

**United Nations
Commission on
International
Trade Law**

YEARBOOK

Volume XIX: 1988



UNITED NATIONS

New York, 1989

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.

A/CN.9/SER.A/1988

UNITED NATIONS PUBLICATION

Sales No. E.89.V.8

ISBN 92-1-133321-0

ISSN 0251-4265

05000P

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INTRODUCTION

This is the nineteenth 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 twenty-first session, which was held in New York from 11 to 20 April 1988, 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 twenty-first session of the Commission are reproduced. These documents include reports of the Commission's Working Groups dealing with international payments and the liability of operators of transport terminals, as well as reports and notes by the Secretary-General and the Secretariat. Also included in this part are selected working papers that were before the Working Groups.

Part three contains the text of the United Nations Convention on International Bills of Exchange and International Promissory Notes, the documents of the General Assembly relative to the adoption of the Convention, a bibliography of recent writings related to the Commission's work, a list of documents before the twenty-first session as well as of other documents referred to in the present volume and reproduced in this volume or in an earlier volume of the *Yearbook*.

UNCITRAL secretariat
Vienna International Centre
P.O. Box 500, A-1400 Vienna, Austria
Telex: 135612 Telefax: 232156

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:

Volume	Years covered	United Nations publication, Sales No.
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
XVIII	1987	E.89.V.4

THE TWENTY-FIRST SESSION (1988)

A. Report of the United Nations Commission on International Trade Law on the work of its twenty-first session

(New York, 11-20 April 1988) [Original: English]^a

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^aOfficial Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17) (27 June 1988).

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INTRODUCTION

1. The present report of the United Nations Commission on International Trade Law covers the Commission's twenty-first session, held in New York, from 11 to 20 April 1988.

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 twenty-first session on 11 April 1988. 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

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.

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 the Libyan Arab Jamahiriya, all members of the Commission were represented at the session.

6. The session was also attended by observers from the following States: Bangladesh, Bulgaria, Burma, Canada, Democratic Yemen, Denmark, El Salvador, Finland, Gabon, Germany, Federal Republic of, Holy See, Honduras, Indonesia, Morocco, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Rwanda, Saint Lucia, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Turkey, Vanuatu and Venezuela.

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

(a) *United Nations organs*

International Trade Centre (UNCTAD/GATT)

(b) *Specialized agencies*

United Nations Industrial Development Organization

(c) *Intergovernmental organizations*

Asian-African Legal Consultative Committee
Hague Conference on Private International Law
International Institute for the Unification of Private Law

(d) Other international organizations

Inter-American Bar Association
 Inter-American Commercial Arbitration
 Commission
 International Chamber of Commerce
 Latin American Federation of Banks

C. Election of officers²

8. The Commission elected the following officers:

Chairman: Mr. Henry M. Joko-Smart
 (Sierra Leone)

Vice-Chairmen: Mr. Michael Joachim Bonell (Italy)
 Mr. Rafael Eyzaguirre (Chile)
 Mr. Kuchibhotla Venkataramiah
 (India)

Rapporteur: Mr. Iván Szász (Hungary)

D. Agenda

9. The agenda of the session, as adopted by the Commission at its 389th meeting, on 11 April 1988, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. International payments.
5. Operators of transport terminals.
6. Procurement.
7. Countertrade.
8. Future programme of work.
9. Co-ordination of work.
10. Status and promotion of UNCITRAL texts.
11. Training and assistance.
12. Interpretation of conventions.
13. Working methods of the Commission.
14. General Assembly resolutions on the work of the Commission.
15. Other business.
16. Date and place of future meetings.
17. Adoption of the report of the Commission.

E. Adoption of the report

10. At its 401st meeting, on 20 April 1988, the Commission adopted the present report by consensus.

²The elections took place at the 389th, 390th and 396th meetings, on 11 and 14 April 1988. 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 the 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 the 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*A. Electronic funds transfers*

11. The Commission decided, at its nineteenth session in 1986, to begin the preparation of Model Rules on electronic funds transfers and to entrust this task to the Working Group on International Payments.³ The Commission had before it at the current session the report of the Working Group on the work of its sixteenth session (A/CN.9/297), at which the Working Group had undertaken the preparation of the Model Rules.

12. The Working Group commenced its work by considering a list of legal issues that might be considered for inclusion in the Model Rules contained in a report prepared by the secretariat (A/CN.9/WG.IV/WP.35). At the end of its session, the Working Group requested the secretariat to prepare draft provisions based on the discussions in the Working Group for its consideration at its next session (A/CN.9/297, para. 98).

13. The Commission discussed whether the Model Rules to be drafted by the Working Group should be restricted to international funds transfers or should also be applicable to domestic funds transfers. After discussion, the Commission agreed with the prevailing view in the Working Group that the Model Rules should concentrate on problems arising in international funds transfers, but would have to consider both domestic and international aspects of such transactions, and that a decision would have to be made at a later time on the extent to which the rules should be considered to be applicable to domestic funds transfers.

B. Draft Convention on International Bills of Exchange and International Promissory Notes

14. The Commission took note of General Assembly resolution 42/153 of 7 December 1987, in which the Assembly had requested the Secretary-General to ask all States to submit the observations and proposals they wished to make on the draft Convention before 30 April 1988 and decided to consider, at its forty-third session, the draft Convention, with a view to its adoption at that session, and to create to this end, in the framework of the Sixth Committee of the General Assembly, a working group that would 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.

15. The Commission considered some procedural aspects of the implementation of that resolution. For example, several representatives expressed the concern that their Governments would be unable to meet the deadline for the submission of observations and proposals. However, they indicated that their Governments

³*Official Records of the General Assembly, Forty-first Session, Supplement No. 17* (A/41/17), para. 230.

would attempt to submit their comments as soon as possible so as to enable the Secretariat to translate and distribute them by 30 June 1988, as provided in the resolution.

16. As regards the working group to be convened in the framework of the Sixth Committee, it was generally agreed that Governments would soon need to know the precise dates of the working group session so as to enable them to make the appropriate arrangements, including the inclusion of experts in the special field of negotiable instruments law in their delegations to the Sixth Committee. It was realized that the determination of the dates fell within the exclusive competence of the Sixth Committee and that the dates would thus finally be decided upon only after the Sixth Committee had commenced its work. Nevertheless, the Commission deemed it desirable, in view of the above-mentioned need, to express a wish as regards those dates and to invite the Sixth Committee to have due regard to that wish when fixing the dates of the working group session. In view of the decision of the General Assembly that the working group would meet at the beginning of its forty-third session for a maximum period of two weeks, the Commission expressed the wish that the working group be convened during the period of 26 September to 7 October 1988.

17. It was noted that the General Assembly had decided to consider, at its forty-third session, the draft Convention with a view to its adoption at that session. In the light of the fact that the draft Convention had been prepared over a 16-year period, the view was expressed that the Commission should recommend to the General Assembly that the project be brought to completion at its forthcoming session. Another view was that it was inopportune for the Commission to make any such recommendation, especially since the Assembly was in any event aware of the recommendation made by the Commission at its twentieth session.⁴

18. The Commission considered the report of the Secretary-General on stand-by letters of credit and guarantees (A/CN.9/301) and, in particular, the conclusions and suggestions as to possible future work of the Commission in this field. The report described in its first part the functions and characteristics of stand-by letters of credit and independent guarantees. In its second part, it provided an overview of the legal framework, comprising statutory provisions of law, case law and uniform rules. In its third part, the report discussed some sample legal issues that may arise in the context of stand-by letters of credit as well as guarantees. The report concluded that there existed considerable disparity and uncertainty in respect of the legal rules governing the two kinds of instruments.

19. The Commission agreed with the conclusion of the report that a greater degree of certainty and uniformity was desirable. The Commission noted with approval the suggestion in the report that future work be

envisaged in two stages, the first relating to contractual rules or model terms and the second pertaining to statutory law.

20. As regards the first stage, the Commission welcomed the work undertaken by the International Chamber of Commerce (ICC) in preparing draft Uniform Rules on Guarantees. The Commission was agreed that world-wide acceptable uniform rules would usefully contribute to overcoming the current uncertainties and disparities in this field of considerable practical importance. It was agreed that comments and possible recommendations by States Members of the Commission, with its balanced representation of all regions and the various legal and economic systems, could help to enhance the world-wide acceptability of such rules. In this connection, the observer for ICC stated that ICC would welcome such support and contribution by the Commission which was in line with the long-standing and fruitful co-operation between the two organizations.

21. There was wide support for the suggestion set forth in the report to devote one session of the Working Group on International Contract Practices in November of this year to a review of the ICC draft Uniform Rules on Guarantees. Such a review would help to assess the world-wide acceptability of the draft Rules and to formulate comments and possible suggestions that ICC could take into account before finalizing the draft Rules. However, since this would be the first time that a working group of the Commission would review a text prepared by another organization, a view was expressed that this instance should remain an exception and not constitute a precedent. Another view was expressed that, in addition to procedural and financial considerations, it would not be appropriate to convene a working group to review a non-statutory text that was under preparation by another organization. In the spirit of co-operation, it would be appropriate for comments and possible suggestions to be made through the traditional channels of communication used in respect of other ICC texts, e.g., direct communications to ICC either from individual Governments or business circles or through the National Committees of ICC.

22. The prevailing view in the Commission after the deliberations was that it should entrust its Working Group on International Contract Practices, during one session in November 1988, with a review of the ICC draft Rules and with a consideration of the desirability and feasibility of any future work relating to the second stage.

23. The second stage, as envisaged in the conclusions of the report, was to consider the advisability of striving for greater uniformity at the statutory law level. The suggestion was to attempt the preparation of a uniform law, convention or model law that would deal with those matters that could not effectively be regulated by agreement of the parties, including any uniform rules. Examples noted in the report include the recognition of party autonomy and of the independent nature of guarantees. Of particular importance would be a clear

⁴*Ibid.*, Forty-second Session, Supplement No. 17 (A/42/17), para. 304.

regulation of those objections to a demand for payment that do not follow from the guarantee agreement but are based on instances such as fraud or manifest abuse.

24. While some doubts were expressed as to the practical need and usefulness of such a uniform law, there was wide support for the view that successful work in this direction was desirable in view of the practical problems that could only be dealt with at the statutory level. The Commission was aware of the difficulties inherent in such an effort relating to fundamental concepts of law, such as fraud or similar grounds for objections, and touching upon procedural matters. Nevertheless, it was felt that, in view of the desirability of legal uniformity and certainty, a serious effort should be made.

25. It was agreed that a final decision on this point could and should be taken only after the discussions in the Working Group, on the basis of its findings and advice concerning the desirability and feasibility of work towards a uniform law. The Commission requested the Secretariat to report to it at its twenty-second session on any pertinent developments within ICC and to prepare a study on the possible features and issues that might appropriately be covered in a uniform law.

26. On the basis of all such information, including the results of consultations by Governments with interested groups in their countries, the Commission would be in a position at its twenty-second session to take a final decision on whether a uniform law should be prepared and, if so, what its scope and contents should be, including the question of whether, in addition to guarantees and stand-by letters of credit, traditional documentary letters of credit should also be covered.

Chapter III. Liability of operators of transport terminals

27. 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.⁵ At its seventeenth session in 1984, the Commission decided to assign that task to its Working Group on International Contract Practices.⁶

28. At its current session, the Commission had before it the report of the Working Group on International Contract Practices on the work of its eleventh session (A/CN.9/298). The Commission noted that the Working Group had completed its task of preparing a draft text of uniform rules on the liability of operators of transport terminals and that the Working Group had recommended the adoption of the uniform rules in the form of a convention. The Commission expressed its appreciation to the Working Group and to its Chairman, Mr. Michael Joachim Bonell of Italy, for the work achieved.

29. The Commission decided to consider at its twenty-second session, with a view to its adoption, the draft Convention on the Liability of Operators of Transport Terminals in International Trade as prepared by the Working Group. The Commission requested the Secretary-General to transmit the draft Convention to all States and interested international organizations for comments. The Secretariat was requested to prepare and distribute a compilation of the comments as early as possible before the twenty-second session of the Commission. The Commission further requested the Secretary-General to prepare for that session a draft of final clauses to the draft Convention.

30. It was noted that the Commission, upon adopting the draft Convention, might decide to recommend to the General Assembly the convening of a diplomatic conference for the conclusion of a Convention on the Liability of Operators of Transport Terminals in International Trade. In that connection, the suggestion was made that such a diplomatic conference might present a good opportunity to consider a possible revision of the limits of liability and the provisions pertaining to units of account in the United Nations Convention on the Carriage of Goods by Sea, 1978 (hereafter referred to as the Hamburg Rules) and the United Nations Convention on International Multimodal Transport of Goods. In support of that suggestion, it was pointed out that such an effort might constitute a first step that might eventually lead to a greater degree of harmony of such clauses in other transport conventions as well.

31. In response to the above suggestion, the concern was expressed that the possibility that a convention might be revised might cause States that were considering becoming a party to the convention to postpone their decision on ratification or accession. It was agreed that at present there was no need to decide on that suggestion and that it might be taken up at a later stage. Since it was felt that detailed information on the liability limits and units of account used in the various transport conventions could be useful to the Commission, the Secretariat was requested to prepare an analytical compilation of such provisions for the twenty-second session.

Chapter IV. International countertrade

32. At its nineteenth session in 1986, the Commission, in the context of its discussion of a note by the Secretariat entitled "Future work in the area of the new international economic order" (A/CN.9/277), considered its future work on the topic of countertrade. There was considerable support in the Commission for undertaking work on the topic, and the Secretariat was requested to prepare a preliminary study on the subject.⁷ At the current session, the Commission had before it a report entitled "Preliminary study of legal issues in international countertrade" (A/CN.9/302), which contained

⁵*Ibid.*, Thirty-eighth Session, Supplement No. 17 (A/38/17), para. 115.

⁶*Ibid.*, Thirty-ninth Session, Supplement No. 17 (A/39/17), para. 113.

⁷*Ibid.*, Forty-first Session, Supplement No. 17 (A/41/17), paras. 241 and 243.

a description of contractual approaches to countertrade and an enumeration of some of the more important legal issues involved in that type of trade.

33. Divergent views were expressed as to whether work should be continued in the area. On the one hand, there was broad support for continuing the work. It was noted that an appreciable share of international trade was conducted by the use of countertrade arrangements and that such arrangements gave rise to legal issues to which parties often did not find optimal contractual solutions. It was considered that the most appropriate course of action would be to draw up a legal guide that would discuss legal issues typical of countertrade contracts and would provide assistance in drawing up such contracts. For example, it could provide advice on the contractual forms appropriate for countertrade transactions or on the relationship between contracts forming part of such a transaction.

34. On the other hand, reservations were expressed regarding the usefulness of preparing such a legal guide. It was noted that such work by the Commission might duplicate work by other organizations, in particular the work of the Economic Commission for Europe and the Association of State Trading Organizations in Developing Countries. Some of the representatives expressing such reservations suggested that work in the area be discontinued. Others were of the view that the Commission should review the scope and concept of the work of other organizations in the area and, in connection with that review, decide on the scope and concept of any work by the Commission. However, in response, it was said that the work of the Commission would have particular merit in view of its global representation and the wide distribution of the results of its work.

35. After discussion, the Commission decided that it would be desirable to prepare a legal guide on drawing up countertrade contracts. It was considered, however, that such a legal guide should not duplicate the work of other organizations. The Commission requested the Secretariat to prepare for the next session of the Commission a draft outline of the possible content and structure of a legal guide on drawing up countertrade contracts in order for it to decide what future action might be taken.

Chapter V. Procurement

36. At its nineteenth session in 1986, the Commission decided to take up the topic of procurement and it entrusted the subject to the Working Group on the New International Economic Order.⁸ The Working Group is scheduled to hold its tenth session at Vienna, from 17 to 28 October 1988, at which time it will commence its work on the topic.

37. The Secretary of the Commission informed the Commission that the Secretariat had convened a meeting of a group of experts at Vienna from 7 to 11 December

⁸*Ibid.*, para. 243.

1987 to advise it on the preparation of the documentation for the Working Group. At its upcoming session, the Working Group might be expected to outline the nature of any work that might be undertaken in the field. One possible recommendation might be for the Commission to prepare and adopt a set of principles on public procurement to which States would be encouraged to conform in formulating their national procurement codes or regulations. The Working Group might also anticipate that, once an agreed set of principles had been established, the Commission might prepare a model procurement code based upon those principles.

38. The Commission took note with appreciation of the preparatory work thus far undertaken by the Secretariat and requested the Working Group to proceed with its work expeditiously.

Chapter VI. Future programme of work

39. At its twentieth session in 1987, the Commission decided that at its twenty-first session it should engage in a general discussion of the future work of the Commission for the medium term.⁹ In response to a request of the Commission, a note by the Secretariat was submitted to serve as a basis for such a discussion. The note set forth the topics on which the Commission was currently preparing a draft legal text with a projected time schedule for completion. It also indicated topics that the Commission might consider at the current session with a view to determining whether they should be placed on the programme of work (A/CN.9/300). In order to facilitate discussion at the session, the topics of stand-by letters of credit and guarantees and of countertrade, on which the Commission had previously requested a preliminary study, were considered in substance both under separate agenda items and under the item regarding the planning for future work.

40. It was suggested in the note by the Secretariat that the Commission might wish to consider whether the current developments in regard to transport techniques and transport documentation, and the fact that the International Maritime Committee (IMC) was preparing draft rules on sea waybills and on electronic waybills that might be approaching completion within the next year, would make it desirable for the Commission to engage in a general review of the subject of transport documents at its twenty-second session. Such a review might encompass a review of the IMC text. The review might also be conducted with a view to determining whether the Commission might make a further contribution in the field of transport documents.

41. Different views were advanced in respect of that suggestion. According to one view, the Commission had had a long-term interest in transport documents and a review of the subject in 1989 would be appropriate. Since the principal item on the agenda would be the consideration of the draft Convention on the Liability of

⁹*Ibid.*, Forty-second Session, Supplement No. 17 (A/42/17), para. 339.

Operators of Transport Terminals in International Trade, the delegations to the session of the Commission would include experts in transport law. Another view was that the agenda for the twenty-second session should not include items that might be time-consuming, thereby avoiding the question of whether there would be sufficient time for proper consideration of the draft Convention.

42. After discussion, the Commission decided to request the Secretary-General to prepare a report for the twenty-second session on current problems with the law governing transport documents in the light of developments in transport techniques and transport documentation. The action to be taken on the report would depend on its content and on the time available at the session. The Commission was in agreement that submission of the report and its possible consideration at the twenty-second session must not be allowed to jeopardize the adoption of the draft Convention.

43. The Secretary of the Commission reminded the Commission that it had played an important role in the preparation of the 1974 revision by ICC of the Uniform Customs and Practice for Documentary Credits and a lesser, though still significant, role in the preparation of the 1983 revision. He noted that it could be expected that there would be another revision adopted by ICC around 1993. Consequently, in anticipation of the commencement of that revision, the secretariat was planning to submit to the Commission at its twenty-second session a report on the legal questions that had arisen in regard to the current (1983) version.

44. As envisaged in the report of the programme of work of the Commission (A/CN.9/300, para. 22), the Commission discussed what additional subjects might be included in its work programme for the next five to 10 years. It was felt that a general discussion on possible subjects could provide an indication of the future direction of the activities of the Commission as a formulating agency, in addition to its functions relating to co-ordination, promotion, training and assistance. It was emphasized that the question of planning the future work of the Commission was a matter of primary importance for the Commission's role as the lead formulating agency in the field of international trade law.

45. Various topics were suggested for study by the Secretariat and for possible inclusion in the future programme of work. It was agreed that any later decision on such inclusion should take into account such factors as the amount of current work of the Commission, the limited resources available to the Secretariat and the need to avoid duplication of the work of other organizations.

46. One proposal was to examine the need to provide for the legal principles that would apply to the formation of international commercial contracts by

electronic means, and particularly through the medium of visual display screens. Such a study might include the formation of contracts for special transactions relating, for example, to securities—including bonds, shares or other instruments—to commodities and to foreign exchange.

47. The proposal received wide support. It was noted in particular that there currently existed no refined legal structure for the important and rapidly growing field of formation of contracts by electronic means. Future work in that area could help to fill a legal void and to reduce uncertainties and difficulties encountered in practice. Such an effort could benefit from the knowledge and expertise gathered by the Commission and its secretariat in the related field of electronic funds transfers. The Commission requested the Secretariat to prepare a preliminary study on the topic.

48. Another proposal was that the Commission examine the desirability and feasibility of preparing a model law on the promotion and protection of foreign investment. It was noted that the topic was of particular and considerable importance to developing countries. However, the proposal was opposed on the ground that a model law would be of limited usefulness since the investment legislation of a State depended on the specific economic situation and policies, which often changed within a short span of time.

49. Still other proposals related to topics that might be dealt with in one or more protocols supplementing the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (hereafter referred to as the United Nations Sales Convention). One such topic was the regulation of liquidated damages and penalty clauses in the international sale of goods. It was thought that a uniform regulation in the field would be desirable. The proposal was opposed on the ground that, in the light of the difficulties encountered by the Commission when preparing the Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance (1983), it was unrealistic to expect success from a renewed attempt.

50. Another topic relating to the international sale of goods was the retention of property by use of reservation of title clauses. The proposal was limited to the relationship between buyer and seller, thus excluding the area of third-party rights. The proposal was opposed on the ground that the crucial area where uniformity was desirable was precisely that of third-party rights, particularly in the event of bankruptcy. Referring to work previously undertaken by the Council of Europe, it was stated that insurmountable problems arose from the existing disparity and changes of national bankruptcy laws. Yet another topic relating to the international sale of goods was an optional legal régime for quality warranties given by the seller.

51. A further suggestion was that the Commission consider the preparation of general conditions for

production co-operation or joint production and for trade co-operation agreements relating to scientific and technological matters. Another suggestion was that the Commission consider the preparation of a convention on judicial co-operation and assistance in arbitration matters, covering, for example, service of documents and taking of evidence.

52. Some support was expressed for the following three areas, which at one time or another had been suggested or studied by the Commission: joint ventures, product liability and unfair competition.

Chapter VII. Co-ordination of work

53. The Commission had before it a report of the Secretary-General that set forth a register of international organizations engaged in activities in the field of international trade law (A/CN.9/303). The report concentrated on those organizations that were formulating agencies, although it included some organizations that were particularly important to the development of international trade law in other ways. The survey did not claim to be exhaustive, especially with regard to trade associations. However, an attempt had been made to include the work of those trade associations that developed normative texts, including general conditions and standard contracts, intended for relatively widespread use. Information included in the report related to the membership of the organizations, their nature and general rules and an overview of their activities related to international trade law, particularly those of relevance to the work of the Commission.

54. The Commission welcomed the report and considered that the type of information contained in it was useful in the implementation of its mandate to co-ordinate the work of other international organizations. It was suggested that at each of its sessions the Commission should devote sufficient attention to such co-ordination so as to avoid duplication of efforts among international organizations as well as conflicts between the results of their work. The observation was made that co-ordination among international organizations depended in large measure on the co-ordination undertaken by individual Governments among the various government ministries and branches active in different international organizations.

55. The observer for the International Institute for the Unification of Private Law (UNIDROIT) expressed satisfaction over the work of the Working Group on International Contract Practices on the draft Convention on the Liability of Operators of Transport Terminals in International Trade, work that had been begun by a special study group of UNIDROIT and subsequently taken over by the Commission. He noted that the draft Convention had received many favourable comments. He also noted that, in view of the difference in structure and working methods of the Commission and UNIDROIT, there might be other topics on which

the work of the two organizations could be complementary. In particular, it might be desirable to co-operate in the dissemination and promotion of international legal texts as well as in fostering the uniform interpretation of such texts. Document A/CN.9/312 on collection and dissemination of information on the interpretation of UNCITRAL legal texts contained useful suggestions in that regard. He added that a congress entitled Uniform Law in Practice, held in September 1987 in Rome, had provided ample evidence of the need for the collection and dissemination of international legal texts and of the court and arbitral decisions interpreting them.

56. As to the current work of UNIDROIT, the observer for UNIDROIT referred to the project on general principles governing international commercial contracts. He informed the Commission of the preparations for the diplomatic conference, to be held in May 1988 at Ottawa on the invitation of the Government of Canada, entrusted with the preparation of a convention on international financial leasing and a convention on international factoring.

57. The Secretary-General of the Hague Conference on Private International Law recalled the excellent co-operation between the United Nations and the Hague Conference in preparing for the diplomatic conference on the law applicable to contracts for the international sale of goods, held in October 1985. After the diplomatic conference, the United Nations Secretariat had provided a translation of the Convention into Arabic, Chinese, Russian and Spanish, for which he wished once again to express his appreciation.

58. He informed the Commission that a special commission of the Hague Conference that had met in January 1988 had made several recommendations regarding future topics of work to the sixteenth regular diplomatic session of the Conference, which would meet in October 1988. Among the topics that should have priority were the law applicable to contracts of licence and know-how and the law applicable to certain aspects of unfair competition and, in that connection, he noted the work done in the area by the United Nations Conference on Trade and Development (UNCTAD). Other possible future topics of work were the law applicable to negotiable instruments, a topic connected with the work of the United Nations on the draft Convention on International Bills of Exchange and International Promissory Notes; the law applicable to the contract of transport; conflict-of-laws issues in the area of trans-border flow of data, among which were issues of the electronic transfer of funds; and the law applicable to contractual obligations in general. He also indicated that conflict-of-laws issues relating to product liability cases would be considered with a view to establishing whether the Convention on this topic, which had been prepared by the Hague Conference in 1973 and which had entered into force among five States, should be supplemented or modified.

59. The observer for the Asian-African Legal Consultative Committee (AALCC) spoke of the importance of

the Commission, as the core legal body in the United Nations system in the field of international trade law, for the developing countries. He noted that the close working relations between the two organizations had led to the inclusion of items of mutual interest in their respective work programmes. Moreover, special emphasis had been laid in AALCC on the work of the Commission by making the report on the work of the Commission a regular feature at the sessions of AALCC.

60. The AALCC observer gave a detailed description of the fruitful co-operation between the Commission and AALCC in the area of international commercial arbitration. He referred to discussions in AALCC in 1976 on certain aspects of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) and an ensuing recommendation of AALCC to the Commission that had led the Commission to commence work on the preparation of the UNCITRAL Model Law on International Commercial Arbitration. The UNCITRAL Model Law provided a useful basis on which national arbitration legislation should be patterned in the future so as to remove the various difficulties encountered in the field of international commercial arbitration. AALCC continued to promote the acceptance of the UNCITRAL Model Law in the States members of AALCC. At its 1986 session at Arusha, United Republic of Tanzania, in 1986, AALCC had reminded its member States that they had seldom been the seat of international arbitrations because their laws on arbitration often contained rules that were inappropriate for international cases and that, if they were to promote the holding of such arbitration in their territories, they should review and revise their legislation on the basis of the Model Law. A number of States in the Asian and African regions had adopted, or initiated steps towards adopting, legislation based on the UNCITRAL Model Law.

61. Information was presented on the activities of the Council for Mutual Economic Assistance (CMEA) regarding its efforts for legal standardization. A CMEA Standing Commission on legal issues was revising certain existing legal texts or was preparing new legal texts, such as general conditions as well as legal guides and model contracts. The Standing Commission was revising mandatory rules in the form of general conditions established within CMEA on the delivery of goods, technical service, assembly, specialization and co-operation, and was preparing new ones on scientific and technological co-operation. The Standing Commission had also undertaken a comparative study of the 1980 United Nations Convention on Contracts for the International Sale of Goods and the comparable legal texts enacted within CMEA.

62. The observer for the UNCTAD/GATT International Trade Centre (ITC) stated that the activities of ITC concerning technical co-operation touched upon or had to take into account legal aspects of international trade. As a result, ITC had launched a subprogramme entitled Legal aspects of foreign trade, which aimed to

fill an information gap and to create the awareness, mainly through training activities, that trade promotion organizations should improve their legal services. To that end, ITC had published a manual on legal aspects of foreign trade.

63. The Commission was informed that the International Law Association would hold its next international conference from 21 to 28 August 1988 at Warsaw. The conference would consider, among other topics, a report prepared by its working group on the new international economic order dealing with issues of indebtedness of developing countries.

64. The observer for the Latin American Federation of Banks (FELABAN) stated that the Federation would continue to disseminate in Latin America ideas and documents of the Commission and to participate in the activities of the Commission. He referred to the nature of the contributions of representatives of FELABAN to the work of the Commission and to its Working Group on International Payments. He informed the Commission of the discussion on the draft Convention on International Bills of Exchange and International Promissory Notes which had taken place at the sixth meeting of lawyers from Latin American banks at Santiago de Chile at the end of 1986. He reported on a symposium organized by the secretariat of the Commission, FELABAN and the Association of Banks of Mexico which had taken place from 1 to 3 June 1987 at Mexico City and at which lawyers from banks of Latin America had discussed the draft Convention on International Bills of Exchange and International Promissory Notes and legal issues of electronic funds transfers. He also reported on a seminar on international commercial arbitration organized by the Bar Association of Costa Rica and Columbia University, New York, which had taken place from 3 to 5 March 1988 at San José, and at which one of the themes had been the UNCITRAL Model Law on International Commercial Arbitration. He announced that FELABAN would hold its seventh meeting of lawyers from Latin American banks from 30 May to 1 June 1988 in Costa Rica. The discussion at that meeting would include the topics of international payments and international commercial arbitration.

Chapter VIII. Status and promotion of texts of the commission

A. Status of conventions

65. 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) (hereafter referred to as the Limitation Convention), the Protocol amending the Limitation Convention (Vienna, 1980); the Hamburg Rules; and 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 it with regard to its work in the field of international commercial arbitration. In addition, the Commission took note of the jurisdictions that had enacted legislation based on the UNCITRAL Model Law on International Commercial Arbitration. The Commission had before it a note by the Secretariat on the status of those conventions and of the Model Law as of 19 February 1988 (A/CN.9/304). It also received oral information on developments subsequent to that date.

66. The Commission noted with satisfaction that, since the last session of the Commission, the United Nations Sales Convention, which entered into force on 1 January 1988, had received an additional five ratifications or accessions from Austria, Finland, Mexico and Sweden, as reported in document A/CN.9/304, and from Australia, which had ratified the Convention in March 1988, bringing the total number of States parties to 16. The representative of the Netherlands reported that, at the meeting of States parties to the two 1964 Hague Conventions (i.e., the Convention relating to a Uniform Law on the International Sale of Goods and the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods) held at Vienna on the occasion of the Commission's twentieth session, in August 1987, the attitude of the States present had been so encouraging towards the United Nations Sales Convention that the Government of the Netherlands had decided to begin the legislative process leading to its ratification. The observer for the Federal Republic of Germany announced that his Government had begun the preparation of the legislation to authorize ratification of the Convention. Representatives and observers of a number of other States reported that the Convention was under active study in their countries. In the light of those developments, the expectation was expressed that, within a few years, at least 40 or 50 States would become parties to the Convention.

67. The Commission expressed its great pleasure that, with the accession of Mexico to the Limitation Convention and to the Protocol amending it, the Convention would come into force on 1 August 1988 in its amended form between Argentina, Egypt, Hungary, Mexico and Zambia and in its unamended form between those five States and Czechoslovakia, the Dominican Republic, Ghana, Norway and Yugoslavia. The representatives of several States reported that the Convention was under study in their countries as well.

68. The Commission engaged in a long discussion about the expectations in respect of the Hamburg Rules. It was noted that with the accession of Botswana the Hamburg Rules had 12 of the 20 States necessary for it to come into force. The representatives of Nigeria and Sierra Leone reported that their Governments expected to ratify or accede to the Hamburg Rules before the end of 1988. The representatives of France and Italy informed the Commission that parliamentary approval for ratification or accession had been given in

both States and that the ministries concerned were studying the possibility of ratifying or acceding to the Hamburg Rules. A number of representatives stated that previous decisions taken in their countries not to become party to the Hamburg Rules were being reconsidered in the light of new developments. The Secretary of the Commission stated that it was the expectation of the secretariat that by the end of 1989 at least 20 States would have ratified or acceded to the Hamburg Rules, thus enabling them to come into force. He noted in that regard that the movement from the 1924 Hague Rules to the Hamburg Rules was already clear. In the 10 years since the diplomatic conference at which the Hamburg Rules had been adopted, only two States had become party to the Hague Rules, and one of them had subsequently acceded to the Hamburg Rules. In contrast, 12 States had already become party to the Hamburg Rules and, as already announced, others soon would as well.

69. The Commission was reminded that the Hamburg Rules had been prepared at the express request of the developing countries. The current legal régime of the Hague Rules was considered to be unfair to the owners of cargo, and developing countries were more apt to represent such interests than to represent the owners of the carriers. The Commission was further reminded that in the drafting of the Hamburg Rules great care had been taken to achieve a careful balance of interests. While adoption of the Hamburg Rules would benefit the owners of cargo in contrast to the current situation, it would do so by instituting a fair and equitable liability régime in keeping with modern transport technology and consistent with other transport conventions. It was further noted that the Hamburg Rules contained many technical changes in the law that would be of benefit to the owners and operators of carriers.

70. It was noted that the opposition to the Hamburg Rules had centred on the argument that the shift in liability from cargo owner to carrier would lead to an increase in costs to the carrier, and therefore to increased freight rates, without assurance that there would be a corresponding decrease in cargo insurance. In that regard, attention was drawn to a recent study by UNCTAD on the economic and commercial implications of the entry into force of the Hamburg Rules, wherein it was concluded that adoption of the Hamburg Rules would have minimal economic and commercial consequences.¹⁰ It was also noted in the Commission that once the Hamburg Rules came into force they would govern carriers from all countries, since the Hamburg Rules applied to all contracts of carriage of goods by sea between two States if the port of loading, the port of discharge, the optional port of discharge or the place where the document of contract had been issued was located in a contracting State, or if the contract of carriage stated that the Hamburg Rules applied. The nationality of the carrier was irrelevant to the application of the Rules. Therefore, once the Hamburg Rules came into force, carriers from all countries would have to take out insurance and make

¹⁰TD/B/C.4/315 (Part I), para. 99.

the other necessary adjustments in regard to some of the cargo they carried. As a result, there would be less reason for them to wish to continue to be governed by the Hague Rules in regard to the remainder of the cargo they carried.

71. The Commission was informed that, subsequent to the issuance of document A/CN.9/304, Nigeria had adopted legislation based on the UNCITRAL Model Law on International Commercial Arbitration, bringing to three the total number of States that had adopted legislation based on the Model Law. Representatives of several States informed the Commission that legislation based on the Model Law was under study in their countries.

72. The Commission noted that document A/CN.9/304 showed that an additional two States, Cameroon and Costa Rica, had ratified or acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and it was informed that, subsequent to the issuance of the document, Bahrain had acceded to the Convention, bringing the total number of States parties to 76. The Commission expressed its satisfaction with the steady increase in membership of the Convention, noting that in each of the 30 years since the Convention was first ratified in 1959, with the single exception of 1963, at least one State had ratified or acceded to it. The Commission expressed the hope that those States which had not already done so would consider ratifying or acceding to the Convention.

B. Promotion of texts of the Commission

73. The Commission at its twentieth session "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".¹¹ The Commission had before it at the current session a report of the Secretary-General on the promotion of texts emanating from the work of the Commission (A/CN.9/305).

74. The report set forth some of the factors that affected the adoption by States of the UNCITRAL texts and suggested that many of them were common to all conventions on private law matters. The report showed in a table the high correlation between past or present membership in the Commission and the adoption of one or more of the texts emanating from its work, and suggested reasons why that correlation might exist. The report also indicated actions taken or contemplated by the Secretariat to promote the UNCITRAL texts.

75. One of the actions taken by the Secretariat was the preparation of four short explanatory notes, for promotional purposes, on the Hamburg Rules (A/CN.9/306), the United Nations Sales Convention (A/CN.9/307), the Limitation Convention (A/CN.9/308) and the Model

Law (A/CN.9/309). The notes, of about 10 pages each, contained a short history of the texts and a brief description of their basic features.

76. The Commission was in general agreement that in a given State the primary activities necessary to promote adoption of the texts emanating from the work of the Commission had to be the responsibility of individuals and organizations of that State.

77. In that regard, mention was made of the important role of representatives to the Commission. They were in the best position to bring to the attention of their Governments the advantages to be derived from the adoption of the UNCITRAL texts. It was also suggested that they were well placed to encourage other States, and particularly those from the same region or with which their country had substantial trade, to adopt the UNCITRAL texts.

78. In respect of the promotional efforts that might be undertaken by the secretariat, it was agreed that most had been set forth in the report. The four notes prepared by the Secretariat on the UNCITRAL texts (A/CN.9/306-309) were said to be a great aid in the promotion of the texts. They provided an explanation of the texts that was sufficiently detailed to be useful but sufficiently concise so that busy officials could be expected to read them. They would also be a useful resource in the preparation of official reports on the UNCITRAL texts.

79. It was stated to be of great importance that members of the Secretariat seize every possible opportunity to contact the relevant ministry officials in individual countries.

80. The Commission agreed with the suggestion that one of the more useful ways to promote the adoption of the UNCITRAL texts was the holding of seminars similar to the one scheduled to be held in Lesotho in 1988. Further discussion on the subject was postponed until consideration of the agenda item on training and assistance (see paragraphs 87 to 97 below).

81. A suggestion was made that the Secretariat prepare a periodical or newsletter for the purpose of informing both legal experts and significant persons in trade and commerce of the work of the Commission. However, the prevailing view was that the suggestion was not feasible at the present time.

82. It was recognized that the current financial situation of the Organization made it difficult for the Secretariat to engage in all of the promotional activities that were desirable. There was general agreement with the conclusion reached in the report of the Secretary-General that the promotional activities of the Secretariat must be designed to achieve the maximum results with the minimum expenditure of resources (A/CN.9/305, para. 51). It was also pointed out, however, that the expenditure of a relatively small amount of additional resources for the promotion of texts already prepared by the Commission at substantial cost to the

¹¹Official Records of the General Assembly, Forty-second Session, Supplement No. 17 (A/42/17), para. 340.

Organization would be a particularly cost-effective means of obtaining maximum value for the work and expense already incurred.

C. Promotion of the Legal Guide

83. The Commission, at its twentieth session in 1987, had adopted the *UNCITRAL Legal Guide on Drawing up International Contracts for the Construction of Industrial Works*.¹² When doing so, the Commission had requested the Secretary-General to take effective measures for the widespread distribution and promotion of the use of the *Legal Guide*.

84. The Commission had before it at the current session a note by the Secretariat setting forth the activities of the Secretariat to distribute and promote awareness of the *Legal Guide* (A/CN.9/310). The note indicated that the English version of the *Legal Guide* had been published on 5 February 1988 and that the five other language versions would soon appear.¹³

85. In addition to the official and other automatic distribution to Governments, depository libraries and the like, copies of the *Legal Guide* had been sent to the resident representatives of the United Nations Development Programme (UNDP) and to the World Bank and other development financing institutions with an invitation for them to bring it to the attention of the appropriate officials in the countries in which they carried out their activities. As the *Legal Guide* was a sales publication, it was also available from the Sales Section of the Organization, which would also be involved in its promotion.

86. It was noted that a distinction needed to be drawn between the activities that led to the physical distribution of the *Legal Guide* and those activities which would lead individuals active in drawing up international contracts for the construction of industrial works to read enough of the *Legal Guide* to become aware of its value to them. In the latter connection, it was noted that reviews of the *Legal Guide* in professional journals and lectures on it in seminars and symposia involving professionals in the field were excellent means to elicit such interest. The Commission reiterated the view expressed at its twentieth session that, in addition to whatever activities the Secretariat might undertake, Governments, and particularly those of States members of the Commission, should take active steps to make the existence and value of the *Legal Guide* known in the relevant circles in their countries.

Chapter IX. Training and assistance

87. The Commission had before it a note by the Secretariat in which were put forward certain proposals for future action by the Commission in respect of the

programme of training and assistance (A/CN.9/311). In order to set the proposals in context, the note briefly reviewed earlier efforts in that sphere.

88. In the note it was indicated that, beginning with its first session, the Commission as well as the General Assembly had expressed the view that the activities of the Commission in the field of training and assistance were important. It was suggested, however, that relatively little had in fact been accomplished.

89. The most significant activity undertaken by the Commission had been the sponsoring of two seminars held at Geneva and Vienna on the occasion of the Commission's eighth and fourteenth sessions, in 1975 and 1981, respectively. On both occasions travel to the seminar of approximately 15 participants had been paid for by contributions from donor States. Although no formal evaluations had been made at the time, all evidence indicated that the participants had considered the seminars a success.

90. Nevertheless, in spite of the evident success of the symposia once they were held, the Secretariat had experienced severe administrative problems in organizing them. The primary difficulty had been that, since there had been no assured source of funds to finance them, it had become nearly impossible to plan for them in a proper manner. Many pledges had been received late and some of the pledges that had been received in sufficient time had been paid late, causing the expected award of several fellowships to be withdrawn. As a result of those difficulties, no further similar symposia had been organized, and since 1981 the activities of the Secretariat in the field had been largely restricted to co-sponsorship and participation in seminars and symposia organized by other organizations.

91. In the note by the Secretariat it was indicated that, following the decision of the Commission at its twentieth session in 1987, that training and assistance should be given higher priority than in the past, the Secretariat was organizing a seminar in Lesotho in 1988 for countries from southern and eastern Africa and planned to hold a seminar at Vienna for young scholars and practitioners from developing countries in connection with the Commission's twenty-second session in 1989. The seminar in Lesotho would be hosted by the Government of Lesotho and co-sponsored by the Preferential Trade Area for Eastern and Southern African States. The Commission was informed that pledges had been received from the Governments of Denmark, Finland, the Netherlands and Sweden for the seminar in Lesotho. While additional funds would be necessary in order to finance the seminar, the Secretariat was confident that they would soon be available.

92. The Commission was in agreement with the plans to hold the symposium in 1988 in Lesotho for countries from the subregion and to hold the symposium at Vienna in connection with the twenty-second session of the Commission in 1989. It expressed the hope that sufficient funds would be contributed in order for the two symposia to be carried out in the manner planned by the Secretariat.

¹²*Ibid.*, para. 315.

¹³The *Legal Guide* was published as document A/CN.9/SER.B/2 and also as a United Nations publication, Sales No. E.87.V.10.

93. There was general agreement with the conclusion expressed in the note by the Secretariat that, in order for the Commission and its secretariat to carry on a viable programme of training and assistance an adequate and assured source of funds had to be available. The Commission noted that difficulties were experienced in planning a seminar or symposium both when the funds were not available sufficiently in advance to make the necessary commitments and when the level of contributions was inadequate.

94. A discussion followed regarding the suggestion by the Secretariat that the Commission recommend to Governments, the relevant United Nations organs, organizations, institutions and individuals that they contribute on an annual basis to the trust fund already in existence to finance symposia organized by the Commission. It was recognized that the suggestion was essentially the same as that contained in General Assembly resolution 42/152, paragraph 5 (d), but the view was expressed that if such a recommendation was made by the Commission after discussion on the topic, it could be hoped to elicit a favourable response. A further view was expressed that any such recommendation should make it clear that contributions to the trust fund or any other contributions would be purely voluntary. Any target figure for total annual contributions, such as the amount of \$US 150,000 suggested by the Secretariat, would be only in the nature of a guideline and would not constitute a fixed goal. Furthermore, it was pointed out that a decision by a Government to make contributions on an annual basis would not constitute a commitment of the Government to continue to contribute to the trust fund, or to continue to do so in the same amount, in the future.

95. Several representatives expressed support for the suggestion and stated that their Governments would actively consider contributing to the trust fund on an annual basis. Other representatives stated that, while they could see the purpose behind the suggestion, it would be easier for their Governments to contribute for a specific symposium or other specific purpose rather than to the trust fund in general. Nevertheless, in the light of the willingness of some Governments to consider making such an annual contribution, those representatives were willing to bring the suggestion to the attention of their Governments.

96. A suggestion was made that the Secretariat prepare a report for the twenty-second session of the Commission on reasons, other than financial ones, that States might have for failing to contribute to the Commission's programme of training and assistance. This suggestion was not generally accepted.

97. After discussion, the Commission decided to invite Governments, the relevant United Nations organs, organizations, institutions and individuals to make voluntary contributions on an annual basis to the existing trust fund for UNCITRAL symposia.

Chapter X. Collection and dissemination of information on interpretation of legal texts of the Commission

98. On the basis of a note by the Secretariat (A/CN.9/312), the Commission considered the need and means for collecting and disseminating court decisions and arbitral awards relating to legal texts emanating from its work, as had been suggested at previous sessions (A/CN.9/312, paras. 1 and 2). The discussion focused on decisions relating to the United Nations Sales Convention, which had entered into force on 1 January 1988. It was understood, however, that any agreed mechanism for collection and dissemination would be used also in respect of other legal texts already enacted or soon to be in force, i.e., the UNCITRAL Model Law on International Commercial Arbitration, the Limitation Convention and the Protocol amending it, as well as other legal texts upon their entry into force, in particular the Hamburg Rules.

99. The Commission agreed with the findings in the note as regards the need for collecting and disseminating relevant court decisions and arbitral awards. Information on the application and interpretation of the international text would help to further the desired uniformity in application and would be of general informational use to judges, arbitrators, lawyers and parties to business transactions.

100. The Commission accepted the suggestions in the note in respect of the means for collecting decisions (A/CN.9/312, paras. 15-18). In brief, the scheme of collection would be as follows. While the secretariat of the Commission would function as the focal point, it had to rely on the co-operation of the States parties to the Convention in question. Those Member States would be invited to assist in the gathering of court decisions and arbitral awards or to designate either an individual person or a specific organ or body as "national correspondent". It was noted that there existed a great variety as to the types of bodies or persons that a State might wish to entrust with the task (e.g., an official or section of the Ministry of Justice/Attorney-General's Department or of another Ministry, member of the council of law reporting, chamber of foreign commerce, research institute or a commercial law professor).

101. It was pointed out that the scheme would work effectively only with an appropriate organizational infrastructure for obtaining the relevant decisions from the courts of the country. Special considerations applied to arbitral awards, which constituted an equally important source of information on the application and interpretation of a commercial law convention. Their availability was limited by requirements of confidentiality and by the fact that arbitrations were being administered by a variety of arbitral institutions and often were conducted as pure *ad hoc* proceedings without any administrative link to an institution. The Secretariat was requested to develop, in co-operation with the national correspondents, suitable measures to obtain relevant arbitral awards (or anonymous excerpts thereof).

102. The decisions and awards thus collected would be forwarded in their original language and in full length to the Secretariat, which would ensure that they were stored and made accessible upon request to any interested person. At least initially, that task would be performed by the Secretariat itself. At a later stage, consideration might be given to entrusting another organization with the task of operating a documentation centre, including the possibility of computer storage and access.

103. As regards the dissemination of relevant decisions, the Commission was agreed that the publication of the decisions in full and in the six official languages of the United Nations would far exceed the resources available to the Secretariat. As suggested in the note (A/CN.9/312, para. 20), the publication of full law reports might be undertaken, at least in one language, by a commercial publisher. It would be desirable if commercial publishers in various countries were willing to publish original decisions in full, regardless of whether they were in one of the official languages of the United Nations. In that connection, emphasis was placed upon the importance of free access to reported materials, unimpeded by copyright restrictions.

104. As regards the more limited scope of information that the Secretariat could disseminate, the Commission accepted the following suggestions set forth in the note (A/CN.9/312, paras. 21-26): The national correspondents designated by States would prepare, in one of the official languages, abstracts or headnotes of all national decisions involving the interpretation of a provision of the Convention; the precise format and structure of the abstracts would be agreed upon by the national correspondents at a meeting that might be convened in conjunction with the twenty-second session of the Commission; and the meeting would also be devoted to the preparation of a subject index or similar reference system and to a discussion of organizational matters concerning collaboration between the national correspondents and the Secretariat.

105. The abstracts prepared by the national correspondents, together with any references to publication of the decisions, would be translated into the other official languages by the Secretariat and published as part of the regular documentation of the Commission. Initially, the abstracts could be included in an annual report and later in more frequent reports, depending upon the volume of decisions.

106. It was suggested that only those decisions that had not been appealed to a higher court should be published.

107. The Commission considered a more far-reaching proposal, that of establishing a permanent editorial board. In addition to performing the above-mentioned tasks conferred upon the national correspondents, the board would proceed to a comparative analysis of the collected decisions and report periodically to the

Commission at its annual sessions on the state of application of the Convention. The reports should evidence in particular the existence of uniformity or divergency in the interpretation of the individual provisions of the Convention as well as the existence of gaps in the provisions which might come to light in actual court practice. In support of the proposal, it was pointed out that the establishment of such a board, composed of representatives of States parties to the Convention, would ensure that in the comparative analysis of the material collected and the regular reporting on the state of application of the Convention equal attention would be given to the national experience of each State without giving any State or region a privileged position for political, economic or purely linguistic reasons.

108. In response to the proposal, various concerns were expressed. At the technical or organizational level, the institution of a permanent editorial board was said to be too formalized and its operation appeared unwieldy in view of the expected large number of States parties to the Convention that would wish to have a representative on the board. At a substantive level, the proposal was said to be too ambitious or at least premature. In particular, there was a risk that the interpretation given to the Convention in the analysed decisions of a particular jurisdiction would appear to represent an authoritative opinion of the member State although the collection of court decisions and arbitral awards was unlikely to be complete and the status and value of court judgements differed considerably from one legal system to another. Any such impression should be avoided, and reports on the interpretation of the Convention were to be for purposes of information only.

109. After deliberation, the Commission decided for the time being not to establish a permanent editorial board. It was understood that the proposal would be reconsidered in the light of experience gathered in the collection of decisions and the dissemination of information along the lines suggested in the note and adopted by the Commission. It was generally understood that any measures in the new undertaking would have to be reviewed and possibly adjusted in the light of such experience.

Chapter XI. Working methods of the Commission

110. At its twentieth session, in 1987, the Commission decided that consideration should be given to several issues regarding its working methods and, in particular, the membership of the Commission and of its working groups.¹⁴ In order to facilitate the discussion, the Secretariat presented some background information concerning those issues in a note entitled "Working methods of the Commission" (A/CN.9/299).

¹⁴Official Records of the General Assembly, Forty-second Session, Supplement No. 17 (A/42/17), para. 344.

A. *Increase in membership of the Commission*

111. In its first part, the note dealt with the issue of a possible increase in membership of the Commission. It recalled the discussions and decision on the increase in 1973 from the original level of 29 States to the current one of 36 States (General Assembly resolution 3108 (XXVIII)). It further recalled the 1977 decision that enabled non-member States to participate as observers in sessions of the Commission or its working groups. The note suggested that, in view of the latter decision and the ensuing practice, it had made little practical difference whether a State was present as a member State or as an observer. The primary consequence of membership appeared to be that a member State would be more likely than a non-member State to be represented at meetings of the Commission and its working groups and to be represented by experts in international trade law. Finally, the note suggested that a change in the number of member States in the Commission would have no financial implications for the United Nations.

112. During the discussion in the Commission, divergent views were expressed as to the advisability of recommending to the General Assembly an increase in the membership of the Commission. According to one view, there were good reasons for suggesting a substantial increase in membership which, if accepted by the Assembly at its forty-third session, could already be taken into account in the elections to be held at that session. An important reason was that membership in the Commission promised to enhance awareness of the work of the Commission and interest in its achievements. Active participation as a member State tended to further a favourable attitude towards acceptance of legal texts emanating from the work of the Commission and towards assistance in respect of other important functions, such as training and assistance. The proposal was further supported on the ground that a State was more likely to be represented at sessions of the Commission as a member than as an observer.

113. Moreover, the large number of States that had participated as observers and had made valuable contributions indicated that there existed a considerable interest beyond the 36 States that were currently members. With reference to the increase in 1973, it was noted that since that time membership in the United Nations had increased by 27 States, of which 9 were of the Latin American region. The proponents of the increase in membership of the Commission did not propose any definite number since it was for the General Assembly to agree on an equitable and politically acceptable number.

114. Another view was that it was not advisable to recommend an increase in membership at the current session. The valuable participation and contributions of non-member States had shown that States with an interest in the work of the Commission had full opportunity for active involvement and appeared to have used that opportunity. The remaining difference between a member State and a non-member State was

the domestic question of the likelihood of its being represented at sessions.

115. Moreover, it had not been established whether a desire or need for an increase in membership was felt in all regional groups alike and whether an increase in membership would in fact increase active participation by States hitherto not actively involved. In addition, it would be difficult to agree on a number that was politically acceptable as reflecting an equitable distribution. Finally, it was inopportune to recommend an increase of membership at a time when the United Nations was undergoing a process of review about possible restructuring.

116. After deliberation, the Commission agreed not to take a decision at the current session and to reconsider the matter at its twenty-third session in 1990.

B. *Size and role of the working groups*

117. The note by the Secretariat (A/CN.9/299) set forth, in its second part, the historical development of the working groups. It showed, in particular, that the working groups had been small in the early years and had gradually increased to the current size, with all member States of the Commission represented in all three working groups. It also showed that, while at the outset working groups had been entrusted with a particular task and then had been discontinued upon the completion of that task, in more recent years working groups had been treated as continuing bodies and had been assigned a new task once a previous task had been completed.

118. The note further described the varying role of the working groups in relation to the Commission as their parent body. During recent years, the differences between a session of the Commission and that of a working group were primarily procedural in nature. Finally, the note set forth some policy considerations that the Commission might wish to take into account in its deliberations on the appropriate size of a working group.

119. During its current session, the Commission did not engage in an exchange of views on the topic of the size and role of the working groups. It was felt that the topic was related to the topic of a possible increase in membership of the Commission and that, accordingly, its consideration should be postponed until the twenty-third session of the Commission.

Chapter XII. *Relevant general assembly resolutions and other business*

A. *General Assembly resolutions on the work of the Commission*

120. The Commission took note with appreciation of General Assembly resolution 42/152 of 7 December 1987 on the report of the United Nations Commission

on International Trade Law on the work of its twentieth session and of resolution 42/153 of 7 December 1987 on the draft Convention on International Bills of Exchange and International Promissory Notes.

B. Date and place of the twenty-second session of the Commission

121. It was decided that the Commission would hold its twenty-second session from 16 May to 2 June 1989 at Vienna.

C. Sessions of the working groups

122. It was decided that the Working Group on International Payments would hold its seventeenth session from 5 to 15 July 1988 in New York. It was decided that the Working Group might hold its eighteenth session from 5 to 16 December 1988 at Vienna, its nineteenth session from 10 to 21 July 1989 in New York and its twentieth session in the second half of 1989 at dates to be determined by the Secretariat if, in the judgement of the Working Group, its progress in respect of the preparation of the Model Rules on electronic funds transfers so warranted.

123. The Commission decided that the tenth session of the Working Group on the New International Economic Order would be held from 17 to 28 October 1988 at Vienna and that it might hold its eleventh session from 17 to 28 April 1989 in New York. It was agreed that the Working Group might hold its twelfth session in the second half of 1989 at dates to be determined by the Secretariat.

124. It was decided that the Working Group on International Contract Practices would hold its twelfth session from 21 November to 2 December 1988 at Vienna. While no session of the Working Group would be held in 1989 prior to the twenty-second session of the Commission, the Commission decided to authorize the holding of the thirteenth session of the Working Group in the latter half of 1989 if the programme of work so warranted.

ANNEX

**List of documents before the Commission
at its twenty-first session**

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

B. United Nations Conference on Trade and Development (UNCTAD): extract from the report of the Trade and Development Board on the first part of its thirty-fifth session, TD/B/1193

"B. Progressive development of the law of international trade: twenty-first annual report of the United Nations Commission on International Trade Law (Agenda item 6 (b))

287. At the 734th meeting, on 20 September 1988, the representative of China said that, given the importance of UNCITRAL's work, measures should be taken to facilitate adoption and implementation of the various legal instruments which it elaborated. He emphasized the need to strengthen UNCITRAL's work in training and assistance, in particular the training of professionals of the developing countries and the advisory service on legislation. With regard to UNCITRAL's

work programme balanced consideration should be given to the needs of countries at different levels of economic development. UNCTAD could play its role in supporting UNCITRAL's work, especially in the training of personnel in the international trade law sector of developing countries.

Action by the Board

288. At the same meeting, the Board took note of the report of the United Nations Commission on International Trade Law on its twenty-first session (A/43/17 circulated under cover of document TD/B/1179) and of the comments made thereon."

C. General Assembly: report of the Sixth Committee (A/43/820)

I. INTRODUCTION

1. The item entitled "Report of the United Nations Commission on International Trade Law on the work

of its twenty-first session" was included in the provisional agenda of the forty-third session of the General Assembly pursuant to paragraph 11 of General Assembly resolution 42/152 of 7 December 1987.

2. At its 3rd plenary meeting, on 23 September 1988, 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 4th meeting of the Sixth Committee, on 27 September 1988. The Sixth Committee also had before it the report of the Secretary-General containing observations and proposals received from Governments in connection with the draft Convention on International Bills of Exchange and International Promissory Notes (A/43/405 and Add.1-3). In addition, a letter dated 6 October 1988 from the Permanent Representative of Zimbabwe to the United Nations addressed to the Secretary-General (A/43/709) was circulated under the item. Finally, the Working Group on the draft Convention, created at the beginning of the session pursuant to paragraph 3 of General Assembly resolution 42/153, submitted its report to the Sixth Committee (A/C.6/43/L.2).

4. The Sixth Committee considered the item at its 4th to 6th, 10th and 21st meetings, from 27 to 30 September and on 7 and 24 October 1988. The summary records of those meetings (A/C.6/43/SR.4-6, 10 and 21) contain the views of the representatives who spoke on the item.

II. CONSIDERATION OF DRAFT RESOLUTIONS A/C.6/43/L.3 and A/C.6/43/L.4

5. At the 10th meeting, on 7 October, the representative of Mexico introduced a draft resolution entitled "Draft Convention on International Bills of Exchange and International Promissory Notes" (A/C.6/43/L.3).

¹Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17).

6. At the same meeting, the Committee adopted draft resolution A/C.6/43/L.3 without a vote (see para. 9 and draft resolution I).

7. At the 21st meeting, on 24 October, the representative of Austria introduced a draft resolution entitled "Report of the International Trade Law Commission on the work of its twenty-first session" (A/C.6/43/L.4) and indicated that India was no longer a co-sponsor. The draft resolution was thus sponsored by Argentina, Australia, Austria, Brazil, Canada, Cyprus, Czechoslovakia, Denmark, Egypt, Finland, France, the German Democratic Republic, Germany, Federal Republic of, Greece, Guyana, Hungary, Italy, Japan, the Libyan Arab Jamahiriya, Netherlands, Sierra Leone, Sweden, Turkey, the United Kingdom of Great Britain and Northern Ireland and Yugoslavia, later joined by Kenya, Lesotho and Spain.

8. At the same meeting, the Committee adopted draft resolution A/C.6/43/L.4 without a vote (see para. 9, draft resolution II).

III. RECOMMENDATIONS OF THE SIXTH COMMITTEE

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

[Text not reproduced in this section. The draft resolutions were adopted, with editorial changes, as General Assembly resolution 43/165 and General Assembly resolution 43/166 (see part one, sections D and E, below). The report of the Working Group of the Sixth Committee that considered the draft Convention on International Bills of Exchange and International Promissory Notes (A/C.6/43/L.2) is reproduced in part three, II, A. The comments of Governments on the draft Convention (A/43/405 and Add. 1 to 3) are reproduced in part three, II, B. An excerpt from the summary records of the discussion of the draft Convention in the Sixth Committee is reproduced in part three, II, C.]

D. General Assembly resolution 43/165 of 9 December 1988

43/165. UNITED NATIONS 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 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, in particular those of developing countries, in the extensive development of international trade,

Being aware that the free circulation of bills of exchange and promissory notes facilitates international trade and finance,

Being convinced that the adoption of a convention on international bills of exchange and international promissory notes will facilitate the use of such instruments,

Taking note with satisfaction of the decision of the United Nations Commission on International Trade Law at its twentieth session¹ to transmit the text of the draft Convention on International Bills of Exchange and International Promissory Notes² to the General Assembly for its consideration,

Recalling its resolution 42/153 of 7 December 1987, in which it requested the Secretary-General to draw the attention of all States to the draft Convention, to ask

¹Official Records of the General Assembly, Forty-second Session, Supplement No. 17 (A/42/17), para. 304.

²*Ibid.*, annex I.

I. INTERNATIONAL PAYMENTS

A. Electronic funds transfers

1. Report of the Working Group on International Payments on the work of its sixteenth session (Vienna, 2-13 November 1987) (A/CN.9/297) [Original: English]

1. At its nineteenth session in 1986 the Commission decided to begin the preparation of Model Rules on electronic funds transfers and to entrust this task to the Working Group on International Negotiable Instruments, which it renamed the Working Group on International Payments¹. It also decided that the first meeting for this purpose (sixteenth session of the Working Group) should be held in 1987 after the twentieth session of the Commission².

2. The Commission decided that the Model Rules should be flexible and should be drafted in such a way that they did not depend upon specific technology. Where appropriate, the Model Rules should present alternative solutions in order to take into account differences in banking systems. Furthermore, the Model Rules should deal with the relationship between banks as well as the relationship between banks and their customers³.

3. It was suggested that the Working Group should begin its work by considering the list of legal issues set forth in the final chapter of the *UNCITRAL Legal Guide on Electronic Funds Transfers*⁴ (hereafter cited as *UNCITRAL Legal Guide*) as well as any other issues the secretariat might consider appropriate to place before the Working Group.

4. The Working Group held its sixteenth session at Vienna from 2-13 November 1987. The Working Group is composed of all States members of the Commission. The session was attended by representatives of the following States member of the Working Group: Argentina, Australia, Austria, Brazil, Czechoslovakia, Egypt, France, Hungary, Italy, Japan, Kenya, Mexico, Netherlands, Nigeria, Spain, Sweden, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Yugoslavia.

5. The session was attended by observers from the following States: Bolivia, Canada, Colombia, Demo-

cratic People's Republic of Korea, Germany, Federal Republic of, Indonesia, Morocco, Poland, Republic of Korea, Saudi Arabia, Thailand.

6. The session was attended by observers from the following international organizations: International Monetary Fund, Hague Conference on Private International Law, International Institute for the Unification of Private Law, Latin American Federation of Banks, Banking Federation of the European Community, International Chamber of Commerce.

7. The Working Group elected the following officers:

Chairman: Mr. José María Abascal Zamora
(Mexico)

Rapporteur: Mr. Mervyn Alan Keehn (Australia)

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

(a) Provisional agenda (A/CN.9/WG.IV/WP.34).

(b) Electronic Funds Transfers, Note by Secretariat (A/CN.9/WG.IV/WP.35)

(c) UNCITRAL Legal Guide on Electronic Funds Transfers, United Nations publication, Sales No. E.87.V.9

9. The Working Group adopted the following agenda:

(a) Election of Officers

(b) Adoption of the agenda

(c) Preparation of Model rules on electronic funds transfers

(d) Other business

(e) Adoption of the report.

DELIBERATIONS AND DECISIONS

10. The Working Group decided to commence its work at the current session by considering a list of legal issues that might be considered for inclusion in the model rules contained in a report prepared by the secretariat (A/CN.9/WG.IV/WP.35).

11. The following paragraphs reflect the substance of the discussion with respect to each of the legal issues considered by 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. 230.

²*Ibid.*, para. 273.

³*Ibid.*, para. 231.

⁴A/CN.9/SER.B/1. The list of legal issues is also found unchanged in substance in the draft *UNCITRAL Legal Guide*, A/CN.9/266/Add.2.

I. Scope of application

I.1 *Should the Model Rules apply only to international funds transfers or also to domestic funds transfers?*

12. Views were expressed on the general nature of the Model Rules to be prepared. It was suggested that Model Rules drafted narrowly so as to cover only a few precise points would be welcomed by the banking community and would be likely to be widely adopted. The prevailing view was that the Model Rules should be drafted so as to cover a wider range of banking situations and legal problems. Although such rules would have less likelihood of being widely adopted, they would serve an educational role and thereby lead towards the harmonization of law in this field.

13. A view was expressed that the Model Rules should include both domestic and international funds transfers. In support of this view it was stated that international funds transfers necessarily involved domestic elements. Therefore, in order to reduce inconsistencies between the law governing purely domestic funds transfers and the domestic elements of international funds transfers, it would be desirable to consider both in the Model Rules.

14. Under another view the Model Rules should consider only international funds transfers. It was suggested that the task would not otherwise be completed in a manageable period of time. Moreover, Model Rules limited to international funds transfers would be more likely accepted than would rules that might conflict with national law. In order to facilitate restriction of the Model Rules to the international aspects of funds transfers, it was suggested that they should be restricted to inter-bank relationships. In opposition, it was stated that the inter-bank relationships could be adequately governed by contracts between the banks; the interest in the Model Rules lay in the possibility of developing rules affecting the rights of customers.

15. The prevailing view was that the Model Rules should concentrate on problems arising in international funds transfers, but would have to consider both domestic and international aspects of such transactions, and that a decision should be made at a later time on the extent to which the Rules should be considered to be applicable to domestic funds transfers.

I.2 *Should the Model Rules apply only to electronic funds transfers or also to paper-based transfers?*

16. There was general agreement that the Model Rules should not apply to the truncation of negotiable instruments even though in such cases the essential data is forwarded to the drawee by electronic means. Negotiable instruments present too many special problems that are already regulated by statutory law and international conventions. Furthermore, at least at the present time there appeared to be no truncation of negotiable instruments that circulate internationally.

17. Under one view the Model Rules should apply only to the electronic aspects of funds transfers. Under another view it would be preferable for the Model Rules to cover both electronic funds transfers and paper-based funds transfers. In support of that view it was suggested that, since many funds transfers used both electronic and paper-based techniques, it would be difficult to consider one without considering the other. Furthermore, although it was the special problems created by the electronic aspects of funds transfers that had led to the decision to prepare the Model Rules, the Model Rules should in any case be based to the extent appropriate on the rules governing paper-based funds transfers.

I.3 *Should the Model Rules apply to both credit transfers and debit transfers?*

18. In reply to a question whether there were currently in use any international electronic debit transfers, it was pointed out that the use of certain payment cards brought about a debit transfer. Another form of international electronic debit transfer was created when Eurobonds held in electronic form were sold and the clearing took place against credit to an account. It appeared, however, that ordinary commercial debit transfers fulfilling the payment functions of a bill of exchange did not exist as yet internationally.

19. The prevailing view was that the Commission should concentrate on credit transfers but that the Model Rules should be drafted, if possible, so that they could be adapted to debit transfers at a later time if that was found to be desirable.

I.4 *Should the Model Rules apply only to funds transfers where accounts at banks are to be debited and credited or should they also apply where accounts at other financial institutions are to be debited and credited?*

20. Under one view only accounts at banks should be envisaged. It was stated that in most countries the definition of what constituted a bank was established by law and the activity of banking was regulated strictly. Under another view many financial institutions other than banks engaged in electronic funds transfers. The Model Rules would apply to an activity and they should apply to all financial institutions that engaged in that activity. However, the Model Rules should stay neutral as to what kinds of financial institutions would be envisaged.

I.5 *Should consumer electronic funds transfers be excluded from the scope of application of the Model Rules?*

21. A view was expressed that the Model Rules should not cover consumer electronic funds transfers. In support of that view it was stated that there were already laws dealing with consumer funds transfers in several countries and that other international organiza-

tions, such as the Organization for Economic Co-operation and Development and the European Communities, were already studying these issues in respect of the countries belonging to those organizations. It was suggested that consumer issues were better dealt with at the national or regional level since they involved policy choices that might appropriately vary in different parts of the world.

22. According to another view consumer electronic funds transfers should not, as such, be excluded from the scope of application of the Model Rules. It was stated that, although there were different inter-bank arrangements for different electronic funds transfer techniques, those differences were not based on whether the funds transfer was by a consumer or for a consumer purpose. In general, it would be difficult to prepare a definition of a consumer funds transfer that would be adequate in all situations on a global basis.

23. It was suggested that, for the purposes of the Model Rules, it would be better not to employ the word "consumer", which is a loaded term in many countries, but to employ the term "user" or "customer". It was further suggested that in many cases the legal problems were the same in respect of all classes of users. This could best be determined by an examination of specific legal issues as they arose. It was also suggested that if the Model Rules were to offer solutions at a sufficient level of generality, it might be possible, in respect of certain classes of transactions or parties, for countries to adopt consumer protection legislation that would nevertheless remain consistent with the Model Rules. In response to a suggestion that the Model Rules might distinguish between high-value and low-value funds transfers, it was stated that the value of a funds transfer did not change the nature of the legal issues involved. A view was also expressed that it was premature to discuss whether the Model Rules should deal with funds transfers that raised issues of consumer rights until it had been decided to what extent the Model Rules would deal with issues that were not themselves connected to the international nature of the funds transfer.

II. Definitions and general provisions

II.1 *What terms should be defined in the Model Rules and what should be the orientation of the definition given?*

24. The Working Group considered the following types of terms that might be defined:

- (a) Parties to a funds transfer;
- (b) Bank;
- (c) Funds transfer instruction;
- (d) Dates relevant to the funds transfer: entry date; interest date; pay date and value date.

25. It was pointed out that terminology in this field had not as yet become standardized. The Committee on Banking and Related Financial Services of the International Organization for Standardization (ISO TC68)

was in the process of standardizing the terminology that was being used by its various sub-committees when developing international standards and that it was intended to include in that effort the terminology used by the International Chamber of Commerce in its draft inter-bank compensation rules.

26. It was noted that the ISO TC68 terminology focused on the bank-to-bank transaction, which was a consequence in part of the fact that the international standards developed by that committee dealt primarily with the credit transfer message that passed between two banks. The terminology used in the *UNCITRAL Legal Guide* reflected the fact that the *Legal Guide* looked at the funds transfer primarily from the point of view of a bank customer transferring funds to the account of another bank customer at the same or a different bank. It also reflected the desire to use the same terminology, to the extent possible, to describe both credit transfers and debit transfers.

27. A view was expressed that the terms proposed by ISO TC68 should be used in the Model Rules. In support of this view it was stated that it was important to harmonize the terms as used by bankers and as used in legal rules governing funds transfers so as to reduce confusion. Under another view the terminology used in the *Legal Guide* was more appropriate for legal rules that were concerned with the rights of customers. It was also stated that, since the Working Group had decided that the Model Rules should be drafted in a style that would permit their application to debit transfers, the terminology in the *Legal Guide* should be used since it was more adaptable to debit transfers than was the ISO TC68 terminology.

28. The prevailing view was that an effort should be made to use the ISO TC68 terminology, but only to the extent that it was consistent with the purposes and needs of the Model Rules. It was pointed out that, in any case, great care would have to be taken in regard to the problems of terminology in languages other than English and French (the languages used by ISO TC68) and that it would be important for technicians in those languages to be consulted when the Model Rules were prepared.

II.2 *Should the Model Rules contain a rule as to the effect of contracts on matters governed by the Rules?*

29. Under one view it was inconsistent to discuss the effect of contracts on matters governed by the Model Rules when the Rules themselves would not necessarily be of a normative nature. Under another view, even if the Model Rules were not of a normative nature, they could indicate the view of the Commission as to the appropriate substantive rule and the extent to which that rule might be varied by contract.

30. There was general agreement that many aspects of the inter-bank funds transfer process and of the relationship between banks and their customers would continue to be governed by contracts. Under one view

those contracts should prevail over anything in the Model Rules to the contrary. In support it was stated that the provisions of the Model Rules would still be of value since they would apply in respect of issues not covered by those contracts or where there was no contract. Under another view, at least some aspects of the Rules would have to be mandatory to be effective. Otherwise, banks would be able to change them to their advantage through contracts of adhesion. Moreover, in some cases it might be necessary to have mandatory rules in order to achieve a desirable uniformity of result. It was suggested that it would be possible to decide on the desirability that the Model Rules be mandatory only as each issue was considered.

31. As to whether a customer should have a right to rely on the provisions of an inter-bank contract, under one view such contracts could give rights only to the parties to those contracts. Under another view, if customers could not rely on those contracts, for example in respect of the time within which a receiving bank had to notify a sending bank that it would not act on a funds transfer instruction, the Model Rules would have to have provisions on those matters that might duplicate or be different from the inter-bank rule.

II.3 *Should the Model Rules contain rules for their interpretation?*

32. A view was expressed that the question covered two issues, namely whether the Model Rules should contain rules for their own interpretation and whether the Model Rules should contain rules of interpretation of funds transfer instructions. A view was expressed that the Model Rules should not contain rules for their own interpretation. In support of this view it was stated that rules of interpretation cause more problems than the rules they seek to interpret. The prevailing view favoured the inclusion of rules for the interpretation of the Model Rules. In support of this view it was stated that interpretation provisions were useful in international texts and that there were standard formats for such provisions for use in UNCITRAL texts that would be appropriate in this context.

33. The Working Group considered the suggestion that a rule of interpretation in the Model Rules could be used to indicate which was to prevail when the account to be debited or credited was indicated both by name and by number and the two were not consistent. Views were expressed that banks do not generally bother with names since many people carry the same name. It was also said that computers do not transmit names and there may even be technical problems in doing so. Furthermore, a comparison of account numbers and names would cause delays. Under another view an instruction must be followed strictly as it was given. When it is not followed, the bank has breached its obligation to the customer. When the designation of the account is given by name and by number, the bank should investigate the cause of any discrepancy. A view was expressed that the rule to resolve this matter would not be a rule of interpretation but a substantive rule which would have to be resolved in connection with matters of liability.

II.4 *Should the Model Rules contain provisions on conflicts of laws?*

34. The Working Group was informed that the Hague Conference on Private International Law would have before it in January 1988 a report discussing whether the Conference should undertake work on conflicts of law in respect of transborder data flow. One aspect of that report would consider electronic funds transfers.

35. A view was expressed that the Model Rules should not contain provisions on conflicts of laws. In support of that view it was stated that there were no domestic laws on electronic funds transfers. It would therefore be useless to provide conflict rules where specific domestic law did not yet exist. It was further stated that conflicts of laws problems arising in this area did not differ from those in any other area of activity and that, therefore, there was no need to have special rules unless there were specific problems relating to electronic funds transfers.

36. It was agreed that conflicts of laws issues in this area were of great importance and under one view the Model Rules should contain provisions on the subject since the lack of agreement on what law was applicable to different aspects of funds transfers was one of the problems facing bankers and their lawyers. It was stated that the rules on conflicts of laws should be consistent with the substantive rules developed on the various issues and that the experience with rules for paper-based transfers should be used wherever possible. The Working Group expressed the hope that it would be possible to co-operate with the Hague Conference in this endeavour.

III. Obligations of parties

A. *Form of the instruction*

III.1 *Should the Model Rules include a provision on the form and minimum content of a funds transfer instruction?*

37. Under one view there was no need for the Model Rules to prescribe the form or minimum content of a funds transfer instruction. It was stated that the computers of neither the sending bank nor the receiving bank would process an instruction that did not include the data elements required by the funds transfer system in use. In reply it was stated the instruction might be sent by telex, in which case it was quite possible for the instruction to be incomplete.

38. Under another view the substantive provisions in the Model Rules would be based on assumptions as to the content of the various messages; it was important that those assumptions be made clear. The Working Group observed that the data elements to be required should be as limited as possible so as to guard against their becoming obsolete by the rapid advance of technology and to be sure that they did not give a competitive advantage to one system over another.

III.2 *Should the Model Rules require funds transfer instructions to be authenticated? If so, should they prescribe mandatory or acceptable forms of authentication? Should they state the consequences of following the form of authentication agreed for the type of instruction used?*

39. Under one view the reason for requiring authentication in most systems was to ensure the protection of the banker of the party to be debited. In support of this view it was stated that the question had arisen in the past most often in the context of deciding who should bear the loss where a signature had been forged so well that the forgery could not be easily detected. Many national laws put the loss on the banker since the banker was authorized to respond only to instructions emanating from the customer. In the case of a forged signature or other unauthorized instruction the customer would have had nothing to do with the instruction.

40. Under another view the requirement of an authentication was for the protection of the customer as well as the bank. Usually, once the bank had shown that it had received an instruction that appeared to be genuine, the bank would not recredit the customer's account unless the customer proved that the authentication was not genuine. Therefore, it was important to the customer that the system be so designed as to reduce to a minimum the likelihood of a forged signature or other unauthorized authentication. This was of particular importance in electronic funds transfers where it would normally be very difficult to show that an apparently correct authentication was in fact false.

41. Views were expressed that the Model Rules should not contain rules requiring funds transfers to be authenticated or rules prescribing the forms of authentication that would be acceptable. In support of those views it was stated that the methods of authentication depended on the system being used. It was pointed out that those methods were continually changing with technology. It was said to be up to the bank to set up an appropriate form of authentication as it would suffer liability in the event the authentication was false. Furthermore, since the form of authentication would be governed by a contract between the sender and receiver of the instruction, the issue of authentication could not be resolved without first solving the question of the relationship between the Model Rules and contracts. Holders of this view also subscribed to the view that the concern of the Model Rules in this regard should be to allocate responsibility for loss arising out of a false authentication.

42. The prevailing view was that the Model Rules should require identification of the sender of a funds transfer instruction before a bank could debit an account, but no particular method or level of authentication should be prescribed. Since different levels of security would be appropriate for different types of funds transfers, banks and their customers, including other banks, might appropriately agree on the level of security desired.

43. The Working Group then considered what consequences should follow when the bank acted on an instruction that had been falsely authenticated. There was general agreement that the bank had the responsibility to justify every debit to a customer's account. It was suggested that a bank could in some circumstances justify a debit to an account when the instruction was shown to be false, for example, when the false authentication was caused by the negligence of the customer or when an insecure method of authentication had been chosen by the customer because it was less expensive. The view was expressed that these questions could be pursued only in the context of a full discussion of the allocation of loss arising out of fraud or error.

44. It was further suggested that different levels of responsibility might be imposed on sophisticated users and unsophisticated users. In respect of funds transfer systems oriented towards individual customers, a lower level of security might be decided upon by the bank in order to save money for both the bank and customers. In respect of funds transfer systems oriented towards more sophisticated users, the user may have a choice as to the level of security desired. In bank-to-bank transactions the level of security of the authentication may be determined by all the banks in the system. The view was expressed that special consideration would have to be given to the extent to which, if at all, the parties should be permitted to allocate by contract the loss arising out of a false authentication.

45. The Working Group also noted that in a certain number of cases it was impossible to determine whether the authentication of an instruction was false or not. Under one view it was felt the bank should be required to bear any such losses, but under another view the question of whether the bank had the burden of proving the legitimacy of an apparently legitimate authentication or whether the customer had the burden of proving its falsity was determinative as to the party who bore the risk of the loss.

B. *Obligations arising out of funds transfer*

III.3 *Should the receiver of an instruction be obligated to act on a funds transfer instruction it has received?*

46. There was general agreement that a bank did not invariably have an obligation to follow an instruction it had received. Under one view the receiving bank had no obligation to follow an instruction until the bank had accepted the instruction. At most, failure to act on an instruction that had not been accepted might give rise to a breach of contract. Under another view where there was a pre-existing contract between the sender and the receiving bank, the receiving bank would be responsible on an instruction that conformed to the contract once the instruction was received.

47. It was noted that if it was decided that the receiving bank was never obligated as a matter of banking law to follow the instruction until the instruction had been

accepted, it would not be necessary to determine the circumstances that would justify the bank's refusal to follow the instruction. Any such determination could be left to the contract between the parties. On the other hand if it was decided that the receiving bank would be obligated to follow the instructions it had received, the list of situations when the bank would be exonerated from that obligation found in the working paper at paragraph 62 would be the nucleus of any such list to be included in the Model Rules.

48. The Working Group noted that if the obligations of a receiving bank to follow an instruction arose only on its acceptance of it, the concept of acceptance would have to be defined for this particular purpose. The idea of acceptance was widely used in the law, for example the acceptance of an offer or the acceptance of a bill of exchange, and these existing definitions would probably confuse rather than clarify the matter. It was said that the definition of acceptance in the draft legislation in the United States took over a page.

49. The view was expressed that if a bank did not intend to follow an instruction, it should have an obligation to notify the sender that it would not do so. Otherwise the sender could reasonably anticipate that his instruction was being carried out and the funds transfer was being made. Under one view this obligation should exist only when the sender was a bank. It was also suggested that such an obligation should not exist where the receiving bank had no prior contractual relationship with the sending bank. The prevailing view was that the receiving bank should have an obligation to notify the sender if it did not intend to follow an instruction, whether or not there was a contract between the sender and the receiving bank.

50. It was noted that an obligation on the receiving bank to notify the sender if it was not going to follow the instruction implied the existence of a time-limit. This raised two questions: the length of the time limit, and the consequence of failure to comply with the time limit. The Working Group did not consider the time limit that would be appropriate. As to the consequences of failing to notify in time that it would not follow the instruction, one suggestion was that the receiving bank should be considered to have accepted the instruction by the passage of time. The consequences of its failure to act would then be the same as in any other case of failure to comply with an instruction it had accepted.

51. Different views were expressed as to whether the bank sending a notice that it would not follow a funds transfer instruction should be required to give the reasons for its failure to act. On the one hand, it was stated that, from the viewpoint of the transferor and of the sending bank, it was important to know what needed to be done to modify the instruction or otherwise cause the receiving bank to act on it. If the receiving bank would not in any case act on the instruction, another intermediary bank would have to be used. On the other hand, it was stated that it was dangerous for the receiving bank to be required to give reasons for its refusal to execute the instruction,

especially when it turned out that the reason given by a busy clerk turned out to be incorrect. It was also stated that when the difficulty was of a technical nature, the computer of the receiving bank might reject the instruction without human intervention. If the computer of the receiving bank was programmed to do so, it might indicate to the sender the reason it had rejected the instruction. When the reason for rejection was, for example, that the receiving bank suspected illegal activities, it would be inappropriate to require the receiving bank to notify the sending bank of its suspicions.

III.4 *If the Model Rules require a receiving bank to act on a funds transfer instruction, what actions would be required?*

52. Different views were expressed as to whether the Model Rules should set forth specific actions to be taken by a receiving bank, such as those listed in paragraph 51 of the working paper, or whether a general statement of obligation to do that which was necessary would be sufficient. It was suggested that in any case the Model Rules should not mention steps, such as verification of an authentication, that the bank would take for its own protection. It would be sufficient to state the consequences of having acted on a false authentication and permit the bank to decide whether in some circumstances it preferred not to verify the authentication and run the risk of bearing a loss.

53. The general view was that the Model Rules should describe in general terms the actions to be taken by a bank that was required to act on an instruction. It was suggested, for example, that a receiving bank that had accepted an instruction would be liable to carry out the instruction received, without setting forth in detail how it would do so.

54. A question was raised as to whether an intermediary bank that forwarded an instruction would be deemed to have guaranteed the authentication of the instruction received by his sending bank. Under one view if the transferor's authentication was false, every bank in the transmission chain from the transferor bank to the transferee bank where the account of the fraudulent party was held should be responsible to the defrauded party. Under another view a bank could verify only the authentication of the message it had received; it could not be held responsible for frauds or errors that happened prior to the message it had received. On the other hand, if the proceeds of the fraud or error were still in the possession of a bank, an adequate procedure should be available to permit the defrauded party to recover those funds.

III.5 *Should the Model Rules provide that the duty of the transferor bank is limited to performing certain specified acts as suggested above or should the duty of the transferor bank be to see that the transferor's instruction is carried out?*

55. The discussion of this question was limited to problems that arose prior to the time a correct funds

transfer instruction arrived at the transferee bank. In all but a few cases the transferee would have designated the transferee bank, and the transferor bank would have had no influence over that choice.

56. The view was expressed that the transferor bank undertakes as against its customer an obligation to achieve a result, i.e. to see that the funds transfer is effected. Therefore, it must be responsible to its customer for the consequences of any failure to effect the transfer as instructed, wherever the failure took place. If the failure occurred at an intermediary bank, the transferor bank should have a right of indemnity from that bank. In the opinion of some who held this view, the situation could appropriately be compared to that involved where goods were to be carried by successive carriers. If the goods were damaged, the consignor or consignee as the case may be could recover from the carrier with whom he had dealt. It was stated that this result was particularly important in international electronic funds transfers since it was often unclear what had gone wrong or where and, in any case, an intermediary bank would usually be in a foreign country where it would be difficult for the transferor to pursue his claim.

57. Under a different view a bank should be held responsible only for its own acts. One of those acts would be the choice of an appropriate transmission system and intermediary bank, but if the choice had been appropriate, the transferor bank should not be responsible for their failures. It was stated that, contrary to what was indicated in the prior paragraph, a bank undertook only to use its best efforts. Furthermore, since bank charges for making funds transfers were quite low and were not commensurate with the risk that would be involved if banks had to be responsible for failures at other banks, the cost of making funds transfers would increase.

58. It was suggested that much of the concern about increased risk was in reality related to a concern over the possibility of consequential damages. It was suggested that the present issue should be considered in the context of funds transfers that had gone astray and the claim of the customer was limited to return of the funds that had not been credited to the account of the transferee as instructed, with interest if appropriate, or was a claim for interest alone based on a delay in the funds transfer. At a later time consideration could be given to the question when, and from whom, consequential damages should be available as a result of the non-fulfilment of a funds transfer as instructed.

59. It was also suggested that consideration of the issue as to whether the transferor bank should be responsible to the transferor for failures that occurred at other banks became confused with the separate question as to the basis of liability of the transferor bank or intermediary bank, i.e. whether it should be strictly liable to achieve a result, should be liable unless it proved it was not at fault, or should be liable only if the transferor proved that the loss had occurred as a result of negligence or other fault.

60. The prevailing view was that the transferor bank should be responsible for the loss unless it showed that the loss had not occurred through its fault. Discussion centred on how the transferor bank could show that the problem had not occurred through its fault. It was suggested that this would require it to show who was at fault. A question was raised whether the transferor would then have to pursue the party at fault. Since there would be no direct contractual link between the transferor and the intermediary bank, several theories were suggested by which the transferor would acquire either a direct right of action or a derivative right of action from the transferor bank. Another question raised was whether the transferor bank would again become responsible if the intermediary bank was held by a court not to have been at fault. A question was also raised as to who should bear the loss if it occurred through the fault of an entity with limited liability, such as a telecommunications carrier. It was suggested that insurance might be available to reimburse for any such loss.

III.6 *Should the Model Rules provide whether and to what extent the responsibility of intermediary banks and transferee banks for properly carrying out their part in the funds transfer is to the bank that sent them the funds transfer instruction, to prior parties, especially the transferor, and in the case of the transferee bank, to the transferee?*

61. It was pointed out that most of this issue had been discussed in the context of the responsibility of the transferor bank to the transferor. However, the situation of the transferee bank had not been considered.

62. It was noted that at some point of time the transferee bank would become responsible only to the transferee. It was less clear when that point of time was reached and the nature of the transferee bank's responsibility prior to that time. It was suggested that a provision that the transferee bank was responsible only to the party who had chosen it, i.e. the transferee in almost every case, would have the practical effect that the transferor's obligation in regard to both the funds transfer and the underlying debt would be satisfied when a correct funds transfer instruction arrived at the transferee bank. Subsequent credit of the transferee's account would be important to the transferee but not to the transferor. On the other hand, a rule that the funds transfer was not complete until the transferee was "paid" by credit to its account or otherwise led to the conclusion that the transferee bank was responsible either to the transferor, the transferor bank or the last intermediary bank.

63. Because of the close inter-connection between these problems and the rules on finality which were yet to be considered, the Working Group decided to defer consideration of this issue.

III.7 *Should the Model Rules specify the occasions when the receiving bank would not be required to carry out the instruction?*

64. In light of the agreement that a receiving bank should not be required as a matter of banking law to carry out the instruction until it had accepted the instruction, it was not felt necessary to consider the question. It was recognized that in the further elaboration of the Model Rules it would become necessary to consider what events would exonerate a bank that had accepted an instruction from a failure to carry out that instruction.

III.8 *Should the Model Rules state the periods of time within which funds transfers must be implemented?*

65. One view was that the periods of time within which banks act on an electronic funds transfer instruction vary so much from one country to another and from one type of transmission technique to another that it would not be possible to fix specific time limits for a funds transfer. A different view was that customers and bankers alike would benefit from specific time limits and that, with the current technology, it would be possible to fix limits that would be meaningful but would not be too constraining on banks. It was suggested that it would already be helpful if a rule was devised with the limit left open to be filled in by each country. It might also be necessary to have a series of different time limits for different circumstances, or to phrase the limit as one of a reasonable period of time or "as soon as possible". During the discussion it became evident that some participants were thinking of time limits of 24 hours or less while others were thinking of up to a month, depending on the nature of the transaction.

66. The suggestion was also made that it would be sufficient if each bank in the chain was required to act within a specific period of time. The transferor could know the maximum period of time necessary for the funds transfer by adding the amount necessary for each segment.

67. It was stated that a transferor who needed funds available at a particular location at a particular time could contract with his bank by fixing a pay date. If the bank was not willing to commit itself to such an obligation, it could refuse to accept the instruction, or could accept it with a disclaimer as to its ability to guarantee the pay date. It was also suggested that, if the Model Rules were to set maximum time limits for funds transfers, those limits should be subject to being shortened by agreement but not lengthened.

68. There was general agreement that the draft rules should provide that if a transferor requested a particular pay date, the transferor bank should say whether it could meet that date. The Model Rules could provide the maximum period of time in which the funds transfer

should be completed for those cases in which no pay date was requested by the transferor. It was noted that some delegations would prefer a less specific time.

III.9 *Should the Model Rules provide for the obligations of the sender of the funds transfer instruction?*

69. Although the Working Group agreed that the sender of the instruction was obligated to give correct information and to reimburse the receiving bank, it was not thought necessary to so provide in the Model Rules.

III.10 *Should the Model Rules provide for the obligations of the parties to the funds transfer process other than the banks?*

70. It was suggested that the Model Rules should provide that clearing houses and parties to the funds transfer process other than banks, such as telecommunications carriers, would be liable where the loss was attributable to them.

71. However, it was noted that the Model Rules could not effectively provide rules on the liability of public telecommunications carriers because in most countries they were exempt by rules of administrative law from liability for damages caused by loss or delay of messages or change in their content. Views were expressed that even though this was true, many international electronic funds transfer instructions were carried by networks that did not enjoy such an exemption from liability under administrative law. Some such networks were owned by banks. In some cases individual banks operated message systems by which they transmitted both domestic and international funds transfer instructions. It was suggested that the Model Rules should not ignore the consequences of loss caused by these message systems.

72. The prevailing view was that the Model Rules should not attempt to cover the liability of telecommunications carriers enjoying limited liability, but that there should be rules allocating any loss caused by such an entity between the parties to the funds transfer. In this respect it was noted that it had already been decided that the transferor bank should, in general, be responsible to the transferor for the proper carrying out of the funds transfer instruction, subject to indemnification by subsequent banks in the chain and to defences that were yet to be determined. It would be necessary to establish within the context of that liability system the party who should assume the loss caused by a telecommunications carrier or other such party.

C. *Obligations subsequent to the funds transfer*

III.11 *Should the Model Rules provide that banks are required to make a detailed statement available to their customers in respect of debits and credits to their accounts and the frequency of such statements?*

III.12 *Should the Model Rules provide that the bank's statement as to the debits and credits it has entered to the account is final if the customer does not object within some period of time? Should this period be shorter than the limitation period for beginning legal action? If so, about how long should it be and from what event should the time be measured?*

73. The Working Group decided to consider questions III.11 and III.12 together since they raised related issues.

74. The view was expressed that the frequency and manner by which banks distributed a notice of debits and credits to customer accounts was a matter involving the status of the account that was not properly for consideration in the Model Rules. Practices differed widely from one country to another and from one type of account to another.

75. Under another view it was not primarily a question of the status of the account but of the notification of a funds transfers that had been reflected by an entry in the account. With the increase in the number and value of funds transfers, the constant possibility of and the speed with which fraudulent transactions could be completed, all of which were associated with the increase in the use of electronic funds transfers, it would be to the benefit of both customers and banks for customers to be expected to report questionable transactions to their bank as soon as possible. This suggested that customers should have only a limited period of time within which to report apparent discrepancies. At the end of the period the customer might be precluded from raising the discrepancy, or the burden of proof that there had been an error or fraud might be placed on the customer. If this were so, banks would need to furnish some form of notification of transactions within a reasonable period of time.

76. It was suggested that different rules might apply in respect of individuals and of commercial customers. It was also suggested that large commercial customers sending and receiving large numbers of funds transfer instructions often could not be aware of discrepancies for a long period of time. It was questioned whether notice should be considered to have been given if the customer could access transaction information from his account by on-line computer link. A view was expressed that the Model Rules might contain a provision on the weight to be given to the records of the bank as evidence of the payment by the transferor to the transferee.

77. The prevailing view was that the Model Rules should take into consideration the need for the bank to make available to customers a record of international electronic funds transfers and the period of time within which customers could question allegedly unauthorized or incorrect entries to the account.

IV. Error, fraud and liability therefor

IV.1 *Should the Model Rules specify the consequences and the procedures for rectifying an error when*

- *the amount of the funds transfer was credited to an account at the wrong branch or at the wrong bank;*
- *the amount was credited to the wrong account at the correct bank;*
- *an insufficient amount was credited to the transferor's account;*
- *an excessive amount was credited to the transferor's account.*

78. It was stated that errors in international electronic funds transfers were frequent (having regard to the large number of transactions) and were usually settled easily in the absence of any specific error resolution procedure. It was pointed out that many aspects of an error resolution procedure would follow automatically from the decision of the Working Group that the transferor bank would be liable to the transferor for the proper carrying out of the funds transfer instruction unless it showed a reason why it should be exonerated. The right of each bank to indemnity from the bank to which it had sent a proper instruction would assure that the loss was placed on the bank where the error had occurred.

79. The Working Group considered whether a bank could make corrections to an account by debiting it without the consent of the customer. It was stated that banks do it regularly when the error was of a bookkeeping variety or was otherwise manifest and, it was suggested, the power of a bank to correct such an error was an implied term of the contract between the bank and its customer and should be considered acceptable. It was also suggested that the customer should be informed of the action of the bank and should have an opportunity to object. It was agreed that where there was a conflict over the entry, the bank had no power to correct the entry by unilateral action. A view was expressed that in some jurisdictions a bank had no power to correct any type of entry by debiting the customer's account without its consent and that such conduct on the part of the bank could very well be unconstitutional as amounting to taking the property of another without the process of law. It was also stated that in some countries the question was considered to be governed by the rules on the finality of a funds transfer.

80. The Working Group considered whether banks and customers should have an obligation to pay interest on funds that had been incorrectly credited to their account. It was pointed out that the draft interbank compensation rules being prepared by the International Chamber of Commerce contained such an obligation since the bank incorrectly credited with funds should not unjustly enrich itself in such a situation.

81. A general view was expressed that the customer should not bear any responsibility for interest on

money incorrectly credited to his account but that when the bank recovered the funds it should be able to recover any interest it might have credited the customer as a result of the excessive credit in the account. In support of that view it was stated that bank customers are not in the same situation as are banks. While banks actively manage all funds at their disposal, bank customers might not have earned any interest on the funds and might not even have been aware of the credit to the account. A view was expressed that where a customer used the funds knowing they had been wrongly credited, and it could be demonstrated that it had profited, the customer should reimburse the bank for interest. Another view was expressed that a customer should pay interest only where it had been asked for return of the funds and it had not returned them or where it had received the funds in bad faith.

IV.2 *Should the Model Rules contain provisions establishing the appropriate jurisdiction in case of litigation involving an international electronic funds transfer?*

82. The Working Group decided to postpone consideration of the question.

IV.3, IV.4 and IV.5

83. The Working Group decided not to consider questions IV.3, IV.4 and IV.5 since the issues had been dealt with during its consideration of question IV.1.

IV.6 *Should the Model Rules provide that a bank might be liable for consequential damages for its failure to execute a funds transfer properly?*

84. It was noted that the term "consequential damages" did not adequately express the desired concept in all languages. In the context it was used here it referred to any loss other than loss of funds, interest and loss arising out of changes in exchange rates.

85. There was a divergence of views on this issue. Under one view banks should be liable for consequential damages only if such damages were foreseeable by the bank. This was said to be the normal rule in contract law and that it struck a fair balance between the interests of the transferor and the transferor bank. It was stated that it was a particularly appropriate rule in view of the liability scheme agreed upon by the Working Group, since it would be up to the transferor bank to include in its funds transfer instruction to its receiving bank the information giving rise to foreseeability of possible consequential damages if it were to be able to recover indemnification for such damages from that receiving bank.

86. Under another view the test of foreseeability when applied to funds transfers often gave rise to difficult speculation as to the knowledge of various officials of the bank as to the possibility of consequential damages. It was suggested that the bank should be liable only if it had specifically contracted for such responsibility. Under yet another view the bank should be liable for

consequential damages only if it had been negligent, or under still another view, if it had been in bad faith, or if it had been in deliberate disregard of the transferor's interest. It was also suggested that the matter, arising in the first place between the transferor and the transferor bank, could be left to local law.

IV.7 *Should the Model Rules contain rules as to whether the transferor is responsible for some or all fraudulent activity of family members, employees, or third persons that cause a funds transfer instruction to be sent to the transferor bank?*

87. The Working Group did not consider question IV.7 in detail.

V. Finality

88. Rather than considering the individual questions in the working paper as it had in regard to the other major issues, the Working Group decided that the first task was to clarify the concept of finality. It noted that, while all legal systems faced similar practical problems, the differences in organization of the banking system and the different legal concepts used to arrive at the solutions to the problems made it particularly difficult to consider this subject.

89. The Working Group decided to proceed by first considering two interrelated questions: whether there should be a single point of time when a funds transfer instruction should be considered to be final for all legal purposes and whether the questions of finality should be considered only in the context of the funds transfer as a whole or whether, when there were several transactions in the funds transfer, there should be separate rules of finality for each transaction.

90. A view was expressed that an attempt should be made to have a rule that would provide a single point of time at which a funds transfer would become final for all purposes. Such a rule would reflect the reality of the changing legal relationships between the transferor and transferee, transferor and transferor bank and transferee and transferee bank. Since the change in legal relationships would occur at some point of time, the consequences of that change in legal relationships should also be recognized as having occurred at that point of time. Banks should organize their funds transfer operations in such a way that they can effectively implement the obligations that flow from those legal relationships, bearing in mind the legal ownership of the funds at each step of the transaction.

91. Under another view it would not be feasible to have a single point of time when all aspects of the funds transfer would become final. In particular, it was pointed out that each transaction in a funds transfer would involve the sending and receipt of a funds transfer instruction between two banks and settlement between them. The fact that the high-value funds transfer systems in operation that include a settlement feature all had rules on two important aspects of finality (namely revocability of the instruction by the sending bank and reversibility of the transaction in case

of failure to settle) showed that finality rules already existed for the individual transactions. It was suggested that, while the finality rules of these funds transfer systems expressly governed only the banks themselves, they should be taken into account when considering the rules on finality for the funds transfer between the transferor and the transferee.

92. As to the right of the transferor to revoke the funds transfer instruction, under one view he should be able to do so until the latest possible point of time, i.e. when appropriate action had been taken by the transferee bank, which was assumed to be at the time of credit to the transferee's account. Until that time the transferor was master of the instruction. The instruction revoking the prior instruction might follow the same route as the original funds transfer instruction or, according to another suggestion, the transferor might have the revocation sent directly to an intermediary bank or to the transferee bank. It was suggested that the revocation would be effective only if it overtook the funds transfer instruction before that instruction had been acted upon. It was also stated that the revocation should be at the risk and expense of the transferor.

93. Under another view the transferor should lose the right to revoke the funds transfer instruction at an early point of time, which might be when the transferor bank had accepted the instruction, normally by debiting the transferor's account or by sending the instruction to an intermediary bank or to the transferee bank. It was suggested that permitting the transferor to revoke at a later time might be dangerous for the banking system. In reply it was suggested that the transferor's right to revoke its instruction need not put in question the finality of each separate transaction within the funds transfer.

94. During the discussion it was recognized that in some countries the transferor in a consumer funds transfer as defined by national law had been given an extended right to revoke funds transfers. Because of the special policy issues involved in such rules, the Working Group did not consider them as a basis for its own consideration of finality issues in international funds transfers.

95. The Working Group noted that a distinction should be made between revocation of a funds transfer instruction on the initiative of the transferor and reversibility of the action taken by a bank in pursuance

of that instruction because the receiving bank did not receive settlement for the instruction. The Working Group noted that in some legal systems a bank was authorized to reverse the credit it had given because of failure to receive settlement while in other legal systems the rules on finality would preclude such reversal. It was noted that in international funds transfers transferees in one country might find that credit to their account had been reversed because of the failure of a bank in another country to receive settlement.

96. The Working Group undertook a preliminary consideration of the issues involved in the case of the bankruptcy of the transferor, transferee or of one of the relevant banks during the course of the funds transfer. It was noted that the existence of finality rules for each transaction in the funds transfer chain might tend towards placing the risk of the failure of an intermediary bank on the other banks rather than on the transferor.

97. The Working Group also exchanged views as to when credit to the account of the transferor would no longer be subject to attachment or other legal process and when credit to the account of the transferee became subject to such legal process. The difficulty of knowing when an account had been debited or credited was noted as well as the question whether debiting or crediting the account should be treated as a relevant legal act since the bank could schedule its off-line data processing operations at the time of the day most convenient to it. The view was expressed that there should not be different rules on finality for on-line and off-line data processing operations in a funds transfer. Under another view any rules on finality should take account of the technological changes that had taken place and they should be defined in operational terms that could be carried out by a bank.

FUTURE WORK

98. The Working Group requested the secretariat to prepare draft provisions based on the discussions during this session for its consideration at its next meeting. Where it seemed appropriate, the secretariat should prepare alternative provisions.

99. The Working Group recommended that its seventeenth session be held in New York from 5 to 15 July 1988.

2. Electronic funds transfers: note by the Secretariat (A/CN.9/WG.IV/WP.35) [Original: English]

1. At its nineteenth session in 1986 the Commission decided to begin the preparation of Model Rules on electronic funds transfers and to entrust this task to the Working Group on International Negotiable Instruments, which it renamed the Working Group on International Payments¹. It also decided that the first

meeting for this purpose (sixteenth session of the Working Group) should be held in 1987 after the twentieth session of the Commission². The session of the Working Group has been scheduled to be held at Vienna from 2 to 13 November 1987.

2. The Commission decided that the Model Rules should be flexible and should be drafted in such a way that they did not depend upon specific technology.

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. 230.

²*Ibid.*, para. 273.

Where appropriate, the Model Rules should present alternative solutions in order to take into account differences in banking systems. Furthermore, the Model Rules should deal with the relationship between banks as well as the relationship between banks and their customers³.

3. It was suggested that the Working Group should begin its work by considering the list of legal issues set forth in the final chapter of the *UNCITRAL Legal Guide on Electronic Funds Transfers*⁴ (hereafter cited as *UNCITRAL Legal Guide*) as well as any other issues the secretariat might consider appropriate to place before the Working Group.

4. This report presents issues that might be considered for inclusion in the Model Rules. Since the list of legal issues in the *UNCITRAL Legal Guide* and the commentaries thereon did not envisage the preparation of a specific legal text and additional issues might be considered in the Model Rules, it was thought preferable to prepare a new report oriented towards the preparation of these Rules. The list of issues in this report is based on the list of legal issues in the *UNCITRAL Legal Guide*. In many cases it repeats the question in a modified form and either refers to the commentary or repeats some portion of it. It should be noted that the terminology used in this report is that used in the *UNCITRAL Legal Guide*.

5. The Working Group may consider it desirable to consider the various issues without reaching final decisions and, at the end of its review of those issues, to decide on the next actions to be taken.

I. Scope of application

I.1 *Should the Model Rules apply only to international funds transfers or also to domestic funds transfers?*

6. The principal reason for the Commission to undertake the preparation of these Model Rules is to reduce conflicts in legal rules in cases of international funds transfers. A common means used to reduce the conflicts in legal rules governing international trade is to adopt a special legal regime whose scope of application is limited to international transactions of the type in question. This technique works best when international transactions can be clearly distinguished from domestic transactions. In some cases certain domestic aspects of an international transaction cannot be ignored. If a special international legal regime is nevertheless desired, that legal regime will have to include the domestic aspects of the transaction that cannot be ignored. The alternative is to adopt harmonized or unified rules governing all transactions of the type in question, whether domestic or international.

7. In the case of international funds transfers, it would not be possible to construct a legal regime that included the relationship between the customer and the bank, as directed by the Commission, without including some domestic elements. It is undoubtedly in large part for this reason that the 1930 Geneva Convention providing a Uniform Law for Bills of Exchange and Promissory Notes and the 1931 Convention providing a Uniform Law for Cheques were intended to unify the law governing domestic as well as international transactions.

8. As a result it may be thought that the preparation of the Model Rules might proceed on the assumption that they will apply to both domestic and international funds transfers.

I.2 *Should the Model Rules apply only to electronic funds transfers or also to paper-based funds transfers?*

9. The increase in international funds transfers that stimulates an interest in preparing these Model Rules has been brought about by the increased use of electronic funds transfer techniques. These techniques apply both to the transmission of a customer's funds transfer instruction between banks and to the transmission of an instruction between the customer and the bank. Commercial law issues arising in the context of electronic funds transfers can be divided into three categories: those that are common to all forms of electronic data transfer (e.g. proof of transactions), banking law issues unique to electronic funds transfers and, as shown by the discussion in the *UNCITRAL Legal Guide*, general banking law issues that are as much at question in paper-based funds transfers as they are in electronic funds transfers. This suggests the usefulness for the Model Rules to apply both to electronic funds transfers and to paper-based funds transfers, with the probable exception that they should not apply to negotiable instruments, including cheques.

10. If it were to be decided that the Model Rules should apply only to electronic funds transfers, a definition of the term would be necessary for determining the scope of application. The definition used in the *UNCITRAL Legal Guide* that

"an electronic funds transfer . . . is a funds transfer in which one or more of the steps in the process that were previously done by paper-based techniques are now done by electronic techniques"⁵

served a useful purpose in the context of the *Legal Guide*, since it furnished a basis on which to analyse the impact of various types of electronic techniques on the pre-existing legal rules governing paper-based funds transfers. However, the definition would serve less well for determining the scope of application of the Model Rules, or other legal text.

11. The definition of an electronic funds transfer, and therefore the scope of application of the Model Rules, might be restricted to funds transfers where the customer

³*Ibid.*, para. 231.

⁴A/CN.9/Ser.B/1. The list of legal issues is also found unchanged in substance in the draft *UNCITRAL Legal Guide*, A/CN.9/266/Add.2.

⁵Chapter I, para. 6.

initiated the transaction by giving his instruction in electronic form. Such a definition was used in the Electronic Funds Transfer Act of 1978 in the United States of America, the purpose of which was to protect consumers. However, such a definition would exclude all funds transfers, including large international commercial funds transfers executed by electronic means, from the scope of application of the Model Rules when the customer's instruction to transfer the funds was given on paper or orally.

12. The definition and therefore the scope of application might be restricted to funds transfers where the inter-bank instruction was sent by electronic means. However, that would make the application of the Model Rules to the bank-customer relationship depend on the method used by the bank to forward the instruction, a matter which is often outside the control of the customer, and which the customer might not even know. Furthermore, instructions might be sent between several banks to implement the customer's instruction. Some of those instructions might be paper-based and some might be electronic.

I.3 Should the Model Rules apply to both credit transfers and debit transfers?

13. Interbank funds transfers, whether debit transfer or credit transfer, are effectuated by debits and credits to accounts in banks. As a result of this basic similarity, some of the legal issues might be treated in an identical manner, or at least in a substantially similar manner. However, there are a number of differences in banking practices between debit transfers and credit transfers that call for totally different legal rules.

14. It may be thought that it would be preferable to begin the preparation of the Model Rules for credit transfers only, since these are operationally less complicated than debit transfers. At a later time it could be decided whether it would also be desirable to include debit transfers, and what changes or additions would be necessary in order to do so. If this approach were taken, care should be taken when preparing the Model Rules for credit transfers to avoid decisions that would later increase the difficulty of incorporating debit transfers.

15. It may be noted that some of the issues in this report are applicable only to credit transfers. Several additional issues will need to be considered if it is decided that the Model Rules should also apply to debit transfers.

16. In any case, it may be thought that funds transfers effectuated by the use of negotiable instruments, including cheques, should be excluded from the Model Rules. Issues arising because of truncation in the collection process of such instruments or because of other use of electronic techniques might better be handled by modifications to the existing law governing such instruments.

I.4 Should the Model Rules apply only to funds transfers where accounts at banks are to be debited and credited or should they also apply where accounts at other financial institutions are to be debited and credited?

17. It may be thought that this issue need not to be addressed in the preparation of the Model Rules, even though it may be an important issue within any given country. The word "bank" could be used throughout the preparation of the Model Rules without prejudice to the definition that the word might be given at a later time or by users of the Model Rules.

18. It may be thought that the Model Rules should apply where the account of the transferor is to be debited but cash is to be paid to the transferee or where the transferor pays in cash to a bank for credit to the account of the transferee at the same or a different bank, but that the Model Rules should not apply where funds are paid in by the transferor and are to be paid in cash to the transferee.

I.5 Should consumer electronic funds transfers be excluded from the scope of application of the Model Rules?

19. All types of electronic funds transfers, including those that might be classified as consumer transfers, were considered in the *UNCITRAL Legal Guide*. In most cases the legal issues in consumer and non-consumer funds transfers were found to be the same. In those cases where different legal issues arose, or in the more frequent cases where the same legal issues arose but a different legal rule might be envisaged for consumer funds transfers, this was pointed out. For that purpose it was not necessary to define what was a consumer funds transfer.

20. If consumer funds transfers were to be excluded from the scope of the Model Rules, a definition would have to be given. It could be based on the characterization of the transferor or of the transferee of the funds, e.g. a party who was neither characterized as a commercial party nor as an agency of the State might be considered to make consumer funds transfers, but it could not be based on the purpose of the funds transfer, as it was in the United Nations Convention on Contracts for the International Sale of Goods, where sales of goods for personal, family or household use were excluded. Other bases for distinguishing consumer funds transfers could be the amount of money involved (a generally unsatisfactory distinction) or the funds transfer technique used. It can be assumed, for example, that funds transfers executed by use of plastic card technology are, at the present time, normally consumer funds transfers while certain high-value systems are normally for non-consumer purposes.

21. However, while the current technology and its uses offer some means of distinguishing between consumer and non-consumer funds transfers, the distinction between the two is not inherent in the technology. It is possible that the plastic card technology will evolve in such a way that it will serve as the basis for most electronic

funds transfer authentications, both consumer and non-consumer. Similarly, facilities that are currently used for high-value on-line funds transfer instructions may also be used for batch transmission of low-value funds transfer instructions. Therefore, the criteria for distinguishing between consumer and non-consumer funds transfers on the basis of the funds transfer technology utilized may be different in the future from what it might be today.

22. Since the Commission has decided that the Model Rules should present alternative solutions in order to take into account differences in banking systems, the Working Group might consider the possibility of indicating those issues where some countries might wish to adopt different rules for consumer funds transfers. It would be a separate question whether the Working Group wished to consider what the nature of those different rules might be.

II. Definitions and general provisions

A. Definitions

II.1 *What terms should be defined in the Model Rules and what should be the orientation of the definition given?*

23. Definitions of certain terms will be necessary, especially since there is a wide discrepancy in the terms used for both legal purposes and banking purposes in different countries. Important policy choices are often reflected in the terms chosen and the definitions given to those terms. The following are terms and types of terms that might be defined:

(a) *Parties to a funds transfer*

24. There are three principal variables to be considered in choosing the terms to be used in describing the parties to a funds transfer: (1) whether the parties are to be described in terms of the flow of funds (e.g. transferor, transferor bank, transferee, transferee bank as used in the *UNCITRAL Legal Guide*) or in terms of the flow of the instructions (e.g. initiating bank, destination bank, reimbursing bank); (2) whether the same terminology can be used for both debit transfers and credit transfers, if both are to be covered by the Model Rules; and (3) whether the parties are to be described in terms of the entire funds transfer, as suggested by the terms in the *UNCITRAL Legal Guide*, or in terms of a particular segment of the funds transfer (e.g. sending bank, receiving bank), as is the case with the terminology proposed by the Banking Committee of the International Organization for Standardization (ISO TC 68) for its international standards, e.g. ISO DIS/7982.

25. The number of terms used should be kept to a minimum consistent with clarity. A proliferation of terms means that the same party may be described by several terms depending on the point of view (i.e. the first bank in a credit transfer might be the "transferor bank", the "initiating bank", the "receiving bank" of the instruction from the customer and the "sending bank" of an instruction to the second bank). This may make it more difficult to know which party is being referred to. However, it may make it easier to state legal rules

governing all parties who act in a similar way. For example, a "sending party" may be required to take certain precautions whether that party is a non-bank customer, a transferor bank or an intermediary bank.

(b) *Bank*

26. If the word "bank" is defined, the definition would be an important determinant of the scope of application of the Model Rules. See issue I.4.

(c) *Funds transfer instruction*

27. This term was used throughout the *UNCITRAL Legal Guide* to indicate all types of instructions from customers to bank and from one bank to another for both debit transfers and credit transfers.

(d) *Dates relevant to the funds transfer*

28. One important source of confusion in international funds transfers has been the inconsistent use of terms to designate dates relevant to funds transfers. The following are the dates defined in the *UNCITRAL Legal Guide* and the definitions given there.

Entry date: Date on which entries are made in the records of an account.

Interest date: Date on which the funds credited to an account begin to earn interest or funds debited to an account cease to earn interest.

Pay date: Date on which the funds are to be freely available to the transferee for withdrawal in cash.

29. In addition to these definitions ISO DIS/7982 also defines:

Value date: Date on which funds are to be freely available to the receiving bank.

30. The term "value date" was not defined in the *UNCITRAL Legal Guide* because it is also widely used in some countries to denote the date on which the funds are to be made available to the transferee (see "pay date") or the date on which the funds begin or cease to earn interest if credited or debited to an account (see "interest date").

B. General provisions

31. Several general provisions that may well be desirable in the Model Rules are suggested in this section. The general provisions suggested are only for the purpose of establishing a possible framework for later consideration and additional ones may appear to be desirable as the work progresses.

II.2 *Should the Model Rules contain a rule as to the effect of contracts on matters governed by the Rules?*

32. No matter how detailed the Model Rules, or specific national legislation, might be, many questions arising in funds transfers are, and will continue to be, governed by

contracts between banks and their customers, between banks and clearinghouses and between the banks themselves. The existence of these contracts raises several questions that might be considered in the Model Rules. The Model Rules might state to what extent the Model Rules themselves are intended to be mandatory (if adopted by a State) and to what extent they could be varied by contract.

33. Since contracts between banks and their customers are almost always prepared by the banks and, with rare exceptions involving large customers, the banks will not negotiate special terms with their customers, these contracts present a classic example of contracts of adhesion. The Model Rules might, therefore, provide for some means of ascertaining the fairness of the contract terms and the extent to which they would be enforceable. Such a means might be specific to the Model Rules or might partake of more general means of controlling contracts of adhesion.

34. The inter-bank funds transfer procedures are almost always the subject of bilateral or multilateral agreements, including agreements in the nature of clearinghouse rules. Under classical contract theory, these agreements bind only the parties to them and neither create rights in nor impose obligations on third parties. Nevertheless, to the extent these agreements establish the framework within which a customer's funds transfer instruction will be carried out, they have an important practical effect on those third parties. It might be considered, therefore, whether the Model Rules should provide to what extent such agreements would create rights in and impose obligations on third parties.

II.3 *Should the Model Rules contain rules for their interpretation?*

35. Rules of interpretation can be of several types. A standard provision in recent conventions on international trade law calls for regard to be given to the international character of the convention and the need to promote uniformity in its application. The Model Rules may provide a standard by which to interpret the intent of a party. Of particular relevance to funds transfers might be a rule that provides whether the amount expressed in words or the amount expressed in figures prevails when the two are not identical. A similar rule might indicate which is to prevail when the account to be debited or credited is indicated both by name and by number and they are not consistent.

II.4 *Should the Model Rules contain provisions on conflict of laws?*

36. The *UNCITRAL Legal Guide*, Issue 6, suggests that conflict of laws problems are serious in international funds transfer cases. The funds transfer may traverse banks in several countries, be in the currency of yet another country for the discharge of an obligation governed by the law of yet a third country. It is this transnational dimension of international funds transfers that calls for the preparation of these Model Rules with the aim of harmonizing the underlying law and banking practices.

37. In addition, agreement on conflict of laws rules would be helpful to determine which law was applicable to those matters not covered by the Model Rules. Such conflict of laws rules could be contained in the Model Rules themselves or they could be elaborated as a separate instrument by an appropriate international organization.

III. Obligations of parties

A. *Form of the instruction*

III.1 *Should these Model Rules include a provision on the form and minimum content of a funds transfer instruction?*

38. The most important element for the smooth operation of funds transfer systems is to establish clearly the rights and obligations of the parties. The issues relevant to the remedies for failure to fulfil those obligations are considered in chapter IV.

39. In addition to the obligations that would be provided by the Model Rules, further or more precise obligations may be required by the rules of a clearinghouse or other funds transfer system.

40. There is strict statutory regulation of the form and content of negotiable instruments, including cheques. This is at least in part because negotiable instruments create rights in the holder that may be greater than the rights of the transferor of the instrument to the holder. However, it may be thought that similar statutory regulation is not required for other types of funds transfer instructions that do not create such rights.

41. Nevertheless, a credit transfer from a customer cannot be carried out unless the transferor's instruction contains at least certain data elements, namely: (1) the amount to be transferred, including the designation of the currency where that is not self-evident, (2) the account to be debited, (3) the identification of the bank, including branch if necessary, where the account to be credited is located, and (4) the account to be credited. In addition, the instruction should be dated and should be authenticated in an adequate manner (see issue I.7). While all of these data elements may be in words on a paper-based funds transfer instruction, they may all be in figures or even in code in a funds transfer instruction in electronic form.

42. Other important information for the funds transfer process itself may include the date on which the transfer is to commence or the date on or by which the transferee's account is to be credited, in those cases when the transfer is not for immediate processing. In addition, there must be some means of identifying the transaction, which may be in the nature of a transaction sequence number or, in the case of a cash dispenser or point-of-sale transaction, an indication of the location of the machine or nature of the transaction. In some funds transfers the purpose of the funds transfer must be indicated, perhaps by reference to an invoice number.

43. Whether or not the Model Rules require certain data elements, the parties will agree to use prescribed formats for electronic funds transfers where the receiving bank is expected to process the instructions by computer. Inter-bank agreements may be in the form of adherence to the rules of a clearinghouse or telecommunications service. The format requirements might well include data elements that would not be required by the Model Rules.

III.2 *Should the Model Rules require funds transfer instructions to be authenticated? If so, should they prescribe mandatory or acceptable forms of authentication? Should they state the consequences of following the form of authentication agreed for the type of instruction used?*

44. Instructions sent by customers to banks and between banks can be expected to be authenticated. The authentication will usually be of the individual instruction but, where instructions are transmitted in batches, the authentication may relate to the entire batch. Authentication may be on paper, usually in the form of a signature or of a stamp or facsimile thereof, or it may be in electronic form suitable for the type of electronic system used. The form of authentication used in transmitting instructions from a customer to a bank, and the security features of that form of authentication, are usually established by the bank rather than by the customer. However, the customer may have a choice between different on-line or off-line technologies to deliver his funds transfer instructions with varying degrees of security, convenience and cost. Authentication requirements between banks are usually established by agreement or by the clearinghouse or transmission system used.

45. While it might be thought appropriate to require by law that instructions from customers and between banks be authenticated, it may be thought less appropriate for the form of the authentication to be stipulated, as signature has often been stipulated in the past, since there are so many possible means to authenticate an electronic funds transfer instruction and new means will evolve in the future. Consideration might be given as to whether it would be possible and appropriate to provide criteria by which to measure the adequacy of the form of authentication used. Yet another possibility would be to provide that each country might provide the types of authentication required or permitted, or the criteria by which to measure the adequacy of each type of authentication of electronic funds transfer instructions in use in that country.

46. The requirement, or use, of authentication raises the question of the consequences for sender and receiver of an instruction that appears to have been authenticated in the proper manner but which is, in fact, false. This aspect of the question is considered below.

47. For general discussion, see *UNCITRAL Legal Guide*, issue 12.

B. *Obligations arising out of the funds transfer*

III.3 *Should the receiver of an instruction be obligated to act on a funds transfer instruction it has received?*

48. The receivers of funds transfer instructions are always banks. These banks can be divided into three categories: transferor banks (i.e. the bank whose customer has initiated the funds transfer), intermediary banks (i.e. banks that have received an instruction from one bank and must pass on the instruction to another bank) and transferee banks. Senders of funds transfer instructions include transferors (and especially non-bank customers), transferor banks and intermediary banks.

49. Normally, there is a pre-existing agreement between the sender and the receiver that the receiver will act on instructions received by it. In some cases a sender may send an instruction to a bank with which it has no pre-existing agreement. However, in those cases there would still normally be some reason for the sender to expect the receiver to act on the instruction.

50. Where there is a pre-existing agreement that the receiver will act on the instruction, failure to do so would be a breach of contract. The question arises whether the receiver also has an obligation arising out of receipt of the instruction itself. A negative reply would mean that a bank that received an instruction from a source with which it had no previous agreement would be free to retain the instruction and neither act in conformity with it nor notify the sender that it would not do so. While this could be expected to be a relatively rare event, the determination as to the source of a bank's obligation to act on a funds transfer instruction it has received may be of particular importance in the case of an intermediary or transferee bank, since those banks are in direct privity of contract only with the bank sending them the instruction and not with the transferor.

III.4 *If the Model Rules require a receiving bank to act on an instruction, what actions would be required?*

51. In the case of a credit transfer the steps that might be followed by a receiving bank would be to

- verify the authentication of the instruction;
- verify the instruction for its formal completeness and that it contained no apparent errors;
- verify whether it was satisfied that it would receive reimbursement from the sender;
- debit the account of the sender and, where the account to be credited was at the same bank, credit that account;
- where the account to be credited was at a different bank, choose an appropriate means of sending the instruction to the bank, including an appropriate means of transmission and an appropriate intermediary bank if one was necessary, send to the intermediary bank or

transferee bank its own funds transfer instruction that accurately transcribes the relevant data on the instruction it had received and the additional data necessary for re-transmission; and provide the means by which the bank to which this inter-bank instruction was sent would receive reimbursement for the amount of the instruction;

— notify the debit party of the debit, and when the receiving bank is the transferee bank, notify the transferee of the credit;

— notify the sender that the instruction will not be carried out, if that is the case, and the reason why it will not be carried out.

52. It might be considered whether the Model Rules should require that any or all of these actions should be taken or whether a general statement of obligation would be sufficient.

53. Verification of the authentication of the instruction would include examination of signature or of the electronic authentication used.

54. The receiving bank may be reimbursed in a number of ways. Some may be under its complete control, such as debiting the account of the sending party. In other cases settlement may be made through a clearinghouse or by receipt of credit from a reimbursing bank on the instruction of the sender. Whatever may be the means of reimbursement, the receiving bank can normally be expected to satisfy itself that it has been or will be reimbursed before it credits the account of its credit party and forwards a new funds transfer instruction, if one is required. In some countries receiving banks explicitly or implicitly satisfy themselves as to reimbursement in regard to most or all funds transfers before acting in a way to commit themselves. In other countries reimbursement for domestic funds transfers is sufficiently secure that no special action is necessary. Even in those countries, a bank would normally first satisfy itself as to reimbursement in respect of international funds transfers.

55. In some cases banks may act on an instruction by crediting an account, sending a new funds transfer instruction to another bank or taking other similar action prior to the time they are satisfied as to the arrangements for reimbursement. In such cases the question arises whether the bank does so at its own risk or whether it can reverse its actions in case of failure to be reimbursed.

56. In some electronic funds transfers, as in paper-based funds transfers, the receiving bank may forward the instruction it has received without change. Even then, some arrangement must exist for settlement of the second inter-bank transfer. In many electronic funds transfers a new instruction must be created with the receiving bank becoming the sending bank of that instruction. The new instruction will incorporate some, but not necessarily all, the data received and some of that data will be in a different field. For instance, the name of the receiving bank becomes the name of the

sending bank. Some new data may be required. The bank as sending bank must create the new instruction accurately with all the necessary data.

57. Except in rare cases, neither the transferor nor the transferee bank can choose the transferee bank. However, there is often a choice of the means for sending the instruction to that bank, e.g. paper-based credit or debit transfer, exchange of magnetic tape, telex, data transmission. There may also be a choice of routes between the two banks and of means of reimbursing the transferee bank. Often the transferor either explicitly or implicitly chooses the means by which the instruction should be forwarded to the transferee bank, or is at least aware of the choice to be made by his bank. However, it is usually the transferor bank that chooses the routing and the means of reimbursing its receiving bank. This choice may be of significance to the transferor, not only for the costs involved, but also for such matters as the speed of transmission, the time of finality (and discharge of his obligation), and the security of transmission. The usual statement of legal rule, formulated before there was such a wide choice of means of transmission with varying characteristics, is only that whenever a correspondent bank is required in order to complete the funds transfer, the bank must choose an appropriate correspondent bank.

58. A receiving bank's obligation to act may be satisfied by notifying the sending party that the bank will not carry out the instruction, thus permitting the sending party to take appropriate action. The notice may be expected to specify the reason why the instruction will not be carried out.

III.5 *Should the Model Rules provide that the duty of the transferor bank is limited to performing certain specified acts as suggested above or should the duty of the transferor bank be to see that the transferor's instruction is carried out?*

59. The extent of the duty of the transferor bank is of particular importance in international funds transfers and in domestic funds transfers in those domestic systems where a funds transfer may pass through several banks, communication systems or clearinghouses between the transferor bank and the transferee bank.

For general discussion, see *UNCITRAL Legal Guide*, issue 16.

III.6 *Should the Model Rules provide whether and to what extent the responsibility of intermediary banks and transferee banks for properly carrying out their part in the funds transfer is to the bank that sent them the funds transfer instruction, to prior parties, especially the transferor, and, in the case of the transferee bank, to the transferee?*

60. The extent of the obligation of intermediary and transferee banks to the transferor is linked to the extent of the obligation of the transferor bank to the trans-

feror. If the transferor bank's obligation is limited to its own actions, intermediary and transferee banks must have a direct obligation to the transferor, even though they are not in direct privity of contract. Otherwise the transferor would have no right to recover from anyone for losses caused by an intermediary or transferee bank. The difference in rules on this point in different legal systems is a source of danger for many international funds transfers.

61. For general discussion of the situation of the transferee bank, see *UNCITRAL Legal Guide*, issue 17.

III.7 *Should the Model Rules specify the occasions when the receiving bank would not be required to carry out the instruction?*

62. Such occasions might include that

- the authentication could not be verified;
- the instruction appeared to have an error;
- the receiving bank was not satisfied with the reimbursement offered by the sender of the instruction.

63. Such occasions might also include exonerating events such as

- computer failure, transmission system failure, power failure or the like, when the causes of the failure were beyond the control of the bank, and the consequences of the failure could neither be avoided nor overcome;
- government action, such as the imposition of exchange controls.

64. Even though the receiving bank might be excused from carrying out the instruction for any of the reasons suggested, it might still have an obligation to the sender or to the transferor to notify the sender promptly that it would not or could not carry out the instruction, unless the impeding event also made notification impossible.

65. Since it can be predicted that computer failure, transmission system failure and power failure will occur, individual banks, funds transmission systems and the banking system as a whole might be expected to plan so as to minimize the likelihood of such failure and to avoid or overcome the consequences. Some of the planning involved is common to all types of computer and data transmission activities and includes such matters as redundancy of equipment, back-up files and disaster recovery plans. Other types of planning are specific to banking, such as the possibility of adjusting settlement deadlines under certain circumstances. It may be thought that in order to determine whether the computer failure, transmission system failure or power failure would constitute an exonerating event, it should be determined whether it could have been avoided or its consequences could have been avoided or overcome by proper planning in advance.

66. See also discussion in *UNCITRAL Legal Guide*, issue 19.

III.8 *Should the Model Rules state the periods of time within which funds transfers must be implemented?*

67. Although different types of electronic funds transfers require different periods of time for each bank involved to carry out its obligations and for the entire funds transfer to be completed, they share the common characteristic of being more reliable as to the amount of time necessary than are paper-based funds transfer systems. This very reliability has been an inducement for bank customers to change their behaviour in reliance on the ability of banks to make time-sensitive funds transfers as required. The most striking examples involve large international financings where the funds must be available in a particular account at a particular hour, but more routine examples are abundant where the payment of salaries or social security allotments is to be made on fixed days.

68. The period of time for the implementation of a funds transfer that is of interest to a bank customer is the time necessary for the transferee's account to be credited after the transferor has given the instruction to the transferor bank. If the Model Rules provide that the transferor bank should be responsible for performance of the entire funds transfer, a provision on the time within which the funds transfer should be completed might also be appropriate.

69. If the transferor bank is responsible only for its own actions, a provision on the period of time within which it must complete those actions or notify its sending party that it could not or would not act might be appropriate. A similar provision in respect of the intermediary banks and the transferee bank might also be appropriate. Furthermore, it might be appropriate to consider whether additional provisions would be necessary for those cases in which transferors have been informed of the time necessary to complete time-sensitive funds transfers and wish to indicate a pay date (i.e. when the credit is to be available to the transferee) on the instruction.

70. For additional discussion, see *UNCITRAL Legal Guide*, issue 23.

III.9 *Should the Model Rules provide for the obligations of the sender of a funds transfer instruction?*

71. The principal obligation of the sender is to reimburse the receiving bank at the time and in the manner agreed between them.

72. The sender must also give the receiving bank accurate information on its funds transfer instruction. If the instruction is incorrect as to amount, including currency, name of party or indication of account to be credited, including proper branch of transferee bank, the Model Rules might provide that the consequences of the error would fall on the sender, although the receiving bank may have an obligation to aid the sender in recovering the funds.

III.10 *Should the Model Rules provide for the obligations of parties to the funds transfer process other than the banks?*

73. Clearinghouses of various types and dedicated carriers of funds transfer instructions are an integral part of the funds transfer process. They are often owned by or operated for the benefit of the banking industry. It may seem appropriate to include in the Model Rules a statement of their obligations to sending and receiving banks and to transferors and transferees.

74. There are other carriers of funds transfer instructions that do not offer a dedicated service. They range from public carriers that offer telex or data transmission services to value added networks that offer funds transfer instruction capability with specified message formats and protocols as one of their services. Some of these carriers may also be considered to be such an integral part of the funds transfer process that they should be included within the scope of application of the Model Rules.

75. To the extent that the obligations of clearinghouses and carriers are not set forth in the Model Rules, it may seem appropriate to provide for the allocation between banks and customers for loss occasioned by such entities.

76. For additional discussion, see *UNCITRAL Legal Guide*, issue 18.

C. Obligations subsequent to the funds transfer

III.11 *Should the Model Rules provide that banks are required to make a detailed statement available to their customers in respect of debits and credits to their accounts and the frequency of such statements?*

77. There seems to be little doubt that banks have to be ready to give a statement to their customers as to the debits and credits entered to the account. The main questions relate to the form and frequency of the statement and whether the bank must send it to the customer or whether the customer must go to the bank for it. There are often different rules for commercial customers and for other customers. The increased volume of funds transfers during the past forty years and the even greater increase in value represented by funds transfers has led towards a greater frequency of the distribution of such statements.

78. These matters are governed by legal rules in some countries and by bank custom or by contract between the parties in others.

79. For general discussion, see *UNCITRAL Legal Guide*, issue 24.

III.12 *Should the Model Rules provide that the bank's statement as to the debits and credits it has entered to the account is final if the customer does not object within some period of time? Should this period be shorter than the limitation period for beginning legal action? If so, about how long should it be and from what event should the time be measured?*

80. The distribution of a statement of account activity to the customer allows the customer to reconcile his records with those of the bank. It may also be thought that the Model Rules should include a provision that the customer, having such an opportunity, must report discrepancies within some specified period of time. If this approach is taken, it may be of less importance whether the exact period of time within which discrepancies would have to be reported was uniform.

81. It might also be considered whether the customer's failure to report a discrepancy automatically made the statement binding on both bank and customer or whether the statement should be binding only to the extent that the other party had suffered loss as a result of the delayed notification.

82. For additional discussion, see *UNCITRAL Legal Guide*, issue 25. Issue 26 is also relevant.

IV. Error, fraud and liability therefor

IV.1 *Should the Model Rules specify the consequences and the procedures for rectifying an error when*

- *the amount of the funds transfer was credited to an account at the wrong branch or at the wrong bank;*
- *the amount was credited to the wrong account at the correct bank;*
- *an insufficient amount was credited to the transferee's account;*
- *an excessive amount was credited to the transferee's account?*

83. The error may have been made by the transferor, the transferor bank, an intermediary bank or the transferee bank. If an error by the transferor or the transferor bank leads to a debit to the transferor's account of an incorrect amount or the information given to identify the transaction shows the wrong account was credited, the transferor may be expected to know of the mistake and to require corrective action after notice of the debit has been received (see issue III.12). In all other cases, unless the transferor requests confirmation of the credit in all of its particulars, it will know a mistake has occurred only when the transferee complains that it has not received the amount due.

84. If a bank has made an error in amount, it should discover the error in reconciling its transactions. Reconciliation procedures available for electronic funds transfers make this process faster, easier and less expensive

than for paper-based transfers. An error in the identification of the transferee bank or branch may be discovered by the bank or branch that receives the instruction but cannot find the account, but if the account is identified only by number and the only error is in the bank identification, the receiving bank or branch may credit an account without knowing it was not the correct account. In both cases the error will be found only as a result of a complaint by the transferee that it has not received the funds due or as a result of the notification given by the party incorrectly credited.

85. Issue V.5 raises the question as to when an underlying obligation is discharged by a funds transfer. A related question is what is the effect on the underlying obligation when the transferee's account is not credited as required or when it is credited for less than the full amount. The rule as to the effect on the underlying obligation may have implications for the obligations of the banks in rectifying the error.

86. In the majority of cases the existence of the error will be acknowledged and all parties will co-operate in rectifying it. In these cases, the only question is to determine who should bear the transaction charges and whether interest adjustments should be made.

87. Where an incorrect account is credited or the correct account is credited for too large an amount, the party credited may not be willing to have his account debited to rectify the error. It should be clear in the law that the money must be repaid, in court action if necessary. A more difficult question is whether the bank of the person who was credited incorrectly is authorized, or might be required, to debit the account without that person's consent when the fact of error is clear. The bank should not be expected to debit the account when there is dispute as to the propriety of the credit.

88. If the bank is not authorized, or chooses not, to debit the account to rectify the error, the Model Rules might specify whether the transferor must bear the consequences of the error even when made by a bank and must bring legal action against the party improperly credited or whether the bank that made the error must take the action. This in turn will determine the mechanism for the inter-bank adjustments. There might be a difference in result if the error was made by the transferor bank, an intermediary bank or the transferee bank.

89. For additional discussion, see *UNCITRAL Legal Guide*, issue 41.

IV.2 *Should the Model Rules contain provisions establishing the appropriate jurisdiction in case of litigation involving an international electronic funds transfer?*

90. It is common for legal texts governing international transactions to contain legal rules on the appropriate jurisdiction in which to litigate disputes arising out of those rules.

91. In the case of funds transfers, the need for or the appropriateness of such rules might depend upon decisions made as to the substantive rules on responsibility. For example, if it was decided that a transferor bank was responsible for its own actions, so that the transferor would have to determine which bank caused the error and sue that bank for recovery, it might be thought appropriate to allow the transferor to sue in its own courts as well as in those where the problem occurred.

IV.3 *Should the Model Rules specify rules establishing the burden of proof as to whether the transferor had authorized a funds transfer and as to whether it had been implemented as instructed?*

92. For general discussion, see *UNCITRAL Legal Guide*, issues 21 and 22.

IV.4 *Should the Model Rules provide that either the transferor or the transferee would be able to recover interest for a delay of a funds transfer?*

93. For general discussion, see *UNCITRAL Legal Guide*, issue 27.

94. The draft inter-bank compensation rules for cases of delayed or incorrect funds transfers that are being prepared by the International Chamber of Commerce provide that the bank that has funds by error must pay interest to the other bank, even when the error was that of the bank that was out of funds.

IV.5 *Should the Model Rules provide that either the transferor or the transferee could recover exchange losses for delay or non-performance of a funds transfer?*

95. For general discussion, see *UNCITRAL Legal Guide*, issue 28.

96. Even if the Model Rules did not contain provisions covering exchange loss to the transferor or transferee, it might be appropriate for them to contain a provision establishing the date on which exchange rates should be calculated when an international funds transfer was not executed as planned, and the funds were returned to the transferor.

IV.6 *Should the Model Rules provide that a bank might be liable for consequential damages for its failure to execute a funds transfer properly?*

97. For general discussion, see *UNCITRAL Legal Guide*, issue 29.

IV.7 *Should the Model Rules contain rules as to whether the transferor is responsible for some or all fraudulent activity of family members, employees, or third persons that cause a funds transfer instruction to be sent to the transferor bank?*

98. This issue assumes that the existence and nature of the fraud have been established.

99. The fraud may be perpetrated by an employee in the course of employment. It may be perpetrated by an employee or other person who, because of his employment or relationship, learned the secret code (PIN or password) and had access to any device necessary to send funds transfer instructions. The fraud may have been caused by a third person with whom the transferor had no prior relationship. In the latter case there may have been varying degrees of negligence on the part of the transferor that contributed to the loss.

V. Finality

V.1 *Should the Model Rules contain a single rule on the finality of a customer funds transfer that would govern a number of issues or should there be separate rules as regards the time when*

— *the debit to the transferor's account reduces, or the credit to the transferee's account increases, the amount against which attachment can be made or which falls within the transferor's estate in insolvency proceedings;*

— *death of the transferor, the termination of legal existence of a corporate entity or a similar event terminates the authority of the banks to act on the funds transfer instruction;*

— *the transferor loses the right to withdraw or to cancel the funds transfer instruction.*

100. A single rule on "finality" is easier for banks to administer than are separate rules on each of the different issues. However, not all consequences usually associated with finality of a funds transfer can necessarily be accommodated by a single rule.

101. For general discussion, see *UNCITRAL Legal Guide*, issue 31.

V.2 *On what event or point of time should the Model Rules consider a funds transfer to be final for some or all purposes suggested above?*

102. The *UNCITRAL Legal Guide*, chapter IV, paragraphs 4 to 19 suggested a number of different points of time when a funds transfer might be considered to be final. Most of those events related to some action of the transferee bank in regard either to the funds transfer instruction or to the transferee's account.

103. One event that is commonly considered to indicate finality of a funds transfer is the entry of a debit or credit to an appropriate account. However, using electronic funds transfer techniques, and especially when entries are made by batch processing or are made to a provisional account, it may be difficult to determine when the entry was made. Therefore, if an entry of a debit or credit to an account is to constitute finality of a funds transfer or otherwise affect legal rights and obligations, consideration might be given to determining what constitutes entry of the debit or credit using different electronic funds transfer techniques.

104. There is a further question that is stimulated by the fact that actions of the banks that might be considered as making the funds transfer final, such as entry of a debit or credit to the account or the sending of a notice, may be taken by the bank in one order or another for its administrative convenience rather than for reasons related to the funds transfer itself. In particular, batch processed funds transfers may be processed the night before the entry date or during the night following the entry date. As a result there may be as much as a 24-hour difference in the time when different items might be processed and still bear the same entry date. Consideration might be given as to how such matters should affect the rules on finality.

105. For general discussion see *UNCITRAL Legal Guide*, issues 32, 39 and 40.

V.3 *Should the Model Rules contain provisions on the time when a funds transfer between banks is final? Should any such provision be identical to or different from the time of finality of a customer's funds transfer? What should be the effect of finality of a funds transfer between two banks on the customer's funds transfer?*

106. It may not be considered appropriate in all countries to make a distinction between finality of the funds transfer between banks and the finality of the funds transfer between the non-bank transferor and transferee. However, the distinction is maintained in many countries and is probably unavoidable in international funds transfers. What is less clear in most cases is the effect on the customer funds transfer, and the rights and obligations of the parties to it, of the finality of a funds transfer between any given pair of banks.

107. For general discussion, see *UNCITRAL Legal Guide*, issue 33.

V.4 *Should the Model Rules contain provisions on the allocation of the risk of loss between the parties to a funds transfer that a bank will become insolvent prior to the settlement for the funds transfer?*

108. In respect of the amount represented by the funds transfer, prior to the commencement of the funds transfer the transferor runs the risk that the transferor

bank will become insolvent. After the funds transfer is final, the transferee runs the risk that the transferee bank will become insolvent. It is not clear who bears the risk that either of these banks or that one of the intermediary banks will become insolvent during the funds transfer and before settlement.

109. A funds transfer may be made by a chain of banks as follows:

Transferor	Transferor	Intermediary	Intermediary	Transferee	Transferee
	Bank	Bank	Bank	Bank	
	A	B	C	D	

110. There are many possible situations if one of the banks becomes insolvent. Assume that Bank A debits the transferor's account and sends the instruction to Bank B. Settlement occurs by debit to the account Bank A holds with Bank B. Before Bank B sends the instruction to Bank C, it becomes insolvent. In this case the transferor has not paid the transferee but its account with Bank A has been debited. Similarly Bank A has settled with Bank B. Should Bank A be required to find another route to Bank D? Does the transferor or Bank A bear the risk of loss from Bank B's insolvency?

111. A different problem is posed when Bank D has credited the transferee's account before Bank B has settled with Bank C and before Bank C has settled with Bank D. If Bank C then becomes insolvent, should Bank B be required to settle with Bank C. Should Bank C be required to settle with Bank D in spite of Bank C's insolvency? Alternatively, should Bank B be required to settle directly with Bank D, thereby eliminating Bank C from the settlement chain?

112. Would the rule be different if Bank C's failure was that of settlement at the clearinghouse?

113. What should be the impact of such failure to settle on the funds transfer between the transferor and the transferee?

114. Whether or not it would be necessary for every country to have special rules on the allocation of the risk of loss arising out of the insolvency of a domestic bank, it may be thought that such rules would be of particular value for international funds transfers.

115. For general discussion, see *UNCITRAL Legal Guide*, issue 37.

V.5 *Should the Model Rules contain a provision on the time when an underlying obligation is discharged?*

116. In most countries the rules on discharge of an underlying obligation by funds transfer are not contained in the law governing the funds transfer. Instead, those rules are contained in the law governing the underlying obligation. Nevertheless, the two sets of rules should be in harmony. Therefore, without prejudice to any later decision should the Model Rules be transformed into a convention, model law or other form of binding legal norm, it may be thought appropriate to consider in the context of the Model Rules the appropriate time for discharge of an underlying obligation when payment is made by means of an electronic funds transfer.

117. For general discussion, see *UNCITRAL Legal Guide*, issue 36.

B. Stand-by letters of credit and guarantees: report of the Secretary-General (A/CN.9/301) [Original: English]

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INTRODUCTION

Scope and lay-out of report

1. The Commission at its fifteenth session in 1982 decided to request the Secretary-General to submit to a future session of the Commission a study on letters of credit and their operation in order to identify legal problems arising from their use, especially in connection with contracts other than those for the sale of goods (A/37/17, para. 112).¹ The proposal for such a study was made on the occasion of the Commission's consideration of the work of the International Chamber of Commerce (ICC) then in progress to revise the 1974 version of the Uniform Customs and Practice for Documentary Credits (UCP).

2. In support of the proposal it was pointed out that letters of credit were originally intended to be used in connection with the documentary sale of goods. Currently they were being used for a number of other purposes, such as in connection with bid bonds and repurchase agreements. It was suggested that the legal rules developed for the one situation might not be appropriate for these other uses to which letters of credit were currently being put (A/37/17, para. 109).

3. As will be discussed in more detail below (Part I, A), these other uses of letters of credit are, except for acceptance credits or facility letters, essentially in the form of stand-by letters of credit. While the traditional documentary credit provides the seller (or similar performing party) with a secure mechanism for payment by the buyer, the stand-by letter of credit is a default instrument in that it covers the risk of non-performance or defective performance by a contractor, supplier or other obligor.

4. Stand-by letters of credit, which are issued primarily by banks in the United States of America and less frequently in some other countries, thus serve the same purpose as do bonds or guarantees used in most countries. These other indemnity devices, issued by banks or similar institutions, are therefore included in this report; their characteristics and uses are described below in Part I, B.

5. Stand-by letters of credit and guarantees (or bonds), while functionally equivalent or at least similar, differ as to their legal treatment for the formal reason that the stand-by letter of credit is a letter of credit. Thus, the laws and rules governing documentary letters of credit would generally be applicable to stand-by letters of credit. As discussed below (Part II, A), the question arises whether, or to what extent, such laws

¹Report of the United Nations Commission on International Trade Law on the work of its fifteenth session, *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 17* (A/37/17). Reports of the annual session of the Commission are reprinted in the Yearbook of the United Nations Commission on International Trade Law for the year in question.

or rules are appropriate for the stand-by letter of credit in view of its different purpose. For guarantees and bonds, the legal framework is different. As discussed below (Part II, B), it is characterized by a varied development of national laws, in particular case law, towards recognizing the independent (non-accessory) legal nature of the guarantee and by attempts to prepare uniform rules.

6. Despite the different legal setting of stand-by letters of credit and guarantees, many of the same legal issues and problems may arise in both contexts. The discussion of such issues (e.g. unfair calling of first demand instruments) will therefore deal jointly with stand-by letters of credit and guarantees (Part III).

7. In the last part of this report, some conclusions will be suggested as to the desirability and feasibility of undertaking efforts towards establishing uniform legal rules or clauses. Some recommendations will be presented as to possible future work of the Commission, including co-operation with the ICC.

Previous involvement of the Commission

8. The topic of this report as outlined above has been with the Commission since its inception, albeit with varying scope and emphasis, first on bank or contract guarantees and later on stand-by letters of credit. Pursuant to a request by the Commission at its first session in 1968 (A/7216, para. 29), the secretariat submitted to the second session a preliminary study of guarantees and securities as related to international payments (A/CN.9/20 and Add.1). Ten years later, the secretariat submitted a preliminary study on stand-by letters of credit (A/CN.9/163), following a decision by the Commission at its eleventh session in 1978 to include in its programme of work as a priority topic "Stand-by letters of credit, to be studied in conjunction with the International Chamber of Commerce" (A/33/17, paras. 67(c)(ii)a, 68 and 69). The wording of the topic indicates what has been a recurrent feature in the Commission's previous involvement, namely co-operation with ICC.

9. This co-operation has taken various forms. At the secretariat level, it has consisted of informal contacts and consultations, including participation at various meetings of relevant ICC Commissions and Working Parties. In support of ICC's efforts in obtaining comprehensive information on the practice and needs in this field, questionnaires, reports and draft rules prepared by ICC and sent to its National Committees have been transmitted to Governments and to banking and trade institutions not represented in ICC for their comments. The replies were then forwarded to ICC, in some cases with an analysis by the secretariat. This kind of assistance was rendered in connection with ICC's efforts to prepare uniform rules on contract guarantees and its work of preparing the 1974 and 1983 revisions of UCP.

10. For a number of years starting with the third session in 1970, the Commission considered progress

reports of ICC on its preparatory work in the field of contract guarantees. In commenting on the work, suggestions were made, for example, on the scope of the work and on the interests and needs to be taken into account. The Commission would encourage continuation of the work and, on occasion, expressed the hope that ICC would submit to it any draft rules before their final adoption by the competent organs of ICC.

11. In 1978, ICC adopted and published its "Uniform Rules on Contract Guarantees" (ICC publication no. 325), which do not recognize first demand guarantees.² The following year, the Commission encouraged ICC to continue its work on stand-by letters of credit in co-operation with the secretariat and reiterated the hope that ICC would submit any results of its work before final adoption (A/34/17, para. 48).

12. What may be called the ultimate form of co-operation between organizations is the endorsement by one organization of a final text adopted by another organization, usually expressed as a recommendation that it be used in transactions of the type in question. In the area of guarantees and letters of credit, the Commission has done so only with regard to UCP (in respect of their 1962, 1974 and 1983 revisions).

13. As will be described in more detail below (paras. 68-70), ICC is currently engaged in preparing uniform rules applicable to guarantees, indemnities, bonds or similar undertakings. A first draft of "ICC Uniform Rules for Guarantees" is set forth in the annex to this report.

I. Functions and characteristics of stand-by letters of credit and guarantees

A. Stand-by letter of credit distinguished from traditional documentary credit

1. Commercial or documentary credit

14. The traditional and most common use of a letter of credit in international transactions is that of the commercial or documentary credit. It is the primary, and by far the main, type envisaged by UCP and defined in its article 2 as:

"any arrangement, however named or described, whereby a bank (the issuing bank), acting at the request and on the instructions of a customer (the applicant for the credit),

i. is to make a payment to or to the order of a third party (the beneficiary), or is to pay or accept bills of exchange (drafts) drawn by the beneficiary,

or

ii. authorizes another bank to effect such payment, or to pay, accept or negotiate such bills of exchange (drafts),

²On this point and on the limited success of these Uniform Rules see below, paras. 62-67.

against stipulated documents, provided that the terms and conditions of the credit are complied with." (1983 revision, ICC publication no. 400; reproduced in annex II to A/CN.9/251).

15. Commercial letters of credit are used to effect or facilitate payment of amounts due under international transactions, especially contracts of sale. Pursuant to a stipulation in the contract, the buyer instructs his bank to open a letter of credit in favour of the seller. The issuing bank notifies the seller usually through a correspondent bank in the seller's country. The correspondent bank may be instructed to act as a mere intermediary transmitting information ("advising bank") or to add its own undertaking, as "confirming bank", to that of the issuing bank.

16. The letter of credit is either revocable or, if it so states, irrevocable. In the first case, the issuing bank may, without notice to the beneficiary (seller), cancel or modify it before the acceptance of the documents. In the second case, the issuing bank is bound by contract with the seller and would need his consent for any modification or revocation.

17. The letter of credit sets forth the terms and conditions of payment, in particular the documents to be tendered, except for the rare case of a "clean" commercial credit. Documents specified usually include bills of lading or other transport documents issued by the carrier, a commercial invoice, an insurance policy, and often other documents such as inspection certificates or certificates of origin.

18. The bank may be committed to perform its promise against the tender of the documents in one of three ways. It may be obliged (1) to pay cash or credit the beneficiary's account, or (2) to accept a bill of exchange drawn on it by the seller in the amount of the purchase price, or (3) to negotiate a bill of exchange drawn by the seller on the buyer. Reportedly,³ the first type prevails in Continental Europe and South America, the second type is the most common one in the United Kingdom, many Commonwealth countries and in the United States, and the third type is common in South East Asia.

19. The value of the documentary credit, appreciated especially in sales transactions involving carriage of goods by sea, lies in its twin objectives, namely to raise credit and to secure payment of the purchase price. The credit meets the common interest of both parties not to tie up funds during the transport of goods. Even more importantly, it safeguards the different interests of buyer and seller. The buyer is assured that payment is made only against documents that confer title of the goods to him or at least provide evidence of their shipment and of certain qualities (e.g. by certificates of inspection, examination or origin). The seller when parting possession of the goods is assured of payment, or honour of a bill of exchange he may wish to

discount, by a financially strong and reliable third party, often a confirming bank in his own country. He is thus protected against the risk of the foreign buyer's inability or unwillingness to pay.

20. Realizing these objectives achieved by a documentary credit, one understands why its potential and use go beyond sales transactions. It may be used in the context of works contracts, provision of services or any other transaction where the fact of performance for which payment is due may be established by documents such as certificates of acceptance or completion or any other certification, preferably by an independent third party.

21. Just as it is true that the use of the traditional documentary credit or commercial letter of credit is not limited to sales transactions, it will be seen that other types of letters of credit such as acceptance credits and, in particular, stand-by credits are not limited to use in non-sale transactions.

2. Other uses of letter of credit, especially stand-by letter of credit

(a) Acceptance credit or facility letter

22. The idea of facilitating the raising of credit is the main objective of the "acceptance credit" or "facility letter". The issuing bank does not finance the customer's transactions from its own funds but helps him to secure credit from other sources, by authorizing him to draw on it bills of exchange up to a certain limit. With such backing these so-called "commercial bills" may be easily discounted while the customer needs to provide the necessary funds only shortly before maturity. Often the funds needed are taken from the proceeds of the discount of a fresh, second set of bills (so-called "rolling-over").

23. The acceptance credit may be given in respect of any business activity of the customer. For example, it may help to finance building projects or other works, the provision of services or the manufacture of goods for sale. While there may be an international link, for example where the goods are intended for export, the acceptance credit is essentially a domestic facility, sometimes used, instead of a loan, for reasons of special domestic legislation. Above all, there are only two parties to the credit with their places of business usually in the same country, namely the issuing bank and its customer who is at the same time applicant and beneficiary of the credit. Thus, there is no need here for further discussion of this type of letter of credit.⁴

(b) Use of stand-by letter of credit in sale and non-sale transactions

24. The stand-by letter of credit was developed in the United States of America where the pledging of credit

³Ellinger, Letters of Credit, in: The Transnational Law of International Commercial Transactions, vol. 2 of Studies in Transnational Economic Law (eds. Horn and Schmitthoff, Deventer 1982) 241, 244.

⁴For more details see, e.g., Ellinger (note 3) 246, and Securitibank's collapse and the commercial bills market of New Zealand, 20 Malaysia Law Review (1978) 84.

as surety and the issuance of guarantees is beyond the powers of banks as defined in statutes, charters and case law. During the past thirty years it has been commonly used there instead of guarantees or bonds that banks elsewhere may issue.

25. In other countries stand-by letters of credit are used, if at all, to a considerably lesser extent. Often the reason for doing so is that the commercial or banking relationship at hand involves a United States party. In other contexts, the reasons contributing to what appears to be an increasing use are probably to be found in the familiarity of business and banking circles with the traditional letter of credit and their perception of its legal certainty as compared with a possibly unsettled law on guarantees, in particular as regards the independence of the bank's undertaking from the underlying transaction (see below, paras. 57-61).

26. In contrast to the documentary credit, which secures payment due to the beneficiary for his regular performance of a commercial obligation, the stand-by letter of credit is designed to provide security or indemnity to the beneficiary for the unlikely contingency of the other party's default. Such contingency, and the need to protect against it, may arise in respect of a great variety of commercial or financial obligations. Stand-by letters of credit may thus be used to underwrite undertakings in various contexts, as are bank guarantees and bonds.

27. For example, the stand-by letter of credit may protect the employer or owner of a construction project or similar works contract against the non-performance, late performance or faulty performance of the contractor who, in turn, may benefit from stand-by letters of credit guarding against his sub-contractors' default. At different stages of such projects, various types of stand-by letters of credit may be used that are better known from bank guarantees and bonds (e.g. tender guarantees, repayment guarantees, performance and customs bonds, retention money guarantees, maintenance guarantees; see below, paras. 42-44). Of other commercial uses, only two more may be mentioned, namely protection against a charterer's failure to carry out maintenance obligations and indemnity for losses accruing from a land owner's failure to obtain a building licence.⁵

28. In the financial field, stand-by letters of credit may, for example, bolster corporate issues of commercial paper (e.g. to take advantage of the credit rating of the bank providing the stand-by credit) or to back corporate bond issues on the long-term market. Other common uses include underwriting municipal obligations and industrial revenue bonds, limited partnership syndications, reinsurance, mergers and acquisitions.⁶

⁵As to further examples, see, e.g., *Ellinger*, Standby Letters of Credit, 6 Int. Bus. Lawy. (1978) 612-614; Recent extensions in the use of commercial letters of credit (comment) 66 Yale L.J. (1957) 903-909, and *Murray*, Letters of Credit in Nonsale of Goods Transactions, 30 Bus. Lawy. (1975) 1103-1105.

⁶*Rowe*, Guarantees—Stand-by letters of credit and other securities (Euromoney, London 1987) 110.

29. The variety of recent uses confirms predictions made more than ten years ago, namely that "the letter-of-credit device would be used to accomplish results that previously had to be accomplished by performance bonds, or repurchase agreements,"⁷ and that "the spread of the letter of credit into non-sales areas has just begun, and the only limit would seem to be in the extent of the creative abilities of businessmen, bankers and lawyers and the economic restraints affecting the extension of financial credit by banks."⁸

30. It must be added that stand-by letters of credit are used also in sales transactions and thus often in addition to the traditional letter of credit in one and the same transaction. It may be given for the benefit of the buyer so as to cover, in case of seller's breach, expenses or losses that might be incurred in arranging import or other measures taken in anticipation of the seller's performance. More frequently, the seller is the beneficiary and the stand-by letter of credit operates as a secondary payment in case the primary mode of payment fails (e.g. promissory notes are not paid).

31. In the latter situation the roles of buyer and seller and their respective banks with regard to the stand-by letter of credit are seemingly the same as with regard to the documentary credit. The buyer's bank, at the request and account of its customer, may issue the stand-by credit itself or instruct a bank in the seller's country to issue it, providing that bank with a counter-guarantee (whether or not in the form of a stand-by letter of credit) promising reimbursement if the stand-by credit is called in accordance with its terms. However, the similarity in pattern should not disguise the fact that even in such a situation the stand-by letter of credit differs essentially from the documentary credit as regards the nature and purpose of the undertaking and the ensuing risks.

32. While the documentary credit is employed in anticipation of the seller's performance, the stand-by letter of credit aims at meeting the contingency of default, which is considerably less likely to occur. However, if it is called, the stand-by letter of credit tends to entail greater risks.

33. The undertaking, which is for obvious reasons almost always irrevocable, is independent from the underlying transaction in that the beneficiary need not prove default, as he would have to do under an accessory guarantee or surety instrument. While the formal requirements for a claim as stipulated in the stand-by credit may include documents by an independent third party dealing with the issue of default (e.g. certificate of engineer or decision by court or arbitral tribunal), it is far more common to require only a written statement of the beneficiary himself to the effect that the other party defaulted on its obligation. Payment might thus be demanded and obtained even though the contingency had not in fact occurred.

⁷*Harfield*, Code, Customs and Conscience In Letter-of-Credit Law, 4 U.C.C.L.J. (1971) 14.

⁸*Murray* (note 5) 1123.

34. The ensuing risk rests ultimately on the bank's customer who, in addition to having performed his obligation in the underlying transaction, would have to reimburse the bank that had made the payment in accordance with the terms of the stand-by credit. In case of correct payment, whether or not the contingency had occurred, the risk might have to be borne by the bank if the customer was bankrupt or insolvent. However, banks normally protect themselves by requiring sufficient security or collateral before issuing the credit.

35. The stand-by letter of credit in its most common form is thus considerably more risky than the traditional documentary credit, which provides a high degree of security by requiring documents that confer title or at least evidence shipment of apparently conforming goods. While dressed in the form of a normal letter of credit, the stand-by credit resembles in functional terms, and constitutes in essence, a bank guarantee or similar indemnity.

B. Bank guarantees, bonds and similar indemnities

36. When entering the area of guarantees, bonds and similar securities issued by banks or other institutions, one is faced with confusing terminology, conceptual uncertainty and a bewildering array of classifications. For example, traditional labels (e.g. "guarantee", "bond", "*cautionnement*") are used also for more recent types of securities with different legal content. Suggested classifications juxtapose categories such as primary/secondary, autonomous/ancillary, independent/accessory, automatic/documentary, unconditional/conditional, or abstract/causal. Generally speaking, this state of affairs reflects the varying stages and directions of legal development (as discussed below, Part II).

1. Independence from underlying transaction

37. For the purpose of identifying those guarantees, bonds and other securities for which the stand-by letter of credit constitutes a functional equivalent, the most appropriate criterion is that of the independence of the guarantor's undertaking from the underlying relationship between principal and beneficiary. The most obvious example is the on-demand guarantee (also called first demand or simple demand guarantee), which may be payable either against a written statement of the beneficiary about the principal's default (in general or specific terms) or on simple demand whereby the principal's default would be impliedly stated.

38. As is the case with stand-by letters of credit, the promise to pay the guarantee may be subject to further conditions such as presentation of a certificate of default issued by a third party. Even such a requirement stated in the terms of the guarantee itself does not affect the legal independence of the guarantee, though it establishes a practical link with the underlying relationship in accordance with the commercial purpose of the guarantee. In the opposite case of an accessory guarantee (e.g. the traditional common law "letter of guarantee"

or "contract of guarantee") the existence and scope of the guarantor's undertaking legally depends on the principal's actual default which, in turn, presumes the existence of a valid obligation on his part. The beneficiary's right to payment is subject to the restrictions or objections provided for in the general law of guarantee or suretyship, irrespective of whether they are set forth in the contract of guarantee.

39. The necessary task of distinguishing clearly between independent and accessory guarantees is made difficult by the fact that both types serve essentially the same commercial purpose and may bear the same label. This is also true, for example, with regard to the term "performance bond". It may refer either to an independent guarantee designed to protect the beneficiary's interest in the principal's performance or to an accessory undertaking, usually of a bonding or insurance company (e.g. in Canada and the United States), to step in for a defaulting principal, to arrange for the completion by others or to indemnify the beneficiary for his expenses or losses.⁹ Payment to the beneficiary is thus but one of various options open to the guarantor which, in further contrast to the independent guarantee, covers only actual damages suffered by the beneficiary as a result of the principal's actual default. Determination of the principal's default tends to involve the guarantor (surety) in factual investigations and disputes between principal and beneficiary—all matters shunned by issuers of independent monetary guarantees. Banks, in particular, are equipped and willing to deal with documents, as they do in letter of credit operations, but not with goods or construction projects.

2. Types and uses

40. One encounters essentially the same wide variety in the commercial contexts in which independent guarantees or bonds are used, as in the case of stand-by letters of credit. After all, the function and purpose are identical, including the desire of not tying up capital as security for an unlikely contingency, as would be the case if a deposit were given to the beneficiary or funds were placed in escrow. Guarantees or bonds may be used to underwrite any kind of commercial obligation or liability. To mention only a few examples, they may ensure repayment of a bank loan, provide security for interim measures or deferred payments, or facilitate the smooth functioning of commercial activities, for example, by ensuring compliance with mutual obligations in joint undertakings or by overcoming temporary obstacles such as a missing document in a documentary credit operation.

41. Guarantees or bonds are particularly useful and commonly used in complex long-term relationships such as co-operation agreements, civil engineering contracts and, in particular, construction or works contracts. In accordance with the various stages of a

⁹For details see, e.g., *Graham and Matejck*, The law and practice relating to the use of letters of credit and performance bonds in securing contractual performance in Canada and the United States, in: *Les garanties bancaires dans les contrats internationaux*, Colloque de Tours des 19 et 20 juin 1980 (feduci, Paris) 49-66.

project and the respective needs, different types of guarantees are used, as described in the *UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works* (Chapter XVIII, Security for performance, paras. 1-13, 17-24, 40).¹⁰

42. In the initial phase, tender guarantees (or bid bonds) are employed to add strength to the bidder's commitment by protecting the beneficiary against withdrawal of the bid or non-acceptance of the award of the contract. Where the purchaser has to make an advance payment to finance the first stage of the operations, any obligation to repay the amount in full or in part may be secured by a repayment guarantee (or advance payment bond). Advance payments to the contractor for the specific purpose of transporting capital goods or materials to the construction site may be covered by transportation guarantees. Where the purchaser himself provides equipment or machinery, instead of advance payment, equipment guarantees may be issued in his favour.

43. Performance guarantees are designed to ensure completion of the project by the contractor in accordance with his contractual obligations. Where the contract price is to be paid in stages depending on the progress of the work, a retention money guarantee may be issued as a substitute for an otherwise retained percentage of the progress payment. In order to ensure re-export of equipment imported for temporary use, customs bonds may be posted with the authorities. Finally, for any obligations relating to the warranty period after completion, security may be sought through maintenance guarantees. As with any other financial obligation, the purchaser's duty to pay the contract price may be backed by a payment guarantee.

44. In addition to these main types of guarantees, other types may be agreed upon between contractor and purchaser for more specific purposes. The contractor, in turn, may seek to shift his exposure in part on to his sub-contractors by proportionate guarantees tailored in the light of the main contract guarantees.

45. In the context of construction projects as in any other commercial context, it is a matter of negotiation whether for a given purpose a guarantee or some other device will be used. The economic strength of the parties and the special market situation and practices will influence the crucial terms of the guarantee, in particular whether it would be payable on simple demand or against a third party's determination of the principal's default.

II. The legal framework

A. Laws and rules for stand-by credits

1. Few provisions of law

46. Stand-by letters of credit are not regulated in any special laws on stand-by credits, except for certain government regulations laying down, for example, the

powers and procedures of banks. Instead, they would be governed, in accordance with their form, by any general law of letters of credit. However, most States have no specific legislation on letters of credit; and where it exists it tends to consist of only a few provisions often of a general nature.

47. A more comprehensive set of provisions on letters of credit is to be found in the United States of America, where the stand-by letter of credit originated. The range of issues covered by article 5 of the Uniform Commercial Code (UCC), enacted with minor variations in all 50 states, may be gathered from its section headings: Formal Requirements; Signing (5-104), Consideration (5-105), Time and Effect of Establishment of Credit (5-106), Advice of Credit; Confirmation; Error in Statement of Terms (5-107), "Notation Credit"; Exhaustion of Credit (5-108), Issuer's Obligation to Its Customer (5-109), Availability of Credit in Portions; Presenter's Reservation of Lien or Claim (5-110), Warranties on Transfer and Presentment (5-111), Time Allowed for Honor or Rejection; Withholding Honor or Rejection by Consent; "Presenter" (5-112), Indemnities (5-113), Issuer's Duty and Privilege to Honor; Right to Reimbursement (5-114), Remedy for Improper Dishonour or Anticipatory Repudiation (5-115), Transfer and Assignment (5-116), Insolvency of Bank Holding Funds for Documentary Credit (5-117).

48. Article 5 UCC, as expressed in section 5-102(3), "deals with some but not all of the rules and concepts of letters of credit as such rules or concepts have developed prior to this act or may hereafter develop", and according to the Official Comment on that section "the rules embodied in the Article can be viewed as those expressing the fundamental theories underlying letters of credit". There remain thus, even here, ample room and need for development and refinement of legal solutions based on commercial usages. Moreover, there is a clear deference to commercial practices in three states (Alabama, Missouri and New York) where article 5 does not apply to documentary credits incorporating the UCP.

49. In view of the lack of a statutory framework in most countries and its fragmentary nature in others, courts may generally give effect to the letter-of-credit practices developed by the business community and, as regards stand-by letters of credit, take into account their different purpose and characteristics. In some legal systems restrictions may follow from mandatory provisions of law, even if those provisions do not expressly refer to stand-by letters of credit. Such provisions dealing, for example, with questions of validity or expiry of bank guarantees are likely to be applied also to the functionally equivalent stand-by credit, especially where the provisions are regarded as forming part of public policy.

2. Uniform international rules

50. Stand-by letters of credit might, in conformity with their purpose and despite their name, be made subject to the Uniform Rules for Contract Guarantees

¹⁰A/CN.9/SER.B/2; New York 1988, United Nations publication, sales no. E.87.V.10.

(ICC Publication no. 325) which "apply to any guarantee, bond, indemnity, surety or similar undertaking, however named or described" (article 1(1)). However, these Rules for Tender, Performance and Repayment Guarantees are of limited practical use since they fail to recognize the most common type of stand-by credit, i.e. a credit that is payable upon the beneficiary's declaration of the principal's default (see below, paras. 64-67).

51. The international rules most commonly referred to in stand-by letters of credit are the Uniform Customs and Practice for Documentary Credits. While this practice developed under previous versions of UCP, the 1983 revision (ICC Publication no. 400, reproduced in annex II to A/CN.9/251) now specifically covers stand-by letters of credit.

52. Its article 2 cited earlier (para. 14) defines not only the documentary credit or traditional letter of credit but also, and in the same terms, the stand-by letter of credit. Even more explicit, and apparently sensitive to the difference in nature and purpose of the two types of letter of credit, is article 1 according to which "these articles apply to all documentary credits, including, to the extent to which they may be applicable, stand-by letters of credit".

53. No rules or guidelines are offered for determining which of the articles of UCP are in fact applicable to a stand-by letter of credit and, if they are applicable, to what extent. The answer has to be sought by examining the purpose and scope of each provision and then judging its suitability for this functionally different type of credit. While questions of applicability may be easily answered at a general level, there remains a considerable amount of uncertainty when it comes to concrete issues.

54. Generally applicable are, for example, the general provisions and definitions set forth in articles 1 to 6, the rules on the form and notification of credits (articles 7 to 14) and the imposition or exclusion of liabilities and responsibilities of banks (articles 15 to 21). Of these provisions, articles 3 and 6 are of particular relevance to stand-by credits in that they establish and underline the independence or autonomy of the letter of credit. As an important complement, article 4 provides that "all parties concerned deal in documents, and not in goods, services and/or other performances to which the documents may relate"; the reference to services and performances as well as goods reflects the wide coverage of UCP, including its extension to stand-by credits.

55. In general, the provisions that would not be applicable include those on transport documents, insurance documents and commercial invoices (articles 22 to 42), which are geared to the traditional documentary credit in a sales transaction. However, those provisions may be relevant to a stand-by letter of credit operating as a secondary payment (see above, para. 30).

56. The miscellaneous provisions of UCP (articles 43 to 53) combine applicable and non-applicable rules. This may happen even within one and the same article;

for example, article 44 deals with partial drawings that may occur in stand-by operations and with partial shipments that are unlikely to occur. In respect of a number of these articles, no certainty exists as to whether they are applicable to stand-by letters of credit. To mention only one example, the question has arisen (and is currently before the ICC Commission on Banking Technique and Practice) whether subparagraph *a*) of article 47 governing the period of time for presentation of documents and their refusal after the expiry date is applicable to a stand-by letter of credit.

B. Laws and rules for bank guarantees and similar indemnities

1. Evolution of law recognizing independent guarantees

57. As is the case with stand-by letters of credit, bank guarantees and similar indemnities have in most States not been the subject of special legislation, except for specific laws, for example, on procurement, public works or banking, which may prescribe or prevent certain types of guarantee or contain certain requirements. General provisions of law on bank guarantees are rare (e.g. sect. 665-674 of the 1964 International Trade Code of Czechoslovakia and sect. 252-255 of the 1976 International Commercial Contracts Act of the German Democratic Republic). Even rarer is the inclusion of a statutory provision expressly referring to the guarantee payable on demand and without objections, as found in section 1087 of the 1978 Law of Obligations of Yugoslavia.

58. In most legal systems, it fell to the courts to respond to the emergence of the independent guarantee, which was essentially a creation of banking and commercial practice.¹¹ The evolution of the law, while differing from country to country, often faced the same kind of difficulty. On the one hand, it started from the traditional statutory or non-statutory law governing the accessory guarantee (surety); on the other hand, the realization that the new guarantee was of an independent nature made it necessary to disregard the basis of the traditional law, i.e. the linkage between guarantee and underlying transaction, and to develop a truly separate type of guarantee. The process of differentiation and severance has been easier and faster in some jurisdictions than in others. In a number of countries the process was facilitated by the application by analogy of letter-of-credit law with its well-established principle of independence or by general resort to the principle of contractual freedom.

59. Compared with the legal situation eight years ago, as described in an account covering various regions of the world,¹² there has been further progress towards

¹¹ Lesguillons, *Histoire, signification et pratique des garanties*, in: *Les garanties bancaires* . . . (above, note 9) 1-10.

¹² See contributions in *Les garanties bancaires* . . . (above, note 9), especially: Vasseur, *Rapport de synthèse: le droit des garanties bancaires dans les contrats internationaux en France et dans les pays de l'Europe de l'Ouest* (319-364); Florescu, *Pays socialistes Européens* (367-381); El Hakim, *Les pays du Proche-Orient* (383-406); Cremades/Valluis/Zivy, *Droit et pratique des garanties en Amérique Latine* (81-99).

wide recognition in national law of the independent guarantee. Nevertheless, the principle is not yet firmly established in all legal systems; and there is no uniformity as regards the extent to which the principle is recognized. Uncertainty or divergence of views exists, for example, with regard to the legal effects on the guarantee of any initial invalidity, modification or agreed termination of the underlying transaction or with regard to the relevance of the beneficiary's default having caused the principal's non-performance.

60. Even with regard to such a generally accepted rule as the fraud exception (discussed later, paras. 85-88), the positions in different jurisdictions differ considerably when it comes to determining the precise scope of the rule and the procedural measures available to implement it. Conceptually speaking, the fraud rule neither contradicts nor limits the independence of the guarantee. As in any other context where principles such as abuse of right (*abus de droit*) or *exceptio doli* operate, it presupposes the existence of a formal right to call the guarantee. The fraud rule constitutes an exception to the general rule that the obligation to pay the guarantee depends only on the conditions contained in the guarantee, and it shows that even an unconditional guarantee that is labelled as "payable on demand and without objections" remains subject to some objections.

61. Since the nature of the guarantee and the rights and obligations under it are based on the will of the parties, they are determined according to the terms and conditions laid down in the guarantee agreement. The texts of guarantee agreements tend to be elaborate, in part due to the fact that they have been drafted by banking and commercial parties against the background of a fragmentary statutory framework and often unsettled case law. Contract practice in this field is not widely standardized and experience shows that the texts of guarantee agreements are not always free from uncertainties, ambiguities or inconsistencies. Above all, even the most elaborate and consistent text could not provide answers to all the issues that may arise during the lifetime of the guarantee. There would thus seem to be a need for a set of standard rules that could be conveniently referred to in guarantee agreements.

2. Uniform international rules

(a) ICC Uniform Rules for Contract Guarantees (1978)

62. In an effort to respond to this need, ICC prepared over a 12-year period of time the earlier mentioned 1978 ICC Uniform Rules for Contract Guarantees (ICC Publication no. 325). These Rules cover tender, performance and repayment guarantees, whether issued by banks or other institutions (hence the term "contract guarantees" instead of "bank guarantees").

63. The issues dealt with in the Rules include the guarantor's undertaking, last date of claim, expiry and return of guarantee, amendments to contracts and guarantees, submission of claim and documentation to support it, applicable law and settlement of disputes.

Neither the relationship between the guarantor and the principal nor the relationships between banks are comprehensively dealt with in the Rules.

64. More importantly, the independent nature of the guarantee is not unequivocally stated. One may even get the impression that secondary or accessory guarantees are covered when seeing, for example, the term "surety" included in article 1: "These rules apply to any guarantee, bond, indemnity, surety or similar undertaking, however named or described . . ." Above all, the Rules recognize only conditional guarantees, without expressly so stating.

65. As explained in the Introduction to the Rules, it was "not found advisable to make provision for so-called simple or first demand guarantees, under which claims are payable without independent evidence of their validity". The reason given therefor was "to invest guarantee practice with a moral content". The requirement of independent evidence is set forth in article 9 which, leaving aside its subparagraph *a*) on tender guarantees, reads as follows:

"If a guarantee does not specify the documentation to be produced in support of a claim or merely specifies only a statement of claim by the beneficiary, the beneficiary must submit:

a) . . .

b) in the case of a performance guarantee or of a repayment guarantee, either a court decision or an arbitral award justifying the claim, or the approval of the principal in writing to the claim and the amount to be paid."

66. It is obvious that article 9 does not give effect to a simple demand guarantee. Less obvious is a weakness that may constitute a trap to an unwary party. Taken literally, the chapeau would embrace a simple demand guarantee, since it is one which "merely specifies only a statement of claim by the beneficiary", and such guarantee would then, if subjected to the Rules, undergo a mutation to a guarantee payable only with the principal's consent or after a decision of a court or arbitral tribunal.

67. The failure to give effect to demand guarantees and the limited range of issues covered by the Rules are probably the main reasons for the fact that the Rules have not become widely accepted and used.

(b) ICC Draft Uniform Rules for Guarantees (1988)

68. Aware of the limited success of its 1978 Uniform Rules, ICC has undertaken a new effort towards preparing uniform rules for guarantees, indemnities, bonds and similar undertakings. Entrusted with this task is the Joint Working Party "Contractual Guarantees", composed of five members each of the ICC Commission on Banking Technique and Practice and the ICC Commission on International Commercial Practices.

69. The Joint Working Party decided, after extensive discussions, to take as the basis of its work a Code of

Practice for Demand Guarantees and Bonds drawn up by the Committee of London and Scottish Bankers and to incorporate certain provisions of the 1978 ICC Uniform Rules on Contract Guarantees. At its meeting on 7 and 8 January 1988, the Joint Working Party agreed upon a first draft of ICC Uniform Rules for Guarantees. It should be noted that this draft must be reviewed by the two ICC Commissions and it may be referred back to the Joint Working Party for further consideration.

70. This first draft has been reproduced in the annex to this report so as to provide information on the range of issues covered and on the current thinking within ICC as regards the general approach and individual solutions. This information may assist the Commission in considering any future activities in this field and, in particular, any means of co-operation with ICC (as suggested later, paras. 94-99).

III. Some legal issues and practical problems

71. The ICC Draft Uniform Rules for Guarantees provide a good indication of the range and kind of issues that may arise in guarantee operations. There are further issues that may be mentioned here, without taking a stand on whether they should be included in a future version of the Rules. First, a number of issues may come up in the relationship between the principal (account party, applicant) and his bank, pertaining, for example, to uncertain, inconsistent or incomplete instructions or to the matter of cover or reimbursement. Then, there are additional issues relating to activities of the bank such as the issuance of guarantees by teletransmission, including questions of authentication, or the involvement of a bank as a mere advising bank or as an agent claiming or collecting on behalf of the beneficiary. Other questions may relate to amendments of the guarantee, any instructions in this respect by the principal, or the possible refusal by the beneficiary to accept the guarantee.

72. Of all the issues, whether or not covered by the current ICC draft, only a few can be discussed here by way of illustration. The following issues have been selected for reasons of their practical relevance and the need for clear and uniform solutions. They would in part be covered by the guarantee agreement and otherwise remain to be answered by the applicable law.

A. Stipulated terms and conditions of payment

73. Since the undertaking of the guarantor is based on the contractual principle of party autonomy and in recognition of the independent nature of the guarantee, the guarantor's obligations are determined by the terms of the guarantee agreement, subject to any limitation imposed by mandatory provisions of law. Problems encountered in this context tend to be due to uncertain or inconsistent formulations in the agreement.

1. Amount and possible reduction

74. The amount payable under a guarantee is often calculated in proportion to the value of an underlying obligation such as a certain percentage of the contract price. However, the use of percentage figures may create doubts as to the precise reference point, in particular in case of changes in the underlying transaction, and might even cast doubt on the independent character of the guarantee. Therefore, the amount of the guarantee is often expressed in absolute terms, at least as a maximum amount.

75. Especially performance guarantees relating to long-term projects tend to provide for a gradual reduction of the amount payable in accordance with the progress of the works. The mechanism for reduction would specify the extent of the reduction and link it to particular phases of the works. However, the mere indication of these phases would not be appropriate for an independent guarantee; certificates of partial completion or acceptance might be required so that guarantors are in a position to determine the amount due on the basis of documents.

2. Statement of claim and any supporting documents

76. A variety of requirements for calling the guarantee has been developed and used, based on varying commercial factors such as bargaining power, confidence and assessment of risk. The claim may be unconditional as in the case of a true simple demand guarantee where a demand suffices, or it may have to be accompanied by the beneficiary's statement about the principal's default. A general declaration to that effect may be sufficient, or the beneficiary may be required to state more details; for example, the nature of the principal's breach of his obligations, the fact that as a result the beneficiary is entitled to payment of the claimed amount and that the amount has not yet been paid to him. Yet another requirement as to the content of the statement may be a submission to arbitration (or court jurisdiction) to enable the principal to recover the amount in case of an unjustified call. It may be questioned whether any of these statements or declarations, even if in writing, constitutes a document—a question that may arise in applying provisions of the UCC or UCP to stand-by letters of credit, since such letters of credit often require only a pro-forma declaration by the beneficiary and, perhaps, presentment of a sight draft.

77. However, there can be no doubt of the documentary nature of other writings required to call a credit, even though only few of them resemble the commercial documents used in documentary credit operations (see earlier case of secondary payment, para. 30). In particular, in order to implement the purpose of the guarantee to guard against the risk of default, the required writings may relate to evidencing any kind of default, whether it be non-performance, non-conformity or late performance of construction, supply or payment obligations. Evidentiary documents of this type may be established by the engineer on site or another technical expert agreed upon for that

purpose. Yet other requirements are those envisaged in subparagraph *b*) of article 9 of the 1978 ICC Uniform Rules on Contract Guarantees (cited above, para. 65); namely, consent of the principal or decision of a court or arbitral tribunal.

78. There exists, thus, a wide range of possible requirements reflecting the variety of commercial needs. The fewer the conditions, the more the guarantee functions like a security deposit, shifting the burden of litigation, but not tying up capital. The more demanding the requirement as to establishing proof of default, the more the guarantee resembles an accessory type of guarantee (e.g. surety). While this impression is understandable from a practical point of view, legal analysis allows and requires a distinction to be made between documentary requirements, even if those documents relate to occurrences in the underlying transaction, and a direct link of dependence between the guarantee undertaking and any terms or events in that transaction.

79. However, the distinction between payment conditions that require the beneficiary to state that there has been default by the principal or to submit documentary evidence of such default and making payment accessory to the valid existence and breach of an obligation easily becomes doubtful where an otherwise clearly independent guarantee contains formulations such as "if the contractor does not perform his obligations" or "in case of the principal's breach of contract". Specific wordings of this nature place the guarantee in danger of being classified as accessory and subject to suretyship law, in particular by those courts that still hesitate to recognize in full independent guarantees.

3. *Validity period and expiry*

80. Certainty is especially desirable as regards the validity period of the guarantee and thus the liability of the guarantor and its right to charge commission or fees. The starting point, i.e. the date when the guarantee enters into effect, should be clearly defined; where it depends on events, e.g. awarding of contract or receipt of advance payment, difficulties may be avoided by tying the start of the guarantee period to the receipt of documentary evidence or notice thereof by the guarantor.

81. The more crucial point is the expiry of the validity period. Again, a definite date is preferable to any link with an occurrence or element of the underlying transaction (e.g. awarding of contract to other bidder, completion of project or expiry of warranty period). Problems may be reduced by requiring evidence or notice or by stipulating in addition an ultimate final date.

82. Whatever the agreed expiry date, it may turn out not to be valid or in practical terms not effective. No serious difficulties are encountered with termination prior to the expiry date by virtue, for example, of agreed cancellation, release by the beneficiary or return of the guarantee instrument. Considerable problems arise, however, from possible continuation or extension

of the validity beyond the agreed expiry date. Such prolongation may be imposed by provisions of law found in some States which, for example, deny the expiry effect as long as the beneficiary retains the guarantee instrument or may even prescribe a statutory limitation period of up to 30 years.

83. More common is, at a practical level, the serious problem that has been labelled as the "pay or extend" demand. Especially in respect of an unconditional guarantee, the beneficiary may reinforce a demand for extension by threatening to call the guarantee. While the demand may be legitimate and justified on the ground that the secured contingency may still occur and thus the commercial purpose of the guarantee is not yet obsolete, there exists a potential for abuse. In either case, the principal has little choice but to agree to the extension. Since the guarantor often has little time for obtaining the principal's instructions, some bank-customer agreements confer a discretion on the guarantor to extend the validity period, which places considerable responsibility on the guarantor and may not be in the best interest of the principal.

B. *Fraud exception, other objections and supportive court measures*

84. In addition to limits following from the terms of the guarantee, especially conditions of payment, some other exceptions or objections may come into play based on statutory or case law. For example, a finding that the underlying transaction violates public policy or involves an unlawful activity may be a ground for objecting to payment. As mentioned above (para. 59), other instances of invalidity, termination or mere modification of the underlying contract, or the fact that the principal's default was due to an act or omission by the beneficiary may as such constitute the basis of an objection in those jurisdictions that do not adhere strictly to the principle of independence. Depending on the particular circumstances, they may also fall under the fraud exception, which, as noted above (para. 60), is not in conflict with that principle.

1. *Fraudulent or unfair calling*

85. As in the context of traditional documentary credits, fraud may relate to commercial documents presented by the beneficiary. Since such documents are normally issued by another person, the fraudulent act may consist of forging that person's signature or of inducing that person to make an untrue statement. The potential for fraud or abusive calls of guarantees or stand-by letters of credit is considerably enlarged by reason of the fact that often only a statement by the beneficiary himself is required or even a simple demand suffices. While the frequency of fraudulent, unfair or improper calls cannot be assessed with any degree of accuracy, court decisions in various countries bear evidence of the occurrence of such instances in a variety of fact settings. In addition, there is potential for threatening to call the guarantee as a means of securing an advantage in the underlying relationship.

86. In those jurisdictions where courts have had to deal with actions or with requests for interim measures based on alleged fraud the fraud exception has generally been recognized. However, its precise scope and application differ from country to country in various respects, and within certain jurisdictions the attitude of courts has been changing during recent years.

87. As regards the substantive scope, a difference of considerable practical importance stems from the fact that in some jurisdictions the fraud exception has been extended beyond fraud to cover instances of blatant abuse, manifest arbitrariness or bad faith. Even concerning the question whether a particular act amounts to fraud there exists a divergency of views that is wider than seems natural or necessary in the use of such a general concept as fraud. Different positions are taken, for example, as regards the relevance of fraudulent conduct by a person other than the beneficiary, or of apparently extraneous, possibly political, motives of the beneficiary, or of difficulties the principal may later face in trying to recover from the beneficiary an improperly obtained amount. Another example of divergency and uncertainty arising in the more complex situation of an indirect guarantee is whether a back-to-back or counter-guarantee may be called by a guarantor who paid upon a fraudulent or abusive call, perhaps without attempting to resist the call, although there was no collusion with the beneficiary.

88. Moreover, no uniformity exists as regards the required degree of certainty of the guarantor's knowledge of the fraud and, at the procedural level, the required evidence and the standard of proof. Thus, for the same type of court measure (e.g. injunction blocking payment) diverse requirements have been used such as absolute proof, strong evidence, *prima facie* evidence, high degree of probability, sometimes admitting only documentary evidence, excluding affidavits, or allowing any ready means of evidence.

2. Court measures blocking payment

89. Considerable divergency exists also in respect of the types and conditions of court measures that may be available in cases of alleged fraud or other objections. The most common interim measures are injunctions or similar orders that enjoin the beneficiary from calling the guarantee or the guarantor from paying it (*défense de payer*). Their availability depends on the particular requirements of the procedural law and on the varying judicial attitudes towards guarantee cases. In addition to the above questions of evidence, matters of divergency are, for example, which persons are entitled to obtain such measures, the extent of probable harm to the person applying, the period of time during which the measure would remain in effect, and the possible extra-territorial effect of the measure.

90. A variety of other court measures essentially aiming at freezing or conserving funds have been considered and tried in various jurisdictions and granted by some courts. Such measures are, for example,

sequestration of funds held by the guarantor, seizure of such funds, attachment of the beneficiary's right of claiming the guarantee, arrest of the proceeds obtained, or injunction enjoining the movement of the assets out of the jurisdiction. The particular requirements and availability of any such measures in guarantee or stand-by letter of credit cases varies from country to country.

CONCLUSIONS

91. On the basis of the above account, a number of conclusions may be drawn that may assist the Commission in considering the desirability and feasibility of any future activity in this field. What was referred to at the fifteenth session as the letter of credit used in non-sale transactions is essentially the stand-by letter of credit used at times also in sales transactions. By its function and purpose, the stand-by letter of credit differs considerably from the traditional commercial letter of credit or documentary credit and is equivalent to independent bank guarantees and similar indemnities.

92. Stand-by letters of credit and guarantees play an important role in commercial practice and raise essentially the same kind of issues. Both types of instruments are used in a legal framework shaped by varying case law and rarely by statutory provisions. A general source of difficulties has been identified for each type of instrument. As regards stand-by letters of credit, it is often doubtful whether a given provision of the law on letters of credit is applicable, i.e. appropriate in view of the special nature and purpose of the stand-by letter of credit. As regards guarantees, uncertainty arises from the fact that the autonomy or independent nature of the undertaking is not yet recognized in full and firmly established in all jurisdictions.

93. When it comes to specific legal issues in the context of stand-by letters of credit or guarantees, difficulties are often due to the unsettled, unrefined state of the applicable law and the divergency of positions taken in different jurisdictions. Uncertainty and disparity may hinder the smooth functioning of guarantee operations in international cases where at least the principal and the beneficiary have their places of business (and their banks) in different States and where the laws of more States may become relevant by reason of the fact that, for example, banks in third countries are involved or that the guarantee forms part of a complex international network of contracts and connected guarantees. Moreover, individual stand-by letters of credit or guarantee agreements are unable to provide all necessary answers, their terms are not always consistent and they may be interpreted differently depending on the varying concepts and perceptions of the courts.

94. The Commission may thus wish to conclude that a greater degree of certainty and uniformity would be desirable. The foremost means of achieving this would be a comprehensive and consistent set of rules that parties may refer to in guarantees and stand-by letters of credit. In this respect, the recent efforts of ICC in

preparing uniform rules should be welcomed. The draft Uniform Rules for Guarantees, annexed to this report, deserve careful consideration and examination as regards the range of issues covered and, in particular, the individual solutions currently suggested. This would allow the Commission, with its balanced representation of all regions and the various economic and legal systems, to assess the world-wide acceptability of the draft Rules.

95. While the Commission may wish to hold a preliminary exchange of views at this session, it would seem appropriate to provide an opportunity for more extensive discussions and possible recommendations to ICC after representatives have had a chance to consult interested circles in their countries. If the Commission would agree with this suggestion, it may wish to authorize its Working Group on International Contract Practices to hold a session for that purpose, possibly in November of this year.

96. The Working Group might also be requested to consider more closely, in the light of its examination of the ICC draft Rules, the following two ideas relating to needs that no set of contractual rules may meet. First, while uniform rules cover guarantees of all types with various degrees of payment conditions, it may be desirable to facilitate and standardize the drafting of individual guarantees of specific types. This might be done by means of model forms or, borrowing the technique employed in the Incoterms, by "Guaranterms" setting forth a variety of terms and specifying the rights and obligations of the parties under the selected term.

97. Secondly, since there are some important matters that remain subject to mandatory law and may not be regulated by the agreement of the parties, including by uniform rules incorporated into the agreement, it may be desirable to strive for greater uniformity at the statutory level. For example, uniform rules may contain provisions consistent with the independent nature of a guarantee, but the final and full recognition of such independence depends on its acceptance by the law. It would thus be an appropriate topic for a uniform law to specify clearly whether, and if so which, objections relating to the underlying transaction may be raised as

a matter of law to the payment of the guarantee and to state expressly that otherwise only those objections are permitted that follow from the terms of the guarantee agreement or stand-by letter of credit. Other suitable issues may be those mentioned above where mandatory provisions of law currently frustrate agreements of the parties (e.g. continuation of validity period beyond agreed expiry date).

98. Probably the most important topic for a uniform law would be the vexing problem of fraudulent or abusive calls and of appropriate court measures. The problem, which was at the heart of a previous note of the secretariat on stand-by letters of credit (A/CN.9/163), cannot effectively be dealt with by contractual rules. Without underestimating the difficulties of agreeing on the scope of the fraud exception and of supportive court measures, it is submitted that at least an attempt in this direction might be made. Based on suggestions by practitioners, it is further submitted that it would be useful to consider whether a uniform law might cover not only guarantees and stand-by letters of credit, but also traditional letters of credit. While the extent and the circumstances of fraud in documentary credits may be different, the legal problem is essentially the same and it cannot be solved by contractual rules (i.e. UCP).

99. Other topics that could be addressed in any future uniform law are, for example, court jurisdiction, arbitration and the applicable law. A uniform law could help to overcome the present disparity in matters that are governed by mandatory provisions of law. It could also come to the aid of parties who did not settle other questions in their guarantee agreement or letter of credit. Finally, a uniform law could and should guarantee the parties' freedom and give full effect to their agreement, including a reference to UCP or any uniform rules on guarantees that might be adopted. If the Commission were to pursue the idea of a uniform law, it may wish to request the secretariat to prepare a study, in consultation with ICC, on the possible features and the issues that might appropriately be covered. The study might also suggest whether a model law or convention would be preferable to a uniform law, or that issue might be deferred to a later time.

ANNEX

(Reproduced here is a first draft of ICC Uniform Rules for Guarantees agreed upon by a Joint Working Party on 8 January 1988)

ICC DRAFT UNIFORM RULES FOR GUARANTEES

INTRODUCTION

These Uniform Rules have been drawn up by an ICC Joint Working Party of members representing the Commission on International Commercial Practices and the Commission on Banking Technique and Practice to apply to the use of guarantees world-wide. Their purpose is to provide a basis for

consistency of treatment by the parties to these engagements and the resolution of problems notably in relation to claims and expiry.

The Rules have been drafted to take account of and to encourage the issue of guarantees which provide for the documentary support of claims and for reduction of the guarantee amount against delivery documents or against

dates. They aim also at reducing the common expiry problems encountered with guarantees. One purpose, therefore, is to provide a framework within which equitable guarantee arrangements between principals and beneficiaries can continue to develop. The Rules intend to encourage a better understanding and standard practice in the use of guarantees.

The ICC hopes these Rules will make a major contribution to regulating guarantees by providing the basis on which parties can operate consistently. The Rules aim, by encouraging good guarantee practice, to achieve a fairer balance between the interests of the parties concerned and to deal with problems that arise.

As with the Uniform Customs and Practice for Documentary Credits (ICC Publication No. 400), this is a voluntary set of rules which does not confront the difficulties and conflicts arising from different national systems of law, and it recognises for example that specific requirements in some countries will have to be met. As a general guide, therefore, principals will be required to indemnify Guarantors against the consequences of foreign laws and usages. These Rules will largely depend for their eventual success, as did the Uniform Customs and Practice, upon their adoption and employment by the international business community. It is acknowledged that there may remain situations for a period of time in which some guarantees will not by their terms or because of the specific requirements of certain countries fall within all the articles hereafter, but the frequency of such cases would be expected to diminish.

A. Scope and application of the rules

Article 1

These Rules apply to any guarantee, indemnity, bond or similar engagement however named or described (hereinafter "Guarantee") unless otherwise provided in the Guarantee or any amendment thereto which a Guarantor (as hereinafter described) is instructed to issue and which states that it is subject to the Uniform Rules for Guarantees of the International Chamber of Commerce (Publication No. XXX).

B. Definitions

Article 2

(a) For the purposes of these Rules a Guarantee means an undertaking given by a bank, insurance company or any other party (hereinafter "the Guarantor") at the request of a Principal or given on the instructions of a bank, insurance company or any other party so requested by the Principal (hereinafter the "Instructing Party") to another party (hereinafter the "Beneficiary") to secure him in respect of a specified obligation.

(b) A Guarantee may be confirmed at the request of a Guarantor by another party (hereinafter "Confirming Guarantor"). Such an engagement is in addition to that of the Guarantor and may be described as confirming, joining-in, endorsement of, or counter-signing a Guarantee.

C. General provisions

Article 3

All instructions for and amendments to the Guarantee should be clear, precise and avoid excessive detail. Accordingly all Guarantees should stipulate:

(a) the name of the Principal;

- (b) the name of the Beneficiary;
- (c) the underlying transaction requiring the issue of the Guarantee;
- (d) a total amount payable and the currency in which it is payable;
- (e) the date and/or event of expiry of the Guarantee;
- (f) the terms and procedures for claiming payment.

Article 4

Unless otherwise provided in the Guarantee, Guarantors and Confirming Guarantors shall not accept any assignment or other form of disposition which the Beneficiary may make, or may purport to make, of the Guarantee and, despite any knowledge of any such disposition, the Guarantor and Confirming Guarantor shall be deemed to remain solely liable to the first Beneficiary for the benefit of the Guarantee and its proceeds.

Article 5

All Guarantees are irrevocable.

Article 6

A Guarantee enters into effect as from the date of its issue to the Beneficiary, unless its terms expressly provide that its effectiveness is subject to conditions (e.g., written notification of an award of contract, the receipt of specified advance payment monies or any other event).

Article 7

Each Guarantee is by its nature separate from any underlying transaction and from any obligation for which the Guarantee may be security. Guarantors and Confirming Guarantors shall in no way be concerned with or bound by any such transaction even if any reference whatsoever thereto is included in the Guarantee. A Guarantor's or Confirming Guarantor's obligation of performance of any Guarantee is solely to pay the sum or sums specified therein.

Article 8

Except where the relevant Guarantee expressly provides otherwise, in guarantee operations the words "to", "until", "till", "from" and words of similar import applying to any date or term will be understood to include the date mentioned.

Article 9

Unless otherwise expressly provided in the Guarantee all interest, commission, charges and expenses arising in the course of guarantee operations will be for the account of the Principal.

D. Liabilities and responsibilities of guarantors

Article 10

All documents presented to a Guarantor or Confirming Guarantor shall be examined by that Guarantor or Confirming Guarantor with reasonable care to ascertain on their basis alone whether or not they appear on their face to be in compliance and conformity with the terms and conditions of the relevant Guarantee. Where such documents do not appear so to conform or appear on their face to be inconsistent with one another, they shall be rejected.

Article 11

(a) A Guarantor or Confirming Guarantor shall have reasonable time in which to examine a claim in respect of the Guarantee and to determine whether to pay or to reject the claim.

(b) If such Guarantor or Confirming Guarantor determines to reject a claim, it will give notice without delay by telecommunication or (if that is not possible) by other expeditious means to that effect to the Beneficiary.

Article 12

Subject to Article 16 hereunder Guarantors and Confirming Guarantors, in the course of guarantee operations, assume no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification, or legal effect of any guarantee document or for the general and/or particular statements made therein, or for the good faith or acts and/or omissions of any person whomsoever.

Article 13

In the course of guarantee operations, Guarantors and Confirming Guarantors, insofar as they have exercised reasonable care assume no liability or responsibility for consequences arising out of delay and/or loss in transit of any messages, letters, claims or documents, or for delay, mutilation or other errors arising in the transmission of any telecommunication, or for errors in translation or interpretation of technical terms. Guarantors and Confirming Guarantors reserve the right to transmit Guarantee texts or any parts thereof without translating them.

Article 14

In the course of guarantee operations, Guarantors and Confirming Guarantors assume no liability or responsibility for consequences arising out of interruptions of their business by acts of God, riots, civil commotions, insurrections, wars or other causes beyond their control or by strikes, lock-outs or industrial action of whatever nature.

Article 15

If in the course of guarantee operations an Instructing Party and/or Guarantor utilises at the Principal's request the services of another party as Guarantor or Confirming Guarantor it does so for the account and at the risk of the Principal, and an Instructing Party and/or Guarantor assumes no liability or responsibility should the issuing or confirming instructions (or amendments thereto) not be carried out in whole or in part, even if it has itself taken the initiative in the choice of such other party as Guarantor or Confirming Guarantor.

Article 16

Guarantors and Confirming Guarantors shall not be excluded from liability or responsibility under the terms of Articles 12, 13 and 15 above for their own or their servants' grossly negligent or wilful acts or omissions.

E. Claims*Article 17*

A Guarantor or Confirming Guarantor is liable to the Beneficiary only in accordance with the terms and conditions

specified in the Guarantee (and any amendment thereof), and in these Rules and up to an amount not exceeding that stated in the Guarantee and any amendment thereof.

Article 18

In the event of a claim, each Guarantor involved in the guarantee operations shall inform its Instructing Party without delay.

Article 19

A Guarantee may contain express provision for reduction by a specified or determinable amount or amounts on a specified date or dates or upon presentation to the Guarantor or the Confirming Guarantor of document(s) specified for this purpose.

Article 20

The amount payable under a Guarantee shall be reduced by the amount of any payment made in satisfaction of a claim in respect thereof and, where the total amount payable under a Guarantee has been satisfied by payment and/or reduction, the Guarantee shall thereupon terminate.

F. Submission of claims*Article 21*

A claim must be made in accordance with the terms and conditions of the Guarantee and, in particular, all specified documents must be presented to the Guarantor or the Confirming Guarantor on or before the expiry date of the Guarantee, otherwise the claim will be rejected.

Article 22

Any claim presented to the Guarantor or Confirming Guarantor must be in any one of the following agreed forms of written demand:

(a) the Beneficiary's written demand incorporating his statement that the Principal is in breach of his obligation(s) and indicating the nature of such breach; or

(b) the Beneficiary's written demand incorporating his statement that the Principal is in breach of his obligation(s) indicating the nature of such breach and supported by the documents to be specified in the Guarantee; or

(c) the Beneficiary's written demand incorporating his statement (i) indicating that the Principal is in breach of his obligation(s) and, (ii) indicating the nature of such breach and, (iii) declaring that as a result thereof the Beneficiary has become entitled to payment of the amount claimed by him and that the amount claimed has not been paid whether directly or indirectly, by or on behalf of the Principal or by any form of set off; and, (iv) supported by such other documents as may be specified in the Guarantee.

Where a Guarantee is issued and is expressed to be subject to these Uniform Rules and provides for claims by or on behalf of the Beneficiary on the Beneficiary's simple demand without any statement or document in support, it shall be deemed to have been issued in accordance with this Article and claims must comply with paragraph (a) of this Article.

G. Payment of the claim

Article 23

After paying a claim the Guarantor or Confirming Guarantor shall submit without delay the Beneficiary's claim documents to the Principal or to the Instructing Party or Guarantor for transmittal to the Principal.

H. Guarantee expiry provisions

Article 24

Expiry of a Guarantee must be indisputable; that is, upon a specified final date for the presentation of claims ("Expiry Date") or upon presentation to the Guarantor or the Confirming Guarantor of document(s) specified for the purpose of expiry ("Expiry Event"). If both an Expiry Date and an Expiry Event are specified in a Guarantee, the Guarantee will expire on whichever of the Expiry Date or Expiry Event occurs first. A Guarantor or a Confirming Guarantor shall have no obligation in respect of claims received after the Expiry Date or the Expiry Event specified in the Guarantee.

Article 25

Where a Guarantor has been given instructions for the issue of a Guarantee but the instructions are such that, if they were executed, the Guarantor would by reason of law be unable to observe any expiry provision of the relevant Guarantee, the instructions shall not be executed and the Guarantor must immediately inform the Instructing Party of the reasons for such inability and request appropriate instructions from that Instructing Party.

Article 26

Irrespective of any expiry provision contained therein, a Guarantee will be deemed to be cancelled on presentation to the Guarantor or the Confirming Guarantor of the Beneficiary's written statement of cancellation of the Guarantee, whether or not the Guarantee or any amendments thereto are returned with such statement.

Article 27

Where a Guarantee has terminated (by payment, expiry, cancellation or otherwise) retention of the Guarantee or of any amendments thereto shall not preserve any rights under the Guarantee.

Article 28

Where a Guarantee has terminated (by payment, expiry, cancellation or otherwise) or there has been a reduction of the total amount payable thereunder a Guarantor or Confirming Guarantor shall, in turn, so notify the party which gave that Guarantor or Confirming Guarantor its instructions in relation to the Guarantee.

Article 29

(a) The Guarantor or Confirming Guarantor shall not extend the validity period of a Guarantee without the approval of the Principal even if a request for extension is presented as an alternative to payment under the Guarantee.

(b) If the Beneficiary requests such an extension as an alternative to his demand for payment in accordance with the terms and conditions of the Guarantee, the Guarantor or

Confirming Guarantor shall so inform the party which gave that Guarantor or Confirming Guarantor its instructions in relation to the Guarantee and shall defer payment of the claim for such time as the Guarantor or the Confirming Guarantor shall consider reasonable to permit the Principal and the Beneficiary concerned to reach agreement on the granting of such extension. That Guarantor or Confirming Guarantor shall incur no liability (for interest or otherwise) should any payment to the Beneficiary be delayed as a result of the above-mentioned procedure.

Article 30

(a) For the purposes of this Article, a "business day" of any Guarantor or Confirming Guarantor is a day on which that Guarantor or Confirming Guarantor is, or apart from any cause specified in Article 14 would be open for guarantee operations.

(b) If, apart from the provisions of this paragraph (b), a Guarantee would expire on any other day than a business day of the Guarantor or the Confirming Guarantor, expiry of the Guarantee shall be deferred until the next following business day of that Guarantor or Confirming Guarantor respectively and expiry of any undertaking between a Guarantor or a Confirming Guarantor and an Instructing Party shall be deferred by the same number of days.

(c) In addition, in any case where there is a Confirming Guarantor and/or an Instructing Party and any undertaking between a Guarantor and a Confirming Guarantor and/or between a Guarantor or Confirming Guarantor and an Instructing Party would, apart from the provisions of this paragraph (c), expire on any other day than a business day of the Guarantor or Confirming Guarantor on whom claims may be presented under that undertaking, expiry of such undertaking shall be deferred until the next following business day of that Guarantor or Confirming Guarantor respectively. Where expiry of an undertaking is so deferred expiry of any earlier undertaking between a Guarantor and a Confirming Guarantor and/or between a Guarantor or Confirming Guarantor and an Instructing Party shall be deferred by the same number of days.

(d) In any case where a Guarantor or Confirming Guarantor invokes the provisions of this Article in relation to an undertaking as referred to above, that Guarantor or Confirming Guarantor shall be required to present a statement that a claim under a Guarantee has been made upon him on a specified day which was not a business day for him under Article 30 (b) of the Uniform Rules for Guarantees of the International Chamber of Commerce (Publication No. XXX).

I. Applicable law and jurisdiction

Article 31

Unless otherwise provided in the Guarantee the applicable law is that of the Guarantor's place of business. If the Guarantor has more than one place of business, the applicable law is that of the branch which issued the Guarantee.

Article 32

If the parties have not agreed to the jurisdiction of any specific court, then any dispute between them relating to the Guarantee shall be settled exclusively by the competent court of the country of the Guarantor's place of business or, if the Guarantor has more than one place of business, by the competent court of the country of the branch which issued the Guarantee.

II. LIABILITY OF OPERATORS OF TRANSPORT TERMINALS

A. Report of the Working Group on International Contract Practices on the work of its eleventh session (New York, 18-29 January 1988) (A/CN.9/298) [Original: English]

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INTRODUCTION

1. At its sixteenth session, in 1983, the Commission decided to include the topic of the 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 (A/38/17, para. 115).¹

2. In response to that request, UNIDROIT transmitted its preliminary draft Convention to the Commission. At its seventeenth session, the Commission assigned to the Working Group on International Contract Practices the task of formulating uniform legal rules on the liability of operators of transport terminals (A/39/17, para. 113). 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),

¹Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 17 (A/38/17).

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.

3. The Working Group commenced its work on the topic at its eighth session with a comprehensive consideration of the issues arising in connection with the liability of operators of transport terminals (A/CN.9/260). At that time it decided to settle the form that the uniform rules should take after establishing their substance and content. At its ninth session, the Working Group held an initial discussion of all 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 its future work (A/CN.9/275). At its tenth session, the Working Group considered draft articles 1 to 3 of the uniform legal rules and revised draft articles 5 to 15 and new draft articles 16 and 17 that had been prepared by the Secretariat (A/CN.9/WG.II/WP.58) and prepared texts for several of those draft articles. (A/CN.9/287).

4. The Working Group, which was composed of all States members of the Commission, held its eleventh session in New York from 18 to 29 January 1988. The session was attended by representatives of the following States members of the Working Group:

Argentina, Australia, Austria, Brazil, China, Cuba, Czechoslovakia, Egypt, France, German Democratic Republic, India, Italy, Japan, Lesotho, Libyan Arab Jamahiriya, Mexico, Netherlands, Nigeria, Spain, Sweden, Union of Soviet Socialist Republics, United States of America and Yugoslavia.

5. The session was attended by observers from the following States:

Bangladesh, Canada, Democratic People's Republic of Korea, Democratic Yemen, Ecuador, Federal Republic of Germany, Holy See, Peru, Poland, Republic of Korea, Romania, Sudan, Switzerland, Thailand, Togo, Uganda and Venezuela.

6. The session was also attended by observers from the following international organizations:

(a) *United Nations specialized agency*

United Nations Conference on Trade and Development;

(b) *Intergovernmental organizations*

Central Commission for the Navigation of the Rhine, International Institute for the Unification of Private Law (UNIDROIT), Office Central des Transports Internationaux Ferroviaires;

(c) *International non-governmental organizations*

Comité Maritime International, Institute of International Container Lessors, International Cargo Handling Co-ordination Association, International Chamber of Commerce.

7. The Working Group elected the following officers:

Chairman: Mr. Michael Joachim BONELL (Italy)

Rapporteur: Mr. Kuchibhotha VENKATRAMIAH (India).

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

(a) Provisional agenda (A/CN.9/WG.II/WP.59);

(b) Liability of operators of transport terminals: revised text of draft uniform rules on liability of operators of transport terminals based upon discussions and decisions at tenth session of Working Group (A/CN.9/WG.II/WP.60).

9. 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

10. The Working Group engaged in a review of all articles of the draft uniform rules on the liability of operators of transport terminals on the basis of document A/CN.9/WG.II/WP.60. Chapter II of the present report contains the discussion and decisions of the Working Group in the context of that review. The Working Group decided to recommend that the draft uniform rules be adopted in the form of a convention.

11. After completing its review of the draft uniform rules, the Working Group convened a drafting group to which it referred the draft uniform rules. The drafting group was requested to incorporate into the draft uniform rules the decisions taken by the Working Group and to review the draft uniform rules in order to ensure linguistic consistency within each language version and correspondence among the different language versions. The draft uniform rules as modified and submitted by the drafting group were then reviewed by the Working Group (see below, chapter IV). Upon completion of that review the Working Group approved the draft uniform rules as contained in annex I to the present report.

II. Review of the draft uniform rules on the basis of document A/CN.9/WG.II/WP.60

Article 1

Paragraph (1)

12. The Working Group discussed the words "involved in international carriage", which were within square brackets. According to one view, the words were

unnecessary since the requirement that the goods be involved in international carriage was also contained in article 2(1)(b). The prevailing view, however, was that the words should be retained and the square brackets deleted, since it was useful to emphasize that the rules applied only in respect of goods involved in international carriage.

13. A suggestion was made that the restriction of the uniform rules to operations in respect of goods involved in international carriage should be reflected in the title of the uniform rules; that suggestion was referred to the drafting group. A suggestion to change the words "to provide or to procure transport-related services" to "to perform or to procure the performance of transport-related services", in order to achieve consistency with other provisions of the uniform rules, was also referred to the drafting group.

14. It was decided to delete subparagraph (a) for the following reasons: Retaining that subparagraph would exclude from the scope of the uniform rules a significant portion of operations performed by operators, particularly operations performed at container terminals, and would thus leave a large gap in the coverage of the rules. Moreover, the dividing line between the temporary placement of goods on the ground during direct transfer, which under that subparagraph would not be covered by the uniform rules, and the storage of goods, which would be covered, was not clear and would be difficult to define. It was noted that, with the deletion of the subparagraph, stevedores would be covered by the uniform rules; although they would prefer to benefit from an extension of the liability regime applicable to carriers, it was not always possible for them to do so, and they should be able to receive comparable protection under the uniform rules. It was further observed that storage of goods was no longer the central function of a terminal operator; rather, his essential undertaking, reflected in paragraph (1), was to take goods in charge in order to perform transport-related services.

15. In favour of retaining the provision it was stated that the uniform rules should apply only when the goods were stored by the operator.

16. A question was raised as to whether the uniform rules applied when the operator accepted goods for long-term storage and did not know the ultimate destination of the goods. It was suggested that article 1(3) could assist in resolving that question.

Paragraph (2)

17. It was stated that the definition of "goods" should not include articles of transport or packaging that were owned by persons other than the shipper or the person who engaged the operator; to do so would subject those articles to the operator's rights of security in the goods under article 10, which would conflict with the rights of their owners and with international conventions or national laws governing rights of security in those articles. It was agreed that the issue should be dealt with in the context of article 10.

18. A view was expressed that vehicles used to transport goods, such as barges, railway wagons, trailers and chassis, should not be subject to the liability regime of the uniform rules, and thus should not be included in the definition of "goods". It was noted that those vehicles were in many cases subject to their own legal rules under international conventions or national laws. The liability regime under the uniform rules on the liability of operators of transport terminals was said not to be intended or suitable to deal with loss of or damage to such vehicles. For example, because the value of those vehicles was often much greater than the value of the goods carried by them, the limits of liability provided in the uniform rules for loss of or damage to goods would in many cases not be adequate to compensate for loss of or damage to the vehicles. Accordingly, the Working Group decided to follow the approach used in article 1(5) of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) (hereinafter referred to as the "Hamburg Rules")², namely, to include in the definition of "goods" articles used to consolidate or package goods, but not articles used purely to transport the goods. It was noted, however, that the distinction between the two types of articles was becoming less clear as a result of developments in transport practice and technology. In accordance with its decision, the Working Group adopted a definition of "goods" along the following lines:

"'Goods' includes a container, pallet or similar article of packaging or transport to the extent that the goods are consolidated or packaged therein and the article of packaging or transport was not supplied by the operator."

Paragraph (3)

19. Paragraph (3) was found to be acceptable. A view was expressed that the paragraph should be interpreted in such a way that, in the case of segmented transport, the term "international carriage" covered only segments in respect of which the places of departure and destination were identified as being situated in two different States. That view, however, was not accepted by the Working Group.

Paragraph (4)

20. Paragraph (4) was found to be acceptable. It was understood that the term "transport-related services" covered services that were relevant for the movement of the goods and not, for example, financial services with respect to the goods.

Paragraph (5). Form of notices and requests under uniform rules

21. The Working Group engaged in a discussion concerning the form of notices and requests under the uniform rules. The discussion focused on draft articles 1(5) and 11(1). It was understood, however, that the

²See *Final Act of the United Nations Conference on the Carriage of Goods by Sea (A/CONF.89/13)*.

discussion also related to the references to notices and requests in draft articles 5(3), 5(4), 10(3), 11(2), 11(5), 12(2), 12(4) and 12(5).

22. According to one view the uniform rules should contain, in article 1(5) or in a separate article, a general requirement as to the form of all notices and requests under the rules. Support was expressed for a proposal to amend article 1(5) to read as follows:

“‘Notice’ means a written or oral communication given pursuant to this [Law] [Convention] which is immediately preserved in a form or manner which provides a retrievable record of the information contained therein.”

23. The proposal also called for the deletion of the last sentence of article 11(1). It was explained that under the proposal any notice pursuant to the uniform rules could be given orally so long as the giver of the notice preserved a record of the notice that was retrievable whenever needed in connection with a claim under the uniform rules.

24. In opposition to the proposal it was stated that the uniform rules should permit oral notice to be given without any formalities. According to that view it should be left to each party to determine the appropriate form of notice to use in accordance with good commercial practice and to protect his interests. It was noted that the recipient of an oral notice could protect his interests by making a written acknowledgement of the notice. The sufficiency of proof that oral notice had been given was said to be a question to be resolved by a court or tribunal resolving a dispute in which the notice was relevant. It was pointed out that, under the proposal, even if there was no dispute that oral notice had been given, the notice would be of no effect if it was not preserved. It was also pointed out that the reference in the proposal only to a “written or oral communication” precluded notice from being effective if it was given by computer-to-computer communication.

25. According to another view, the uniform rules should not contain a general requirement as to the form of all notices and requests under the rules; rather, the question of form should be dealt with in connection with each individual notice and request under the rules. Thus, it was proposed that article 1(5) should be deleted. Another proposal was to delete both article 1(5) and the last sentence of article 11(1), and leave the question of the form of a notice or request to the applicable national law. In that connection, another suggestion was made that notice under article 11(1) should be given in writing.

26. In the course of the discussion the view emerged that article 1(5) should be retained in its present form since it unified in an acceptable manner the differing practices and national legal rules relating to the form of notices and that the question of whether, as an exception to that general provision, certain types of notice or request should be able to be given orally should be resolved separately. The Working Group

accepted that approach. In that connection, support was expressed for permitting notice of apparent loss or damage under article 11(1) to be given orally. The prevailing view, however, was that the notice should be subject to the general notice provision in article 1(5), since the notice was important and requiring it to be given in a form which provided a record of it would avoid the problems that would arise if the fact that the notice had been given was questioned or if the contents of the notice was uncertain.

Article 2

Paragraph (1)

27. Opposition was expressed to the present version of paragraph (1)(a) on the ground that it departed from general conflict of laws principles. Under those principles the uniform rules would apply if they were part of the law of the place where the goods were located; they also allowed parties autonomy to agree that the rules were to apply to their relationship. In addition, it was noted that there existed transport terminals that straddled the boundaries of two or more States, and that some of those States might apply the rules and others might not. In such cases neither the place where the transport-related services were performed nor the place where the goods were located provided a suitable criterion for the application of the uniform rules, since the operator could influence the application of the rules by performing the transport-related services or locating the goods in the portion of the terminal that was in the State where the operator's legal position was more favourable.

28. The Working Group decided that the Convention should apply whenever the transport-related services were performed by an operator whose place of business was located in the territory of a contracting State or whenever the rules of private international law led to the application of the law of a contracting State. The Working Group also decided to retain the requirement presently set forth in paragraph (1)(b). The drafting group was requested to draft a provision to implement those decisions, and to consider including a provision to deal with the case where an operator had more than one place of business, such as article 10 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)³ (hereinafter referred to as the “United Nations Sales Convention”).

29. It was noted that paragraph (1)(a) did not require the transport-related services to be performed in a transport terminal, which raised the question of whether the uniform rules would apply if the services were performed within the territory of the relevant State but outside a terminal. Moreover, the uniform rules did not define what was a transport terminal.

Paragraph (2)

30. It was decided to delete paragraph (2) for the following reasons. The paragraph contained a rule of

³Final Act of the United Nations Conference on Contracts for the International Sale of Goods (A/CONF.97/18).

evidence, and such matters should not be dealt with in the uniform rules. The rule was too subjective and thus inconsistent with article 1(3) and would be difficult for courts to apply. Although it was important for the operator to know whether or not the goods were involved in international carriage and therefore subject to the uniform rules, an operator who did not have such knowledge would be sufficiently protected by article 1(3). That article implicitly required a reasonable indication to the operator when he took over the goods that they were involved in international carriage and enabled him to claim that the rules did not apply in the absence of such an indication.

31. In favour of retaining paragraph (2), it was argued that the paragraph was needed in order to protect the operator who did not know that the goods were involved in international carriage; it was stated, however, that the provision should be set forth separately as a defence of the operator and not in the article dealing with the scope of application of the rules. According to a further view, the provision would protect an operator who took over and delivered goods in the domestic leg of segmented international transport, particularly in view of an uncertainty in the case of segmented transport as to what were the relevant places of departure and destination for the purpose of establishing whether the goods were involved in international carriage under article 1(3). It was pointed out, however, that article 2(2) did not help to resolve that question.

Article 3

32. A proposal was made to change the words "made them available to" to "placed them at the disposal of" in order to correspond with language used in article 4(2)(b)(ii) of the Hamburg Rules. However, that proposal was not adopted and article 3 was retained in its present form.

Article 4

33. Among the alternative wordings for the opening phrase of paragraph (1) the Working Group preferred alternative 5. That alternative obligated the operator to issue a document at the customer's request and clarified that the operator could also do so in the absence of such a request. The drafting group was requested to review the drafting of that alternative.

34. A view was expressed that the phrase "without unreasonable delay" might give rise to difficulties in interpretation, and it was suggested that a more objective phrase, such as "within a customary time period", be used instead. It was agreed, however, to retain "without unreasonable delay". It was understood that, in order to determine whether a delay was "reasonable", it would be relevant to consider the customary practice in the type of terminal in question.

Paragraph (1)(a) and (b)

35. The Working Group agreed that the operator should have a high degree of flexibility with respect to

the manner in which he acknowledged his receipt of the goods. The Working Group was of the view that the text of subparagraphs (a) and (b) allowed for such flexibility, since it enabled the operator to acknowledge his receipt of the goods by issuing a document, by signing a document produced by the customer or by making an appropriate notation on a document prepared or issued by a third party, such as a carrier. It was understood that the operator could satisfy the documentation requirement under the present text of paragraph (1) by delivering to the customer a document issued by a third party, such as a carrier, signed on behalf of the operator by the third party.

36. A suggestion was made that the operator should expressly be permitted to enter a reservation on the document signed or issued by him if he had no reasonable means of checking the goods or had grounds to question their condition or quantity. That was said to be particularly important where the operator was to sign a document prepared by the customer or make a notation on a document prepared or issued by a third party. It was understood that under the present text of subparagraph (a) the operator could enter such a reservation; thus, no further provision to that effect was necessary. It was further understood that the "reasonable means of checking" in subparagraph (b) did not require an operator to open a sealed container. The Working Group accordingly found the text of subparagraphs (a) and (b) to be acceptable, but requested the drafting group to review those subparagraphs with a view towards ensuring their suitability for electronic data-processing techniques.

Paragraph (2)

37. Paragraph (2) was found to be acceptable.

Paragraph (3)

38. Paragraph (3) was found to be acceptable. It was noted that the paragraph did not specify how long the record of the information contained in the document issued by the operator should be preserved.

Paragraph (4)

39. The Working Group decided to delete the first sentence of paragraph (4) as unnecessary. The second sentence of paragraph (4) was found to be acceptable. It was understood that, if the operator did not sign the document as required, article 4(2) would apply.

Paragraph (5)

40. A suggestion was made that paragraph (5) might be more useful if it were modified to make it clear that the absence from the document of information required in paragraph (1) did not affect the existence or the validity of the contract between the operator and the customer. It was noted that a comparable provision appeared in the Convention for the Unification of Certain Rules relating to International Carriage by Air (Warsaw, 1929). In opposition to the suggestion it was

noted that the document required under the Warsaw Convention played a more central role in the liability scheme of that Convention than did the document under the present uniform rules. Such a provision was therefore regarded as unnecessary. Accordingly, the suggestion was not adopted and paragraph (5) was deleted.

Article 5

Paragraphs (1) and (2)

41. Paragraphs (1) and (2) were found to be acceptable.

Paragraphs (3) and (4)

42. A view was expressed that the person entitled to receive goods should be able to make the request under paragraphs (3) or (4) for handing over the goods in any form he considered appropriate and sufficient to protect his interests, including orally. According to another view, the request should be required to be made in a form which provided a retrievable record of the request. In accordance with its discussion and decision concerning the form of notices and requests under the uniform rules (see paragraphs 21 to 26, above), the Working Group decided to retain paragraphs (3) and (4) in their present form.

43. The Working Group decided that the period of time referred to in paragraph (4) should be 30 days.

Article 6

Paragraph (1)

44. The approach contained in paragraph (1) was found to be acceptable. A view was expressed that the amounts of the limits set forth within square brackets were too low; according to another view, however, they were satisfactory. The Working Group decided to retain the square brackets around those amounts so that the forum that was to adopt the rules as a convention or as a model law could consider them further.

45. A view was expressed that if the uniform rules were adopted as a convention a reservation should be permitted whereby a contracting State could apply higher limits to air terminals. According to a further view a reservation should be permitted whereby a contracting State could apply the convention only to sea terminals. The Working Group returned to the question of reservations after it had reached its decision with respect to the form in which the uniform rules should be adopted (see paragraph 96, below).

Limitation based on number of packages or shipping units

46. A proposal was made to reintroduce an alternative limit of liability based on the number of packages or shipping units, which had been deleted by the Working Group at its tenth session. In support of the proposal it was stated that, in particular with respect to goods of

high value, which were often transported in containers, the limits based on weight would in many cases be considerably below the actual value of the goods. Reference was also made to the respective provisions in the Hamburg Rules and in the United Nations Convention on International Multimodal Transport of Goods (hereinafter referred to as the "Multimodal Convention").⁴ It was noted, however, that the application of limits based on the number of packages or shipping units had given rise to problems in practice. It was also noted that the reintroduction of such limits would require further provisions with respect to the document to be issued by the operator. The Working Group decided not to alter its previous decision to delete the limits based on the number of packages or shipping units, but recommended that when the uniform rules were circulated for comments Governments should consider the question of whether such limits should be reintroduced.

Paragraph (2)

47. Paragraph (2) was found to be acceptable. It was noted that in a situation where the operator rendered his services free of charge, such as in the case of a public facility in which incoming or outgoing cargo was required by law to be deposited, it might not be possible to calculate a limit of liability under paragraph (2). It was stated, however, that such cases, which were rare, could be resolved by courts through appropriate construction.

Paragraphs (3) and (4)

48. Paragraphs (3) and (4) were found to be acceptable.

Article 7

Paragraphs (1) and (3)

49. Paragraphs (1) and (3) were found to be acceptable.

Paragraph (2)

50. The drafting group was requested to review the wording "if he proves that he acted in the performance of the services for which he was engaged by the operator" so as to avoid an unintended implication that the liable person would be deprived of the defences and limits of liability in the case of a minor deviation in the performance of the services required of him by the operator.

Article 8

Paragraph (1)

51. Differing views were expressed as to the circumstances in which the operator should lose the benefit of the limits of liability under the uniform rules. One view was that the operator should lose that benefit only in the case of his own intentional or reckless conduct, and not in the case of such conduct by his

⁴TD/MT/CONF/16.

employees or other persons engaged by him. It was therefore proposed that the words "or his servants" should be deleted from paragraph (1). The following reasons were advanced in support of that view. Relatively unbreakable limits enabled insurers to assess their risks more accurately and resulted in lower insurance costs than if the limits were more breakable. It was more economically efficient for the risk of loss or damage in excess of the limits of liability to be insured by the customer than by the operator. Since a significant proportion of loss of or damage to goods occurred due to the intentional or reckless acts of employees or other persons engaged by the operator, enabling the limits to be broken in cases of such acts would significantly broaden the exposure of the operator to unlimited liability, which would render the uniform rules unattractive. It was also pointed out that the operator should lose the limits only in the case of his own intentional or reckless acts, i.e. acts of his employees that were authorized or in the scope of their duties. It should be a matter for the shipper or owner of the goods to insure against other risks if there was a possibility of loss greater than the specified limits. It was also noted that under article 8(1) of the Hamburg Rules a carrier lost the benefit of the limits of liability only in the case of his own intentional or reckless acts.

52. A second view was that the operator should lose the benefit of the limits of liability not only in the case of his own intentional or reckless acts, but also in the case of such acts by his employees and other persons engaged by him. The following reasons were advanced in support of that view. Under article 8(2) the liability of employees or other persons engaged by the operator for loss, damage or delay resulting from their intentional or reckless acts was unlimited; however, those persons often did not have the financial resources or insurance to cover that liability, and the operator should be fully liable for the loss, damage or delay. The limits of liability contained in article 6 were low; thus the ability of a claimant to recover in excess of those limits should be broadened. The approach used in the Hamburg Rules should not be adopted in the uniform rules, since the Hamburg Rules approach was part of a package of compromises centring around the elimination of the nautical-fault defence of the carrier. A provision whereby the operator would lose the benefit of the limits of liability only in the case of his own intentional or reckless acts would be of little effect, since an operator was usually a legal entity that could act only through its authorized personnel.

53. Since neither of the foregoing views prevailed, the Working Group retained the compromise approach presently contained in paragraph (1), under which the operator lost the benefits of the limits of liability in the case of his own intentional and reckless acts as well as those of his employees, but not in the case of such acts committed by other persons engaged by him. In retaining that approach, the Working Group emphasized that it was desirable for Governments in examining paragraph (1) to consider the underlying policy question of the extent to which the limits of liability of the operator should be breakable.

54. In order to achieve consistency with paragraph (2), the Working Group agreed to change the words "or his servants" in paragraph (1) to "or his servants or agents". It was understood that the phrase "servants or agents" referred to employees of the operator and did not include independent contractors engaged by him.

55. A proposal was made to add at the end of paragraph (1) the following:

"provided that in the case of such act or omission of a servant or agent it is also proved that he was acting within the scope of his employment."

56. In support of that addition it was said to be unjustifiable to deprive an operator of the benefit of the limits of liability if the intentional or reckless acts of his servants or agents were committed outside the scope of their employment. The addition corresponded with the approach followed in the Protocol to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929 (The Hague, 1955).

57. In opposition, it was stated that the addition was not necessary, since all references in the uniform rules to acts of servants or agents of the operator implicitly contained the proviso that those acts should be within the course of the servants' or agents' employment. According to a contrary view, however, that was not implicit in respect of all references to acts of servants or agents of the operator, and it was therefore necessary to include the proviso expressly in paragraph (1). In that connection, it was said to be dangerously and undesirably ambiguous in article 5(1) whether the reasonable measures which servants, agents or other persons engaged by the operator had to take in order for the operator to avoid liability referred only to measures within the scope of the servants' or agents' employment. In the light of the differing views concerning the proposed addition to paragraph (1), the proposal was not accepted.

Paragraph (2)

58. Paragraph (2) was found to be acceptable.

Article 9

59. The drafting group was requested to find more suitable language than "any applicable international, national or other rule of law" to express the requirement that the goods should be marked, labelled, packaged or documented in accordance with any applicable legal requirement. Apart from that request, article 9 was found to be acceptable.

Article 10

Paragraphs (1) and (2)

60. Paragraphs (1) and (2) were found to be acceptable.

Paragraph (3)

61. A view was expressed that paragraph (3) should serve only as a reminder to the operator that the right to sell goods retained by him pursuant to paragraph (1) depended upon the applicable law and that the paragraph should not change the rules relating to the right of sale under the applicable law.

62. Objections were raised to the designation of the law of the place where the transport-related services were performed as the law applicable to the right of sale of the goods. A view was expressed that paragraph (3) should designate the law of the State where the goods were located, since conflict of laws rules in most legal systems would normally point to that law as the applicable law. It was said to be inappropriate to require a court in the State where the goods were located to refer to the law of the State where the transport-related services were performed in adjudicating the existence of a right of sale or the consequences of a sale. According to a further view, paragraph (3) should simply refer to the "applicable law".

63. The decision of the Working Group was to designate as the applicable law in paragraph (3) the law of the State where the operator had his place of business. It was noted that some transport terminals straddled the boundaries between two or more States and making the exercise of the right of sale subject to the law of the place where the goods were located might encourage the operator to place the goods in a section of the terminal that was located in the State having the most favourable laws concerning the right of sale. In addition, designating the law of the State where the operator had his place of business would be consistent with the decision taken by the Working Group in connection with article 2(1)(a). It was observed, however, that the result of the decision to designate the law of the State where the operator had his place of business would be to create a right of sale in cases where the operator was permitted to sell the goods under that law but would not have been permitted to do so under the law of the place where the goods were located.

64. A proposal was made to exclude from the provisions concerning the right of sale containers and similar articles of packaging or transport that were clearly marked and were owned by a party other than the carrier or the shipper, since the sale of those containers or articles would infringe upon the rights of their owners. A further proposal was to exclude not only containers and similar articles, but also any other goods that were owned by a third party. In opposition to the proposals it was stated that paragraph (3) in its present form was sufficient to protect third-party owners of the containers, articles or goods, since the operator would be able to sell them only when permitted to do so by the applicable law, and subject to the notice and accounting requirements that were provided in paragraph (3) and other safeguards under the applicable law. To exclude the containers or similar articles or goods from the right of sale could conflict with rules in

some legal systems that permitted the sale of those items under certain conditions. The decision of the Working Group was to exclude from the provisions concerning the right of sale the containers and similar articles of packaging or transport mentioned above, and the drafting group was requested to effect the exclusion in paragraph (3).

65. It was generally agreed that the substance of the second and third sentences of the paragraph relating to notice of the intended sale and accounting for the proceeds of the sale should be retained, since they provided minimum safeguards. According to another opinion, however, a legal system that provided a right of sale would also contain rules concerning notice and accounting for the proceeds of the sale; thus, paragraph (3) should merely refer to the applicable law with respect to those matters.

66. The decision of the Working Group was to request the drafting group to redraft paragraph (3) taking into account the decisions reflected in the foregoing paragraphs.

Article 11

67. It was noted that parties might in some situations consider the time periods provided in article 11 to be too short. It was understood that the parties might agree to longer time periods within the limits of article 13 (2).

Paragraph (1)

68. The Working Group considered the last sentence of paragraph (1) in connection with its discussion of the form of notices and requests under the uniform rules (see paragraphs 21 to 26, above). In other respects paragraph (1) was found to be acceptable.

Paragraph (2)

69. It was stated that the expression "final destination" was ambiguous. For example, in the case of containerized goods it was unclear whether "final destination" referred to an inland container depot where the container was retained after the goods were unloaded or to the consignee of the goods. It was understood that the term intended to refer to the final recipient of the goods who would be in a position to inspect them. The drafting group was requested to clarify that point. A proposal to delete the 7-day notice period and to retain only the 45-day period was not adopted.

Paragraphs (3) and (4)

70. The paragraphs were found to be acceptable.

Paragraph (5)

71. An observation was made that the time period of 21 days might be too long. The Working Group, however, found paragraph (5) to be acceptable.

Article 12

Paragraph (1)

72. A question was raised as to when juridical or arbitral proceedings were "instituted" for the purpose of the time-bar under paragraph (1). It was understood that the word "instituted" referred to the time when the proceedings were legally considered to have come into being, which depended on the applicable legal system. Paragraph (1) was found to be acceptable.

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

73. The paragraphs were found to be acceptable.

Paragraph (5)

74. It was noted that paragraph (5) in its present form differed from article 20(5) of the Hamburg Rules. A proposal was made to amend the paragraph so as to enable a carrier or other person to institute a recourse action against an operator not only within an additional 90-day period from the time when the carrier or other person had been held liable in an action against himself or had settled a claim upon which such an action had been based, but also within a 90-day period after settling a claim even if no action had been brought against him. According to an opposing view, the two-year limitation period should be permitted only if an action had been brought against the person settling the claim, and not if he had settled the claim voluntarily without an action having been brought against him. The Working Group decided to retain paragraph (5) in its present form.

Article 13

75. Article 13 was found to be acceptable.

Article 14

76. It was generally agreed that the interpretation provision contained in article 7 (1) of the United Nations Sales Convention was preferable to article 14 in its present form, and the drafting group was requested to reformulate article 14 to correspond with that provision. According to an opposing view, however, that provision was too complex and contained terms, such as "good faith", that were difficult to apply in practice.

Article 15

77. It was generally agreed that the words within square brackets, "or any law of [this State] [such State] relating to the international carriage of goods" should be changed so as to subordinate the uniform rules only to national laws giving effect to a convention relating to the international carriage of goods, and not to other national laws relating to the international carriage of goods. The drafting group was requested to implement that decision with appropriate language.

Article 16

78. The Working Group found the version of article 16 for inclusion in a convention to be acceptable.

Article 17

Paragraphs (1), (4), (6), (7) and (8)

79. The paragraphs were found to be acceptable. It was understood that the word "adopted" in paragraph (1)(b) referred to the time when the revision was adopted by the relevant revision conference or committee. The Working Group considered that the final determination as to which international transport conventions should be specified in paragraph (1)(b) should be made by the forum that would finalize and adopt the uniform rules, taking into account the conventions then in existence.

Paragraph (2)

80. The text of paragraph (2) was found to be acceptable. It was noted that, for reasons of cost and efficiency, it was desirable for the meeting of the revision committee to take place on the occasion and at the location of a session of the Commission.

Paragraph (3)

81. A proposal was made to delete subparagraphs (c) and (f) and the reference in subparagraph (d) to insurance covering job-related injuries to workmen, on the ground that an increase in the costs mentioned in those provisions should not be regarded as factors that might give rise to an increase in the limits of liability. The prevailing view, however, was that since an increase in those costs might be thought to justify a reduction in the limits of liability the provisions should be retained. Various suggestions to improve the drafting of paragraph (3) were referred to the drafting group.

Paragraph (5)

82. A proposal was made to add to paragraph (5) the further restriction that no revision of the limits of liability subsequent to the first revision may be considered less than five years from the adoption of the previous revision. The proposal was said to promote stability in the limits of liability. The proposal was not adopted since there might be cases where a revision of the limits would be desirable before a five-year period had expired. It was observed that States would not abuse the revision procedure by calling for a meeting of the committee more frequently than was necessary.

Proposed additional provision

83. It was proposed to add an additional provision to article 17 according to which, in the case of a revision of a limit of liability, the applicable limit would be that which was in effect on the date of the occurrence that caused the loss, damage or delay. The proposal was based on article 42 of the Protocol to Amend the

Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocol done at The Hague on 18 September 1955 (Guatemala, 1971). The view was expressed that it was preferable for such a provision to appear in article 6. The drafting group was requested to formulate a provision in accordance with the proposal so that the Working Group could consider the question further.

III. Form of the uniform rules

84. The Working Group generally agreed to recommend to the Commission that the uniform rules should be adopted in the form of a convention. It was stated that uniformity of law in the area would be better and more completely achieved by means of a convention than by a model law. It was noted that the law relating to the international transport of goods was for the most part contained in international transport conventions. In order effectively to integrate within that scheme and to fill the gaps in the law left by those conventions, it was said to be preferable for the uniform rules to be adopted in the form of a convention.

85. A view was expressed that adoption of the rules as a convention at the present time would be premature, since a link existed between the uniform rules on the one hand and, on the other hand, the Hamburg Rules and the Multimodal Convention, which were not yet in force. According to that view, it was preferable for the time being to adopt the uniform rules in the form of a model law, particularly since the activities of terminal operators were still subject to rapid changes and new developments. It was also noted that a model law might lead to quicker harmonization of law in that area than a convention. However, those who expressed support for a model law did not object in principle to adopting the rules in the form of a convention, and they stressed that their preference did not result from a less than positive attitude towards the content of the uniform rules.

86. The Working Group noted that, in considering its recommendation that the uniform rules should be adopted in the form of a convention, the Commission might wish to consider the financial implications of possible procedures to adopt the convention. It was agreed that the question of whether or not reservations to the convention should be permitted and, if so, whether the question should be dealt with specifically or as a matter of general principle, should be left for consideration by the Commission in connection with its formulation of final clauses of the convention.

IV. Consideration of title and articles of draft convention submitted by drafting group

87. The following paragraphs reflect modifications made by the Working Group 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 title of the draft Convention and the text of the draft articles submitted by the drafting group are as set forth in annex I to this report.

Article 1

88. The Working Group approved the article as submitted by the drafting group. It was noted that the definitions of "notice" and "request" in subparagraphs (e) and (f) related only to notices and requests specifically provided for in the Convention and that the opening words of article 1, "In the text of this Convention", were intended to eliminate any ambiguity as to that point.

Article 2

Paragraphs (1) and (3)

89. The Working Group approved the paragraphs as submitted by the drafting group.

Paragraph (2)

90. A suggestion was made to delete paragraph (2). It was stated that, in contrast to the international sale of goods, the question dealt with by that paragraph was not of significant practical importance with respect to the activities carried out by terminal operators. Moreover, the reference to "transport-related services as a whole" was said not to be sufficiently clear. The Working Group, however, approved paragraph (2) as submitted by the drafting group.

Articles 3 and 4

91. The Working Group approved articles 3 and 4 as submitted by the drafting group.

Article 5

Paragraphs (1), (2) and (3)

92. The Working Group approved the paragraphs as submitted by the drafting group.

Paragraph (4)

93. The paragraph submitted by the drafting group concluded with the words, "within a period of 30 consecutive days after the request of such person, the goods may be treated as lost." It was observed that the wording did not resolve the question whether the time period commenced with the dispatch of a request for the delivery of the goods or with receipt of the request by the operator. Noting that an analogous question had been resolved in paragraph (3) by reference to the receipt of the request by the operator, the Working Group decided to adopt the same approach in paragraph (4).

Article 6

94. Article 6 as submitted by the drafting group contained, within square brackets, a paragraph (5) as follows:

“[(5) The limits of liability under paragraphs (1) and (2) are the limits in force on the date of the occurrence pursuant to the provisions of article 17.]”

95. In connection with its discussion of article 17 the Working Group decided not to retain paragraph (5) (see paragraph 116, below). In other respects the Working Group approved article 6 as submitted by the drafting group.

96. The Working Group returned to the question of reservations under the draft Convention that had been raised in connection with article 6 (see paragraph 45, above). The decision of the Working Group was that the question of whether the draft Convention should contain a provision dealing with reservations and, if so, the content of such a provision, should be left for consideration by the Commission in connection with its formulation of final clauses of the draft Convention. It was agreed that, for the present, the draft Convention should include a footnote clarifying that the establishment of preambular and final clauses, including the question of reservations, had been left to the Commission.

97. A view was expressed that it might be desirable for the draft Convention to establish an overall limit to the liability of the operator to cover all claims arising from a single catastrophic event. It was understood that Governments could consider that question when the draft Convention had been circulated for comments.

Articles 7, 8 and 9

98. The Working Group approved the articles as submitted by the drafting group.

*Article 10**Paragraph (1)*

99. The Working Group approved the paragraph as submitted by the drafting group.

Paragraph (2)

100. It was understood that the words “official institution” referred to an official institution that customarily acted as depository for the sum referred to in the paragraph, such as the office of the clerk of a court.

101. In paragraph (2) as submitted by the drafting group the words “the State where the operator has his place of business” were placed within square brackets. A proposal was made to delete the words, since the requirement that the depository be an official institution was sufficient protection for the parties. It was also stated that including the words might give rise to

problems in connection with laws regulating the transfer of funds from one country to another. The prevailing view, however, was to retain the words and to remove the square brackets. In support of that view it was stated that an operator would normally have a right to be paid at his place of business; therefore, the sum securing his payment should be deposited in the State where he had his place of business. The understanding of the Working Group was that the words in question applied only to the deposit of a sum with an official institution, and not to the deposit of the sum with a mutually accepted third party.

Paragraph (3)

102. The paragraph as submitted by the drafting group was contained within square brackets, which the Working Group decided to remove.

103. The second sentence of the paragraph as submitted by the drafting group read, “The preceding sentence does not apply to containers which are owned by a party other than the carrier or the shipper and which are clearly marked as regards ownership.” It was generally agreed that the exclusion of those containers from the right of sale should not apply to containers that the operator repaired or serviced for the owner and in respect of which charges were due to the operator. Therefore, the Working Group agreed to add to the second sentence the words, “except in respect of repairs of or improvements to the containers by the operator”. It was understood that the second sentence related only to the right of sale mentioned in the first sentence, and not to the right of retention provided in paragraph (1). In other respects the Working Group approved the paragraph as submitted by the drafting group.

Paragraph (4)

104. A view was expressed that it was preferable for certain procedural aspects of the sale to be governed by the law of the place where the goods were located. The Working Group approved the paragraph as submitted by the drafting group.

Article 11

105. The Working Group approved the article as submitted by the drafting group.

Article 12

106. The Working Group approved the article as submitted by the drafting group. It was noted that the requirement that the declaration mentioned in paragraph (4) be made in writing corresponded with article 22(2) of the Convention on the Limitation Period in the International Sale of Goods (New York, 1974).⁵

⁵Final Act of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods (A/CONF.63/14 and Corr.1).

Article 13

107. The Working Group approved the article as submitted by the drafting group.

Article 14

108. The article as submitted by the drafting group contained two alternative formulations. The first alternative used the wording of article 7(1) of the United Nations Sales Convention; the second alternative used the wording of article 3 of the Hamburg Rules. It was noted that the United Nations Sales Convention formulation contained a reference to the observance of good faith in international trade that was not contained in the Hamburg Rules formulation. The concept of the Working Group was in principle to follow the Hamburg Rules approach, since the present draft Convention was, like the Hamburg Rules, within the field of international transport of goods. It was stated that the observance of good faith in international trade was an implicit requirement in international commercial relations, and thus did not have to be specifically expressed in the draft Convention. In opposition, it was stated that the United Nations Sales Convention formulation would better promote uniformity; moreover, the considerations that had led the Commission to adopt that formulation should lead it to adopt the same formulation in the present draft Convention.

109. In formulating the wording of article 14 the Working Group decided to adopt the wording of the United Nations Sales Convention, omitting the reference to the observance of good faith. It was understood, however, that the omission was not to be regarded as a diminished view, in the present context, of the role and importance of good faith in international trade.

Article 15

110. In the article as submitted by the drafting group the words "or under any law of such State giving effect to or derived from a convention relating to the international carriage of goods" were contained within square brackets. It was noted that the words repeated the substance of the second sentence of article 1(a). As reflected in article 1(a), the draft Convention was not intended to interfere with other international transport conventions. The bracketed wording had been proposed in order to deal with problems arising from the manner in which the provisions of international transport conventions were adopted in some legal systems.

111. The words "giving effect" referred to legislation in some countries by which international transport conventions to which those countries were a party were implemented. The words "derived from" referred to laws in other countries derived from and corresponding with the provisions of international transport conventions to which the country had not become a party. A proposal was made to delete the words "derived from" because they could raise questions as to whether or not a national law was "derived from" an international

transport convention and thus produce uncertainty as to whether or not the draft Convention was subordinate to such a law. The prevailing view, however, was to retain the words "derived from".

112. The Working Group decided to remove the square brackets around the words in article 15 and otherwise to approve the article as submitted by the drafting group. A view was expressed that the words in question should be given further attention by Governments when the draft Convention was circulated to them for comments.

Article 16

113. The Working Group approved the article as submitted by the drafting group.

Article 17

114. The Working Group requested the Secretariat to prepare and annex to the present report a tentative list of international transport conventions that might be included in paragraph (1)(b).

115. Paragraph (9) as submitted by the drafting group was contained within square brackets. The Working Group decided to retain the paragraph as formulated by the drafting group, and to remove the square brackets. In other respects, article 17 was approved as submitted by the drafting group.

116. In connection with its consideration of paragraph (9), the Working Group considered that paragraph (5) of article 6, which had been placed within square brackets by the drafting group, should not be retained.

V. Other business

117. The Working Group noted that, in approving the draft Convention on the Liability of Operators of Transport Terminals in International Trade, it had completed the task entrusted to it by the Commission.

118. A representative of the secretariat of the United Nations Conference on Trade and Development (UNCTAD) reported to the Working Group on the close substantive co-operation that existed between UNCTAD and the Commission in connection with the preparation of the draft Convention on the Liability of Operators of Transport Terminals in International Trade. In particular, UNCTAD had pursued its work on the economic and commercial aspects of transport terminal operator management as a complement to the essential task being performed by the Working Group. A new report on commercial risk factors in container terminal management had been prepared by the UNCTAD Shipping Division. The Working Group took note with satisfaction of the remarks of the representative of the UNCTAD secretariat.

ANNEX I

[Original: Arabic, Chinese, English, French, Russian and Spanish]

DRAFT CONVENTION ON LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE
AS PREPARED BY THE WORKING GROUP ON INTERNATIONAL CONTRACT PRACTICES^a*Article 1**Definitions*

In the text of this Convention:

(a) "Operator of a transport terminal" (hereinafter referred to as "operator") means a person who, in the course of his business, undertakes to take in charge goods involved in international carriage in order to perform or to procure the performance of 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 to the extent that he is responsible for the goods as a carrier or multimodal transport operator under applicable rules of law governing carriage;

(b) "Goods" includes a container, pallet or similar article of packaging or transport if the goods are consolidated or packaged therein and the article of packaging or transport was not supplied by the operator;

(c) "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;

(d) "Transport-related services" includes such services as storage, warehousing, loading, unloading, stowage, trimming, dunnaging and lashing;

(e) "Notice" means a notice given in a form which provides a record of the information contained therein;

(f) "Request" means a request made in a form which provides a record of the information contained therein.

*Article 2**Scope of application*

(1) This Convention applies to transport-related services performed in relation to goods which are involved in international carriage:

(a) When the transport-related services are performed by an operator whose place of business is located in a contracting State, or

(b) When, according to the rules of private international law, the transport-related services are governed by the law of a contracting State.

(2) If the operator has more than one place of business, the place of business is that which has the closest relationship to the transport-related services as a whole.

(3) If the operator does not have a place of business, reference is to be made to the operator's habitual residence.

*Article 3**Period of responsibility*

The operator shall be responsible for the goods from the time he has taken them in charge until the time he has handed

^aThe establishment of preambular and final clauses of the draft Convention, including the question of clauses pertaining to reservations, has been left for consideration by the Commission.

them over or made them available to the person entitled to take delivery of them.

*Article 4**Issuance of document*

(1) The operator may, and at the customer's request shall, without unreasonable delay, either:

(a) Acknowledge his receipt of the goods by signing a document produced by the customer identifying the goods and stating their condition and quantity, or

(b) Issue a signed document acknowledging his receipt of the goods and the date thereof, and stating their condition and quantity in so far as they can be ascertained by reasonable means of checking.

(2) If the operator fails to act in accordance with either subparagraph (a) or (b) of paragraph (1), he is rebuttably presumed to have received the goods in apparently good condition.

(3) The document referred to in subparagraph (b) of paragraph (1) may be issued in any form which preserves a record of the information contained therein.

(4) The signature on the document under paragraph (1) may be in handwriting, printed, in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means.

*Article 5**Basis of liability*

(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, 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, unless he proves that he, his servants, agents or other persons of whose services the operator makes use for the performance of the transport-related services took all measures that could reasonably be required to avoid the occurrence and its consequences.

(2) 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 transport-related services to take the measures referred to in paragraph (1) 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.

(3) Delay in handing over the goods occurs when the operator fails to hand them over or make them available to a person entitled to take delivery of them, within the time expressly agreed upon or, in the absence of such agreement, within a reasonable time after receiving a request for the goods by such person.

(4) If the operator fails to hand over the goods or make them available to a person entitled to take delivery of them within a period of 30 consecutive days after the date agreed upon or, in the absence of such agreement, within a period of 30 consecutive days after receiving a request for the goods by such person, the goods may be treated as lost.

Article 6

Limits of liability

(1) The liability of the operator for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount not exceeding [2.75] units of account per kilogram of gross weight of the goods lost or damaged. However, if the goods are involved in international carriage which does not, according to the contracts 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 kilogram of gross weight of the goods lost or damaged.

(2) The liability of the operator for delay in handing over the goods according to the provisions of article 5 is limited to an amount equivalent to two and a half times the charges payable to the operator for his services in respect of the goods delayed, but not exceeding the total of such charges in respect of the consignment of which the goods were a part.

(3) In no case shall the aggregate liability of the operator under both paragraphs (1) and (2) 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) The operator may agree to limits of liability exceeding those provided for in paragraphs (1), (2) and (3).

Article 7

Application to non-contractual claims

(1) The defences and limits of liability provided for in this Convention apply in any action against the operator in respect of loss of or damage to the goods, as well as delay in handing over the 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 transport-related services, such servant, agent or person, if he proves that he acted within the scope of his employment or engagement by the operator, is entitled to avail himself of the defences and limits of liability which the operator is entitled to invoke under this Convention.

(3) Except as provided in article 8, the aggregate of the amounts recoverable from the operator and from any servant, agent or person referred to in the preceding paragraph shall not exceed the limits of liability provided for in this Convention.

Article 8

Loss of right to limit liability

(1) The operator is not entitled to the benefit of the limit of liability provided for in article 6 if it is proved that the loss, damage or delay resulted from an act or omission of the operator himself or his servants or agents 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, a servant or agent of the operator or another person of whose services the operator makes use for the performance of the transport-related services is not entitled to the benefit of the limit of liability provided for in article 6 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.

Article 9

Special rules on dangerous goods

If dangerous goods are handed over to an operator without being marked, labelled, packaged or documented in accordance with any applicable 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 imminent 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 reimbursement for all costs to the operator of taking the measures referred to in subparagraph (a).

Article 10

Rights of security in goods

(1) The operator has a right of retention over the goods for costs and claims relating to the transport-related services performed by him in respect of the goods during the period of his responsibility for them. However, nothing in this Convention shall affect the validity under any applicable law of any contractual arrangements extending the operator's security in the goods.

(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 the State where the operator has his place of business.

(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 for in this article to the extent permitted by the law of the State where the operator has his place of business. The preceding sentence does not apply to containers which are owned by a party other than the carrier or the shipper and which are clearly marked as regards ownership except in respect of repairs or of improvements to the containers by the operator.

(4) 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 take delivery of 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 State where the operator has his place of business.

Article 11*Notice of loss, damage or delay*

(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 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 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.

(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 of or damage to the goods, 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 21 consecutive days after the day when the goods were handed over to the person entitled to take delivery of them.

Article 12*Limitation of actions*

(1) Any action under this 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.

(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 against the operator may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs if it is instituted within 90 days after the carrier or other person has been held liable in an action against himself or has settled the claim upon which such action was based and if, within a reasonable period of time after the filing of a claim against a carrier or other person that may result in a recourse action against the operator, notice of the filing of such a claim has been given to the operator.

Article 13*Contractual stipulations*

(1) Unless otherwise provided in this Convention, any stipulation in a contract concluded by an operator or in any document signed or issued by the operator pursuant to article 4 is null and void to the extent that it derogates, directly or indirectly, from the provisions of this 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 the preceding paragraph, the operator may agree to increase his responsibilities and obligations under this Convention.

Article 14*Interpretation of the convention*

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.

Article 15*International transport conventions*

This 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 a State which is a party to this Convention or under any law of such State giving effect to or derived from a convention relating to the international carriage of goods.

Article 16*Unit of account*

(1) The unit of account referred to in article 6 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 judgement 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 operation 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 the preceding paragraph 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 liability*

(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 one quarter of the contracting States, or

(b) When an amendment of a limit of liability in respect of loss, damage or delay of goods set forth in one of the Conventions hereinafter named is adopted. The Conventions are:^b

(2) The meeting of the Committee shall take place on the occasion and at the location of the session of the United Nations Commission on International Trade Law immediately following the event giving rise to the convocation of the meeting.

(3) In determining whether the limits should be amended, and if so, by what amount, the following criteria, determined on an international basis, and any other criteria considered to be relevant, shall be taken into consideration:

(a) The amount by which the limits of liability in a convention referred to in paragraph (1)(b) have been amended;

(b) The value of goods handled by operators;

(c) The cost of transport-related services;

(d) Insurance rates, including, *inter alia*, cargo insurance, liability insurance for operators and insurance covering job-related injuries to workmen;

(e) The average level of damages awarded against operators for loss of or damage to goods or delay in handing over goods; and

(f) The costs of electricity, fuel and other utilities.

(4) Amendments shall be adopted by the Committee by a two-thirds majority of its members present and voting.

^bA list prepared by the UNCITRAL secretariat of international transport conventions that might be included in this subparagraph is contained in annex II to the present report.

(5) No amendment of the limits of liability under this article may be considered less than five years from the date on which this Convention was opened for signature.

(6) Any amendment adopted in accordance with paragraph (4) 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 18 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 18 months after its acceptance.

(7) 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.

(8) When an amendment has been adopted in accordance with paragraph (4) but the 18-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 after that period shall be bound by any amendment which has been accepted in accordance with paragraph (6).

(9) The applicable limit shall be that which, in accordance with the preceding paragraphs, is in effect on the date of the occurrence which caused the loss, damage or delay.

ANNEX II

INTERNATIONAL TRANSPORT CONVENTIONS FOR POSSIBLE INCLUSION IN ARTICLE 17(1)(b) OF DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE

I. Air Transport

— Convention for the Unification of Certain Rules relating to International Carriage by Air (Warsaw, 1929);

— Protocol to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929 (The Hague, 1955);

— Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules relating to International Carriage by Air Performed by a Person other than the Contracting Carrier (Guadalajara, 1961);

— Protocol to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocol done at The Hague on 18 September 1955 (Guatemala, 1971);

— Additional Protocol No. 1 to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929 (Montreal, 1975);

— Additional Protocol No. 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October as Amended by the Protocol done at The Hague on 28 September 1955 (Montreal, 1975);

— Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October as Amended by the Protocols done at The Hague on 28 September 1955 and at Guatemala City on 8 March 1971 (Montreal, 1975);

— Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocol done at The Hague on 28 September 1955 (Montreal, 1975);

II. Maritime Transport

— International Convention for the Unification of Certain Rules relating to Bills of Lading (Brussels, 1924);

— Protocol to Amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed at Brussels on 25 August 1924 (Brussels, 1968);

— Protocol Amending the International Convention for the Unification of Certain Rules relating to Bills of Lading of 25 August 1924, as amended by the Protocol of 23 February 1968 (Brussels, 1979);

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

III. Multimodal Transport

— United Nations Convention on International Multimodal Transport of Goods (Geneva, 1980);

IV. Rail Transport

— Accord Concernant le Transport International des Marchandises par Chemins de Fer (SMGS) (1966);

— Convention Concerning International Carriage by Rail (COTIF) (1980);

V. Road Transport

— Convention on the Contract for the International Carriage of Goods by Road (CMR) (Geneva, 1956);

— Protocol to the Convention on the Contract for the International Carriage of Goods by Road (CMR), Geneva, 1956 (Geneva, 1978).

**B. Liability of operators of transport terminals:
revised text of draft uniform rules on liability of operators of transport terminals
based upon discussions and decisions at tenth session of Working Group:
note by the Secretariat (A/CN.9/WG.II/WP.60) [Original: English]**

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INTRODUCTION

1. At its tenth session (1-12 December 1986), the Working Group on International Contract Practices considered draft articles 5 to 17 of uniform rules on the liability of operators of transport terminals on the basis of texts that had been prepared by the secretariat

(A/CN.9/WG.II/WP.58). The Working Group also considered draft articles 1 to 3, for which texts had been prepared by the Working Group at its ninth session (A/CN.9/275, paragraphs 16 to 45). The Working Group did not have time to consider draft article 4. The report of the Working Group on the work of its tenth session is contained in A/CN.9/287.

2. The present document contains revisions of draft articles 1 to 3 and 5 to 16 on the basis of discussions and decisions by the Working Group at its tenth session. Draft article 4 as prepared by the Working Group at its ninth session and the notes adopted by the Working Group for guidance in consideration of that draft article (A/CN.9/275, paragraph 58) are also set forth. The changes made in the present text to the language of draft articles 1 to 3 as set forth in A/CN.9/287 and draft articles 5 to 16 as set forth in A/CN.9/WG.II/WP.58 are indicated in the footnotes to the present text. For reasons given in footnote 36, below, the procedure for revising the limits of liability cannot be implemented in the precise manner tentatively agreed to by the Working Group at its tenth session; accordingly, draft article 17 has been reformulated so as to conform as closely as possible to the procedure envisaged by the Working Group.

**Revised text of draft uniform rules on liability
of operators of transport terminals**

Article 1

DEFINITIONS¹

For the purposes of this [Law][Convention]:

(1) "Operator"² means a person who, in the course of his business, undertakes to take in charge goods [involved in international carriage]³ 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, between two carriers or from one means of transport to another, 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.

(2) "Goods"⁴ includes any container, trailer, chassis, barge, pallet, railway wagon or similar article of transport or packaging, if not supplied by the operator.

(3) "International carriage"⁵ 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.

¹If a provision along the lines of paragraph (5) is retained in this article, the title of the article may have to be changed since paragraph (5) is not, strictly speaking, a definition. It may be preferable to set forth that provision as a separate article.

²This definition is that set forth in A/CN.9/287, para. 122, modified in accordance with para. 124.

³The words "involved in international carriage" have been placed within square brackets only to call attention to the question of whether the requirement that the goods be involved in international carriage should be set forth in article 1 or in article 2; see A/CN.9/287, para. 123.

⁴This definition is that set forth in A/CN.9/287, para. 129.

⁵This definition is that set forth in A/CN.9/287, para. 135.

(4) "Transport-related services"⁶ includes such services as storage, warehousing, loading, unloading, stowage, trimming, dunnaging and lashing.

[(5) Any notice given or request made pursuant to this [Law][Convention] shall be given or made in a form which provides a record of the information contained therein.⁷]

Article 2

SCOPE OF APPLICATION⁸

(1) This [Law][Convention] applies whenever the transport-related services⁹ are performed:

(a) in the territory of [this][a contracting] State [,and

(b) in relation to goods which are involved in international carriage].¹⁰

(2) 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

PERIOD OF RESPONSIBILITY¹¹

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 to¹² the person entitled to take delivery of them.

Article 4

ISSUANCE OF DOCUMENT¹³

(1) [Alternative 1] The operator shall [in all cases], without unreasonable delay, either:

⁶This definition is that set forth in A/CN.9/287, para. 128.

⁷The language of this provision is that set forth in A/CN.9/287, para. 136, modified in accordance with para. 140.

⁸In accordance with A/CN.9/287, para. 141, the language of this article is based upon article 2 as prepared by the Working Group at its ninth session (A/CN.9/275, para. 41). Paragraph (1) is based on alternative 2 prepared by the Working Group. The words "[Convention][Law]" appearing in A/CN.9/275, para. 41, have been reversed in order to achieve consistency as to the order of these words throughout the text. Paragraph (2) was deleted in A/CN.9/287, para. 147. Paragraph (3) as amended in A/CN.9/287, para. 150, has been re-numbered as paragraph (2).

⁹The Working Group at its ninth session provisionally included the word "operations" in alternative 2 of paragraph (1) in order to designate the operations covered by the uniform rules (A/CN.9/275, para. 41). In accordance with A/CN.9/275, para. 41, note c, it has been replaced in this draft by the term "transport-related services".

¹⁰See A/CN.9/287, para. 144; also, paras. 120 and 123.

¹¹The language of this article is that set forth in A/CN.9/287, para. 153.

¹²The Working Group may wish to consider whether the words "made them available to" should be changed to "placed them at the disposal of" in order to correspond with the language used in the Hamburg Rules (art. 4(2)(b)(ii)) and the Multimodal Convention (art. 14(2)(b)(ii)).

¹³The Working Group did not have time to consider article 4 at its tenth session. The following is the text of that article prepared by the Working Group at its ninth session and the notes adopted by it for guidance in consideration of that text (A/CN.9/275, para. 58).

[*Alternative 2*] Unless and to the extent that such requirement is waived by the customer, the operator shall, without unreasonable delay, either:

[*Alternative 3*] At the request of the customer the operator shall, without unreasonable delay, either:

[*Alternative 4*] The operator may, at his option, either:

[*Alternative 5*] The operator may, and at the customer's request shall, without unreasonable delay, either:

(a) acknowledge his receipt of the goods by signing a document produced by the customer identifying the goods and stating their condition and quantity, or

(b) issue a signed document acknowledging his receipt of the goods and the date thereof, and stating their condition and quantity insofar as they can be ascertained by reasonable means of checking.

(2) If the operator fails to act in accordance with either sub-paragraph (a) or (b) of paragraph (1), he is rebuttably presumed to have received the goods in apparently good condition.

(3) The document referred to in sub-paragraph (b) of paragraph (1) of this article may be issued in any form which preserves a record of the information contained therein.

(4) A document under this article shall be signed by the operator or on his behalf by a person having authority from him. The signature may be made in handwriting, printed, in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means.

[(5) The absence from the document of one or more of the particulars referred to in paragraph (1) of this article shall not affect the legal character of the document as a document of the operator.]

Notes

a. The various alternatives to paragraph (1) reflect various approaches to the question of whether and the extent to which the operator should be obligated to issue a document. The final wording of this provision could contain elements of one or more of the alternatives.

b. A view was expressed that if the operator was obligated to issue a document only at the request of his customer, the value of the presumption provided for by paragraph (2) would be limited.

c. A view was expressed that the phrase "without unreasonable delay" in paragraph (1) was misleading, and that a definite period of time should be specified.

d. Sub-paragraph (a) of paragraph (1) is intended to take account of the practice in some terminals.

e. The phrase "reasonable means of checking" in sub-paragraph (b) of paragraph (1) is not intended to require an operator to open sealed containers.

f. With respect to paragraph (4), a view was expressed that if another person was authorized to sign a document

on behalf of the operator, his ability to do so by mechanical and similar means should be restricted.

g. A view was expressed that paragraph (5) was needed in order to preserve the legal character of the document. According to an opposing view, however, such a provision was important in transport conventions where the transport document was negotiable, constituted a document of title to the goods or served as the contract of carriage; however, that was not the case with the document of the operator, and paragraph (5) was therefore unnecessary.

h. In accordance with a decision of the Working Group at its eighth session, this draft article does not deal with negotiable documents.

Article 5

BASIS OF LIABILITY¹⁴

(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, 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 transport-related services¹⁵ took all measures that could reasonably be required to avoid the occurrence and its consequences.

(2) 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 transport-related services 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.

(3) 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.

(4) If the operator does not hand over the goods to a person entitled to receive them within a period of [] 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, the goods may be treated as lost.¹⁶

¹⁴The language of this article is that found in A/CN.9/WG.II/WP.58 except as noted below. Paragraph (2) has been deleted (see A/CN.9/287, para. 19).

¹⁵In this and subsequent provisions, the Secretariat has substituted the term "transport-related services" for the term "[safekeeping and operations]" referred to in article 3 . . . appearing in A/CN.9/WG.II/WP.58 in order to be consistent with the decision in respect of article 2; see note 9 above.

¹⁶Paragraph (4) (formerly paragraph (5)) has been modified to reflect the suggestion in A/CN.9/287 para. 22.

Article 6

LIMITS OF LIABILITY¹⁷

(1) 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 [2.75] units of account per kilogramme of gross weight of the goods lost or damaged. 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.¹⁸

(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 two and a half times the charges payable to the operator for his services in respect of the goods delayed, but not exceeding the total of such charges in respect of the consignment of which the goods were a part.¹⁹

(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) The operator may agree to limits of liability exceeding those provided in paragraphs (1), (2) and (3).

Article 7

APPLICATION TO NON-CONTRACTUAL CLAIMS²⁰

(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 transport-related services, such servant, agent or person, if he proves that he acted in the performance of the services for which he was engaged by the operator, is entitled to avail himself of the defences and limits of liability which the operator is entitled to invoke under this [Law][Convention].

¹⁷The language of this article is that set forth in A/CN.9/WG.II/WP.58 except as noted below. Paragraphs (4) and (6) were deleted at the tenth session, A/CN.9/287, paras. 39 and 41.

¹⁸The language of this paragraph is that set forth in A/CN.9/287, para. 29 (see para. 32), modified in accordance with A/CN.9/287, para. 35.

¹⁹The language of this paragraph is that set forth in article 6(2) in A/CN.9/WG.II/WP.58, modified in accordance with A/CN.9/287, paras. 36 and 37.

²⁰Paragraphs (1) and (3) contain the language set forth in A/CN.9/WG.II/WP.58, article 7(1) and (3), as decided in A/CN.9/287, paras. 42 and 46, respectively. Paragraph (2) has been modified to reflect the suggestion in A/CN.9/287, para. 44.

(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 LIABILITY²¹

(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 servants 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 transport-related services 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 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.

Article 9

SPECIAL RULES ON DANGEROUS GOODS²²

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 imminent 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 reimbursement for all costs to the operator of taking the measures referred to in subparagraph (a).

Article 10

RIGHTS OF SECURITY IN GOODS

(1) The operator has a right of retention over the goods for costs and claims relating to the transport-related services performed by him in respect of the goods during the period of his responsibility for them. However, nothing in this [Law][Convention] shall affect the validity under [other legal rules of this State][national law] of any

²¹The language of this article is that set forth in A/CN.9/WG.II/WP.58.

²²The language of this article is that set forth in A/CN.9/287, para. 60, with subparagraph (a) modified in accordance with para. 63 and subparagraph (b) in accordance with para. 65.

contractual arrangements extending the operator's security in the goods.²³

(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 transport-related services were performed].²⁴

(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 transport-related services 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 transport-related services were performed.²⁵

Article 11

NOTICE OF LOSS, DAMAGE OR DELAY²⁶

(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 or, if no such document was signed or issued, in good condition. Such notice may be given orally.²⁷

²³The first sentence of this paragraph is that set forth in A/CN.9/WG.II/WP.58. The second sentence is based on the decision in A/CN.9/287, para. 66 with the words "[other legal rules of this State]" added for the eventuality that the uniform rules are adopted in the form of a model law.

²⁴The language of this paragraph is that set forth in A/CN.9/WG.II/WP.58, substituting "transport-related services" for "[safekeeping and operations]".

²⁵The language of this paragraph is that set forth in A/CN.9/287, para. 74, substituting "transport-related services" for "[safekeeping and operations]".

²⁶The language of this article is that set forth in A/CN.9/WG.II/WP.58 except as noted below. Paragraph (6) was deleted in accordance with A/CN.9/287, paras. 86 and 87.

²⁷The secretariat was requested by the Working Group 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 (A/CN.9/287, para. 140). The final sentence of this paragraph has been added to the language of article 11(1) in A/CN.9/WG.II/WP.58 in order to take account of that request. It does not, however, contain the proviso that oral notice must be given "immediately". The Working Group may wish to consider whether the basic time limit established under article 11(1) (i.e., that notice of apparent loss or damage must be given not later than the working day after the day when the goods were handed over by the operator) is sufficiently "immediate" for oral notice. Such a time limit has the advantage of certainty. Setting forth a special rule that oral notice must be given "immediately" might lead to uncertainty in particular cases as to whether notice was timely.

(2) Where the loss or damage is not apparent, the provisions of paragraph (1) apply correspondingly if notice is not given within 7 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.²⁸

(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 21 consecutive days after the day when the goods were handed over to the person entitled to take delivery of them.²⁹

Article 12

LIMITATION OF ACTIONS³⁰

(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 against the operator may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs if it is instituted within 90 days after the carrier or other person has been held liable in an action against himself or has settled the claim upon which such action was based and if, within a reasonable period of time after the filing of a claim against a

²⁸The language of this paragraph is that set forth in A/CN.9/287, para. 80.

²⁹The words "60 days" have been changed to "21 days" (see A/CN.9/287, para. 85).

³⁰The language of this article is that set forth in A/CN.9/WG.II/WP.58 except as noted below.

carrier or other person that may result in a recourse action against the operator, notice of the filing of such a claim has been given to the operator.³¹

Article 13

CONTRACTUAL STIPULATIONS³²

(1) Unless otherwise provided in this [Law][Convention], any stipulation in a contract for the provision of transport-related services concluded by an operator or in any document signed or issued by the operator pursuant to article 4 of this [Law][Convention] 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 CONVENTION³³

[For convention only]

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 CONVENTIONS³⁴

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 ACCOUNT³⁵

[For model law]

The unit of account referred to in article 6 of this Law 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] according to the value of [the national currency] at the date of judgement or the date agreed

³¹The language of this paragraph has been modified to reflect the agreements set forth in A/CN.9/287, para. 92.

³²The language of this article is based upon that set forth in A/CN.9/WG.II/WP.58, substituting "for the provision of transport-related services" for "[for the safekeeping of goods]".

³³The language of this article is that set forth in A/CN.9/WG.II/WP.58.

³⁴The language of this article is that set forth in A/CN.9/WG.II/WP.58, with the modification in respect of square brackets set forth in A/CN.9/287, para. 100.

³⁵See A/CN.9/287, para. 101.

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 judgement 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 operation 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 LIABILITY

[For convention]³⁶

(1) The Depositary shall convene a meeting of a Committee composed of a representative from each

³⁶In accordance with A/CN.9/287, para. 112, the UNCITRAL secretariat consulted with the appropriate authorities within the United Nations Office of Legal Affairs with respect to the revision procedure tentatively agreed to by the Working Group at its tenth session (see A/CN.9/287, para. 102-111). The authorities have concluded that that procedure would present substantial legal and procedural difficulties. The authorities have advised, however, that it would be permissible for a meeting of the parties to the Convention to decide on a revision of the limits of liability to be convened on the occasion of an UNCITRAL session and to be serviced by the UNCITRAL secretariat, subject to resolution by appropriate United Nations bodies of the administrative and financial implications of such a procedure. The text presented in this article is an example of how such a procedure, if agreed to by the Working Group, might be formulated. It conforms as closely as possible to the procedure tentatively agreed to by the Working Group at its tenth session.

Contracting State to consider increasing or decreasing the amounts in article 6 of this Convention:

(a) upon the request of at least one-quarter of the Contracting States, or,

(b) when an amendment of a limit of liability³⁷ in respect of loss, damage or delay of goods³⁸ set forth in one of the Conventions hereinafter named is adopted.³⁹ The Conventions are: [insert Conventions].

(2) The meeting of the Committee shall take place on the occasion and at the location of the session of the United Nations Commission on International Trade Law immediately following the event giving rise to the convocation of the meeting.

(3) In determining whether the limits should be amended, and, if so, by what amount, the following criteria, determined on an international basis, and any other criteria considered to be relevant, shall be taken into consideration:

(a) the amount by which the limits of liability in a convention referred to in paragraph (1)(b) of this article have been amended;

(b) the value of goods handled by operators;

³⁷Subparagraph (b) refers to "a limit of liability" rather than "the limits of liability", with the intent that an amendment of any limit in one of the specified transport conventions (e.g. a limit in respect of loss or damage) would trigger a revision conference which could amend any limit in the uniform rules (e.g. limits in respect of loss, damage or delay).

³⁸Under this subparagraph, in order to trigger the revision mechanism the amended limit under a specified transport convention must be a limit in respect of loss, damage or delay in respect of goods, and not, for example, in respect of death or personal injury.

³⁹The procedures for amending the limits of liability in respect of loss, damage or delay under various international transport conventions differ. For example, the Hamburg Rules provide for the convening by the Depositary of a revision conference to amend the limits (art. 33). The Convention Concerning International Carriage by Rail (COTIF) provides for the limits to be amended by a Revision Committee established under the Convention (art. 19; see also art. 8). The Warsaw Convention, both as originally adopted and as amended by the Hague and Guatemala Protocols, contains no specific procedure for amending the limits (cf. art. 41). However, separate protocols have been adopted to amend the limits in those texts (Montreal Protocols No. 1, 2 and 3). In the case of the Hamburg Rules, an amendment enters into force on the first day of the month following one year after its acceptance by 2/3 of the Contracting States (art. 33(4)); an amendment under COTIF enters into force on the first day of the twelfth month following the month in which the Central Office notifies it to member States, unless 1/3 of the member States have objected within 4 months from the date of such notification (art. 21(2)); Montreal Protocols No. 1, 2 and 3 will enter into force on the 90th day after the deposit of the 30th instrument of ratification. Since an amendment of the limits in these and other transport conventions may not enter into force until some period of time after it has been adopted, which can be considerable, under paragraph (1)(b) of the present article the event triggering the revision mechanism in the uniform rules would be the adoption of an amendment of the limits of liability under a transport convention, rather than the entry into force of such an amendment.

(c) the cost of labour and other services in connection with the performance of transport-related services;

(d) insurance rates, including, *inter alia*, cargo insurance, liability insurance for operators and insurance covering job-related injuries to workmen;

(e) the average level of damages awarded against operators for loss or damage to goods or delay in handing over goods; and

(f) the costs of electricity, fuel and other utilities.

(4) Amendments shall be adopted by the Committee by a two-thirds majority of its members present and voting.

(5) No amendment of the limits of liability under this article may be considered less than five years from the date on which this Convention was opened for signature.

(6) Any amendment adopted in accordance with paragraph (4) 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 18 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 18 months after its acceptance.

(7) 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.

(8) When an amendment has been adopted in accordance with paragraph (4) of this article but the 18-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 after that period shall be bound by any amendment which has been accepted in accordance with paragraph (6).

[For model law]⁴⁰

[In implementing this model law, it would be desirable to provide a mechanism for adjusting the limits of liability periodically to take account of significant changes in the value of the currency of the implementing State.]

⁴⁰See A/CN.9/287, para. 103.

III. INTERNATIONAL COUNTERTRADE

International countertrade: preliminary study of legal issues in international countertrade:
report of the Secretary-General (A/CN.9/302) [Original: English]

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INTRODUCTION

1. The Commission, at its eleventh session (1978), decided to include in its programme of work the subject of international barter and exchange (A/33/17, paras. 67-69).¹ At its twelfth session (1979), the Commission, on the basis of a report of the Secretary-General entitled "Barter or exchange in international trade" (A/CN.9/159), adopted the view that barter-like transactions took too many different forms to admit of regulation by means of uniform rules. However, it requested its secretariat to include in the studies then being conducted in respect of contract practices consideration of clauses of particular importance in barter-like transactions. The Commission also requested the secretariat to approach other organizations within the United Nations system engaged in studies on such transactions, and to report to it on the work being undertaken by those organizations (A/34/17, paras. 21 and 22). At its seventeenth session (1984), the Commission discussed a report of the Secretary-General that reported on the activities of international organizations relative to barter-like transactions (A/CN.9/253). In that discussion, a number of delegations indicated that they attached great importance to the subject and that further consideration of it would be useful. It was agreed that, in the light of a report on the developments in the field to be prepared by the secretariat, the Commission might consider whether concrete steps in the field should be undertaken by it (A/39/17, para. 132).

2. At its nineteenth session (1986), the Commission, on the basis of a note by the Secretariat (A/CN.9/277), considered its future work in the area of the new international economic order. In the context of that discussion the Commission decided that the secretariat should place a preliminary study on the subject of countertrade (a term used instead of barter and similar terms to reflect current international usage) before the Commission at a future session (A/41/17, para. 243).

3. The present report contains the preliminary study on legal issues arising in countertrade requested by the Commission. Paragraphs 111 to 113 discuss the question whether, and if so in what way, the Commission should engage in further work on this subject.

¹Report of the United Nations Commission on International Trade Law on the work of its eleventh session (1978), *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17* (A/33/17).

I. Concept of the study

A. Description of subject-matter of the study

(a) Definition of countertrade transaction

4. A countertrade transaction, as it is normally understood, is a composite transaction in which one party supplies, or procures the supply of, goods or other economic value to the second party, and, in return, the first party agrees to purchase or procures to be purchased from the second party, or from a party designated by the second party, goods or other economic value, so as to achieve an agreed ratio between the reciprocal performances.

5. While many countertrade transactions involve the mutual purchase of goods, other transactions involve the furnishing of services or the sale of a factory or similar production facility coupled with a commitment to purchase some or all of the output (usually referred to as a buy-back) or the purchase of manufactured goods of large value with a commitment that some portion of the component parts will be manufactured in the purchaser's country (usually referred to as an offset).

(b) Commercial objectives of international countertrade

6. There are several different commercial objectives that may be sought by engaging in countertrade transactions. Among the more prominent are the following: First, countertrade may be a financing mechanism in that the proceeds realized or expected to be realized from an export are used to finance an import. This usually arises when the import is to be paid in a convertible currency, and the importer's country is short of such currencies. Secondly, a party who has difficulties marketing his own products may, by linking his imports to exports, secure outlets for his products. Thirdly, countertrade may be used as an instrument of industrial development, for example when countertrade is made part of an industrial co-operation arrangement (such as co-production, product specialization or joint venture) or if it attracts foreign investments or technology to areas of the importer's interest.

(c) *Extent of countertrade in international trade*

7. Economic circumstances prompting parties to enter into countertrade transactions exist in all types of economic, social and political systems. As a result, an appreciable share of international trade is conducted by use of such arrangements. Countertrade has been a regular feature of trade between socialist countries of Eastern Europe and Western developed countries for a number of years. Countertrade has also been used in trade between developed countries, in particular in sectors involving products of high technology and high value. In the past decade, the increasing shortage of foreign currency, the need to preserve or gain access to international markets and the desire to stimulate industrial development have caused countertrade to be used increasingly by developing countries. The situation today seems to be such that

“countertrade is now common between developing countries, between developed and developing countries and between developed countries. Moreover, it is taking place irrespective of whether there exists an institutional framework, i.e. governmental agreements, for it or not.”²

B. *Scope of the study*

8. Legal issues that arise in countertrade transactions are of two types. One type of issues concerns governmental regulation in the area of countertrade. The other type concerns private law matters.

(a) *Governmental regulation*

9. Governmental regulation of countertrade may be carried out through rules providing, for example, that certain types of imports must be paid for only through a countertrade arrangement, or that certain types of local products are prohibited from being offered in countertrade, or that state trading agencies are to explore the possibility of countertrade when negotiating certain types of contract. Other such rules may relate to an institutional framework through which countertrade must be channelled. It has been, for example, characteristic of planned economy States that only a limited number of enterprises have been authorized to enter into countertrade transactions and that ministerial organs supervising a particular sector have had prerogatives in approving a countertrade transaction.

10. Such legal rules are frequently directed to one contracting party only and often do not directly affect the content or the legal effect of the contract concluded by that party. In other instances the regulation may affect the contract; for example, by limiting the freedom of the parties as to the content of a contract term.

11. Governmental regulation of that nature is strongly influenced by national governmental policies, and it is

unlikely that a unification or harmonization of such laws may be achieved. Therefore, this report does not attempt to analyse the content of those legal rules. However, such rules are referred to in this study whenever they affect the contractual relations of the parties.

(b) *Private law*

12. Private law issues may originate either in respect of a contract covering one of the segments of the countertrade transaction, i.e. individual supplies of goods or services under the transaction, or from the overall countertrade agreement co-ordinating those segments. While the contractual arrangements governing the individual segments of countertrade transactions are cast in the form appropriate to the subject-matter of that segment, i.e. contracts of sale, construction, licence, services, or work and labour, the overall countertrade agreement is a contractual arrangement in which the parties agree on elements of the contracts governing the individual segments of the transaction and on the relationship among those segments.

13. The majority of the private law issues arising from the contracts governing individual segments of a countertrade transaction are the same as those arising in similar contracts concluded as discrete and independent transactions. Therefore, there is no need to deal with those legal issues in this study except to the extent that they are affected by the fact that they arise in the context of a countertrade transaction.

14. The countertrade agreement, on the other hand, gives rise to issues that are typical of or especially important to countertrade and that are solved by approaches developed in countertrade practice. It is primarily on those issues that this study will focus.

C. *Universal treatment of issues*

15. In discussing private law issues of international countertrade the question arises whether they may be treated as a universal phenomenon or whether there exist regional particularities that require a differentiated treatment. Several observations may be made on this question.

16. First, there exists an extensive countertrade practice in a wide range of industrial sectors in trade between planned economy States in Eastern Europe and Western market economy States. It is characteristic of East-West transactions that similar contract approaches and solutions are often used, and that those similarities often extend to several countries. This is largely due to the fact that countertrade has a tradition in Eastern Europe, that countertrade in Eastern Europe is conducted by a small number of specialized foreign trade organizations, that the countertrade transactions are monitored by the competent administrative organs and that issues of East-West countertrade are relatively often discussed in commercial and legal publications.

²Countertrade, Background note by the UNCTAD secretariat, Trade and Development Board, Committee on Economic Co-operation among Developing Countries, TD/B/C.7/82, 28 August 1986, para. 7.

17. Secondly, countertrade is less frequently used in trade between parties from developed market economy countries than in inter-regional trade and the transactions tend not to consist of the ordinary exchange of goods. Many of the countertrade transactions that are concluded between parties from developed market economy countries involve the sale of specialized high technology products of exceptionally high value (e.g. a power plant or aircraft). Such countertrade transactions often take the form of a direct or indirect offset transaction. Nevertheless, private law issues or solutions involved in countertrade transactions between parties from developed market economy countries, whether for the ordinary exchange of goods or of the offset variety, do not appear to be essentially different from those involved in inter-regional countertrade transactions.

18. Thirdly, even though countertrade with parties from developing countries is a phenomenon that, in comparison with countertrade in some other regions, does not have such a long tradition, as noted by a specialized publication,

"A remarkable feature of the spread of CT [countertrade] world-wide has been the ease with which concepts developed for the highly institutionalized countertrade environment of Eastern Europe have been transferred to the much less regulated economies of the Third World countries."³

One reason for this appears to be the fact that many parties in industrially developed countries that have acquired expertise in East-West countertrade, in particular international trading houses, have in recent years expanded their operations to developing countries. Perhaps of greater importance is that the basic motives for engaging in countertrade and the basic constellation of interests of the parties to such contracts do not show regional particularities, and the contracts do not reveal legal issues essentially different from those involved in countertrade in other regions.

19. A conclusion to be drawn from this is that the present report, covering contractual aspects of countertrade, should deal with countertrade as a universal phenomenon raising common legal issues.

D. Terminology

20. Writings on international countertrade do not use a uniform terminology in referring to particular types of countertrade. The lack of uniformity may be a consequence of differing commercial linguistic usage or of the use of different criteria for classifying countertrade practice. This is manifested by the use of the same expression for distinguishable types of countertrade practice or of different expressions for a given kind of practice. Terms that are often used either as synonyms for countertrade or to describe various types of countertrade are barter, compensation, counter-purchase, offset, buy-back and switch transactions. It is not necessary in

this report to make distinctions between them for the purposes of describing and analysing the legal issues involved.

21. It is necessary, however, to define for the purposes of this report certain terms that are used herein. Since the scope of this report is global and since it will cover various forms of countertrade, the terms used are broad so as to cover countertrade in different economic or regional contexts. In addition, account has been taken of the fact that countertrade transactions are not limited to reciprocal sales of goods but may include other types of contract.

(a) Parties to countertrade

22. The following expressions have been chosen to denote parties to a countertrade transaction: the term *exporter* or *counter-importer* will be used for the person supplying (i.e. exporting) goods or services, and being obligated to purchase (i.e. to counter-import) other goods or services in return; the term *importer* or *counter-exporter* will be used for the person purchasing (i.e. importing) goods or services, and having a right to supply (i.e. to counter-export) other goods in return. It may be noted that in many cases the importer and the counter-exporter is the same person and that this may also be the case with the exporter and the counter-importer. However, it also occurs that the exporter designates another person to perform the counter-import obligation, or that the importer agrees that another person will counter-export instead of the importer.

23. The term *exporter* is used in some writings to denote the economically or technologically stronger countertrading party, and the term *importer* for the weaker party. The reason for such usage is that it frequently occurs that the party who exports first, and assumes an obligation to counter-import at a later time, is the party from a developed country, who is assumed to be the stronger party, whereas the party who imports first, and secures for himself a right to counter-export at a later time, is the party from a developing country, who is assumed to be the weaker party. However, it increasingly occurs, in particular in countertrade with the least developed countries, that it is the party from the developing country that exports first, since he may not be allowed to import goods until he has earned the necessary convertible currency by an export. Therefore, in order to make the meaning of the terms in this report clear, it should be emphasized that the term *exporter* signifies only that he is the supplier under the first contract to be concluded. By the same reasoning, the term *importer* refers to the other party to the first contract. The terms *counter-importer* and *counter-exporter* refer to the parties to the second contract. Although the export contract and the counter-export contract are seldom concluded at the same time, when they are, it is a matter of indifference in the context of this report as to which party is referred to as the exporter and which one as the importer.

³*Strategies for Countertrade Success*, prepared and published by Business International S.A., Geneva, Switzerland, November 1986, 3.

(b) *Contracts in countertrade*

24. The contracts entered into by the parties are referred to by names consistent with the names of the parties, i.e. *export* and *import contract* for the first contract entered into and *counter-export* and *counter-import contract* for the second contract entered into. In this report these contracts are usually referred to in the singular even though there may be several such contracts on both sides of the countertrade transaction. The countertrade aspect of the transaction, which involves the obligation to enter into future export or counter-export contracts and provides for the relationship between the two contracts, is set forth in a *countertrade agreement*. This agreement is usually set forth in a separate document, but the term countertrade agreement is used in this report for this set of obligations even when they are found in the export contract.

(c) *Subject-matter of countertrade*

25. The subject-matter of countertrade contracts may be finished products, production equipment, industrial works, technology, or various services such as carriage of goods, tourist services or maintenance and repair. The term goods will be used for simplicity to cover all such subject-matters.

E. *Sources of information*

26. It has been noted in a previous report to the Commission that, despite the increasing number of studies that have been devoted in recent years to international countertrade, "the dearth of available barter-like contracts in practice makes it difficult to undertake an analysis of the various types of clauses found in such contracts" (A/CN.9/253, para. 20). Other organizations have had similar experience. For example, as noted by the UNCTAD secretariat, "it should not be surprising that factual information is hard to come by. There is no systematic reporting of countertrade, and parties are usually reluctant to divulge information" (TD/B/C.7/82, para. 9).

27. The secretariat of the Commission has based the present study on various sources. One source has been a collection of countertrade contracts that was the result of a request by the Secretary-General directed to Member States of the United Nations to provide the Commission's secretariat with relevant contract materials and a similar request by the Secretary of the Commission to a number of individuals in different regions of the world. Information has also been derived from writings dealing with or touching upon legal issues of international countertrade. In addition, members of the secretariat consulted informally with individuals having expertise in this type of trade.

II. *Contractual approaches to countertrade*

28. A preliminary question for the parties to a countertrade transaction is how to structure the contracts for the export and the counter-export segments of

the transaction. In particular, it should be decided whether the export and the counter-export side of the transaction will be covered by definite contracts concluded concurrently, or whether an export contract should be concluded first, leaving the counter-export contract to be concluded in a definite form at a later stage.

29. Typical variations regarding this question may be classified into the following groups: barter, matched contracts, unified contract and countertrade agreement.

A. *Barter contract*

30. Barter contracts in the strict legal sense of an exchange of goods for goods are occasionally used in international trade. Parties dealing in commodities may trade equivalent amounts located in different parts of the world in order to secure supplies closer to the point of ultimate use or delivery to their customers, thereby saving on transport costs. Barter contracts in the strict legal sense are also used on occasion in countertrade transactions for the exchange of different types of goods. The primary reason appears to be to avoid or to reduce transfers of money in connection with contract deliveries.

31. There are difficulties in the use of barter in countertrade transactions. The conclusion of a barter contract requires that the value of the goods to be exchanged be comparable, which in turn implies that the quality and quantity of the goods must be precisely defined at the time of the conclusion of the contract. However, such contract precision about future deliveries in both directions is often not commercially feasible. Furthermore, if the contract does not state the monetary value of the goods, it is difficult to provide a satisfactory monetary relief when one party delivers goods that do not conform to the contract and it is not practical for the party in default to cure the defect in performance. Even if monetary relief can be calculated, either because there is a reference price in the contract or a sufficiently objective price standard exists, the awarding of monetary relief may contravene the basic purpose of concluding a barter contract.

32. Since a delivery of goods constitutes the compensation for a delivery in the other direction, any failure to deliver or non-conforming delivery may provide a ground for non-performance of a reciprocal delivery. Since it is seldom feasible to arrange for simultaneous deliveries of the two counter-purchases, such an intensive interrelation between the deliveries may, instead of effectively stimulating contractual discipline, have a disruptive effect on planned deliveries, especially since it may be more complicated to arrange for security of performance in a barter contract than in a sales contract. For example, barter limits the use of a documentary letter of credit, the device normally used in international sales of goods to ensure that one obligation has been performed as a condition to the performance of the counter-obligation.

33. As to other types of security that may be used in barter, such as a bank guarantee, the mechanism for exercising the guarantee in the barter context would normally be more cumbersome than in a straight-forward transaction. The reason is that a guarantee clause in a barter contract would often call for guarantees of both promises to deliver. If both guarantees were "on demand", a party not faithful to the contract could effectively deter the other party from calling one guarantee by threatening to call the other guarantee himself. While similar cross-guarantee situations can arise in sales transactions, they are not as inherent to the basic transaction.

34. As a result of these difficulties, barter contracts are relatively seldom used as the legal form for international countertrade.

B. Matched contracts

35. The parties may conclude two independent contracts that do not refer to each other, the first for the supply of goods in one direction, and the second for the supply of goods in the other direction. The only link between the contracts is that the willingness to conclude one contract depends on the conclusion of the other. However, because this link is not reflected in the contracts, the obligations under each contract apply independently.

36. Matched contracts may be the preferable procedure to follow when the countertrade aspect of the transaction can be left to the continuing business relationship between the parties or when the two contracts can be concluded simultaneously. Since each contract is concluded and administered separately, all of the normal methods of securing performance are available. A difficulty arising in the supply of goods in one direction may be treated in the context of that contract alone, without necessarily affecting obligations in the other contract.

37. Matched contracts are not, however, widely used for arranging countertrade transactions. The very essence of the countertrade transaction is the need or desire to link the import and export of goods. Therefore, unless the two matched contracts can be concluded at the same time, some mechanism to induce or require the conclusion of the subsequent contract is needed. Even when the two matched contracts can be concluded at the same time, one party may wish to have some mechanism to link the performances under the two contracts.

C. Unified contract

38. A technique that is probably written about more in the literature than used in practice is to embody both sales agreements into a single contract. Such a contract differs from a barter contract in that both deliveries of goods are priced in terms of a monetary value and, normally, the obligations to pay for each of the

deliveries would be stated. The contract would differ from the use of matched contracts in that both contractual obligations to deliver and pay would be set forth in the same document and would obviously be linked to one another.

39. While the use of this technique has been advocated in the past as a means of ensuring the existence and fulfilment of the countertrade obligation, it presents many technical difficulties. In addition to the need to set forth all of the contractual obligations as to description of the goods, quantity and quality that have been mentioned in respect of barter and matched contracts, the difficulties arising out of linking so closely together the different contractual obligations that were described in connection with the barter contract also arise in the case of a single sales contract, though perhaps not to quite the same degree. Because of these difficulties, official export financing and credit insurance agencies are usually reluctant, if not unwilling, to finance or insure such transactions.

D. Countertrade agreement

40. As a result of these difficulties most countertrade transactions are characterized by the existence of a countertrade agreement setting forth as many of the details of the countertrade commitment as can then be agreed upon. One of three basic patterns might be followed, depending on the extent to which the parties are ready to conclude the definitive export and counter-export contracts for the individual segments.

(a) The countertrade agreement might be entered into prior to the conclusion of any definitive export contract. The countertrade agreement might specify the total monetary value of the purchases to be made in each direction, indicate in general terms the types of goods to be purchased, specify the currency in which the goods are to be priced and payment is to be made and specify the procedures for payment. One common provision when this pattern is followed is that the price is to be paid into a blocked account that can be used only for payment for counter-imports. Such a provision not only reduces concerns over the expenditure of foreign exchange, but it also pressures the exporter to conclude counter-import contracts so as to procure those goods for use or re-sale, thereby realizing the currency to pay for his own export under the agreement.

(b) The export contract and the countertrade agreement might be concluded simultaneously. The countertrade agreement may be set forth in the export contract, although this appears to be rare in practice. It can include all of the obligations mentioned above, except the obligation to enter into an export contract.

(c) The countertrade agreement, the export and the counter-export contracts might be concluded simultaneously. In this case the countertrade agreement will contain only those provisions agreed between the parties linking the export and counter-export contracts. When the countertrade agreement is contained in the

same document as one or both of the contracts, the resulting document would fall within the category of a matched or unified contract as described above.

III. Completion of incomplete contract

41. One of the primary legal problems in countertrade arises out of the fact that the parties typically do not know which goods are to be delivered to fulfil the countertrade commitment, and may not even know the exact nature of the goods to be delivered in the export contract. As a result, it is a salient characteristic of countertrade agreements that they typically do not embody a definite description of all the performances required by the parties, but rather provide a framework on the basis of which the parties should agree on the missing contract terms at a later stage. If such subsequent agreement is not reached, the result of a lack of definiteness of contract terms may be that it is impossible to determine whether the agreement has been breached and, thus, the aggrieved party may have limited or no means to obtain relief.

42. Different approaches may be taken in the countertrade agreement as to the nature of the commitment to conclude the subsequent contract. At the one extreme are cases in which the parties provide only that a party will purchase from the other party unspecified goods, the amount of which may be specified in monetary terms. Such open-ended commitments appear to be used only when the importer has reason to expect the exporter to live up to the commitment for commercial reasons and when it is not important to the importer to be more specific as to the goods to be sold as the countertrade equivalent.

43. A variant of a commitment which indicates only the value of the future contract but not the goods is found in a countertrade scheme involving a transferable document referred to as an international trading certificate (ITC). The ITC would confer on the holder a right to sell goods, up to the amount specified in the ITC, to a party in the ITC-issuing country without an import licence, and it would constitute a guarantee by the issuing authority that convertible funds would be available for payment. The countertrade transaction would begin by the export of goods from the country which requires countertrade exports as a condition for the importation of goods. An ITC would be issued to the exporter by an authority such as the central bank. The authority would issue such an instrument in order to stimulate the export of that particular type of goods. The exporter would hand the ITC over to the foreign importer who would be free to rely on the instrument himself or to transfer it to another party. Such a scheme represents an effort to facilitate countertrade by multilateralizing it.⁴

44. At the other extreme are cases in which the parties provide guidelines for the conclusion of the definite export or counter-export contract, and, as those guide-

lines become more specific, the countertrade agreement approaches the point at which delivery of the goods becomes legally enforceable.

45. The typical cases, however, lie between the two extremes. In a typical case, a countertrade agreement provides a degree of definiteness to some terms of the future contract with an expectation that the incomplete contract will be supplemented so as to become legally enforceable.

A. *Contract terms to be supplemented*

46. Two kinds of contract terms of the future contract may be distinguished. One kind are the essential terms which must be present for the contract to be legally binding. The other kind are terms that are not essential for the contract to be legally binding, but are regarded by the parties to be necessary or useful for the implementation of the contract.

47. It is in the nature of countertrade transactions that the economically most important terms that are likely to be left indefinite in the countertrade agreement are also the terms that are essential to conclude a legally binding contract. For example, under many legal systems the essential contract terms in a contract of sale, a contract typical of countertrade, are those referring to the description, quantity and price of the goods. It is advisable that the countertrade agreement should include as many of those terms as possible and give as clear guidance as possible to the manner in which the other terms should be determined. Such guidance will help the parties in their future efforts to complete the contract. Such guidance may also be sufficiently clear to serve itself to determine any missing terms of the contract.

48. However, the vast majority of all the terms that might be found in a contract for the international sale of goods are not essential in order to conclude a legally binding contract. Nevertheless, they are included in typical contracts because of their importance to the proper implementation of the contract; indeed, on occasion, to any realistic possibility of implementing the contract at all. This is more true of international contracts of sale than of domestic contracts of sale, and would seem to be even more so in respect of countertrade transactions. The general rules of law, including the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (the "United Nations Sales Convention"), will supply those legally non-essential terms that are not supplied by the parties in their contract or contracts; nevertheless, the parties should give careful attention to ensuring that all the terms necessary for a good contract relationship are provided.

49. In the case of countertrade transactions in which some of the goods are undetermined at the time the countertrade agreement is concluded, those terms of the eventual export or counter-export contracts that can be settled are often included in the countertrade agree-

⁴UNCTAD doc. TD/B/C.7/82, referred to in note 2 above, paras. 52-56.

ment. For example, the countertrade agreement may provide how payment is to be made, even though the goods and their price may still be unknown.

B. Means of contract supplementation

50. When the countertrade agreement leaves open a contract term, the contract may be supplemented on the basis of rules in the applicable law providing a standard or guideline for contract supplementation. For example, many legal systems may provide a solution when the parties have not settled the price of goods, their quality or the time within which the contract is to be performed. The solution may be, for instance, that the price should be the one "generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned", or that the goods should be "fit for the purposes for which goods of the same description would ordinarily be used", or that the contract is to be performed "within a reasonable time after the conclusion of the contract" (articles 55, 35(2)(a) and 33(c) of the United Nations Sales Convention).

51. Nevertheless, such contract supplementation provided by the applicable law may be a source of difficulty in the implementation of a countertrade agreement. Such difficulty may arise, for example, out of divergencies among legal systems as to the techniques of supplementation, as to the role of the court, the arbitral tribunal, or the parties in determining the missing term, as to the judicial control over a supplementation of the term, or as to the cases where such supplementation may be resorted to.

52. In view of such difficulties, parties to countertrade transactions often provide in the countertrade agreement a standard or guidelines for contract supplementation. The following contractually agreed ways for determining a missing contract term may be distinguished: (1) reference to a standard; (2) determination by a party to the contract; (3) agreement to negotiate; (4) determination by third person.⁵ In international countertrade, the counter-export goods and the price are the most important questions left indefinite by the countertrade agreement.

(a) Reference to standard

53. Legal systems normally recognize as valid a provision that the price or other contract term may be determined by reference to a standard such as a formula, tariff, quotation, rate, index, statistics, or some other factor not influenced by the will of either party.⁶

⁵For a fuller comparative legal discussion of these means of contract supplementation see R. B. Schlesinger (General Editor), *Formation of Contracts*, A Study of the Common Core of Legal Systems (Conducted under the Auspices of the General Principles of Law Project of the Cornell Law School), Oceana Publications, Dobbs Ferry, New York, Stevens & Sons, London, 1968, vol. I, 84-91 (general report) and 433-534 (reports on particular legal systems).

⁶Schlesinger, *Formation of Contracts*, vol. I, referred to in note 5, 87. It should be noted, however, that the use of a particular standard may make the obligation invalid where the standard is prohibited by law (e.g. some legal systems do not permit the use of a gold standard or a standard based on the level of wages).

54. The proposition that legal systems normally recognize contractual standards is unreserved where the application of the standard involves a computation, or other objective method to arrive at the contract term. However, where the application of the standard requires judgement or discretion, the position of legal systems is less certain and uniform in that a standard requiring a degree of judgement or discretion in its application may in some legal systems be considered too indefinite to produce a contract term.⁷

(b) Determination of term by party to contract

55. There is a strong tendency in many legal systems to recognize the validity of clauses empowering a party to the contract to determine a term of an obligation. However, the tendency is subject to qualification.⁸

56. As to the determination of the quantity of goods to be delivered under a contract, legal systems generally recognize that, in principle, this could be left to a party, but the authorization should be limited, or is deemed to be limited, to a reasonable or good faith determination in the context of that which has been agreed between the parties.⁹

57. Many legal systems would recognize the power given to a party to set a price if it was limited by such concepts as reasonableness, good faith or fairness. Under some legal systems, an ambiguous authorization would be considered to imply a standard of reasonableness. Other legal systems require the freedom to determine the price to be limited by a more definite standard.¹⁰

(c) Agreement to negotiate

58. Countertrade agreements often contain clauses indicating a commitment of the parties to negotiate with a view to reaching an agreement on one or more contract terms. Such commitments may relate to any contract issues, including the price, quality or quantity of goods, or time periods for delivery.

59. An agreement to negotiate which does not result in a subsequent agreement will normally, because of its indefiniteness as regards the content of agreement to be reached, not be given effect by a court or an arbitral tribunal.¹¹ Nevertheless, a party in breach of an agreement to negotiate may be responsible for any

⁷It seems that, for example, French law requires a greater degree of definiteness of a standard than some other legal systems; see M. Fontaine, *Aspects juridiques des contrats de compensation*, *Droit et pratique du commerce international*, tome 7, no. 1, mars 1981, 195; and B. Mercadal, *La détermination du prix dans les contrats*, *Droit et pratique du commerce international*, tome 5, no. 3, sept. 1979, 443-448.

⁸Schlesinger, *Formation of Contracts*, vol. I, referred to in note 5, 88 and, *passim*, 433-534.

⁹*Ibid.*

¹⁰*Ibid.*, 89 and, *passim*, 433-534.

¹¹*Ibid.*; nevertheless, where the agreement to negotiate refers to the price, under some legal systems the price may be determined as if there were a clause providing for a reasonable price (this is expressly provided, for example, in sec. 2-305(1)(b) of the Uniform Commercial Code of the United States of America).

damage arising from the breach. However, in order to establish such a breach, the obligation to negotiate must be based on definite terms.

60. In order to increase the effectiveness of clauses envisaging future agreement, parties might incorporate in them various additional elements. Such elements may be in particular the following:

(a) a "best efforts" or "good faith" clause laying down criteria to be observed in the negotiations;

(b) more specific guidelines, such as a provision that no undue prejudice should arise to either party from the contract to be concluded, or that the contract should be negotiated on the basis of the prevailing market conditions, or that the contract should support certain specified commercial objectives of a party;

(c) a procedure to be observed by the parties in the negotiations; the procedure might specify, for example, the party who is to submit a contract offer, time periods for submitting it, issues to be covered by it, or the form or means of its transmission;

(d) the kinds of goods on which the negotiation process would focus or to which it would be limited;

(e) a reference to a standard, possibly with a tolerance range, from which a contract offer should not depart; such a standard may refer to issues such as price, quality, or conditions of delivery;

(f) the time within which an agreement must be reached, and beyond which negotiations will be deemed to have failed;

(g) instances where a party would be considered no longer under the duty to negotiate or in breach of the duty; such instances may occur, for example, when the counter-exporter has not accepted any of the offers that met agreed conditions, or when a party has not made any such offer;

(h) consequences of unsuccessful negotiations; possible solutions may be, for example, prolongation of the time period in which the countertrade obligation must be fulfilled, or the triggering of a contract provision on penalties or liquidated damages. The clause may also provide for a differentiation among consequences, depending on the reason for the failure to reach an agreement.

61. While no procedure for negotiation or guidelines as to the result to be achieved can ensure success, particularly if one party does not wish the negotiations to succeed, it can enhance the likelihood that two parties who are negotiating in good faith will succeed. Furthermore, the more specific the negotiation clause, the easier it would be to show that the other party acted in bad faith if negotiations were to fail. As suggested above, the negotiation clause might differentiate between various consequences of a failure to complete the negotiations successfully depending on the reason for the failure to reach agreement. Even if the consequences of a failure to reach agreement because of the bad faith of one of the parties are not specified in the contract, in some legal systems bad faith in the negotiations may give rise to an action for damages. However, the party

claiming damages would often find it difficult to quantify those damages. Therefore, the likelihood that an agreement to negotiate could be enforced by the usual legal means is slim.

(d) *Determination of term by third person*

62. Legal systems generally recognize the right of the parties to agree that a term of an obligation will be fixed by a third person.¹² There are, however, differences among legal systems concerning such an agreement. For example, while some legal systems recognize that an arbitral tribunal or even a court may be entrusted with the fixing of a contract term, others permit it only if it is not performed as part of arbitral or judicial proceedings. Other divergencies relate to cases where the parties cannot agree on the person who is to supplement the contract or where the designated person fails to act. In these cases, under some legal systems, the parties have no recourse to a procedure for designating or replacing the person, and have to accept the consequences of the fact that the term of the obligation has not been determined. Under other legal systems, the court may, in some circumstances, appoint the third person under a procedure analogous to the one for appointing an arbitrator, or, if the missing term is the amount of a price, treat the case as if there were an agreement for a reasonable price. There are also differing approaches in legal systems to the availability and extent of court control over a decision by the third person.¹³

IV. Provisions in countertrade agreement relating to content of contract to be concluded

63. Where a countertrade agreement does not directly determine the content of a term of the counter-export, but instead provides a procedure for arriving at such a term, the agreement may contain substantive guidelines regarding the term. Such guidelines may concern in particular the type of possible counter-export goods, their quality, quantity and price.

A. *Type of goods*

64. When the parties to a countertrade transaction do not commit themselves to a particular type of counter-export goods, the guidelines concerning possible counter-exports are frequently expressed in the form of a list attached to or contained in the countertrade agreement indicating goods which may be purchased to fulfil the countertrade commitment. Such a list is drawn up by the counter-exporter or by the officials of the counter-exporter's country. In the former case it may indicate the goods the counter-exporter produces or in which he trades. In the latter case the list may include other goods which the relevant officials wish to see exported in countertrade transactions. The list may also originate from the counter-importer, who is thus expressing the

¹²Schlesinger, *Formation of Contracts*, vol. I, referred to in note 5, 88.

¹³*Ibid.*, 88, 497, 513.

scope of his readiness to counter-import. Alternatively, the list may be the result of a synthesis of the views of both parties on the future counter-export.

65. The list may go beyond a simple enumeration of the goods. It may, for example, lay down a structure of the counter-export. For instance, some types of counter-trade transactions, such as indirect offset transactions, may provide directives as to the regions within the counter-exporting country from which a certain value must be counter-imported, or the industries that will be recognized as counter-exporters, or the minimum trade that must be generated in each of those industries. There are also examples in counter-purchase transactions of lists specifying a counter-export structure. Such a list may specify, for example, the percentage of goods to be counter-imported from the importer and the percentage that may be bought from other suppliers.

66. Another variety of guidelines may deal with the origin of counter-export goods. For example, it may be provided that any such goods must be of domestic origin or may originate only from particular suppliers. Since industrial products may contain significant imported value or value originating from other suppliers, the guidelines would often specify criteria for determining the origin of the goods.

67. While a mere list expressing the various possibilities regarding counter-export, without constraining the parties to any particular goods, does not in itself give the basis for an enforceable contract due to lack of definiteness, such a list in the countertrade agreement may be part of a binding contract obligation. For example, the importer may give a guarantee that some or all of the listed goods will be available for shipment should the parties agree on the terms of delivery.

68. Such a guarantee is most likely to be given, or to be a reasonable implication from the terms of the countertrade agreement, when the importer produces or sells the type of goods in question. The importer is likely to refrain from giving such a guarantee, and it may not be a reasonable implication from the terms of the countertrade agreement, when the possible counter-exports cover a broad range of goods or when the goods are not to be supplied by the importer himself but by an enterprise over which the importer has no control.

B. *Quality of goods*

69. Concern over the quality of goods to be offered for counter-export is one of the major problems in countertrade transactions. If the goods are not known when the countertrade agreement is concluded, or are known only by broad categories, precise statements of quality cannot be made. The statement of quality may be limited to broad generalizations, such as that the goods must be of merchantable, export or prime quality. Any more precise statement of required quality would be left to the export or counter-export contract

where the specific goods to be delivered are described. This procedure will often be completely satisfactory when the goods offered for counter-export are commodities or manufactured goods with highly standardized levels of quality.

70. However, when the exporter claims that the goods offered for counter-export are of such a low quality that he cannot either use or re-sell them or that they are worth less than the price at which they are offered, a quality standard worded in general terms may not provide an adequate means of measuring whether the counter-exporter is offering goods in conformity with the countertrade commitment. Where the exporter has a choice as to the goods to be taken for counter-export, a disagreement as to whether certain goods are of the requisite quality may not be serious. However, if the importer insists that the goods offered are to be taken for counter-export, the entire countertrade transaction is called into question. It may not be possible to come to agreement on the subsequent export and counter-export contracts and both parties may believe that the other party is not in good faith. The effect on one segment of the countertrade transaction of an alleged breach of contract in other segments of the transaction is discussed in section V.

71. A special problem arises in respect of goods to be counter-exported in connection with a buy-back transaction, where the exporter has exported a production facility such as a factory and agreed to purchase some or all of the resulting production over a period of time. The extent to which the goods can be described depends, at least in part, on the range of products that could be produced by the facility. A mine could produce only the ore to be found at that mine. A factory could normally produce a range of products. The specific products might change over the period of the buy-back commitment. Moreover, quality specifications for manufactured goods must often be more precise than for more generic goods.

C. *Quantity of goods*

72. When a countertrade commitment refers to goods of one specified type, the quantity of such goods would normally be specified in, or could be calculated on the basis of, the clause in the countertrade agreement determining the extent of the countertrade commitment. When the countertrade agreement provides for several possibilities concerning the type of counter-export goods, the quantity of each possible type of goods would often not be stipulated in the countertrade agreement. In such a case the quantities of counter-export goods, determined in one or more counter-export contracts, would have to be in conformity with the clause in the countertrade agreement determining the extent of the countertrade commitment. The countertrade agreement may also specify in such a case the procedure by which the counter-exporter or the counter-importer will determine the exact quantities of each type of goods that are to be taken.

D. *Extent of countertrade commitment*

73. The extent of a countertrade commitment is frequently expressed by a monetary value. The value may be expressed as a percentage of the value of the export goods or as an absolute amount; in these cases, the countertrade agreement may contain a clarification as to whether certain outlays, such as those for freight, insurance, public charges or financing costs form part of the value. Sometimes, however, the countertrade commitment may be quantified by reference to a specific quantity of a given type of counter-export goods.

74. In countertrade transactions with successive deliveries (e.g. in buy-back transactions), in long-term transactions, or in transactions where the counter-exporter's financing costs are uncertain at the time of the conclusion of the countertrade agreement (e.g. because of a floating-rate credit arrangement), clauses are sometimes present providing for an increase or decrease of the countertrade commitment depending on movements of prices or financing costs. In the case of capital goods it may be agreed that the commitment will be increased in proportion with expenses for spare parts or technical assistance.

75. Under some circumstances, when the exporter has made prior purchases from the importer, the guidelines regarding quantity of counter-exports may include a concept often referred to by the expression "additionality". The essential principle here is that the only purchases by the counter-importer that will be considered as fulfilling the countertrade commitment will be those that exceed the usual, or traditional, quantities purchased by the counter-importer from the counter-exporter or in the counter-exporting country. When the transaction is between two individual enterprises, the issue of additionality may be solved by agreeing on the quantity that is to be regarded as the usual or traditional purchase. Where, however, the arrangement gives to the counter-importer a latitude in choosing the goods or the supplier, the additionality clause may have to be more elaborate; it may be based on parameters such as trade statistics, indexes and trends, or it might be left to a third person or body to determine the purchases that are deemed to be additional.

E. *Price of goods*

(a) *Means of setting the price*

76. The problems of setting forth the price in the countertrade agreement are similar to those in respect of the quality of the goods. If the goods to be delivered under the export and counter-export contracts are known, a definitive price may be stated. If those goods are to be delivered at some time in the future, a standard or procedure for determining the price may be used instead, especially in the case of manufactured goods. If the goods to be delivered under either the export or the counter-export contract are not known, a standard or procedure for determining the price must

be provided. Some of the standards or procedures that might be used for determining the price and their particular application to countertrade transactions are set forth below.

77. *Price quoted in a market of goods of standard quality.* Where there exists a regular reporting of prices of goods of standard quality, as, for example, in an international exchange, the parties may link the price of the future counter-export deliveries to such a price standard. This method may also be used where the standard refers to a component part of the counter-export goods, provided that the price of the component is in a constant relation with the price of the final product.

78. *Production cost.* The parties may agree to base the counter-export price on production costs of an agreed producer. In such a case it may be appropriate for the contract clause to address issues such as the elements constituting the cost standard, the increases and decreases of the reference costs that should be translated into an adjustment of the counter-export price, or the cost movements that should not be so translated.

79. *Counter-importer's resale price.* Another possibility is to agree that the counter-export price will be proportional to the price charged by the counter-importer to its distributors. The questions that may arise in such a situation may include the treatment of any differences among the prices charged to distributors, charges that constitute the reference price, and the method of verifying the information on the resale prices.

80. *Most-favoured-customer clause.* Where the counter-exporter is supplying the counter-export goods to several customers, it may suit the expectations of the parties if the counter-exporter grants the counter-importer the most favourable price. Such a clause may indicate the means to be used to ascertain who was the most favoured customer in regard to the goods in question and address the question of comparability between the reference price and the counter-export price.

81. *A competitor's price.* The price clause may be linked to the price of a competitor producing the same goods as those that will be counter-exported. Such a clause might indicate how the reference producer should be identified, which elements are to be included in or excluded from the reference price, and the manner of obtaining price information.

82. *Average price.* The counter-export price may be calculated as an average of several comparable prices. This is an approach that has in practice received considerable recognition. A clause of this type may address the following: the number of quotations to be obtained by each party, the entities, countries or regions from which quotations may or should be obtained, the quality or quantity of goods to which the quotations should refer, the method of ensuring the

comparability of the quoted prices, any formula for calculating the average, or the procedure to be used if quotations are not available.

83. A price formula may be based on a single price standard. However, the parties may combine two or more standards in various ways. For example, a price clause may provide for the price to be determined by one standard but for there to be a comparison of prices determined in accordance with other standards. If the difference in result reaches an agreed amount or percentage, there may be a procedure for adjusting the price to be paid. Another possibility may be to provide for the calculation of the price according to two or more formulae with a formula for calculating an average or for determining the decisive price. When the counter-export goods have yet to be determined, the possible choices may call for different price clauses.

(b) *Some issues to be dealt with in a price standard clause*

84. In any of the foregoing cases the parties sometimes provide a time-frame for various stages of the price-setting procedure and indicate the point of time when the price clause should crystallize. The details of such a provision would depend, *inter alia*, on whether the price is to be determined only once or periodically. The provision may be linked to the placing of an order, the finalization of the counter-export contract, or the delivery of goods.

85. Another issue that may be considered in practice is the possibility that the structure of the standard price may not be the same as the structure of the counter-export price. For example, the two prices may differ as to whether the buyer has to bear, in addition to the agreed amount, the costs of transportation, insurance or a public charge, or whether it is the seller who has to bear these outlays. Where such a difference exists, the price clause may contain a formula to make the two cases comparable.

86. The quantity of goods may also be a consideration affecting the price. When the countertrade agreement envisages a quantity that is higher or lower than the quantity range on which the price standard is based, the price formula may have to ensure adjustment.

87. Furthermore, parties may agree to reflect in the price formula a party's commercial risk. Examples of such risks may include the counter-importer's resale risk, or a risk of a party that the price to be determined would be less favourable than the free market price. This risk factor may be reflected in the price clause by a percentage to be added to or deducted from the amount of the standard price.

(c) *Currency and means of payment*

88. It would be normal for the export and the counter-export goods to be priced in the same currency, which may be the currency of one of the two countries involved or it may be that of a third country, especially

a third country with a freely convertible currency used in international trade. The choice of the currency in which payment is to be made may depend on the means by which payment is to be made.

89. If payment for one or more of the deliveries is to benefit from a special export credit arrangement or export credit guarantees, that segment of the transaction, and perhaps the entire transaction, may have to be priced in a particular currency. If payment for individual segments of the transaction is to be made to a blocked account for use only for imports in conformity with the countertrade agreement, the currency in which the goods are priced takes on the nature of a unit of account. The most important technical factor in choosing the relevant currency would be the ease with which prices for the goods in that currency could be determined and with which any remaining balance at the completion of the countertrade transaction could be disposed of.

V. *Relationship between export contract, countertrade commitment and counter-export contract*

90. Since the economic motives for engaging in countertrade can be satisfied only if both the export and the counter-export contract are concluded and performed as envisaged, it is possible to consider them as one contract, albeit a composite one. It may well be a universal rule that complete non-performance by one party of his contractual obligations in a contract of sale authorizes the other party not to perform his, and authorizes a formal avoidance of the contract. It may also be a universal rule that non-performance of one's own obligations and avoidance of the contract is not authorized when the failure of the other party is not sufficiently serious.

91. In a simple sales contract these rules lead to the conclusion that the buyer is not obligated to pay for the goods if they are not delivered at all or they have sufficiently serious defects, but is obligated to take and pay for them if they are delivered with less serious defects. It is a separate question whether the buyer could withhold payment of any portion of the price because of the defects.

92. One of the issues frequently raised in discussions of the legal issues of countertrade is whether this paradigm of the simple sales contract should be applied to the countertrade transaction. It is generally suggested that the legal answer depends on the drafting of the contracts by the parties, i.e. that it is a matter within the control of the parties.

A. *Non-performance of export contract*

93. In the normal case the exporter is primarily interested in the performance of the export contract. If that contract is not performed, he would have no reason to wish to conclude or perform the counter-

export contract. The importer is often interested in performance of both the export contract and the counter-export contract. Therefore, even if the export contract is not performed, the importer often wishes the counter-export contract to be performed.

94. It appears that the most frequent solution found in practice is for the two obligations to be linked; the countertrade commitment ceases to have effect if the export contract does not come into force or is not performed. Most often it is provided for by a clause in the countertrade agreement rather than by a clause in the export contract.

95. There are, however, transactions where the contract terms do not provide for such a dependency of the countertrade commitment on the performance of the export contract. When the export and counter-export contracts are incorporated in separate and independent agreements, the logical interpretation is that the countertrade commitment remains binding irrespective of the performance of the export contract. This conclusion is less clear when the countertrade commitment is contained in the countertrade agreement but nothing is said as to the dependency of the countertrade commitment on performance of the export contract.

B. *Non-performance of countertrade commitment*

96. If the countertrade commitment is not performed, the question is whether the importer may suspend or delay payment under the export contract. In favour of a negative answer is that the amount of the export contract price often exceeds by far the importer's prejudice resulting from the absence of counter-export. When this is the case, the withholding of payment under the export contract on the ground that the countertrade commitment has not been performed may be seen to be a disproportionate consequence.

97. Moreover, the risk of non-payment would be considerably increased if the importer might refuse payment because of an obstacle affecting the performance of the countertrade agreement. The risk of such a withholding of payment may increase the exporter's difficulties in finding a person who would be willing to finance the export or to insure a risk of non-payment since such a risk is a circumstance extraneous to the export contract and difficult for the interested financial institutions to assess.

98. However, a possibility that payment under the export contract may be withheld until the countertrade commitment has been performed constitutes an effective incentive for the exporter to meet that commitment. Moreover, performance of the counter-export contract may be vital to the importer as a source of financing to pay for the goods under the export contract. The interplay of the foregoing considerations often results in one of the following two contractual approaches to this problem.

99. One approach is based on giving preference to the exporter's interest in maintaining the independence of his claim for the export price from the countertrade commitment. Such independence is normally sought to be achieved by incorporating the export contract and the countertrade agreement in distinct documents. Furthermore, there is either no mention in the export contract of the counter-export contract, or there is a positive statement that the export contract is to be performed irrespective of the performance of the counter-export contract. In such a case, the importer's interest in having security in the performance of the countertrade commitment would normally be met by a clause in the countertrade agreement providing for a penalty or liquidated damages, possibly secured by a bank guarantee, to cover the possibility that the exporter might not meet his countertrade commitment.

100. The other approach is based on giving preference to the importer's interest in preventing the exporter from receiving the export price until the exporter has met the countertrade commitment. Under this approach, the importer would normally deposit the export price in an account, and the release of the money from the account would be subject to contractually agreed conditions. Such a mechanism is predicated on the principle that the money may be used only as payment for counter-export goods. Alternatively, the relevant contract terms may provide that, under certain circumstances, the money will be released to the exporter after deduction of any penalty or liquidated damages in favour of the importer. It should be noted, however, that, in view of the cost involved in immobilizing money in the account, the use of such an arrangement becomes less likely the longer the time period provided for meeting the countertrade commitment.

C. *Counter-export and termination of countertrade commitment*

(a) *Existence of counter-export*

101. In order to ensure that purchases made by the exporter from the importer are credited to fulfilment of the countertrade commitment, the countertrade agreement and the counter-export contract may refer to one another. Any provisions in the countertrade agreement relating to the content of counter-export contracts will be significant in establishing whether a purchase by the exporter should be considered a counter-export contract in the sense of the countertrade commitment. Such provisions may indicate, for example, the type, quality or origin of goods, the structure of counter-exports or the concept of additionality. In addition, the counter-export contract or a document accompanying its performance (e.g. a document evidencing receipt of the counter-export goods, invoice, or a mutually agreed account evidencing export and counter-export deliveries) may provide that the amount of the contract is to be credited against the countertrade commitment. Sometimes the parties also agree that among the documents to be presented for the collection of payment under the letter of credit should be a counter-exporter's statement

that the payment fulfils or reduces the counter-importer's countertrade commitment.

(b) *Absence of counter-export*

102. A countertrade commitment is normally terminated by the performance of the counter-export contract. The question may also arise whether and under what circumstances the countertrade commitment might terminate even if no counter-export contract has been concluded, or even if the counter-exporter has not delivered under a concluded counter-export contract.

103. When the negotiation of a counter-export contract has not been successful, the *prima facie* conclusion may be that the countertrade commitment continues to be binding until a counter-export is performed. If it is shown that the importer acted within an agreed negotiation procedure, and that the substance of his contract proposals were within agreed guidelines, the likely conclusion would be that the exporter has not fulfilled the countertrade commitment. If, however, it is shown that any such procedures or substantive guidelines have been violated by the importer, the conclusion might be drawn that the exporter is no longer under a duty to continue negotiations concerning a counter-export contract.

104. Another situation in which there may be a disagreement as to whether the countertrade commitment should be terminated or reduced may arise when the counter-exporter fails to deliver under a counter-export contract. In such a case it may be argued that, in so far as the counter-exporter has breached his obligation to deliver, the commitment to counter-import should cease to be binding on the exporter. A more far-reaching argument might be that non-delivery under the counter-export contract, irrespective of whether the counter-exporter is responsible for it, should terminate the countertrade commitment.

105. In order to avoid such a controversy, parties sometimes include in the countertrade agreement or in the counter-export contract provisions dealing with the effect of a non-delivery of goods under the counter-export contract on the countertrade commitment. Sometimes such provisions also cover the effect of a non-delivery when the counter-exporter can show, for example, that the non-delivery was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences. Furthermore, the provisions may address the case of partial delivery, in particular the question whether the countertrade commitment continues to be binding with respect to the non-delivered part.

D. *Drafting of contracts to express desired relationship*

106. The answer to the question whether a contractual segment of a countertrade transaction, i.e. the export,

the countertrade commitment or the counter-export, is to be interpreted on its own terms, independently from another segment, or whether there is a relationship between the segments, is influenced by the drafting structure of the transaction.

107. When the different contractual segments are embraced by one contract, the different contract obligations are likely to be seen as parts of one network of obligations. If, in such a case, the parties wish to ensure separation between transaction segments, special provisions would be necessary. However, even if special provisions of this nature are included in a contract, the transaction might nevertheless be interpreted in a way favourable to the interrelationship of obligations, particularly if those special provisions are not formulated in a precise way.

108. When separate contracts are used, the interpretation is likely to be that, *prima facie*, each contract is to be applied on its own terms. Any relationship between contracts would have to be expressly stipulated. Nevertheless, there exists the view that an intention of the parties to arrange a countertrade transaction may lead to an interpretation that, despite the presence of separate contracts, the transaction segments might be interpreted as a unit.¹⁴ However, in so far as such a view is applicable to the transaction, it appears that, in accordance with the principle of freedom of contract, the separation may be ensured by an express provision to that effect in the transaction documents.

109. If the parties wish to establish a certain relationship between separate contracts, they may so provide explicitly. For example, the countertrade agreement may provide that it forms an integral part of the export contract; or, the export contract may provide that its entry into force is suspended until the entry into force of the countertrade agreement. It may be noted that such broad contract language may result in an interpretation that the exporter's obligation to deliver the export goods and his commitment to conclude a counter-import contract are interrelated, and that, as a consequence, the exporter, in order to be able to hold the importer responsible for a breach of an obligation under the export contract, must not be in breach of his countertrade commitment.

110. Another example of a provision linking transaction segments is a stipulation in the countertrade agreement according to which, if there is an obstacle to the delivery under the export contract, the countertrade commitment ceases to be binding on the exporter. Alternatively, the counter-export contract may make reference to the countertrade agreement specifying, for instance, that the payment under the contract is to be deducted from the amount of the countertrade commitment or that a breach of the duty to deliver under the contract will result in a reduction of the countertrade commitment.

¹⁴O. Capatina, *Considérations sur les opérations de contre-achat dans les relations de commerce extérieur de la Roumanie, Droit et pratique du commerce international*, tome 8, no. 2, 1982, 179.

VI. Conclusion

111. The conduct of countertrade often requires the ability to resolve difficult problems of a commercial nature and to co-ordinate the undertaking and performance of obligations that are disparate in nature and in time and that must often be undertaken by parties who are not parties to the countertrade agreement. This calls first of all for commercial skill in conducting these transactions. It also calls for skill in drafting the contractual agreements that structure the transactions, whether or not those contractual agreements are fully enforceable through the use of the usual legal means.

112. The Commission may wish to consider whether it would wish to prepare a legal guide on drawing up countertrade contracts that would include, in addition to the essentially legal discussion presented in the present report, advice on the practical problems of drawing up such contracts. If the Commission were to decide to prepare such a legal guide, it might wish to

request the secretariat to prepare a draft outline of its contents and such further preliminary studies as seemed appropriate. If the Commission were to do so, the secretariat would consult with a group of experts with adequate representation from the different regions. The draft outline and preliminary studies might be presented to the Commission at its twenty-second session or, if the Commission thought it appropriate, to a Working Group.

113. The Commission might, on the other hand, conclude that the preparation of a legal guide on the practical problems of drawing up countertrade contracts would not contribute significantly to the unification or harmonization of international trade law, which is the mandate of the Commission. If the Commission were to so decide, it might conclude that the preparation of the present report constituted a useful contribution by the Commission to those who draw up such contracts, and that the subject might be deleted from the future programme of work.

IV. INTERNATIONAL SHIPPING LEGISLATION

United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg)^a: note by the Secretariat (A/CN.9/306) [Original: English]

INTRODUCTION

1. The United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) (hereinafter referred to as the "Hamburg Rules") was adopted on 31 March 1978 by a diplomatic conference convened by the General Assembly of the United Nations at Hamburg, Federal Republic of Germany. The Convention is based upon a draft prepared by the United Nations Commission on International Trade Law (UNCITRAL).

2. The Hamburg Rules establish a uniform legal regime governing the rights and obligations of shippers, carriers and consignees under a contract of carriage of goods by sea. Their central focus is the liability of a carrier for loss of and damage to the goods and for delay in delivery. They also deal with the liability of the shipper for loss sustained by the carrier and for damage to the ship, as well as certain responsibilities and liabilities of the shipper in respect of dangerous goods. Other provisions of the Hamburg Rules deal with transport documents issued by the carrier, including bills of lading and non-negotiable transport documents, and with limitation of actions, jurisdiction and arbitral proceedings under the Convention.

3. As of 16 February 1988, twelve countries had ratified or acceded to the Convention. They are: Barbados, Botswana, Chile, Egypt, Hungary, Lebanon, Morocco, Romania, Senegal, Tunisia, Uganda, and United Republic of Tanzania. Twenty ratifications or accessions are needed for the Convention to come into force.

I. Background to the Hamburg Rules

A. *The Hague Rules*

4. The Hamburg Rules are the result of a movement to establish a modern and uniform international legal regime to govern the carriage of goods by sea. For many years, a large proportion of the carriage of goods by sea has been governed by a legal regime centred

around the International Convention relating to the Unification of Certain Rules relating to Bills of Lading, adopted on 25 August 1924 at Brussels, otherwise known as the "Hague Rules".

5. The Hague Rules establish a mandatory legal regime governing the liability of a carrier for loss of or damage to goods carried under a bill of lading. They cover the period from the time the goods are loaded on to the ship until the time they are discharged. According to their provisions, the carrier is liable for loss or damage resulting from his failure to exercise due diligence to make the ship seaworthy, to properly man, equip and supply the ship or to make its storage areas fit and safe for the carriage of goods. However, the Hague Rules contain a long list of circumstances that exempt the carrier from this liability. Perhaps the most significant of these exemptions frees the carrier from liability if the loss or damage arises from the faulty navigation or management of the ship.

6. The Hague Rules have been amended twice since their adoption, first in 1968 (by means of a protocol hereinafter referred to as the "Visby Protocol") and again in 1979 (by means of a protocol hereinafter referred to as the "1979 Additional Protocol"). These amendments deal mainly with the financial limits of liability under the Hague Rules. They do not alter the basic liability regime of the Hague Rules or the allocation of risks effected by it.

B. *Dissatisfaction with the Hague Rules system*

7. There emerged over the course of time increasing dissatisfaction with the Hague Rules system. This dissatisfaction was based in part upon the perception that the overall allocation of responsibilities and risks achieved by the Hague Rules, which heavily favoured carriers at the expense of shippers, was inequitable. Several provisions of the Hague Rules were regarded as ambiguous and uncertain, which was said to result in higher transportation costs and to add further to the risks borne by shippers. The dissatisfaction with the Hague Rules was also based upon the perception that developments in conditions, technologies and practices relating to shipping had rendered inappropriate many features of the Hague Rules that may have been appropriate in 1924.

^aThis note has been prepared by the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) for informational purposes only; it is not an official commentary on the Convention.

C. *Steps towards revising the law governing the carriage of goods by sea*

8. The question of revising the law governing the carriage of goods by sea was first raised by the delegation of Chile at the first session of UNCITRAL in 1968. Shortly afterwards, the General Assembly recommended that UNCITRAL should consider including the question among the priority topics in its programme of work. UNCITRAL did so at its second session in 1969.

9. At about the same time, the law relating to bills of lading and the carriage of goods by sea had come under study within a working group of the United Nations Conference on Trade and Development (UNCTAD). The Working Group concluded that the rules and practices concerning bills of lading, including those contained in the Hague Rules and the Hague Rules as amended by the Visby Protocol, should be examined and, where appropriate, revised and amplified and that a new international convention should be prepared. The objective of that work would be to remove the existing uncertainties and ambiguities in the existing law and to establish a balanced allocation of responsibilities and risks between cargo interests and the carriers. The Working Group recommended that the work be undertaken by UNCITRAL. In 1971, UNCITRAL decided to proceed accordingly.

10. By 1976, UNCITRAL had finalized and approved the text of a draft Convention on the Carriage of Goods by Sea. Thereafter, the General Assembly convened the diplomatic conference at Hamburg, which adopted the Hamburg Rules in 1978.

II. Salient features of the Hamburg Rules

A. *Scope of application*

11. In order to achieve international uniformity in the law relating to the carriage of goods by sea, the Hamburg Rules have been given a relatively wide scope of application—substantially wider than that of the Hague Rules. The Hamburg Rules are applicable to all contracts for the carriage of goods by sea between two different States if, according to the contract, either the port of loading or the port of discharge is located in a Contracting State, if the goods are discharged at an optional port of discharge stipulated in the contract and that port is located in a Contracting State, or if the bill of lading or other document evidencing the contract is issued in a Contracting State. In addition to those cases, the Hamburg Rules apply if the bill of lading or other document evidencing the contract of carriage provides that the rules are to apply. The application of the Rules does not depend upon the nationality of the ship, the carrier, the shipper, the consignee or any other interested person.

12. The Hamburg Rules do not apply to charter-parties. However, they apply to bills of lading issued pursuant to charter-parties if the bill of lading governs

the relation between the carrier and a holder of the bill of lading who is not the charterer.

13. Unlike the Hague Rules, which apply only when a bill of lading is issued by the carrier, the Hamburg Rules govern the rights and obligations of the parties to a contract of carriage regardless of whether or not a bill of lading has been issued. This is becoming increasingly important as more and more goods are carried under non-negotiable transport documents, rather than under bills of lading.

B. *Period of responsibility*

14. The Hague Rules cover only the period from the time the goods are loaded onto the ship until the time they are discharged from it. They do not cover loss or damage occurring while the goods are in the custody of the carrier prior to loading or after discharge.

15. In modern shipping practice carriers often take and retain custody of goods in port before and after the actual sea carriage. It has been estimated that most loss and damage to goods occurs while the goods are in port. In order to ensure that such loss or damage is the responsibility of the party who is in control of the goods and thereby best able to guard against that loss or damage, the Hamburg Rules apply to the entire period the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge.

C. *Basis of carrier's liability*

16. The basis of the carrier's liability under the Hague Rules system was one of the principal concerns of the movement for reform that eventually resulted in the Hamburg Rules. While the Hague Rules provide that the carrier is liable for loss or damage resulting from his failure to exercise due diligence to make the ship seaworthy, to properly man, equip and supply the ship or to make its storage areas fit and safe for the carriage of goods, a long list of circumstances exempts the carrier from this liability. These provisions are based upon exemption clauses that commonly appeared in bills of lading when the Hague Rules were adopted in the early 1920s. Perhaps the most significant of these exemptions frees the carrier from liability if the loss or damage arises from the faulty navigation or management of the ship, the so-called "nautical fault" exception. As a result of these exemptions, the shipper bears a heavy portion of the risk of loss of or damage to his goods.

17. The original justifications for this liability scheme, and in particular the nautical fault exception, were the inability of the shipowner to communicate with and exercise effective control over his vessel and crew during long voyages at sea, and the traditional concept of an ocean voyage as a joint adventure of the carrier and the owner of the goods. However, subsequent developments in communications and the reduction of

voyage times have rendered those justifications obsolete. The liability scheme has no parallel in the law governing other modes of transport. Moreover, it is viewed as contrary both to the general legal concept that one should be liable to pay compensation for loss or damage caused by his fault or that of his servants or agents, and to the economic concept that loss should fall upon the party who is in a position to take steps to avoid it.

18. The Hamburg Rules effect a more balanced and equitable allocation of risks and responsibilities between carriers and shippers. Liability is based on the principle of presumed fault or neglect. That is, the carrier is liable if the occurrence that caused the loss, damage or delay took place while the goods were in his charge, and he may escape liability only if he proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences. This principle replaces the itemization of the carrier's obligations and the long list of his exemptions from liability under the Hague Rules, and eliminates the exemption from liability for loss or damage caused by the faulty navigation or management of the ship. The liability of the carrier under the Hamburg Rules corresponds with the liability imposed upon carriers under international conventions governing carriage of goods by other modes of transport, such as road and rail.

D. Deck cargo

19. Sea cargo carried on deck was traditionally subject to high risk of loss or damage from the elements or other causes. For this reason the Hague Rules do not cover goods carried on deck by agreement of the parties, permitting the carrier to disclaim all liability for such cargo. However, developments in transport and packaging techniques, and in particular containerization, have made it possible for cargo to be carried on deck with relative safety. It is common for containers to be stored on deck in modern container ships.

20. The Hamburg Rules take these developments into account. First, they expressly permit the carrier to carry goods on deck not only if the shipper so agrees, but also when such carriage is in accordance with the usage of the particular trade or if it is required by law. Second, they hold the carrier liable on the basis of presumed fault or neglect for loss, damage or delay in respect of goods that he is permitted to carry on deck. If he carries goods on deck without being permitted to do so, he is made liable for loss, damage or delay resulting solely from the carriage on deck, without being able to exclude that liability by proving that reasonable measures were taken to avoid the loss, damage or delay.

E. Liability for delay

21. Historically, sea voyages were subject to innumerable uncontrollable hazards, which frequently resulted in delays and deviations. Because of this unpredictability,

the Hague Rules do not cover the liability of the carrier for delay in delivery. However, as a result of modern shipping technology, the proper charting of the oceans and sophisticated and efficient methods of navigation, voyages have become less subject to delays and more predictable. Shippers have come to rely upon and expect compliance with undertakings by carriers to deliver the goods within a specified period of time. Thus, the Hamburg Rules govern the liability of the carrier for delay in delivery in the same manner as liability for loss of or damage to the goods; i.e., in accordance with the principle of presumed fault or neglect.

F. Financial limits of liability

22. The Hamburg Rules limit the liability of the carrier for loss of or damage to the goods to an amount equal to 835 units of account per package or other shipping unit, or 2.5 units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher. The carrier and the shipper can agree to limits higher than those, but not to lower limits.

23. The unit of account is the Special Drawing Right (SDR) as defined by the International Monetary Fund (IMF). The Rules set forth detailed provisions as to the manner in which the limits expressed in units of account are to be converted into national currencies with special provisions for certain States that are not members of the IMF. The limits of liability under the Hamburg Rules are 25 per cent higher than those established under the 1979 Additional Protocol, which also uses the SDR as the unit of account. In the Hague Rules and the Visby Protocol the limits of liability are expressed in units of account based upon a certain quantity of gold. Because national currencies no longer have fixed values in relation to gold, the values of those limits in national currencies vary.

24. The Hamburg Rules maintain the dual per package/per kilogram system established in the Visby Protocol. The purpose of this system is to take account of the fact that the value/weight ratios of goods carried by sea differ markedly. Sea cargo ranges from cargo such as bulk commodities, which have a low value relative to their weight, to cargo such as complex heavy machinery, which has a much higher value/weight ratio.

25. Under the dual system, the relatively low limit of 2.5 units of account per kilogram would apply to unpackaged commodities carried in bulk, while the higher per-package limit would apply to items carried in packages or other shipping units. The break-even point is 334 kilograms: if a package or shipping unit is under that weight, the per-package limit would apply; above that weight, the per-kilogram limit would apply. For the purpose of calculating the limits of liability, the packages or shipping units contained in a container are deemed to be those enumerated in the bill of lading or other transport document evidencing the contract of carriage.

26. The liability of the carrier for delay in delivering the goods is limited to $2\frac{1}{2}$ times the freight payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage.

27. The Hamburg Rules contain an expedited procedure for revising the limits of liability in the event of a significant change in the real value of the limits resulting, for example, from inflation.

G. *Rights of carrier's servants and agents*

28. If a servant or agent of the carrier proves that he acted within the scope of his employment, he is entitled to avail himself of the defences and limits of liability that the carrier is entitled to invoke under the Hamburg Rules.

H. *Loss of benefit of limits of liability*

29. A carrier loses the benefit of the limits of liability if it is proved that the loss, damage or delay resulted from an act or omission of the carrier done with intent to cause the loss, damage or delay, or recklessly and with knowledge that the loss, damage or delay would probably result. A servant or agent of the carrier loses the benefit of the limits of liability in the event of such conduct on his part.

I. *Liability of the carrier and actual carrier; through carriage*

30. A carrier may enter into a contract of carriage by sea with a shipper but entrust the carriage, or a part of it, to another carrier. The contracting carrier in such cases often includes in the bill of lading a clause that exempts him from liability for loss or damage attributable to the actual carrier. Shippers face difficulties in legal systems that uphold those exemption clauses because they have to seek compensation from the actual carrier; that carrier might be unknown to the shipper, might have effectively restricted or excluded his liability or might not be subject to suit by the shipper in an appropriate jurisdiction. The Hague Rules do not deal with the liability of the actual carrier.

31. The Hamburg Rules balance the interests of shippers and carriers in such cases. They enable the contracting carrier to exempt himself from liability for loss, damage or delay attributable to an actual carrier only if the contract of carriage specifies the part of carriage entrusted to the actual carrier and names the actual carrier. Moreover, the exemption is effective only if the shipper can institute judicial or arbitral proceedings against the actual carrier in one of the jurisdictions set forth in the Hamburg Rules. Otherwise, the contracting carrier is liable for loss, damage or delay in respect of the goods throughout the voyage, including loss, damage or delay attributable to the

actual carrier. Where the contracting carrier and the actual carrier are both liable, their liability is joint and several.

J. *Liability of the shipper*

32. Under the Hamburg Rules a shipper is liable for loss sustained by the carrier or the actual carrier, or for damage sustained by the ship, only if the loss or damage was caused by the fault or neglect of the shipper, his servants or agents.

33. Particular obligations are imposed upon the shipper with respect to dangerous goods. He is obligated to mark or label the goods in a suitable manner and, where he hands over dangerous goods to a carrier, he must inform the carrier of their dangerous character and, if necessary, of the precautions to be taken. Failure to meet these obligations could, in particular cases, entitle the carrier to be compensated for loss suffered from the shipment of the goods. The carrier may be entitled to dispose of dangerous goods or render them innocuous without compensating the shipper if the shipper fails to meet his obligations with respect to the goods, or if the goods become an actual danger to life or property.

K. *Transport documents*

1. *Bills of lading*

34. Under both the Hague Rules and the Hamburg Rules, the carrier must issue a bill of lading if the shipper requests one. However, the Hamburg Rules take into account modern techniques of documentation by providing that a signature on a bill of lading not only may be handwritten but also may be made by any mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading is issued.

35. The Hamburg Rules itemize the types of information required to be set forth in the bill of lading. Among other things, these include the general nature of the goods, the number of packages or pieces, their weight or quantity, and their apparent condition. The itemization is more extensive than that under the Hague Rules, since the additional information is needed in order to implement the liability regime of the Hamburg Rules, which is more comprehensive than that of the Hague Rules.

36. Under the Hamburg Rules the absence of one of the required particulars does not affect the legal character of the document as a bill of lading. This resolves a question which is not dealt with in the Hague Rules and which has been resolved in disparate ways in national legal systems.

37. Under the Hamburg Rules as well as the Hague Rules, the information set forth in the bill of lading is *prima facie* evidence of the taking over or loading by the carrier of the goods as so described. The Hamburg

Rules and the Visby Protocol further provide that the description of the goods is conclusive in favour of a third-party transferee of the bill of lading who in good faith has acted in reliance on the description. The Hamburg Rules provide that if the carrier did not note the apparent condition of the goods on the bill of lading, they are deemed to have been in apparent good condition. This, too, resolves a question that is uncertain under the Hague Rules.

38. If the carrier knows or reasonably suspects that information in the bill of lading concerning the general nature of the goods, the number of packages or pieces, or their weight or quantity, is not accurate, or if he had no reasonable means of checking that information, he may, under the Hamburg Rules, insert in the bill of lading a reservation specifying the inaccuracies, grounds of suspicion or the absence of reasonable means of checking. The *prima facie* or conclusive evidentiary effect of the bill of lading is not applicable in respect of such information. These provisions are more explicit than comparable provisions of the Hague Rules.

39. Sometimes, a shipper asks the carrier to issue a "clean" bill of lading (i.e., without inserting a reservation) even though the carrier may have grounds to question the accuracy of information supplied by the shipper for insertion in the bill of lading or may have no reasonable means of checking the information, or may have discovered defects in the condition of the goods. In return, the shipper agrees to indemnify the carrier against loss suffered by him as a result of issuing the bill of lading without a reservation. The Hamburg Rules provide that such an agreement is valid as against the shipper, unless the carrier intends to defraud a third party who relies on the description of the goods in the bill of lading. However, the agreement has no effect as against a third-party transferee of the bill of lading, including a consignee.

2. Other transport documents

40. There is a growing practice in maritime transport for carriers to issue non-negotiable transport documents, such as sea waybills, rather than bills of lading. Although non-negotiable documents have been used in certain trades for some time, the use of such documents is spreading to other trades. Non-negotiable documents avoid certain problems that have arisen in connection with the use of bills of lading, such as the arrival of the goods at their destination before the bill of lading reaches the consignee.

41. The Hamburg Rules accommodate these developments; first, by applying to contracts for carriage of goods by sea regardless of whether or not a bill of lading is issued, and secondly, by providing that a transport document issued by the carrier, which is not a bill of lading, is nevertheless *prima facie* evidence of the conclusion of the contract of carriage by sea and of the taking over of the goods by the carrier as described in the document.

42. Since the Hague Rules apply only when a bill of lading has been issued, they do not deal with other types of transport documents.

L. Claims and actions

43. The Hamburg Rules contain provisions governing judicial as well as arbitral proceedings brought under the Rules. They expressly permit the parties to agree to submit their disputes under the Convention to arbitration. This is important because some legal systems preclude the settlement by arbitration of disputes relating to the carriage of goods by sea. Arbitration has become recognized as an effective means of resolving such disputes; thus the Hamburg Rules contain provisions to settle questions such as limitation of actions and jurisdiction in connection with arbitration. The Hague Rules do not provide for arbitration.

1. Limitation of actions

44. A claim under the Hamburg Rules must be brought in judicial or arbitral proceedings within a two-year limitation period. The period may be extended by the party against whom the claim is made. Under the Hague Rules suit must be brought within one year. The Hamburg Rules further provide that a party held liable under the Hamburg Rules has an additional period of time after the expiration of the two-year period to institute an action for indemnity against another party who may be liable to him. Comparable provisions are not contained in the Hague Rules, but were added by the Visby Protocol.

2. Jurisdiction

45. The Hamburg Rules require judicial or arbitral proceedings to be brought in one of the places specified in the Rules. The specified places are broad enough to meet the practical needs of the claimant. These include the following: the principal place of business or habitual residence of the defendant; the place where the contract of carriage was made, if made through the defendant's place of business, branch or agency there; the port of loading; the port of discharge; any other place designated in the contract of carriage or arbitration agreement. Judicial proceedings may also be instituted in a place where a vessel of the owner of the carrying vessel has been validly arrested, subject to the right of the defendant to have the action removed to one of the places mentioned in the preceding sentence. Notwithstanding those options, if, after a claim has arisen, the parties by agreement designate a place where the claimant may institute judicial proceedings, the proceedings must be instituted in that place; the same is true with respect to an agreement as to the place of arbitral proceedings, if the agreement is otherwise valid. The Hague Rules do not contain provisions with respect to jurisdiction.

M. Selected provisions

46. The Hamburg Rules are mandatory in the sense that the parties to a contract of carriage by sea may not by agreement reduce the carrier's responsibilities and obligations under the Rules. However, those responsibilities and obligations may be increased.

47. Other provisions of the Hamburg Rules pertain to the relationship between the Rules and the law of general average and other international conventions. Upon becoming a party to the Hamburg Rules, a State that is a party to the Hague Rules or the Hague Rules as amended by the Visby Protocol must denounce them. Under certain conditions the denunciation may be deferred for a period of up to 5 years.

III. Uniformity of law

48. The Hamburg Rules offer the potential of achieving greater uniformity in the law relating to the carriage of goods by sea than do the Hague Rules. First, since the Hague Rules apply only when a bill of lading is issued, the significant and growing portion of maritime transport in which bills of lading are not issued is not covered by them. Secondly, even when the Hague Rules do apply, many aspects of the rights and obligations of

the parties to a contract of carriage are not dealt with. A question or issue that is not covered by the Hague Rules will be resolved by rules of national law, which often produce disparate solutions, or by clauses in bills of lading, which may unfairly favour one of the parties and which may be given effect to differing degrees in national legal systems.

49. The Hamburg Rules, by comparison, deal much more comprehensively with the rights and obligations of the parties to a contract of carriage. In order to achieve their potential for uniformity of law in this area, they must be adhered to by States world-wide.

IV. Further information about the Hamburg Rules

50. Further information about the Hamburg Rules may be obtained from:

UNCITRAL secretariat
Vienna International Centre
P.O. Box 500
A-1400 Vienna
Austria
Telex: 135612
Telefax: (43)(1) 232 156

V. INTERNATIONAL SALE OF GOODS

A. United Nations Convention on Contracts for the International Sale of Goods⁴: note by the Secretariat (A/CN.9/307) [Original: English]

INTRODUCTION

1. The United Nations Convention on Contracts for the International Sale of Goods provides a uniform text of law for international sales of goods. The Convention was prepared by the United Nations Commission on International Trade Law (UNCITRAL) and adopted by a diplomatic conference on 11 April 1980.

2. Preparation of a uniform law for the international sale of goods began in 1930 at the International Institute for the Unification of Private Law (UNIDROIT) in Rome. After a long interruption in the work as a result of the Second World War, the draft was submitted to a diplomatic conference in The Hague in 1964, which adopted two conventions, one on the international sale of goods and the other on the formation of contracts for the international sale of goods.

3. Almost immediately upon the adoption of the two conventions there was wide-spread criticism of their provisions as reflecting primarily the legal traditions and economic realities of continental Western Europe, which was the region that had most actively contributed to their preparation. As a result, one of the first tasks undertaken by UNCITRAL on its organization in 1968 was to enquire of States whether or not they intended to adhere to those conventions and the reasons for their positions. In the light of the responses received, UNCITRAL decided to study the two conventions to ascertain which modifications might render them capable of wider acceptance by countries of different legal, social and economic systems. The result of this study was the adoption by diplomatic conference on 11 April 1980 of the United Nations Convention on Contracts for the International Sale of Goods, which combines the subject matter of the two prior conventions.

4. UNCITRAL's success in preparing a Convention with wider acceptability is evidenced by the fact that the original 11 States for which the Convention came into force on 1 January 1988 included States from every geographical region, every stage of economic development and every major legal, social and economic system. The original 11 States were: Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, United States, Yugoslavia and Zambia.

⁴This note has been prepared by the secretariat of the United Nations Commission on International Trade Law for informational purposes; it is not an official commentary on the Convention.

5. As of 31 January 1988, an additional four States, Austria, Finland, Mexico and Sweden, had become a party to the Convention.

6. The Convention is divided into four parts. Part One deals with the scope of application of the Convention and the general provisions. Part Two contains the rules governing the formation of contracts for the international sale of goods. Part Three deals with the substantive rights and obligations of buyer and seller arising from the contract. Part Four contains the final clauses of the Convention concerning such matters as how and when it comes into force, the reservations and declarations that are permitted and the application of the Convention to international sales where both States concerned have the same or similar law on the subject.

Part One

SCOPE OF APPLICATION AND GENERAL PROVISIONS

A. *Scope of application*

7. The articles on scope of application state both what is included in the coverage of the Convention and what is excluded from it. The provisions on inclusion are the most important. The Convention applies to contracts of sale of goods between parties whose places of business are in different States and either both of those States are Contracting States or the rules of private international law lead to the law of a Contracting State. A few States have availed themselves of the authorization in article 95 to declare that they would apply the Convention only in the former and not in the latter of these two situations. As the Convention becomes more widely adopted, the practical significance of such a declaration will diminish.

8. The final clauses make two additional restrictions on the territorial scope of application that will be relevant to a few States. One applies only if a State is a party to another international agreement that contains provisions concerning matters governed by this Convention; the other permits States that have the same or similar domestic law of sales to declare that the Convention does not apply between them.

9. Contracts of sale are distinguished from contracts for services in two respects by article 3. A contract for

the supply of goods to be manufactured or produced is considered to be a sale unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for their manufacture or production. When the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services, the Convention does not apply.

10. The Convention contains a list of types of sales that are excluded from the Convention, either because of the purpose of the sale (goods bought for personal, family or household use), the nature of the sale (sales by auction, on execution or otherwise by law) or the nature of the goods (stocks, shares, investment securities, negotiable instruments, money, ships, vessels, hovercraft, aircraft or electricity). In many States some or all of such sales are governed by special rules reflecting their special nature.

11. Several articles make clear that the subject matter of the Convention is restricted to the formation of the contract and the rights and duties of the buyer and seller arising from such a contract. In particular, the Convention is not concerned with the validity of the contract, the effect which the contract may have on the property in the goods sold or the liability of the seller for death or personal injury caused by the goods to any person.

B. *Party autonomy*

12. The basic principle of contractual freedom in the international sale of goods is recognized by the provision that permits the parties to exclude the application of this Convention or derogate from or vary the effect of any of its provisions. The exclusion of the Convention would most often result from the choice by the parties of the law of a non-contracting State or of the domestic law of a contracting State to be the law applicable to the contract. Derogation from the Convention would occur whenever a provision in the contract provided a different rule from that found in the Convention.

C. *Interpretation of the Convention*

13. This Convention for the unification of the law governing the international sale of goods will better fulfil its purpose if it is interpreted in a consistent manner in all legal systems. Great care was taken in its preparation to make it as clear and easy to understand as possible. Nevertheless, disputes will arise as to its meaning and application. When this occurs, all parties, including domestic courts and arbitral tribunals, are admonished to observe its international character and to promote uniformity in its application and the observance of good faith in international trade. In particular, when a question concerning a matter governed by this Convention is not expressly settled in it, the question is to be settled in conformity with the general principles on which the Convention is based. Only in

the absence of such principles should the matter be settled in conformity with the law applicable by virtue of the rules of private international law.

D. *Interpretation of the contract; usages*

14. The Convention contains provisions on the manner in which statements and conduct of a party are to be interpreted in the context of the formation of the contract or its implementation. Usages agreed to by the parties, practices they have established between themselves and usages of which the parties knew or ought to have known and which are widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned may all be binding on the parties to the contract of sale.

E. *Form of the contract*

15. The Convention does not subject the contract of sale to any requirement as to form. In particular, article 11 provides that no written agreement is necessary for the conclusion of the contract. However, if the contract is in writing and it contains a provision requiring any modification or termination by agreement to be in writing, article 29 provides that the contract may not be otherwise modified or terminated by agreement. The only exception is that a party may be precluded by his conduct from asserting such a provision to the extent that the other person has relied on that conduct.

16. In order to accommodate those States whose legislation requires contracts of sale to be concluded in or evidenced by writing, article 96 entitles those States to declare that neither article 11 nor the exception to article 29 applies where any party to the contract has his place of business in that State.

Part Two

FORMATION OF THE CONTRACT

17. Part Two of the Convention deals with a number of questions that arise in the formation of the contract by the exchange of an offer and an acceptance. When the formation of the contract takes place in this manner, the contract is concluded when the acceptance of the offer becomes effective.

18. In order for a proposal for concluding a contract to constitute an offer, it must be addressed to one or more specific persons and it must be sufficiently definite. For the proposal to be sufficiently definite, it must indicate the goods and expressly or implicitly fix or make provision for determining the quantity and the price.

19. The Convention takes a middle position between the doctrine of the revocability of the offer until acceptance and its general irrevocability for some

period of time. The general rule is that an offer may be revoked. However, the revocation must reach the offeree before he has dispatched an acceptance. Moreover, an offer cannot be revoked if it indicates that it is irrevocable, which it may do by stating a fixed time for acceptance or otherwise. Furthermore, an offer may not be revoked if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

20. Acceptance of an offer may be made by means of a statement or other conduct of the offeree indicating assent to the offer that is communicated to the offerer. However, in some cases the acceptance may consist of performing an act, such as dispatch of the goods or payment of the price. Such an act would normally be effective as an acceptance the moment the act was performed.

21. A frequent problem in contract formation, perhaps especially in regard to contracts of sale of goods, arises out of a reply to an offer that purports to be an acceptance but contains additional or different terms. Under the Convention, if the additional or different terms do not materially alter the terms of the offer, the reply constitutes an acceptance, unless the offeror without undue delay objects to those terms. If he does not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

22. If the additional or different terms do materially alter the terms of the contract, the reply constitutes a counter-offer that must in turn be accepted for a contract to be concluded. Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or settlement of disputes are considered to alter the terms of the offer materially.

Part Three

SALE OF GOODS

A. *Obligations of the seller*

23. The general obligations of the seller are to deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention. The Convention provides supplementary rules for use in the absence of contractual agreement as to when, where and how the seller must perform these obligations.

24. The Convention provides a number of rules that implement the seller's obligations in respect of the quality of the goods. In general, the seller must deliver goods that are of the quantity, quality and description required by the contract and that are contained or packaged in the manner required by the contract. One set of rules of particular importance in international sales of goods involves the seller's obligation to deliver

goods that are free from any right or claim of a third party, including rights based on industrial property or other intellectual property.

25. In connection with the seller's obligations in regard to the quality of the goods, the Convention contains provisions on the buyer's obligation to inspect the goods. He must give notice of any lack of their conformity with the contract within a reasonable time after he has discovered it or ought to have discovered it, and at the latest two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

B. *Obligations of the buyer*

26. Compared to the obligations of the seller, the general obligations of the buyer are less extensive and relatively simple; they are to pay the price for the goods and take delivery of them as required by the contract and the Convention. The Convention provides supplementary rules for use in the absence of contractual agreement as to how the price is to be determined and where and when the buyer should perform his obligation to pay the price.

C. *Remedies for breach of contract*

27. The remedies of the buyer for breach of contract by the seller are set forth in connection with the obligations of the seller and the remedies of the seller are set forth in connection with the obligations of the buyer. This makes it easier to use and understand the Convention.

28. The general pattern of remedies is the same in both cases. If all the required conditions are fulfilled, the aggrieved party may require performance of the other party's obligations, claim damages or avoid the contract. The buyer also has the right to reduce the price where the goods delivered do not conform with the contract.

29. Among the more important limitations on the right of an aggrieved party to claim a remedy is the concept of fundamental breach. For a breach of contract to be fundamental, it must result in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the result was neither foreseen by the party in breach nor foreseeable by a reasonable person of the same kind in the same circumstances. A buyer can require the delivery of substitute goods only if the goods delivered were not in conformity with the contract and the lack of conformity constituted a fundamental breach of contract. The existence of a fundamental breach is one of the two circumstances that justifies a declaration of avoidance of a contract by the aggrieved party; the other circumstance being that, in the case of non-delivery of the goods by the seller or non-payment of the price or failure to take delivery by

the buyer, the party in breach fails to perform within a reasonable period of time fixed by the aggrieved party.

30. Other remedies may be restricted by special circumstances. For example, if the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A party cannot recover damages that he could have mitigated by taking the proper measures. A party may be exempted from paying damages by virtue of an impediment beyond his control.

D. *Passing of risk*

31. Determining the exact moment when the risk of loss or damage to the goods passes from the seller to the buyer is of great importance in contracts for the international sale of goods. Parties may regulate that issue in their contract either by an express provision or by the use of a trade term. However, for the frequent case where the contract does not contain such a provision, the Convention sets forth a complete set of rules.

32. The two special situations contemplated by the Convention are when the contract of sale involves carriage of the goods and when the goods are sold while in transit. In all other cases the risk passes to the buyer when he takes over the goods or from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery, whichever comes first. In the frequent case when the contract relates to goods that are not then identified, they must be identified to the contract before they can be considered to be placed at the disposal of the buyer and the risk of their loss can be considered to have passed to him.

E. *Suspension of performance and anticipatory breach*

33. The Convention contains special rules for the situation in which, prior to the date on which performance is due, it becomes apparent that one of the parties will not perform a substantial part of his obligations or will commit a fundamental breach of contract. A distinction is drawn between those cases in which the other party may suspend his own performance of the contract but the contract remains in existence awaiting future events and those cases in which he may declare the contract avoided.

F. *Exemption from liability to pay damages*

34. When a party fails to perform any of his obligations due to an impediment beyond his control that he could not reasonably have been expected to take into account at the time of the conclusion of the contract

and that he could not have avoided or overcome, he is exempted from paying damages. This exemption may also apply if the failure is due to the failure of a third person whom he has engaged to perform the whole or a part of the contract. However, he is subject to any other remedy, including reduction of the price, if the goods were defective in some way.

G. *Preservation of the goods*

35. The Convention imposes on both parties the duty to preserve any goods in their possession belonging to the other party. Such a duty is of even greater importance in an international sale of goods where the other party is from a foreign country and may not have agents in the country where the goods are located. Under certain circumstances the party in possession of the goods may sell them, or may even be required to sell them. A party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them and must account to the other party for the balance.

Part Four

FINAL CLAUSES

36. The final clauses contain the usual provisions relating to the Secretary-General as depositary and providing that the Convention is subject to ratification, acceptance or approval by those States that signed it by 30 September 1981, that it is open to accession by all States that are not signatory States and that the text is equally authentic in Arabic, Chinese, English, French, Russian and Spanish.

37. The Convention permits a certain number of declarations. Those relative to scope of application and the requirement as to a written contract have been mentioned above. There is a special declaration for States that have different systems of law governing contracts of sale in different parts of their territory. Finally, a State may declare that it will not be bound by Part II on formation of contracts or Part III on the rights and obligations of the buyer and seller. This latter declaration was included as part of the decision to combine into one convention the subject matter of the two 1964 Hague Conventions.

Further information can be obtained from:

UNCITRAL secretariat
Vienna International Centre
P.O. Box 500
A-1400 Vienna
Austria

Telex: 135612
Telefax: (43)(1) 232156

**B. Convention on the Limitation Period in the International Sale of Goods (New York, 1974)^a:
note by the Secretariat (A/CN.9/308) [Original: English]**

INTRODUCTION

1. The Convention on the Limitation Period in the International Sale of Goods (New York, 1974) provides uniform international legal rules governing the period of time within which a party under a contract for the international sale of goods must commence legal proceedings against the other party to assert a claim arising from the contract or relating to its breach, termination or invalidity. This period is referred to in the Convention as the "limitation period". The basic aims of the limitation period are to prevent the institution of legal proceedings at such a late date that the evidence relating to the claim is likely to be unreliable or lost and to protect against the uncertainty and injustice that would result if a party were to remain exposed to unasserted claims for an extensive period of time.

2. The Limitation Convention grew out of the work of the United Nations Commission on International Trade Law (UNCITRAL) towards the harmonization and unification of international sales law, which also resulted in the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (hereinafter referred to as the "United Nations Sales Convention"). During that work it was observed that, while most legal systems limited or prescribed a claim from being asserted after the lapse of a specified period of time, numerous disparities existed among legal systems with respect to the conceptual basis for doing so. As a result there were disparities in the length of the period and in the rules governing the limitation or prescription of claims after that period. Those disparities created difficulties in the enforcement of claims arising from international sales transactions, and thus burdened international trade.

3. In view of those problems UNCITRAL decided to prepare uniform international legal rules on the limitation period in the international sale of goods. On the basis of a draft Convention prepared by UNCITRAL, a diplomatic conference convened in New York by the General Assembly adopted the Limitation Convention on 14 June 1974. The Limitation Convention was amended by a Protocol adopted in 1980 by the diplomatic conference that adopted the United Nations Sales Convention, in order to harmonize the Limitation Convention with the latter Convention.

^aThis note has been prepared by the secretariat of the United Nations Commission on International Trade Law for informational purposes; it is not an official commentary on the Convention. A commentary prepared at the request of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods appears in A/CONF.63/17 (reprinted in *Yearbook of The United Nations Commission on International Trade Law*, vol. X: 1979 (United Nations publication, Sales No. E.81.V.2), part three, chap. I and in *UNCITRAL: The United Nations Commission on International Trade Law* (United Nations publication, Sales No. E.86.V.8), annex II, B.

4. The Limitation Convention will enter into force on 1 August 1988 for the 10 States that have ratified or acceded to it thus far. Czechoslovakia, Dominican Republic, Ghana, Norway and Yugoslavia are parties to the unamended Convention. Argentina, Egypt, Hungary, Mexico and Zambia are parties to the Convention as amended by the 1980 Protocol.

I. Scope of application

5. The Convention applies to contracts for the sale of goods between parties whose places of business are in different States if both of those States are Contracting States. Under the 1980 Protocol the Convention also applies if the rules of private international law make the law of a Contracting State applicable to the contract. However, in becoming a party to the Protocol a State may declare that it will not be bound by that provision. Each Contracting State must apply the Convention to contracts concluded on or after the date of the entry into force of the Convention.

6. The application of the Convention is excluded in certain situations. First, the Convention will not apply if the parties to a sales contract expressly exclude its application. This provision gives effect to the basic principle of freedom of contract in the international sale of goods. Secondly, the Convention will not apply in certain cases where matters covered by the Convention are governed by other Conventions. Thirdly, Contracting States are permitted to deposit declarations or reservations excluding the application of the Convention in the following situations: two or more Contracting States may exclude the application of the Convention to contracts between parties having their places of business in those States when the States apply to those contracts the same or closely related legal rules. So far, one State has availed itself of that declaration. In addition, a State may exclude the application of the Convention to actions for annulment of the contract. No State has thus far availed itself of such a declaration.

7. Since the Convention applies only in respect of international sales contracts, it clarifies whether contracts involving certain services are covered. A contract for the supply of goods to be manufactured or produced is considered to be a sales contract unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for their manufacture or production. Furthermore, when the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services, the Convention does not apply.

8. The Convention contains a list of types of sales that are excluded from the Convention, either because of the purpose of the sale (goods bought for personal, family

or household use (under the 1980 Protocol sales of those goods are covered by the Convention if the seller could not have known that they were bought for such use)), the nature of the sale (sales by auction, on execution or otherwise by law) or the nature of the goods (stocks, shares, investment securities, negotiable instruments, money, ships, vessels, aircraft or electricity (the 1980 Protocol adds hovercraft)).

9. The Convention makes it clear that it applies only to the usual type of commercial claims based on contract. It specifically excludes claims based on death or personal injury; nuclear damage; a lien, mortgage or other security interest; a judicial judgement or award; a document on which direct enforcement or execution can be obtained; and a bill of exchange, cheque or promissory note. The limitation periods for those claims are generally subject to particular rules and it would not necessarily be appropriate to apply in respect of those claims the rules applicable to ordinary commercial contractual claims.

II. Duration and commencement of limitation period

10. The duration of the limitation period under the Convention is four years. The period cannot be modified by agreement of the parties, but it can be extended by a written declaration of the debtor during the running of the period. Also, the contract of sale may stipulate a shorter period for the commencement of arbitral proceedings, if the stipulation is valid under the law applicable to the contract. Rules are provided as to how the period should be calculated.

11. A limitation period of four years' duration was thought to accomplish the aims of the limitation period and yet to provide an adequate period of time to enable a party to an international sales contract to assert his claim against the other party. Circumstances where an extension or recommencement of the limitation period would be justified are dealt with in particular provisions of the Convention.

12. With respect to the time when the limitation period commences to run, basic rule is that it commences on the date on which the claim accrues. The Convention establishes when claims for breach of contract, for defects in the goods or other lack of conformity and for fraud are deemed to accrue. Special rules are provided for the commencement of the limitation period in two particular cases: where the seller has given the buyer an express undertaking (such as a warranty or guarantee) relating to the goods which is stated to have effect for a certain period of time, and where a party terminates the contract before the time for performance is due. Rules are also provided in respect of claims arising from the breach of an instalment contract and claims based on circumstances giving rise to a termination of such a contract.

III. Cessation and extension of limitation period

13. Having established the time of commencement and the length of the limitation period, the Convention

sets forth rules concerning the cessation of the period. The period ceases to run when the claimant commences judicial or arbitral proceedings against the debtor, or when he asserts his claim in existing proceedings. A counterclaim is deemed to have been asserted on the same date as the date when the proceedings in which the counterclaim is asserted were commenced, if the counterclaim and the claim against which it is raised relate to the same contract or to several contracts concluded in the course of the same transaction.

14. Judicial or arbitral proceedings commenced by a claimant within the limitation period might terminate without a binding decision on the merits of the claim; for example, because the court or arbitral tribunal lacks jurisdiction or because of a procedural defect. The creditor would normally be able to pursue his claim by commencing new proceedings. Thus, the Convention provides that if the original proceedings end without a binding decision on the merits the limitation period will be deemed to have continued to run. However, by the time the original proceedings have ended, the limitation period might have expired, or there might remain insufficient time for the claimant to commence new proceedings. To protect the claimant in those cases the Convention grants him an additional period of one year to commence new proceedings.

15. The Convention contains rules to resolve in a uniform manner questions concerning the running of the limitation period in two particular cases. First, it provides that where legal proceedings have been commenced against one party to the sales contract, the limitation period ceases to run against a person jointly and severally liable with him if the claimant informs that person in writing within the limitation period that the proceedings have been commenced. Secondly, it provides that where proceedings have been commenced against a buyer by a party who purchased the goods from him, the limitation period ceases to run in respect of the buyer's recourse claim against the seller if the buyer informs the seller in writing within the limitation period that the proceedings against the buyer have been commenced. Where the proceedings in either of those two cases have ended, the limitation period in respect of the claim against the jointly and severally liable person or against the seller will be deemed to have continued to run without interruption, but there will be an additional year to commence new proceedings if at that time the limitation period has expired or has less than a year to run.

16. One effect of the provision mentioned above relating to the buyer is to enable him to await the outcome of the claim against him before commencing an action against his seller. This enables the buyer to avoid the trouble and expense of instituting proceedings against the seller and the disruption of their good business relationship if it turns out that the claim against the buyer was not successful.

17. Under the Convention the limitation period recommences in two cases: if the creditor performs in the debtor's State an act that, under the law of that State,

has the effect of recommencing a limitation period, or if the debtor acknowledges in writing his obligation to the creditor or pays interest or partially performs the obligation from which his acknowledgement can be inferred.

18. The Convention protects a creditor who was prevented from taking the necessary acts to stop the running of the limitation period in extreme cases. It provides that when the creditor could not take those acts as a result of a circumstance beyond his control and which he could neither avoid nor overcome, the limitation period will be extended so as to expire one year after the date when the circumstance ceased to exist.

IV. Overall limit of limitation period

19. Since the limitation period may, under the circumstances noted above, be extended or recommence, the Convention establishes an overall time period of 10 years, from the date on which the limitation period originally commenced to run, beyond which no legal proceedings to assert the claim may be commenced under any circumstances. The theory behind that provision is that enabling proceedings to be brought after that time would be inconsistent with the aims of the Convention in providing a definite limitation period.

V. Consequences of expiration of limitation period

20. The principal consequence of the expiration of the limitation period is that no claim will be recognized or enforced in legal proceedings commenced thereafter. The expiration of the limitation period will not be taken into consideration in legal proceedings unless it is invoked by a party to the proceedings. However, in light of views expressed at the diplomatic conference that adopted the Convention that the limitation or prescription of actions was a matter of public policy and that a court should be able to take the expiration of the limitation period into account on its own initiative, a Contracting State is permitted to declare that it will not apply that provision. No State has thus far made such a declaration.

21. Even after the limitation period has expired a party can in certain situations raise his claim as a defence to or set-off against a claim asserted by the other party.

VI. Other provisions and final clauses

22. Other provisions of the Convention deal with implementation of the Convention in States having two or more territorial units where different legal systems exist. A series of provisions deals with declarations and reservations permitted under the Convention and with procedures for making and withdrawing them. The permitted declarations and reservations have been mentioned above; no others may be made under the Convention.

23. The final clauses contain the usual provisions relating to the Secretary-General of the United Nations as depositary of the Convention. The Convention is subject to ratification by States that signed the Convention by 31 December 1975 and for accession by States that did not do so. The Chinese, English, French, Russian and Spanish texts of the Convention are equally authentic.

24. The Secretary-General of the United Nations is also the depositary of the 1980 Protocol amending the Convention, which is open for accession by all States. Since the Protocol has already received the necessary number of accessions, the Convention as amended by the Protocol will enter into force on the same date as the unamended Convention, i.e. on 1 August 1988.

25. A State that ratifies or accedes to the Convention after the Convention and Protocol come into force will become a party to the Convention as amended by the Protocol if it notifies the depositary accordingly. The Convention as amended will enter into force for that State on the first day of the month following the expiration of 6 months after the date of deposit of its instrument of ratification or accession. Accession to the Protocol by a State that is not a Contracting Party to the Convention constitutes accession to the Convention as amended by the Protocol.

VI. INTERNATIONAL COMMERCIAL ARBITRATION

UNCITRAL Model Law on International Commercial Arbitration^a: note by the Secretariat (A/CN.9/309) [Original: English]

INTRODUCTION

1. The UNCITRAL Model Law on International Commercial Arbitration was adopted by the United Nations Commission on International Trade Law on 21 June 1985, at the close of the Commission's 18th annual session.¹ The General Assembly, in its resolution 40/72 of 11 December 1985, recommended "that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice".

2. The Model Law constitutes a sound and promising basis for the desired harmonization and improvement of national laws. It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a world-wide consensus on the principles and important issues of international arbitration practice. It is acceptable to States of all regions and the different legal or economic systems of the world.

3. The form of a model law was chosen as the vehicle for harmonization and improvement in view of the flexibility it gives to States in preparing new arbitration laws. It seems advisable to follow the model as closely as possible since that would be the best contribution to the desired harmonisation and in the best interest of the users of international arbitration, who are primarily foreign parties and their lawyers. In this spirit, only minimal modifications have been made in the first jurisdictions to adopt the Model Law, i.e. Canada (at the federal level and in almost all Provinces and Territories) and Cyprus.

I. Background to the Model Law

4. The Model Law is designed to meet concerns relating to the current state of national laws on arbitration. The need for improvement and harmoni-

sation is based on findings that domestic laws are often inappropriate for international cases and that considerable disparity exists between them.

A. *Inadequacy of domestic laws*

5. A global survey of national laws on arbitration revealed considerable disparities not only as regards individual provisions and solutions but also in terms of development and refinement. Some laws may be regarded as outdated, sometimes going back to the nineteenth century and often equating the arbitral process with court litigation. Other laws may be said to be fragmentary in that they do not address all relevant issues. Even most of those laws which appear to be up to date and comprehensive were drafted with domestic arbitration primarily, if not exclusively, in mind. While this approach is understandable in view of the fact that even today the bulk of cases governed by a general arbitration law would be of a purely domestic nature, the unfortunate consequence is that traditional local concepts are imposed on international cases and the needs of modern practice are often not met.

6. The expectations of the parties as expressed in a chosen set of arbitration rules or a "one-off" arbitration agreement may be frustrated, especially by a mandatory provision of the applicable law. Unexpected and undesired restrictions found in national laws relate, for example, to the parties' ability effectively to submit future disputes to arbitration, to their power to select the arbitrator freely, or to their interest in having the arbitral proceedings conducted according to the agreed rules of procedure and with no more court involvement than is appropriate. Frustrations may also ensue from non-mandatory provisions which may impose undesired requirements on unwary parties who did not provide otherwise. Even the absence of non-mandatory provisions may cause difficulties by not providing answers to the many procedural issues relevant in an arbitration and not always settled in the arbitration agreement.

B. *Disparity between national laws*

7. Problems and undesired consequences, whether emanating from mandatory or non-mandatory provisions or from a lack of pertinent provisions, are aggravated by the fact that national laws on arbitral procedure differ widely. The differences are a frequent

^aThis note has been prepared by the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) for informational purposes only; it is not an official commentary on the Model Law.

¹The text of the Model Law is contained in annex I to the report of that session (*Official Records of the General Assembly, Fortieth session, Supplement No. 17 (A/40/17)*); it is reproduced, e.g., in *UNCITRAL—The United Nations Commission on International Trade Law* (United Nations publication, Sales No. E.86.V.8), p. 157.

source of concern in international arbitration, where at least one of the parties is, and often both parties are, confronted with foreign and unfamiliar provisions and procedures. For such a party it may be expensive, impractical or impossible to obtain a full and precise account of the law applicable to the arbitration.

8. Uncertainty about the local law with the inherent risk of frustration may adversely affect not only the functioning of the arbitral process but already the selection of the place of arbitration. A party may well for those reasons hesitate or refuse to agree to a place which otherwise, for practical reasons, would be appropriate in the case at hand. The choice of places of arbitration would thus be widened and the smooth functioning of the arbitral proceedings would be enhanced if States were to adopt the Model Law which is easily recognisable, meets the specific needs of international commercial arbitration and provides an international standard with solutions acceptable to parties from different States and legal systems.

II. Salient features of the Model Law

A. *Special procedural regime for international commercial arbitration*

9. The principles and individual solutions adopted in the Model Law aim at reducing or eliminating the above concerns and difficulties. As a response to the inadequacies and disparities of national laws, the Model Law presents a special legal regime geared to international commercial arbitration, without affecting any relevant treaty in force in the State adopting the Model Law. While the need for uniformity exists only in respect of international cases, the desire of updating and improving the arbitration law may be felt by a State also in respect of non-international cases and could be met by enacting modern legislation based on the Model Law for both categories of cases.

Substantive and territorial scope of application

10. The Model Law defines an arbitration as international if "the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States" (article 1(3)). The vast majority of situations commonly regarded as international will fall under this criterion. In addition, an arbitration is international if the place of arbitration, the place of contract performance, or the place of the subject-matter of the dispute is situated in a State other than where the parties have their place of business, or if the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

11. As regards the term "commercial", no hard and fast definition could be provided. Article 1 contains a note calling for "a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not". The note then

provides an illustrative list of relationships that are to be considered commercial, thus emphasizing the width of the suggested interpretation and indicating that the determinative test is not based on what the national law may regard as "commercial".

12. Another aspect of applicability is what one may call the territorial scope of application. According to article 1(2), the Model Law as enacted in a given State would apply only if the place of arbitration is in the territory of that State. However, there is an important and reasonable exception. Articles 8(1) and 9 which deal with recognition of arbitration agreements, including their compatibility with interim measures of protection, and articles 35 and 36 on recognition and enforcement of arbitral awards are given a global scope, i.e. they apply irrespective of whether the place of arbitration is in that State or in another State and, as regards articles 8 and 9, even if the place of arbitration is not yet determined.

13. The strict territorial criterion, governing the bulk of the provisions of the Model Law, was adopted for the sake of certainty and in view of the following facts. The place of arbitration is used as the exclusive criterion by the great majority of national laws and, where national laws allow parties to choose the procedural law of a State other than that where the arbitration takes place, experience shows that parties in practice rarely make use of that facility. The Model Law, by its liberal contents, further reduces the need for such choice of a "foreign" law in lieu of the (Model) Law of the place of arbitration, not the least because it grants parties wide freedom in shaping the rules of the arbitral proceedings. This includes the possibility of incorporating into the arbitration agreement procedural provisions of a "foreign" law, provided there is no conflict with the few mandatory provisions of the Model Law. Furthermore, the strict territorial criterion is of considerable practical benefit in respect of articles 11, 13, 14, 16, 27 and 34, which entrust the courts of the respective State with functions of arbitration assistance and supervision.

Delimitation of court assistance and supervision

14. As evidenced by recent amendments to arbitration laws, there exists a trend in favour of limiting court involvement in international commercial arbitration. This seems justified in view of the fact that the parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and, in particular in commercial cases, prefer expediency and finality to protracted battles in court.

15. In this spirit, the Model Law envisages court involvement in the following instances. A first group comprises appointment, challenge and termination of the mandate of an arbitrator (articles 11, 13 and 14), jurisdiction of the arbitral tribunal (article 16) and setting aside of the arbitral award (article 34). These instances are listed in article 6 as functions which should be entrusted, for the sake of centralization,

specialization and acceleration, to a specially designated court or, as regards articles 11, 13 and 14, possibly to another authority (e.g. arbitral institution, chamber of commerce). A second group comprises court assistance in taking evidence (article 27), recognition of the arbitration agreement, including its compatibility with court-ordered interim measures of protection (articles 8 and 9), and recognition and enforcement of arbitral awards (articles 35 and 36).

16. Beyond the instances in these two groups, "no court shall intervene, in matters governed by this Law". This is stated in the innovative article 5, which by itself does not take a stand on what is the appropriate role of the courts but guarantees the reader and user that he will find all instances of possible court intervention in this Law, except for matters not regulated by it (e.g., consolidation of arbitral proceedings, contractual relationship between arbitrators and parties or arbitral institutions, or fixing of costs and fees, including deposits). Especially foreign readers and users, who constitute the majority of potential users and may be viewed as the primary addressees of any special law on international commercial arbitration, will appreciate that they do not have to search outside this Law.

B. Arbitration agreement

17. Chapter II of the Model Law deals with the arbitration agreement, including its recognition by courts. The provisions follow closely article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (hereafter referred to as "1958 New York Convention"), with a number of useful clarifications added.

Definition and form of arbitration agreement

18. Article 7(1) recognizes the validity and effect of a commitment by the parties to submit to arbitration an existing dispute ("*compromis*") or a future dispute ("*clause compromissoire*"). The latter type of agreement is presently not given full effect under certain national laws.

19. While oral arbitration agreements are found in practice and are recognized by some national laws, article 7(2) follows the 1958 New York Convention in requiring written form. It widens and clarifies the definition of written form of article II(2) of that Convention by adding "telex or other means of telecommunication which provide a record of the agreement", by covering the submission-type situation of "an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another", and by providing that "the reference in a contract to a document" (e.g. general conditions) "containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract".

Arbitration agreement and the courts

20. Articles 8 and 9 deal with two important aspects of the complex issue of the relationship between the arbitration agreement and resort to courts. Modelled on article II(3) of the 1958 New York Convention, article 8(1) of the Model Law obliges any court to refer the parties to arbitration if seized with a claim on the same subject-matter unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The referral is dependent on a request which a party may make not later than when submitting his first statement on the substance of the dispute. While this provision, where adopted by a State when it adopts the Model Law, by its nature binds merely the courts of that State, it is not restricted to agreements providing for arbitration in that State and, thus, helps to give universal recognition and effect to international commercial arbitration agreements.

21. Article 9 expresses the principle that any interim measures of protection that may be obtained from courts under their procedural law (e.g. pre-award attachments) are compatible with an arbitration agreement. Like article 8, this provision is addressed to the courts of a given State, in so far as it determines their granting of interim measures as being compatible with an arbitration agreement, irrespective of the place of arbitration. In so far as it declares it to be compatible with an arbitration agreement for a party to request such measure from a court, the provision would apply irrespective of whether the request is made to a court of the given State or of any other country. Wherever such request may be made, it may not be relied upon, under the Model Law, as an objection against the existence or effect of an arbitration agreement.

C. Composition of arbitral tribunal

22. Chapter III contains a number of detailed provisions on appointment, challenge, termination of mandate and replacement of an arbitrator. The chapter illustrates the approach of the Model Law in eliminating difficulties arising from inappropriate or fragmentary laws or rules. The approach consists, first, of recognizing the freedom of the parties to determine, by reference to an existing set of arbitration rules or by an *ad hoc* agreement, the procedure to be followed, subject to fundamental requirements of fairness and justice. Secondly, where the parties have not used their freedom to lay down the rules of procedure or a particular issue has not been covered, the Model Law ensures, by providing a set of suppletive rules, that the arbitration may commence and proceed effectively to the resolution of the dispute.

23. Where under any procedure, agreed upon by the parties or based upon the suppletive rules of the Model Law, difficulties arise in the process of appointment, challenge or termination of the mandate of an arbitrator, Articles 11, 13 and 14 provide for assistance by courts or other authorities. In view of the urgency of the matter and in order to reduce the risk and effect of

any dilatory tactics, instant resort may be had by a party within a short period of time and the decision is not appealable.

D. Jurisdiction of arbitral tribunal

Competence to rule on own jurisdiction

24. Article 16(1) adopts the two important (not yet generally recognized) principles of "*Kompetenz-Kompetenz*" and of separability or autonomy of the arbitration clause. The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause shall be treated as an agreement independent of the other terms of the contract, and a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause. Detailed provisions in paragraph (2) require that any objections relating to the arbitrators' jurisdiction be made at the earliest possible time.

25. The arbitral tribunal's competence to rule on its own jurisdiction, i.e. on the very foundation of its mandate and power, is, of course, subject to court control. Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, article 16(3) provides for instant court control in order to avoid unnecessary waste of money and time. However, three procedural safeguards are added to reduce the risk and effect of dilatory tactics: short time-period for resort to court (30 days), court decision is not appealable, and discretion of the arbitral tribunal to continue the proceedings and make an award while the matter is pending with the court. In those less common cases where the arbitral tribunal combines its decision on jurisdiction with an award on the merits, judicial review on the question of jurisdiction is available in setting aside proceedings under article 34 or in enforcement proceedings under article 36.

Power to order interim measures

26. Unlike some national laws, the Model Law empowers the arbitral tribunal, unless otherwise agreed by the parties, to order any party to take an interim measure of protection in respect of the subject-matter of the dispute, if so requested by a party (article 17). It may be noted that the article does not deal with enforcement of such measures; any State adopting the Model Law would be free to provide court assistance in this regard.

E. Conduct of arbitral proceedings

27. Chapter V provides the legal framework for a fair and effective conduct of the arbitral proceedings. It opens with two provisions expressing basic principles that permeate the arbitral procedure governed by the

Model Law. Article 18 lays down fundamental requirements of procedural justice and article 19 the rights and powers to determine the rules of procedure.

Fundamental procedural rights of a party

28. Article 18 embodies the basic principle that the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case. Other provisions implement and specify the basic principle in respect of certain fundamental rights of a party. Article 24(1) provides that, unless the parties have validly agreed that no oral hearings for the presentation of evidence or for oral argument be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party. It should be noted that article 24(1) deals only with the general right of a party to oral hearings (as an alternative to conducting the proceedings on the basis of documents and other materials) and not with the procedural aspects such as the length, number or timing of hearings.

29. Another fundamental right of a party of being heard and being able to present his case relates to evidence by an expert appointed by the arbitral tribunal. Article 26(2) obliges the expert, after having delivered his written or oral report, to participate in a hearing where the parties may put questions to him and present expert witnesses in order to testify on the points at issue, if such a hearing is requested by a party or deemed necessary by the arbitral tribunal. As another provision aimed at ensuring fairness, objectivity and impartiality, article 24(3) provides that all statements, documents and other information supplied to the arbitral tribunal by one party shall be communicated to the other party, and that any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties. In order to enable the parties to be present at any hearing and at any meeting of the arbitral tribunal for inspection purposes, they shall be given sufficient notice in advance (article 24(2)).

Determination of rules of procedure

30. Article 19 guarantees the parties' freedom to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, subject to a few mandatory provisions on procedure, and empowers the arbitral tribunal, failing agreement by the parties, to conduct the arbitration in such a manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

31. Autonomy of the parties to determine the rules of procedure is of special importance in international cases since it allows the parties to select or tailor the rules according to their specific wishes and needs, unimpeded by traditional domestic concepts and without the earlier mentioned risk of frustration. The supplementary dis-

cretion of the arbitral tribunal is equally important in that it allows the tribunal to tailor the conduct of the proceedings to the specific features of the case without restraints of the traditional local law, including any domestic rules on evidence. Moreover, it provides a means for solving any procedural questions not regulated in the arbitration agreement or the Model Law.

32. In addition to the general provisions of article 19, there are some special provisions using the same approach of granting the parties autonomy and, failing agreement, empowering the arbitral tribunal to decide the matter. Examples of particular practical importance in international cases are article 20 on the place of arbitration and article 22 on the language of the proceedings.

Default of a party

33. Only if due notice was given, may the arbitral proceedings be continued in the absence of a party. This applies, in particular, to the failure of a party to appear at a hearing or to produce documentary evidence without showing sufficient cause for the failure (article 25(c)). The arbitral tribunal may also continue the proceedings where the respondent fails to communicate his statement of defence, while there is no need for continuing the proceedings if the claimant fails to submit his statement of claim (article 25(a), (b)).

34. Provisions which empower the arbitral tribunal to carry out its task even if one of the parties does not participate are of considerable practical importance since, as experience shows, it is not uncommon that one of the parties has little interest in co-operating and in expediting matters. They would, thus, give international commercial arbitration its necessary effectiveness, within the limits of fundamental requirements of procedural justice.

F. Making of award and termination of proceedings

Rules applicable to substance of dispute

35. Article 28 deals with the substantive law aspects of arbitration. Under paragraph (1), the arbitral tribunal decides the dispute in accordance with such rules of law as may be agreed by the parties. This provision is significant in two respects. It grants the parties the freedom to choose the applicable substantive law, which is important in view of the fact that a number of national laws do not clearly or fully recognize that right. In addition, by referring to the choice of "rules of law" instead of "law", the Model Law gives the parties a wider range of options as regards the designation of the law applicable to the substance of the dispute in that they may, for example, agree on rules of law that have been elaborated by an international forum but have not yet been incorporated into any national legal system. The power of the arbitral tribunal, on the other hand, follows more traditional lines. When the parties have not designated the applicable law, the arbitral

tribunal shall apply the law, i.e. the national law, determined by the conflict of laws rules which it considers applicable.

36. According to article 28(3), the parties may authorize the arbitral tribunal to decide the dispute *ex aequo et bono* or as *amiables compositeurs*. This type of arbitration is currently not known or used in all legal systems and there exists no uniform understanding as regards the precise scope of the power of the arbitral tribunal. When parties anticipate an uncertainty in this respect, they may wish to provide a clarification in the arbitration agreement by a more specific authorisation to the arbitral tribunal. Paragraph (4) makes clear that in all cases, i.e. including an arbitration *ex aequo et bono*, the arbitral tribunal must decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Making of award and other decisions

37. In its rules on the making of the award (articles 29-31), the Model Law pays special attention to the rather common case that the arbitral tribunal consists of a plurality of arbitrators (in particular, three). It provides that, in such case, any award and other decision shall be made by a majority of the arbitrators, except on questions of procedure, which may be left to a presiding arbitrator. The majority principle applies also to the signing of the award, provided that the reason for any omitted signature is stated.

38. Article 31(3) provides that the award shall state the place of arbitration and that it shall be deemed to have been made at that place. As to this presumption, it may be noted that the final making of the award constitutes a legal act, which in practice is not necessarily one factual act but may be done in deliberations at various places, by telephone conversation or correspondence; above all, the award need not be signed by the arbitrators at the same place.

39. The arbitral award must be in writing and state its date. It must also state the reasons on which it is based, unless the parties have agreed otherwise or the award is an award on agreed terms, i.e. an award which records the terms of an amicable settlement by the parties. It may be added that the Model Law neither requires nor prohibits "dissenting opinions".

G. Recourse against award

40. National laws on arbitration, often equating awards with court decisions, provide a variety of means of recourse against arbitral awards, with varying and often long time-periods and with extensive lists of grounds that differ widely in the various legal systems. The Model Law attempts to ameliorate this situation, which is of considerable concern to those involved in international commercial arbitration.

Application for setting aside as exclusive recourse

41. The first measure of improvement is to allow only one type of recourse, to the exclusion of any other means of recourse regulated in another procedural law of the State in question. An application for setting aside under article 34 must be made within three months of receipt of the award. It should be noted that "recourse" means actively "attacking" the award; a party is, of course, not precluded from seeking court control by way of defence in enforcement proceedings (article 36). Furthermore, "recourse" means resort to a court, i.e. an organ of the judicial system of a State; a party is not precluded from resorting to an arbitral tribunal of second instance if such a possibility has been agreed upon by the parties (as is common in certain commodity trades).

Grounds for setting aside

42. As a further measure of improvement, the Model Law contains an exclusive list of limited grounds on which an award may be set aside. This list is essentially the same as the one in article 36(1), taken from article V of the 1958 New York Convention: lack of capacity of parties to conclude arbitration agreement or lack of valid arbitration agreement; lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of a party to present his case; award deals with matters not covered by submission to arbitration; composition of arbitral tribunal or conduct of arbitral proceedings contrary to effective agreement of parties or, failing agreement, to the Model Law; non-arbitrability of subject-matter of dispute and violation of public policy, which would include serious departures from fundamental notions of procedural justice.

43. Such a parallelism of the grounds for setting aside with those provided in article V of the 1958 New York Convention for refusal of recognition and enforcement was already adopted in the European Convention on International Commercial Arbitration (Geneva, 1961). Under its article IX, the decision of a foreign court setting aside an award for a reason other than the ones listed in article V of the 1958 New York Convention does not constitute a ground for refusing enforcement. The Model Law takes this philosophy one step further by directly limiting the reasons for setting aside.

44. Although the grounds for setting aside are almost identical to those for refusing recognition or enforcement, two practical differences should be noted. First, the grounds relating to public policy, including non-arbitrability, may be different in substance, depending on the State in question (i.e. State of setting aside or State of enforcement). Secondly, and more importantly, the grounds for refusal of recognition or enforcement are valid and effective only in the State (or States) where the winning party seeks recognition and enforcement, while the grounds for setting aside have a different impact: The setting aside of an award at the place of origin prevents enforcement of that award in

all other countries by virtue of article V(1)(e) of the 1958 New York Convention and article 36(1)(a)(v) of the Model Law.

H. Recognition and enforcement of awards

45. The eighth and last chapter of the Model Law deals with recognition and enforcement of awards. Its provisions reflect the significant policy decision that the same rules should apply to arbitral awards whether made in the country of enforcement or abroad, and that those rules should follow closely the 1958 New York Convention.

Towards uniform treatment of all awards irrespective of country of origin

46. By treating awards rendered in international commercial arbitration in a uniform manner irrespective of where they were made, the Model Law draws a new demarcation line between "international" and "non-international" awards instead of the traditional line between "foreign" and "domestic" awards. This new line is based on substantive grounds rather than territorial borders, which are inappropriate in view of the limited importance of the place of arbitration in international cases. The place of arbitration is often chosen for reasons of convenience of the parties and the dispute may have little or no connection with the State where the arbitration takes place. Consequently, the recognition and enforcement of "international" awards, whether "foreign" or "domestic", should be governed by the same provisions.

47. By modelling the recognition and enforcement rules on the relevant provisions of the 1958 New York Convention, the Model Law supplements, without conflicting with, the regime of recognition and enforcement created by that successful Convention.

Procedural conditions of recognition and enforcement

48. Under article 35(1) any arbitral award, irrespective of the country in which it was made, shall be recognized as binding and enforceable, subject to the provisions of article 35(2) and of article 36 (which sets forth the grounds on which recognition or enforcement may be refused). Based on the above consideration of the limited importance of the place of arbitration in international cases and the desire of overcoming territorial restrictions, reciprocity is not included as a condition for recognition and enforcement.

49. The Model Law does not lay down procedural details of recognition and enforcement since there is no practical need for unifying them, and since they form an intrinsic part of the national procedural law and practice. The Model Law merely sets certain conditions for obtaining enforcement: application in writing, accompanied by the award and the arbitration agreement (article 35(2)).

Grounds for refusing recognition or enforcement

50. As noted earlier, the grounds on which recognition or enforcement may be refused under the Model Law are identical to those listed in article V of the New York Convention. Only, under the Model Law, they are relevant not merely to foreign awards but to all awards rendered in international commercial arbitration. While some provisions of that Convention, in particular as regards their drafting, may have called for improvement, only the first ground on the list (i.e. "the parties to the arbitration agreement were, under the law applicable to them, under some incapacity") was modified since it was viewed as containing an incomplete and potentially misleading conflicts rule. Generally, it was deemed desirable to adopt, for the sake of

harmony, the same approach and wording as this important Convention.

III. Further information

Further information on the Model Law may be obtained from:

UNCITRAL secretariat
Vienna International Centre
P.O. Box 500
A-1400 Vienna
Austria

Telex: 135612
Telefax: (43)(1) 232 156

VII. STATUS AND PROMOTION OF UNCITRAL TEXTS

A. Status of Conventions: note by the Secretariat (A/CN.9/304) [Original: English]

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.¹

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 19 February 1988 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).

¹Report 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.

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.

3. Since the most recent report in this series showing the status of conventions as of 15 May 1987 (A/CN.9/294), the United Nations Convention on Contracts for the International Sale of Goods has come into force on 1 January 1988 and received four additional ratifications or accessions. In addition, both the Convention on the Limitation Period in the International Sale of Goods and the Protocol amending that Convention have fulfilled the requirements to come into force on 1 August 1988.

4. The names of the States that have ratified or acceded to the conventions since the preparation of the last report are underlined>.

ANNEX

1. *Convention on the Limitation Period in the International Sale of Goods (New York, 1974)*

<i>State</i>	<i>Signature</i>	<i>Ratification Accession, Approval</i>	<i>Entry into force</i>
Argentina		9 October 1981	1 August 1988
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	1 August 1988
Dominican Republic		23 December 1977	1 August 1988
Egypt		6 December 1982	1 August 1988
German Democratic Republic	14 June 1974		
Ghana	5 December 1974	7 October 1975	1 August 1988
Hungary	14 June 1974	16 June 1983	1 August 1988
<i>Mexico</i>		21 January 1988	1 August 1988
Mongolia	14 June 1974		
Nicaragua	13 May 1975		
Norway ¹	11 December 1975	20 March 1980	1 August 1988
Poland	14 June 1974		
Ukrainian SSR	14 June 1974		

<i>State</i>	<i>Signature</i>	<i>Ratification Accession, Approval</i>	<i>Entry into force</i>
USSR		14 June 1974	
Yugoslavia		27 November 1978	1 August 1988
Zambia		6 June 1986	1 August 1988

Signatures only: 10; ratifications and accessions: 10.

Declarations and reservations

¹Upon 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)

<i>State</i>	<i>Accession</i>	<i>Entry into force</i>
Argentina	19 July 1983	1 August 1988
Egypt	6 December 1982	1 August 1988
Hungary	16 June 1983	1 August 1988
Mexico	21 January 1988	1 August 1988
Zambia	6 June 1986	1 August 1988

In accordance with articles XI and XIV of the Protocol, the Contracting States to the Protocol are considered to be Contracting Parties to the Convention on the Limitation Period in the International Sale of Goods as amended by the Protocol in relation to one another and Contracting Parties to the Convention, unamended, in relation to any Contracting Party to the Convention not yet a Contracting Party to this Protocol.

3. United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg)

<i>State</i>	<i>Signature</i>	<i>Ratification, Accession</i>
Austria	30 April 1979	
Barbados		2 February 1981
Botswana		16 February 1988
Brazil	31 March 1978	
Chile	31 March 1978	9 July 1982
Czechoslovakia ¹	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 Rep. 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

<i>State</i>	<i>Signature</i>	<i>Ratification, Accession</i>
United Rep. of Tanzania		24 July 1979
United States of America	30 April 1979	
Venezuela	31 March 1978	
Zaire	19 April 1979	

Signatures only: 23; ratifications and accessions: 12.

Ratifications and accessions necessary to bring Convention into force: 20

Declarations and reservations

¹Upon signing the Convention the Government of 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)

<i>State</i>	<i>Signature</i>	<i>Ratification Accession, Approval</i>	<i>Entry into force</i>
Argentina ⁴		19 July 1983	1 January 1988
Austria	11 April 1980	29 December 1987	1 January 1989
Chile	11 April 1980		
China ⁵	30 September 1981	11 December 1986	1 January 1988
Czechoslovakia	1 September 1981		
Denmark ¹	26 May 1981		
Egypt		6 December 1982	1 January 1988
Finland ^{2 7}	26 May 1981	15 December 1987	1 January 1989
France	27 August 1981	6 August 1982	1 January 1988
German Democratic Republic	13 August 1981		
Germany, Federal Rep. of	26 May 1981		
Ghana	11 April 1980		
Hungary ^{3 4}	11 April 1980	16 June 1983	1 January 1988
Italy	30 September 1981	11 December 1986	1 January 1988
Lesotho	18 June 1981	18 June 1981	1 January 1988
Mexico		29 December 1987	1 January 1989
Netherlands	29 May 1981		
Norway	26 May 1981		
Poland	28 September 1981		
Singapore	11 April 1980		
Sweden ^{2 7}	26 May 1981	15 December 1987	1 January 1989
Syrian Arab Republic		19 October 1982	1 January 1988
United States of America ⁶	31 August 1981	11 December 1986	1 January 1988
Venezuela	28 September 1981		
Yugoslavia	11 April 1980	27 March 1985	1 January 1988
Zambia		6 June 1986	1 January 1988

Signatures only: 11; ratifications, accessions and approval: 15

Declarations and reservations

¹Upon signing the Convention the Governments of Denmark and Norway declared in accordance with article 92(1) that they would not be bound by Part II of the Convention (Formation of the Contract).

²Upon ratifying the Convention the Governments of Finland 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).

³Upon 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.

⁴Upon 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 allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing, would not apply where any party had his place of business in their respective States.

⁵Upon approving the Convention the Government of China declared that it did not consider itself bound by article 1(1)(b) and Article 11 as well as the provisions in the Convention relating to the content of Article 11.

⁶Upon ratifying the Convention the Government of the United States of America declared that it would not be bound by article 1(1)(b).

⁷Upon ratifying the Convention the Governments of Finland and Sweden declared, pursuant to article 94(1) and 94(2), that the Convention would not apply to contracts of sale where the parties had their places of business in Finland, Sweden, Denmark, Iceland or Norway.

**5. Convention on the Recognition and Enforcement of Foreign Arbitral Awards
(New York, 1958)**

<i>State</i>	<i>Signature</i>	<i>Ratification Accession</i>
Argentina	26 August 1958	
Australia		26 March 1975
Austria ²		2 May 1961
Belgium ²	10 June 1958	18 August 1975
Benin		16 May 1974
Botswana ^{1 2}		20 December 1971
Bulgaria ^{2 3}	17 December 1958	10 October 1961
Burkina Faso		23 March 1987
Byelorussian SSR ^{2 3}	29 December 1958	15 November 1960
Cameroon		19 February 1988
Canada ^{1 6}		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	26 October 1987
Cuba ^{1 2 3}		30 December 1974
Cyprus ^{1 2}		29 December 1980
Czechoslovakia ^{2 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 Rep. of ²	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 ²		12 May 1981
Israel	10 June 1958	5 January 1959
Italy		31 January 1969
Japan ²		20 June 1961
Jordan	10 June 1958	15 November 1979
Kuwait ²		28 April 1978
Luxembourg ²	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 ²		12 February 1959
Netherlands ²	10 June 1958	24 April 1964
New Zealand ²		6 January 1983

<i>State</i>	<i>Signature</i>	<i>Ratification Accession</i>
Niger		14 October 1964
Nigeria ^{1 2}		17 March 1970
Norway ^{2 4}		14 March 1961
Pakistan	30 December 1958	
Panama		10 October 1984
Philippines ^{1 2}	10 June 1958	6 July 1967
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 ^{2 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 ²	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 ^{2 3}	29 December 1958	10 October 1960
USSR ^{2 3}	29 December 1958	24 August 1960
United Kingdom ²		24 September 1975
United Republic of Tanzania ²		13 October 1964
United States of America ^{1 2}		30 September 1970
Uruguay		30 March 1983
Yugoslavia ^{1 2 5}		26 February 1982

Signatures only: 3; ratifications and accessions: 75.

Declarations and reservations

(Excludes territorial declarations and certain other reservations and declarations of a political nature)

¹Upon ratification the Convention will apply only to differences arising out of legal relationships whether contractual or not which are considered as commercial under the national law.

²State will apply the Convention to recognition and enforcement of awards made in the territory of another contracting State.

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.

⁴State 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.

⁵State will apply the Convention only to those arbitral awards which were adopted after the coming of the Convention into effect.

⁶The Government of Canada declared, with respect to the Province of Alberta, that it would apply the Convention only to the recognition and enforcement of awards made in the territory of another contracting State.

6. UNCITRAL Model Law on International Commercial Arbitration (1985)

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, Quebec and Yukon Territory).

Cyprus

**B. Promotion of texts emanating from the work of the Commission: report of the Secretary-General
(A/CN.9/305) [Original: English]**

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1. The Commission at its twentieth session "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" (A/42/17, para. 340).¹ This report indicates the actions taken or contemplated by the secretariat to fulfil that mandate. The Commission may wish to consider whether there are additional actions that might be taken by the Commission or the secretariat within available resources that would further promote the texts.

I. Texts to be promoted

2. This report discusses promotion of the following texts, which are collectively hereafter referred to as the UNCITRAL texts:

(a) Convention on the Limitation Period in the International Sale of Goods (New York, 1974) (hereafter referred to as the Limitation Convention);

(b) Protocol amending the Convention on the Limitation Period in the International Sale of Goods (Vienna, 1980) (hereafter referred to as the Protocol);

(c) United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (hereafter referred to as the Sales Convention);

(d) United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) (hereafter referred to as the Hamburg Rules);

(e) Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (hereafter referred to as the New York Convention);

(f) UNCITRAL Model Law on International Commercial Arbitration (1985) (hereafter referred to as the Model Law).

3. Even though the New York Convention did not emanate from the work of the Commission, it has been included in the list as a text to be promoted by the secretariat since the Commission has shown particular interest in it and has based its own work in the field of arbitration on it. The Model Law is also included because its promotion involves activities similar to those necessary to promote the conventions.

4. Promotion of the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules requires different kinds of efforts than does promotion of the conventions and the Model Law and is not discussed in this report. Promotion of the UNCITRAL Legal Guide

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*.

on Drawing Up International Contracts for the Construction of Industrial Works is the subject of a separate note (A/CN.9/310).

II. Factors that affect promotion

5. Although each of the UNCITRAL texts has certain special features relevant to its promotion, they can for most purposes be treated as a group. Common unifying features are: They must be adopted by individual States in order to be legally binding in those States. In most States legislative action is necessary either to authorize their adoption or to give them domestic legal force. In many States the responsibility for initiating action to adopt the texts rests with the Ministry of Foreign Affairs, even though the substantive responsibility may lie with a different ministry. This division of substantive responsibility from the responsibility for initiating action and scheduling parliamentary approval may tend to lower the priority the texts are given in those countries. Because the UNCITRAL texts deal with subject matter that is already dealt with in domestic legal systems, their adoption by a State entails the adoption of legal rules that differ from the existing legal rules on the same subject in greater or lesser degree in both substance and presentation. As a result, some people may at first react negatively to the texts until they have had the opportunity to study them in depth. Since they are texts of global application, a smaller percentage of the States that are eligible to become party to them participated in their preparation than participate in the preparation of similar texts of regional application. Consequently, there may be less awareness than is warranted of their value for regional and global economic integration and reduction of non-tariff barriers to trade. These factors help explain why most conventions for the global unification of private law are adopted so slowly; they are not applicable only to the UNCITRAL texts.

6. However, once a text receives widespread acceptance, that success becomes a factor in favour of its adoption by those States that have not already done so since it demonstrates that the text contains acceptable legal solutions and that it is drafted in an acceptable style.

7. The Model Law, not being a convention, is normally not within either the substantive responsibility of the Ministry of Foreign Affairs or within its procedural responsibility for taking initiative to place it before the parliament for adoption. The Ministry may, however, have some responsibility to bring it, as a product of the United Nations, to the attention of the ministry that would be substantively responsible. In substance, the Model Law, unlike a convention that must be adopted by a State with a minimum, if any, deviations from the text as adopted by the diplomatic conference, serves as an internationally agreed statement as to the desirable contents and presentation of a national law on international commercial arbitration, but States are free to use as much or as little of the Model Law as they deem proper in their particular situation.

8. Nevertheless, the goals sought to be achieved by the Commission are furthered by the highest possible degree of fidelity to the structure and provisions of the Model Law. In particular, the goal of reducing barriers to the use of international commercial arbitration is furthered when foreign parties and their lawyers can easily understand the law governing the arbitration. That is best achieved when the text is an internationally recognized text, such as the Model Law.

9. Consequently, promotion of the Model Law by the secretariat involves both encouraging individual States to adopt a new law governing international commercial arbitration containing features from the Model Law, and encouraging States to remain as faithful as possible to the text of the Model Law as adopted by the Commission. It could even be said that the latter of these two tasks is the special responsibility of the Commission's secretariat.

III. Current pattern of adherence

10. As of 31 January 1988 two of the three UNCITRAL Conventions had the number of adoptions necessary for them to come into force, the Sales Convention on 1 January 1988 and the Limitation Convention on 1 August 1988. The Hamburg Rules had eleven of the twenty adoptions necessary for it to come into force. As of 31 January 1988 there was a total of 36 States parties to the three Conventions. That consisted of 28 individual States, two of which (Egypt and Hungary) were party to all three conventions and four of which (Argentina, Mexico, Yugoslavia and Zambia) were party to two of the conventions, i.e. Sales Convention and Limitation Convention.

11. The vast majority of the States that have become party to one or more of the three conventions is or has been a member of the Commission. Possible reasons are that States that have an existing interest in the unification of international trade law may be more likely to seek membership on the Commission; States that are members of the Commission are more apt to have participated in the preparation of the texts that emanate from its work and therefore to have formed a favourable view of them; States that have not participated either as a member or as an observer may not even be actively aware of the existence of the texts. The exact relationship between membership in the Commission and ratification of its conventions is shown below.

	<i>Three UNCITRAL Conventions</i>		
	<i>Total number of States</i>	<i>States party to at least one convention</i>	<i>Percentage</i>
Current member of Commission	36	15	42
Past member of Commission	28	9	32
Member of United Nations, but never of Commission	95	4	4
Non-member State of United Nations	11	0	0

12. While the table shows a high correlation between present or past membership on the Commission and adoption of one or more of the conventions, it also shows that a substantial majority of the present and past members have not adopted any of them. Undoubtedly this figure will soon diminish noticeably since most of the States that have announced plans to adopt one or more of the conventions fall into those two categories.

13. The same correlation is evident in respect of present or past membership on the Commission and adoption of the New York Convention.

	<i>New York Convention</i>		
	<i>Total number of States</i>	<i>States party</i>	<i>Percentage</i>
Current member of Commission	36	28	78
Past member of Commission	28	17	61
Member of United Nations, but never of Commission	95	26	27
Non-member State of United Nations	11	3	27

14. Of the two States that have so far adopted the Model Law, one (Cyprus) is a current member of the Commission while the other (Canada) has been a regular and active participant as an observer.

IV. Means of promoting texts

A. *Promotion of texts within a State*

15. Since the decision that a State will adopt an UNCITRAL text is usually a collective one, involving inter-ministerial consultation, perhaps consultation with non-governmental sectors of society and parliamentary approval, promotional activities of one form or another must often be undertaken to persuade the numerous individuals involved that it would be desirable to adopt the text in question. These activities in a given State may be limited to the preparation of one or more official reports. They may also include a more extensive educational and promotional programme involving the preparation of reports, articles and other written material for appropriate media, the holding of seminars and symposia and the solicitation of endorsements of the text from relevant trade and professional circles. These activities within a given State must be the responsibility of individuals and organizations from the State in question.

16. Educational and promotional activities within a State may be directed towards a comparison of the UNCITRAL text with the existing law of that country and a discussion of its advantages or disadvantages in comparison to the existing law. Because of the international character of the UNCITRAL texts, those activities may also include discussion of the international implications of the text, including a comparison with foreign law or a discussion of its impact on foreign

parties trading with the State in question. This may mean in particular that foreign scholars and practitioners may be invited to participate in symposia or seminars on the UNCITRAL text under consideration. The secretariat may also be invited to participate in educational and promotional activities in order to lend its particular international experience and point of view.

B. *Establishing a favourable international climate*

17. The main task of the secretariat in promoting adoption of the UNCITRAL texts is to establish a favourable international climate for the widespread adoption of the texts. The favourable climate in favour of the work of the Commission as a whole has already been established. The Commission has an enviable reputation for producing legal texts of high professional quality on important subjects of international trade law. This reputation exists both in business, legal and governmental circles concerned with issues of international trade law and in diplomatic circles concerned with the Commission in the context of the United Nations. However, while this reputation contributes to a sympathetic audience in respect of the individual texts, it seldom is sufficient by itself to cause a State to adopt a text.

18. The most important actions leading to the establishment of a climate favourable to the adoption of the UNCITRAL texts were taken during their preparation. If the texts were of dubious quality or did not meet an evident need, they could not be promoted successfully, no matter how much effort was expended. These texts of high quality that meet an evident need can be successfully promoted. Nevertheless, specific promotional activities must also be taken in respect of each of them.

1. *Adoption of the text by other States*

19. The adoption of an UNCITRAL text by one State is an important factor influencing other States to adopt it also. This is not only because adoption of a text is the ultimate form of endorsement, but also because of the practical concern that adoption of a convention by one State has no legal significance until enough other States have adopted it for it to come into force. Furthermore, widespread adoption of a text advances the goal of the progressive unification of international trade law, thereby making the text more valuable to practitioners from all countries.

20. Consequently, officials and other individuals from States that have adopted UNCITRAL texts have an interest in encouraging other States, and particularly those from the same region or with which they engage in significant international trade, to adopt the texts as well. These persons may be particularly influential advocates for the adoption of the text since they are likely to understand the problems faced by a State considering its adoption.

21. It is of particular importance that the New York Convention, the Sales Convention and the Limitation Convention are all in force, or soon will be, and that all three conventions have received ratifications or accessions during the past year. The secretariat is putting particular efforts into promoting the Hamburg Rules so that they will also soon enter into force. Developments in the past year suggest that once they come into force, a number of other States that are now hesitant could be expected to ratify or accede to them.

2. *Endorsement by the General Assembly*

22. The Commission at its twentieth session prepared a draft resolution for the General Assembly by which the General Assembly would have called on all States to consider whether to ratify or accede to the three conventions and the Protocol that have emanated from the work of the Commission, naming each of them individually, and would have called on the Secretary-General to have reported to the General Assembly at its forty-fourth session in 1989 on the results (A/42/17, para. 332).

23. The General Assembly was in accord with the Commission on the purpose and substance of the draft resolution but, in a desire to reduce the number of resolutions adopted by it, included the two substantive paragraphs of the draft resolution as paragraphs 9 and 10 of resolution 42/152 on the work of the Commission at its twentieth session.

24. As was anticipated by the Commission, the relevant paragraphs of resolution 42/152 will be brought to the attention of all Governments by note verbale of the Secretary-General prior to the twenty-first session of the Commission. It is to be hoped that this renewed endorsement by the General Assembly will cause the authorities of additional States to consider ratifying or acceding to them.

3. *Endorsement by other international organizations*

25. In addition to endorsement of the texts by the General Assembly, their endorsement by other international organizations can be an important form of promotion. The secretariat has solicited endorsements of the UNCITRAL texts from those organizations with which it is in active contact and where such endorsements are a normal part of that organization's activities. If the organization is intergovernmental, the endorsement normally consists of a recommendation similar to that in General Assembly resolution 42/152 that the Member States of the organization should consider adoption of the text. Such endorsements are most likely from regional organizations that see the UNCITRAL texts as important elements in regional economic integration and development. If the organization is non-governmental, the resolution might recommend that members of the organization take steps to initiate action in their individual countries leading towards adoption of the text. A number of endorsements of the

UNCITRAL texts have been adopted by both inter-governmental and non-governmental organizations.

26. An endorsement of a text by an intergovernmental or non-governmental organization may be directly influential with the relevant national authorities. Such resolutions may also be the basis for similar resolutions by affiliated national organizations, thereby aiding in the local promotion of the text.

4. *Publication of UNCITRAL texts and explanatory materials*

27. In order to make the UNCITRAL texts and a short history of their preparation more widely available, the secretariat recently published a book on the work of UNCITRAL.² The book has appeared in English, French, Spanish and Russian. A separate off-print of the Hamburg Rules has been published in English, French and Spanish.

28. The conventions and the Model Law have also been re-printed in a number of professional journals, so that they are widely available. Of particular importance are the translations of these UNCITRAL texts into languages other than the official languages of the United Nations, especially when the translations have been officially agreed to by all the countries in which the language is used.

29. In addition to the short history of the preparation of the UNCITRAL texts contained in the book on UNCITRAL, a need has been felt for materials that were specifically designed for the promotion of the individual texts. To fill a portion of this need the secretariat has prepared four promotional pamphlets on the Hamburg Rules, Sales Convention, the Limitation Convention, and the Model Law. The text of these four pamphlets is presented to the Commission for its information in documents A/CN.9/306, 307, 308 and 309.

30. At its 11th session the UNCTAD Committee on Shipping in its resolution 55(XI), paragraph 8, requested the UNCTAD secretariat to prepare a study on the economic and commercial implications of the Hamburg Rules and the United Nations Convention on International Multimodal Transport of Goods, including present insurance practices, and to submit a brief document, in the form of a booklet, explaining the provisions of the conventions and the implications of becoming contracting parties thereto (TD/B/1034, annex I). By agreement between the two secretariat units, the Commission's secretariat undertook to have the material on the Hamburg Rules prepared. Professor Rolf Herber (Federal Republic of Germany), who was the president of the diplomatic conference at which the Hamburg Rules were adopted, prepared the first draft in the capacity of consultant to the Commission's secretariat. The text, which is later to be combined by UNCTAD with similar material on the Multimodal

²UNCITRAL — *The United Nations Commission on International Trade Law* (United Nations publication, Sales No. E.86.V.8).

Convention in book form, is expected to be presented to the 13th session of the UNCTAD Committee on Shipping, held at Geneva from 14 to 22 March 1988, as document TD/B/C.4/315 (Part One). Copies will be made available at the Commission session.

5. *Professional literature*

31. All of the UNCITRAL texts have been the subject of numerous articles and shorter notices in legal and trade publications. Individual members of the secretariat have contributed to this effort by publishing articles in their own name. In some cases these articles are known to have been influential. However, because of the small size of the secretariat and the wide range of subjects undertaken by the Commission, this activity, which must be undertaken in spare time in addition to the regular duties of preparing documentation for meetings and servicing those meetings, can be expected to have only a limited promotional effect on a world-wide level.

32. A review of the literature in this field shows that a much larger number of articles have been written by delegates to sessions of the Commission or Working Groups. Furthermore, many delegates have inspired their colleagues or students to write articles on texts in preparation or that have been adopted by the Commission. The articles written or inspired by delegates have, both because of their number and because of their depth of understanding of the issues, been of major importance to the promotion of the texts.

33. The secretariat would particularly encourage an increase in the number of doctoral dissertations and other academic and professional writing on the work of the Commission. The background materials in the UNCITRAL Yearbook and in the official records of the three diplomatic conferences are available in many university and other libraries. More recent documents can be made available by the secretariat. Arrangements can be made for scholars and students to use the UNCITRAL Law Library in Vienna.

34. A bibliography of the professional literature on the work of the Commission has been one of the regular features in the UNCITRAL Yearbook. Beginning with the nineteenth session in 1986 the bibliography has been distributed as a document for the annual session of the Commission, thereby greatly increasing its timeliness and usefulness. It will continue to be included in the Yearbook. Although special bibliographies on individual texts emanating from the work of the Commission have not been prepared, since it was thought that the classified nature of the annual bibliography served that purpose sufficiently well, such bibliographies could be prepared if the Commission were of the view that they were of sufficient value.

6. *Symposia*

35. The first two symposia sponsored by the Commission in 1975 and 1981 were for the purpose of training

in general in international trade law and did not have specific promotional purposes in mind. At its fourteenth session in 1981 the Commission decided that, in view of the shortage of resources available to it for this purpose, the secretariat should attempt to organize future seminars and symposia on a regional basis, and it welcomed the possibility that regional seminars might be sponsored jointly with regional organizations (A/36/17, para. 109). For the first time the Commission indicated that one of the purposes of the seminars would be the promotion of texts emanating from the work of the Commission.

36. Since 1981 the secretariat has co-sponsored a number of regional seminars in co-operation with other organizations. Although in each case the basic administration of the seminar was undertaken by the other organization in question, the secretariat has been involved in planning the content of the programme and furnished speakers for the programme itself. Members of the secretariat have also spoken on the work of the Commission at a much larger number of seminars and professional meetings sponsored by other organizations. All of these activities have been reported in past years in the report on training and assistance. It is expected that similar activities will continue to be undertaken in the future as the occasion presents itself because of their general value in making known the work of the Commission.

37. Following the decision of the Commission at its twentieth session that increased emphasis should be given both to training and assistance and to promotion of texts, especially in developing countries (A/42/17, para. 340), the secretariat has undertaken to organize a regional seminar that is specifically intended for promotion purposes. The seminar is planned to be held in Lesotho in August 1988. The Preferential Trade Area, a regional organization in Southern and Eastern Africa with a membership of 16 States, has agreed to act as a co-sponsor.

38. Since the purpose of the seminar would be to acquaint decision makers in the States concerned with UNCITRAL as an institution and with the legal texts that have emanated from its work and to promote the adoption and use of those texts, the seminar is scheduled to last for a period of two weeks and to include several participants from each State. Although the number of participants per State will depend in part on the level of financing available, a matter discussed in a companion report (A/CN.9/311), and the composition might vary from one State to another, it is anticipated that participants would be drawn from the Ministries of Foreign Affairs, Justice, Transportation (for the Hamburg Rules) and from the university, the bar and representatives of the business community. Lecturers and discussion leaders would come from the secretariat, delegates to the Commission and local participants.

39. The seminar has been organized on the principle that there is an efficiency for the Commission and for the participants in considering all of the UNCITRAL

texts at the same time. Although they cover the four distinct fields of sales, carriage of goods by sea, international commercial arbitration and negotiation of industrial works contracts, many of the same people are relevant in each country for the decision whether or not to adopt the text. Furthermore, there was the belief that proper consideration of any of the texts requires both lectures and extensive time for discussion.

40. For the first seminar of this type to be organized by the secretariat it was thought to be desirable that there be participants from a number of States and that the seminar be co-sponsored by a regional organization for economic co-operation and development. In this manner the participants can share with one another their evaluation as to whether adoption of the UNCITRAL texts would provide an appropriate, modern and uniform legal infrastructure that would contribute to the economic development of their countries.

41. It is expected that further seminars of this type will be organized in the future, taking into account the experience with this seminar. Regional seminars may also be organized on single texts or subjects emanating from the work of the Commission.

7. Interns

42. Arrangements can be made for young professionals in relevant ministries, particularly from developing countries, to spend an internship period with the Commission's secretariat. In addition to learning about the substance of international trade law, the intern would become acquainted with the processes by which the unification and harmonization of international trade law are carried out. At the end of their internship such interns could be expected to be better prepared to evaluate whether the adoption of UNCITRAL and other texts on international trade law would be of value for their country.

8. Promotion of texts with key individuals

43. While many of the promotion activities that the secretariat can undertake would be aimed at establishing a generally favourable climate conducive to adoption of the UNCITRAL texts, some would be intended to identify key individuals who might take initiative in their country to bring about their adoption. For example, it appears reasonable to believe that one of the reasons a higher percentage of current and past member States of the Commission have adopted UNCITRAL texts than have non-members is that delegates to Commission sessions have a personal knowledge of the work of the Commission and are in a position to initiate favourable action in their countries.

44. The seminar planned in Africa in 1988 has been designed with the idea that the participants would be individuals who would be strategically placed to initiate action in their countries. It is expected that additional

seminars will be planned for key individuals in the future.

45. Key individuals are also often participants at meetings of other international organizations, and efforts are made by the secretariat when attending those meetings to meet and discuss the UNCITRAL texts with them.

9. Individual consultations

46. The secretariat has been requested on several occasions to consult with individual countries during their consideration of one of the UNCITRAL texts. This has usually consisted of commenting in writing on draft legislation. It has also consisted of travel to the country in question to consult with relevant officials or to participate in seminars or symposia on the text under consideration.

47. One example of the secretariat's promotional activities of this type that was directed to more than one State was the preparation of a document comparing the provisions of the Sales Convention with those of the two 1964 Hague Conventions it was designed to replace (i.e. the Convention relating to a Uniform Law on the International Sale of Goods and the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods). This document was furnished to the Netherlands, as depositary of the two 1964 Hague Conventions, and distributed by it to the Contracting States to those Conventions.

48. The secretariat remains willing to the extent its resources so permit to render its support to any country that requests it and to share the experience it has gained. Unfortunately, the current vacancy situation in the Commission's secretariat places severe limitations on the extent of such possible consultations and the restrictions on the available financial resources limit the travel that can be undertaken, unless it is financed by the requesting country.

V. Resource availability

49. The secretariat has limited resources available for promoting the texts that have emanated from the work of the Commission. As noted by the Commission in the report on the work of its twentieth session, promotion of adoption of the UNCITRAL texts and increased priority to training and assistance activities was not meant to suggest a diminished importance to the preparation of new legal texts on subjects of international trade law (A/42/17, para. 340). It was also noted at the twentieth session 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 (A/42/17, para. 341). During the five month period from the adoption of the Commission's report to the preparation of this report there has been no net change in the available staff and none of the current vacancies are expected to be filled in the near future.

50. There are no funds specifically provided in the budget of the Commission's secretariat for promotion of adoption of texts. Activities that require substantial sums of money, such as sponsorship of seminars, must be met by extra-budgetary funds. A separate report will be submitted to the Commission that will discuss the seminars planned by the secretariat and the financial requirements involved (A/CN.9/311). Some promotion activities that call for travel by the secretariat or the use

of consultants have been met out of the regular budget available to the secretariat, and that source of funds can be expected to continue. However, increased levels of funding from the regular budget cannot be expected.

51. The conclusion that would seem to follow is that the promotion activities of the secretariat must be designed to achieve maximum results with the minimum expenditure of resources.

C. Collection and dissemination of information on interpretation of UNCITRAL legal texts: note by the Secretariat (A/CN.9/312) [Original: English]

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INTRODUCTION

1. At the sixteenth (1983) and seventeenth (1984) sessions of the United Nations Commission on International Trade Law, suggestions were made that means should be explored to disseminate judicial and arbitral decisions concerning legal texts emanating from the work of the Commission (A/38/17, para. 137; A/39/17, para. 155).¹ At its eighteenth session (1985) the Commission had before it a note by the Secretariat (A/CN.9/267) which discussed possible mechanisms for the collection and dissemination of decisions relating to legal texts emanating from the work of the Commission, and various measures to encourage and facilitate the uniform interpretation of such texts. The note suggested that it might at the time be premature for the Commission to formulate concrete mechanisms and measures, and that the Commission might wish to consider doing so after the entry into force of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (hereafter

referred to as "Sales Convention"). Accordingly, the Commission decided to defer consideration of the matter to an appropriate future session (A/40/17, para. 377).²

2. At its twentieth session (1987), the Commission decided to hold at its twenty-first session a general discussion on its work for the medium term future. In this connection, it was agreed that the Commission should discuss the means by which information on the interpretation of the Sales Convention by courts and arbitral tribunals could be collected and disseminated (A/42/17, para. 343).³

3. The current note summarizes and supplements the earlier note (A/CN.9/267) with a view to assisting the Commission at this session to formulate concrete measures, in the light of the existing need for collection and dissemination of pertinent information. The note focuses on information relating to the Sales Convention, which entered into force on 1 January 1988, and

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); Report 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).

²Report 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).

³Report 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).

to the Convention on the Limitation Period in the International Sale of Goods (New York, 1974, hereafter referred to as "Limitation Convention"), which, together with the 1980 Protocol amending that Convention, will enter into force on 1 August 1988. Any measures the Commission may agree upon might also be applied at a later time to the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) (hereafter referred to as "Hamburg Rules") after its entry into force. The Commission may wish to consider whether the same, or similar, measures should further be used in respect of other legal texts emanating from its work; for example, the UNCITRAL Model Law on International Commercial Arbitration.

4. Even if limited to the Sales Convention and the Limitation Convention, the number of decisions to be coped with is impossible to predict; the only thing certain is that the volume of materials will increase considerably over the years, not the least because of the expected increase in the number of States parties to these Conventions. The considerations and suggestions in this note had thus to be based on a reasonable guess as to quantity, and any concrete measures the Commission may take at this session will have to be reviewed and possibly adjusted in a few years.

I. Need for collecting and disseminating decisions

5. There are essentially two factors to be taken into account when determining the need for the Commission and its secretariat to collect and disseminate decisions interpreting the Conventions. First, regard should be had to the purpose and value of providing information on the interpretation of the Convention in question. Secondly, any action and its precise scope would depend on the extent to which the desired information was not otherwise available.

A. Purpose and value of information on interpretation

6. The purpose and value most often referred to is the desire to enhance uniformity in the interpretation of uniform law. As suggested in the earlier note (A/CN.9/267, para. 8), the widespread distribution of decisions concerning the Conventions could itself promote a measure of uniformity in their interpretation in that it enables and encourages those called upon to apply them to take into account decisions of foreign judges and arbitrators.

7. The need for uniform interpretation was realised in the drafting of all the UNCITRAL Conventions. For example, the Sales Convention states in article 7(1) the following basic principle for applying the Convention, "(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application . . .". Similar provisions are found in the Limitation Convention

(article 7) and the Hamburg Rules (article 3). In addition, in the Sales Convention, article 7(2) provides, "Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law". It would be difficult to carry out the obligations contained in article 7(1) and (2) without having the necessary information on the interpretation given to the texts by others.

8. The need for uniform interpretation has been recognised in many scholarly writings and at various symposia on the Sales Convention, and it was a specific topic at the Twelfth Congress of the International Academy of Comparative Law, Sydney/Melbourne, Australia in August 1986. The exchange of experience and views embodied in the national reports to that Congress showed and emphasized the need for uniform interpretation and a number of suggestions were made as to measures that could be taken to promote it.

9. The value of information on the interpretation of the Conventions goes beyond the idea of uniform interpretation in two respects. First, early and complete dissemination of decisions could help to overcome the objection that a new international text stands on its own and is not embedded in case law, unlike the traditional domestic law it is designed to replace. Especially during the initial phase, dissemination of decisions would thus encourage and enhance the acceptability of the new texts as it will become known that they are being used and that the combined wisdom of judges and arbitrators from many countries contributes to their refinement. Secondly, information on decisions would be helpful to parties and their counsel in planning and executing commercial contracts, as well as to courts, arbitral tribunals and lawyers in dealing with disputes arising from such transactions.

B. Limited availability of information on interpretation

10. In terms of authenticity, the best source for information on interpretation of the Conventions is the *travaux préparatoires*, i.e. the full documentation on the preparatory work, available in the six official languages of the United Nations. The documents provide an authoritative account of the legislative history of the provisions in the Working Group, the Commission and the Diplomatic Conference. However, in spite of the fact that these documents are distributed to all Governments, to United Nations depository libraries and to many other libraries, as a practical matter they are not easily accessible in all countries that are or will be party to the Conventions. Indeed, it is not clear whether the text of the Conventions themselves is easily accessible in all the countries that are a party to them.

11. Furthermore, judges, arbitrators and practitioners faced with a specific issue are not normally keen to embark on an extensive search through the voluminous

documentation tracing the development of a given provision. Even such a search would not always lead to a concrete answer, due to the tremendous variety of fact-situations and the ever-developing commercial practice. Therefore, despite the eminent value of the *travaux préparatoires* in guiding interpretation and application of the text in question, there remains a considerable need for disseminating decisions on that text.

12. As explained in the earlier note (A/CN.9/267, para. 2), there does not now exist a well-established mechanism for ensuring that parties to commercial transactions, lawyers, judges and arbitrators will have access to decisions of foreign courts or of arbitral tribunals relating to UNCITRAL legal texts. A first limitation stems from the fact that not all court decisions are reported, even less so arbitral decisions.

13. In all those cases where a decision has been reported, a second limitation arises from the fact that foreign decisions are available, if at all, only to a limited extent. The situation is aggravated by language barriers since decisions are normally reported only in their original language. Even when collections of decisions or legal journals from other countries are available, it will be difficult to identify the decisions pertaining to UNCITRAL Conventions unless there is an adequate indexing or reference system.

14. The above difficulties appear to be somewhat lessened by the fact that there already exists extensive literature on the UNCITRAL Conventions and there is likely to be even more in the future on both the texts and on judicial decisions emanating from them. However, while the literature is widely available in developed countries, it is not and may not be in the future widely available to courts and arbitral tribunals resolving disputes in many other parts of the world.

II. Possible means of collecting decisions

15. The first task would be to collect all decisions that could be obtained, including unreported ones. While the UNCITRAL secretariat may bear the primary responsibility, it is not in a position to accomplish this task alone. As suggested in the earlier note (A/CN.9/267, para. 5), the Commission might recommend that the General Assembly adopt a resolution calling upon States to provide the secretariat with decisions of their courts. Similarly, arbitral institutions could be invited to transmit arbitral awards involving the interpretation of an UNCITRAL legal text, subject to any required consent of the parties.

16. An alternative or additional proposal would be to establish a network of national correspondents designated by the States parties to the Convention. The national correspondent might, for example, be an official in the Ministry of Justice (Attorney-General's Department), a member of a council of law reporting as

found in many common law jurisdictions, a law professor or any other person competent and sufficiently equipped to perform that task. If the expected work of the national correspondent were to go beyond collecting and forwarding the original decisions (to include, for example, the preparation of abstracts as suggested below, paras. 22-23), organizational implications as well as the financial implications to the States concerned would have to be considered.

17. In order to limit the task of collection in conformity with the above described needs, a degree of selectivity might be employed at this stage. A general criterion could be whether the decision contained an interpretation of a provision of law or in another relevant manner dealt with a point of law, thus excluding decisions where the heart of the dispute involved a straight application of a provision of the Convention to the facts of the case.

18. Whatever information on the collected decisions would be disseminated, it seems desirable for all original decisions in full length to be stored in one place where they would be accessible to any interested person. The Commission may wish to request its secretariat to ensure that the decisions are stored and accessible in this way. At least initially, the secretariat could itself perform this task. Later one could study the feasibility of entrusting this task to another organization with a documentation centre which, in turn, might develop into a focal point for training and research on the relevant UNCITRAL legal text. The secretariat has received preliminary and informal information on such a possibility at Vienna, which would have the advantage of close proximity to the seat of the secretariat. In respect of possible future storage and retrieval via computer, mention should also be made of plans considered by the International Institute for the Unification of Private Law (UNIDROIT) to establish an information system or data bank for uniform law.

III. Possible scope and means of disseminating information on interpretation

19. It would seem ideal if the Commission and its secretariat could establish a system of law reports which would (as, e.g., the Commonwealth commercial law reports) contain the full texts of judgements and a headnote summarizing the ruling or propositions of law and the basic facts. However, realism dictates that this idea must be discarded as not being feasible in view of the tremendous work involved in translating, editing and publishing the considerable volume of materials in the six official languages of the United Nations.

20. While the Commission and its secretariat thus have to take a more modest approach, the publication of full law reports might be undertaken by a commercial publisher, at least in one language. If a publisher were to express interest in this direction, the

secretariat may be entrusted with working out a relationship that would at the same time help the publisher and increase the overall benefit of the commercial publication to the international community. Matters that could be agreed upon include the form and structure of a subject index or other reference system, the furnishing of copies of the decisions gathered by the secretariat and the national correspondents against an arrangement which could enable users in developing countries to purchase the law reports at a reduced price or in local currency.

21. Turning now to the more modest scope of information that the secretariat could disseminate, a minimal solution would be to facilitate the finding of decisions by citing the cases, classified in accordance with a subject index to be established, and giving the source if they had been published. However, it should be possible to do more, especially if one could enlist the assistance of the national correspondents.

22. A feasible and useful solution could be to prepare and publish abstracts of the collected decisions. The abstracts would, along the lines of headnotes, essentially consist of a complete citation of the case and its original source, including its original language, a brief summary of the case, the ruling and the interpretation given to the particular provision of uniform law. If this approach were to be accepted, the precise format and details of the abstracts would have to be worked out, possibly with some examples as models.

23. In view of the considerable amount of work involved in preparing the abstracts, the secretariat would have to rely on the national correspondents for this task. They know the local language, are familiar with the style of the local decisions and would have access to any other legal texts cited in the decisions. The abstracts received from the national correspondents in one of the official languages of the United Nations would then be compiled and edited by the secretariat for publication in the six official languages.

24. Experience in similar contexts suggests that the preparation of abstracts by numerous correspondents may present problems in that there may emerge a diversity of format and style and there might be delays, since correspondents tend to work at different speeds. However, these problems are not regarded as unmanageable by the secretariat. As regards the possible diversity of styles, the above proposal of setting a standard format and structure should go a long way towards mitigating the problem. It might also be appropriate to call a meeting of the national correspondents where this proposal could be implemented and other organizational matters discussed. The Commission may also wish to entrust this group with the elaboration of a subject index or similar reference system, with the assistance of the secretariat.

25. At least until the number of decisions became too large, the publication of the abstracts could be accommodated within the regular documentation programme

of the Commission. This does not mean that only one document per year need be published, on the occasion of the Commission's annual session; one would rather envisage more frequent publications depending on the number of abstracts ready for publication.

26. The documents would be distributed through the regular channels of distribution to all States. In order to ensure that the abstracts reached all interested users, the following two measures might be considered. First, each State party to one of the Conventions might be invited to devise a scheme of further distribution within its jurisdiction so that the abstracts would reach, for example, corporate counsel in business enterprises, members of the bar and commercial law professors. Secondly, where the local language of a State party to one of the Conventions was not one of the official languages of the United Nations, the national correspondent might wish to arrange for translation into the local language. If this additional burden were undertaken by national correspondents, the aggregate work suggested to be done by them would obviously be of such size that considerable organizational and financial implications would ensue.

27. A final point to be considered is whether the Commission should play a more direct role in ensuring uniform interpretation of the texts elaborated by it. Based on the detailed discussion of various possibilities in the earlier note and the conclusions suggested therein (A/CN.9/267, paras. 10-15), the following recommendation may be made. The Commission could request the secretariat to monitor judicial and arbitral decisions relating to the interpretation of the texts, and to report to the Commission on the status of their interpretation when circumstances warrant. In pointing out conflicts in the interpretation of the texts, as well as any gaps in their provisions which came to light, the issuance of the reports could itself assist in promoting their uniform interpretation. Moreover, in the light of these reports the Commission could consider steps to be taken to deal with such conflicting interpretations or gaps.

CONCLUSION

28. Now that the Sales Convention has come into force and the Limitation Convention and its amending Protocol will come into force on 1 August 1988, the Commission may wish to decide on a mechanism to collect and disseminate judicial and arbitral decisions interpreting these and possibly other UNCITRAL legal texts. The Commission may wish to conclude that the focal point of collection of the decisions should be its secretariat, that the collection should be done with the help of States party to the Conventions and national correspondents from those States and that abstracts of the decisions should be prepared and disseminated as a regular Commission document. It may also wish to request the secretariat to ensure that the full texts of the decisions are stored in one place and are made accessible to any interested person.

**D. Activities of the secretariat to distribute and to promote awareness of the
UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works:
note by the Secretariat (A/CN.9/310) [Original: English]**

INTRODUCTION

1. When the Commission adopted the *UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works* at its twentieth session (1987), it requested the Secretary-General "to take effective measures for the widespread distribution and promotion of the use of the *Legal Guide*" (A/42/17, para. 315).¹ Specifically, the Commission urged the secretariat to arrange for prompt publication of the *Legal Guide* in all languages, to take steps to distribute the *Legal Guide* to relevant Government officials, libraries and trade organizations worldwide and to take steps to promote the *Legal Guide* (A/42/17, para. 313). In considering the report of the Commission on the work of its twentieth session, the General Assembly recommended "that all efforts should be made so that the *Legal Guide* becomes generally known and available" (General Assembly resolution 42/152 of 7 December 1987, para. 8).

2. The following sections discuss steps that have been taken or are contemplated by the UNCITRAL secretariat. Steps to promote awareness and use of the *UNCITRAL Legal Guide* must be taken within the context of the limited human and financial resources available to the UNCITRAL secretariat (see A/CN.9/305, paras. 49 and 50, and A/CN.9/311). This applies as well to steps taken by other units of the United Nations Secretariat that have been or will be involved in publishing and promoting the *Legal Guide*, since the critical financial situation of the United Nations has produced comparable resource shortages in those units. The UNCITRAL secretariat is endeavouring to achieve the maximum results from its promotional activities within the level of resources available to it.

3. In connection with its discussion of the promotion of the *UNCITRAL Legal Guide* at its twentieth session, the Commission expressed the view that measures should also be taken by Governments, particularly those of member States of the Commission (A/42/17, para. 313). Governments might, for example, take steps to bring the *Legal Guide* to the particular attention of personnel of Government departments and organs and State-owned enterprises who are involved in drawing up international contracts for the construction of industrial works, and other relevant circles, such as firms or enterprises, lawyers, engineers, trade associations and libraries. Governments might wish to consider the possibility of publishing a notice about the *UNCITRAL Legal Guide* in their journals of official notices or announcements.

I. Publication and issuance of *UNCITRAL Legal Guide*

4. The English version of the *UNCITRAL Legal Guide* was issued at Vienna on 5 February 1988. The Chinese version is expected to be issued by the end of March 1988 and the Spanish version by the end of April. The other language versions (Arabic, French and Russian) are in various advanced stages of publication and will be issued in due course.

II. Distribution of *UNCITRAL Legal Guide*

5. Copies of the *UNCITRAL Legal Guide* are being distributed, pursuant to the general world-wide distribution of UNCITRAL documents and publications, to the following recipients: all Permanent Missions to the United Nations in New York and in or accredited to Vienna and through them to the ministries to which they distribute UNCITRAL documents; 30 United Nations Specialized Agencies; 25 intergovernmental organizations; 350 international non-governmental organizations; 65 United Nations Information Centres and 320 depository libraries of United Nations documents world-wide.

6. In addition, copies of the *UNCITRAL Legal Guide* are being sent to approximately 400 recipients world-wide on special mailing lists instituted and maintained by the UNCITRAL secretariat. These recipients include, for example, professors of law and of trade; practising lawyers; individual officials of Governments and of international governmental and non-governmental organizations; consultants; bar associations; and chambers of commerce and other trade associations.

7. The UNCITRAL secretariat is sending copies of the *UNCITRAL Legal Guide* to all Resident Representatives of the United Nations Development Programme (UNDP) and to the Regional Procurement Advisers for each Region of the World Bank. The secretariat will also distribute the *Legal Guide* to relevant personnel of organs within the United Nations system that are active in the areas of industrialization and economic development, including those that are involved in works construction projects in developing countries. Those recipients will be asked to bring the *Legal Guide* to the attention of appropriate persons and circles in the areas served by them.

III. Availability of *UNCITRAL Legal Guide* as sales publication

8. The *UNCITRAL Legal Guide* is a sales publication of the United Nations. It can be ordered from the United Nations, at one of the addresses given below,

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).

under the appropriate sales number. The sales number of the English version is E.87.V.10; the sales numbers of the other language versions begin with, instead of the letter E, the following letters: Arabic-A, Chinese-C, French-F, Russian-R, Spanish-S. The document number A/CN.9/SER.B/2 should also be quoted. Readers from Europe, Africa and northern Asia should address their orders to United Nations Publications, Palais des Nations, CH-1211 Geneva 10, Switzerland; readers from North, Central and South America, southern Asia and the Pacific should address their orders to United Nations Publications, Room DC 2-0853, United Nations Headquarters, New York, New York 10017, U.S.A.

9. The *UNCITRAL Legal Guide* will also be obtainable at 110 bookshops and distribution centres throughout the world that regularly stock United Nations publications. The price of the *UNCITRAL Legal Guide* is \$US 42.00 or an equivalent amount in other currencies.

IV. Publicity and promotion of awareness of *UNCITRAL Legal Guide*

10. The *UNCITRAL Legal Guide* will be listed in the catalogues of United Nations publications. The catalogues are issued annually by the United Nations Sales Section. In addition, the Sales Section in Geneva will include information about the *Legal Guide* in special mailings targeted to particular audiences, such as lawyers, engineers, firms and enterprises involved in international commerce and contracting and academics in the fields of law, engineering and construction. The Publications Unit will also arrange for copies of the

Legal Guide to be distributed to specialists for review in appropriate journals.

11. The UNCITRAL secretariat has prepared an information sheet about the *Legal Guide* for distribution at appropriate forums, such as seminars on construction law, and to various recipients, such as journals in the field of international commercial law, construction law, construction and engineering.

V. Seminars and symposia

12. The UNCITRAL secretariat is planning to participate in or organize seminars and symposia to promote awareness of the existence of the *UNCITRAL Legal Guide* and to discuss its contents. The secretariat will participate in a workshop on international engineering contracts co-sponsored by INGRE, an engineering and construction enterprise in Yugoslavia, and the University of Zagreb Construction Institute, in Cavtat, Yugoslavia, from 25 to 27 April 1988.

13. The UNCITRAL secretariat is co-sponsoring with the Preferential Trade Area for the Eastern and Southern African States a regional seminar on UNCITRAL texts and international trade law, to be held in Lesotho in August, 1988 (see A/CN.9/305, paras. 37-40 and A/CN.9/311, paras. 28-31). A portion of the seminar will be devoted to the *UNCITRAL Legal Guide*.

14. The UNCITRAL secretariat is exploring possibilities of organizing seminars on the *UNCITRAL Legal Guide* in other regions, including Asia and Latin America.

VIII. TRAINING AND ASSISTANCE

Training and assistance: note by the Secretariat (A/CN.9/311) [Original: English]

INTRODUCTION

1. From the first session of the Commission in 1968 when it "noted the special importance of increasing the opportunities for the training of experts in the field of international trade law, particularly in many of the developing countries" (A/7216, para. 67)¹ to the twentieth session in 1987 when it "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" (A/42/17, para. 335), the Commission has had on its agenda every year an item entitled "Training and Assistance". Nevertheless, in spite of the reiteration in the report of the Commission and in the annual resolution of the General Assembly on the work of the Commission of the importance of training and assistance activities, only a comparatively small amount has been accomplished.

2. The primary purpose of this report is to make certain proposals for future action. In order to set these proposals in the proper context, it is useful to review briefly the past efforts.

I. Early discussions and activities

3. The earliest activities of the Commission were oriented towards disseminating knowledge about the existing body of international trade law. This was accomplished by such means as endorsing certain texts and encouraging their adoption by States or their use by parties to international trade transactions, preparing a register of texts and planning a programme of training and assistance.²

4. At first the Commission saw itself as a stimulator of training in the field of international trade law rather than as the body to carry out that training. This is best reflected in the decision of the Commission at its second session in 1969 when it adopted a proposal submitted by Brazil, Ghana, the United Republic of Tanzania and the United States of America, as follows:

"In an effort to help meet the need for developing local expertise in international trade law, particularly

in the developing countries, and for intensifying and co-ordinating the existing programmes, the Commission requests the Secretary-General:

"(a) To recommend to the bodies concerned that regional seminars and training courses under the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law should continue to include topics relating to international trade law;

"(b) To recommend that some of the fellowships to be granted under the Programme of Assistance referred to in sub-paragraph (a) above be awarded to candidates having a special interest in international trade law;

"(c) To take the necessary steps to add the names and relevant particulars of experts in international trade law for inclusion in a supplement to the Register of Experts and Scholars in International Law, as described in paragraph 36(ii)(a) of the report of the Secretary-General (A/CN.9/27);

"(d) To complete the information thus far obtained in respect of activities of international organizations in the field of training and assistance in matters of international trade law, as described in paragraph 36(i) of the report of the Secretary-General;

"(e) To consult with the Advisory Committee on the United Nations Programme of Assistance referred to in sub-paragraph (a) above and with United Nations organs, specialized agencies and other organizations and institutions active in the field of international trade law concerning the feasibility of establishing within their programmes at selected universities or other institutions in developing countries:

"(i) Regional institutes or chairs for training in the field of international trade law;

"(ii) Seminars or courses for students, teachers, lawyers and government officials interested or active in this field;

"(f) To report to the third session of the Commission the results of his consultations and the extent to which it has been possible to achieve the foregoing objectives and to inform the Commission of what further measures may be appropriate in the light of this experience" (A/7618, para. 160).

5. By the third session in 1970 the view was expressed by some representatives that the Commission should aim at the establishment of an independent pro-

¹Report 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).

²These activities are reviewed in a report of the Secretary-General submitted to the fourteenth session in 1981, A/CN.9/203, paras. 13-16, 65-98.

gramme of training and assistance rather than limiting itself to encouraging the inclusion of such a programme within those already in existence. It was noted, however, that suggestions calling for substantial financial outlays had to take into account the fact that appropriations were limited and that activities could be undertaken only within the limit of available resources (A/8017, paras. 198-199).

6. Beginning with the third session in 1970, the Commission discussed on several occasions proposals to develop teaching materials in this field. It was expected that the materials would be developed by a young scholar from a developing country. However, at the sixth session in 1973 the Secretary of the Commission explained the financial difficulties that had been encountered in securing sufficient voluntary contributions that would enable a young scholar from a developing country to travel to a centre with adequate library facilities where he could develop teaching materials for use in his own university and possibly in universities in his region (A/9017, para. 90). It does not appear that teaching materials were ever produced as a direct outcome of the efforts of the Commission.

7. One activity that did have more success for a period of time was the establishment of internship programmes for young lawyers from developing countries to gain practical experience through secondment to commercial and financial establishments in developed countries. When this suggestion was made at the fourth session in 1971, several representatives said they would see whether such arrangements could be made in their country (A/8417, para. 142). Such arrangements were made in several countries and from the fifth to the eleventh sessions the report of the Commission notes that one or more States had made, or planned to make, available under the auspices of the Commission one or more fellowships for this purpose.

8. Eventually, however, this effort lapsed, probably because it had never become well institutionalized in the Commission, the secretariat or the host countries. Neither the reports of the Secretary-General to the Commission nor the reports of the Commission indicate more than the number of fellowships granted and the country that granted them.

9. Internships have also been available for young scholars and practitioners to serve with the Commission's secretariat. It was mentioned in the report of the Commission's fifth session that some recipients of United Nations/UNITAR fellowships had received training with the Office of Legal Affairs (A/8717, para. 91) and that such funding had been repeated on occasion. However, the last time a UNITAR or similar fellowship was granted for an intern to serve with the Commission's secretariat was in 1984. Since the award of such fellowships is outside the control of the Commission's secretariat, the situation cannot be expected to change. Therefore, while the opportunity for internships with the Commission's secretariat is still available, and on average three or four interns are accepted every year, candidates must have other sources of income for their

travel and subsistence during the period of the internship. This has effectively limited the internships to candidates from developed countries.

II. Symposia and seminars

10. The suggestion that the Commission should itself organize seminars on international trade law was first made at the fifth session in 1972. In keeping with the academic orientation that had characterized the previous discussions of training and assistance, the Secretary-General proposed the organization of an international symposium on the role of universities and research centres in the teaching, development and dissemination of international trade law. The Commission requested the Secretary-General to explore the feasibility of such a symposium (A/8717, para. 96).

11. The following year at the sixth session the decision was made to hold the symposium on the occasion of the eighth session of the Commission in 1975. In order to be sure that the symposium would not be restricted to participants from developed countries, the Secretary-General was requested to seek voluntary contributions from Governments, international organizations and foundations to cover the cost of travel and subsistence of participants from developing countries (A/9017, paras. 104 and 107).

12. The symposium was duly held in connection with the eighth session of the Commission in 1975. Four countries, Austria, Federal Republic of Germany, Norway and Sweden, contributed funds for fellowships that were awarded to participants from 14 developing countries. In addition, 13 professors from nine countries participated in the symposium at their own expense.

13. In view of the general satisfaction with the symposium, there was some discussion about sponsoring a symposium every two years in connection with the Commission's session. However, at that time the Commission decided only to organize a second symposium in connection with its tenth session in 1977 (A/10017, paras. 106-113).

14. The symposium scheduled for the tenth session in 1977 was cancelled for lack of funds. A note was submitted by the Secretary-General setting forth the actions that had been taken to raise the necessary funds and the results (A/CN.9/137). The note went on to question whether the Commission should plan to hold future symposia and, if so, whether it would not be desirable to devise a different, and more reliable, method of financing this activity. It was suggested that the symposia might be financed out of the regular budget of the United Nations.

15. The Commission was agreed that alternative means to the system of total reliance on voluntary contributions from Governments and other sources was necessary and it recommended to the General Assembly that the General Assembly consider the possibility of

providing for the funding of the Commission's symposia, in whole or in part, out of the regular budget of the United Nations. It also decided that, if the funds were available, it would hold the symposium in connection with its twelfth session in 1979 (A/32/17, para. 45 and Annex II, paras. 48-53).

16. The General Assembly was sympathetic to the recommendation of the Commission but, in view of pressures already manifest not to introduce new elements into the budget of the Organization, in its resolution 32/145 of 16 December 1977 it requested the Secretary-General "to study the problem of how adequate financial resources can be provided for the symposia . . .". In view of the resulting uncertainty as to whether and when funding would be available and the fact that six to nine months were necessary after funding was assured in order to organize the symposium, the Commission at its eleventh session in 1978 decided to leave it to the secretariat to propose a suitable date (A/33/17, paras. 77 and 78).

17. By the thirteenth session in 1980 sufficient pledges from Governments had been received to finance the travel and subsistence of approximately 15 participants from developing countries. Consequently, the Commission decided to hold the symposium in connection with the fourteenth session in 1981 (A/35/17, paras. 154-162).

18. The symposium was held as scheduled with 15 participants from developing countries financed by fellowships out of funds contributed by nine States and an additional 43 participants from 24 States who attended the symposium at their own expense. Although no formal evaluation was made at the time, at the twentieth session of the Commission "The great value of such seminars was underscored by one delegate who had participated in the most recent [i.e. 1981] seminar on a fellowship" (A/42/17, para. 340).

19. In spite of the evident success of the symposium once held, the report of the fourteenth session shows that the financial difficulties faced by the secretariat in organizing symposia or seminars had been brought once again to the attention of the Commission:

"105. The Commission was informed that the planning for the Symposium had been greatly hindered by the late payment of pledges. It had not been certain until the final days before the Symposium was held how many fellowships could be awarded. Moreover, some of the pledges had not been received, and, in several cases, it had been necessary to withdraw the expected award of a fellowship because the funds were not available at the necessary time" (A/36/17).

20. In a report of the Secretary-General to that session these administrative concerns were elaborated at some length and it was stated that "In order for the Commission to sponsor an effective programme of training and assistance, it must have an assured source of funds to cover the necessary direct expenses involved . . . [Moreover,] it is vitally important to the success of the programme that the necessary funds be made available

well in advance of its scheduled date" (A/CN.9/206, paras. 23, 26).

21. In the Commission there was agreement that it should continue to sponsor symposia and seminars on international trade law. Following a suggestion in the report of the Secretary-General, the Commission concluded that it was desirable for these seminars to be organized on a regional basis, and that they might be sponsored jointly with regional organizations. Furthermore, for the first time the Commission indicated that one of the purposes of holding seminars would be to "help to promote the adoption of the texts emanating from the work of the Commission" (A/36/17, para. 109). The current role of seminars as a means of promoting the adoption and use of texts emanating from the work of the Commission is discussed in companion reports A/CN.9/305 and A/CN.9/310.

22. So far as the serious problems caused by the uncertain financial resources available for the Commission's programme in training and assistance were concerned and the administrative difficulties caused by the late payment of pledges, the Commission expressed the hope that States would once again make contributions for the purposes of the Commission's programme of training and assistance (A/36/17, para. 110).

23. The indication in the report of the Commission's fourteenth session in 1981 that one of the purposes of the seminars would be the promotion of texts emanating from the work of the Commission was a logical development. By that time the Commission had produced a number of texts on international trade law, three of which were in the form of international conventions that would have no legal effect until they came into force by ratification or accession by 10 or 20 States, depending on the convention. Co-sponsorship of regional seminars and participation by members of the secretariat in other seminars and professional meetings promised to be the most effective means of educating relevant individuals about the work of UNCITRAL and of promoting the texts emanating from its work. By the sixteenth session in 1983 the Secretary of the Commission was able to inform the Commission that the secretariat had intensified its efforts to promote the Conventions, particularly through its activities in co-ordination with other organizations and training and assistance programmes (A/38/17, para. 120).

24. The situation reported by the Secretary of the Commission in 1983 has continued, indeed intensified, throughout the past five years. Co-sponsorship of regional seminars, which has been almost exclusively in developing countries, and participation in other professional seminars and symposia have been viewed by the secretariat primarily with a view to promotion of UNCITRAL and the adoption of its texts. Viewed in this way, these activities appear to have been successful.

25. At the twentieth session of the Commission in 1987 the secretariat presented to the Commission a note on the draft Medium-Term Plan for 1990-1995 (A/CN.9/XX/CRP.2). In accordance with the instructions given by

the General Assembly on the preparation of the Medium-Term Plan, the Commission was called on to determine the relative priorities of the activities to be undertaken by the secretariat during the period of the next Medium-Term Plan. In this note it was stated that, in spite of the fact that the activities actually undertaken in respect of training and assistance were considered to have been successful, for lack of personnel and money, the secretariat had not been able to undertake activities that would significantly contribute to providing "training and assistance in the field of international trade law, taking into account the special interests of developing countries . . ." (*ibid.*, para. 6).

26. The Commission was in agreement that an increased priority should be given to efforts by the secretariat to promote the adoption and use of texts emanating from the work of the Commission. At the same time it was recognized that the secretariat's efforts to date in that regard had been undertaken at the expense of such training and assistance activities as the seminars for young lawyers that had been held in 1975 and 1981. 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 (A/42/17, para. 340).

III. Future activities

27. While the Commission has always been in favour of an active programme of training assistance, especially in respect of developing countries, its decision at the twentieth session was the strongest statement it has made that there should be an increased priority given to training and assistance in the allocation of work, and therefore of resources, of the Commission and its secretariat.

28. Pursuant to that decision of the Commission, the secretariat is currently planning to organize two seminars, one in August 1988 in Lesotho for countries from Southern and Eastern Africa; the second in connection with the Commission's twenty-second session at Vienna in 1989 for young lawyers and scholars. These two seminars are intended to serve two different purposes; consequently, their organization, participation, and level of funding necessary will be different.

29. The seminar in Lesotho in August 1988 will be hosted by the Government of Lesotho and co-sponsored by the Preferential Trade Area for Eastern and Southern African States, a regional organization with a membership of 15 States. The purpose of the seminar will be to acquaint decision makers in the States concerned with UNCITRAL as an institution and with the legal texts that have emanated from its work and to promote the adoption and use of those texts. The number of participants might vary from one State to another and will depend in part on the level of funding available, but it is anticipated that participation would be drawn from the Ministries of Foreign Affairs, Justice, Transportation (for the Hamburg Rules) and from the university, the bar and representatives of the business

community. Lecturers and discussion leaders would come from the secretariat, delegates to the Commission and local participants.

30. The seminar has been organized on the principle that there is an efficiency for the Commission and for the participants in considering all of the UNCITRAL texts at the same time. Although they cover the four distinct fields of sales, carriage of goods by sea, international commercial arbitration and negotiation of industrial works contracts, many of the same people are relevant in each country for the decision whether or not to adopt the text. Furthermore, there was the belief that proper consideration of any of the texts requires both lectures and extensive time for discussion.

31. For the first seminar of this type to be organized by the secretariat it was thought to be desirable that there be participants from a number of States and that the seminar be co-sponsored by a regional organization for economic co-operation and development. In this manner the participants can share with one another their evaluation of the UNCITRAL texts as a means to provide an appropriate, modern and uniform legal infrastructure that would contribute to the economic development of their countries.

32. The seminar to be held in connection with the Commission's twenty-second session in 1989 will be based on the seminar held in 1981. It will take place over a week's period of time. In addition to members of the secretariat, delegates and observers to the Commission will be invited to give lectures on topics relevant to the Commission and its programme of work. Fellowships will be made available to the extent of available funds to young lawyers and scholars from developing countries. Additional qualified participants without fellowship will be accepted to the limit of available space.

33. Other formats for seminars that would fall within the Commission's mandate can easily be imagined, especially for the specific promotion of the *UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works* (see the note on that subject, A/CN.9/310). If the two seminars that have been planned are successful, the secretariat expects to hold additional ones on a regular basis.

34. As is evident from the review in this report of the Commission's programme of training and assistance, most of the planned activities of significance over the past 20 years have been hampered or cancelled by a shortage of funds. As stated in the report of the Secretary-General submitted to the fourteenth session in 1981, "In order for the Commission to sponsor an effective programme of training and assistance, it must have an assured source of funds to cover the necessary direct expenses involved" (A/CN.9/206, para. 23). Subsequent to that report and the hope expressed by the Commission at that session that "States would once again make contributions for the purposes of the Commission's programme of training and assistance" (A/36/17, para. 110), in each of the resolutions on the

work of the Commission the General Assembly has urged financial support for the Commission's programme of training and assistance. In its most recent formulation, the General Assembly in resolution 42/152 of 7 December 1987, paragraph 5,

"(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;"

35. In spite of the annual repetition of this invitation in the resolutions of the General Assembly, not a single contribution was offered to the secretariat for this purpose from 1981 through 1987. In connection with the seminar planned for August 1988 in Lesotho, the secretariat contacted several Governments believed to be sympathetic to such an appeal and has received varying degrees of oral assurance that a contribution will be made. At the date of writing, no written commitments have been received. However, it is believed that sufficient funds will be available so that it will not be necessary to cancel the seminar, as has happened to several seminars proposed in the past.

36. As has been stated before, an adequate and assured source of funds must be available if the Commission and its secretariat are to carry on a viable programme of training and assistance. Although it has been suggested in the past that the programme might be financed out of the regular budget, no such funding is available or is likely in the current financial situation of the Organization. Furthermore, as was pointed out in the Sixth Committee when this suggestion was debated in 1977, under "the established principles and precedents for the funding of United Nations activities . . . the cost of holding the UNCITRAL symposia appeared to be of the kind that should be met out of voluntary contributions and not out of the regular United Nations budget" (A/32/402, para. 34).³

37. The Commission might wish, therefore, to consider how a programme of voluntary contributions can provide an adequate and assured source of funds that would permit the secretariat to plan and execute a programme of training and assistance, both for the training of young lawyers and scholars from developing countries and to promote the adoption and use of texts emanating from the work of the Commission.

38. In considering this question, the Commission might wish to note that the difficulties in the past have arisen primarily out of the inability to plan on the amount of money that would be available. The secretariat has never had, and does not now have, a source of funds to which it could resort if the expected contributions were not realized, or were not realized in time. This has forced it to be extremely conservative in its planning, thereby refraining from planning training, assistance or promotion activities that it otherwise considered to be desirable.

39. The alternative in the United Nations to planning individual activities and soliciting contributions for each specific activity, which has been the pattern in the Commission with its generally unsatisfactory results, is to establish a trust fund into which voluntary contributions are made on a yearly basis and from which expenditures are made as needed. Such trust funds are common and range in size from some that are quite modest to those that receive and disburse tens of millions of dollars annually.

40. If the Commission were to decide that its training and assistance activities should be financed in this manner, no new administrative actions would be necessary. A trust fund was created in 1981 for the contributions for the symposium held that year. The trust fund is still in existence and will be used as the means of receiving and disbursing funds for the seminar planned for Lesotho in August 1988. All that the Commission would be called on to do at this session would be to recommend to Governments, the relevant United Nations organs, organizations, institutions and individuals that they contribute to the fund on an annual basis.

41. It will be noted that the recommendation of the Commission would echo that made by the General Assembly in its resolution 42/152 of 7 December 1987, set out at paragraph 34 above. However, having been made by the Commission after discussion of the topic, the recommendation could be expected to elicit a favourable response.

42. The Commission might also wish to consider what it would regard as an appropriate goal for annual contributions to the trust fund. It is obvious that any figure is arbitrary, since the level of activities financed from the fund will be adjusted not to exceed the resources. However, it can be safely stated that an initial figure of \$150,000 per year would permit the secretariat to organize seminars of various types that would fulfil the expectations of the Commission. After an initial period the Commission would be in a position to recommend any increase or decrease in the target figure, in the light of the results.

³Report of the Sixth Committee, *Official Records of the General Assembly, Thirty-second Session, Annexes*, agenda item 113.

IX. CO-ORDINATION OF WORK

Co-ordination of work: register of organizations: report of the Secretary-General
(A/CN.9/303) [Original: English]

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INTRODUCTION

1. One of the decisions of the Commission at its first session in 1968 was to create a register of texts in the field of international trade law and a register of international organizations and their work in the field (A/7216, para. 60).¹ The Register of Texts was duly published in two volumes.²

2. The register of organizations was expected to be an extension of the survey of the work of a number of world-wide and regional intergovernmental organizations and of non-governmental organizations in the field that was contained in the report of the Secretary-General submitted to the twenty-first session of the General Assembly in 1966, on the basis of which resolution 2205 (XXI) creating the Commission was adopted. At its third session in 1970 the Commission considered the possibility of preparing a permanent publication comparable to the Register of Texts, but concluded that the most useful method by which current information on the activities of other organizations in matters dealt with by the Commission could be presented was in the form of annual reports by the Secretary-General on the activities of those organizations (A/8017, paras. 169 and 172).

3. Pursuant to that decision the Secretariat has in recent years submitted to the Commission two types of reports. The first type has consisted of general surveys of activities of other organizations related to international trade law. In the second type the Secretariat has selected particular areas of international trade law and has reported in depth on the activities of organizations in those areas (see A/36/17, para. 100). The most recent general report (A/CN.9/281) was presented to the Commission in 1986 and the Secretariat plans to present the next one to the twenty-second session of the Commission in 1989. In-depth reports have dealt with the subjects of international transport documents (A/CN.9/225), barter and barter-like transactions

(A/CN.9/253) and international commercial arbitration (A/CN.9/280).

4. The present report has been prepared in order further to assist the Commission by providing it with information about the various organizations engaged in activities concerning the field of international trade law, enabling the Commission to obtain a broad view of those organizations and their potentialities. Information included in the report relates to the membership of the organizations, their nature and general roles and an overview of their activities related to international trade law, particularly those of relevance to the work of the Commission.

5. The report concentrates on those organizations that are formulating agencies, although it includes some organizations that are particularly important to the development of international trade law in other ways. As in the prior reports on the work of other organizations, the present report includes organizations involved in activities relevant to international trade even though those activities may go beyond the areas on which the Commission's programme of work has concentrated, and even though those activities may not result in normative legal texts. The basic criterion for inclusion in the report has been the relevance of the work conducted by the organization concerned to the Commission's areas of interest.

6. This survey does not claim to be exhaustive, especially in regard to trade associations. There has been an attempt to include the work of those trade associations that develop normative texts, including general conditions and standard contracts, intended for relatively widespread use. The most conspicuous examples are the trade associations in transportation that prepare standard transport documents. Deliberately excluded have been trade associations that prepare general conditions or standard contracts intended for relatively restricted usage in particular trades, although such texts play an important role in international trade law.

7. The secretariat would welcome suggestions in respect of this register of organizations that might be brought to the attention of the Commission at its next session.

¹Report of the United Nations Commission on International Trade Law on the work of its first session (1968), *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16* (A/7216).

²*Register of Texts of Conventions and other Instruments concerning International Trade Law, Vols. I and II*, United Nations Publications, Sales No. E.71.V.3 and E.73.V.3, respectively.

I. Intergovernmental organizations

Asian-African Legal Consultative Committee (AALCC)

8. AALCC is an intergovernmental organization of 39 member States and 2 associate members. Its primary activities have been as an advisory body to member States in respect of developments in public international law, especially matters under negotiation in the various organs of the United Nations. However, a standing Subcommittee on International Trade Law, which meets concurrently with the Plenary at the annual session, was created in 1970.

9. On the recommendation of the Subcommittee, AALCC has prepared two standard forms for sales of commodities. In addition three different model bilateral agreements on investment promotion and protection have been adopted and transmitted to member Governments to assist their authorities in negotiating investment promotion and protection agreements.

10. Regional arbitration centres have been created at Cairo and Kuala Lumpur with a third planned for West Africa. The centres have promulgated a model arbitration clause calling for arbitration under the UNCITRAL Arbitration Rules.

11. AALCC has recommended to its member States that they use the UNCITRAL Arbitration Rules, ratify or accede to the United Nations Convention on Contracts for the International Sale of Goods and to the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules) and adopt the UNCITRAL Model Law on International Commercial Arbitration.

Cartagena Agreement (Andean Group)

12. Five States participate in the structure established by the Agreement, the function of which is to promote subregional economic development and integration. In addition to trade liberalization and common external tariff measures, the Andean Group's major organ, the Commission, has taken a number of actions relevant to international trade law, particularly in the form of binding Commission Decisions. For example, based on proposals developed by the Junta and its Permanent Secretariat, the Commission recently issued Decision 220, replacing Decision 24 and setting out a common regime for the treatment of foreign capital and concerning trademarks, patents, licences and royalties. This Decision sets out, *inter alia*, certain required provisions and certain prohibited provisions in technology transfer and licensing contracts. It also contains provisions for agreements transforming foreign companies into mixed ownership entities and provides for the establishment of a subregional industrial property office. The functions of this office include the preparation of standard form contracts licensing the use of trademarks or exploitation of patents in the subregion.

Central American Common Market (CACM)

13. Five States participate in this organization for regional economic integration. In addition to efforts aimed at establishing a common market, activities relevant to international trade law include preparing conventions and taking other measures for the development of a regional payment mechanism, elimination of non-tariff barriers and facilitation of transportation. A customs and tariff convention has been concluded, establishing a regional customs committee which is considering simplification of customs formalities and adoption of updated uniform documents. Instruments in preparation include a regional convention on international transit of goods on land and a revised uniform customs law.

Council for Mutual Economic Assistance (CMEA)

14. CMEA is an intergovernmental organization grouping 10 States with centrally planned economies. Its purpose is to promote economic co-operation and integration among the member States. It carries out its work on the harmonization and unification of the legal rules governing trade between the member States through a permanent Conference on Legal Questions.

15. CMEA has adopted a number of legal texts governing the contractual relations between enterprises in the member States, including the General Conditions of Delivery of Goods between the Organizations of the Member Countries and the General Principles for the Supply of Spare Parts for Machinery and Equipment.

16. The Conference on Legal Questions has approved, for discretionary application, the basic principles for the drafting, structure, content and fulfilment of clauses relating to inter-state obligations in the area of multi-lateral production, specialization and co-operation between CMEA member countries. In addition, a practical guide has been prepared for drafting of contracts on the basis of the principles for various types of industrial co-operation between organizations of member countries. Other such items prepared for discretionary application include the Individual Model Principles for Trade and Payment Agreements and a model agreement on the performance of commissioned research, design, structural and experimental work.

17. The Standing Commission on Foreign Trade, as part of its continuing work on the standardization of foreign trade instruments, has approved a recommendation on standardized forms for consolidated documents used in clearing operations between bank of CMEA member countries through the International Bank for Economic Co-operation.

18. The legal aspects of other subjects on the CMEA agenda relevant to harmonization of trade law include, *inter alia*, transport, labour, arbitration, double taxation and industrial and intellectual property protection.

19. An important aspect of the harmonization of trade law in CMEA consists of the conduct of

comparative law analyses, surveys of national law and studies on implementation of uniform rules, such as the recent publication of *The Contract Law of the CMEA Member Countries and the Socialist Federal Republic of Yugoslavia, General Principles*.

20. In the area of dispute settlement, the 1972 Convention on Settlement by Arbitration of Civil Law Disputes arising from Economic, Scientific and Technical Co-operation (Moscow) has been adopted, as have the 1974 Uniform Rules for Arbitration Tribunals. On the basis of the latter, CMEA member countries approved national regulations for arbitration tribunals attached to their Chambers of Commerce. A study is being undertaken on the usefulness of formulating a uniform law on arbitration for foreign trade and on the execution of foreign arbitral awards taking into account the UNCITRAL Model Law on International Commercial Arbitration.

Council of Europe (CE)

21. The Council of Europe was established to promote European unity and to improve the quality of life. Among the many activities it has undertaken has been promotion of the unification and harmonization of various aspects of law, including international trade law.

22. The two primary means employed by the Council to achieve the unification and harmonization of law have been the preparation of international conventions and the adoption of recommendations addressed to the Governments of its member States.

23. Among the more than 100 conventions concluded thus far with a view to harmonization of national legislation, many of which are open to accession by non-member States, a number concern such trade-related subjects as data privacy, product liability, foreign money liabilities, bearer securities, arbitration, and calculation of time limits. In addition, CE has elaborated or is in the process of completing texts on mutual administrative assistance on tax matters, powers of official receivers (in bankruptcy) in a foreign country, creditor's rights and protection of individuals with regard to automatic data processing.

24. Recommendations on trade law related subjects that have been adopted by the Council include a Recommendation on the harmonization of laws relating to the requirements of written proof and to the admissibility of reproductions of documents and recordings on computers (with appended rules). Recommendations have been adopted on such other subjects as consumer protection and data privacy.

Customs Co-operation Council (CCC)

25. CCC is an intergovernmental organization with some 100 member States. It works for the harmonization and simplification of customs procedures, primarily

through the preparation of draft Conventions, standards and recommended practices, supervision of the implementation and development of conventions, dissemination of guidelines, and study of customs questions.

26. The principal instrument supporting the work of CCC is the 1973 International Convention on the Simplification and Harmonization of Customs Procedures (Kyoto Convention). A series of annexes to the Convention treat such subjects as customs warehouses, drawback, temporary admission, rules of origin, documentary evidence of origin, customs transit and free zones. The annexes contain *standards* (provisions the general application of which is recognized as necessary for the achievement of harmonization and simplification of customs procedures), *recommended practices* (provisions recognized as constituting progress towards the harmonization and simplification of customs procedures, the widest possible application of which is considered to be desirable) and *notes* (indicating some possible courses of action to be followed in applying the standard or recommended practice).

27. In order to assist member States with the application of the Kyoto Convention and other customs facilitation matters, the Council issues guidelines offering practical advice on subjects such as immediate release of goods, use of customs procedures to promote exports, auditing, use of a single document for exportation, importation and transit, rapid frontier controls, management information systems and accelerated clearance of urgent air consignments.

28. CCC is also undertaking a preliminary study on the feasibility of adopting a new international convention to unify the measures now in existence concerning temporary admission. The new Convention would follow the Kyoto Convention model, with a body containing common elements (particularly those in existing Conventions) and various annexes setting out specific provisions applicable to individual categories of goods.

29. Through the Automatic Data Processing Subcommittee of the Permanent Technical Committee, CCC is fostering the greater use of automatic data processes (ADP) in customs applications, including data interchange between importers and customs and between carriers and customs. In this regard it has made several recommendations regarding the use and legal value of computer records and reviewed legislation to foster the use of ADP.

Economic and Social Commission for Asia and the Pacific (ESCAP)

30. A regional economic commission of the United Nations, ESCAP engages in activities intended to facilitate the economic development of Asia and the Pacific. Examples of ESCAP activities relevant to the formulation of international trade law include the preparation of Guidelines for Maritime Legislation, the development of a common sales contract form for

pepper and the preparation of standard contracts and general conditions for tropical hardwood trade. ESCAP provides technical assistance and training in trade-related legislation facilitation matters and promotes regional participation in international trade facilitation agreements.

Economic Commission for Europe (ECE)

31. ECE, a regional economic commission of the United Nations, has engaged in extensive legal activities in pursuance of its goal of regional economic development. In an earlier period, it prepared a number of general conditions of sale and standard form contracts, as well as the 1961 European Convention on International Commercial Arbitration. More recently its legal work has concentrated on administrative law matters, but it continues to be interested in private law matters.

32. At the initiative of the Inland Transport Committee, the International Institute for the Unification of Private Law (UNIDROIT) has prepared and transmitted to the Committee for its consideration a draft convention on liability and compensation for damage caused during the carriage of dangerous goods by road, rail and inland waters.

33. The Group of Experts on International Contract Practices in Industry of the Committee on the Development of Trade has prepared a guide to drawing up international contracts for services relating to maintenance, repair and operation of industrial and other works and is currently drafting a guide to the legal aspects of new forms of industrial co-operation (joint ventures and joint development, production and co-ordinated marketing of products). The new guide will include an examination of compensation trade.

34. The Working Party on Facilitation of International Trade Procedures is not a formulating agency. However, it has prepared and is preparing various transport documents aligned to the United Nations Layout Key and suitable for electronic storage and transmission. It has encouraged other formulating agencies to undertake work necessary to permit the use of modern methods of trade documentation, both in paper-based and electronic form. It has also urged its member States to adopt existing international texts or to make changes in their laws that would facilitate international trade.

35. In transport matters, within the scope of the Inland Transport Committee and its subsidiary bodies, ECE has prepared a number of conventions to simplify border crossing such as the 1982 Convention on the Harmonization of Frontier Controls of Goods and the Customs Convention in the International Transport of Goods under Cover of TIR Carnets, which has gained adherence outside the ECE region. An Administrative Committee has been established to implement the TIR Convention and the Working Party on Customs

Questions affecting Transport, has developed a new multimodal TIR Carnet and is preparing a TIR Handbook and a TIR Carnet model. A number of other conventions dealing with technical aspects of transportation have been concluded, some of which are being reviewed for possible amendment and updating.

36. To assist the Committee on the Development of Trade in monitoring progress in long-term trade and economic co-operation agreements, the secretariat compiles an up-to-date Register of such agreements and regularly analyses treaty provisions in studies presented to the Committee.

Economic Community of West African States (ECOWAS)

37. Established by a 1975 treaty, ECOWAS joins 16 States in a customs union and subregional economic integration. ECOWAS aims to eliminate not only customs duties between member States, but also quantitative and administrative restrictions and other obstacles to the free movement of persons, services and capital. A number of technical and specialized Commissions have been established covering such subjects as trade, customs, payments and transport.

38. Under the terms of the ECOWAS Treaty, member States shall, upon the advice of the Trade, Customs, Immigration, Monetary and Payments Commission, take appropriate measures to harmonize and standardize their customs regulations and procedures to facilitate the movement of goods and services across their frontiers. Other ECOWAS activities relevant to international trade law include the preparation of protocols on the regime to be applied to ECOWAS enterprises and on transit trade and transit facilities.

European Economic Community (EEC)

39. The 12 member states of EEC have joined together to promote economic development by the establishment of a common market, economic integration and the harmonization of national economic policies. The activities of EEC in the harmonization and unification of law as it affects trade between the member States are too numerous to be summarized adequately in this document. It must suffice to indicate that in certain fields the EEC has direct law making power that it exercises through the adoption of a regulation, which is directly applicable in the member States. Directives are not in principle directly applicable, but bind the member States to adopt legislation that is compatible with them.

40. EEC has pursued its objectives of abolishing trade and monetary restrictions between member States and creating a unified market by issuing regulations and directives on matters such as the liberalization of capital movements, customs transit, insurance business, products liability, agency, company law and public procurement. In certain cases the unification of law

between the member States of the EEC has been carried out by the adoption of a convention, such as the Convention of 19 June 1980 on the Law Applicable to Contractual Obligations and the Convention of 27 September 1968 on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters. The Council in certain situations is empowered to decide that all member States should adhere to a convention, as occurred with the 1979 Council regulation that States members of the Community should become parties to the Convention on a Code of Conduct for Liner Conferences. In yet other circumstances the EEC itself can become party to a convention.

General Agreement on Tariffs and Trade (GATT)

41. The over 90 governments party to GATT seek to reduce trade barriers and expand international trade through multilateral trade negotiations and agreements, particularly with respect to tariff structure and non-tariff barriers to trade. As a consequence, the legal activities of GATT are in the field of public international law involving State to State relations. One activity of more immediate relevance to current work of UNCITRAL is the 1981 Agreement on Government Procurement. A Committee on Government Procurement, which supervises the Agreement, has examined national laws, regulations and procedures relating to implementation of the Agreement. In addition, GATT has published a *Practical Guide* to the Agreement.

42. GATT has sponsored a number of agreements designed to facilitate trade by reducing technical barriers. These include Agreements on Technical Barriers to Trade ("Standards Code"), Customs Valuation and Import Licensing.

Hague Conference on Private International Law

43. The Hague Conference is an intergovernmental organization with 35 member States. It works for the progressive unification of the rules of private international law through the preparation of multilateral treaties.

44. A number of trade-related conventions have been concluded by the Hague Conference, including the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and on the Taking of Evidence Abroad in Civil and Commercial Matters, the Convention on the Law Applicable to Contracts for the International Sale of Goods and the Convention on the Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters. Subjects currently on the work programme relevant to trade law include the preparation of studies on the law applicable to unfair contracts, transport contracts, negotiable instruments, licensing and know-how agreements, and unfair competition; jurisdictional conflicts stemming from the extraterritorial application of competition law and other types of economic regulation; conflict of laws in transfrontier data flows.

International Association of State Trading Organizations of Developing Countries (ASTRO)

45. With a membership consisting of the State trading organizations (STOs) of 27 countries, ASTRO aims, *inter alia*, to provide a trade information network for STOs and generally to promote economic and technical co-operation among developing countries.

46. The activities carried out by ASTRO include research, training, consultancy, information services and joint collaboration. Of particular relevance to the harmonization of trade law is ASTRO's publication, with regular updates, of a *Comprehensive Reference Service on Countertrade and Other Special Trade and Financing Transactions*. This two-volume set includes a *Manual on Countertrade, Switch, Discounting and Leasing*, containing guidelines for practitioners, as well as a *Loose-Leaf Service on Countertrade Practices*. The latter contains basic countertrade information, reflecting Government policy statements and regulations, as well as actual practice.

International Bank for Reconstruction and Development (IBRD)

47. The formulating activities of IBRD, a specialized agency of the United Nations, have arisen in connection with its own lending activities. The Guidelines for Procurement under IBRD Loans and IDA Credits are incorporated into loan and credit agreements and thus become binding on the borrowers and the recipients of the credits. Similar Guidelines for the Use of Consultants by World Bank Borrowers and by the World Bank as Executing Agency have been developed, covering services of consultants where consultants are retained by borrowers in connection with Bank-financed projects and where consultants are retained by the Bank as executing agency for studies financed by UNDP. The procurement Guidelines and, to a lesser extent, the consultant Guidelines, have been followed as models by other international lending institutions.

48. In co-operation with two other international lending institutions, the Asian Development Bank and the Inter-American Development Bank, IBRD has developed Sample Bidding Documents for the Procurement of Goods and Sample Bidding Documents for the Procurement of Works for use by borrowers in the procurement of goods and civil engineering works through international competitive bidding.

49. IBRD initiated the establishment of the International Centre for the Settlement of Investment Disputes (ICSID) by adopting the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States. For the purposes of its arbitration and conciliation proceedings, ICSID has published the ICSID Arbitration and Conciliation Rules. Similarly, IBRD has initiated in 1985 the establishment of the Multilateral Investment Guarantee Agency (MIGA).

***International Center for Public Enterprises
in Developing Countries (ICPE)***

50. With governments of 35 countries as members, ICPE aims to assist public enterprises from developing countries in becoming stronger and more efficient in the discharge of their business, as well as their socio-economic responsibilities.

51. Together with the United Nations Industrial Development Organization (UNIDO), ICPE has worked on the preparation of a guide to the guarantee and warranty provisions in transfer of technology contracts, containing draft individual guarantee and warranty clauses.

52. ICPE also carries out research, training, consultancy, information, documentation and publishing activities and holds seminars.

International Civil Aviation Organization (ICAO)

53. ICAO, established by the Chicago Convention on International Civil Aviation 1944, is a specialized agency of the United Nations with 156 member States. Its objectives are, generally, to foster the development and orderly growth of international air transport and to promote the development of air navigation facilities and safety. The general work programme of ICAO's Legal Committee has included, *inter alia*: liability of air traffic control agencies; liability for damage caused by noise and sonic boom; the lease, charter and interchange of aircraft in international operations; and promotion of the instruments of the "Warsaw System".

54. At its twenty-fifth session (1983), the Legal Committee reviewed the status of the "Warsaw System" instruments (the Convention for the Unification of Certain Rules relating to International Carriage by Air, concluded at Warsaw on 12 October 1929, and its subsequent amendments) relating to the international carriage of passengers, cargo and mail by air and adopted a decision urging ratification of the 1975 Montreal Protocols.

55. Pursuant to Article 37 of the Chicago Convention the ICAO adopts and regularly revises, upon the recommendations of its Facilitation Division, the Standards and Recommended Practices contained in annex 9 to the Convention, which State Parties undertake to implement. These Standards and Recommended Practices cover "customs and immigration procedures . . . and such other matters concerned with the safety, regularity and efficiency of air navigation as may from time to time appear appropriate."

***International Institute for the Unification of Private Law
(UNIDROIT)***

56. UNIDROIT is an intergovernmental organization with 52 member States whose purpose is to investigate methods of harmonizing and co-ordinating private law.

UNIDROIT prepares draft conventions that are submitted to diplomatic conferences hosted by States or to other organizations for further preparation or adoption.

57. A significant portion of UNIDROIT's activities has involved various aspects of international trade law. Based on UNIDROIT's activities a number of uniform laws and conventions have been adopted by diplomatic conferences including the Convention relating to a Uniform Law on the International Sale of Goods, the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, the Convention on Agency in the International Sale of Goods, the Convention on the Contract for the International Carriage of Goods by Road (CMR), the Convention relating to the Limitation of the Liability of Owners of Inland Navigation Vessels, the European Convention providing a Uniform Law on Arbitration and the European Convention on Products Liability in regard to Personal Injury and Death.

58. Recently, the Institute has finalized draft Conventions on International Financial Leasing and on International Factoring, both of which will be submitted to a diplomatic conference to be hosted by the Canadian Government in Ottawa from 9 to 28 May 1988, in which all States have been invited to participate.

59. Other topics and activities relevant to international trade law in UNIDROIT's work programme include liability and compensation for damage caused during the carriage of dangerous goods by road, rail and inland navigation vessels (pursuant to a request by the Inland Transport Committee of the Economic Commission for Europe that UNIDROIT examine the possibility of a draft convention on the subject); relations between principals and agents in the international sale of goods, the franchising contract, general principles of international commercial contracts, organization of an information system or data bank on uniform law, and legal assistance to developing countries.

60. A draft text elaborated by the UNIDROIT Study Group on Warehousing and adopted at the 62nd Session of the Governing Council of UNIDROIT has partially served as the basis for the preparation by the UNCITRAL Working Group on International Contract Practices of the draft Convention on the Liability of Operators of Transport Terminals in International Trade.

International Maritime Organization (IMO)

61. IMO is a specialized agency of the United Nations with 130 member States. Its primary purpose is to develop machinery for co-operation among governments on their regulations and practices relating to technical aspects of international shipping. IMO concerns relate to such matters as safety at sea, protection of the environment and facilitation of maritime traffic. One of the principal means the Organization has used to achieve its goals has been the preparation and promotion of international conventions.

62. Among the conventions prepared by IMO of relevance to international trade law which have entered into force are the 1965 International Convention on Facilitation of Maritime Traffic, the 1969 International Convention on Civil Liability for Oil Pollution Damage and its 1976 Protocol, the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, the 1971 Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, the 1974 Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, and the 1976 Convention on Limitation of Liability for Maritime Claims. Relevant IMO instruments that await fulfilment of the requirements for their entry into force include: the 1976 Protocols for Revising the Unit of Account Provisions in the 1974 Athens Convention and the 1971 Fund Convention and the 1984 Protocols to amend the 1969 civil liability Convention and the 1971 Fund Convention. The expedited system for amending the various liability and compensation limits in the 1984 Protocols is based to a considerable extent upon the provisions of the unit of account and the adjustment of the limit of liability adopted by UNCITRAL at its 15th session (A/37/17, para. 63) and recommended by the General Assembly in resolution 37/107 of 16 December 1987 for use in the preparation of new international conventions containing limitations of liability provisions or in revisions of existing ones.

63. The Legal Committee, which normally prepares the IMO draft conventions, is currently considering revision of the 1974 Athens Conventions, as well as a possible convention on liability for damage caused by maritime carriage of hazardous and noxious substances. It has recently prepared a draft convention, based on a draft text prepared by CMI, to revise and replace the 1910 Convention on salvage and assistance at sea, which is due to be considered by a diplomatic conference in 1989. IMO is also participating with UNCTAD in a Joint Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Issues to study the revision of the 1926 and 1967 Conventions on maritime liens and mortgages (along with a draft revision by CMI) and the 1952 Convention on arrest of sea-going ships, the preparation of model laws or guidelines, and the feasibility of establishing an international registry of maritime liens and mortgages.

64. The 1965 Convention on facilitation of international maritime traffic aims to simplify and reduce to a minimum the formalities, documentary requirements and procedures on the arrival, stay and departure of ships engaged in international voyages. Of particular interest to international trade law are the efforts to induce the acceptance by port, customs and health officials of documents in computer-readable form rather than in paper-based form.

*Intergovernmental Organization
for International Carriage by Rail (OTIF)*

65. OTIF is an intergovernmental organization, with 33 member States in Europe, North Africa and Western

Asia, whose purpose is to develop and foster the application of a uniform legal system for international rail transport, concerning the carriage of goods, passengers and luggage.

66. A number of Conventions dealing with various aspects of transport by rail were replaced, at the Eighth Revision Conference, by a single instrument, the Convention concerning International Transport by Rail (COTIF) of 8 May 1980. COTIF came into force on 1 May 1985. COTIF represents a fundamental reform of the structure previously found in the separate instruments, with institutional provisions appearing in the Convention proper, and rules on the contract of carriage in the appendices: Appendix A, uniform rules concerning international rail transport of passengers and luggage (CIV), and Appendix B, goods (CIM, with annexes concerning dangerous goods (RID), personal wagons (RIP), containers (RICO), and express parcels (RIEX)).

67. In addition to adoption and codification of international rail transport law, OTIF formulates rules for the carriage of dangerous goods, maintains a list of lines to which the COTIF regime applies, collects jurisprudential information and acts as Registrar for the Arbitration Tribunal established by the Convention.

(See also the entry under International Rail Transport Committee (CIT).)

Latin American Integration Association (ALADI)

68. The successor organization to the Latin American Free Trade Association, ALADI comprises 11 States. Constituted by the 1980 Treaty of Montevideo, ALADI aims to strengthen the economic relations of its member States with a view to economic integration and the establishment of a common market.

69. In addition to the establishment of a regional tariff preference, member States may conclude regional or partial scope (bilateral) agreements touching on trade facilitation and other non-tariff matters. Under the Montevideo Treaty's convergence scheme (article IX), partial scope treaties are to include provisions for the accession of third States and the extension of treaty benefits to all ALADI members.

70. ALADI has established a Council on Transport for the Facilitation of Trade, an auxiliary organ focusing on the simplification and harmonization of documents, procedures and customs formalities involved in international trade and transport. Other ALADI efforts to eliminate non-tariff barriers include the development of a draft code of conduct concerning import licensing procedures and rules for the harmonization of customs procedures.

Nordic Council of Ministers (NC)

71. Comprising the Ministers of State concerned with Nordic co-operation, or those concerned with special

questions, from five Nordic States, NC promotes Nordic co-operation by facilitating joint action and discussion by the member countries' legislatures and governments. NC maintains an active programme of harmonization of legislation, including commercial law matters. One of its recent activities is the preparation of new uniform Sale of Goods Acts which are based on the structure of and take into account the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980).

Organization of American States (OAS)

72. This regional organization of 32 member States has as one of its principal objectives the promotion of co-operative action and the solution of economic problems.

73. In this regard, the Inter-American Juridical Committee, the principal OAS legal organ, promotes the progressive development and codification of international law and examines legal aspects of hemispheric integration and legislative unification. Typically, the Committee has developed draft conventions and explanatory reports (with the assistance of the Secretariat for Legal Affairs) which have been considered for adoption by a specialized Inter-American Conference on Private International Law, of which there have been three to-date. This procedure for the codification of private international law stems from a recommendation first made by the Inter-American Council of Jurists in 1965 for a convocation of a specialized conference on private international law in order to revise the general rules on international trade and civil law in the Code of Private International Law (Bustamante Code). Among the trade-related subjects presented to these Conferences have been: conflict of laws concerning bills of exchange, promissory notes, and invoices; conflict of laws concerning checks; commercial arbitration; general rules of private international law; conflict of laws concerning commercial companies; and extraterritorial validity of foreign judgements and arbitral awards.

74. In addition to acting on regional instruments, the Inter-American Specialized Conference on Private International Law has recommended that member States ratify or accede to the Hamburg Rules. Beyond those already mentioned, the Inter-American Juridical Committee and the Legal secretariat have examined a number of other trade related issues, resulting, in certain cases, in Committee recommendations and reports. These subject areas include regulation and control of private foreign investment activities of transnational corporations, legal aspects of technology transfer and industrial property protection.

Preferential Trade Area for Eastern and Southern African States (PTA)

75. Established under the auspices of the United Nations Economic Commission for Africa, PTA, a regional economic integration organization in which the

governments of 14 countries are members, works to promote economic co-operation and development. Key aims include the establishment of a common market and an eventual economic community for Eastern and Southern African States.

76. The Council of the Federation of Chambers of Commerce and Industry, a body created under PTA auspices, has recommended that a subregional (PTA) Centre for Commercial Arbitration be established. The Council has also recommended that disputes be settled in accordance with the UNCITRAL Arbitration Rules, subject to such modifications as shall be set forth in the Statute of the Centre. In order to prepare the proposed Centre for operation, PTA is planning to conduct research on the laws of the PTA member States on arbitration and on the recognition and enforcement of foreign arbitral awards.

77. PTA's other activities include the establishment of clearing facilities (Preferential Trade Area Clearing House (PTACH)) and tariff reductions on a common list of selected commodities.

United Nations Centre on Transnational Corporations (CTC)

78. CTC serves as the focal point within the United Nations for all matters related to transnational corporations and it serves as the secretariat to the Commission on Transnational Corporations.

79. As a formulating agency, CTC has been involved in the development by the Commission of the Code of Conduct on Transnational Corporations which has been under negotiation since 1977.

80. CTC's series of publications has covered such subjects as natural gas clauses in petroleum contracts, arrangements between joint venture partners in developing countries and licensing agreements for technology transfer. The Advisory and Information Services Division provides advisory services and information to requesting governments on such matters as foreign investment policies, laws and regulations, the evaluation and screening of investment and technology proposals and contractual arrangements.

United Nations Conference on Trade and Development (UNCTAD)

81. UNCTAD, a permanent organ of the General Assembly comprising some 168 countries, is the central body of the United Nations concerned with trade and development. Although it is not primarily a formulating agency in the field of international trade law, it has adopted a number of legal texts. In the field on international shipping it has prepared three conventions, the Convention on a Code of Conduct for Liner Conferences, the United Nations Convention on International Multimodal Transport of Goods and the United Nations Convention on Conditions for Registration of Ships.

82. A Joint UNCTAD/IMO Intergovernmental Group on Maritime Liens and Mortgages and Related Subjects is reviewing the international conventions relating to maritime liens, mortgages and the arrest of sea-going ships. UNCTAD has prepared model clauses on marine hull and cargo insurance and is preparing a standard form and model provisions for a multimodal transport document to complement the United Nations Convention on International Multimodal Transport of Goods.

83. On the initiative of UNCTAD, in 1980 the General Assembly adopted the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, which contained provisions for its further implementation and revision. A Code of Conduct on Transfer of Technology has been under consideration by an UNCTAD sponsored Conference since 1978.

84. A number of commodity agreements, with the principal objectives of price and export earnings stabilization and long-term development, have been concluded under UNCTAD auspices.

United Nations Educational, Scientific and Cultural Organization (UNESCO)

85. While the main thrust of the activities of UNESCO, which is a specialized agency of the United Nations comprising some 158 States, is not in the field of trade, certain of its educational and cultural activities touch upon trade law matters.

86. UNESCO's activities in the field of copyright and neighbouring rights comprise, *inter alia*, the application and promotion of international conventions concluded under its sponsorship on copyright and on the protection of performers, producers of phonograms and broadcasting organizations. To facilitate developing countries' access to protected works, UNESCO's International Copyright Information Centre (administered jointly with the World Intellectual Property Organization (WIPO)) has established various model contracts accompanied by comments and guidelines. UNESCO has also developed a model law on copyright for developing countries, as well as model laws covering other copyright subjects. In co-operation with WIPO, UNESCO convened a Working Group on Model Provisions for National Laws on Publishing Contracts for Literary Works. Other copyright activities by UNESCO include exploration of an international instrument on the safeguarding of works in the public domain and studies concerning the protection of works of visual art.

87. While not strictly concerned with trade law, UNESCO's adoption of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property may also be mentioned.

United Nations Industrial Development Organization (UNIDO)

88. UNIDO is a specialized agency of the United Nations, with 142 member States. In pursuit of its goal of achieving accelerated industrialization of the developing countries, it has a programme of activities designed to equip them with the legal tools and know-how necessary for industrialization. UNIDO has done this by developing a range of model contracts, guidebooks and guidelines for various sectors and aspects of industrialization.

89. Under the aegis of the System of Consultations, UNIDO has prepared model contracts for various industries, including a model form of turnkey lump-sum and cost-reimbursable contracts for fertilizer plants and a model form of agreement for the licensing of patents and know-how in the petrochemical sector. UNIDO has also evolved a set of legal materials, including surveys, analyses and checklists, for contractual arrangements according to the requirements of each of 13 industrial sectors. Other UNIDO *Guidelines* treat establishment of joint-ventures and multinational production enterprises in developing countries, the evaluation of transfer of technology agreements, as well as the acquisition of technology through joint ventures.

90. The UNIDO Technological Information Exchange System (TIES) disseminates information and guidance on contractual arrangements in various industrial sectors particularly affected by technology transfer questions (e.g. food-processing, computer software and hotel industry). TIES data focuses on terms and conditions of licensing, know-how and technical assistance agreements entered into by developing countries participating in the System.

91. UNIDO's Technological Advisory Services programme advises developing countries in the negotiation of contracts for joint ventures, turnkey deliveries, licences, know-how, management and franchising, and related financial arrangements. It also assists in the actual drafting of agreements.

World Intellectual Property Organization (WIPO)

92. WIPO, which is a specialized agency of the United Nations comprising some 126 States, was established to promote the protection of intellectual property. It administers, *inter alia*, the Berne Convention for the Protection of Literary and Artistic Work, the Paris Convention for the Protection of Industrial Property, the Madrid Agreement concerning the International Registration of Marks, the Nice Agreement concerning International Classification of Goods and Services for the Purposes of the Registration of Marks, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations and the Brussels Convention relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite.

93. In order to implement its basic responsibilities for these Conventions and the Unions they create, WIPO

has prepared a Model Law for Developing Countries on Inventions. It has also prepared a number of guides, such as the Licensing Guide for Developing Countries and the Guide to the Berne Convention for the Protection of Literary and Artistic Work.

II. Non-governmental organizations

Baltic and International Maritime Council (BIMCO)

94. BIMCO is a trade association of ship owners, brokers and other parties engaged in carriage of goods by sea who come from some 100 countries. BIMCO has an active programme of preparing and publishing standard form contracts and documents used in the trade. It also endorses and adopts as its own standard form contracts and documents issued by other organizations.

Comité Maritime International (CMI)

95. CMI is an association of 44 national maritime law associations whose purpose is to promote the unification of maritime law and practice. It has prepared a number of draft conventions on various subjects that have been submitted directly to diplomatic conferences. The subjects of these conventions, some of which are widely applied, include collisions at sea, assistance and salvage at sea, limitation of shipowners' liability, maritime mortgages and liens and carriage of goods by sea.

96. With the development of permanent intergovernmental organizations concerned with the same subject matter, CMI has submitted its draft conventions to those organizations for further preparation and adoption. CMI also conducts studies and holds seminars on subjects of maritime law and prepares legal texts that are not intended to become conventions, such as the rules for sea waybills now under preparation.

International Air Transport Association (IATA)

97. IATA is a trade association comprising 161 airline companies as active (international carriers) or associate (domestic) members. IATA makes membership available to operating companies licensed to provide scheduled air service by a government eligible for membership in ICAO. A significant portion of IATA's activities involves an effort to harmonize trade practice, usages and law through the adoption of resolutions, recommended practices, standards, procedures, guidelines and uniform documents.

98. IATA's activities relevant to international trade law include: the preparation of a standard air waybill; participation with the Customs Co-operation Council (CCC) in customs harmonization and facilitation efforts; representation of the industry in matters before other bodies; promotion of the Montreal Protocols to the Warsaw system; identification of necessary amendments to the facilitation annex of the Chicago Convention on International Civil Aviation 1944; preparation of a

Standard Ground Handling Agreement; and sponsorship of interline agreements on such matters as passenger, baggage and cargo handling.

International Bar Association (IBA)

99. With membership in over 100 countries drawn from national and local associations and individuals, IBA aims, *inter alia*, to study practical legal problems, promote the unification of law where appropriate and co-operate with international juridical organizations. Matters relevant to international trade law are dealt with by the Section on Business Law.

100. The Section on Business Law, which carries on its work through numerous specialized committees, is not primarily a formulating agency. Most of the committee work consists of programmes arranged at the annual meetings. However, based on the work of Committee D (Procedures for Settling Disputes), IBA has adopted Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration (IBA Rules of Evidence).

International Chamber of Commerce (ICC)

101. ICC is a non-governmental organization comprising national bodies in 107 countries, of which 57 are represented by National Councils and 50 by the national chambers of commerce. Its object is to promote trade and international business. It carries out a wide range of activities in pursuit of its aims, including the conducting of studies, taking of positions in matters of current interest in international trade, holding of seminars and publishing informative material of various types.

102. Although ICC is not primarily a formulating agency it has developed several texts for voluntary use, some of which are considered to constitute the generally accepted statement of rights and obligations of parties to the transactions concerned. Of special note are INCOTERMS, which is currently under study for revision, and the Uniform Customs and Practice for Documentary Credits.

103. Other ICC texts include the Uniform Rules for Collections, Uniform Rules for a Combined Transport Document, Uniform Rules for Contract Guarantees, Rules for Adaptation of Contracts and Uniform Rules of Conduct for Interchange of Trade Data by Teletransmission.

104. The ICC arbitration rules have had a strong influence in the field of international commercial arbitration. Similarly, ICC has had a strong influence through its seminars and research publications.

International Council for Commercial Arbitration (ICCA)

105. ICCA is a non-governmental organization with members in 27 countries throughout the world that was

established with the objective of promoting the use of arbitration as a method for solving international trade disputes.

106. ICCA is not a formulating agency. It has, however, shown great interest in the new rules being formulated by other organizations in the field of international commercial arbitration, such as the UNCITRAL Arbitration Rules and the UNCITRAL Model Law on International Commercial Arbitration, and by the discussions it has held and positions it has taken, it has helped shape their content and contributed to their wider diffusion and use. It carries out its activities by organizing arbitration congresses and by a publishing programme.

International Federation of Consulting Engineers (FIDIC)

107. FIDIC is a trade association comprising national professional organizations of independent consulting engineers from 45 countries. FIDIC aims to study, promote and protect common professional interests and to encourage the creation of professional organizations in countries without such groupings.

108. FIDIC has prepared a number of standard conditions of contract and model forms of agreement including the Conditions of Contract for Works of Civil Engineering Construction, Conditions of Contract for Electrical and Mechanical Works (with form of tender and agreement), International Model Form of Agreement between Client and Consulting Engineer and International General Rules for Agreement between Client and Consulting Engineer for Pre-Investment Studies. Similar documents have also been established for design and supervision of construction of works and for project management.

International Federation of Freight Forwarders Associations (FIATA)

109. FIATA is a trade association representing some 1,200 individual affiliated firms in 113 countries and territories. It aims, *inter alia*, to improve the quality of the services of its members by promoting uniform forwarding documents, standard trading conditions, and the exchange of information, and by carrying out appropriate studies and surveys and consulting with other formulating agencies.

110. Among the documents developed and approved by FIATA over the years are: Certificate of Receipt (FCR); Certificate of Transport (FCT); Negotiable Combined Transport Bill of Lading (FBL); Warehouse Receipt (FWR); and Shippers Declaration for the Transport of Dangerous Goods (SDT) for use by its member firms.

111. FIATA participates actively in the activities of other organizations that are formulating rules that might have an impact on the role of freight forwarders.

International Law Association (ILA)

112. Established with the aim of promoting the advancement and unification of international law, ILA has carried out activities in the area of private trade law such as elaboration of draft conventions and model rules of law and practice, adoption of resolutions and preparation of comparative law studies.

113. Recent examples of ILA activities include preparation of a draft model law on time of payment of a monetary obligation, commentary on various CMI draft conventions, studies on various legal aspects of a New International Economic Order (e.g., dispute settlement, technology transfer and restrictive business practices), and passage of a resolution recommending that States take certain harmonizing and unifying action with respect to value clauses.

International Rail Transport Committee (CIT)

114. Some 200 transport enterprises (rail, road and navigation) from the 33 States Parties of COTIF in Europe, Western Asia and North Africa are members of CIT. CIT, whose working languages are French and German, aims to develop international railway transport law on the basis of COTIF and its Appendices and to provide for the uniform regulation of other issues concerning international rail transport law.

115. CIT's work is carried out through specialized Committees and Study Groups, and includes the publication of uniform and other regulations relevant to the carriage of passengers, luggage and goods. Uniform rules for the implementation of COTIF and its Appendices have been published, consisting of regulations binding transport enterprises and their users. Related agreements, both of mandatory and an indicative character, have also been included. CIT is also organizing a study of the legal requirements for the substitution of a rail consignment note by another instrument suitable for automatic data processing (DOCIMEL Project).

International Road Transport Union (IRU)

116. IRU is a trade association of some 119 non-profit national road transport organizations (goods or passenger) and professional bodies from 52 countries as active and associate members. IRU aims to study and help solve road transport questions and to promote unification and simplification of transport regulations and practice.

117. Although IRU does not act primarily as a formulating agency, it has prepared an International Consignment Note (CMR), which is widely used in Europe. IRU participates actively in the activities of other formulating agencies drafting texts of interest to the road transport profession, such as the European Agreement concerning the International Carriage of Dangerous Goods by Road; the Agreement on the

International Carriage of Perishable Foodstuffs and on the Special Equipment to be Used for such Carriage; and the Protocol to the Convention on the Contract for the International Carriage of Goods by Road.

International Union of Railways (UIC)

118. A trade association representing railways in over 60 countries, UIC aims to harmonize the operational conditions of international rail traffic.

119. Recent examples of UIC activities relevant to international trade law and documentation include: the establishment of a model agreement covering legal aspects of common inspection agreements; the preparation of model contractual clauses for suppliers and users of railway computer programs; and a proposal for the use of the International Consignment Note (CIM) as an international customs document for consideration by the International Rail Transport Committee (CIT) and the ECE Group of Experts on Customs Questions Affecting Transport.

X. PROGRAMME OF WORK AND WORKING METHODS

A. Programme of work of the Commission: note by the Secretariat (A/CN.9/300) [Original: English]

INTRODUCTION

1. This report is submitted pursuant to a decision of the Commission at its twentieth session in 1987 that the secretariat should prepare a report for the twenty-first session that would serve as a basis for a general discussion of the work of the Commission for the medium term future (A/42/17, para. 343).¹ It considers topics on which the Commission is currently preparing a draft legal text with an indication of the projected time schedule for completion. It also considers topics on which the Commission might wish to make a decision at this session as to whether they should be placed on the programme of work.

I. Topics currently before the Commission

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

2. The draft Convention was adopted by the Commission at its twentieth session and submitted to the General Assembly with a recommendation "that the General Assembly consider the draft Convention with a view to its adoption or any other action to be taken" (A/42/17, para. 304).

3. The General Assembly in its resolution 42/153 requested the Secretary-General to call the attention of all States to the draft Convention, to ask them to submit their comments and proposals thereon prior to 30 April 1988, and to send those comments and proposals to all Member States prior to 30 June 1988. The General Assembly also decided that it would consider the draft Convention during the course of its forty-third regular session in 1988 with a view to adopting the Convention during that session. It decided to create for that purpose, within the framework of the Sixth Committee, a working group to meet for a maximum of two weeks at the beginning of the session in order to consider the comments and proposals of States.

4. While the draft Convention is no longer before the Commission, its consideration by the working group and the Sixth Committee may affect the working schedules of some representatives and observers to the Commission and of the secretariat during 1988.

B. *Liability of operators of transport terminals*

5. The Working Group on International Contract Practices will hold its eleventh session in New York from 18 to 29 January 1988. It is possible that at that session the Working Group will complete its work of preparing the draft Uniform Rules on the Liability of Operators of Transport Terminals. If another session is needed to complete the draft Rules, it will be held at Vienna in the second half of 1988. Therefore, by late 1988 or the beginning of 1989 the Working Group will be free to undertake additional tasks.

6. The Commission may wish to decide at its present session that the draft Uniform Rules as adopted by the Working Group should be circulated to all States and interested international organizations for comment and that the draft Uniform Rules with an analytical compilation of the comments received should be submitted to the Commission at its twenty-second session in 1989 for discussion and adoption.

7. The Working Group has not yet decided whether it will recommend to the Commission that the Uniform Rules should be adopted in the form of a convention or in the form of a model law. If the Commission were to decide that the Uniform Rules should be in the form of a convention and if the convention were to be adopted by a diplomatic conference, the conference would probably take place in 1991.

C. *Model Rules for electronic funds transfers*

8. The Working Group on International Payments held its sixteenth session at Vienna from 2 to 13 November 1987 at which it began the work leading to the preparation of Model Rules for Electronic Funds Transfers (A/CN.9/297). At the conclusion of the session the secretariat was asked to prepare a first draft of the Model Rules for submission to the seventeenth session of the Working Group to be held in New York from 5 to 15 July 1988.

9. Since the first draft of the Model Rules has not yet been submitted to the Working Group, it is not possible to know how difficult it will be to achieve consensus on their coverage and substance and, therefore, to make a precise estimate of the length of time necessary to prepare the Model Rules. Nevertheless, if it is assumed that five sessions of the Working Group were necessary to consider the draft text and if it is assumed that two

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).

sessions could be held in 1988 and 1989 and one in 1990, the draft Model Rules could be submitted to the Commission for discussion and adoption in 1991.

D. *International procurement*

10. The Commission at its nineteenth session decided that upon the completion of its work preparing the draft *UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works*, the Working Group on the New International Economic Order should undertake the subject of international procurement (A/41/17, para. 243). The secretariat has been undertaking preparatory work and held a meeting of a group of experts at Vienna from 7 to 11 December 1987 to advise it in the preparation of the documentation for the first meeting of the Working Group on this subject.

11. The Working Group is scheduled to hold its tenth session from 17 to 28 October 1988 at Vienna when it will undertake its consideration of the subject of international procurement. At that session the Working Group may be expected to recommend the nature of any work that might be undertaken in this field. One possible recommendation might be that the Commission prepare and adopt an agreed set of principles on public procurement to which States would be encouraged to conform in formulating their national procurement codes or regulations or in revising existing codes or regulations. The Working Group might also anticipate that, once the agreed set of principles had been established, the Commission might prepare a model procurement code based upon those principles. It could be expected that a draft of an agreed set of principles might be ready for submission to the Commission at its twenty-third session in 1990. A draft model procurement code might be ready for presentation to the Commission at its twenty-sixth session in 1993.

II. Other topics

A. *Standby letters of credit and guarantees*

12. The Commission at its fifteenth session in 1982 requested the secretariat to submit at a future session a report on the use of letters of credit especially in connection with contracts other than those for the sale of goods (A/37/17, para. 112). The Commission will have before it at this session a report on standby letters of credit and guarantees (A/CN.9/301). The report will suggest actions that might be undertaken by the Commission. If the Commission should decide to undertake work in this field, it may wish to decide on the priority to be given to the topic.

B. *Countertrade*

13. The Commission at its nineteenth session in 1986 placed the subject of countertrade on its programme of work and requested the secretariat to prepare a report

for a future session on the work that might be undertaken by the Commission in this field (A/41/17, para. 243). The Commission will have before it at this session a report on the subject that will include suggestions for future work by the Commission (A/CN.9/302). If the Commission should decide to undertake work in this field, it may wish to decide on the priority to be given to the topic.

C. *International commercial arbitration*

14. The Commission at its nineteenth session in 1986 decided that the secretariat should submit at a future session in-depth studies on the taking of evidence in arbitral proceedings and on multi-party arbitration (A/41/17, para. 258). The secretariat intends to submit the requested studies to the earliest possible session of the Commission, taking into account the decisions made by the Commission at this session on the other items for the programme of work and the level of staffing available to the secretariat in the near to medium-term future.

D. *Transport documents*

15. The subject of transport documents came before the Commission for the first time during its preparation of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules). While the Hamburg Rules recognize the continuing importance of the bill of lading, and in article 15 set forth the minimum contents of such a document, several provisions encourage a movement towards other forms of documentation. Article 2 provides that the Hamburg Rules (and especially the liability regime, including the limitation of liability) apply to the carriage of goods under any form of contract of carriage. Article 14 provides that a bill of lading need be issued by the carrier only if requested by the shipper. Article 18 provides for the legal effect of a document other than a bill of lading issued to evidence the receipt of goods to be carried.

16. The Commission had before it at its fifteenth session in 1982 a study discussing the legal regime in respect of transport documentation under the principal multilateral conventions and some of the current developments in the field (A/CN.9/225 and Corr.1). The report concluded that there might be a greater need in the future than there had been in the past for the harmonization of the rules governing such transport documentation. The Commission requested the secretariat to keep it informed of any future course of action that it might take (A/37/17, para. 104).

17. The Commission had before it at its seventeenth session in 1984 a report of the Secretary-General concerning the 1983 revision of the Uniform Customs and Practice for Documentary Credits (UCP) by the International Chamber of Commerce (A/CN.9/251). The report pointed out that one of the reasons for the revision of the 1974 version of UCP had been the

changes in transport technology and documentation. The Commission adopted a decision by which it commended the use of the 1983 revision of UCP in transactions involving the use of a documentary credit (A/39/17, para. 129).

18. Article 4 of the draft uniform rules on the liability of operators of transport terminals contains provisions on the document that may be issued by operators of transport terminals (A/CN.9/298, Annex).

19. A report of the Secretary-General to the twentieth session of the Commission on the legal implications of automatic data processing described the efforts of the International Rail Transport Committee (CIT) to establish an electronic replacement for the rail consignment note that would be acceptable to banks for use in documentary credits and to custom officials (A/CN.9/292, paras. 19-23).

20. An international subcommittee of the Comité Maritime International (CMI) is currently preparing draft rules on sea waybills and on electronic waybills, which may be approaching completion within the next

year. The secretariat has submitted comments on the current draft to CMI.

21. The Commission might wish to consider whether these developments would make it desirable for it to engage in a general review of the subject of the changes taking place in transport techniques and transport documentation, with special attention to the CMI draft rules, and with a view to determining whether it might make a further contribution in this field. Such a discussion might be particularly appropriate at the Commission's twenty-second session in 1989 when the major item on the agenda is expected to be the uniform rules on liability of operators of transport terminals.

E. Other possible subjects

22. At the session of the Commission the secretariat plans to bring to the Commission's attention additional subjects for consideration for its future programme of work. These will be subjects that the secretariat has some reason would be appropriate for work by the Commission, but about which the secretariat does not currently have enough information to make a suggestion.

B. Working methods of the Commission: note by the Secretariat (A/CN.9/299) [Original: English]

INTRODUCTION

1. The Commission at its twentieth session in 1987 decided that consideration should be given at its twenty-first session to several different issues regarding the working methods of the Commission. This note is intended to give background information for the consideration of those issues.

I. Increase in membership of the Commission

2. 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 (A/42/17, para. 344).¹

3. The original membership of the Commission as provided in General Assembly resolution 2205 (XXI) was 29 States with the following distribution of seats:

- (a) Seven from African States;
- (b) Five from Asian States;
- (c) Four from Eastern European States;

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). Reports of the annual session of the Commission are reprinted in the Yearbook of the United Nations Commission on International Trade Law for the year in question.

- (d) Five from Latin American States;
- (e) Eight from Western European and other States.

4. Of the original 29 members, 14 were elected for a period of three years, with their mandates expiring on 31 December 1970, and 15 were elected for a period of six years, with their mandates expiring on 31 December 1973. In subsequent elections all members were to be elected for periods of six years with their mandates expiring on 31 December of the year in question. The date of expiration of membership was later changed by resolution 31/99 to the last day prior to the opening of the seventh annual session of the Commission following the date of election.

5. At the sixth session of the Commission in 1973 attention was drawn to the fact that the mandate of 15 member States would expire on 31 December 1973 and that this would have certain implications for the membership of Working Groups that were scheduled to meet between 1 January 1974 and the Commission's seventh session later that year (A/9017, para. 139).

6. At the session of the General Assembly later in 1973, a draft resolution was introduced in the Sixth Committee that would have increased the membership of the Commission from 29 to 35 with the following distribution of the additional seats:

- (a) Two from African States;

- (b) One from Asian States;
- (c) One from Eastern European States;
- (d) One from Latin American States;
- (e) One from Western European and other States (A/9408, para. 5).²

7. An oral amendment to the draft resolution was proposed by Kuwait to increase the membership of the Commission to 36 rather than 35, with the additional seat to be held by an Asian State (A/9408, para. 8). At the request of the representative of Uruguay a roll call vote was taken on the proposed amendment. "In explanation of his request, the representative of Uruguay, on behalf of the Latin American Group, stated that the members of his Group would vote against the amendment on the ground that it was contrary to the principle of geographical distribution of seats in the Commission ensuring the adequate representation of the various regions. The representative of Uruguay also stated that the position taken by the Latin American Group should not be interpreted as an opposition to the aspirations of the Asian Group and that, if the amendment were approved, it should not constitute a precedent" (A/9408, para. 52).

8. The amendment was adopted by 79 votes to 14 with 7 abstentions and the current pattern of membership of the Commission was established.

9. In 1973 when the increase in membership was considered by the General Assembly, only representatives from member States of the Commission were permitted to participate in meetings of the Commission along with observers from international organizations. However, since 1977, on the recommendation of the Commission at its ninth session in 1976 (A/31/17, para. 74) and the decision of the General Assembly in its resolution 31/99, paragraph 10(c), reaffirmed most recently by its resolution 38/134, paragraph 7(c), Governments of all States that are not a member of the Commission are invited to participate at sessions of the Commission and its Working Groups as observers. Since all States are invited to attend either as member or as observer, the principle of regional representation may have less practical significance than it did in earlier days. Nevertheless, the principle of regional representation may continue to have a political significance, especially when the report of the Commission is considered in the General Assembly.

10. The Commission has interpreted broadly the role of observers at sessions of the Commission and its Working Groups in order to encourage the widest level of participation and interest in the development of its work. It has done so in the belief that this would lead to the most generally acceptable texts emanating from its work. Once a State is represented at a meeting of the Commission or a Working Group, there has been little practical difference whether it is present as a member State or as an observer, except in respect of serving as

an officer of the meeting. Even then two of the Working Groups have elected chairmen to serve in their personal capacity from amongst representatives of observer States.

11. It appears, therefore, that the primary consequence of membership in the Commission may be that a member State will be more likely than a non-member State to be represented at meetings of the Commission and its Working Groups. Furthermore, the representation of member States may be more likely to be drawn "from among persons of eminence in the field of the law of international trade", as called for by the General Assembly in resolution 2205(XXI), and member States may thereby be more likely to contribute actively to the unification and harmonization of international trade law. Membership may affect both the ministry officials charged with substantive responsibility for international trade law and the financial authorities. In the former case membership may stimulate interest in the subject and better justify the expenditure of human resources to prepare for and to attend meetings. In the latter case membership may better justify the spending of the necessary funds.

12. Change in the number of member States in the Commission would have no financial implications for the United Nations.

II. Working groups

13. The Commission at its twentieth session decided that there should be a review of the policy in regard to membership of the Working Groups of the Commission (A/42/17, para. 344). That review also calls for a review of the role of Working Groups in implementing the programme of work of the Commission.

A. Size of Working Groups: historical development

14. The Commission has created five inter-sessional Working Groups, of which three are currently active.

(a) The Working Group on Time-Limits and Limitations (Prescription) was created by the Commission at its second session in 1969 with seven members (A/7618, para. 46). After it had prepared the draft Convention on the Limitation Period in the International Sale of Goods in three sessions, it was allowed to go out of existence.

(b) The Working Group on the International Sale of Goods was created by the Commission at its second session with 14 members, which was increased to 15 at the Commission's eighth session (A/7618, para. 38, A/10017, paras. 114-115). Upon completion of the work leading to the adoption by the Commission of the draft Convention on Contracts for the International Sale of Goods, the Working Group was renamed by the Commission at its twelfth session in 1979 as the Working Group on International Contract Practices (A/34/17, para. 126).

²Report of the Sixth Committee, *Official Records of the General Assembly, Twenty-eighth Session, Annexes*, agenda item 92 (A/9408).

(c) Although the Working Group on International Contract Practices was the Working Group on the International Sale of Goods with a new name but the same 15 members, it was treated as a new Working Group for all other purposes. It has been assigned the preparation of the uniform rules on liquidated damages and penalty clauses and the UNCITRAL Model Law on International Commercial Arbitration and it is currently assigned the preparation of uniform rules on the liability of operators of transport terminals. Its membership was increased from 15 to the full 36 members of the Commission at the Commission's sixteenth session in 1983 (A/38/17, para. 143).

(d) The Working Group on International Shipping Legislation was created by the Commission at its second session with seven members (A/7618, para. 133) and a mandate to indicate to the Commission the topics and method of work that might be followed in respect of international shipping legislation. At the Commission's fourth session in 1971 the Working Group was assigned the task of preparing the draft Convention on the Carriage of Goods by Sea and was enlarged to 21 members (A/8417, para. 19). At the conclusion of that task in 1975, the Commission kept the Working Group in existence, for the time being, "since it might be necessary to refer certain matters to it after the Commission had considered the draft Convention, but that, for the present, no new mandate should be given to the Working Group" (A/10017, para. 76). At the Commission's eleventh session in 1978, it was noted that the former Working Group on International Shipping Legislation had been dissolved (A/33/17, para. 60).

(e) The Working Group on International Negotiable Instruments was created by the Commission at its fifth session in 1972 with eight members (A/8717, para. 61), which was subsequently increased to 14 in 1984 (A/39/17, para. 88) and to the full 36 members of the Commission in 1986 (A/41/17, para. 221). From 1973 to 1987 the Working Group held 15 sessions, of which 14 were devoted to the draft Convention on International Bills of Exchange and International Promissory Notes and one to the universal unit of account. The Commission at its nineteenth session in 1986 renamed the Working Group as the Working Group on International Payments and assigned it the task of preparing Model Rules on Electronic Funds Transfers (A/41/17, para. 230).

(f) The Working Group on the New International Economic Order was created by the Commission at its eleventh session in 1978 (A/33/17, para. 41). At the Commission's twelfth session in 1979 it decided that the Working Group should be composed of 17 members and should recommend to the Commission topics which could appropriately form part of the programme of work of the Commission (A/34/17, para. 100). The Commission at its thirteenth session in 1980 increased the membership of the Working Group to all 36 members of the Commission (A/35/17, para. 143). The Commission, at its nineteenth session in 1986, decided that when the Working Group completed its work preparing the UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial

Works, the Working Group should undertake work on international procurement (A/41/17, para. 243).

15. This review of the history shows that in the early years of the Commission it was assumed that individual Working Groups were to be created for a particular task and that they would be dissolved at the completion of that task. In later years Working Groups have been treated as continuing bodies so that, on the completion of one task, a new task has been assigned to them. While the assignment of tasks has been roughly consistent with the names of the Working Groups, that has not been held to be an absolute necessity. In recent years, Working Groups have been renamed to indicate the broader mandates they have been given. Since 1978 it has been recognized that the Commission could have three Working Groups. In the pattern of conferences each of the Working Groups has been authorized to meet twice a year for two weeks each, for an authorized total of 12 weeks of Working Group meetings. However, since meetings of Working Groups are scheduled only when necessary to carry out the programme of work, eight to 10 weeks of Working Group meetings have been held in most years.

16. In the early years, Working Groups consisted of small numbers of members. Only member States of the Commission and international organizations could participate as observers. Gradually the size of the Working Groups has increased until at the present time all three Working Groups are composed of all member States of the Commission.

B. Role of Working Groups and relationship to Commission

17. Working Groups have been assigned the task on several occasions to consider what specific topic the Commission might undertake within a general subject matter already decided upon by the Commission. However, the most characteristic role of the Working Groups has been to prepare a draft text for subsequent consideration and adoption by the Commission.

18. The role of a Working Group was first considered by the Commission at its third session when it received the report of the Working Group on the International Sale of Goods in which the Working Group had analysed the studies and comments of Governments on the Uniform Law on the International Sale of Goods (ULIS). At the end of the Commission's discussion it decided that the Working Group should consider ULIS systematically, chapter by chapter, and said that "before the new text of a uniform law or the revised text of ULIS is completed, the Working Group should only submit questions of principle to the Commission for consideration" (A/8017, para. 72).

19. By the Commission's fifth session in 1972 there was some concern that the working methods followed by it to that point of time had not been sufficiently productive. As a result, a sessional Working Group was requested to

consider a proposal that had been submitted by the representative of Spain. The sessional Working Group recommended:

"(a) As a general rule, sessions of working groups should be extended to three weeks;

(b) Consequently, sessions of the Commission could be reduced to two weeks, keeping in mind, however, the items for each session in order to allow for any necessary extension of the plenary session for a given year;

(c) As a general rule, the size of future working groups should be limited to the extent consistent with the representation of viewpoints represented in the Commission" (A/8717, para. 108).

20. While no decision was reached by the Commission at its fifth session, the report indicates in part that

"Several representatives, however, while stating that working methods could be further refined, expressed preference for a more pragmatic approach. In their view, the Commission should plan its future work in accordance with the exigencies of individual topics. Other representatives were of the opinion that the proposals of the Working Group might shift the power of the Commission to the various working groups, which would be undesirable" (A/8717, para. 109).

21. At the sixth session of the Commission in 1973, while discussing the report of the Working Group on International Negotiable Instruments,

"The Commission was agreed that it should defer consideration of the substantive provisions of the draft uniform law until the Working Group had completed its work and submitted a final draft with commentary" (A/9017, para. 33).

22. At the Commission's seventh session in 1974, the report noted that "The Commission, in accordance with its general policy of considering the substance of the work carried out by working groups only upon completion of that work, took note of the report of the Working Group on International Negotiable Instruments" (9617, para. 27). The only time the Commission has deviated from this policy was at its seventeenth session in 1984 when it considered the main controversial issues in respect of the draft Convention on International Bills of Exchange and International Promissory Notes and the draft Convention on International Cheques with a view to giving policy advice to the Working Group.

23. The Commission's policy of considering the substance of the work carried out by Working Groups only upon completion of that work has increased the role and authority of the Working Groups. It could be said that the basic policy issues in the development of a legal text by the Commission have been settled in the Working Groups and that, during the past 15 years, with the single exception of the Commission's seventeenth session in 1984, the consideration of texts by the Commission has been largely restricted to placing the

final polish on a structure that had been already agreed upon. It is undoubtedly for that reason that all three of the Commission's Working Groups have been increased to the full membership of the Commission. By so doing the distinction between a session of a Working Group and a session of the Commission has been substantially diminished.

24. In regard to the substance of the work, a session of the Commission and a session of a Working Group composed of all member States of the Commission are treated as being of nearly equal importance. For example, the Commission at its twentieth session in 1987 adopted with a minimum of discussion the UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works (A/42/17, para. 315). The Legal Guide had been thoroughly discussed in a number of sessions of the Working Group on the New International Economic Order, which had been composed of all 36 member States of the Commission almost since its creation. In respect of the draft Convention on International Bills of Exchange and International Promissory Notes, the Commission began its consideration of the text at article 33, where the fifteenth session of the Working Group on International Negotiable Instruments had terminated its consideration of the text (A/42/17, paras. 13-15). The Commission had increased the size of the Working Group to all 36 member States for the Working Group's final review of the draft Convention.

25. The differences between a session of the Commission and of a Working Group are currently primarily procedural. The session of a Working Group is limited to one subject while the session of the Commission may deal with a wide range of subjects. Only the Commission can adopt a text in definitive form or as a draft convention to be recommended to the General Assembly for action. According to General Assembly resolution 41/177D the Commission has a right to summary records of its meetings and they are requested by the secretariat when legal texts are under consideration. A Working Group does not have a right to summary records even though most of the preparation of a legal text takes place in the Working Groups.

C. *Size of Working Groups—policy considerations*

26. The increase in the size of the Working Groups has had several undoubted advantages. Broad participation of all interested parties throughout the development of a text, whether as member of the Working Group or as observer from a non-member State or from an international organization, increases the likelihood that the text will be properly balanced and that any significant difficulties in accommodating the text in the national legal systems of various States will have been solved or reduced. In addition to improving the quality of the final version of the text, broad participation throughout its preparation is likely to increase the level of interest in it and contribute to its subsequent widespread adoption.

27. However, the policy articulated at the Commission's fifth session that Working Groups should remain small also has its advantages. A smaller Working Group may be more efficient in drafting the legal text within the policy guidelines laid down by the Commission since better communication may be stimulated between the participants. While there would be no financial advantage to the United Nations in having smaller Working Groups, unless that led to a reduction in the number of languages needed for simultaneous interpretation, some member States of the Commission might prefer not to be an automatic member of all three Working Groups with the call on human and financial resources that it implies.

28. If the Commission were to decide that it wished to return to the earlier practice of Working Groups with limited membership, it would have to decide on the size of the different Working Groups, the principle of selection of membership and the term of office. In particular, it would need to decide whether all Working Groups should be of the same size or whether the size of the Working Group should depend on the project undertaken. A further question would be whether the term of office should terminate on completion of a project or should continue to new projects, as was the case in the past.

29. Unless a decision to return to the practice of Working Groups of limited size was combined with a

request to the General Assembly to withdraw paragraph 7(c) of resolution 38/134 by which it "Reaffirms the importance of the participation of observers from all States and interested international organizations at sessions of the Commission and its Working Groups", all States would continue to be invited to meetings of Working Groups, either in the capacity of member or in the capacity of observer. Therefore, it might be thought that a predetermined size of a Working Group, as well as its regional composition, was of little importance.

30. One suggestion as to how these considerations could be accommodated would be that a Working Group would consist of all member States of the Commission that expressed a desire to be a member of the Working Group for a particular project. All member States of the Commission that had not expressed the desire to be a member of the Working Group might still be invited to attend as observers, as would all other States, and might be permitted at any time to indicate their desire to become a member of the Working Group.

31. Whether or not the Commission decides that its Working Groups should be of limited size, it may wish to consider whether it should continue to follow its current practice of not discussing the substance of a project until the Working Group has completed preparation of a draft text.

I. UNITED NATIONS CONVENTION ON INTERNATIONAL BILLS OF EXCHANGE AND INTERNATIONAL PROMISSORY NOTES

(General Assembly resolution 43/165, annex)

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 (UNCITRAL Convention)" and also contains in its text the words "International bill of exchange (UNCITRAL Convention)".

(2) This Convention applies to an international promissory note when it contains the heading "International promissory note (UNCITRAL Convention)" and also contains in its text the words "International promissory note (UNCITRAL Convention)".

(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,

provided that either the place where the bill is drawn or the place of payment is specified on the bill and that such place is situated in a Contracting State.

(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,

provided that the place of payment is specified on the note and that such place is situated in a Contracting State.

(3) This Convention does not deal with the question of sanctions that may be imposed under national law in cases where an incorrect or false statement has been made on an instrument in respect of a place referred to in paragraph (1) or (2) of this article. However, any such sanctions shall not affect the validity of the instrument or 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 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.

Chapter II. Interpretation

Section 1. General provisions

Article 4

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 5

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 15;
- (g) "Protected holder" means a holder who meets the requirements of article 29;
- (h) "Guarantor" means any person who undertakes an obligation of guarantee under article 46, whether governed by paragraph (4) (b) ("guaranteed") or paragraph (4) (c) ("aval") of article 47;

(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 9;

(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 6

For the purposes of this Convention, a person is considered to have knowledge of a fact if he has actual knowledge of that fact or could not have been unaware of its existence.

Section 2. Interpretation of formal requirements

Article 7

The sum payable by an instrument is deemed to be a definite sum although the instrument states that it is to be paid:

- (a) With interest;
- (b) By instalments at successive dates;
- (c) By instalments at successive dates with 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 8

- (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 70.

Article 9

- (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;
 - (b) At a fixed period after sight;
 - (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 10

(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 11

A bill may be drawn by the drawer:

- (a) On himself;
- (b) Payable to his order.

Section 3. Completion of an incomplete instrument*Article 12*

(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 paragraph (2)(d) 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 13*

An instrument is transferred:

- (a) By endorsement and delivery of the instrument by the endorser to the endorsee; or
- (b) By mere delivery of the instrument if the last endorsement is in blank.

Article 14

(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 15

(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 16

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;
- (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 13.

Article 17

(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 18

(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 19

An endorsement in respect of a part of the sum due under the instrument is ineffective as an endorsement.

Article 20

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 21

(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 22

(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 28 or article 30.

(2) If such an endorsee endorses for collection, he is not liable on the instrument to any subsequent holder.

Article 23

The holder of an instrument may transfer it to a prior party or to the drawee in accordance with article 13; 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 24

An instrument may be transferred in accordance with article 13 after maturity, except by the drawee, the acceptor or the maker.

Article 25

(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 70 or article 71.

Article 26

(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 70 or article 71.

Chapter IV. Rights and liabilities*Section 1. The rights of a holder and of a protected holder**Article 27*

(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 13.

Article 28

(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 30;

(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 29

"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 12 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 paragraphs (1) (a), (b), (c) and (e) of article 28;

(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 55 for presentment of that instrument for payment had not expired;

(e) He did not obtain the instrument by fraud or theft or participate in a fraud or theft concerning it.

Article 30

(1) A party may not set up against a protected holder any defence except:

(a) Defences under paragraph (1) of article 33, article 34, paragraph (1) of article 35, paragraph (3) of article 36, paragraph (1) of article 53, paragraph (1) of article 57, paragraph (1) of article 63 and article 84 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 31

(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 32

Every holder is presumed to be a protected holder unless the contrary is proved.

Section 2. Liabilities of the parties

A. General provisions

Article 33

(1) Subject to the provisions of articles 34 and 36, 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 34

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 35

(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 36

(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 37

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 38

(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 39

(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 40

(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 41

(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 42

(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 43

(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 44*

(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 45*

(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 70, against return of the instrument.

G. *The guarantor**Article 46*

(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 the maker, the 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 47

(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 28;

(b) Against a protected holder only those defences which he may set up under paragraph (1) of article 30.

(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 28;

(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 30;

(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 paragraph (1) (b) of article 30, 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 53 or article 57, that the instrument was not presented for acceptance or for payment;

(iii) The defence, under article 63, that the instrument was not duly protested for non-acceptance or for non-payment;

(iv) The defence, under article 84, 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 48

(1) Payment of an instrument by the guarantor in accordance with article 72 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 49

(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 50

(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 paragraph (2) (b) or (c) of article 49, 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 51

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 52

(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 presented for acceptance under paragraph (2) (b) or (c) 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 53

(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 54

(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 52, unless the bill is in fact accepted.

(2) (a) If a bill is dishonoured by non-acceptance in accordance with paragraph (1) (a) 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 59.

(b) If a bill is dishonoured by non-acceptance in accordance with paragraph (1) (b) 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 55

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;
- (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 56

(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 referred to in paragraph (1) of this article continues to operate beyond 30 days after maturity;

(c) If an instrument is payable on demand, and the cause of delay in making presentment referred to in paragraph (1) of this article 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 55.

(3) Presentment for payment is also dispensed with as regards a bill, if the bill has been protested for dishonour by non-acceptance.

Article 57

(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 58

(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 56 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 59, 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 59, exercise a right of recourse against the endorsers and their guarantors.

Section 3. Recourse

Article 59

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 60 to 62.

A. Protest

Article 60

(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;

(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 61

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 62

(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 52 or paragraph (2) of article 56.

Article 63

(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 64*

(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;

(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 65

(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 66

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 67

(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 68

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 70 or article 71.

*Section 4. Amount payable**Article 69*

(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 70

(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 71

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 70, 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 72*

(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 70 or article 71:

(a) At or after maturity; or

(b) Before maturity, upon dishonour by non-acceptance.

(2) Payment before maturity other than under paragraph (1) (b) of this article does not discharge the party making the payment of his liability on the instrument except in respect of the person to whom payment was made.

(3) A party is not discharged of 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 58.

(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 73

- (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;
 - (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;
 - (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 74

- (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 55.
- (2) In such case if payment is not made at the place where the instrument was presented for payment in accordance with article 55, the instrument is considered to be dishonoured by non-payment.

Article 75

- (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 5 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 55, 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 55;
- (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 55 or at the place of actual payment.

Article 76

- (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 55.
 - (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 (4) and (5) of article 75 are applicable where appropriate.

Section 2. Discharge of other parties*Article 77*

(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 bill 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 78*

(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 paragraph (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 70 or article 71, 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 79

(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 70 or article 71.

(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 80

(1) A party who has paid a lost instrument in accordance with the provisions of article 78 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 paragraph (2) (b) of article 78 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 81

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 paragraph (2) (a) of article 78.

Article 82

A person receiving payment of a lost instrument in accordance with article 78 must deliver to the party paying the written statement required under paragraph (2) (a) of article 78, receipted by him, and any protest and a receipted account.

Article 83

(1) A party who pays a lost instrument in accordance with article 78 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 82.

Chapter VIII. Limitation (prescription)

Article 84

(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 bill;

(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 70 or article 71 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 85

The Secretary-General of the United Nations is hereby designated as the Depositary for this Convention.

Article 86

(1) This Convention is open for signature by all States at the Headquarters of the United Nations, New York, until 30 June 1990.

(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 87

(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 88

(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 89

(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 90

(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 New York, this ninth day of December, one thousand nine hundred and eighty-eight, 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. DOCUMENTS OF THE GENERAL ASSEMBLY RELATIVE TO THE ADOPTION OF THE CONVENTION ON INTERNATIONAL BILLS OF EXCHANGE AND INTERNATIONAL PROMISSORY NOTES

A. Report of the United Nations Commission on International Trade Law on the work of its twenty-first session (Sixth Committee, forty-third session of the General Assembly, agenda item 131)

Open-ended Working Group on the draft Convention on International Bills of Exchange and International Promissory Notes: report of the Working Group (A/C.6/43/L.2) [Original: English]

1. At its forty-second session, the General Assembly decided, in its resolution 42/153 of 7 December 1987, to consider the draft Convention on International Bills of Exchange and International Promissory Notes at its forty-third session, with a view to its adoption at that session, and to create to this end, in the framework of the Sixth Committee of the General Assembly, a working group that would 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 on the draft Convention.

2. At the forty-third session, the Sixth Committee, in accordance with that decision, established at its 2nd meeting, on 23 September 1988, an open-ended Working Group, and appointed, at its 4th meeting, on 27 September 1988, Mr. José María Abascal Zamora (Mexico) as Chairman of the Working Group.

3. The Working Group held eight meetings between 26 and 30 September 1988. The Working Group had before it the observations and proposals made by States on the draft Convention and contained in documents A/43/405 and Add.1-3. The Working Group decided to consider any proposals submitted to it in writing within an agreed period of time.

4. As a result of the deliberations and decisions of the Working Group, it decided to recommend the adoption of the draft Convention in the form it had been adopted by the United Nations Commission on International Trade Law at its twentieth session (as contained in document A/42/17, Annex) with the following modifications:

Title of Convention

Reword as follows: United Nations Convention on International Bills of Exchange and International Promissory Notes.

Article 1, (1) and (2)

Replace the words (*Convention of...*), appearing twice in each paragraph (1) and paragraph (2), by the words (*UNCITRAL Convention*).

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,

provided that either the place where the bill is drawn or the place of payment is specified on the bill and that such place is situated in a Contracting State.

(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,

provided that the place of payment is specified on the note and that such place is situated in a Contracting State.

(3) This Convention does not deal with the question of sanctions that may be imposed under national law in cases where an incorrect or false statement has been made on an instrument in respect of a place referred to in paragraph (1) or (2) of this article. However, any such sanctions shall not affect the validity of the instrument or the application of this Convention.

Article 4

To be deleted; as a consequence, all following articles to be renumbered and any cross references to such articles to be adjusted accordingly.

Article 31 (1) (a)

Replace the numbers 54, 58, 64 by the numbers 54(1), 58(1), 64(1).

Article 57 (2) (b)

After the words *in making presentment* insert the words *referred to in paragraph (1) of this article*.

Article 57 (2) (c)

After the words *cause of delay* insert the words *in making presentment referred to in paragraph (1) of this article*.

Article 77 (2) (b) (iii)

Replace the words *Paragraphs (3) and (4) of article 76* by the words *Paragraphs (4) and (5) of article 76*.

Article 87 (1)

Reword as follows:

(1) This Convention is open for signature by all States at the Headquarters of the United Nations, New York until 30 June 1990.

5. The complete text of the draft Convention as amended by the Working Group will be set forth in the annex to the draft resolution of the Sixth Committee.

**B. Report of the United Nations Commission on International Trade Law
on the work of its twenty-first session (General Assembly, forty-third session)**

**Draft Convention on International Bills of Exchange and International Promissory Notes: report of the Secretary-General
(A/43/405 and Add. 1 to 3)**

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INTRODUCTION

1. On 7 December 1987, the General Assembly adopted resolution 42/153 entitled "Draft Convention on International Bills of Exchange and International Promissory Notes". Paragraphs 2 to 3 of the resolution read as follows:

"The General Assembly,

"...

"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."

2. By a note dated 25 February 1988, the Secretary-General, in accordance with the resolution, asked States to submit any observations and proposals that they might have on the draft Convention.

3. Section II of the present report contains, with minimal editorial modifications, the observations and proposals that had been received as of 3 June 1988.

4. Any further communications received from States will be circulated in addenda to the present report.

Observations and proposals received from Governments

AUSTRIA

[Original: English]

1. The draft Convention on International Bills of Exchange and International Promissory Notes, which UNCITRAL was

able to adopt by consensus at its twentieth session in 1987, is the result of intensive work undertaken by the Commission in 15 sessions during the period from 1973 to 1987. Twice, in 1982 and 1986, all States were given the opportunity to submit written observations and proposals. At three UNCITRAL plenary sessions the draft articles were considered in great detail in the light of the numerous proposals submitted by member States.

2. The draft, in the view of Austria, represents a balanced compromise between different legal systems applicable to international bills of exchange and promissory notes. Austria believes that the draft constitutes the best possible solution to the various problems that had to be solved in connection with the subject matter it proposes to regulate and that no further improvements can be realistically expected. Therefore, the draft Convention that was before the General Assembly at its forty-second session could have been adopted by Austria—as well as by a number of other States—at that session without any further consideration. Austria sees no compelling reason to reopen the discussion about a draft that already had been considered for almost 15 years and that is not likely to be improved any further. Austria hopes that the General Assembly at its forty-third session will be able to pass a decision on the adoption of the draft and to submit it to States for signature and ratification.

CHILE

[Original: Spanish]

1. Chilean Law No. 18.092, of 14 January 1982, which governs the subject matter in question, is based essentially on certain points of the Geneva Uniform Law of 1930 on Bills of Exchange and Promissory Notes, and, as regards certain points, on the Negotiable Instruments Law of the United States of America, as well as on the Colombian Commercial Code of 1971 and other modern legal documents.

2. Consequently, the text of the draft Convention on International Bills of Exchange and International Promissory Notes causes certain difficulties for Chile inasmuch as it represents a combination of the common law and Geneva systems that will apply to international transactions; it is our understanding that, if Chile were a party to the new Convention, this would not entail any amendment of our domestic laws, which have been thoroughly studied and meet

the present requirements of national negotiations that make use of negotiable instruments such as the bill of exchange and promissory note.

3. Although Chile appreciates that the draft Convention is a compromise solution the aim of which is co-existence between the institutions of the Geneva system and the solutions and practices of common law, it is none the less certain, in the opinion of the Government of Chile, that it will lead to difficulties in the application of its provisions and to various problems of interpretation by the competent courts where claims and defences may derive from both negotiable instruments.

4. As a consequence, it has to be kept very much in mind, in the opinion of the Government of Chile, that there is a lack of compatibility between the international obligations that the new Convention may generate and various international conventions, such as the Inter-American Convention on Conflict of Laws Concerning Bills of Exchange, Promissory Notes and Invoices and the 1930 Geneva Convention already mentioned.

5. Chile feels that the text of the draft Convention under consideration is complicated, dense, highly regulatory and difficult in terms of comprehension and practical application.

6. Accordingly, Chile wishes to state, without prejudice to the general points already mentioned, that it might not accept article 4 of the draft in question and might make use of the possibility of reservation referred to in article 89 of the text.

7. Similarly, Chile wishes to point out that the Chilean legislation, like the Geneva Convention of 1930, does not recognize the validity of bills of exchange payable by instalments.

8. Nor does Chilean law recognize the distinction drawn in the draft Convention under consideration between "holder" and "protected holder", which gives rise to a set of complicated regulations, difficult to understand, that will cause problems of interpretation for the competent courts.

9. Chile believes it inappropriate, furthermore, to introduce regulations relating to agency in a bill of exchange or promissory note since, although, on the one hand, it recognizes the importance of the principal and the agent in any legal act, it considers, on the other hand, that such a contract is alien to the strictly exchange-related effects and functioning of negotiable documents, whether the party to the instruments is acting or not under an agency contract or another figure of civil or commercial law, which gives rise to enforceable claims and defences.

10. To the above Chile should like to add that in the draft Convention there is a series of provisions not envisaged in Chilean law, in particular, nor in continental Latin law, but which are considered justified inasmuch as we are dealing with a compromise draft that combines and incorporates regulations from the common law and Geneva systems; in so doing it produces a mixture of highly regulatory provisions that do not make for the clarity and simplicity that there should be in regulations governing negotiable documents of such importance for the validity and efficacy of international trade transactions.

11. Finally, the regulations governing discharge of liability seem to the Government of Chile equally complex and highly regulatory, and the period of limitation of four years seems very long, since Chilean law lays down periods of one year for

direct claims by the holder and six months for claims for repayment. Nevertheless, in view of the fact that we are dealing with international bills of exchange and promissory notes, a longer period might be justified, especially if the said period of general limitation coincides with the period fixed by other international conventions, such as the one relating to the international sale of goods.

CZECHOSLOVAKIA

[Original: English]

The Government of Czechoslovakia has no comments to make.

ECUADOR

[Original: Spanish]

1. It is necessary to make it clear in article 1 that the terms "international bill of exchange" and "international promissory note" should be in the same language as that in which such instruments are drafted. Furthermore, the text of the draft Convention should refer to international promissory notes drawn to order, instead of "international promissory notes", since it is well known that there are various types of promissory notes but that the only ones that are instruments of exchange are promissory notes drawn to order.

2. Subsections 1 and 2 of article 2 should be amended in order to avoid the occurrence of the term that is defined as part of the definition itself e.g., "(1) An international bill of exchange is a bill of exchange . . .", "(2) An international promissory note is a promissory note . . .".

3. Article 3 lays it down that bills of exchange and promissory notes are instruments payable "on demand or at a definite time". However, article 10 states the possibility that they shall also be payable at a fixed period after sight and at a fixed period after a certain date. Furthermore, article 8 hints at the probability that instruments may be paid "(c) by instalments at successive dates", which is forbidden by the Hague Convention concerning bills of exchange and promissory notes drawn to order, because it is considered to be contrary to the nature of these instruments of exchange intended for circulation. Consequently, the provisions of articles 3, 8 and 10 should be harmonized.

4. Since the acceptor is mentioned in article 41, the definition of that term should be included in article 6.

5. It would be desirable for the Convention to refer to the competent law for determining the capacity of contracting of the parties.

6. Also, the text of the Convention should provide for the possibility of there being several identical parts or copies of bills of exchange and international promissory notes drawn to order.

7. There should also be a thorough revision of the language, spelling and drafting used in the Spanish version.

8. Accordingly, the Government of Ecuador considers it advisable to leave a prudent margin of time in order to produce a better text before the Convention is adopted.

FINLAND

[Original: English]

1. The Government of Finland considers the draft Convention on International Bills of Exchange and International Promissory Notes, which was adopted by UNCITRAL at its twentieth session, an acceptable solution to the problems arising in connection with international transactions. The draft text is a valuable end product of lengthy endeavours to overcome the divergencies arising out of the existence of different legal systems governing negotiable instruments. Finland, being a party to the 1930 Geneva Conventions on bills of exchange and promissory notes, considers the draft Convention a well balanced compromise between the Geneva system and the other legal régimes.

2. The Government of Finland, therefore, supports the submission of the draft Convention to the General Assembly at its forty-third session for adoption by the Assembly.

FRANCE

[Original: French]

Comments of the French Government on the field of application of the draft Convention on International Bills of Exchange and International Promissory Notes (articles 1-4)

1. In view of the incompatibility of the draft with the Geneva Conventions of 1930, which concern 19 States parties and around 20 countries that have modelled their domestic legislation on the rules contained in these Conventions, as well as with the Inter-American Convention on Conflict of Laws Concerning Bills of Exchange, Promissory Notes, and Invoices, signed at Panama in 1975, to which some 10 States are parties, the future Convention should not be allowed to produce legal effects in States that have decided not to ratify it.

2. It is therefore essential to limit the field of application of the Convention as far as possible to States which are parties to it.

3. This limitation is imperative.

4. For example, looking at bills of exchange, the drawer need only, having so decided by an act of his sole volition, enter in the heading and in the text of the bill of exchange that he is drawing the magic words "International bill of exchange (Convention of . . .)", and in addition indicate two of the five places mentioned in article 2,¹ to render the Convention applicable to the instrument, even if neither of the two places indicated is located in the territory of a contracting State (article 4 of the draft Convention).

5. The same would hold true for promissory notes.

6. Thus, it is intended that the draft should confer on the drawer or maker, as a consequence of his sole, unilateral and discretionary choice, the power to bring into play application of the eight chapters of the Convention to the instrument he has drawn, and to remove it from the purview of the law that would normally be applicable, *ratione loci*, disregarding the fact that this law normally applicable to a given exchange

relation might well be the law of a State which has not ratified the Convention.

7. It is not even required that the country in whose territory the bill of exchange is issued should have ratified the Convention.

8. Example: assume a country A that has not ratified the Convention. A resident of this country enters on the bill of exchange that he is drawing the ritual words indicated above and gives as the place where his bill is drawn a city in this country A and as the place of payment a city in a country B that has also not ratified the Convention. The Convention will none the less be applicable. Consequently, if we imagine, on the one hand, that this bill of exchange has been covered by a guarantee such as the one provided for by articles 47 ff. (*aval*) and that this guarantee has been given in the territory of a State that has ratified the UNCITRAL Convention and, on the other hand, that a dispute arises between the bearer (a discounting banker) and the guarantor and is brought before a court in a State which is the place of residence of the guarantor and that has not ratified the UNCITRAL Convention,² this court—in particular if the State to which it belongs has ratified the Inter-American Convention—must, in application of one of these two Conventions³ (Geneva, article 4, paragraph 2, Panama, article 3) apply the UNCITRAL Convention,⁴ while, once again, the State it belongs to has not ratified this Convention. The provisions of this State's law and those of the UNCITRAL Convention may differ as regards determination of the guarantor's obligations and in particular as regards knowing to whom the guarantee is given and in what degree, as well as what defences may be set up by the guarantor against the bearer. Furthermore, there is no reason why the fact of the drawer placing the bill of exchange under the UNCITRAL Convention, and the guarantor (*avaliste*) then giving his guarantee in the territory of a country that has ratified the Convention, should not be constitutive of an evasion of the national law of State A perpetrated by means of the drawer's guile in removing the bill of exchange he is issuing from the purview of the law normally applicable. An international convention prepared under the auspices of the United Nations should not be an instrument inciting to fraud to the detriment of the rights of the weaker party in the transaction.

9. The example given above is not at all far-fetched.

10. It is all the more unacceptable that the drawer should be allowed to remove a bill of exchange from the purview of the legislation normally applicable *ratione loci*, to place it as a whole under that of the Convention, which is not accepted by States not having ratified it, and to place it, possibly with fraudulent intentions, under the purview of the law of these States, in that according to article 2, paragraph (3), even proofs that the statements of place entered on bills of exchange and promissory notes are incorrect would not render the Convention inapplicable.

²For example, State A, which is at the same time that of the drawer and that of the guarantor.

³Article 4, paragraph 2, of the Geneva Convention provides that "The effects of the signatures of the other parties liable [other than the acceptor of a bill of exchange or the maker of a promissory note] . . . are determined by the law of the country in which is situated the place where the signatures were affixed". Article 3 of the Panama Convention states that "All obligations arising from a bill of exchange shall be governed by the law of the place where they are contracted."

⁴"A treaty to which a State is not party is to be looked upon as a foreign law" (French Court of Cassation, 1 February 1972, Dalloz 1973, p. 59).

¹Place where the bill is drawn;
Place indicated next to the signature of the drawer;
Place indicated next to the name of the drawee;
Place indicated next to the name of the payee;
Place of payment.

11. Example: assume a bill of exchange drawn by a drawer resident in a State A, which has not ratified the Convention, and drawn on a drawee of this same State A. This drawer would need only to engage in a deception (which under French law and without a doubt under other legal systems would constitute the offence of falsification of a commercial document and be punishable under criminal law)⁵ by mentioning fraudulently (and all too easily) as the place where the bill was drawn a city in a State B, which might or might not have ratified the UNCITRAL Convention, for the Convention to be applicable to this purely domestic bill of exchange. According to the draft Convention, application of the law of the State would be avoided completely legally, whereas it alone would have a claim to be applicable.

12. It is therefore absolutely necessary that article 2, paragraph (3), should be deleted and that it should be established that the different places mentioned on the bill must be places in contracting countries that actually are different.

13. It is equally necessary that article 4, which provides that the Convention is applicable "without regard to whether the places indicated . . . pursuant to paragraph (1) or (2) of article 2 are situated in Contracting States", be substantially amended.

14. It is true that, at the suggestion of the representative of the Hague Conference on Private International Law, article 89 permits a reservation intended to limit application of the Convention by the courts of a State strictly to the case where both the place where the bill is drawn or the note is made and the place of payment are situated in Contracting States. However, the reservation presumably concerns only a Contracting State; it affords no relief to non-contracting States. More seriously, to the extent that it permits a Contracting State to avoid, as far as it is itself concerned, the indirect extraterritorial effect of the Convention, it institutionalizes this extraterritorial effect for non-contracting States.

15. Therefore, not only article 4, but also article 2, must be amended and it must be provided that the Convention is applicable only on the condition that the actual place where the bill is drawn and the actual place of payment are situated in different contracting States.

16. Similarly, as regards promissory notes, the Convention should be applicable only on the condition that the actual place where the note is made and the place of payment are situated in different Contracting States.

17. In this way, the field of application of the Convention would be limited in a reasonable way. All indirect extraterritorial effects of the Convention for a State that has not ratified it would not be avoided, but this would result from normal application of the rules for determining which court is competent in objective situations involving a foreign factor.

*Comments of the French Government on the concepts
of a protected holder and a non-protected holder
in the draft Convention on International Bills of Exchange
and International Promissory Notes*

18. The provisions concerning protected holders and holders who are not protected holders constitute a characteristic example of the complexity of the Convention both as regards the definitions and as regards the status of each category of holder.

⁵After having entered on the bill the ritual words indicated above.

19. Not all holders have the same status. The draft makes a distinction between a so-called protected holder and a holder "who is not a protected holder". The distinction and the terminology employed are directly copied from the United States Uniform Commercial Code.

20. It remains to determine who is a protected holder and who is a holder who is not a protected holder.

21. Subparagraphs (f) and (g) of article 6 appear to define a holder and a protected holder; in reality they do not define these terms, because article 6 (f) merely refers the reader to article 16 and article 6 (g) refers to article 30.

22. First, therefore, one has to read article 16, which defines a holder.

23. With regard to a protected holder, as defined by article 30, he is "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", if the conditions to be indicated later are satisfied. It is therefore important to go back to article 13, which itself refers the reader to paragraph (2) of article 1 and subparagraph (d) of paragraph (2) of article 3 and, more generally, to articles 2 and 3.

24. After this first stage has been completed, one notes that a holder is a protected holder only if several conditions are satisfied. One of these, set forth in article 30 (a), is that he must have been without knowledge of a defence against liability on the instrument (*aucune des exceptions relatives à l'effet*). What kind of defence? One of the defences referred to in subparagraphs (a), (b), (c) and (e) of paragraph (1) of article 29, which, for its part, refers to non-protected holders. The rules governing the two types of holder are thus clearly intertwined. One is obliged to turn to article 29 and, in particular, to paragraph (1) (a); it emerges that a protected holder is one who is without knowledge of a defence (*moyen de défense*) that may be set up against a protected holder in accordance with paragraph (1) of article 31. Thus article 30 has referred us to article 29, which refers us to paragraph (1) of article 31, which itself contains three subparagraphs, of which subparagraph (a) itself refers to eight articles (articles 34, 35, 36, 37, 54, 58, 64 and 85).

25. That is not all: a protected holder—under article 30, supposedly defining him—must know that, in order to count as "protected", he must have observed the time-limit provided by article 56 for presentment for payment. Now the rules concerning the time-limit for presentment for payment are distributed among eight subparagraphs.

26. Thus, simply to ascertain the definition of a protected holder, reference has to be made to 14 articles of the Convention, or more than 16 per cent of the substantive articles of the Convention, of which there are 85.

27. It still remains to determine the legal situation of a protected holder. Article 31 proceeds to describe this, but in two paragraphs it enumerates all the defences that may nevertheless be set up against a so-called protected holder. Paragraph (1) (a), with the purpose of indicating a first group of defences that may be set up, is the subparagraph mentioned above that refers to eight articles of the Convention. To this first batch of defences at least five other defences are then added. One must further add the defence resulting from article 35, from which it emerges that, even *vis-à-vis* a protected holder, a person whose signature has been forged is not liable. Further reference is made by other articles to

protected holders (article 73 (4) (e)) and to holders who are not protected holders (article 73 (3); article 78).

28. Despite all this, the description of the legal situation of a protected holder is still not complete. Even though article 31 does not warn him of this, a holder would be well advised to refer to article 48 in order to discover what defences may be set up against him by a guarantor (*avaliste*); article 48 (4) itself refers the reader to several articles.

29. In addition, the term "knowledge", which is found in articles 30 and 31, is defined by article 7.

30. Account should also be taken of article 32, from which it emerges that any holder who receives an instrument from a protected holder is himself, in principle, a protected holder.

31. Ultimately, however, all these particular provisions do not constitute the main point. It is only in article 33—as a kind of side issue, whereas in fact a basic rule is being stated—that it is set forth that "every holder is presumed to be a protected holder unless the contrary is proved".

32. It might be supposed that, as a result of the effects of all the provisions cited, the concepts of a so-called protected holder and a "holder who is not a protected holder" rest on a clear cut distinction between these two categories of holder. However, attention has already been drawn to the fact that there are many defences that can be set up against a so-called protected holder. At the same time, it must be noted that certain defences cannot be set up against a holder who is not a protected holder—that is to say, a holder against whom all defences can, in principle, be set up—if he took the instrument without knowledge of such defences.

33. In short, a so-called protected holder is far from being protected under all circumstances and a holder who is not a protected holder is protected under certain circumstances. The distinction thus loses some of its force. The legal situations of the categories of holders are ultimately intermingled, making it impossible to establish a clear and distinct profile of a holder.

34. In this regard, the draft Convention is open to grave criticism; it is unintelligible. But the holder is the central figure in law on bills of exchange and promissory notes.

35. His situation must therefore be clearly defined. A person to whom an instrument is presented and who has to decide promptly either to take the instrument or to refuse it must be in a position to make up his mind on the spot. The Convention is not intended to be applied by university professors or specialists, but by staff of banks or enterprises, who must know where they stand at first glance. The draft Convention does not meet this need.

Comments of the French Government on the distinct concepts of guarantee and aval in the draft Convention on International Bills of Exchange and International Promissory Notes (articles 47-49)

36. The very principle of a dual guarantee system is highly questionable. Its implementation in the draft Convention gives rise to serious problems of understanding and to complexities that bank clerks will not be in a position to cope with.

37. Just one example, relating to "the guarantor" (article 47 ff.). This article, under the pretext of meeting the requirements of the proponents of the common law system and the Geneva system, establishes a two-tiered guarantee system. The first guarantee system, using the words "guaranteed", "payment guaranteed" etc., would make the guarantor responsible, making him into a kind of surety able to set up a large number of defences, even against a protected holder, as is the practice under the common law system.

38. The second system, closer to the Geneva system, using the words "good as *aval*" would permit the guarantor (*avaliste*) to set up fewer defences against the protected holder, whose position would thus be stronger. However, the guarantor may also express his guarantee through a simple signature.

39. In this case, a distinction must be made as to whether or not the guarantor is "a bank or financial institution". The defences that can be set up against the protected holder are not the same.

40. The "guarantee" rules are completely incomprehensible. Apart from the fact that it is hard to imagine that, in a so-called "unifying" convention, there should be two sets of rules based on the two different legal systems that are to be unified, these two sets of rules, which are brought into play as a result of the magic words used or of "words of similar import", by their very nature and the way they are brought into play completely undermine the holder's security.

41. No legal system provides for so complex a system of rules concerning guarantees. The articles of the Convention should therefore be completely rewritten, especially since "guarantee" is a current practice.

HUNGARY

[Original: English]

1. The Government of the Hungarian People's Republic always supported the efforts aimed at the unification and harmonization of the law of international trade. For this reason, the Hungarian Government also welcomed the work relating to establishing a draft Convention on International Bills of Exchange and International Promissory Notes.

2. The Hungarian Government considers that existing national laws and regulations relating to negotiable instruments do not correspond to the needs of international trade as well as international payment and credit transactions. From the point of view of the promotion and development of international economic and trade relations the unification of law in this field would be desirable.

3. The Hungarian Government is of the opinion that the draft Convention as adopted by UNCITRAL is a well-balanced compromise between the two principal systems of law regulating bills of exchange and promissory notes: the system of the Geneva Conventions of 1930, on the one hand, and the system that is represented by the English Bills of Exchange Act and the United States Negotiable Instruments Law, on the other hand.

4. Therefore, the Hungarian Government considers the draft Convention suitable to be recommended by the General Assembly for signature, in the form adopted by UNCITRAL.

ITALY

[Original: French]

General comments

1. The Italian Government is appreciative of the remarkable efforts made by the United Nations Commission on International Trade Law (UNCITRAL) with a view to improving the draft under discussion, but considers that the results aimed at have not yet been achieved; it may be recalled that the idea was essentially to make available to financial and commercial operators an instrument that would be reliable and easy to use, capable of overcoming the obstacles that may derive, in such a delicate matter, from diversity in national legislations.

2. In the light of these aims, the Italian Government considers that the draft in question should be evaluated not only by comparing it with particular legal traditions, but above all in terms of its capacity to eliminate uncertainties of application; and it considers that, at the present time, there are still grounds for perplexity in this regard.

3. First, with reference to the drafting, the Italian Government is bound to stress its dissatisfaction with a method which makes exaggerated use of the technique of cross-references: a method which makes the reading of the text extremely difficult and which inevitably entails the danger of contradictions and uncertainties in interpretation.

4. It must be added that this danger is accentuated by the attempt evident in the draft to provide rules covering all the practices followed in the most diverse national contexts. This leads to considerable complication and almost insurmountable difficulties when one is trying to meet the requirement, essential for the interpreter, for the construction of a unitary system. As an example one may note the provision made for a concept, known only in some systems, of a guarantee for the drawee, even a non-accepting drawee, a concept which, moreover, is regulated in terms remarkably different from the general guarantee of a negotiable instrument; this leads, to say the least, to considerable inconsistency within the system and consequently to serious dangers of uncertainty in application.

5. It seems clear that in a unifying exercise one should, rather than seeking a specific solution for each problem, identify the essential elements which can become common to the different legal systems.

6. In general terms, the Italian Government also considers that these uncertainties are further aggravated by the way in which the draft Convention determines its own field of application.

7. It seems clear—and this has been observed for a long time—that the “universalist” solution adopted in articles 2(3) and 4 may create great difficulties where the rules on conflicts of laws of the *lex fori* would lead to the application of a different law from that of a contracting State: in this case, it seems very difficult, to say the least, to foresee the solution that a judge would adopt in a concrete situation.

8. It need not be stressed that this problem, obviously of decisive importance, is further aggravated by the fact that these rules on conflicts of laws are the subject of an obligation under public international law for several States (in particular, those that are parties to the Geneva Convention).

9. It is realized that the principle of formalism in relation to negotiable instruments may lead to solutions that leave aside

the question of an actual relationship with the territory of a contracting State. It seems important, however, that the considerations set out above, involving matters of public policy, should prevail and it therefore appears necessary to remove the uncertainties indicated and to reconsider the solution adopted in the draft.

Particular comments

10. The Italian Government proposes to limit itself here to drawing attention to a limited number of points that give rise to perplexity and that seem of decisive importance in the evaluation of the draft.

11. The Italian Government would like, in the first place, to see a thorough re-examination of the concept of “holder” and of “protected holder”. Such concepts, which should constitute the centre of the whole system of the Convention, are defined by resorting in an extreme degree to the technique of the cross-reference. Their comprehension requires the reading of a very large number of provisions (for example, giving a list that is doubtless not exhaustive, articles 6, 7, 16, 29, 30 and 33). Consequently, the utilization of this approach, rather than easing problems of application, seems to make their solution even more difficult.

12. It is therefore considered highly desirable for the whole problem to be reconsidered. This would be possible by abandoning the attempt to define the legal position of the holder of the instrument in terms of status and, in a manner doubtless more consistent with the “functional approach” that is being sought, by directly regulating the concrete situations that can arise. In any event, it is essential that, if the status of the holder is to be defined, the formulation of the rules should be made much clearer and their reading made much easier than is the case with the text under consideration.

13. The Italian Government has been drawing attention for a long time to its dissatisfaction at the inadequate protection given by the draft to the holder of the instrument, considering that such protection represents the bedrock of all negotiable instruments law and that the need for adequate protection is still greater in the case of instruments that are to circulate internationally. For this reason, the desired reconsideration of the concepts of “holder” and “protected holder” should be aimed at strengthening the position of the holder of the instrument (particularly with reference to articles 7, 13, 30 and 31).

14. As a minimal requirement for the strengthening of such protection, the Italian Government considers it absolutely necessary, in particular, to reconsider the solution adopted in article 27 of the draft. This provision contains, for the hypothesis of an endorsement made by an agent without authority (*falsus procurator*), a rule identical with that for a forged endorsement: it thus ignores the clear difference between the two situations and, in particular, the fact that, while it may be reasonable to expect the person negotiating the instrument to assume the risks of a material forgery, the situation is different in the case of an endorsement made by an agent without the necessary authority or power: in the latter case, one is not dealing with a factual circumstance which is more or less easy to verify, but rather with a legal situation that often requires very delicate and sometimes debatable assessments; this difficulty is aggravated in an international context, where the problem is further complicated by the often radical difference in national legislations. It therefore seems unreasonable and highly contradictory with the requirement to protect the circulation of the instrument to make the person who acquires the instrument assume even this latter risk.

15. Another important point which, in the view of the Italian Government, needs to be reconsidered in detail is that concerning the rules on guarantees, which present several inconsistencies and contradictions.

16. In the first place, as indicated above, the Italian Government is caused considerable perplexity by the concept of a guarantee for the drawee. First, it seems clear that, if additional liability on an instrument is needed, the parties could in any case meet this need by other means (for example, by an endorsement), without resorting to an abnormal solution such as that of a guarantee for a person (like the drawee) who is not liable as such.

17. Secondly, the oppressive treatment of the guarantor of the drawee, to the point where he is considered liable even in the event of failure to present a bill for acceptance (article 54(2)) or to present an instrument for payment (article 58(2)) seems undoubtedly inconsistent with a system that, in general, regulates the position of the guarantor in terms that are certainly less onerous than those found, for example, in the Geneva Convention. In substance, a guarantor of this type is denied even the benefit of a guaranteed debt and the possibility of a right of recourse, which, it seems clear, permits abuses at his expense (it is possible even to conceive of fraudulent collusion between the holder of the instrument and the drawee).

18. In addition, there are serious reasons for perplexity in relation to the rules in article 48 concerning the defences that may be set up by the guarantor: an extremely complicated set of rules that are of very doubtful practicability.

19. In particular, not only is the provision of different rules depending on the literal formulations adopted by the parties questionable (a differentiation which presupposes, contrary to reality, a clear perception by practitioners of the difference between these formulations—which are now used in an undifferentiated manner), but the presumptions *juris* and *de jure* adopted in subparagraphs (d) and (e) of article 48(4) regarding the possibility of a guarantee expressed by the guarantor's signature alone seem unjustified and liable to cause confusion. This for at least two types of reason: because it does not seem appropriate to adopt here subjective criteria that do not necessarily reflect differences of economic capacity, and because a distinction of the kind made could inevitably cause serious uncertainties of interpretation (one need only consider the absence of a definition not only of the concept of a "bank" but also, and above all, of that of a "financial institution"—the latter a concept which it would certainly be risky to consider homogeneous under all legal systems).

20. Still in the interests of reducing uncertainties of interpretation to the maximum, the Italian Government considers, lastly, that it would be highly desirable to limit still further the situations freeing the holder from the obligation to present the instrument for acceptance or payment (see articles 53, 56 and 57). In particular, it is considered that, at least in the majority of such cases (some of which involve very delicate problems of law and of fact, such as, for example, the hypothesis of a "corporation, partnership, association or other legal entity which has ceased to exist"), there are no difficulties and it would be highly advisable to provide for a procedure such as a protest officially establishing the non-acceptance or non-payment, thus eliminating a potential ground for dispute.

21. In conclusion, the Italian Government, while reaffirming its appreciation of the work done so far, considers that the

draft under consideration needs to be further improved, and would like to see a simplification of the text that will remove the uncertainties to which it now gives rise, and a strengthening of the protection afforded for the circulation of the instrument and for its holder.

JAPAN

[Original: English]

1. The United Nations Commission on International Trade Law (UNCITRAL) devoted itself to the formulation of a new convention on international negotiable instruments for nearly 15 years and finally succeeded in adopting the draft Convention on International Bills of Exchange and International Promissory Notes by consensus at its twentieth session, held at Vienna, from 20 July to 14 August 1987.

2. From the outset to the final stage of this work, a number of experts from all corners of the earth (not only from member States of UNCITRAL but also from non-member States and various interested circles) actively participated in the discussions to prepare a satisfactory text of a future convention. Lengthy discussions in UNCITRAL were marked by conflicting opinions on various issues, reflecting the divergent legal systems. These opinions were thoroughly debated and, as a result, a wise compromise has been worked out in respect of each of the controversial issues.

3. The draft Convention adopted by UNCITRAL thus embodies a careful compromise among different legal systems, *inter alia*, between the Anglo-American system and the Geneva system.

4. Having said above, the Government of Japan considers the draft Convention adopted by UNCITRAL to be acceptable for many States and therefore supports its adoption by the General Assembly at its forty-third session in its present form. Due regard should be paid to the fact that even one amendment to the draft Convention, if it affects the substance, would necessitate a review of the whole provisions thereof and this would postpone unification of laws in the field of negotiable instruments, one of the most important goals since the establishment of UNCITRAL, to some future date.

5. With respect to minor points of drafting nature, the Government of Japan proposes to amend an incorrect cross-reference to paragraphs (3) and (4) of article 76 in subparagraph (b) (iii) of paragraph 2 of article 77, i.e., the words "Paragraphs (3) and (4) of article 76" should be replaced by the words "Paragraphs (4) and (5) of Article 76".

MALAYSIA

[Original: English]

1. The Government of Malaysia notes with appreciation that the United Nations Commission on International Trade Law, which was formed in 1966 with the object of promoting the progressive harmonisation and unification of the law on international trade with a view to reduce or remove legal obstacles to the flow of international trade, especially those affecting the developing countries, has prepared and drafted the draft Convention on International Bills of Exchange and International Promissory Notes (hereinafter "draft Convention") over 14 years of extensive review and deliberations.

2. Since bills and notes are important instruments in international trade and banking, the draft Convention marks

a milestone in clarifying, simplifying, modernising and unifying the law relating to bills and notes in international trade and banking transactions. In Malaysia, the law relating to bills and notes (as well as cheques) is contained in the Bills of Exchange Act 1949 (Act 204). It is based substantially on the United Kingdom Bills of Exchange Act 1882 and the Cheques Act 1957. As such the Malaysian law is substantially a codification of the English common law.

3. Section 72 of the Malaysian Bills of Exchange Act 1949 sets out the law on the question of which country's law should apply to an international bill or note. Section 72 states:

"72. Where a bill drawn in one country is negotiated, accepted or payable in another, the rights, duties and liabilities of the parties thereto are determined as follows:

"(a) the validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance *supra* protest, is determined by the law of the place where such contract was made:

Provided that—

- (i) where a bill is issued out of Malaysia it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue;
- (ii) where a bill, issued out of Malaysia, conforms, as regards requisites in form, to the law of Malaysia, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold or become parties to it in Malaysia;

"(b) subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance *supra* protest of a bill, is determined by the law of the place where such contract is made:

Provided that where an inland bill is indorsed in a foreign country, the indorsement shall, as regards the payer, be interpreted according to the law of Malaysia;

"(c) the duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured;

"(d) where the bill is drawn out of but payable in Malaysia and the sum payable is not expressed in the currency of Malaysia, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable;

"(e) where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable."

Where section 72 does not apply, any question as to the conflict of laws relating to bills and notes shall be resolved in accordance with the common law. In the face of the express stipulations as to the governing law in section 72, it would be necessary for Malaysia to amend our Bills of Exchange Act 1949 in order to give effect to the draft Convention.

4. Basically, the text of the draft Convention consists of a set of global uniform rules, applicable to special negotiable instruments (i.e., the international bill of exchange and the international promissory note) for optional use in international transactions in order to overcome the different practices and customs arising out of the existence of the

various systems of law governing negotiable instruments. International efforts in the past to resolve difficulties arising from differences in the various systems resulted in the Geneva Conventions of 1930 and 1931 on the unification of the law relating to bills of exchange and cheques and the 1975 Panama Inter-American Convention on Conflict of Laws concerning Bills of Exchange, Promissory Notes and Invoices.

5. The Committee on Rules and Regulations of the Association of Banks in Malaysia has perused the draft Convention and was of the opinion "that the draft appears to be an improvement on the existing convention". In addition, the Exchange Control Department was pleased to note that article 77 of the draft Convention provides that nothing in the draft Convention will prevent the Contracting State from enforcing exchange control regulations applicable in its territory.

6. The following are our views and comments on the drafting of the draft Convention:

(a) *Article 1*—Rearrange as follows:

(1) This Convention applies to—

(a) 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 . . .); and

(b) 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 . . .)".

(2) This Convention does not apply to cheques.

(b) *Article 2, paragraph (3)*—Reword as follows:

(3) This Convention shall apply notwithstanding proof that the statements referred to in paragraph (1) or (2) of this article are incorrect.

(c) *Article 4*: Delete the words "applies without regard to whether" and substitute therefor "shall apply regardless whether or not".

(d) *Article 5*: Too vague to be of any practical use in interpreting the Convention.

(e) *Article 6*: The definitions are not in alphabetical order.

(f) *Article 6, interpretation of "Maturity"*—Reword as follows:

(i) "Maturity" means the time of payment referred to in paragraphs (4), (5), (6) or (7), as may be applicable, of article 10;

(g) *Article 6, interpretation of "Money" or "Currency"*:

It is not clear whether the words "without prejudice to" in this subparagraph (1) mean "notwithstanding" or "subject to".

(h) *Article 7*: Insert the words "having regard to the circumstances," immediately after the words "if he has actual knowledge of that fact or".

(i) *Article 9, paragraph (6)*: The words "unless the person is named only in the reference rate provisions" are not clear.

(j) *Article 15, paragraph (1)*: Delete the fullstop after "("allonge")" and the words "It be signed" and substitute therefor the words "and it must be signed by the person making the endorsement."

(k) *Article 27, paragraph (1)*: Insert immediately after the words "has the right" the words "subject to paragraphs (2) and (3) of this article,".

(l) *Article 32—Rearrange as follows:*

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, except where the subsequent holder:

(a) Participated in a transaction which gives rise to a claim to, or a defence against liability on, the instrument; or

(b) Has previously been a holder, but not a protected holder.

(m) *Article 37, paragraph (4):* Delete the words “may be determined only” and substitute therefor the words “shall be determined solely”.

(n) *Article 48, paragraph (4), subparagraph (d):* The phrase “financial institution” is not defined.

(o) *Article 53, paragraph (3):* Delete the fullstop and the last sentence and substitute therefor the words “, provided that when the cause of the delay ceases to operate, presentment is made with reasonable diligence.”.

(p) *Article 57, paragraph (1):* Delete the fullstop and the last sentence and substitute therefor the words “, provided presentment is made with reasonable diligence when the cause of the delay ceases to operate.”.

(q) *Article 63, paragraph (1):* Delete the fullstop and the last sentence and substitute therefor the words “, provided that when the cause of the delay ceases to operate, protest is made with reasonable diligence.”.

(r) *Article 66, paragraph (2):* The words “by means appropriate in the circumstances” are uncertain in meaning.

(s) *Article 68, paragraph (1):* Delete the fullstop and the last sentence and substitute therefor the words “, provided that when the cause of the delay ceases to operate, notice is given with reasonable diligence.”.

(t) *Article 80, paragraph (4):* Delete the fullstop and the last sentence and substitute therefor the words “, provided that when the cause of the delay ceases to operate, notice is given with reasonable diligence.”.

(u) *Article 85, paragraph (1):* The period of four years is shorter than the six years under the Malaysian Limitation Act.

7. The above are Bank Negara Malaysia's observations and proposals.

SAUDI ARABIA

[Original: English]

It is the Government of Saudi Arabia's view that the Convention will help unify and standardize the international promissory notes, a situation which will strengthen the confidence between the contracting parties and improve its legal power. The draft Convention is to a large extent similar to that of the International Chambers of Commerce law.

SINGAPORE

[Original: English]

1. Singapore expresses its appreciation for the work carried out by the United Nations Commission on International Trade Law in the preparation of the draft Convention on International Bills of Exchange and International Promissory Notes.

2. Singapore notes that the draft Convention seeks to provide uniform rules of laws governing the use of negotiable instruments and promissory notes in international payments. Singapore notes that the draft Convention adopts rules that are common to both the Anglo-American and the Geneva systems of law governing the use of negotiable instruments for payment in international trade and where the rules in the Anglo-American and the Geneva law systems differ, the Convention will adopt the rules from either of the two systems or a new rule that is a compromise of the two systems.

3. While Singapore sees the draft Convention as a positive step towards the harmonization of rules of law in international payments, it feels that the business community in Singapore or elsewhere which have been familiar with existing systems of law may be reluctant to accept a new system governing the use of negotiable instruments. The success of the draft Convention ultimately depends upon the acceptance of the draft Convention by the international business community.

SPAIN

[Original: Spanish]

1. Since the beginning of the work on the preparation of the draft Convention now under consideration, the Spanish Government has taken the view that what in its 1983 and 1986 comments it repeatedly referred to as the “spirit of compromise” is to be regarded as an essential instrument of legal and technical methodology.

2. This “spirit of compromise” characterized the first steps taken in the work on the preparation of the draft Convention, and during this initial stage it produced very good results. However, as the deliberations of the Working Group neared completion, this “spirit” became less and less apparent in the method of proceeding and in the approach adopted to the drafting of the legal text that is being considered today.

3. The idea of compromise guided the initial work on the draft in which an attempt was made to bring together the two major groups of countries adhering respectively to the two main legal doctrinal systems in relation to negotiable instruments existing in the world: on one side, the countries subscribing to the common law system and, on the other, those adhering to or influenced by the doctrinal solutions enshrined in the Geneva Conventions. The search for an intermediate, balanced formula between the two legal systems appears to have been dangerously abandoned since the most recent sessions of the Commission meeting in plenary. This search has been replaced by a process of constant adjustments to the draft text which have strongly inclined it, in an unbalanced manner, towards solutions reflecting common law systems: in the new text, not only have the Geneva formulae supported by Spain been disregarded but, more seriously, the “spirit of compromise” that, as has been repeatedly pointed out, guided the initial approach and the original work on the draft Convention has been given up. Manifestations of this phenomenon and of the consequent rupture of the internal equilibrium between the solutions proposed include the following:

(a) Complete disappearance of the basic, fundamental concepts historically underlying securities and commercial documents in general, and letters of exchange and promissory notes in particular;

(b) Replacement of the rule of concepts by a casuistic approach, with prolix enumerations of hypotheses and assumptions;

(c) The abuse, to a point that cannot be accepted, of cross-references from one rule to another;

(d) Establishment of "dualistic" rules, in conflict with the unifying purpose of the draft Convention, regarding concepts of decisive importance. Such is the case with the "holder"—with the distinction between a mere holder and a "protected holder"—and with the guarantor—with the distinction between a mere guarantor and the giver of an "aval";

(e) The abuse of interpretative or normative methods proper to common law—in particular, the principle of "reasonableness"—which are inappropriate for a strict, rigorous discipline such as the rules governing commercial documents, and bills and promissory notes in particular;

(f) As a consequence of all the above, the Convention in its present form represents an extremely violent rupture with the continental juridical legacy in regard to negotiable instruments. Moreover, as a result of the casuistic approach, cross-references, the duality of rules on certain concepts, the utilization of elements alien to the Spanish doctrinal patrimony and the disappearance of basic concepts in this field, the draft Convention is difficult to understand and interpret. It is difficult for experts and is bound to be much more difficult for the practitioners such as traders, industrialists and bankers. It is easy to see that the consequences of this in the field of legal security are serious and must be rejected—particularly in a sector of legal regulation like the rules on bills of exchange and promissory notes, in which the immediate relationship between the document and the right or obligation in respect of the payment of sums of money is vital and can be subject only to the postponement freely agreed on between the parties. Under the conditions described, the Government of Spain views the proposed text with very grave reservations. The reservations expressed, furthermore, are aggravated in the light of the scope of application of the Convention as now contemplated.

4. The points indicated are discussed in detail below.

5. Regarding the sphere of application of the Convention, the Spanish Government cannot agree to the Convention's producing extraterritorial effects, beyond the limits of sovereignty of the countries that have ratified it. Such extraterritorial effects are judged particularly grave in view of the legal and financial insecurity that would result from the solutions proposed.

6. Article 4 of the draft Convention, referring to paragraphs (1) and (2) of article 2, provide the positive basis for these extraterritorial effects.

7. For its part, article 89 of the draft, which permits reservations on the matter, does not provide an adequate remedy: it would require, when the Convention is applied and international instruments handled, continuous attention to the list of reservations, with not only the resulting imprecision but also a loss of unifying efficiency.

8. The Spanish Government does not therefore consider that it would be appropriate to adopt provisions regarding the sphere of application of the future Convention that would presuppose the application of the Convention by courts of countries that have not ratified it.

9. The absence in the text of concepts and doctrinal categories that are traditional in continental negotiable instruments law is patent. The most marked expression of this is the silence maintained by the draft on the transaction underlying the drawing of the instrument and the influence of the underlying relationship on the documentary relationship.

The ignoring of this type of fundamental concept is the cause of subsequent complexities in the Convention such as the very notable complexity caused by the distinction between a protected holder and a holder who is not a protected holder.

10. In any event, it is paradoxical that an allusion to underlying relationships has found its way into the text at one or two points—for example, article 31, paragraph (1) (b), of the draft, where the "underlying transaction" is mentioned. This mention, however, has not been accompanied by any more determined effort on the part of the Commission to use categories such as this in a more extensive and decisive way throughout the text.

11. The casuistic approach resulting from the absence of concepts and doctrinal categories leads to complete inefficiency in articles 29 and 30, where an attempt is made to specify what constitutes a protected holder and a holder who is not a protected holder: whether a holder is defined in one way or the other depends on a list of unconnected circumstances without it being possible for the average expert reader, after a careful reading of the draft, to guess at the reasons or motives behind the definitions.

12. Here there is an unacceptable manifestation of defective legislative technique, in an extreme degree.

13. The same consideration applies to another vice of legislative technique which affects the draft in a high degree: this relates to the abundant, complex cross-references from some articles to others. These cross-references make the Convention difficult to read for an average interpreter and make its rules very difficult to understand. In short, clarity in this text is conspicuous by its almost complete absence. When this is combined with the casuistic approach referred to earlier, the only conclusion can be that certain significant provisions must be rejected. This is the case, *inter alia*, with articles 4, 13, 29, 30 and 48 of the draft, where an effort to synthesize and clarify is required.

14. Mention has already been made of the appearance in the proposed text of a "non-unifying dualism" in relation to some important aspects of international negotiable instruments law. This anti-unifying phenomenon concerns, in the first place, the concept of a "holder", who can be a protected holder or a holder who is not a protected holder, depending on the cases and circumstances explicitly established by the draft, mainly in articles 29, 30 and 31.

15. The existence of this duality creates a certain insecurity in the legal position of any holder, who can obtain certainty as to his status in this regard only by a meticulous study of the Convention and his personal circumstances in relation to each specific bill or promissory note. This type of detailed study is contrary to the traditional security of the status of holders of negotiable instruments and the no less traditional protection of the evident right created by the drawer and acceptor.

16. The presumption referred to in article 33 does not reduce the disadvantages of the proposed duality; in short, this duality will mean that in any legal proceeding occasioned by non-payment of a bill of exchange there will be a discussion, as a kind of preliminary question, of the status of the holder of the bill, the creditor and plaintiff: this is a factor of uncertainty to which the Spanish Government cannot agree.

17. These considerations apply also to the guarantor. The "non-unifying duality" is also reflected in the provisions on this point, where uniform systems are traditionally provided

in the earlier texts. In the present draft, article 47 and the subsequent articles distinguish, on the basis of a striking accumulation of cross-references, between a simple guarantor and the giver of an "aval": nor will it be easy for the holder to ascertain the true status of each guarantor or giver of an "aval" who has signed the instrument, and insecurity will result from this.

18. When it is borne in mind that the use of particular words or expressions on the part of the guarantor determines the extent to which he is liable and the rights of the holder against him, the situation becomes aggravated in view of the fact that the instruments concerned are international and it is logical to suppose that their text will contain statements in various languages and even in various writing systems.

19. The loss of the traditional rigour associated with negotiable instruments is manifested in the use by the Convention of imprecise criteria in relation to interpretation or applicability. This applies to the criterion of "reasonableness" proposed in regard to the care that the parties must exercise (articles 26(2), 26(3), 27(2)(b), 27(3), 53(3), 55(1)(a), 57(1), 63(1), 68(1) and 68(2)(a)), the hour at which the instrument is to be presented (articles 52 and 56(a)) and the rate of discount (article 71(4)).

20. The Spanish Government continues to regret that the draft contains no rules of a procedural kind to safeguard a rigorous approach within the sphere of judicial procedures.

21. Access by the holder not satisfied by the acceptor in due time and form to summary enforcement proceedings should be provided for by the Convention, without prejudice to this being regulated in detail by national law in accordance with the practices of the country concerned. The ultimate need for such procedures is the basic reason for the appearance of a "non-unifying dualism", for the diversified system in regard to defences which can be set up by the various parties, for the different positions of the various creditors, etc. The recognition of such a right would be a reinforcement, even if somewhat tenuous, of the rigour in relation to negotiable instruments which has been so seriously weakened.

SWEDEN

[Original: English]

1. The Swedish Government is of the opinion that the draft Convention on International Bills of Exchange and International Promissory Notes, as adopted by the United Nations Commission on International Trade Law (UNCITRAL) at its twentieth session, constitutes an acceptable compromise between the principles of the Geneva Uniform Law and those of the Anglo-American legal system. With regard to substance, the Swedish Government has no additional observations or proposals to submit.

2. UNCITRAL has been working on the draft Convention for a long time. The Swedish Government now strongly urges Member States to support the draft Convention with a view to its consideration and adoption by the General Assembly at its forty-third session.

SWITZERLAND

[Original: French]

General remarks

1. The draft Convention concerns only international bills of exchange and international promissory notes. The adoption

of a particular system for international instruments has the disadvantage of placing a new system alongside those that already coexist. However, as it does not seem feasible to reach a consensus on a revision of the Geneva Conventions which would enable them to be adopted also by countries influenced by the Anglo-Saxon tradition, it would seem fruitless to revert to the question of the merits of a particular system for international instruments.

2. There is no doubt that a revision of the existing Geneva Conventions by the members of UNCITRAL and the participating observers would have constituted a much simpler solution for Switzerland, but that course was not followed.

3. In spite of the disadvantages of the establishment of a new system of negotiable instruments law, certain positive aspects must be noted. Thus contacts with the countries not really belonging either to the Anglo-Saxon system or to the Geneva system may have been simplified, because the application of the UNCITRAL Convention would replace laborious research on the relevant national legislation.

Sphere of application (articles 1-4)

4. The field of application seems at the same time too extensive and too restricted.

5. The proposal to subject negotiable instruments to the new law on the basis of simple labelling is hardly desirable as long as additional, objective elements do not confirm its international character (see article 4). It must also be noted that the international connection required by article 2 is limited to the starting point and the end point of the circulation. Thus an instrument drawn on one's own bank, but subsequently circulating abroad, will not come under the terms of the Convention.

6. In addition, it is important to know whether the term "promissory note" in article 1, paragraph (2), in the English text also includes notes in the sense of private investment securities. In the view of the Government of Switzerland, it would be desirable for the committee of experts that will be set up to state that an extension of the concept of a negotiable instrument is not intended. Contrary to "notes", which consist of standardized loan certificates and which must meet particular requirements to this end, negotiable instruments respond to individual needs.

Article 6

7. The presence in the Convention of a detailed catalogue of legal definitions is an excellent feature.

8. Regarding subparagraph (k), it may be asked whether the very nature of a bill of exchange should not exclude recourse to signatures reproduced by facsimile. The fact that bills of exchange are not intended for mass use, the rigorous treatment required for negotiable instruments and the security factor linked to this are important arguments for the rejection of such a solution.

Article 8

9. It would be desirable to eliminate the possibility, provided for in subparagraph (c), of instalments at successive dates, because this unnecessarily complicates the transactions. Its consequence is that partial claims, whose enforcement requires

that they should be treated on their own, remain incorporated in a single document. The debtor has the option of issuing instruments for lower amounts.

10. Subparagraphs (d) and (e) allow the possibility for the debt under an instrument to be paid in foreign currency. This makes the liability under the instrument less transparent and more complicated. This possibility should therefore also be eliminated.

Article 9

11. The variable rate of interest provided for in paragraph (6) may give rise to problems of a practical nature and should therefore be eliminated.

Articles 26 and 27

12. In spite of the improvements made in the draft Convention, the Swiss Government feels that it must maintain its criticism expressed in its earlier comments. Although it notes with satisfaction that liability is limited to the amount of the commitment entered into, interest included, the proposed solution is hardly convincing. The justification given for articles 26 and 27, namely that the person receiving the instrument directly from the forger or the agent without authority or power to bind his principal in the matter is in the best position to check the validity of the signature or of the agent's authority, is not in conformity with business experience, particularly as regards international trade or, in many cases, signatures of bodies corporate. The system adopted has the disadvantage of permitting supplementary recourses, either by the person whose endorsement has been forged or by endorsers prior to the forgery, against the forger or the person who received the instrument directly from the forger. This solution will hinder the circulation of instruments; it is likely to harm their role as credit instruments, notably *vis-à-vis* banks that can legitimately consider that it is impossible for them to verify the authenticity of the signatures submitted to them or the powers of agents who transmit instruments to them. The possibility given them by article 26, paragraph (2), and article 27, paragraph (2), of protecting themselves by being only endorsees for collection does not seem sufficient to counterbalance the disadvantages of the system in general.

Articles 28-31

13. The distinction between two categories of holders—holders and protected holders—continues to appear questionable to the Swiss Government and, in its view, would seriously jeopardize the proper operation of the Convention. The idea on which negotiable instruments are based—namely their abstract character in relation to the underlying liability—would be a reality only as far as the protected holder is concerned.

Article 35

14. That no liability can be imposed on anyone by the forging of his signature seems to us self-evident. In the interests of logic, clarity and simplicity, the Swiss Government proposes that the second sentence of this article should be deleted.

Article 46

15. At first sight, this article may seem difficult to understand and therefore difficult for the parties to the Geneva Convention to accept. After studying it in detail, the Swiss

Government has reached the conclusion that it is admittedly unusual from our point of view but that it deserves consideration. The fact that mere delivery of the instrument even without endorsement implies a guarantee for the recipient may follow from the underlying transaction (for example, a sale). One cannot deny all justification for the incorporation of the guarantee following from the underlying transaction, in view of the close correlation between the two matters, even though the Geneva Convention system provides otherwise. One starts out from the idea that what is involved is in no way an extension of the guarantee under the instrument. The Swiss Government notes, moreover, that the amount guaranteed is limited to the sum that the transferor received, including interest.

Article 48

16. The differing rules for ordinary guarantees of an instrument on the one hand and for *aval* on the other hand, to be based on the terms and form of the guarantee, are complex and not in line with the practical importance of *aval*, which is limited. The desirability of this solution may therefore be doubted.

17. So far as substance is concerned, the Swiss Government notes that the solutions adopted, although differing from those in the Geneva Convention, do facilitate the circulation of instruments. It is not very important whether a guarantee which does not specify its beneficiary is presumed to be for the acceptor (or the drawee) or the drawer, to the extent that the scope of this presumption is clear. What is important is to know whether the presumption is absolute or relative. It would therefore be desirable expressly to specify its nature.

Article 57

18. According to paragraph (2) (a) of this article, the bearer of the instrument may be freed of the obligation to present it for payment by the drawer, the endorser or the guarantor. What is the purpose of this? First, it is to be noted that a bill of exchange is not used for regular, customary payments which are made by electronic means; thus the solution is hardly required by practical considerations. Secondly, the proposed solution is in contradiction with the very nature of a negotiable instrument as a security for money.

Article 61

19. In paragraph (3), the draft adopts a solution that is contrary to the Geneva Convention. The divergency here is not likely to make the circulation of the instrument more difficult; on the contrary, one may even assume that it will facilitate its circulation.

Article 65

20. The Swiss Government notes with satisfaction that the text of the draft has been improved and that the holder must give notice of dishonour only to all those endorsers whose addresses he can ascertain on the basis of information contained in the instrument. This means that the holder has an obligation to give notice only on the basis of the addresses appearing in the instrument itself and that he is not bound to undertake more extensive research.

Article 76

21. This article is not particularly easy to read, but provides appropriate solutions where an instrument cannot or may not be paid in a stipulated currency.

Article 77

22. The Swiss Government fully agrees with the provisions to safeguard the legislation of States on exchange control and the protection of currencies.

Article 79

23. The Swiss Government also welcomes the absence in the draft of a procedure for cancellation, in view of the complications associated with this in international trade.

UNITED STATES OF AMERICA

[Original: English]

1. The United States of America supports the UNCITRAL prepared draft Convention on International Bills of Exchange and International Promissory Notes. It believes that this draft should be approved by the Sixth Committee without change or amendment, and should thereafter be opened by the General Assembly for signature and ratification by States.

2. The draft Convention is the product of 19 years of consideration of the subject by experts from a very broad range of countries. The support of the UNCITRAL process is at least of equal importance to consideration of any particular substantive points.

3. During UNCITRAL's work on this project, the points presented to the Sixth Committee had been fully considered by the Commission and its Working Group. Thus, the objections now made to articles 2 and 4 on the scope of the Convention were raised in 1984, and rejected after a thorough discussion. See the report of the Commission on the work of its seventeenth session (A/39/17), paragraph 69, which states that "There was opposition to the idea of introducing further pre-conditions to the application of the Convention, on the ground that this would narrow the scope of application of the Convention. While it was recognized that difficulties might arise if a dispute in regard to an instrument to which the Convention applied arose in a non-contracting State, it was observed that this problem would inevitably occur in the process of the adoption of uniform rules until the Convention containing the uniform rules was widely adopted."

4. Likewise, the objections now made to articles 29 to 31 on the status of the protected holder were raised in 1984, thoroughly discussed, and rejected by UNCITRAL. See the report of the Commission on the work of its seventeenth session (A/39/17), paragraph 30, which states that "the draft Convention used the double concept of holder and protected holder . . ." and paragraph 31, which adds "After discussion, the prevailing view in the Commission was that the concept of holder and protected holder should be retained . . .".

5. While the Convention as a compromise between two principal legal systems makes some concessions to Common Law concepts, it is not correct to suggest that it favours the Common Law at the expense of the Geneva System. This is documented in the appendix to the observations. Thus, as described more fully in the appendix, the non-protected holder under the Convention has significantly greater protection than that given to the Common Law holder who is not a holder in due course.

6. As to the objection relating to "guarantors" and "avals", France was a member of the Committee that redrafted

articles 47 and 48 and had the opportunity to make its views known both in the plenary session study group and in the plenary session itself.

7. Approval of the Convention would further UNCITRAL's programme to seek harmonization and unification of international commercial law and provide a new type of negotiable instrument for optional use in international trade. This instrument would be governed by rules with greater flexibility than available under the current domestic negotiable instruments law of any country. Instruments issued under the Convention could use such commercially desirable terms as provisions for repayment in units of account (ECUs and SDRs) in instalments and with interest at a variable rate, and the instrument would still be negotiable. Thus, the instrument could be used to allocate risks of currency and interest rate fluctuation according to present commercial needs.

8. In addition, instruments issued under the Convention would obtain a certainty concerning the identity of the law governing them, even as they were transferred from one jurisdiction to another. Use of international law principles and a multilateral convention would obviate disputes concerning mandatory law, party autonomy and other choice of law doctrines.

9. The combination of flexibility of commercial terms and certainty of applicable law in a negotiable instrument assist in the development of new secondary market opportunities for international credit instruments. Instruments issued under the Convention would be freely transferable and would avoid the application of unsuitable domestic law concerning commercially desirable terms. Because further negotiation at a reasonable discount in a secondary market will be facilitated, there would be less danger that a creditor, feeling "locked into" very large amounts of debt to a particular debtor, would decline to extend further credit or charge a higher rate to the debtor.

10. For the above reason, the United States urges the Sixth Committee to approve the draft Convention without amendment and urges the General Assembly to approve the draft Convention without amendment and to open it for signature and ratification as of 1 January 1989.

*Appendix**Some background on technical provisions*

1. There have been suggestions made to the Sixth Committee and to the General Assembly that the present draft is one-sided—that it too closely resembles "American law" or "Common Law". This is a misconception, and does not take account of the compromises between different legal systems reflected throughout the final draft. The technical experts who have worked with this Convention for many years are aware of the compromises and balances that have been struck in drafting these provisions, but others may not be aware of them. Since 1982, certain ambiguities have been resolved by compromises moving some substantive rules of the draft Convention toward Geneva system concepts. Those same compromises and their complexity have moved the language of the affected provisions more toward the Common Law style of drafting statutes.

2. This appendix is included with the United States observations to give brief examples in three areas of the way the Commission worked and the balances it struck.

A. Protected and non-protected holders

3. At Common Law, the "holder in due course" is a holder who is also a good faith purchaser for value without notice. This "holder in due course" concept does not exist under the Geneva system, but holders will receive more protection or less, depending upon whether, in acquiring the instrument, the holder "has knowingly acted to the detriment of the debtor".

4. Under the Geneva system, a "holder" receives greater protection in cutting off defences of prior parties than does the "holder in due course". Also, under the Geneva system the holder who "has knowingly acted to the detriment of the debtor" receives significantly greater protection in cutting off defences of prior parties than does the Common Law "holder" who is not a holder in due course.

5. The Working Group decided very early not to adopt the Common Law concept of "holder in due course". But it did need to distinguish between those holders who would receive more and those who would receive less protection. Ex-UNCITRAL Secretary Professor John Honnold suggested the term "protected holder" for the person who receives more protection. Unlike the "holder in due course", who must be a good faith purchaser for value without notice, the "protected holder" is basically defined as a purchaser without knowledge of a claim or defence upon the instrument at the time of purchase. In contrast to the Common Law rule, neither good faith nor value is a requisite.

6. In addition, the protected holder is free of all defences against remote parties except for incapacity, fraud in the factum, forgery, alteration, non-presentment and the statute of limitations. This list of defences available against a protected holder is longer than the list of defences available against a holder under the Geneva system, but is much shorter than the list of "real defences" available against a "holder in due course" in all Common Law systems.

7. Finally, the Common Law holder who is not a "holder in due course" is subject to all claims and contract defences. Under the Geneva system, even a holder who "has knowingly acted to the detriment of the debtor"^a is subject only to those claims and defences of which he had knowledge. The 1982 draft of the Convention made the holder who was not a protected holder, i.e., a holder who took with knowledge of a defect or defence, subject to all claims and contract defences. This has been subject to intense redrafting, however, and the final draft of the Convention makes this non-protected holder subject primarily only to (1) defences raised by his immediate transferor, (2) defences he knew about when he took the instrument, (3) the defence of fraud if he used fraud to obtain the instrument, and (4) defences available against a "protected holder".^b This non-protected holder therefore has greater protection than is available to the Common Law holder and the substance of this provision has shifted toward the Geneva system concepts.

B. Forged endorsements

8. Under the Geneva system, a signing of the payee's name by a person who is not the payee is an effective endorsement,

^aThere are significant differences between Geneva Convention signatories as to what this language means. See, e.g., Greene, "Personal Defences Under the Geneva Uniform Law of Bills of Exchange and Promissory Notes: A Comparison," 46 *Marquette Law Review* 281 (1963).

^bA/42/17, annex 1 (hereafter referred to as the Convention), article 32.

and subsequent transferees are holders—entitled to payment and cutting off of defences. Under Common Law systems a signature by anyone who is not the payee (or an authorized agent) is *not* effective, and no subsequent transferee can be a holder—or be entitled to receive payment.

9. The 1982 draft of the Convention adopted a "grand compromise". First, it adopted the Civil Law concept that an "endorsement" in the name of the payee (or special endorsee) by a person who was not the payee (or endorser) would be effective to pass rights in the instrument to subsequent parties, including the right to payment. In addition, representatives of major legal systems agreed that the person whose signature had been forged had a cause of action against the forger, and therefore the principle was incorporated into the draft Convention. In addition, the 1982 draft provided that the person whose signature was forged had a cause of action against the person who took the instrument from the forger, i.e., the first transferee who accepted the forgery as valid. This incorporated part of the relevant Common Law concept that every transferee should "know your endorser", without also adopting the remainder of the Common Law concept which imposes liability on every endorser for *all* prior signatures. This compromise may be preferable to any present domestic law.

10. The 1982 draft side-stepped several issues, however, and relegated the liability of the drawee and collecting banks to local law. Further discussion showed that these concepts would not work, and in fact might make all of the forged endorsement provisions unworkable. The final draft makes drawees and collecting banks liable only if they took the instrument directly from the forger. Even then, a drawee or collecting bank is not liable unless either it knew of the forgery before it paid the forger or received reimbursement, or it failed to discover the forgery.^c Again, the substance of the post-1982 changes tends toward the Geneva system because the drawee and collecting banks are now less likely to incur liability.

C. The "Guarantor" and the "Aval"

11. An offshoot of the difference concerning forged signatures is the difference between the risks taken by a guarantor under the different legal systems. A Common Law "guarantor" undertakes the risks related to the creditworthiness of his principal, but is not necessarily deprived of any defences concerning the authority of his principal or the authenticity of his signature. In other words, the Common Law "guarantor" is entitled to the actual signature of his principal or of an authorized agent. Under the Geneva system, the maker of an "aval" undertakes not only creditworthiness risks, but also risks related to authority to sign and the authenticity of the principal's signature, even if he signs the *aval* before the principal signs. At the twenty-first session of the Commission, an ambiguity was discovered in the article on "guarantors" which necessitated a further compromise between the Common Law and the Geneva systems. Everyone thought that the convention language referred to the type of "guarantor" or "aval" which arose under his domestic law. A study group of Canada, France, the Federal Republic of Germany, Italy, the United Kingdom and the United States was appointed to redraft the provision. That group had three basic choices: (1) adopt only one system's liability standard making the Convention unworkable in the other system; (2) create a new and unfamiliar hybrid resulting in disadvantages from the perspective of both systems; or (3) preserve both the "guarantor" and the "aval", letting the parties choose which

^cConvention, articles 26 and 27.

type of liability they desire according to commercial needs, customs and practice. The Group chose the last option and, after a thorough discussion, UNCITRAL agreed.

12. Under the compromise in articles 47 and 48, the parties may use either the Geneva system "*aval*", guaranteeing the principal's creditworthiness, authority and authenticity of signature, or the Common Law "guarantor" guaranteeing only the principal's creditworthiness. Either type can be chosen by indicating the words "*aval*" or "guarantor". When those words are used on the instrument the rules can be expressed quite simply. However, the rules applicable to the party who signs without using those or similar words are quite complex and cannot be stated simply.

YUGOSLAVIA

[Original: English]

1. Yugoslavia considers that the current international banking practice deviates in many respects from the two existing legal systems concerning bills of exchange (the Geneva and the Anglo-American systems) and it therefore welcomes the efforts of UNCITRAL to have this practice reflected in a new international convention. This is in the interest of all States, particularly the developing ones, since the UNCITRAL Convention could help bring about new regulations concerning bills of exchange or introduce novelties into the existing ones to make them better suited to the needs of the contemporary international business transactions.

2. The UNCITRAL draft Convention took over some solutions from the Anglo-American system and others from the Geneva system; however, it also includes a number of original solutions that are the result of the work of experts over a number of years and of the exchange of views effected within the working group and at plenary sessions of UNCITRAL, including also consultations with numerous international organizations.

3. The draft Convention adopted by UNCITRAL at its twentieth session includes some new solutions significantly improving the previous text of the draft Convention. It is felt, however, that the draft Convention would be more practical if reference to other articles, wherever possible, could be avoided. Repeated reference to numerous other articles of the Convention makes comprehension of the text and its simple application rather difficult.

4. The draft Convention also includes new provisions in article 89 representing a reservation the introduction of which has changed the basic approach of the Convention. Although the reservation will enable ratification of the Convention by some States (viewed from this angle it should be supported), introduction of reservations in texts of this kind is not desirable since it weakens the power of unification and may be conducive to legal insecurity.

5. It is certainly possible to give arguments in support of the previous (broader) conception, as well as those in support of the present (narrower) one, but in this case it is also necessary to harmonize the other provisions (in particular the provisions of article 1 concerning the sphere of application). The 10 ratifications stipulated in article 90 for the entering into force of the Convention should be retained if the reservation is to remain, or the number should be increased to 20, if the reservation is to be deleted.

6. Yugoslavia considers that the General Assembly was right in deciding at its forty-second session to have the draft

Convention distributed to all the States Members of the United Nations for their comments, because the new draft Convention also seems to contain certain deficiencies that should be eliminated in the text of the Convention. In addition, this would reduce the negative effects which the adoption of such an important text of the Convention without holding an international diplomatic conference could produce.

Comments on some articles of the draft Convention

Article 1

(including the reservation in article 89)

7. Article 1 of the draft Convention should be considered in relation to the reservation contained in article 89 providing for a possibility that States "at the time of signature, ratification, acceptance, approval or accession" may narrow the sphere of application of the Convention and apply it only to cases "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".

8. There are many reasons why it would have been better not to accept this reservation, most of which were voiced at the twentieth session of UNCITRAL. However, if this reservation is going to facilitate ratification of the Convention by some States, efforts should be made to retain article 89 of the Convention.

9. However, if the provisions of article 89 are to remain (in the same or modified form), it is felt that the provisions of article 1 should also be harmonized with the wording of article 89. Namely, article 2 stipulates five different places, two of which must be indicated in the bill. Hence the following questions:

What happens if neither the place where the bill is drawn nor the place of payment are indicated in the bill?

Will the places indicated next to the drawer's or the drawee's signatures be considered as the relevant places?

What happens if the place where the bill is drawn is not indicated and no place next to the drawer's signature is specified and as a result, it is not possible to establish the place where the bill is drawn on the basis of the data appearing in the bill?

What procedure is to be followed if the place of payment is not indicated in the instrument and pursuant to the provisions of article 56, it is presented for payment in a place situated in a State which is not a contracting State? Will the courts of the State that has used the reservation in relation to such an instrument apply or refuse to apply the provisions of the Convention?

Does the reservation refer to the endorser as well?

10. Some of those difficulties could be eliminated if the terms relating to the place of drawing (making) and the place of payment were defined, since various interpretations in this respect are possible. The place of drawing or of making of the instrument constitutes a particular problem, and it would be better if these terms were substituted by the term issuing of an instrument, which is legally more relevant. One of the suggestions is that the place of drawing and the place of making be defined as places where the instrument is signed. This would facilitate the interpretation of these terms which may cause difficulties, particularly when translated into languages that are not the official languages of the United Nations.

11. Assumptions concerning the place of drawing and the place of payment could perhaps be included in the Convention, as has been done in the Geneva Uniform Law on Bills of Exchange and Promissory Notes, which would help eliminate some of the mentioned difficulties.

Article 9

12. Paragraph (6) of article 9 has been modified in the new draft so as to stipulate that reference rates of interest must not be subject 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. This stipulation is not good and unilateral determination of reference rates of interest should not be allowed (except to a person who is named in the reference rate provisions) and if that is the case not only concerning the drawee and the remitter, but the person who signed the instrument as well.

Article 10

13. At the end of paragraph (1), subparagraph (a), the words "or if it contains words of similar import" should be deleted. This addition could be to the detriment of, rather than useful for, the safe circulation of the instrument. So far as the instrument payable at sight or on demand or at presentment is concerned, nothing that could be to the detriment of the preciseness of rules should be allowed because it could lead to legal insecurity. Moreover, different interpretations of the phrase "words of similar import" would weaken the uniform application of the Convention.

14. Paragraph (2) of article 10 should be deleted because it tends to create vague and inconsistent relations. For example, if the instrument is payable after 13 months or later from the date of the instrument, it is stipulated that the person endorsing such instrument after its maturity would not be liable on this instrument, since in relation to him it would be deemed as the instrument payable on demand and such instruments should be presented for payment within one year, which is impossible with the instruments payable after 13 months or later.

Article 11

15. A provision that the instrument can be drawn on a number of drawees has been left out in article 11. Since such instruments exist, it would be useful if these provisions were retained in the draft and if the relations thus created were defined more precisely.

Article 15

16. New paragraph (3) of article 15 contains a useful addition that states that "a signature alone, other than that of the drawee, is an endorsement only if placed on the back of the instrument". This provision would be even more helpful if a sentence would be added to the effect that the signature must fit in a series of endorsements. It would be important from a practical point of view if the Convention also contained provisions detailing legal consequences in case of the signature not fitting in a series of endorsements.

Articles 26 and 27

17. The solution in article 26 is the result of compromise between the Geneva system, in which the person to whom the instrument is endorsed becomes a holder of the instrument

even if some of the endorsements are forged or signed by an unauthorized person, and the rule of the common law system to the effect that a forged endorsement is no endorsement enabling the instrument to be negotiated.

18. Although it is common knowledge that this compromise solution has been reached within the working group of UNCITRAL with difficulty, it should be noted that it is not a good solution and that it will adversely affect safe and secure circulation of the instrument in business transactions. Furthermore, it can be said that this solution places the person who obtained the instrument from a forger or an unauthorized person in a more inconvenient position not only in relation to the Geneva Uniform Law on Bills of Exchange and Promissory Notes, but also to the Anglo-American system (the institute of estoppel plays an important corrective role in the latter).

19. In order to improve the provisions of these two important articles and make them better suited to the needs of international banking transactions, it is proposed that they be complemented by the provisions contained in the Anglo-American system dealing with forged and unauthorized endorsement.

Article 32

20. On the basis of the provisions of article 32, a party who signs the instrument could lodge a complaint arising from the original transaction *vis-à-vis* the holder to whom the instrument has been transferred by the protected holder. The party who signs the instrument could not do so if the holder is not a protected holder (unless he took the instrument knowing of such claims). This stipulation does not seem to be satisfactory, since it jeopardizes the secure, quick and easy circulation of the instrument, which is the basic characteristic of negotiable securities.

Article 36

21. The assumption in paragraph (2) of article 36 according to which, unless the contrary is proved, "a signature is presumed to have been placed on the instrument after the material alteration", should be re-examined since the provision, as formulated in paragraph (2) of this article, may affect the acceptability of the instrument in business transactions. The assumption that each signature has been placed on the instrument after its alteration seems exaggerated. If a bill of exchange is to exist at all, it has to have at least one signature (for example, the signature of the drawer). How can it then be assumed that all the signatures were placed after alteration of an instrument? If that is the case, an original instrument is involved, not an altered one; moreover, the original unsigned text of the instrument is not a bill of exchange at all.

22. In dealing with this question it is of great importance to ascertain whether the alteration of the instrument is visible or not. The assumption in the sense of article 36, paragraph (2), could be applicable only if the alteration of the instrument is not visible. If the alteration is visible, the costs incurred for proving it should be borne by the person who accepted it.

Article 46

23. It would be useful to divide the provisions relating to the liability of the endorser from the provisions regulating the liability of the person who transfers the instrument by mere delivery. This is due to the fact that the endorser takes over the liability on the instrument and the person who transfers it by mere delivery is not liable on the instrument, because he did not sign it. The question is posed whether the Convention should at all regulate liability which is not on the instrument.

24. The words at the beginning of paragraph (1), article 46, "unless otherwise agreed" should, so far as the endorser is concerned, be replaced by the words "unless otherwise determined in the endorsement", since the agreement apart from the instrument should not be relevant to liabilities of the signers of the instrument.

Article 48

25. The provision in paragraph (1) of article 48 stipulating that "the liability of a guarantor on the instrument is of the same nature as that of the party for whom he has become guarantor," is vague. (What does "of the same nature" imply?) It is therefore proposed that the provisions of paragraph (1) be rephrased so as to make them clearer and more precise.

Article 55

26. The new provision contained in paragraph (2), subparagraph (c) of article 55, stipulates that dishonouring of bills by non-acceptance must be proved by protest before the holder of the instrument could exercise rights against the guarantor of the drawee. However, this provision is not in compliance with the provisions of article 54, paragraph (2), in which it is spelt out that "failure to present a bill for acceptance does not discharge the guarantor of the drawee of liability on the bill". If presentment for acceptance is not obligatory, then how can protest for refusing acceptance be obligatory?

Title in front of article 68

27. Instead of the previous title of paragraph (2), which read "discharge of liabilities of the previous signers of the bills", the new formulation is "notice is dispensed with", which is not good either, especially because it is not in logical correlation with the title of the first paragraph. It is proposed that these titles be harmonized. The title of paragraph (2) could perhaps be "other ways of dispensing with liabilities of the signers of the bill", since precisely these provisions are contained in the said paragraph.

[A/43/405/Add.1]

1. The observations and proposals of Governments on the draft Convention on International Bills of Exchange and International Promissory Notes that had been received by 3 June 1988 are contained in the report of the Secretary-General (A/43/405).

2. The present addendum contains such observations and proposals received between 3 June and 11 July 1988.

Observations and proposals received from Governments

AUSTRALIA

[Original: English]

1. Australia remains of the view that the draft Convention on International Bills of Exchange and International Promissory Notes represents a reasonable and workable compromise between quite different legal systems—the civil and common law.

2. The draft Convention, which has been deliberated upon over a 15-year period by international experts, is the product of considerable refinement and careful balancing. Accordingly, care should be taken in making any changes to the draft at this late stage (and in haste) as they could well jeopardize the fine tuning which has been achieved.

3. In this regard, it is noted that while some concepts in the draft Convention are somewhat alien to Australian commercial and legal practice in this area, it is not considered that they would provide major obstacles to the acceptance by the Australian legal and commercial community of the underlying scheme of the draft Convention. As the draft Convention will merely facilitate *optional* use of a "new" commercial negotiable instrument, and will not apply unless the parties to it agree, problems of acceptance of the instrument should be avoided.

4. Australia strongly supports adoption of the draft Convention by the General Assembly at its forty-third session without substantive change to its text.

CENTRAL AFRICAN REPUBLIC

[Original: French]

Being among the countries that voted in favour of General Assembly resolution 42/153, the Central African Republic plans to communicate its observations and proposals concerning the draft Convention at the latest during the meeting of the working group of the Sixth Committee provided for in paragraph 3 of the resolution.

EGYPT

[Original: French]

Introduction

1. Since the beginning of the work that has led to the draft under consideration, Egypt has been of the view that the role of the United Nations Commission on International Trade Law (UNCITRAL) in the field of negotiable instruments should be directed solely towards revising the 1930 Geneva Conventions in order to make them more acceptable to all legal systems and more in conformity with the present requirements of international trade. Although these Conventions were not intended exclusively for international transactions, they have been introduced into national legislation not only in the Contracting States but also in a large number of other States which, without ratifying the Conventions, have adopted their provisions, in such a manner that the Conventions have led to considerable unification, *de jure* and *de facto*, in the field of negotiable instruments law, thus creating simple and convenient banking practices in a large part of the world.

2. This viewpoint that Egypt (and many other States) adopted at the commencement of the work did not win acceptance. On several occasions, UNCITRAL reiterated its decision to create a new instrument of an international character that could be used on an optional basis, without concerning itself either with the disturbances that the creation of such an instrument might cause in international transactions or with the difficulties that might arise, within Contracting States, from a duality of legal regulations concerning negotiable instruments. Egypt had no choice but to accept that decision. It continued to co-operate in the preparation of the draft with the zeal befitting an undertaking of such importance.

3. It is true that, over the many years during which the draft has been under preparation, several amendments have been introduced that have made it less unacceptable, but it still displays grave defects which, if it remains as it stands, would cause many countries to shy away from it. In the hope that the working group that is to meet within the framework of the Sixth Committee next September will decide to make a last effort to correct at least the most striking of these defects, Egypt is submitting for the group's consideration the following observations which, in the interests of simplification, are directed only to bills of exchange.

I. The form

4. The success of a convention aiming to unify negotiable instruments law depends to a large extent on the *rapprochement* that it succeeds in bringing about between the two legal systems concerned, namely the so-called "continental" system and the Anglo-American system. The reason why the Geneva Conventions have so far not been completely successful is that these Conventions were not able to bring about a viable compromise between the two systems. It is said that they lean rather towards conceptions prevailing in the so-called "civil law" countries at the expense of those of the English-speaking countries. It was precisely to correct this supposed imbalance that UNCITRAL prepared its draft. However, instead of establishing the necessary balance, it fell into the same error, but in an opposite direction. It allowed itself to be influenced by Anglo-American conceptions that are foreign to many other countries. Despite the sincere attempts at reconciliation made by many members of the Commission, including the United Kingdom and the United States of America, the draft remained unbalanced, not only in substance but also in form. To give a single example relating to the question of form, we would mention the expression "reasonable", which is in common use in English law as a qualification of diligence or conduct. This term is frequently employed in the draft whereas in other countries it is considered vague and too flexible for something that needs to be exactly regulated, as negotiable instruments law does.

5. In addition to this, there is a complexity resulting particularly from the frequent cross-references that make the text difficult to read. We shall particularly mention article 48, which alone contains 14 cross-references. This method of drafting texts is inappropriate from the point of view of banking circles, where clear, direct texts are preferred to texts drawn up in a more scholarly but abstruse manner and that are hard to understand at first reading.

II. The international character of the instrument

6. Whether a bill of exchange is international in character depends, according to the first two articles of the draft Convention, on its satisfying two conditions: a double mention on the instrument of the formula "International bill of exchange, Convention of . . ." (article 1), and the condition that it specifies at least two of the five places listed in paragraph (1) of article 2 and indicates that any two of these places are situated in different States (article 2 (1)). Of these two conditions, the first seems to us lacking in seriousness and the second ineffective.

7. Thus the insertion of the formula mentioned in article 1 depends solely on the will of the drawer who, by inserting this formula, gives the instrument the international character needed for the application of the Convention. Thus the drawer, by his own decision and without being subject to any

control, has a discretionary right to decide what legal rules will be applicable to the instrument, a decision that may conceal fraudulent intentions, as, for example, the intention to evade the national law normally applicable to the instrument, with all the legal and fiscal consequences of such evasion. This situation is all the more unfortunate as the second condition offers no serious obstacle to such fraud.

8. As a result of the option offered by the second condition, it may happen that the place where the bill is drawn and the place where it is to be paid are situated in one and the same State and that the bill is nevertheless international because two other places (for example, those indicated next to the name of the drawee and next to the name of the payee) are on the territories of two different States. This result seems to us unacceptable, because the drawing of the bill and its payment are the two main events in the life of a bill of exchange, and the absence of an indication of the place of drawing and the place of payment would constitute an obstacle to the negotiability of the instrument. Egypt proposes not only that their specification should be obligatory but also that the criterion of internationality should be linked to them. Egypt also considers that an international bill of exchange should be one that specifies a place of drawing and a place of payment situated in different States. This designation must also be correct. If it is false, the instrument must remain outside the scope of application of the Convention. It is surprising that this logical and straight-forward conclusion should be contradicted by article 2, paragraph 3, which says that "Proof that the statements referred to in paragraph (1) or (2) of this article are incorrect does not affect the application of this Convention". For a dishonest drawer, this provision would be an invitation to fraud. It should therefore be deleted.

9. Connected with the international character of the instrument is another problem, that of the limits of the sphere of application of the Convention. We have seen that article 2, paragraph 1, requires, for an instrument to be international, only that two of the places specified in it should be situated in "different" States. It does not require that these two States should be "Contracting" States. Lest the silence of the text should be interpreted in a manner contrary to its wishes, the Convention makes a point of specifically stating in article 4 that it will apply without regard to "whether the places indicated on an international bill of exchange . . . are situated in Contracting States". Thus it is enough for the drawer to decide, by his will alone, to mention the formula in article 1 and to specify, even contrary to the facts, two places situated in different States, for the system of the Convention to come into operation and for the national law normally applicable to be supplanted, even if this law is the law of a State that has neither signed nor ratified the Convention.

10. This is extraterritoriality in its most exaggerated form. The scope of application of the Convention is enlarged to an unacceptable extent. This situation must be corrected by a requirement that the States in which the two places specified in the instrument are situated should be not only "different" but also "Contracting States", with the necessary corollary that article 4 would be deleted.

11. With regard to the reservation provided for in article 89, it would be unnecessary if our two proposals set forth above¹ were accepted. If they are not, the possibility of a reservation should be maintained in order to permit Contracting States, if they consider it appropriate, to limit the scope of application of the Convention.

¹Obligatory mention of the place of drawing and the place of payment and the requirement that these two places should be situated in Contracting States.

III. *The concepts of a holder and a protected holder*

12. Since the beginning of the work on the draft Convention, these notions have been the subject of lively discussions. The new conception, unknown or strange in States accustomed to the system of the Geneva Conventions, where the distinction is between holders in good faith and those in bad faith, was not favourably received by these countries. Their qualms were increased by the fact that the conception was poorly presented (the ambiguity of the definitions, the intermingling of cross-references, the complexity of the rules concerning defences that may be set up and the inadequate protection for the so-called protected holder).

13. Although praiseworthy efforts were made in UNCITRAL to remedy this situation, the problem remains in all its gravity. It requires further consideration.

IV. *The role of the drawer*

14. Another defect to which Egypt drew attention already in the first version of the draft Convention concerns the role of the drawer. Although he was the creator of the instrument and the first in the list of parties liable, article 34, paragraph 2, (which has become article 39, paragraph 2, in the new version) treated him as a guarantor and not as a principal debtor, even before the acceptance of the instrument by the drawee. The draft derived several consequences from this, the most serious being that the drawer was allowed to exclude or limit his liability by a stipulation in the bill, without any distinction being established between the guarantee of acceptance and that of payment. This situation, hardly to be recommended, was later modified by an amendment allowing the drawer to free himself of his liability to pay only when the instrument bore the signature of another liable party (present article 39, paragraph 2). This solution, although representing a notable improvement over the previous situation, remains insufficient, because logically the drawer, as creator of the instrument, should remain the primary party liable under it until the drawee has accepted it. Only the signature of the drawee, and not that of another liable party, should permit the drawer to act as a guarantor having the right to free himself of his liability, because it is the drawee who holds the *provision*, and it is the *provision*, whether one likes it or not, that constitutes the most effective guarantee of payment of the instrument in the eyes of the holder. Let us note in passing that the draft text concerning another similar situation, that of the maker of a promissory note, denies this debtor the possibility of freeing himself of the guarantee of payment. The distinction made by the draft between these two situations seems to Egypt unjustifiable.

V. *The guarantee*

15. At the twentieth session of UNCITRAL, at the last meeting devoted to the consideration of the draft Convention, a group of representatives, including those of the Federal Republic of Germany and the United Kingdom, submitted a proposed new version of article 48 concerning guarantees. It is a long text covering over a page and attempting to marry two systems for the guaranteeing of negotiable instruments, that of the Geneva Conventions (*aval*) and the Anglo-American system ("guarantee"). In spite of the extreme complexity of the text and the importance of the subject, the Commission decided to adopt the text at the meeting on which it was submitted.

16. The text deals with the liability of the giver of a guarantee and the defences that he may, and may not, set up

against a holder and against a protected holder. The applicability of this dual system depends on the formula used: the formula "guaranteed" or "payment guaranteed", on the one hand, and the formula "*aval*" or "good as *aval*", on the other. The list of defences that may be set up by the giver of the guarantee against a protected holder differs depending on the formula employed. The list is long, thus giving the holder little protection, if the first formula is used; it is short, and therefore strict, when the second formula is employed.

17. When the guarantee is given by a signature alone, everything will depend on the nature of the giver of the guarantee; if the giver of the guarantee is a bank or a "financial institution", an *aval* is given and a heavy responsibility assumed *vis-à-vis* the holder. If, on the other hand, the giver of the guarantee is not a bank or a "financial institution", he is a mere "guarantor" and has the benefit of the longer list of defences that may be set up against the holder.

18. Would those engaged in transactions with negotiable instruments be able to cope with such complexities? The Government of Egypt doubts it.

19. To sum up, it is far from being Egypt's intention to oppose the draft Convention, the preparation of which has required several years of serious work. It is only with a desire to ensure the success of the draft Convention that Egypt has sought to draw attention to what it considers obstacles that might hinder its adoption by the largest possible number of countries.

GERMAN DEMOCRATIC REPUBLIC

[Original: English]

1. The German Democratic Republic endorses the result achieved in drafting a Convention on International Bills of Exchange and International Promissory Notes.

2. Years of work on this project have ensured an all-embracing, intensive and broad discussion of all issues related to the draft Convention. The completed draft Convention incorporates all the results obtained in the deliberations and constitutes a consistent new régime covering the relations under international bills of exchange and international promissory notes that require regulation.

3. The German Democratic Republic is in favour of finalizing the draft Convention and of opening it for signature as at 1 January 1989. The German Democratic Republic does not consider it opportune to have the discussion on the substance of the Convention reopened, since the experience gained in the course of drafting the Convention shows that renewed discussion of provisions already agreed upon would not produce substantive improvements.

4. The German Democratic Republic holds the view that the present draft Convention is fully based on the principles of co-operation among States under international law; it is compatible with the national law of the German Democratic Republic.

5. As the present draft of the Convention constitutes a compromise, it includes for regulation a few problems that are little known in the practice of the German Democratic Republic and envisages what is to a certain extent an unusual method of regulation in terms of the practice of the German Democratic Republic. In the interest of co-operation among States in the field of international negotiable instruments, the

German Democratic Republic does, however, not consider it appropriate to have continued discussions about substantive provisions of the Convention that have been agreed upon by way of compromise. Discussions about matters such as the distinction between the holder and the protected holder or the distinction between "aval" and guarantee would once again put up for discussion substantive issues of the draft Convention, and might even question the Convention entirely.

6. It is a merit of the régime provided for in the Convention that it pays particular attention to the developments that have taken place in international dealings in the past few decades, and that it offers up-to-date and practice-related solutions to matters related to bills of exchange and promissory notes. The régime can facilitate international trading and financial transactions, and will promote greater uniformity in applying the law on international bills of exchange and international promissory notes, all the more so as this regulation of the Convention focuses on factual matters of an international relevance.

7. The German Democratic Republic regards the regulation under the draft Convention on International Bills of Exchange and International Promissory Notes as a specific regulation applicable to international dealings, which will be fully justified alongside the respective national laws. The draft Convention gives all parties to international trade and financial dealings the possibility to decide by themselves which legal régime the respective bill or note shall be subject to. Thus, the Convention follows the established principle on which the United Nations Convention on Contracts for the International Sale of Goods is based too. The German Democratic Republic believes that the existing Geneva Conventions in the fields of bills of exchange and promissory notes are no obstacle to introducing this new regulation concerning international negotiable instruments.

8. For these reasons, the German Democratic Republic holds that the draft Convention should be adopted without further discussion, and the Convention opened for signature.

MEXICO

[Original: Spanish]

1. Over the course of the Commission's discussions, the Working Group on International Payments devoted 14 sessions, and the Commission itself three plenary sessions, to the preparation of this draft. On at least two occasions the countries were invited to submit their comments (see A/CN.9/248 and A/CN.9/WG.IV/WP.32). Mexico was represented at all these meetings, at which its delegation played an active role, taking every opportunity to put forward the views of the Mexican Government regarding the draft. In addition, when invited to do so, the Mexican delegation presented its comments in writing, and these may also be found in the aforementioned documents.

2. For these reasons, the Mexican Government believes that its views on the subject have been appropriately expressed. Mexico regards the draft as satisfactory since it meets the basic requirements of the international traffic in bills of exchange and promissory notes, taking into account the juridical solutions and commercial practices encountered in the various legal systems.

3. It is particularly important to note that the document that has been formulated represents the first text of a legal system dealing with negotiable instruments to have found a consensus

on the part both of the countries of the romano-germanic law and civil-law family, and also those of the common-law tradition. This fact testifies to the effectiveness of the participating countries' efforts to seek and find compromise formulae.

4. In the light of these facts, the time consumed and the economic resources expended by the States and international organizations that took part in the drafting of this Convention, it would appear pointless to prolong the effort already made and incur still further expense for the purpose of achieving a few betterments and minor improvements. The Mexican Government believes that it would be more useful to allow the draft to pursue its fate and that whatever future improvements are made should result from the experience gained in its application, in line with the opinion expressed by Professor Jorge Barrera Graf during the Commission's nineteenth session.

5. For these reasons, the Mexican Government prefers to refrain from submitting new comments and takes the view that it would be useful if a decision were adopted to invite the States to sign the International Convention, as suggested by UNCITRAL at its past session.

6. Notwithstanding these observations, the Government of Mexico wishes to note that it is a party to the Panama Convention on Conflict of Laws Concerning Bills of Exchange, Promissory Notes and Invoices, and that it therefore considers that the question of the compatibility between that Convention and the UNCITRAL Convention has already been contemplated. Accordingly, the recommendation contained in this note does not imply an undertaking by the Mexican Government to sign the Convention and to accede to it at a later date.

7. This being the case, the Mexican Government should like to express the view that the next meeting on this subject ought seriously to explore the question as to whether this Convention is compatible with the Geneva and Panama Conventions on the conflict of laws.

OMAN

[Original: Arabic]

1. Pursuant to General Assembly resolution 42/153, the competent authorities of the Sultanate of Oman compared the text of the draft Convention with that of the Special Section (Banknotes) of the Omani Banking Law of 1974. Certain differences between them were observed. Thus article 9, paragraph 1, of the draft Convention differs from article 5.10.2 (c) of the Omani Law in that, in the case of a discrepancy between the sum expressed in words and the sum expressed in figures, the draft Convention provides that the sum payable by the instrument is the sum expressed in words, while under article 5.10.2 of the Omani Banking Law an instrument is to be made for a specified sum of money. Similarly, article 56 (f) of the draft Convention differs from article 5.15.4 (1.6) of the Omani Law as regards the time-limit for presentment; the Omani Banking Law provides that an instrument is presented for acceptance and is transferred within a period not exceeding six months, while the draft Convention provides that an instrument is to be presented within one year of its date.

2. The Sultanate of Oman also considers that the word "visa", which appears in article 10, paragraph 7, of the draft Convention, has not been given a clear definition and that it would be advisable to define it.

VENEZUELA

[Original: Spanish]

1. Under article 1, paragraphs (1) and (2), for the Convention to apply, an international bill of exchange or international promissory note must fulfil both the conditions that in the heading and in the text it should contain the words "International Bill of Exchange (Convention of . . .)" or "International Promissory Note (Convention of . . .)", respectively. The Government of Venezuela considers that it should suffice, for the Convention to apply, that an international bill of exchange or an international promissory note should contain the words quoted either in its heading or in its text, so that the paragraphs referred to could be drafted as follows:

"(1) This Convention applies to an international bill of exchange when it contains in its heading or in its text the words 'International Bill of Exchange (Convention of . . .)'.

"(2) This Convention applies to an international promissory note when it contains in its heading or in its text the words 'International Promissory Note (Convention of . . .)'."

2. In article 4 it is stated that the 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 2 are situated in Contracting States, and these places are: the place where the bill is drawn; the place indicated next to the signature of the drawer; the place indicated next to the name of the drawee; the place where the note is made; the place indicated next to the signature of the maker; and, in both cases, the place indicated next to the name of the payee and the place of payment. The Government of Venezuela considers that the Convention should apply when the places indicated are situated in Contracting States, and so article 4 would have to be reworded as follows:

"This Convention applies when 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."

This is a more restrictive solution than the one contained in the draft Convention, but the Government of Venezuela considers that it affords greater legal security. Also related to this matter is the provision contained in article 89 of the draft Convention, which allows a State to enter a reservation in the sense of declaring 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. This provision would be deleted if the foregoing proposal were accepted.

3. Since article 7 contains a tautological definition, in that it states that "a person is considered to have knowledge of a fact if he has actual knowledge of that fact", the Government of Venezuela considers that this article could be redrafted or deleted if it is not strictly necessary.

4. In article 56 (a), the expression "reasonable hour" is used to determine the time at which the holder must present the instrument to the drawee, the acceptor or the maker, and interpretation of what is reasonable may give rise to problems, so that it might be better to replace this term with a more appropriate one.

5. Lastly, the Government of Venezuela wishes to point out that the above comments express only drafting preferences

regarding a draft which will certainly help to develop the rules applicable to international bills of exchange and international promissory notes.

GENERAL COMMENTS
OF THE CENTRAL AFRICAN REPUBLIC, CHAD,
CHILE, COLOMBIA, COTE D'IVOIRE, FRANCE,
GUINEA, MAURITANIA, SENEGAL, SPAIN
AND TOGO

[Original: French and Spanish]

1. The above-mentioned States consider that the draft Convention has many flaws and that it is essential to limit its field of application strictly to States which, in ratifying it, have agreed to assume the consequences.

2. The text of the draft Convention has the defect of dearth of guiding principles. More often than not it confines itself to laying down solutions for specific cases with a view to dealing with difficulties that in practice only arise exceptionally.

3. The plan of the draft Convention, which comprises many references (the definition of the protected bearer is learned only through reading of 14 articles, each of which provides only a partial element) and the obscure drafting of the text make it excessively complicated for a legal expert—and almost impossible for a bank clerk—to grasp the rules.

4. Not all holders of international bills of exchange or international promissory notes have the same status. The legal arrangements for a protected holder and a non-protected holder are defined simultaneously and in an intertwined way, and a clear distinction does not emerge. A protected holder is far from being protected under all circumstances; a non-protected holder sometimes enjoys some protections. Consequently, the draft convention jeopardizes the security of exchange relations as a whole.

5. As regards *aval* or guarantees, the draft has failed in its effort to make a synthesis between the Geneva and common law systems. It has confined itself to offering the guarantor an option between the two systems that is not based on any practical consideration. Depending on whether the guarantor is a bank (or some other financial institution) or an individual who does not have such status, a signature alone and the defences that can be set up against the protected holder are not of the same scope.

6. The draft Convention fails to recognize the formalism inherent in exchange law. It compels the person to whom an instrument is presented to give consideration to his possible involvement in the relations of the signer and successive holders. This person must undertake investigations in various areas: forgery (article 26), the powers of the endorser (article 27, paragraph 1), acceptance (article 41, paragraph 1). The accuracy of these checks is complicated by the interpretation of very fuzzy concepts (reasonable care, means appropriate in the circumstances).

7. All these defects will give rise to a proliferation of disputes and, consequently, a growth in the role of the legal departments of banks.

8. In some areas, for example where it is necessary to evaluate disputes relating to the basic relation, banks will have to set up entirely new legal departments that will no longer be concerned with banking law, but will have to apply international trade law, the rules of conflict of laws and the trade law of different States.

9. After 20 years of detailed work in groups of different sizes, it is not reasonable to hope to remedy the disadvantages that have been outlined. Approval of the text by a number of States reveals a deep division in legal philosophy on the matter.

10. This being the case, the States that do not wish to become parties to the future Convention, which appear to be numerous, have a right to demand that the new text should not prejudice the rules of law that have long been in force in their countries.

11. At present, 19 countries are parties to the Geneva Conventions of 1930, 10 countries are parties to the Inter-American Convention on Conflict of Laws Concerning Bills of Exchange, Promissory Notes, and Invoices, signed at Panama in 1975, and 20 States, without having ratified the Geneva Conventions, have modelled their national laws on them.

12. Limitation of the field of application of the Convention is essential, since application of the future text depends, as things now stand, on the sole volition of the drawer, who need only enter in the text of the bill of exchange the words "International bill of exchange (Convention of . . .)" for the Convention to be applicable, when two of the five places mentioned in article 2 (place where the bill is drawn, place indicated next to the signature of the drawers, place indicated next to the name of the drawees, place indicated next to the name of the payee, place of payment) are situated in different States, even if these are not Contracting States (article 4).

13. We might recall here that the places thus indicated may be incorrect (article 2, paragraph 3). Even if this provision was deleted, the tentacular scope of the Convention would remain unacceptable.

14. It is not acceptable that a sole, unilateral and discretionary decision by the drawer of a bill of exchange or the maker of a promissory note should be able to bring into play application of the eight chapters of the Convention and remove it from the purview of the law that would normally be applicable under the rules for determining which court is competent.

15. Article 4, paragraph 2, of the Geneva Convention provides that the effects of the signatures of the other parties liable (other than the acceptor of a bill of exchange or the maker of a promissory note) are determined by the law of the country in which is situated the place where the signatures were affixed. Article 3 of the Panama Convention reads: "All obligations arising from a bill of exchange shall be governed by the law of the place where they are contracted".

16. In no case may the choice of the law applicable to an exchange transaction involving at least two (promissory notes) or three (bills of exchange) persons result from the volition of only one of them.

17. In order to protect the States that do not wish to become Parties to the new system, articles 2 and 4 must be amended as follows:

(a) For letters of exchange, it must be provided that the Convention is applicable only on the condition that the actual place where the letter is drawn and the actual place of payment are situated in different Contracting States;

(b) For promissory notes, it must be provided that the Convention is applicable only on the condition that the actual place where the note is made and the place of payment are situated in different Contracting States.

[A/43/405/Add.2]

1. The observations and proposals of Governments on the draft Convention on International Bills of Exchange and International Promissory Notes that had been received by 3 June 1988 are contained in the report of the Secretary-General (A/43/405).

2. Addendum 1 to that report contains such observations and proposals received between 3 June and 11 July 1988.

3. The present addendum contains such observations and proposals received between 12 July and 12 August 1988.

Observations and proposals received from Governments

ALGERIA

[Original: French]

The draft Convention does not call for any particular observations by the Ministry of Finance or the banks to which the draft had also been sent for examination.

BAHAMAS

[Original: English]

The Bahamas has no legal objections to the provisions of the draft Convention, but would wish to make the following observations:

(a) *Article 6 (d)*: the definition of "Drawee" may need to be re-examined, for example, in the light of Article 13 (1) which contains a reference to "acceptance of the drawee";

(b) *Article 10*: clarification as to whether the term "fixed period after date", appearing in paragraph (4), would apply for the purposes of paragraph (3) in relation to a "fixed period after a stated date" as well as in relation to a "fixed period after the date of the instrument".

CAMEROON

[Original: French]

1. On the whole, the Cameroonian Government has no major objection to the text of this draft Convention, in view of the fact that the main principles of French law regarding negotiable instruments, which is applied in Cameroon, have with a few exceptions been respected. The exceptions have been made necessary by the concern of the drafters of the Convention to bring about uniformity, at the international level, of the law concerning negotiable instruments.

2. However, the Cameroonian Government considers that the current drafting of some articles might pose problems as regards implementation of the draft Convention.

Article 2, paragraph (3)

3. Proof that the statements referred to in paragraphs (1) and (2) of this article are incorrect does not affect the application of this Convention. One would have thought rather that it would affect it.

4. The place where the bill has been drawn or the note has been made must be shown on either one of the instruments (article 110 of the Commercial Code). This requirement is justified in application of the Geneva Conventions.

5. In international transactions, the law of the place of issue governs the form of the bill, time-limits for recourse and acquisition of funds (articles 3, 5 and 6 of the Convention for the Settlement of Certain Conflicts of Laws). There should therefore be no error in the place of issue.

Article 11, paragraph (1)

6. Bill drawn by two or more drawers: a bill of exchange may rather be endorsed by several persons (successive endorsers) or parties. Only one drawer may draw it. It may also bear the signature of the drawee who accepts it or of the *aval* who guarantees it. The Cameroonian Government does not think it possible that, on the day of its issue, it can be drawn by two or more drawers.

Article 25

7. Instrument which may be transferred after maturity, except by the drawee, the acceptor or the maker: in the opinion of Cameroon, this restriction should be eliminated, since article 123 of the Commercial Code does not mention it: "endorsement after maturity has the same effects as endorsement prior to it . . ." It is proper that article 123 of the Commercial Code does not provide for any restriction, since the parties of a bill of exchange are *a priori* severally liable.

Article 30

8. This article should have been placed before article 29, since it determines who a "protected holder" is; article 29 refers to the protected holder without explanation.

Article 43, paragraph (1)

9. A bill of exchange which may be accepted by the drawee before it has been signed by the drawer: the signature of the drawer is compulsory in establishment of a bill of exchange. This is justified by the fact that it is unwise for the drawee to accept a bill of exchange that has not been signed by the drawer, since his signature guarantees the authenticity of the instrument.

Article 73, paragraph (2)

10. "Payment before maturity . . . 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."

11. It should first of all be noted that the holder may not present the bill for payment before maturity. Similarly, the drawee may not pay the bill before maturity.

12. The Government of Cameroon thinks that a party who has made payment to a protected holder should be discharged by virtue of the joint responsibility that exists under exchange law: "All the parties of a bill of exchange are jointly liable to pay". By analogy, a party who has paid to a holder should be discharged of liability towards the other parties. Incidentally, article 78, paragraph (1), of the draft Convention itself is drafted along the same lines, since it states that: "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".

QATAR

[Original: English]

The Government of the State of Qatar reports that there exists no conflict between the draft Convention and the relevant provisions of the Civil Law in the light of which the draft was examined.

Note

Nicaragua endorses "General comments"
(as reproduced in document A/43/405/Add.1)

The Permanent Mission of France has informed the Secretariat of the decision of Nicaragua to associate itself with the general comments of the Central African Republic, Chad, Chile, Colombia, Côte d'Ivoire, France, Guinea, Mauritania, Senegal, Spain and Togo (see A/43/405/Add.1).

[A/43/405/Add.3]

Observations and proposals received from Governments

CUBA

[Original: Spanish]

1. In the opinion of the Government of Cuba, the text of the draft Convention on International Bills of Exchange and International Promissory Notes, submitted to the General Assembly at its forty-second session, although it does not achieve perfect balance, at least meets the basic requirements of striking an acceptable balance between the two systems of law in connection with this subject.

2. It is clear that the drafting of an international instrument the use of which is optional, as in the case of this Convention, would represent an important step in the complex process of unification of law, while permitting international trade circles to decide whether or not to use this instrument governed by uniform rules. In addition, the growing use of negotiable instruments in international trade fully justifies the efforts towards unification of the law in this subject area.

3. It should be pointed out that adoption of the draft Convention on International Bills of Exchange and International Promissory Notes may provide substantial assistance in the effort to fill possible gaps in national legislation arising from rapid changes both in laws and in usage and customs in international trade.

4. The advantages that would accrue to international trade from this Convention, in view of the possible solutions it offers to difficulties that can arise out of conflicts of laws concerning negotiable instruments, cannot be overlooked either.

5. For all the above reasons, the Cuban Government has viewed the draft Convention on International Bills of Exchange and International Promissory Notes with satisfaction and, on the whole, supports it.

C. Excerpt from the summary record of the 10th meeting on 7 October 1988 of the Sixth Committee, 43rd session of the General Assembly, on the report of the United Nations Commission on International Trade Law on the work of its twenty-first session (A/C.6/43/SR.10)

Chairman: Mr. DENG (Sudan)

[...]

Agenda item 131: Report of the United Nations Commission on International Trade Law on the work of its twenty-first session (continued) (A/43/17, A/43/405 and Add.1-3; A/C.6/43/L.2 and L.3)

35. The CHAIRMAN invited Mr. Abascal Zamora, Chairman of the Working Group on the Draft Convention on International Bills of Exchange and International Promissory Notes, to introduce the report of the Group (A/C.6/43/L.2).

36. Mr. ABASCAL ZAMORA (Mexico) said that various amendments had been proposed and the Working Group had reached an agreement satisfactory to all parties, both on the proposed amendments and on the questions left to the Sixth Committee by UNCITRAL. Moreover, agreement had been reached on the information to be included in international promissory notes and the date on which the Convention, if adopted, would be opened for signature by all States.

37. The most important amendments related to article 2, on the sphere of application of the Convention, and article 4, concerning the international character of the Convention, which had been deleted. In addition, the wording of certain other articles had been amended for technical reasons.

38. Mr. OPERTTI (Uruguay) said that his country, together with 13 other Latin American States, was a party to the Inter-American Convention on Conflict of Laws concerning Bills of Exchange, Promissory Notes and Invoices, signed at Panama in 1975 during the First Inter-American Conference on Private International Law (CIDIP I), which had been held under the auspices of the Organization of American States. The States bound by the Panama Convention were Argentina, Chile, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela.

39. The Panama Convention dealt with conflict-of-laws issues and made it possible, in particular, to determine which jurisdiction at the international level was competent to adjudicate disputes relating to the negotiation of letters of exchange or promissory notes. It also provided that the form taken by negotiable instruments was to be governed by the legislation of the State where they were drawn up and that obligations deriving from such documents should be subject to the law of the State where the said obligations were contracted. That showed unequivocally that the Panama Convention did not have the goal of unifying the international regulation of negotiable instruments. The international circulation of bills of exchange and promissory notes was especially safeguarded. For example, incapacity to contract an obligation according to a particular legislation could be removed if the capacity of the person was recognized by the legislation of the State in whose territory the document produced legal effects. The Panama Convention also provided that if obligations were rendered invalid under the legislation initially applicable, that invalidity did not affect the other obligations validly contracted in accordance with the legislation of the State where they had been entered into.

40. The draft UNCITRAL Convention, for its part, had the goal of unifying regulation applicable to the two principal negotiable instruments and sought to reconcile legal systems based on Roman law and on common law. The rules that it set forth were so-called material and direct rules; the draft contained neither rules relating to conflict of laws nor rules of private international law to which, when necessary, reference could be made in order to determine which territorial legislation was applicable. The scope of application of the draft Convention depended on the definition of the international character of bills of exchange and promissory notes. In order to establish that definition, the sponsors of the draft had relied on the specification of a number of places (place where the bill was drawn, place of payment, place where the note was signed, etc.), at least two of which should be situated in different States in order to give the document its international character. Clearly, the draft was not required to deal with conflict of laws since the international character of the negotiable instrument was sufficient to define the scope of application of the Convention. The special importance accorded to the place where the bill was drawn and the place of payment of the promissory note was, however, linked with the criteria generally used in resolving any conflict of laws.

41. The legal position of the 14 States bound by the Panama Convention with respect to the UNCITRAL draft Convention deserved consideration. From a theoretical point of view, it was perfectly conceivable that those 14 States would ratify the UNCITRAL Convention. In that case, a State having done so would be bound by the uniform UNCITRAL rule in such a manner that, even if, by virtue of the rules relating to conflict of laws set forth in the Panama Convention, the applicable legislation was precisely that of the State in question, it must apply the relevant provision of the UNCITRAL Convention, which was a uniform rule on the matter. *A fortiori*, in the case of a conflict of laws among States parties to the Panama Convention, the rules relating to conflict of laws laid down in that Convention should be applied whether or not those States had ratified the UNCITRAL Convention. It would thus be possible to establish a harmonious relationship between the two Conventions, one being a regional legal instrument on conflict of laws and the other a universal and uniform instrument.

42. The approaches proposed to the content of the draft UNCITRAL Convention itself were, on the whole, acceptable to his delegation. Some formulations were obviously the result of compromise. Article 2, paragraph (3), in particular, had raised difficulties of interpretation, bringing into play, for example, the notion of public order.

43. His delegation would have preferred an approach limited to expressly preserving the rights of the *bona fide* holder without addressing itself to such questions as the validity of the title or the unrestricted freedom of the parties as to whether or not to endow a negotiable instrument with an international character.

44. The remarks made did not in themselves present any obstacle to the future ratification of the UNCITRAL Convention. The retention of the initial formulation of article 89 (new article 88), on reservations, would, moreover, allow States, and particularly the Latin American States, to adopt the new régime with greater ease.

45. Mr. TABAKOV (Bulgaria) said that his delegation was content with the draft Convention on International Bills of Exchange and International Promissory Notes adopted by UNCITRAL at its twentieth session. The work of UNCITRAL on the unification and harmonization of the subject-matter was close to completion, which testified to the quality of the work done. His delegation hoped that it would be able to welcome the results of the application of the Convention at a later stage when it had become an important part of international trade law.

46. The draft Convention had been subjected to close and thorough scrutiny by Bulgarian specialists in international trade law. In their view, the draft convention offered a new system of legal regulation of international negotiable instruments which was little more than a compromise between the two major existing legal systems. That compromise had nevertheless made it possible to achieve the goal in view, namely agreement on the draft Convention. His delegation felt, with the majority of States, that renewed attempts at revision could only prejudice the internal logic of the system as conceived. Neither were there any grounds for seeking an absolute balance between the concessions made to each of the principal existing legal systems. That equilibrium should rather be sought in the fact that the Convention was capable of serving as a regulator of international trade relations and offered equal legal possibilities to parties in the field of acquiring negotiable instruments and the commitments that they entailed.

47. His delegation nevertheless felt that the particular characteristics of domestic legal regulation of negotiable instruments should not prevent States from becoming parties to the Convention since a new and more advanced system of norms of international law was in the course of being formulated and since its completion was one of the priority objectives of UNCITRAL. For that reason, while pursuing its study of the provisions of the draft, his delegation wished above all to highlight their advantages, particularly the opportunity that they provided to establish an effective legal system and to eliminate uncertainty and suspicion in international commercial transactions.

48. The adoption of the Convention might raise practical difficulties. In that regard, his delegation attached great importance to the commentary on the Convention, which would provide answers to the questions left pending because of the succinct nature of the formulations adopted in the Convention itself. It was to be hoped that the efforts made by UNCITRAL to harmonize international law relating to negotiable instruments would stimulate a similar effort on the part of all parties concerned and that the Convention would become an essential part of international trade law as soon as possible.

49. Mr. PISEK (Czechoslovakia) welcomed the compromise reached by the Working Group and thanked all of those who had participated in its work, particularly its Chairman. Credit for the success achieved was also due to all the delegations which had participated in the work of UNCITRAL in a spirit of accommodation.

50. Any world-wide regulation in the sphere of international bills of exchange and international promissory notes must take various legal systems into account and could not simply recapitulate the principles and provisions of any of them. Czechoslovakia, whose system was based on the Geneva Conventions, was well aware of the institutions and provisions adopted in the draft Convention. However, since international bills of exchange and international promissory

notes were used in international transactions by expert bankers and businessmen, the parties concerned would certainly be able to understand the provisions of the Convention and would soon appreciate the advantages of uniform regulation offered by it. His delegation therefore recommended approval of the draft Convention.

51. Mrs. VOLOCHINSKY (Chile) quickly reviewed the work on the draft Convention, and showing that her country had participated in every stage of its preparation.

52. Chile did not support article 2 of the draft, establishing the sphere of application of the Convention, because it allowed the signatories of credit documents to choose the country in which the Convention would be applied, whether or not that country was a party to it. The same difficulty was to be found in article 4. For Chile those provisions were incompatible with those of the 1975 Inter-American Convention of Panama, which Chile itself had ratified.

53. In the discussions in the Working Group, Chile had supported France's draft amendment, which would have replaced article 2 by the following text:

"Sphere of application:

- (i) A bill of exchange is international when the actual place where the bill is drawn and the actual place of payment which are specific, are situated in different Contracting States.
- (ii) A promissory note is international when the actual place where the note is made and the actual place of payment are situated in different Contracting States".

However, the amendment had not been adopted and neither had a proposal submitted by Spain, which Chile also supported. After several days of work in small groups, a compromise solution had been reached which, while not altogether satisfactory to Chile, at least had the virtue of making it clear that the place in which the bill was drawn or paid must be situated in a Contracting State. As for promissory notes, she observed that the place of payment must be situated in a Contracting State.

54. In a way, that provision prevented an instrument from being applied or having effect in any non-contracting State and established that at least one place must be linked to a State party to the Convention. In any case, the Working Group had retained article 89, which authorized the signatory States to make reservations on those specific points.

55. As to the problem of defining the terms "protected holder" and "guarantee", the Working Group had been unable to find a common point of view that would have made it possible to amend some of the relevant provisions. It had been observed specifically that the draft Convention would consecrate current practice in international trade, particularly the operations of banks and international financing systems.

56. Chile would study with the greatest attention the provisions of the new Convention proposed for its approval and would consult its banking circles. If it was decided, however, to approve the Convention, Chile would study the possibilities offered by the reservation referred to in article 89.

57. The other observations of Chile and other States which applied the 1930 Geneva system for bills of exchange and promissory notes had not been accepted, but Chile had not insisted because an understanding had already been reached on a decisive aspect of the convention, namely its sphere of application, by omitting the clauses of articles 2 and 4 that would have precluded any satisfactory agreement.

58. Mr. LINDHOLM (Sweden) noted slight differences between documents A/C.6/43/L.2 and L.3. They were mechanical errors that the Secretariat would certainly have corrected before the final text was published.

59. Mr. VOICU (Romania) and Mr. MARTINEZ-GONDRA (Argentina) made the same comment concerning the French and Spanish versions of the two documents.

60. The CHAIRMAN suggested that the Committee should take note of the report of the Open-Ended Working Group on the Draft Convention on International Bills of Exchange and International Promissory Notes (A/C.6/43/L.2).

61. *It was so decided.*

62. Mr. BERNAL (Mexico) introduced draft resolution A/C.6/43/L.3. He had two corrections to make in the French version of the operative part: in paragraph 2 the words "(a) à la ratification, à l'acceptation, à l'adoption" should be deleted and in paragraph 3 the words "qu'ils signent et ratifient" should be replaced by "deviennent parties à".

63. The United Nations Commission on International Trade Law had ended 15 years of work on a convention on international bills of exchange and international promissory notes, but at the fortieth session some delegations had expressed the wish to amend slightly the draft prepared by the Commission, and in resolution 42/153, the General Assembly had established a Working Group to examine the observations submitted in that connection by Member States.

64. The Group had just successfully completed the negotiations arising from the comments of the delegations concerned

and had managed to complete its work in half the time expected. It was therefore a pleasure for his delegation to submit to the Sixth Committee draft resolution A/C.6/43/L.3, which opened for signature the United Nations Convention on International Bills of Exchange and International Promissory Notes. The amended text of the initial UNCITRAL draft was the product of intensive negotiations by UNCITRAL and the Sixth Committee and it undoubtedly established the balance sought. His delegation therefore proposed that the Sixth Committee should approve the draft resolution under consideration without a vote.

65. *Draft resolution A/C.6/43/L.3 was adopted without a vote.*

66. Mrs. MANNHEIMER (Sweden) said she felt that the Working Group owed its success to the talent, skill and prudence of its Chairman. In her view the amendments to the initial text limited the usefulness of the future convention, but they had the advantage of proposing a compromise solution which all countries could support, even if some would be less inclined to sign the future instrument.

67. Mr. HERNDL (Austria) said that he was very satisfied with the completion of the work on the draft Convention and was pleased that the changes made in the initial text had made it possible to reconcile differences. In his view, the Sixth Committee could add another feather to its cap.

The meeting rose at 11.55 a.m.

[. . .]

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