Conference on Private International Law) noted that the phrase "right of recourse" did not appear in the French version, which quite rightly mentioned only a right on an instrument.

35. Mr. CRAWFORD (observer for Canada) drew attention to the fact that article 73 was in a section entitled "Discharge of a prior party". The right of recourse mentioned in the English version of article 73 was taken from the wording in document A/CN.9/213. A party having signed the instrument could assume that if he paid it he could exercise a right of recourse against prior parties. Therefore the discharge of a prior party impaired that right of recourse. The question raised by the representative of Japan was a different one, which, in his view, was settled by other articles of the draft Convention.

36. The CHAIRMAN noted that the earlier version of the draft Convention in document A/41/17 contained no mention of such a right of recourse, and that, at the nineteenth session of the Commission (A/41/17, para. 202), it had been proposed that the words "right of recourse" should be replaced by "right on the instrument" so as to include rights against primary obligors.

37. Mr. DUCHEK (Austria) suggested that the formulation in article 73, paragraph (1) should be replaced by the phrase "any party entitled to request him to pay the instrument . . .". Primary and secondary obligors would then be covered.

38. Mr. OLIVENCIA (Spain) was prepared to accept the deletion of the reference to "recourse" in article 73, paragraph (1), but stressed that if it had been introduced in the first place, that was because of the heading of section 2 ("Discharge of a prior party"). That heading seemed to refer solely to prior parties in the sequence of endorsements without covering the guarantor, the primary obligor or the accepting drawee. Therefore, if the references to "recourse" and to the concept of "prior party" were to be deleted, the heading of section 2 should be changed.

39. Mr. BERAUDO (France) considered that article 73, paragraph (1), was the outcome of a process of evolution, at least as far as the French version was concerned. The

discharged party also discharged all the parties who had a right against him; however, not all the parties were discharged. The French wording of article 73, paragraph (1), should therefore be kept. However, he proposed that the heading of section 2 should be amended to read "Discharge of other parties".

40. Mr. CHAFIK (Egypt) noted that the Arabic version posed the same problem as the English and Spanish versions and suggested that the attention of the Drafting Group should be drawn to that point.

41. The CHAIRMAN said that if there were no objections, she would take it that article 73 was adopted on the understanding that the reference to the right of "recourse" would be deleted in those language versions in which it appeared; she would also take it that the amendment to the heading of the section proposed by the representative of France was adopted.

42. *It was so decided.*

43. Mr. CHAFIK (Egypt) asked whether the various headings were an integral part of the Convention. Some conventions, such as the Vienna Convention on the International Sale of Goods, specified that the headings were not part of the Convention.

44. Mr. BERGSTEN (Secretary of the Commission) pointed out that if the headings were not legally speaking part of the Convention, they were none the less important for its interpretation.

45. Mr. OLIVENCIA (Spain) emphasized that it was therefore necessary to eliminate any inconsistency in the headings.

46. Mr. LIM (Singapore), supported by Mr. KHAN (United Kingdom), proposed that a provision should be inserted in the draft Convention specifying that the headings were not part of the Convention and should not be used in its interpretation.

47. Mr. BERGSTEN (Secretary of the Commission) said that a provision to that effect could be inserted in article 3 of the draft Convention.

48. The CHAIRMAN, considering that that proposal did not seem to enjoy sufficient support, proposed that the Commission should not take any decision on the matter, on the understanding that there would be no reference to the wording of the various headings of the Convention.

49. *It was so decided.*

Articles 74 to 79 (A/CN.9/XX/CRP.9/Add.2)

50. The CHAIRMAN said that if there were no objections, she would take it that articles 74-79 were adopted by the Commission without amendment.

51. *It was so decided.*

Article 80 (A/CN.9/XX/CRP.9/Add.2)

52. Mr. HERRMANN (International Trade Law Branch) said that the Drafting Group had, as requested by the Commission, inserted in article 80, paragraph (1)(d), a reference to the guarantor of the acceptor and two new subparagraphs concerning the guarantor of the drawee. The Arabic and English versions of article 80, paragraph (2), produced by the Drafting Group had been the subject of a corrigendum (A/CN.9/XX/CRP.9/Add.2/Corr.1).

53. Mr. MAEDA (Japan) proposed that the phrase "from the date of protest for dishonour or, where protest is dispensed with," should be inserted after the words "dishonoured by non-acceptance," in article 80, paragraph (1)(c). If protest was necessary, but was not raised, the exercise of the right against the guarantor of the drawee would not be accelerated and the time-limit for action would be calculated as from the date of maturity.

54. The CHAIRMAN, noting that the proposal was supported by the members of the Commission, took it that the wording proposed by the Japanese delegation was adopted.

55. *It was so decided.*

56. Mr. KHAN (United Kingdom) noted that, whereas the former version of article 80, paragraph (2), had contained a reference to the time-limit provided for in paragraph (1), that reference had been deleted in the new version.

57. Mr. SAMI (Iraq), supported by Mr. LIM (Singapore), considered that there should be no reference in paragraph (2) to the time-limit mentioned in paragraph (1). The one-year period mentioned in paragraph 2 was to be reckoned from the date of payment and had nothing to do with the time-limit mentioned in paragraph (1).

58. Mr. GRIFFITH (Australia), supported by Mr. CRAWFORD (observer for Canada) and Mr. DUCHEK (Austria), considered that the matter had already been considered by the Drafting Group and that the deletion of the reference to the time-limit provided for in paragraph (1) was not a matter of chance.

59. The CHAIRMAN said that, if there were no objections, she would take it that article 80 as amended by Japan, was adopted.

60. *It was so decided.*

61. Mr. HERRMANN (International Trade Law Branch) noted that the observer for the Hague Conference had proposed that a definition of "guarantee" should be inserted in the draft Convention. The Drafting Group had considered that proposal and decided that such a definition would not be necessary, especially since it would pose problems in some of the languages.

The meeting rose at 12.35 p.m.

Summary record (partial)* of the 385th meeting

Tuesday, 11 August 1987, 2 p.m.

[A/CN.9/SR.385]

Chairman: Mrs. PIAGGI de VANOSI (Argentina)

The meeting was called to order at 2.05 p.m.

International payments: draft convention on international bills of exchange and international promissory notes (continued)
(A/41/17; A/CN.9/288; A/CN.9/XX/CRP.9 and Add. 1-4)

Final provisions (A/CN.9/XX/CRP.9/Add.4)

Articles 81, 83 and 84

1. *Articles 81, 83 and 84 were adopted.*

Article 84 bis

2. Mr. HERRMANN (International Trade Law Branch) said that most of the final provisions were identical in wording to those in the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980). The only ones that were not were articles 84 *bis* and 85.

3. In two places in article 84 *bis*, the words "indicated in the instrument" were included in square brackets. That was because there had been disagreement in the Drafting Group as to what exactly had been decided by the Commission. Obviously, it had decided to include an article allowing any State to make a reservation. One view had been, however, that such an article would essentially be a reservation to article 2 and in article 2 the reference was not to the actual place where the bill was drawn or the note made or the actual place of payment, but to the places indicated in the instrument. That was in line with the general philosophy behind the draft Convention, as reflected, for example, in article 1 *bis*, paragraph (3). The view in question had been shared not only by delegations which had opposed the idea of such a reservation in the Commission, but also by two or three which had supported it.

4. The representative of France, on the other hand, took the view that the Commission should follow the proposal made by the Hague Conference on Private International Law in its comments (A/CN.9/WG.IV/WP.32), in which the criterion was the actual place of issue or payment. During the discussion in the Commission, reference had been made to at least two conventions on conflict of laws, the Geneva and Panama Conventions, and to other rules in civil-law countries which adopted that criterion.

5. It had been argued that it would be an innovation to refer to the actual places. But against that it had been said that the innovation was a minor one compared with the major novelty of article 84 *bis*, namely, that the application of the Convention would depend on whether the case was before the courts or not: the regime of the Convention would apply until one party went to court, whereupon a new regime would apply.

6. It was thus for the Commission to decide whether it wished to include the words "indicated in the instrument" or not.

7. Mr. BERAUDO (France) agreed that the Commission had discussed the reservation clause when considering article 2, but pointed out that article 84 *bis* contained no reference to article 2. The reservation clause should therefore be read in the usual way, as a provision whereby a State made it known that its courts would only apply the Convention if the place where the bill of exchange was drawn or the promissory note was made and the place of payment were both in Contracting Parties, by which the State would mean the actual places. It would not be good legal technique—and it would indeed be an innovation—for a reservation clause to admit the use of a fiction: the inclusion of the words "indicated in the instrument" would permit parties to give false indications and then invoke article 2, paragraph (3), under which proof that the statements made were incorrect did not affect the application of the Convention. No State would accept the possibility of its reservation being circumvented through inaccurate indication of the places on the instrument.

8. It was therefore his opinion that the words "indicated in the instrument" should not be included in the article.

9. Mr. GRIFFITH (Australia) said he had always understood a bill of exchange to be an instrument bearing all the relevant information on it—otherwise it was not a bill of exchange. The views expressed by the representative of France called in question the very essence of the definition of a bill of exchange. That definition was set forth in articles 1, 1 *bis* and 1 *ter* of the Convention, and it was his understanding that the situation was similar in the Geneva Convention. What was indicated on the instrument should be taken at its face value: if a place of issue and a place of payment were indicated, one should assume that they were indicated honestly. If a reservation without the words "indicated in the instrument" were to be permitted, that would be tantamount to discarding all the work done by UNCITRAL over the last 14 years. States having ratified the Convention would find it impossible to rely on the information indicated on international bills of exchange and rights of recourse could fail.

10. His delegation therefore opposed the deletion of the words "indicated in the instrument".

11. Mr. SEVON (observer for Finland) supported the view put forward by the representative of Australia. A reservation clause should be drafted for specific purposes in specific situations, and precedent carried very little weight in such matters. As the law developed, new approaches were sometimes needed.

12. There would be considerable practical difficulties if proof had subsequently to be produced in order to establish that an instrument had actually been drawn, made or paid at the place indicated. A party taking up a bill ought to be able to depend on it as worded in all respects. He was therefore in favour of including the words "indicated in the instrument".

13. Mr. DUCHEK (Austria) stated that his delegation had supported the proposal for a reservation clause put forward by the representative of France on the understanding that the

*No summary record was prepared for the meeting after 5.20 p.m.

criteria for the legal system applicable could be discovered from the instrument. If the actual circumstances could not be traced from the instrument, it would have to withdraw its support.

14. Under Austrian Law the obligations of the parties to a bill of exchange had to be determined from what appeared on the instrument. That was also the common understanding of the Geneva system. The words in brackets should therefore be included.

15. Mr. MAEDA (Japan) also felt that the words should be included. To delete them would jeopardize the free circulation of international instruments.

16. Mr. VOLKEN (observer for Switzerland) wondered what difference there would be in practice if the words were included or deleted. When a bill of exchange or a promissory note was signed, the place was indicated on it, and if that was not the real place, then the instrument was already vitiated. When an instrument was drawn up, there should be an idea of where it was to be paid and the indication of inaccurate places would be tantamount to forgery.

17. Mr. KHAN (United Kingdom) stated that his delegation would prefer to include the words in question. The final provisions should be governed by the content of the Convention itself; they should not be a means of introducing innovations that were not in the body of the Convention.

18. Mr. CHAFIK (Egypt) agreed in substance with the representative of France: it was logical that the actual places of issue and payment should be in Contracting States. However, if the words in brackets were deleted, there would be the problem of how to prove the real place of issue or payment. His preference was therefore to include the words.

19. Mr. WEISMANN (observer for the Federal Republic of Germany) said that his preference was for including the words, because only documentary evidence could be admitted when deciding the law applicable to international instruments.

20. Mr. BONELL (Italy) said that he would have liked the principle that the information shown on the instrument was decisive to have been adopted throughout the Convention with the same firmness as in the present article. He was therefore in favour of including the words "indicated in the instrument".

21. The representative of France had been right in warning of the risk of fraud and the possibility of parties wishing to manipulate the law, but there were appropriate remedies in all countries and the courts could invalidate such practices in the very exceptional cases where they occurred.

22. The CHAIRMAN noted that there was a large majority in favour of including the words "indicated in the instrument" in article 84 *bis*.

23. *It was so decided.*

24. *Article 84 bis was adopted.*

Article 85

25. Mr. PELICHET (observer for the Hague Conference on Private International Law) suggested that article 85 be made the second paragraph of article 84 *bis* and read as follows: "No other reservations are permitted."

26. *It was so decided.*

Article 86

27. *Article 86 was adopted.*

Article 87

28. Mr. GRIFFITH (Australia) said that a State ratifying the Convention after its initial entry into force might wish it to enter into force in its territory before the expiry of the prescribed twelve-month period. A special provision could perhaps be made to provide for that possibility.

29. Mr. VOLKEN (observer for Switzerland) pointed out that the State in question would not be the only one concerned. The depositary must be given time to inform all the parties to the Convention of any new ratification or accession. It would therefore be unreasonable to envisage the possibility of a State requesting, say, that the Convention should enter into force on the date of the deposit of its instrument of ratification or a few days later. However, it was unclear whether the stipulation in article 87 referred to the date in article 86, paragraph (1), or to the date in article 86, paragraph (2), or to both. It should presumably refer to both, but he would like to have that point confirmed.

30. Mr. SEVON (observer for Finland) also disapproved of the suggestion made by the representative of Australia. In addition to the reasons already explained by the observer for Switzerland, if the date of entry into force could be brought forward at will, the Convention could enter into force in respect of a single State before it did so for the first 10 States that ratified it. It was usual to provide for a delay, and twelve months was a reasonable amount of time.

31. Mr. PELICHET (observer for the The Hague Conference on Private International Law), replying to the question raised by the observer for Switzerland, said that the date of entry into force referred to in article 87 was the initial date of entry into force of the Convention, as provided in article 86, paragraph (1).

32. Mr. SAMI (Iraq) said that article 87 posed a major problem of interpretation. If it really did refer to paragraph (1) of the preceding article, the matter had to be clarified. There was a clear distinction between the date of the initial entry into force of the Convention and the date of its entry into force in respect of States ratifying it thereafter. If, the Convention was to apply to instruments in a given State only as from the date of its entry into force in respect of that State, article 87 should be redrafted to say so clearly, because that was not implied in its present wording, and a mere reference to paragraph (1) of article 86 would be too vague.

33. The CHAIRMAN proposed that the phrase "in accordance with the provisions of article 86, paragraph (1)" should be added at the end of article 87 to make it more specific.

34. Mr. VOLKEN (observer for Switzerland) said that the Chairman's suggestion implied that the courts of a State would have to apply the Convention before its actual entry into force in that State. Despite the explanations provided by the observer for the Hague Conference, that interpretation would not be workable in practice.

35. Mr. HERRMANN (International Trade Law Branch) said that in the circumstances the courts would not be prevented from applying the Convention by article 87, but would not be obliged to do so.

36. Mr. VOLKEN (observer for Switzerland) said that the comments made by the representative of the secretariat were unrealistic in view of the fact that, where the financial interests of two litigating parties were involved, one of them claiming to its advantage that the Convention was applicable and the other that it had not yet entered into force, the court having jurisdiction could hardly be expected to apply the Convention simply because it was not prevented from doing so, as opposed to being legally bound to do so.

37. Mr. DUCHEK (Austria) pointed out that the Commission had already reached a consensus on the rule to be set out in article 87 in earlier discussions. Specifically, States ratifying the Convention after its initial entry into force under article 86, paragraph (1), were bound to apply it in respect of bills drawn earlier, even if the Convention had not yet entered into force in their territory. If that rule was to be applied—as had been agreed earlier—article 87 should be redrafted in positive terms to read “This Convention applies to instruments drawn or made after the Convention entered into force according to article 86, paragraph (1)”.

38. Mr. BONELL (Italy) drew attention to the situation likely to arise if reservations were entered under article 84 *bis*. An additional provision covering that possibility should perhaps be inserted in article 87 to avoid further difficulties.

39. Mr. SAMI (Iraq) said that, although the explanations of the representative of Austria had been very clear, he failed to see how the courts of a State could be expected to apply the Convention to instruments issued before its entry into force in respect of that State even after its initial entry into force under article 86, paragraph (1). The courts would only apply provisions that were binding upon the State and its national laws.

40. Mr. BERAUDO (France), noting that the substantive debate on applicability had been reopened, reiterated his earlier objections to article 87. It was against French legal practice to make laws retroactive, and if article 87 was to be interpreted as explained by the representative of Austria, it was not acceptable. The inconclusive discussions on the matter clearly indicated that the article in question was ambiguous owing to its negative formulation. In cases involving instruments issued between the time of the initial entry into force of the Convention and its entry into force in respect of States ratifying it subsequently, the courts of such States were free to decide whether or not the Convention should be applied. Since those two options were open anyway, article 87 should be deleted and the matter governed by article 86 alone.

41. Mr. DUCHEK (Austria) said that, although it might be wise to delete article 87 on account of its ambiguity, the problem at issue would still not be settled, because article 86 was merely concerned with entry into force in respect of States and not applicability in respect of instruments. It was still unclear what a State party to the Convention should do in respect of bills drawn before its entry into force in that State. There was nothing in the Convention specifically stipulating that a State ratifying it after its initial entry into force should apply it only after its entry into force in respect of that State. Therefore, the deletion of article 87 would not make the situation any clearer. The problem would eventually have to be solved by amending the text.

42. Mr. BONELL (Italy) said that since the problem might prove to be of little importance in practice, it might be advisable to delete article 87.

43. Mr. SEVON (observer for Finland) said it was self-evident that the Convention would not apply to

instruments issued before its entry into force. In that respect, article 87 merely created confusion, since it did not clarify the applicability of the Convention. However, it was too late to start redrafting a satisfactory article, and the issue should therefore be left to the discretion of individual States when enacting the legislation required to give effect to the Convention. The matter might be taken up at the next session of the Commission, but article 87 should meanwhile be deleted.

44. Mr. SATELER (Chile) shared the views expressed by the representative of France and the observer for Finland.

45. Mr. PELICHET (observer for the The Hague Conference on Private International Law) agreed with the representative of Austria that the deletion of article 87 would not solve the problem. Moreover, the provisions of that article stemmed directly from article 2, and States disagreeing with the substance of article 87 should logically also disagree with that of article 2, which had already been adopted. Indeed, article 2 established an entirely new system of applicability, which partly depended on article 87. Specifically, under article 2, the Convention would operate of itself, independently of its entry into force in the various States, and the implications of that unprecedented situation were reflected in article 87, whose deletion would therefore be a serious mistake because of its important supporting role in relation to article 2.

46. The CHAIRMAN, speaking in her capacity as representative of Argentina, said that since the application of the Convention to bills drawn before its entry into force was completely out of the question, article 87 merely created confusion and should therefore be deleted.

47. Mr. VOLKEN (observer for Switzerland) suggested that article 87 should be redrafted to read “This Convention shall apply in the territory of a contracting State only to instruments drawn or made after the date on which the Convention entered into force in respect of that State.”.

48. Ms. TRAHAN (observer for Canada) said that article 87 should be deleted altogether.

49. *Article 87 was deleted.*

Article 88

50. *Article 88 was adopted.*

51. The CHAIRMAN said that the Commission had concluded its consideration of the final provisions.

Action to be taken on the draft Convention

52. Mr. BERGSTEN (Secretary of the Commission) said that, now that the Commission had completed its review of all the draft articles, it should consider its recommendation to the General Assembly, a topic which had already been aired at the nineteenth session. Three possible options had emerged from that discussion: (i) to forward the text as finalized at the nineteenth session to the General Assembly with the recommendation that a diplomatic conference be convened with a view to adopting the Convention; (ii) to carry out a further review of the text in the Working Group on International Negotiable Instruments and in the Commission, which would then recommend that the General Assembly adopt the text as completed at the twentieth session; (iii) to recommend to the General Assembly that it adopt the draft Convention without a review of the substance of the text. The Commission had taken the second of the three options, and

had complied with the request in General Assembly resolution 41/77 that it complete its work on the draft Convention during its twentieth session.

53. It should be noted that, although the Commission's report containing the draft articles would be sent to New York in the near future, it was unlikely that the General Assembly would be in a position to take any action until its forty-third session in 1988.

54. Mr. GRIFFITH (Australia) said that the need to keep the financial costs of adopting the Convention to a minimum, as mentioned in paragraph 3 of the General Assembly resolution, and the highly technical nature of the draft Convention itself, made it clear that in making its recommendation to the General Assembly the Commission should think in terms of alternatives to a diplomatic conference. The text as adopted by the Commission was workable and coherent, but its complexity was such as to make further amendment or elaboration undesirable. He therefore felt that the draft articles should be forwarded to the Sixth Committee with a strong recommendation that the General Assembly adopt the text as a convention at its forty-third session.

55. Mr. CHAFIK (Egypt) said that, although the subject-matter of the Convention was indeed highly technical, States not represented in the Commission ought in principle to be given the opportunity to express their views on the draft at a plenipotentiary diplomatic conference so as to ensure that the resulting instrument was universally acceptable. While that would certainly be the best approach, however, it might meet with opposition within the United Nations on the grounds of cost. He would therefore be prepared to leave it to the Sixth Committee to determine the fate of the Convention.

56. Mr. BONELL (Italy) said that, while it could be argued that the draft Convention should be negotiated by the Member States of the United Nations at a diplomatic conference, it was important to ensure that an extremely worthwhile text in which so much effort had been invested was not allowed to fall by the wayside. The Commission, which was a technical body, had fulfilled the mandate entrusted to it by the General Assembly, and it was now up to the Sixth Committee to determine what further action was needed. At the same time, if the financial prospects of the United Nations were to improve, the possibility of holding a diplomatic conference should not be ruled out.

57. Mr. MAEDA (Japan), Mr. VINCENT (Sierra Leone), Mr. YEPEZ (observer for Venezuela), Mr. LIU (China), Mr. LIM (Singapore) and Mr. HEGDE (India) agreed with the proposal made by the representative of Australia.

58. Ms. RENMYR (Sweden), Mr. de HOYOS GUTIERREZ (Cuba), Mr. ABASCAL (Mexico), Mr. PAES de BARROS LEAES (Brazil), Mr. EYZAGUIRRE (Chile), Ms. ADEBANJO (Nigeria), Mr. HUNGA (Kenya) and Mr. CHAFIK (Egypt) said that they could also go along with that proposal, but that they agreed with the representative of Italy that the option of a diplomatic conference was not to be excluded.

59. Mr. BERAUDO (France) said that, since his Government found the existing text of the draft Convention ambiguous and unsatisfactory for various reasons which it had already explained at length in previous meetings, it could not agree that the articles should be transmitted to the Sixth Committee with a view to their adoption by the General Assembly. The text could only be regarded as a model law and not as a coercive international instrument.

60. While a diplomatic conference might provide a useful forum for further negotiations, he did not think it was up to the Commission to make such a recommendation. He agreed with the representative of Italy that the decision on what should be done with the text should be left to the Sixth Committee.

61. Mr. WEISMANN (observer for the Federal Republic of Germany) said that, since the prospects of convening a diplomatic conference were somewhat unrealistic, he would be prepared to support the Australian solution, i.e. a clear recommendation to the Sixth Committee that the existing text be adopted as a convention. It would certainly not be acceptable for the draft articles to be finalized in the form of a model law.

62. Mr. PFUND (United States of America) said that the financial constraints affecting the United Nations would probably exclude the convening of a diplomatic conference. His delegation accordingly supported the Australian proposal.

63. Mr. DUCHEK (Austria) said that in the discussions in the Sixth Committee during the General Assembly the previous year his delegation had urged that the Convention be adopted by the Assembly itself. That approach had not, however, met with general approval. He felt that the Commission had properly discharged its duties under General Assembly resolution 41/77 and that further action should be left to the Sixth Committee, where the Member States of the United Nations would have a further opportunity to negotiate.

64. His delegation considered that the "model law" approach was utterly inappropriate and unrealistic in the context of the draft articles: the Convention was not intended to, and could not, serve as a model for national legislation.

65. Mr. SEVON (observer for Finland) agreed with the previous speaker that to convert the draft Convention into a model law would make no sense whatever. In the absence of a consensus on what course of action to recommend to the General Assembly, he shared the views expressed by the representatives of Italy and Austria.

66. Mr. KHAN (United Kingdom) and Mr. SAMI (Iraq) said that they too considered that a formula on the lines proposed by the representative of Italy would be best.

67. Ms. TRAHAN (observer for Canada) said that her delegation could not, in the prevailing financial circumstances of the United Nations, support a proposal for convening a diplomatic conference. It would also strongly object to any suggestion that the Convention be adopted as a model law. If, in order to maintain the tradition of consensus in the Commission, it proved necessary to modify the content of the draft Convention, her delegation would not insist that it be adopted in its existing form by the General Assembly.

68. Mr. OLIVENCIA (Spain) said that the text should be regarded as an important step towards the harmonization of two distinct legal approaches and that the convening of a diplomatic conference might focus undue attention on its inevitable shortcomings. His delegation also recognized the need to promote rather than frustrate UNCITRAL's work in a highly technical field. There was no doubt that the Commission had fulfilled its mandate under General Assembly resolution 41/77, and he felt that the result of its deliberations should be submitted, without any new accompanying recommendation, to the body that had issued that mandate.

69. Mr. AMAMTCHIAN (Union of Soviet Socialist Republics) said that, at the Commission's nineteenth session, his

delegation had actively supported the proposal to convene a diplomatic conference, but that the financial considerations mentioned in paragraph 3(a) of General Assembly resolution 41/77 indicated that a different solution should now be found. He would not object to the proposal by the Italian representative if its adoption would bring about consensus.

70. He wished to make it clear that his delegation would oppose any idea of adopting the draft articles in the form of a model law.

71. Mr. BERGSTEN (Secretary of the Commission) said that, in the light of the views expressed during the discussion, the Commission's recommendation could, in addition to preambular paragraphs recalling the work carried out on preparing the draft articles, consist of the following operative paragraphs:

- "1. *Submits* to the General Assembly the draft Convention on International Bills of Exchange and International Promissory Notes, as set forth in annex 1 to this report;

- "2. *Recommends* that the General Assembly consider the draft Convention with a view to its adoption or any other action to be taken."

72. Mr. BONELL (Italy) said that, while he would not insist that wording to discountenance the model law solution be included in the recommendation, he hoped that such an understanding would be regarded as implicit.

73. Mr. BERGSTEN (Secretary of the Commission) said that in submitting the text to the General Assembly the Commission clearly indicated that the draft articles should constitute a convention and not a model law.

74. Mr. GRIFFITH (Australia) said that the strong views expressed on the question of adopting the draft articles as a model law should be reflected in the Commission's report.

The discussion covered in the summary record ended at 5.20 p.m.

Summary record (partial)* of the 388th meeting

Friday, 14 August 1987, 9.30 a.m.

[A/CN.9/SR.388**]

Chairman: Mrs. PIAGGI de VANOSI (Argentina)

The meeting was called to order at 9.45 a.m.

International payments: draft convention on international bills of exchange and international promissory notes (continued)
(A/41/17; A/CN.9/288; A/CN.9/XX/CRP.1/Add.13, CRP.9 and Add. 1-4, CRP.16)

1. The CHAIRMAN said that the Commission had before it a draft resolution on the work of its twentieth session (A/CN.9/XX/CRP.16), containing its recommendations to the General Assembly on the action to be taken in respect of the draft Convention. If she heard no objection, she would assume that the Commission wished to adopt the draft resolution by consensus.

2. *The draft resolution was adopted by consensus.*

3. Mr. GAUTIER (France) said that his delegation had not opposed the adoption of the draft resolution by consensus because it did not wish to impair the constructive spirit of dialogue at a high level that had characterized the deliberations of UNCITRAL from the start. That in no way, however, prejudged his country's position regarding the future of the draft Convention. His delegation considered that there were still shortcomings in the text to be transmitted to the General Assembly. As it stood, the draft would adversely affect States which did not wish to accede to the new system that was to be introduced.

4. He would be grateful if the statement he had just made could be included *in extenso* in the Commission's report.

5. Mr. BERGSTEN (Secretary of the Commission) said that, although it was not the Commission's practice to include statements by individual delegations in its reports, it might wish in the circumstances to agree to the request by the representative of France.

6. Mr. GRIFFITH (Australia) said that the inclusion of the statement would derogate from the consensus achieved on the draft resolution. He wondered whether there were precedents for such a course of action.

7. Mr. GAUTIER (France) said that it was not his delegation's desire to reopen discussion on the substance of the Convention, but merely to register a reservation. He had specifically stated that his delegation had not opposed the adoption of the draft resolution by consensus.

8. Mr. CHAFIK (Egypt) said that there had been precedents, but that it was not usual to mention the delegation concerned by name.

9. Mr. GAUTIER (France) said that he was surprised that his request had provoked controversy and that he would wish his delegation to be mentioned by name in the report as the author of the statement.

The discussion covered in the summary record ended at 10 a.m.

*No summary record was prepared for the meeting after 10 a.m.

**No summary record was prepared for the 386th and 387th meeting.

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V. CHECK-LIST OF UNCITRAL DOCUMENTS

<i>Document symbol</i>	<i>Title or description</i>	<i>Location in present volume</i>
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