

**United Nations
Commission on
International
Trade Law**

YEARBOOK

Volume XX: 1989



UNITED NATIONS
New York, 1990

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/1989

UNITED NATIONS PUBLICATION

Sales No. E.90.V.9

ISBN 92-1-133402-0

ISSN 0251-4265

05000P

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INTRODUCTION

This is the twentieth 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-second session, which was held at Vienna from 16 May to 2 June 1989, 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-second session of the Commission are reproduced. These documents include reports of the Commission's Working Groups dealing with international payments, procurement and stand-by letters of credit and guarantees, 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 draft Convention on the Liability of Operators of Transport Terminals in International Trade, summary records of selected meetings of the Commission, a bibliography of recent writings related to the Commission's work, a list of documents before the twenty-second session and a list of UNCITRAL documents referred to in the present volume and reproduced in this volume or in an earlier volume of the *Yearbook*.

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

<i>Volume</i>	<i>Years covered</i>	<i>United Nations publication, Sales No.</i>
I	1968-1970	E.71.V.1
II	1971	E.72.V.4
III	1972	E.73.V.6
III Suppl.	1972	E.73.V.9
IV	1973	E.74.V.3
V	1974	E.75.V.2
VI	1975	E.76.V.5
VII	1976	E.77.V.1
VIII	1977	E.78.V.7
IX	1978	E.80.V.8
X	1979	E.81.V.2
XI	1980	E.81.V.8
XII	1981	E.82.V.6
XIII	1982	E.84.V.5
XIV	1983	E.85.V.3
XV	1984	E.86.V.2
XVI	1985	E.87.V.4
XVII	1986	E.88.V.4
XVIII	1987	E.89.V.4
XIX	1988	E.89.V.8

THE TWENTY-SECOND SESSION (1989)

A. Report of the United Nations Commission on International Trade Law on the work of its twenty-second session (Vienna, 16 May-2 June 1989) [Original: English]^a

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^aOfficial Records of the General Assembly, Forty-fourth Session, Supplement No. 17 (A/44/17) (20 July 1989) (hereinafter referred to as "Report").

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INTRODUCTION

1. The present report of the United Nations Commission on International Trade Law covers the Commission's twenty-second session, held at Vienna from 16 May to 2 June 1989.

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.

I. ORGANIZATION OF THE SESSION

A. Opening

3. The United Nations Commission on International Trade Law (UNCITRAL) commenced its twenty-second session on 16 May 1989. The session was opened by Mr. Carl-August Fleischhauer, Under-Secretary-General for Legal Affairs.

B. Membership and attendance

4. General Assembly resolution 2205 (XXI) established the Commission with a membership of 29 States, elected by the Assembly. By resolution 3108 (XXVIII), the General Assembly increased the membership of the Commission to 36 States. The present members of the Commission, elected on 10 December 1985 and 19 October 1988, are the following States, whose terms of office expire on

the last day prior to the beginning of the annual session of the Commission in the year indicated:¹

Argentina (1992), Bulgaria (1995), Cameroon (1995), Canada (1995), Chile (1992), China (1995), Costa Rica (1995), Cuba (1992), Cyprus (1992), Czechoslovakia (1992), Denmark (1995), Egypt (1995), France (1995), Germany, Federal Republic of (1995), Hungary (1992), India (1992), Iran (Islamic Republic of) (1995), Iraq (1992), Italy (1992), Japan (1995), Kenya (1992), Lesotho (1992), Libyan Arab Jamahiriya (1992), Mexico (1995), Morocco (1995), Netherlands (1992), Nigeria (1995), Sierra Leone (1992), Singapore (1995), Spain (1992), Togo (1995), Union of Soviet Socialist Republics (1995), United Kingdom of Great Britain and Northern Ireland (1995), United States of America (1992), Uruguay (1992) and Yugoslavia (1992).

5. With the exception of Cyprus, Kenya, Togo and Uruguay, all members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Australia, Austria, Bolivia, Brazil,

¹Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 19 were elected by the Assembly at its fortieth session, on 10 December 1985 (decision 40/313), and 17 were elected by the Assembly at its forty-third session, on 19 October 1988 (decision 43/307). Pursuant to resolution 31/99 of 15 December 1976, 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, while the term of those members elected at its forty-third session will expire on the last day prior to the opening of the twenty-eighth regular annual session of the Commission, in 1995.

Byelorussian Soviet Socialist Republic, Colombia, Ecuador, Finland, Gabon, German Democratic Republic, Greece, Indonesia, Kuwait, Malta, Oman, Pakistan, Peru, Philippines, Poland, Portugal, Republic of Korea, Romania, Saudi Arabia, Sudan, Sweden, Switzerland, Thailand, Ukrainian Soviet Socialist Republic and Venezuela.

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

(a) *United Nations organs*

International Trade Centre (UNCTAD/GATT)
United Nations Conference on Trade and Development

(b) *Specialized agencies*

International Maritime Organization
International Monetary Fund

(c) *Intergovernmental organizations*

Asian-African Legal Consultative Committee
Central Commission for the Navigation of the Rhine
Commission of the European Communities
Council for Mutual Economic Assistance
Hague Conference on Private International Law
Intergovernmental Organization for International Carriage by Rail
International Institute for the Unification of Private Law

(d) *Other international organizations*

Andean Federation of Councils of Users of International Transport
European Shippers' Council
Institute of International Container Lessors
Inter-American Commercial Arbitration Commission
International Association of Ports and Harbors
International Chamber of Commerce
International Chamber of Shipping
International Maritime Committee
International Road Transport Union
International Union of Railways
Latin American Federation of Banks

C. Election of officers²

8. The Commission elected the following officers:

Chairman: Mr. Jaromir Ruzicka
(Czechoslovakia)

Vice-Chairmen: Mr. José M. Abascal (Mexico)
Mr. Rafael Illescas (Spain)
Mr. Michel Wembou-Djiena
(Cameroon)

Rapporteur: Mr. Seiichi Ochiai (Japan)

D. Agenda

9. The agenda of the session, as adopted by the Commission at its 402nd meeting, on 16 May 1989, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Draft Convention on the Liability of Operators of Transport Terminals in International Trade.
5. International payments.
6. New international economic order.
7. International contract practices.
8. Countertrade.
9. Co-ordination of work.
10. Status of conventions.
11. Training and assistance.
12. General Assembly resolutions on the work of the Commission.
13. Other business.
14. Date and place of future meetings.
15. Adoption of the report of the Commission.

E. Adoption of the report

10. At its 426th meeting, on 2 June 1989, the Commission adopted the present report by consensus.

II. DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE

A. Introduction

11. The Commission, at its sixteenth session, in 1983, decided to include the topic of liability of operators of transport terminals in its programme of work³ and, at its seventeenth session, in 1984, assigned to its Working Group on International Contract Practices the task of preparing uniform legal rules on that topic.⁴

12. The Working Group performed that task at its eighth, ninth, tenth and eleventh sessions (A/CN.9/260, A/CN.9/275, A/CN.9/287 and A/CN.9/298). It completed its work by adopting at the close of its eleventh session in January 1988 the text of the draft Convention on the

²The elections took place at the 402nd and 411th meetings, on 16 May and 22 May 1989. 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. 1: 1968-1970 (United Nations publication, Sales No. E.71.V.1), part two, I, A, para. 14).

³*Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 17* (A/38.17), para. 115.

⁴*Ibid.*, Thirty-ninth Session, Supplement No. 17 (A/39.17), para. 113.

Liability of Operators of Transport Terminals in International Trade (A/CN.9/298, annex I).

13. The Commission, at its twenty-first session in 1988, requested the Secretary-General to transmit the draft Convention to all States and interested international organizations for comments, and requested the secretariat to prepare for the twenty-second session of the Commission a compilation of comments received. The Commission also requested the Secretary-General to prepare for the twenty-second session a draft of final clauses for the draft Convention.³

14. At its current session, the Commission had before it the text of the draft Convention (A/CN.9/298, annex I), a report of the Secretary-General containing a compilation of the comments by Governments and international organizations on the draft Convention (A/CN.9/319 and Add.1-5), and a report of the Secretary-General containing draft final clauses for the draft Convention (A/CN.9/321).

15. The Commission commenced its deliberations by engaging in a general discussion on the draft Convention as a whole. It then considered the question of whether the uniform rules on the liability of operators of transport terminals should be adopted in the form of a convention or a model law. Thereafter, it engaged in a review of the title and provisions of the draft Convention, taking into account the comments that had been submitted by Governments and international organizations, and considered the draft final clauses prepared by the secretariat.

16. The Commission established a drafting group and requested it to incorporate into the text of the draft Convention the decisions taken by the Commission and to review the draft articles in order to ensure linguistic consistency within each language version and correspondence among the different language versions.

17. The draft articles as modified and submitted by the drafting group were then reviewed by the Commission (see paras. 193-224 below). Upon completion of that review, the Commission adopted the decision set out in paragraph 225, by which it submitted the draft Convention to the General Assembly with a recommendation that it should convene an international conference of plenipotentiaries to conclude a Convention on the Liability of Operators of Transport Terminals in International Trade. The text of the draft Convention as submitted to the General Assembly is found in annex I to the present report.

B. General discussion on the draft Convention

18. The view was widely held that the preparation of uniform rules on the liability of operators of transport terminals was desirable in order to achieve uniformity of law in this area and to fill the gaps left by international transport conventions covering the individual modes of transport. The draft Convention was said to be generally

acceptable and to constitute a solid basis for discussion at the current session, at which the text should be finalized.

19. It was stated that the rules should be formulated with a view to encouraging the broadest possible acceptance by States. Although the rules would not be linked to any particular transport convention, they should be compatible with the legal régimes under the various conventions.

C. Form of uniform rules

20. A view was expressed that the uniform rules should be adopted in the form of a model law rather than in the form of an international convention. In support of that view it was said that the operations performed at terminals were subject to rapid changes as technologies developed and that States could more easily adapt their legislation to those changes on the basis of a model law than on the basis of an international convention, which would be cumbersome to amend. Furthermore, it was stated that terminal operators of widely varying degrees of technical sophistication performed differing types of services with respect to various types of goods and that all of those operators, services and goods should not necessarily be subject to the same mandatory legal régime. Rather than adopting the rules as a Convention at that time, it was said to be desirable to adopt them first in the form of a model law to see whether they functioned satisfactorily. According to another view, a convention on that subject was not necessary because the subject was a matter of commercial contracts between the parties. The content of those contracts was said to be an important element in competition among terminals.

21. The most widely held view, however, was that the uniform rules should be adopted in the form of a convention. A convention was said to be more conducive to the achievement of uniformity of law than was a model law. It was considered that the adoption of a convention would meet the needs of those States which favoured an international commitment as to the legal rules governing the liability of terminal operators. States that did not wish to undertake such a commitment could nevertheless use the text of the convention as a model in drafting their legislation. Furthermore, since most of the liability régimes governing carriage were cast in the form of conventions, it was most appropriate to fill the gaps left by those instruments by a convention. It was also stated that establishing the rules in the form of a convention would not interfere with competition among terminal operators since the rules regulated only a minimum number of issues and there remained other issues that could form the basis of negotiations between terminal operators and their customers.

22. Accordingly, the Commission decided to proceed with its discussion of the text under the assumption that the uniform rules would be adopted as a convention. It was understood, however, that, after having established the substance of the convention, the Commission could, if it wished, reconsider the decision on the form of the uniform rules.

³*Ibid.*, Forty-third Session, Supplement No. 17 (A/43/17), para. 29.

D. Title of the draft Convention

23. A proposal was made to delete the term "liability" in the title or to replace it by another term to avoid an implication that the draft Convention covered only issues relating to the liability of transport terminal operators. It was said that deletion of the term "liability" would result in a title that described more accurately the wider scope of issues dealt with in the draft Convention.

24. A proposal was also made to modify the title by replacing the term "international trade" by "international carriage of goods". In support of that proposal, it was stated that most articles of the draft Convention concerned international carriage of goods rather than international trade. In response, it was pointed out that the Working Group had decided to include the term "international trade" in order to reflect more accurately the wider role assumed by transport terminal operators.

25. After considering those proposals the Commission decided to retain the current title.

E. Discussion on individual articles of the draft Convention prepared by the Working Group on International Contract Practices (A/CN.9/298, annex I) (articles 1-17)

Article 1

Subparagraph (a) ("operator of a transport terminal")

26. A view was expressed that the concept of taking goods "in charge" that appeared in the definition of "operator of a transport terminal" was imprecise, and could result in uncertainties in some cases as to whether or not an entity came within the definition. The requirement that, to be an "operator", an entity must take goods in charge in order to perform or to procure the performance of transport-related services was said to be internally inconsistent, since an entity could procure transport-related services even if the goods were not in his charge. It was also said to be inconsistent with the definition of "transport-related services" in paragraph (d), since some of the services mentioned in that paragraph (e.g., storage, trimming, dunnaging, lashing) did not involve taking the goods in charge. A proposal to change the words "take in charge goods" to "take over goods" was considered but was found not to remedy those problems, and was therefore not accepted.

27. Another proposal was to eliminate the concept entirely by deleting the words "to take in charge goods involved in international carriage in order". In support of that proposal it was stated that the concept of taking the goods in charge related to the question of when the operator's responsibility for the goods began. That issue was dealt with in article 3, and should not be addressed in the definition of "operator". In opposition to the proposal, it was stated that the concept was an essential element of the definition of an "operator", since it established the relationship of the operator to the goods. Eliminating the concept was said to result in a discrepancy with article 3,

since it would result in an entity's being regarded as an operator if he procured transport-related services without taking the goods in charge while, under article 3, his responsibility for the goods would commence only when he took the goods in charge. It would also result in a discrepancy with article 5, since the basis of the operator's liability under that article depended upon his having the goods in charge. The proposal was also objected to because it eliminated the reference to "international carriage"; that reference, too, was said to be an essential element of the definition of "operator". Although the proposal received support, it was decided to defer taking a decision on it until after article 3 had been discussed.

28. After the Commission had discussed article 3, and decided to retain the concept of taking the goods "in charge" in that article, the view was expressed that it should also be retained in article 1(a). According to another view, however, the contexts of article 1(a) and article 3 differed, and retention of the concept in article 3 did not necessarily imply that it should also be retained in article 1(a), where it was unnecessary. After extensive discussion the Commission decided to retain the concept in article 1(a) and not to accept the proposal referred to in the preceding paragraph.

29. A proposal was made to delete from the second sentence of subparagraph (a) the reference to a carrier or multimodal transport operator, so that the sentence would read: "However, a person shall not be considered an operator to the extent that he is responsible for the goods under applicable rules of law governing carriage". The purpose of the proposal was to exclude stevedores from the application of the draft Convention when they were covered by clauses in bills of lading that extended to them the benefits of the defences and limits of liability available to carriers under the law relating to carriage. That solution was said to promote efficiency since it enabled the liability of the stevedore towards the owner of the goods or other third party with an interest in the goods to be covered by the carrier's liability insurance and eliminated the necessity for the stevedore to obtain his own insurance against his liability. The proposal was said to be important in relation to the acceptability of the draft Convention in at least one jurisdiction.

30. The proposal was further supported on the grounds that it would eliminate the necessity to determine whether or not the stevedore was responsible for the goods as a carrier. It would only have to be determined whether the stevedore was responsible for the goods under applicable rules of law governing carriage, or whether he was covered by other rules of law, such as those relating to cargo handling or storage.

31. In opposition to the proposal, it was noted that bill of lading clauses did not subject stevedores to the legal régime applicable to carriers; they merely extended to stevedores the benefits of the defences and limits of liability available to carriers. It was also said that it would not be desirable to enable stevedores to avoid the application of the draft Convention by obtaining the protections of a bill of lading clause. It was preferable for stevedores to be subject to the draft Convention, which, in addition to

establishing rules governing the obligations and liability of operators, dealt with other important matters, such as documentation and the operator's rights of security in the goods. Although additional questions were raised as to the desirability and efficacy of the proposal, it was decided to accept it in view of the importance of the considerations that motivated it. It was stated that the proposal would not change the substance of the sentence in question, but would merely enable it to be interpreted in a particular way in certain jurisdictions.

Subparagraph (b) ("goods")

32. It was recognized that subparagraph (b) did not set forth a definition of "goods"; its purpose was merely to clarify whether and under what conditions containers, pallets and similar articles of transport or packaging were to be regarded as goods. It was agreed that, in general, the term "goods" should be interpreted broadly. Thus, items such as live animals and furniture were to be regarded as goods and it was not necessary to mention them specifically in the subparagraph. It was also generally agreed that "goods" included non-commercial goods, such as medicine and supplies transported for disaster relief.

33. It was observed that a discrepancy existed between the different language versions in respect of the words "if the goods are consolidated or packaged therein". In the English version in particular those words might be read as implying that empty containers, pallets or similar articles could under no circumstances be regarded as "goods". A proposal was made to clarify that empty containers, pallets and similar articles were to be regarded as "goods" if they had been the subject of a transaction in which they were treated as goods, for example, if they had been purchased by and were being shipped to a consignee. Another view was that empty containers, pallets and similar articles should be regarded as goods under all circumstances, since an operator should not have to determine the status of those articles. Yet another view was that empty containers, pallets and similar articles should not be regarded as goods under any circumstances. After discussion, the Commission agreed that subparagraph (b) should read along the following lines: "Where goods are consolidated in a container, pallet or similar article of transport or where they are packed, 'goods' includes such article of transport or packaging if it was not supplied by the operator". The Commission referred the subparagraph to the drafting group with instructions to ensure correspondence among all language versions.

Subparagraph (c) ("international carriage")

34. It was observed that an intent of the subparagraph was that the operator should be able to identify from objective factors, such as the transport document accompanying the goods or markings on a container, that the goods were involved in international carriage and that the draft Convention would therefore apply. The objective nature of the subparagraph in that respect was generally supported. A proposal to insert the words "by the operator" after the word "identified" was not accepted, as it was said to introduce a subjective element. Proposals to

replace the word "identified" by the words "can be identified by the operator", and to change the word "identified" to "identifiable", were also not accepted. The Commission decided to retain the current text of subparagraph (c).

Subparagraph (d) ("transport-related services")

35. It was recognized that the subparagraph provided an illustrative listing of transport-related services; it did not purport to provide a general definition of those services. Proposals were made that certain types of services should be added to the listing, such as packing and unpacking goods and fumigation. Another proposal was made that a general definition should be formulated, perhaps supplemented by examples. Yet another proposal was made that the subparagraph should clarify that "transport-related services" included only services involving the physical handling of the goods and not, for example, financial services. Those proposals were referred to the drafting group.

Subparagraphs (e) and (f) ("notice" and "request")

36. A proposal was made that subparagraphs (e) and (f) should be deleted. In support of the deletion it was stated that those subparagraphs raised a number of uncertainties, such as the relationship, if any, of the requirements of the subparagraphs to rules of evidence in national legal systems and the nature of the record that had to be provided. Another uncertainty was whether or not an oral notice or request was sufficient if a record was made of it contemporaneously or thereafter. Moreover, it was said that the subparagraphs would lead to the undesirable result that, even if the recipient of an oral notice or request acknowledged that it had been given or made, the notice or request would have to be regarded as ineffective.

37. It was said to be preferable not to prescribe any particular form for notices or requests in the draft Convention; rather, the matter should be left to be dealt with by the applicable national law. Subject to that law, the person giving the notice or making the request should be able to decide for himself what form to use in accordance with good commercial practice and to protect his interests.

38. The prevailing view was that the subparagraphs should be retained, perhaps with drafting improvements. Requiring a notice to be given or a request to be made in a form that preserved some sort of record of the information contained therein would help to avoid questions as to whether or not the notice had been given or the request had been made, and would help to avoid questions as to the contents of the notice or request. It was also considered useful to establish an internationally uniform rule as to the form of notice or request, in particular, a rule that was adapted to automatic data processing and transmission techniques. Accordingly, it was decided to refer the subparagraphs to the drafting group with the request that it consider them in the light of the discussions within the Commission.

Other terms

39. A view was expressed that it would be useful to clarify the meaning of certain other terms used in the draft Convention, such as "customer" and "person entitled to take delivery" of the goods. It was decided that those terms would be considered in the context of the articles in which they appeared to ensure that their meaning was clear.

*Article 2**Paragraph (1)*

40. In connection with subparagraph (a), the view was expressed that the factor leading to the application of the draft Convention should be the performance of the transport-related services in a contracting State, rather than the location of the operator's place of business in a contracting State. In response, it was stated that designating the operator's place of business as the criterion would avoid problems that could arise in terminals that straddled the boundaries between two States. Such terminals were not uncommon in certain regions. If the criterion for the application of the draft Convention was the performance of the operator's services in a contracting State, and if one of the States straddled by the terminal was a party to the draft Convention but the other was not, various services performed with respect to goods would be subject to different legal régimes depending upon the part of the terminal in which they were performed. Moreover, an operator could arrange to perform the services in the part of the terminal in the State which applied the legal régime more favourable to the operator. Designating the operator's place of business as the criterion for the application of the draft Convention would avoid those problems. It was stated that, in the majority of cases, the suggested criterion would lead to the same result as if the criterion were the place where the services were performed, since the services were usually performed at the operator's place of business.

41. It was noted that, when the services were performed in a contracting State by an operator whose place of business was in a non-contracting State, the Convention would not apply. The question was raised as to whether such a result was desirable. In response, it was said that the result had the merit of being certain.

42. With a view to broadening the application of the draft Convention, a proposal was made to add to the criteria set forth in paragraph (1) the place where the services were performed, so that the paragraph would read as follows:

"(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 the transport-related services are performed in a contracting State, or

(c) When, according to the rules of private international law, the transport-related services are governed by the law of a contracting State".

43. Hesitancy was expressed as regards adding the place where the services were performed as a criterion, since an operator might perform services in several States, some that were contracting States and others that were not, and legal uncertainty could result. After discussion, however, the Commission accepted the proposal.

44. A proposal was made to replace in subparagraphs (a) and (b) the expression "contracting State" with the expression "State party", in the light of terminology used in the Vienna Convention on the Law of Treaties, to which certain international conventions had already conformed. It was observed, however, that the term "contracting State" had been used in other conventions elaborated by the Commission, including the United Nations Convention on International Bills of Exchange and International Promissory Notes (1988), which was elaborated subsequent to the entry into force of the Vienna Convention on the Law of Treaties. It was said to be desirable to maintain consistency in the terminology used in conventions elaborated by the Commission. The Commission agreed that, in using the term "contracting State", its intent was to refer to States in respect of which the Convention was in force. It decided to refer the proposal to the drafting group, which was instructed to take into account the terminology used in other conventions elaborated by the Commission. For the subsequent decision, see paragraph 165 below.

Paragraph (2)

45. Questions were raised as to the desirability of the paragraph, on the grounds that the necessity to determine which place of business had the closest relationship to the operator's services introduced an element of uncertainty. In response, it was stated that the paragraph was necessary in connection with the application of paragraph (1)(a) in cases where the operator had more than one place of business.

46. A proposal was made to delete the words "as a whole" on the grounds that they were vague and difficult to apply. It was decided to retain the words. Accordingly, paragraph (2) was retained in its current form.

Paragraph (3)

47. Some support was expressed for the deletion of the paragraph on the grounds that an operator would normally have a place of business and the paragraph was therefore unnecessary. The Commission, however, decided to retain the paragraph unchanged in view of the fact that some self-employed operators did not have a place of business; in such cases the habitual residence was the most appropriate factor to determine whether the Convention applied. Moreover, the rule contained in the paragraph had been adopted in other international conventions.

Article 3

48. A proposal was made that article 3 should be changed to provide that the operator was responsible for the goods from the time when the applicable rules of law governing carriage ceased to apply until the rules

applicable to the next carriage began to apply. In support of the proposal it was said that the current text of article 3 did not in all situations avoid gaps that could exist after the application of the carriage régime to the incoming carrier ended and before the application of the carriage régime to the outgoing carrier commenced. For example, in a situation in which the goods were unloaded from a ship and left on the quay, the maritime carrier's liability under the Hague Rules would end when the goods passed the ship's rail but the operator's liability might not yet have commenced since he might not be deemed to have taken the goods in charge. The proposed solution was said to avoid such gaps and provide a flexible rule that would adapt the period of operator's liability to the beginning and end of the application of the carriage régime under different modes of transport.

49. The proposal was opposed on the following grounds. It was not desirable for the operation of the draft Convention to be dependent on other conventions or national laws. The operator's period of responsibility would not necessarily be immediately preceded by or followed by carriage (e.g. where the shipper delivered goods to a terminal at the beginning of carriage, or where the operator delivered the goods to the consignee after carriage). The time of beginning and time of ending of a carrier's responsibility under conventions and national laws was not always certain, and was a subject of frequent litigation. The proposal would result in different periods of responsibility depending on which convention or law relating to carriage applied. The Commission did not accept the proposal.

50. Views were expressed in opposition to defining the commencement of the operator's period of responsibility on the basis of the concept of his taking goods in charge. It was said that the concept was imprecise and that it might not lead to the same interpretation in all legal systems. For example, when the customer left the goods in the operator's area without immediately giving instructions to the operator, it might not be clear when the operator's responsibility commenced. It was therefore suggested that the concept should be clarified, perhaps in a definition, to be added to article 1, along the lines of article 4 of the United Nations Convention on the Carriage of Goods by Sea (1978) (hereinafter referred to as the "Hamburg Rules").

51. A proposal was made that the concept of taking goods in charge should be replaced by the concept of handing goods over to the operator. It was said that the latter concept was an appropriate factual description of the moment when the operator's responsibility for the goods under the draft Convention should commence. The proposal was not accepted on the grounds that it did not adequately reflect the various ways in which the operator received the goods contemplated by the draft Convention. Moreover, the concept of handing over was said to be no less a legal concept than the concept of taking in charge.

52. The prevailing view was that the concept of taking goods in charge, while not being an ideal solution, was the most suitable solution that could be formulated in view of the wide variety of situations covered by the draft Conven-

tion. Moreover, the concept had a precise meaning in some legal systems. It was also stated that the concept of taking the goods in charge adequately filled the gaps after the régime applicable to the incoming carrier ended and before the régime applicable to the outgoing carrier began.

53. With respect to the time at which the operator's period of responsibility under the draft Convention ended, the view was expressed that the concept of making the goods available to the person entitled to take delivery of them was not sufficiently clear. For instance, it was not clear whether the concept implied that the operator was under a duty to notify the person entitled to take delivery of the goods that they were available to be collected. A proposal, which was not accepted, was made that the operator should be required to give such a notice.

54. The Commission accepted a proposal that the concept of making the goods available to the person entitled to take delivery of them should be replaced by the concept of placing the goods at the disposal of that person. The proposal was based on the argument that a delay in collecting the goods within the agreed period of time should not lead to a complete termination of the operator's responsibilities unless he had notified the recipient and had asked him to collect the goods. Subject to the amendment called for by that proposal article 3 was retained in its current form.

Article 4

Paragraph (1)

55. The view was expressed that the *chapeau* should be re-drafted so as to clarify that the option of the operator's acting in accordance with either subparagraph (a) or subparagraph (b) was to be exercised by the operator, and not by his customer. According to another view, the operator should not have such an option; rather, the choice should be a matter to be agreed upon by both parties.

56. It was proposed that the word "customer" in the *chapeau* should be changed to "other party" or to "other party to the contract". In support of the proposals it was stated that the word "customer" connoted a continuing business relationship between the parties, while an operator might take over goods from a party in a unique transaction. In opposition to the proposals it was stated that an operator might take over goods from someone other than the other party to the contract with the operator. For example, the other party might be the shipper, while the goods might be taken over from the shipper's carrier; and it was the carrier who would need the document provided for in paragraph (1).

57. The view was expressed that the term "without unreasonable delay" in the *chapeau* was imprecise, and that another term, such as "promptly", should be used instead. It was stated that greater precision was needed in that terminology in view of the consequences of a failure of the operator to act in time, as set forth in paragraph (2).

58. It was proposed that subparagraph (a) should clarify that the condition and quantity of the goods were to be

stated in the document produced by the customer, rather than being inserted by the operator, by replacing the words "identifying the goods and stating their condition and quantity" with "in which the condition and quantity of the goods are identified".

59. It was proposed that the words "and stating their condition and quantity" should be deleted from subparagraph (a). In support of the proposal it was said that the document produced by the customer might not always indicate the condition or quantity of the goods, and it should be sufficient if the operator signed a document without such an indication. In favour of retaining the words it was said that the document should state the condition and quantity of the goods, in the absence of which the presumption provided for in paragraph (2) should apply.

60. It was generally agreed that, in subparagraph (a), the operator should also be required to state the date when he received the goods.

61. It was proposed that the word "produced" in subparagraph (a) should be changed either to "presented" or to "produced or presented", in order to avoid the implication that the customer must have generated the document. In opposition to those proposals, it was stated that the word "produced" clearly indicated that the document must come from the customer's possession.

62. Proposals were made to incorporate into subparagraph (a) a proviso to the effect that the statement in the document as to the condition and quantity of the goods should relate to the condition and quantity only in so far as they could be ascertained by reasonable means of checking. A related proposal was that the operator should be able to insert a reservation in the document if the operator could not verify the statement by reasonable means of checking or if he had reason to question its accuracy.

63. The proposals presupposed that an operator who chose to act under subparagraph (a) should inspect the goods to a reasonable extent when he took them over to verify the statement contained in the document as to the condition and quantity of the goods. If the operator signed the document, he would be bound by the statement contained in it, unless he entered a reservation. The proviso was therefore said to be necessary in order to protect an operator who did not have reasonable means to inspect the goods sufficiently or at all to verify the statements contained in the document. An additional reason advanced in support of the proposal was that the proviso was contained in subparagraph (b), and that subparagraphs (a) and (b) should be parallel. As another means of achieving the result intended by the proposal, a suggestion was made to provide in paragraph (2) that, if the operator elected to act in accordance with subparagraph (a), he was rebuttably presumed to have acknowledged the condition and quantity of the goods as stated in the document in so far as they could be ascertained by reasonable means of checking.

64. The following views were expressed in opposition to the proposals. The actions provided for in subparagraphs

(a) and (b) were of different natures. Under subparagraph (a) the operator merely acknowledged his receipt of the goods. That was intended to be a simple and quick procedure; the operator was under no obligation to inspect the goods, and his signature of the document would not constitute acknowledgement or acceptance of the statement made by the customer in the document as to the condition and quantity of the goods. Thus, there was no need to include the proviso in subparagraph (a). The proviso was needed in subparagraph (b) because under that subparagraph the operator was to make his own statement as to the condition and quantity of the goods. To include the proviso in subparagraph (a) as well might carry the erroneous implication that the operator had a duty to inspect the goods and verify the statements made by the customer in the document.

65. As an additional reason in opposition to the proposals it was said that, if the operator could insert a reservation in a transport document such as a bill of lading contradicting the statements as to the condition and quantity of the goods made in the bill of lading by the customer, the reservation could alter the legal consequences of the document. It was also pointed out that the document contemplated by subparagraph (a) would not be negotiated to a third party and did not bear other legal attributes of a bill of lading; thus, while a proviso relating to reasonable means of checking the goods was included in article 16 of the Hamburg Rules in relation to bills of lading, it was not needed in subparagraph (a).

66. Among those opposed to including the proviso in subparagraph (a) support was expressed for retaining the current structure and text of paragraph (1), subject perhaps to certain drafting improvements, as the paragraph was said to be logical and easy to apply.

67. With respect to the words "reasonable means of checking", it was generally agreed that the operator was required to specify the condition of the goods only on the basis of their external appearance, and that he was not required to open sealed containers.

68. A proposal was made to add in subparagraph (b) a requirement that the document issued by the operator must identify the goods, in order to achieve parallelism with subparagraph (a).

Paragraph (2)

69. A proposal was made to delete the word "apparently" for the reason that, if the operator did not act in accordance with either subparagraph (a) or (b) of paragraph (1), he should be rebuttably presumed to have received the goods in good condition. The prevailing view was that the word "apparently" should be retained. It was said that the operator's legal position in relation to the condition of the goods by virtue of the presumption provided for in paragraph (2) should be consistent with what his position would have been if he had acted in accordance with paragraph (1)(a) or (b). Since, under paragraph (1)(b) (and under paragraph (1)(a) if the proposals referred to in paragraph 62 above were accepted), the operator was bound by the condition of the goods only in so far as it

could be ascertained by reasonable means of checking, an operator who failed to state the condition of the goods should be presumed to have received them in good condition only in so far as the condition of the goods could have been ascertained by reasonable means of checking. Thus, the word "apparently" in paragraph (2) referred to the concept of "reasonable means of checking" in paragraph (1). The view was expressed that the relationship between those two expressions needed to be clarified.

70. A suggestion was made to clarify that the presumption provided for in paragraph (2) arose not only when the operator failed to act in accordance with paragraph (1)(a) or (b) when such action was requested by the customer, but whenever the operator did not sign or issue a document that stated the condition of the goods when he received them.

71. A proposal was made to add at the end of paragraph (2) the words "save to the extent that he has not taken the goods in charge for safekeeping". In support of the proposal it was stated that the presumption provided in paragraph (2) should not apply where the goods were merely transferred from one means of transport to another without storing or safekeeping them. The proposal was accepted and referred to the drafting group.

72. At the close of the discussion on paragraphs (1) and (2), the Commission decided to refer the paragraphs to the drafting group for further work on the basis of the present texts.

Paragraph (3)

73. The Commission decided to retain the substance of the paragraph unchanged.

Paragraph (4)

74. According to one view, the freedom of the parties to use the forms of signature mentioned in the paragraph should be subject to applicable law. The approach used in article 14(3) of the Hamburg Rules was referred to as an example. Another view, which received considerable support, was that the paragraph should permit the signature to be in any form, including by electronic means. A suggestion was made to express that view with words along the lines of article 5(k) of the United Nations Convention on International Bills of Exchange and International Promissory Notes (1988). The drafting group was requested to prepare alternative wordings for the paragraph reflecting the views expressed.

75. The view was expressed that the method of signature should be subject to the customer's agreement, and that the operator should be required to confirm his signature when the customer so requested. The Commission did not consider it necessary to deal with such issues in the draft Convention.

Proposal for new paragraph

76. A proposal was made to provide in article 4 that the absence from the document of one or more particulars referred to in paragraph (1) would not affect the existence

or the validity of the contract for transport-related services. 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) (hereinafter referred to as the "Warsaw Convention"). In opposition to the proposal, however, it was noted that under the Warsaw Convention the existence of the transport document was a condition for the validity of the contract of carriage, whereas the validity of the contract for transport-related services did not depend on the existence or content of the document issued under article 4(1) of the draft Convention. It was therefore decided that it was not necessary to include the proposed provision in the draft Convention.

Article 5

77. An observation was made that article 5 did not contain a special rule for loss of or damage to the goods or for delay caused by fire, as did article 5(4) of the Hamburg Rules. It was understood by the Commission that the liability rules contained in article 5 covered all causes of loss, damage or delay, including fire.

Paragraph (1)

78. It was understood that the word "loss" as it first appeared in the paragraph would include such damages as lost profits in legal systems where such damages were recoverable. A proposal to change that word to "damages" was not accepted. The drafting group was requested to ensure that the intended meaning of the word "loss" was adequately reflected in all language versions.

Paragraph (2)

79. It was decided to retain the substance of the paragraph unchanged. It was noted that the paragraph, although generally modelled on article 5 (7) of the Hamburg Rules, deviated from that model by referring to a "failure" on the part of the operator, his servants, agents or other persons of whose services he made use, instead of "fault or neglect" on the part of those persons. Support was expressed for the approach in the paragraph because it reflected a more modern treatment of the question. It was noted that a similar approach was used in article 80 of the United Nations Convention on Contracts for the International Sale of Goods (1980).

Paragraph (3)

80. The Commission decided to replace the expression "make them available to" by the expression "place them at the disposal of", in view of a similar decision taken with respect to article 3 (see para. 54 above).

Paragraph (4)

81. Proposals were made that the time period in paragraph (4) should be changed from 30 days to 60 days or to 90 days, in order to give the operator an ample opportunity to locate the goods. It was noted that the Hamburg Rules provided for a 60-day period while the United Nations Convention on International Multimodal

Transport of Goods (1980) (hereinafter referred to as the "Multimodal Convention") provided for a 90-day period.

82. The decision of the Commission was to retain the 30-day period. It was stated that the longer periods in the Hamburg Rules and the Multimodal Convention were necessary in view of the distances that goods under those Conventions were carried and the breadth of the territory that would have to be searched to locate the goods. An operator under the draft Convention would have to search only within the terminal. In addition, some goods might be needed promptly by the person entitled to receive them (e.g. construction materials), and he should not have to wait too long before he was able to treat the goods as lost and to make other arrangements.

83. A proposal was made that the liability of the operator should be excluded in cases of *force majeure*. The proposal was not adopted in view of the understanding of the Commission that *force majeure* was implicitly a defence under paragraph (1).

84. A proposal was made to clarify which person had the right to treat the goods as lost. After discussion, it was decided to specify that a person entitled to make a claim for the loss of the goods was the person who could treat the goods as lost. It was observed that that approach would conform to article 12(2) of the draft Convention and to article 5(3) of the Hamburg Rules.

85. A question was raised as to whether, if the goods were declared lost in accordance with paragraph (4) but were later found, a court could declare that the goods were not lost. While differing views on that question were expressed, the Commission decided that the issue was beyond the scope of the draft Convention.

86. The Commission decided to replace the expression "make them available to" by "place them at the disposal of", in view of a similar decision with respect to article 3 and to paragraph (3) of article 5 (see paras. 54 and 80 above).

Article 6

Paragraph (1)

87. The text submitted to the Commission provided two limits of liability for loss of or damage to the goods: a lower limit that would apply if the goods were involved in carriage by sea or by inland waterways and a higher limit if the goods were not involved in such carriage. The view was expressed that it would be preferable to provide for a single limit of liability, regardless of the mode of transport involved, since the dual-limit approach in the current text was difficult to apply in practice. The prevailing view was that the dual-limit approach should be retained. It was observed that the approach took into account the different relative values of goods carried by sea and inland waterways, on the one hand, and by other modes of transport, on the other hand. It also took into account differences in the relative levels of limits of liability in conventions dealing with those various modes of transport.

88. The view was expressed that the paragraph should be amended to clarify where in the transport chain the carriage by sea or by inland waterways must occur in order for the lower limit to apply, e.g. whether the goods must be carried to or from the operator by sea or by inland waterways, or whether the lower limit would apply if the carriage occurred anywhere in the transport chain. It was generally agreed that for the lower limit to apply the carriage should not be remote from the operator in the transport chain since, if it were, the operator might not know that the carriage by sea or by inland waterways was involved. It was noted that, under the Multimodal Convention, the lower limit would apply if carriage by sea or by inland waterways was involved at any stage of the transport. It was observed, however, that, under that Convention, the multimodal transport operator was a party to the contract for the entire transport and would therefore know of the involvement of such carriage. The Commission agreed that the lower limit should apply to the operator if it appeared from objective indications available to the operator that the goods were carried to or were to be carried from the operator by sea or by inland waterways.

89. The Commission decided to defer consideration of the amounts of the limits, which in the current text were set forth within square brackets, until it decided the form that the uniform rules would take. Subsequently, the Commission decided to retain the amounts within square brackets, thus leaving the final decision as to the amounts of the limits of liability to be taken by the conference of plenipotentiaries that would adopt the Convention.

90. A proposal was made to add, as an alternative to the limit of liability per kilogram of gross weight, a limit of liability per package or unit. In support of the proposal, it was stated that the per kilogram approach was appropriate for heavy shipments of low value goods, but not for high-value goods of relatively low weight (e.g. computer equipment). A limit per package or unit was more appropriate for the latter type of goods. Another reason given in support of a per package alternative was that it would align the limits applicable to operators of maritime terminals with those applicable to maritime carriers, which were subject to alternative limits based on weight or based on the number of packages or units. In response, it was pointed out that the per package approach had been considered extensively within the Working Group but was not included in the current text, in particular because of difficulties in defining a package or unit and because of the fact that incorporation of that alternative would require additional provisions in the draft Convention, for example, relating to documentation, which would unnecessarily complicate the text. Accordingly, it was decided to retain the single limit of liability per kilogram of gross weight.

Paragraphs (2) and (3)

91. The Commission decided to retain the substance of the paragraphs unchanged.

Paragraph (4)

92. The view was expressed that the substance of paragraph (4) appeared to be contained in article 13(2), and it

was suggested that either paragraph (4) should be deleted or it should contain a reference to article 13(2). The prevailing view was that paragraph (4) should be retained in its present form. In support of that view it was stated that article 13(2), which covered all responsibilities and obligations of the operator, was broader than paragraph (4); paragraph (4) provided a useful clarification that the operator could agree to limits exceeding those provided for in paragraphs (1), (2) and (3).

93. It was observed that paragraph (4) did not specify the form that the agreement by the operator should take. The Commission agreed that the paragraph as currently drafted should be understood to provide that no matter in what form an operator expressed his agreement to higher limits, he was bound by that agreement and could not later retract it.

Article 7

94. Various points were raised in connection with the heading of article 7, which, in the English version, was the same as the heading of article 7 of the Hamburg Rules. It was observed that certain language versions other than English used terminology that differed from the word "claims" used in the English version. A question was raised as to the discrepancy between the use in the heading of the word "claims" and the use in paragraph (1) of the word "action", which implied legal action before a court or arbitral tribunal. In response to the latter point it was stated that the use of the word "claims" in the heading was satisfactory since the article would apply in respect of any claim made against an operator, whether or not in the context of legal proceedings.

95. A view was expressed that the use of the term "non-contractual claims" should be changed to refer, for example, to "liability claims", in order to reflect accurately the substance of the article, which dealt with contractual as well as non-contractual claims. In response, it was stated that the heading was satisfactory in its current form since the main purpose of the article was to clarify that the limits of liability would apply even in respect of non-contractual claims.

96. The decision of the Commission was to retain the present heading in the English version and to request the drafting group to ensure correspondence in the other language versions.

Paragraph (1)

97. The view was expressed that the word "otherwise" was too vague, and that it should be changed to "of some other nature". It was noted that the word was intended to cover actions that in some legal systems were not categorized as either contract or tort, such as bailment. The decision of the Commission was to retain the word "otherwise", which was also used in article 7(1) of the Hamburg Rules, and to request the drafting group to ensure that the terminology used in the language versions other than English accurately conveyed the meaning of the word as used in the English version.

Paragraph (2)

98. The view was expressed that paragraph (2) established a right of action against a servant or agent of the operator and against other persons of whose services the operator made use for the performance of transport-related services. It was pointed out, however, that the existence of such a right of action depended on applicable national law and that paragraph (2) was limited to providing defences and limits of liability in actions that might be brought in accordance with the applicable law against persons other than the operator.

Paragraph (3)

99. The understanding of the Commission was that the aggregate amount that could be recovered in separate actions arising out of the same incident against the operator and against his servants, agents or other persons of whose services he made use should not exceed the maximum amount that could be recovered from the operator. The Commission requested the drafting group to review the text in all of its language versions so as to ensure that the understanding was properly expressed.

100. A view was expressed that, in a case where the operator agreed pursuant to article 6(4) to a limit of liability exceeding that provided in the draft Convention, by virtue of paragraph (3) the increased limit applied not only to the operator, but also to his servants, agents and other persons of whose services he made use. According to another view, the increased limit did not also apply to those servants, agents and other persons. The Commission decided to leave the issue to be resolved by interpretation in concrete cases.

Article 8

Heading

101. A proposal was made that the heading of the article should be changed to read "Non-application of limits of liability" on the grounds that the current heading, in referring to the loss of the "right" to limit liability, introduced an element of subjectivity, namely, that the operator could decide whether or not to limit his own liability. The Commission referred the proposal to the drafting group.

Paragraph (1)

102. A proposal was made that the term "limitation of liability" should be used, rather than "limit of liability", in order to conform to the terminology used in article 8(1) of the Hamburg Rules. The proposal was referred to the drafting group.

103. A proposal was made that the words "or his servants or agents" should be deleted, for the following reasons. Allowing the limits of liability available to the operator to be broken owing to the acts of his servants or agents would make the liability of the operator uninsurable or insurable only at a high price, and the resulting increase in costs would ultimately be borne by the shipper. If the operator himself was free of fault, it was unfair to deprive him of the limits of liability owing to the wrongful

acts of his servants or agents. The provision should conform to article 8(1) of the Hamburg Rules, under which the limit of liability available to the carrier could be broken only in the event of the intentional or reckless conduct of the carrier himself, and not of his servants or agents.

104. The proposal was not accepted. It was opposed on the following grounds: the current text, under which the limits of liability available to the operator could be broken in the event of intentional or reckless conduct of the servants or agents of the operator, but not of other persons of whose services the operator made use for the performance of the transport-related services, was a compromise reached within the Working Group between the view that the limits should be breakable only in the event of intentional or reckless conduct of the operator himself, and the view that they should be breakable in the event of such conduct not only by his servants and agents but also by other persons of whose services he made use. Operators were often organized as legal entities, and such entities could act only through their servants and agents; thus, to refer to intentional or reckless conduct of the operator himself lacked practical meaning. Under the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (1924) (hereinafter referred to as the "Hague Rules") as amended by a Protocol in 1968 (the Hague Rules as amended by the 1968 Protocol are hereinafter referred to as the "Hague-Visby Rules"), the limits of liability available to the carrier could be broken in the event of intentional or reckless conduct of his servants or agents; similar provisions were contained in the Convention on the Contract for the International Carriage of Goods by Road (CMR) (1956) and in the Warsaw Convention. Article 8(1) of the Hamburg Rules did not provide a model for the draft Convention since the more restricted approach in the Hamburg Rules was part of a package of compromises in which, among other things, the nautical fault defence available to the carrier under the Hague Rules was eliminated.

105. A proposal was made that wording should be added to the paragraph according to which the limits of liability available to the operator could be broken in the event of intentional or reckless conduct of his servants or agents only if they acted within the scope of their employment. In support of the proposal, it was stated that it would be unfair for an operator to be deprived of the limits of liability if his servants or agents acted outside the scope of their employment. The purpose of breakable limits was to induce operators to control the conduct of their servants or agents; however, operators could not control conduct outside their servants' or agents' scope of employment. It was also stated that adding the proposed wording would promote certainty and stability with respect to the limits of liability. The concept of acting within the scope of employment was said to be familiar and to have an established meaning in many legal systems.

106. The proposal was opposed on the following grounds. Whether or not servants or agents had acted within the scope of their employment was difficult to determine, and adding the proposed wording would encourage litigation. The wording was devoid of significance,

since intentional and reckless conduct were by their nature outside the scope of employment. As between the operator and the claimant, the operator should bear the risk of intentional and reckless conduct on the part of his servants and agents.

107. The view was also expressed that it was implicit that an entity was liable for the acts of his servants or agents only if they acted within the scope of their employment. In response to that view, however, it was pointed out that, in the context of article 5(1), the Working Group had intended the operator to be liable for the acts of his servants, agents and other persons of whose services he made use even if they acted outside the scope of their employment.

108. There was no preponderant view for or against the proposal. Therefore, the decision of the Commission was to retain the present text of paragraph (1) without adding the proposed wording.

109. A proposal to place paragraph (1) within square brackets for consideration by the forum that would adopt the Convention in final form was not accepted.

110. The Commission was in agreement that, under paragraph (1), the operator did not lose the benefit of the limits of liability in the event of intentional or reckless conduct by persons, other than his servants or agents, of whose services he made use in performing the transport-related services.

Paragraph (2)

111. The Commission agreed to retain the substance of the paragraph unchanged.

Article 9

In general

112. The view was expressed that the overall approach of the article should be reconsidered. In connection with that view it was noted that the article required an unspecified person to conform to applicable laws and regulations with respect to the marking, labelling, packaging and documentation of dangerous goods, in default of which the operator could take precautionary measures against the goods without paying compensation for their loss or destruction. It was stated that those features could have wide-ranging and possibly unforeseen implications and that it was preferable to leave such matters to international and national instruments on the subject of dangerous goods that dealt with those matters directly and comprehensively. It was also stated that the article failed to deal adequately with the essential question of liability for loss and damage caused by dangerous goods. It was noted that the effect of the article was that the liability of the operator for such loss and damage was governed by the principle of presumed fault or neglect under article 5(1), which was said to be inappropriate in the case of dangerous goods taken over by the operator. The decision of the Commission, however, was that the present text served as an adequate basis for article 9, subject to possible refinements and clarifications.

113. It was observed that there was a link between articles 9 and 5 in that article 9 constituted an exception to the liability rules contained in article 5. It was suggested that the link should be expressed more clearly by moving article 9 closer to article 5. According to other views, however, the placement of article 9 should be retained. The Commission regarded the question as one of drafting and referred it to the drafting group.

114. A proposal was made to add to article 9 wording to the effect that the article did not apply in cases covered by article 4. The proposal was based on an understanding that an operator would normally know of the dangerous character of goods taken over by him because the condition would be indicated on the transport document accompanying the goods, and that the word "condition" in article 4(2) included the dangerous character of the goods. The understanding of the Commission, however, was that the word "condition" related to whether or not the goods were damaged, and not to whether or not they were dangerous; accordingly, the proposal was not accepted.

Chapeau

115. A view was expressed that the *chapeau* should indicate who was obliged to mark, label, package and document the goods. It was suggested that the customer of the operator should be obliged to do so. The prevailing view, however, was that the article should not address that question, since it was dealt with in international and national texts dealing with dangerous goods and to do so in the draft Convention would pose a risk of conflicting with those texts. For similar reasons, the Commission did not accept a suggestion that the article should expressly establish an obligation to inform the operator of the dangerous nature of the goods.

116. A proposal that reference should be made in the *chapeau* only to the goods being marked or labelled as dangerous, in order to conform to article 13(1) of the Hamburg Rules, was not accepted.

117. Various proposals were made with respect to the words "in accordance with any applicable law or regulation relating to dangerous goods" that appeared in the *chapeau*. One proposal was to delete those words, on the grounds that they were unnecessary and that article 13(1) of the Hamburg Rules did not contain such a reference. The proposal was not accepted. Another proposal was to retain the reference in its current form, without designating which country's laws and regulations were to be complied with. In support of that proposal, it was stated that various countries' laws and regulations relating to dangerous goods could be applicable in connection with goods taken over by the operator, and the present article should not preclude the necessity to comply with any of those regulations. The prevailing view, however, was that a specific reference to the laws and regulations of a particular country was desirable. Proposals were made to designate the country where the terminal was located or the country where the transport-related services were performed. After discussion, the Commission decided to refer to any law or regulation relating to dangerous goods applicable in the country where the goods were handed

over to the operator. It was the understanding of the Commission that the words "any law or regulation" referred to international as well as national laws and regulations.

118. It was observed that, under the current text, the provisions of subparagraphs (a) and (b) applied if the dangerous goods were not appropriately marked, labelled, packaged or documented and if the operator "does not otherwise know" of their dangerous character. A proposal was made to introduce an element of objectivity into the latter requirement by adding words to the effect that the provisions would not apply if the operator should have known of the dangerous character of the goods. The prevailing view was that it should not be presumed that the operator knew of the dangerous character of the goods. Accordingly, the proposal was not adopted.

119. The view was expressed that the word "entitled" at the end of the *chapeau* should be reconsidered, on the grounds that the precautions referred to in subparagraph (a) were obligations, not rights, of the operator. However, the prevailing view was that the word "entitled" appropriately expressed the purport of subparagraph (a).

Subparagraph (a)

120. The view was expressed that the operator should be required to give notice of his intention to destroy the goods in view of the extreme character of such a measure and the need to protect the interests of the owner of the goods. In opposition, it was observed that, under the article, the goods could be destroyed only when they posed an imminent danger; there thus would be no time to give such a notice. In the light of that observation it was proposed that the operator should be required to give notice contemporaneously with his destruction of the goods. The prevailing view was that it was sufficient protection of the interests of the owner of the goods that the paragraph restricted the right to destroy the goods without paying compensation to cases of imminent danger, and the Commission decided not to impose a notice requirement.

121. The Commission accepted a proposal to specify in subparagraph (a) that the precautions provided for in the subparagraph must be taken by lawful means.

Subparagraph (b)

122. A proposal was made to provide in subparagraph (b) that the person obligated to reimburse the operator was "the person who failed to meet his obligations to inform him of the dangerous nature of the goods under any international convention or national legislation". The proposal was supported on the grounds that it helped to clarify who was obligated to reimburse the operator, and clarified that the obligation to reimburse the operator was based upon fault. The proposal was adopted in principle, but was amended to read along the following lines: "the person who failed to meet any obligation under such applicable law or regulation to inform him of the dangerous character of the goods". That formulation reflected

the Commission's decision that the person obligated to give notice of the dangerous character of the goods should be determined by relevant international or national rules.

123. The view was expressed that the operator should be reimbursed for his costs of taking the precautions referred to in subparagraph (a) even if he knew of the dangerous character of the goods when he took them over. The Commission decided to make no change to the text along those lines.

124. The Commission expressed its understanding that subparagraph (b) did not affect any rights that the operator might have under national law to reimbursement or compensation for losses other than for the costs specified in the subparagraph. The Commission also expressed its understanding that the obligation of the persons referred to in subparagraph (b), as amended by the Commission, to reimburse the operator did not preclude any liability of those persons to the owners of other goods at the terminal that were damaged by the dangerous goods.

Article 10

Paragraph (1)

125. It was proposed that the article should specify that the operator had a right of retention over the goods only in respect of costs and claims that were due. The Commission accepted the proposal and referred it to the drafting group.

126. A proposal was made that the operator's right of retention over the goods should be extended to cover not only costs and claims that were incurred during his period of responsibility for the goods, but also those which were incurred after his period of responsibility had expired, such as storage fees that continued to accrue after the time the goods should have been collected by the person entitled to receive them. The proposal was accepted and referred to the drafting group.

127. The view was expressed that paragraph (1) should specify that the law applicable to contractual agreements extending the operator's security in the goods should be the law of the place where the goods were located. In opposition it was said that that conflict of laws rule had become out of date; in accordance with more modern concepts, the parties should be able to agree upon the law that would apply. It was pointed out, however, that the law in some States did not permit such a choice. Other proposals were made that the words "under any applicable law" should be deleted as superfluous or that reference should be made to the law of the place where the goods were retained.

128. The decision of the Commission was to refer to "the" applicable law instead of "any" applicable law, in order to avoid an implication that the parties had complete freedom to select the relevant law. The drafting group was requested to ensure conformity as to that usage among all language versions.

Paragraph (2)

129. The Commission decided to retain the substance of the paragraph unchanged.

Paragraph (3)

130. The Commission discussed the question of whether the operator should have the right to sell the retained goods only to the extent permitted by the applicable law, or whether article 10 should provide for a right of sale independently of the applicable law. In support of the latter approach, it was said that to establish a uniform rule providing for a right of sale would avoid uncertainties arising from the disparate treatment of that issue in national legal systems. It was also stated that the paragraph would not be needed if it merely made the right of sale dependent upon the applicable law, since the existence of that right would depend upon the applicable national law even without such a provision.

131. The view prevailed, however, that the right of sale should exist only to the extent permitted by applicable law. It was considered that national laws dealing with the right of sale involved important issues of public policy, as well as differing approaches on which it was difficult to reach international agreement.

132. The view was expressed that the paragraph should refer only to the applicable law, without specifying which country's law would apply. It was noted that most national laws provided for and regulated the right of sale. The prevailing view, however, was that the paragraph should specify a particular national law. According to one view, that law should be the law of the State where the operator had his place of business, as was presently set forth in the paragraph. It was noted that some transport terminals straddled the boundary between two States; in such cases, if the applicable law was the law of the State where the goods were located, it might be uncertain which law applied since goods might be subject to transport-related services on both sides of the border. Moreover, the operator might be encouraged to locate the goods in a section of the terminal that was subject to the régime more favourable to him. Another view was that the applicable law should be the law of the place where the goods were to be handed over by the operator.

133. The Commission decided that the applicable law should be the law of the State where the goods were located. It was pointed out that, if the law of some other State were to apply, such as the law of the operator's place of business, a State where the right of sale did not exist under its national law might have to tolerate the sale of goods located within its territory if the goods could be sold under the law of the other State. That could render the draft Convention unacceptable in States where the right of sale did not exist. It was also stated that the law of the place where the goods were located represented the usual conflict of laws rule.

134. The view was expressed that the operator should be able to sell retained goods only to the extent that their value was proportional to the amount of his claim. It was pointed out, however, that in some cases it would not be

possible to separate the goods in order to achieve that proportionality. It was also stated that it was not necessary to incorporate the concept of proportionality in the text, since it was already implicit in the right of sale. Moreover, paragraph (4), and in particular the obligation of the operator to account for the proceeds of the sale, was said to provide sufficient protection to the owner of the goods. In response to that point, however, it was noted that goods subject to forced sales were sometimes sold at prices below their actual value; the obligation of the operator to account for the proceeds of sale would not sufficiently protect the owner of the goods in such cases. The Commission decided to incorporate the concept of proportionality in the paragraph by providing that the operator was entitled to sell "all or part" of the goods.

135. The Commission did not adopt a proposal that the operator should be entitled to sell only goods belonging to his customer, and not goods belonging to third parties.

136. The Commission decided that the rules provided in the second sentence of paragraph (3) should apply not only to containers but also to pallets and similar articles of transport and packaging. It referred to the drafting group a proposal that the final words of the paragraph should be clarified by changing them to read "unless the operator has made repairs or improvements" to the containers.

Paragraph (4)

137. It was proposed that the operator should be required to wait for a reasonable period of time following the giving of notice of his intent to sell the goods before selling them. Such a waiting period would take into account the possibility of delays in the transmittal of the notice and would allow the owner of the goods sufficient time to take necessary actions to protect his interest. The following views were expressed in opposition to the proposal. The concept of a reasonable period of time was not sufficiently precise. The paragraph required the operator to make reasonable efforts to give notice and it was unclear when the waiting period would commence if the efforts were unsuccessful. To introduce a waiting period would upset the balance achieved by the paragraph. The requirement that the owner of the goods be given a reasonable period of time to protect his interests was already implicit in the notice requirement; in any case it would normally be provided for in the national law that, pursuant to paragraph (4), would govern the procedures for the sale. Accordingly, the proposal was not accepted.

138. A proposal to change the words "in other respects" to "in all other respects" was referred to the drafting group.

Article 11

Paragraph (1)

139. The drafting group was requested to align paragraph (1) with article 4(1)(a).

140. It was proposed that notice of loss or damage should be required to be in writing, which should include notice by telegram and by telex, as an exception to the

general rule regarding the form of notice set forth in article 1(e). The Commission did not accept the proposal.

141. The view was expressed that one working day within which notice of apparent loss of or damage to the goods must be given was not sufficient to enable the recipient to inspect the goods and give the notice. The Commission decided to change the time period for giving that notice to three working days.

142. A suggestion was made to insert after the expression "person entitled to take delivery of them" the words "from the operator" in order to avoid uncertainty in cases of combined transport operators or containerized cargo. The suggestion, considered to be of a drafting nature, was referred to the drafting group.

Paragraph (2)

143. The Commission decided that the 7-day time period in paragraph (2) should be changed to 15 days. With respect to the day on which the 15-day period commenced, the Commission noted that some language versions made reference to the day when the goods reached their final destination, while other language versions referred to the day when the goods reached the consignee or the final recipient. The Commission considered that the time period should commence when the goods reached the final recipient of the goods, who would be in a position to inspect them. The Commission expressed its preference for the term "final recipient" rather than the term "consignee", which might erroneously be interpreted to refer to a consignee in a segment of the carriage of the goods prior to the segment when the goods were carried to their final destination.

144. A view was expressed that the 45-day notice period was not sufficient, since the goods might be carried onward for a considerable period of time after they were handed over by the operator. Accordingly, a proposal was made either to delete the entire proviso that read "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", or to extend the period to 90 days. The prevailing view was that the proviso was useful and should be retained. The Commission decided to change the length of the time period to 60 days, which was the time period in article 19 of the Hamburg Rules.

145. A suggestion was made to include in paragraph (2), after the expression "if notice is not given", the words "to the operator", since those words appeared in the analogous place in paragraph (1).

Paragraphs (3), (4) and (5)

146. The Commission decided to retain the substance of the paragraphs unchanged.

Article 12

Paragraph (1)

147. It was stated that the two-year limitation period was contrary to the existing law in some legal systems. It

was accordingly proposed that, instead of establishing a limitation period, the paragraph should refer to the limitation period in the State where the goods were located. The proposal was not accepted.

Paragraph (2)

148. It was proposed that the reference to article 5 at the end of the paragraph should refer to article 5(4). The proposal was referred to the drafting group.

149. In connection with the first part of the paragraph, which provided that the limitation period commenced on the day on which the operator handed over the goods to the person entitled to take delivery of them, a proposal was made to delete the reference to the person entitled to take delivery of the goods. In support of that proposal it was stated that the limitation period should commence even if the operator handed the goods over to the wrong person. In opposition, it was stated that the period should not commence in such a case. The proposal was not accepted.

150. It was decided to amend the reference to the operator's handing over the goods to the person entitled to take delivery of them, so as to refer to the operator's handing over the goods to, or placing them at the disposal of, that person.

151. It was proposed that the person to be notified of the loss of the goods should be changed from the person entitled to make a claim that the goods were lost to the person entitled to take delivery of the goods. In support of that proposal it was stated that the latter person was normally the person who would be notified by the operator that the goods were lost. Furthermore, it was stated that the operator should not have to investigate who was entitled to claim for the loss of the goods in order to determine whom to notify. The prevailing view was that the present reference to the person entitled to make a claim for the goods should be retained in view of the amendment to paragraph 5(4), previously adopted by the Commission, to the effect that the person entitled to make a claim for the goods may treat them as lost.

152. With respect to the reference to notice of loss of the goods, a proposal was made that it should be specified whether the limitation period was to commence from the time of dispatch or of receipt of the notice. The proposal was not accepted.

153. A proposal was made to add to the end of the paragraph the words "whichever is earlier". It was explained that the purpose of the proposal was to provide that, in the case of total loss of the goods, the limitation period would commence on the day when the operator gave notice that the goods were lost, but if the notice was given later than the 30-day period after which the goods could be treated as lost under article 5(4), the limitation period would commence upon the expiry of the 30-day period. The proposal was accepted in principle and referred to the drafting group.

Paragraphs (3) and (4)

154. The Commission decided to retain the substance of the paragraphs unchanged.

Paragraph (5)

155. The view was expressed that paragraph (5) in its current form created uncertainty for the operator, since he would remain exposed to recourse actions after the recourse claimant had been held liable in the action against himself, which could be several years after the operator handed over the goods. In response, it was stated that the operator was protected by the requirement that the recourse claimant notify the operator of the claim against the recourse claimant. The Commission decided to retain the present purport of the paragraph.

156. It was observed that, under the current text, the recourse claimant must give notice of the claim against himself within a "reasonable time"; it was stated that those words were not sufficiently precise. Proposals were made that a definite period of time should be specified or that the notice should be required to be given "immediately" or "without undue delay". The Commission decided to retain the present reference to a "reasonable period of time".

157. A proposal was made to align paragraph (5) with article 20(5) of the Hamburg Rules by providing that the recourse action might be instituted within the time allowed by the law of the State where the proceedings were instituted, but that the time allowed should not be less than the 90-day period currently referred to in the paragraph. The proposal was not accepted.

158. It was proposed that the paragraph should be amended to provide that a recourse action may be instituted against the operator not only within 90 days after the recourse claimant had been held liable in the action against himself or had settled the claim upon which such action had been based, but also within 90 days after the recourse claimant had settled a claim against himself even if no action had been instituted. The proposal was not accepted.

159. The Commission expressed its understanding that the "recourse action" referred to in the paragraph referred not only to judicial proceedings but also to arbitration proceedings.

Articles 13 and 14

160. The Commission decided to retain the substance of the articles unchanged.

Article 15

161. A proposal that the text of article 15 should be relocated to the final clauses was submitted to the drafting group.

162. A proposal was made to delete the words "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". In support of the proposal, it was stated that the Convention should not be subordinate to national law. In favour of retaining the words, it was stated that their purpose was to preserve rights and duties under national legislation that incorporated into national law the provisions of conventions relating to the international carriage of goods. In particular, 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. The proposal was not accepted. The understanding of the Commission was that the language in question did not subordinate the draft Convention to national laws that were not derived from or did not give effect to a convention relating to the international carriage of goods.

Article 16

163. It was noted that the article was closely modelled on the sample provision for a universal unit of account, adopted by the Commission at its fifteenth session in 1982.⁶ The Commission decided to retain the substance of the paragraph unchanged.

Article 17

General remark

164. The Commission noted that the article was based on the sample amendment procedure for the revision of limits of liability adopted by the Commission at its fifteenth session in 1982⁷ and on article 15 of the Protocol of 1984 to Amend the International Convention on Civil Liability for Oil Pollution Damage (1969).

Paragraph (1)

165. In connection with the term "Contracting State[s]" in the *chapeau* and in subparagraph (a) of paragraph (1), the Commission returned to a consideration of the terminology that should be used in the draft Convention, i.e. whether the term "Contracting State" or "State Party" should be used (see para. 44 above). One view preferred using the term "State Party" throughout the draft Convention. The decision of the Commission, however, was to replace all references in articles 1 through 16 of the current text to "Contracting State" with references to "State Party" and, in article 17, to retain the reference to "Contracting State" in the *chapeau* but to change the words "Contracting States" in subparagraph (a) to "States Parties". In reaching that decision, the Commission

expressed its intention to conform to the terminology set forth in article 2 of the Vienna Convention on the Law of Treaties. Namely, the term "State Party" was used in order to refer to a State in respect of which the Convention was in force; the term "Contracting State" was used in order to refer to a State that had consented to be bound by the Convention by depositing an instrument of ratification, acceptance, approval or accession, whether or not the Convention had entered into force in respect of that State. The Commission requested the drafting group to implement that intention where relevant in subsequent provisions of article 17 and in the draft final clauses.

166. The following concerns were expressed with respect to subparagraph (b): to base the amendment of the limits of liability in the draft Convention on the amendment of the limits in conventions specified in an exhaustive list was not desirable because some of those conventions could fall into disuse and new conventions could be concluded; since the mechanism provided for in subparagraph (b) was automatic, it could result in an excessive number of convocations of Committees to consider amending the limits in the draft Convention; under the subparagraph, proceedings to amend the limits in the draft Convention would have to be initiated even if no State Party had requested them. Proposals intended to address those concerns included a suggestion that the list of Conventions in subparagraph (b) should be made merely illustrative and not final or exhaustive, that the frequency of convocations of the revision Committee should be restricted and that the mechanism in subparagraph (b) should not apply unless at least one State had also requested the convening of the Committee.

167. Yet another proposal was that subparagraph (b) should be deleted in its entirety. In support of that proposal it was stated that, if there was a need to amend the limits of liability in the draft Convention, a sufficient number of States would request the convocation of a revision Committee under subparagraph (a). The Commission accepted that proposal.

168. The Commission accepted a proposal to insert a provision along the following lines:

"If the present Convention enters into force more than five years after it was opened for signature, the depositary shall convene a meeting of the Committee within the first year after it entered into force".

169. A suggestion that the substance of the proposal referred to in paragraph 167 above be combined with the current paragraph (5) was referred for consideration to the drafting group.

Paragraph (2)

170. The Commission decided to retain the substance of the paragraph unchanged.

Paragraph (3)

171. It was proposed that paragraph (3) should be deleted as unnecessary as it merely provided that all relevant considerations should be taken into account in deciding

⁶*Ibid.*, Thirty-seventh Session, Supplement No. 17 (A/37/14 and Corr.1-2), para. 63, annex I.

⁷*Ibid.*, para. 63, annex III.

upon an amendment of the limits of liability. The prevailing view was that the paragraph usefully pointed out particularly relevant considerations. The Commission accordingly decided to retain the paragraph, subject to suggestions for improving the drafting of the *chapeau* and for amending subparagraph (a), which were referred to the drafting group for its consideration.

Paragraph (4)

172. A proposal was made, but not accepted, to add to paragraph (4) a sentence along the following lines:

"Amendments shall be adopted by the Committee by a two-thirds majority of its members present and voting, on the condition that at least one half of the members shall be present at the time of voting".

Paragraph (5)

173. A proposal that paragraph (5) should be moved closer to paragraph (1) was referred to the drafting group for its consideration.

Paragraph (6)

174. It was pointed out that the effect of paragraph (6) was that an amendment would not enter into force until 36 months after its adoption had been notified to Contracting States by the depositary, which was said to be too long. Accordingly, a proposal was made to change each of the two 18-month periods referred to in the paragraph to 12 months, so that it would take only 24 months for an amendment to enter into force. In opposition, it was said that the 18-month periods also appeared in the Protocol of 1984 to Amend the International Convention on Civil Liability for Oil Pollution Damage (1969), and the period of 18 months in that text represented a compromise. With respect to the first 18-month period in paragraph (6), it was stated that a period of that length was necessary in some countries where an amendment to the limits of liability required parliamentary consideration and action. The decision of the Commission was to retain 18 months as the length of both periods.

Paragraphs (7), (8) and (9)

175. The Commission decided to retain the substance of the paragraphs unchanged.

F. Consideration of draft final clauses prepared by the secretariat (A/CN.9/321) (articles A-I)

176. The Commission discussed final clauses on the basis of draft articles A-I prepared by the secretariat and presented to the Commission in document A/CN.9/321.

Article A

177. The Commission decided to retain the substance of the article unchanged.

Article B

Paragraph (1)

178. It was noted that the paragraph set forth two alternatives for the adoption of the Convention. According to the first alternative, the General Assembly, acting on a recommendation of the Sixth Committee, would finalize and adopt the Convention and open it for signature by States. According to the second alternative, the General Assembly would convene a diplomatic conference that would finalize and adopt the Convention and open it for signature. Because of the decision of the Commission to recommend to the General Assembly that it refer the draft Convention to a diplomatic conference, it adopted the second of the two alternatives (see para. 225 below).

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

179. The Commission decided to retain the substance of the paragraphs unchanged.

Article C

180. The Commission decided to retain the substance of the article unchanged.

Article D

181. A proposal was made that States should be permitted to make a reservation excluding the application of article 12, which dealt with the period of time within which judicial or arbitral proceedings could be instituted. It was stated that, in the legal system of at least one State, judicial proceedings involving the subject-matter covered by the draft Convention could not be time-barred and that, if no reservation was permitted, such a State might not be able to adhere to the Convention.

182. Another proposal was that States should be permitted to make a reservation restricting the application of the Convention to certain types of terminal operators. It was said that transport-related services were performed by a wide variety of terminals serving different modes of transport, handling different types of goods and using technologies of different degrees of sophistication, and that States might regard it as undesirable to submit all such operations to a single legal régime. In further support of the proposals it was said that the possibility of making reservations would make it possible for a larger number of States to become parties to the Convention.

183. In opposition, it was said that to permit reservations would defeat the objective of uniformity of law that was sought by the draft Convention. Furthermore, the proposal to permit States to restrict the application of the Convention to certain types of terminal operators was said to be contrary to the objective of filling gaps left by international conventions regulating various modes of transport. Although the view was expressed that the decision as to whether to permit reservations should be left to the diplomatic conference, the prevailing view was that the draft Convention should expressly provide that no reservations could be made to the Convention.

Article E

184. The Commission decided to retain the substance of the article unchanged.

*Article F**Paragraph (1)*

185. Various views were expressed with respect to the number of ratifications or similar actions that should be required in order for the Convention to enter into force. According to one view, five ratifications or similar actions, as set forth within square brackets in the present text of article F, were too few, since only a substantially higher number would be consistent with the objective of the draft Convention to achieve unification of the law relating to the liability of terminal operators. Numbers such as 15, 20 (as required by the Hamburg Rules) or 30 (as required by the Multimodal Convention) were proposed.

186. According to another view, the number of ratifications or similar actions necessary to bring the Convention into force should be low. It was stated that a low number was more apt to achieve uniformity. Requiring a higher number would delay the entry of the Convention into force for a considerable period of time. A low number would enable the Convention to enter into force at an earlier date, and experience with other Conventions showed that the entry into force of a convention had the effect of attracting additional parties. It was also stated that States not wishing to apply the Convention could simply refrain from becoming a party to it, but they should not, by requiring a high number of ratifications or similar actions, prevent the Convention from entering into force as soon as possible for those States which wanted it. After extensive discussion, the Commission decided to fix the number at five.

Paragraphs (2) and (3)

187. The Commission decided to retain the substance of the paragraphs unchanged.

*Article G**Paragraph (1)*

188. With respect to the references to "Contracting States", the Commission decided to conform to its decision with respect to article 17(1) (see para. 165 above) and to change paragraph (1) of article G to read along the following lines:

"At the request of not less than one third of the States Parties to this Convention, the depositary shall convene a conference of the Contracting States for revising or amending it".

Paragraph (2)

189. The Commission decided to retain the substance of the paragraph unchanged.

Article H

190. A proposal to incorporate into the final clauses the provisions of article 17 in the current text was referred to the drafting group.

Article I

191. The Commission decided to retain the substance of the article unchanged.

Concluding clause

192. The Commission decided to retain the substance of the concluding clause unchanged.

**G. Consideration of articles of the
draft Convention submitted by the drafting group
(articles 1-25)**

193. The text of the draft Convention submitted by the drafting group incorporated into the text as approved by the Working Group on International Contract Practices at its eleventh session (A/CN.9/298, annex I) the decisions taken by the Commission at its current session. The text also reflected drafting changes designed to increase understanding, ensure consistency within each language version and correspondence among the various language versions.

194. The following paragraphs reflect modifications made by the Commission to certain of the draft articles submitted by the drafting group. Other minor modifications, and especially those not affecting all language versions, are not specifically mentioned. Subject to those modifications, the text of the draft articles submitted by the drafting group is as set forth in annex I to the present report. The following paragraphs also reflect the discussion within the Commission on certain of the draft articles submitted by the drafting group.

Title of the draft Convention

195. In reference to the words "in International Trade" that appeared at the end of the title, the view was expressed that "in International Transportation" would more appropriately express the scope of the draft Convention. It was noted that some types of goods that would be covered by the draft Convention, for example, equipment and displays for exhibitions and disaster relief supplies, would be involved in international transportation but not in international trade. The Commission approved the title as submitted by the drafting group.

Article I

196. The Commission agreed that examples of transport-related services set forth in subparagraph (d) clearly indicated that those services included only physical

activities and not, for example, financial services. The Commission approved the article as submitted by the drafting group.

Article 2

197. The question was raised as to whether it was necessary to define "State Party". It was agreed that the understanding of the Commission as to the meaning of that term as reflected in the present report (see para. 165 above) was sufficient. The Commission approved the article as submitted by the drafting group.

Article 3

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

Article 4

Paragraph (1)

199. Certain reservations were expressed with respect to the text of the paragraph. Opposition was expressed to the decision to delete from paragraph (1)(a) the reference to the condition and quantity of the goods. The Commission approved the paragraph as submitted by the drafting group.

Paragraphs (2) and (3)

200. The Commission approved the paragraphs as submitted by the drafting group.

Paragraph (4)

201. Reservations were expressed with respect to the paragraph as submitted by the drafting group, which was based on article 14(3) of the Hamburg Rules. Those reservations concerned the proviso making the form of signature depend upon national law, and to the fact that the paragraph restricted permitted forms of signature to those effected by mechanical or electronic means. Preference was expressed for a provision along the following lines: "'Signature' means a handwritten signature, its facsimile or an equivalent authentication effected by any other means". That definition was derived from article 5(k) of the United Nations Convention on International Bills of Exchange and International Promissory Notes (1988). The Commission approved the paragraph as submitted by the drafting group.

Article 5

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

Article 6

203. In connection with paragraph (1)(b), the view was expressed that the paragraph did not reflect the decision of

the Commission to the effect that the lower limit of liability should apply only if it appeared from objective indications available to the operator that the goods were carried to or were to be carried from the operator by sea or by inland waterways. The Commission approved the article as submitted by the drafting group.

Article 7

204. A reservation was expressed with respect to the heading of the article as decided by the Commission and reflected in the heading submitted by the drafting group; it was stated that the heading did not accurately reflect the substance of the article, which dealt with contractual as well as non-contractual claims. The Commission brought the heading as it appeared in some language versions other than English into conformity with the heading in the English version, and approved the article as submitted by the drafting group.

Article 8

205. A reservation was expressed with respect to the heading of the article as decided by the Commission and reflected in the article submitted by the drafting group, on the grounds that the use of the word "right" implied that the operator could decide whether or not to limit his own liability. The Commission approved the article as submitted by the drafting group.

Article 9

206. Dissatisfaction was expressed with the placement of the word "lawful" in paragraph (a), which was said to lead to the interpretation that only "other means" taken by the operator to dispose of the dangerous goods must be lawful, and that the operator could destroy the goods or render them innocuous by unlawful means. According to another view, the word "lawful" should not be used at all since it would imply that the destruction of goods in general was lawful. Instead, the paragraph should require that the goods be destroyed or disposed of in a manner that did not cause environmental damage. The Commission approved the article as submitted by the drafting group.

Article 10

207. A reservation was expressed with respect to paragraph (1) on the ground that it did not reflect the decision of the Commission that the operator's right of retention should cover not only costs and claims that were incurred during his period of his responsibility for the goods, but also those which were incurred after his period of responsibility had expired. The Commission approved the article as submitted by the drafting group.

Article 11

208. In connection with paragraph (2), preference was expressed for using the words "final destination" rather

than the words "final recipient" as decided by the Commission. The Commission approved the article as submitted by the drafting group.

Article 12

209. A reservation was expressed with respect to the decision of the Commission to retain article 12. The Commission approved the article as submitted by the drafting group.

Articles 13, 14, 15, 16, 17 and 18

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

Article 19

211. It was decided to delete the word "Contracting" from paragraphs (1) and (4). A view was expressed that paragraph (3) should be amended to take account of the provision contained in article 2(1)(b), which had been added by the Commission. Subject to the deletion of the word "Contracting", the Commission approved the article as submitted by the drafting group.

Article 20

212. The view was expressed that States should be permitted to make reservations to the Convention. Accordingly, opposition was expressed to the article as submitted by the drafting group. The Commission decided to approve the article.

Articles 21, 22 and 23

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

Article 24

Paragraph (1)

214. Regret was expressed that the Commission had decided to delete subparagraph (b). The Commission approved the paragraph as submitted by the drafting group.

Paragraphs (2) and (3)

215. The Commission approved the paragraphs as submitted by the drafting group.

Paragraph (4)

216. The view was expressed that the transport-related conventions referred to in paragraph (4)(a) were those listed in A/CN.9/298, annex II. The Commission approved the paragraph as submitted by the drafting group.

Paragraphs (5), (6) and (7)

217. The Commission approved the paragraphs as submitted by the drafting group.

Paragraph (8)

218. Views were expressed that the words "State Party" should be changed to "Contracting State" or to "State", on the grounds that the paragraph as submitted by the drafting group did not provide for the situation where a State that had ratified or acceded to the Convention, but in respect of which the Convention had not yet entered into force, wished to denounce it. In opposition, it was stated that the paragraph related to and was consistent with paragraph (7), which dealt with acceptance and entry into force of amendments in relation to States Parties. The Commission approved the paragraph as submitted by the drafting group.

Paragraphs (9) and (10)

219. The Commission approved the paragraphs as submitted by the drafting group.

Article 25

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

Concluding clause

221. The Commission approved the concluding clause as submitted by the drafting group.

222. The Commission expressed its appreciation to the Working Group on International Contract Practices for having prepared a draft Convention of such high quality. The Commission also expressed its appreciation to the Chairman of the Working Group during its preparation of the draft Convention, Mr. Michael Joachim Bonell, Italy, and to the Chairman of the present session, Mr. Jaromir Ruzicka, Czechoslovakia, who presided over the consideration and adoption of the draft Convention by the Commission.

H. Procedure for adopting the draft Convention as a convention

223. The Commission considered the procedures that might be followed for the adoption of the draft Convention as a convention. A statement of the financial implications of holding a diplomatic conference was made by the secretariat. The Commission expressed its strong preference for recommending that the General Assembly convene a diplomatic conference to adopt the Convention. The Commission was of the view that it had established a draft Convention that provided comprehensive and soundly based legal rules regulating an important element of international trade. It recognized, however, that certain issues in particular articles had not been finally settled and

that certain aspects of the draft Convention could be improved even further. It was confident that a final round of negotiations would lead to agreement on those issues and improvements.

224. In order to achieve those results, the Commission regarded it as particularly important that the further negotiations involve the participation of all States, especially those which were not members of the Commission and had not participated in the preparation of the draft Convention, as well as specialists in international transport law. In view of the fundamentally practical aspects of the draft Convention, it was important that representatives of the various relevant commercial and economic interests (e.g., terminal operators, carriers, shippers and insurers) should also participate. Broad-based participation by those States, specialists and interests was regarded as essential for the remaining issues to be settled in a satisfactory manner and for the Convention to meet with world-wide acceptance. The Commission regarded a diplomatic conference as the most desirable forum for the conduct of such negotiations.

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

225. At its 426th meeting, on 2 June 1989, the Commission adopted by consensus the following decision:

The United Nations Commission on International Trade Law.

Recalling that, at its sixteenth session, in 1983, it decided to include the topic of liability of operators of transport terminals in its programme of work and, at its seventeenth session, in 1984, assigned to its Working Group on International Contract Practices the task of preparing uniform legal rules on that topic,

Noting that the Working Group on International Contract Practices devoted four sessions to the preparation of the draft Convention on the Liability of Operators of Transport Terminals in International Trade,

Noting further that the Commission has considered the text of the draft Convention at its twenty-second session, in 1989,

Being convinced that, in order to achieve world-wide acceptability of the Convention, the final negotiations leading to the adoption of the Convention should involve the participation of all States, specialists in international transport law and representatives of the relevant commercial and economic interests,

1. *Submits* to the General Assembly the draft Convention on the Liability of Operators of Transport Terminals in International Trade, as set forth in annex I to the present report;

2. *Recommends* that the General Assembly should convene an international conference of plenipotentiaries for a duration of three weeks in 1991 to conclude, on the basis of the draft Convention approved by the Commission, a Convention on the Liability of Operators of Transport Terminals in International Trade.

III. INTERNATIONAL PAYMENTS

226. The Commission decided, at its nineteenth session, in 1986, to begin the preparation of model rules on electronic fund transfers and to entrust that task to the Working Group on International Payments.⁸ The Working Group commenced its work at its sixteenth session, in November 1987, 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. 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).

227. The Commission had before it at its current session the reports of the seventeenth and eighteenth sessions of the Working Group (A/CN.9/317 and 318). At its seventeenth session the Working Group considered the draft provisions prepared by the secretariat and requested that they be redrafted on the basis of the discussion at that session. At its eighteenth session the Working Group considered the provisions that had been redrafted by the secretariat.

228. The Working Group at its eighteenth session decided that for the time being the provisions should be prepared in the form of a model law and that the scope of application should be limited to those credit transfers which were international in nature. It decided, however, that the model law should apply to all international credit transfers without regard to whether they were in electronic or paper-based form. Therefore, it decided that the title of the draft provisions should be the draft Model Law on International Credit Transfers.

229. The Commission took note with appreciation of the reports of the Working Group and recommended that it continue its efforts with a view to presenting a text to the Commission for its consideration at its twenty-fourth session, in 1991.

IV. NEW INTERNATIONAL ECONOMIC ORDER

230. The Commission, at its nineteenth session, in 1986, decided to undertake work in the area of procurement as a matter of priority and entrusted that work to the Working Group on the New International Economic Order.⁹ At its current session, the Commission had before it the report of the Working Group on the work of its tenth session (A/CN.9/315).

231. The report indicated that the Working Group had engaged in an examination of the major issues arising in connection with procurement and had discussed ways in which those issues might be treated. It had decided to

⁸*Ibid.*, Forty-first Session, Supplement No. 17 (A/41/17), para. 230.

⁹*Ibid.*, para. 243.

embark on the preparation of a model procurement law in order to assist countries, developed and developing, in restructuring or improving their procurement laws and procedures or in establishing sound procurement laws where none presently existed.

232. The Commission expressed appreciation for the work performed by the Working Group thus far. The discussions at the tenth session of the Working Group were said to constitute a sound basis for the further work of the Working Group.

233. It was observed that work was in progress within the General Agreement on Tariffs and Trade (GATT) directed towards the enlargement of the scope of the GATT Agreement on Government Procurement, and the view was expressed that the Working Group should take developments within GATT into account in the preparation of the model procurement law. It was noted that participants in the work within GATT, as well as an observer from the GATT secretariat, had participated in the tenth session of the Working Group, permitting mutual exchanges of views and information that would be useful in the further work of GATT and of the Commission in their respective projects. It was also noted that the work of the Commission would not duplicate that of GATT because the scope and objectives of the two projects differed in a number of respects.

234. The view was expressed that the model procurement law under preparation within the Working Group should take account of the particular needs of foreign participants in procurement proceedings, as well as existing regional arrangements in relation to procurement.

235. The Commission endorsed the view of the Working Group concerning the desirability of greater participation by developing countries in the work of the Working Group. The Commission requested the Working Group to proceed with its work expeditiously.

V. GUARANTEES AND STAND-BY LETTERS OF CREDIT

236. The Commission, at its twenty-first session, in 1988, considered the report of the Secretary-General on stand-by letters of credit and guarantees (A/CN.9/301). Agreeing 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 could be carried out at two levels, the first relating to contractual rules or model terms and the second pertaining to statutory law.¹⁰

237. With respect to the first level, the Commission welcomed the work undertaken by the International Chamber of Commerce (ICC) in preparing draft Uniform

Rules for Guarantees and agreed that comments and possible recommendations by the 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. Accordingly, the Commission decided to devote one session of the Working Group on International Contract Practices to a review of the ICC draft Uniform Rules for Guarantees in order 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.¹¹

238. The Commission also asked the Working Group to examine the desirability and feasibility of any future work relating to the second level as envisaged in the conclusions of the report, namely, the idea of striving for greater uniformity at the statutory level, through work towards a uniform law.¹²

239. At its current session, the Commission had before it the report of the Working Group on International Contract Practices on the work of its twelfth session (A/CN.9/316). The Commission noted that the Working Group had engaged in a review of the ICC draft Uniform Rules for Guarantees, as well as a discussion of the desirability and feasibility of achieving greater uniformity at the statutory level. The Commission also noted the recommendation of the Working Group that work be initiated on the preparation of a uniform law, whether in the form of a model law or in the form of a convention.

240. The observer from ICC stated that the report of the Working Group, which contained the observations and recommendations made with respect to the ICC draft Rules, had been discussed within ICC and that a modified version of the draft Rules was being circulated among that organization's national bodies. It was hoped that a final draft text could be adopted by the end of 1989 with a view to the entry into effect of the Rules on 1 January 1990.

241. The view was expressed that the Commission's review of the draft Rules should not set a precedent for review by the Commission of texts developed by other organizations when those texts were still in a preparatory rather than a final form. In response, it was stated that a distinction had to be made between the case of another organization preparing a text that would be finalized and sponsored by the Commission and the case of a text being prepared and sponsored by another organization. In the latter case, it might be desirable that the views of the Commission be elicited at a preliminary stage.

242. There was wide support for the recommendation of the Working Group that the Commission initiate work on a uniform law. It was felt that the elaboration of a uniform law by the Commission would respond to an urgent need for uniform legislation in the field of guarantees and stand-by letters of credit.

¹⁰*Ibid.*, paras. 20-22.

¹²*Ibid.*, paras. 22-24.

¹⁰*Ibid.*, Forty-third Session, Supplement No. 17 (A/43/17), para. 19.

243. The view was expressed that a decision on such work should be held in abeyance until the entry into effect and operation for some time of the ICC Uniform Rules for Guarantees. It was stated in reply that the elaboration of a uniform law at the statutory level could proceed without duplicating the work of ICC on uniform rules because of the different nature of the two projects. The ICC Rules were of a contractual nature and, as indicated in the report of the Working Group, left important gaps that could only be closed at the statutory level.

244. After deliberation, the Commission decided that work on a uniform law should be undertaken. It entrusted this task to the Working Group on International Contract Practices and requested the secretariat to prepare the necessary documentation.

VI. INTERNATIONAL COUNTERTRADE

245. The Commission, at its nineteenth session, in 1986, 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.¹³

246. At its twenty-first session, in 1988, the Commission had before it a report entitled "Preliminary study of legal issues in international countertrade" (A/CN.9/302), which contained a description of contractual approaches to countertrade and an enumeration of some of the more important legal issues involved in that type of trade. At that session, 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 a draft outline of a legal guide in order for it to decide what future action might be taken.¹⁴ At the current session, the Commission had before it a report entitled "Draft outline of the possible content and structure of a legal guide on drawing up international countertrade contracts" (A/CN.9/322).

247. Various views were expressed as to whether the Commission should continue work in the area. On the one hand, it was said that international countertrade was detrimental to both developed and developing States in that it introduced elements of bilateralism and price-setting in place of multilateralism and price competition. The elaboration of a legal guide on countertrade by the Commission might be understood as an approval of that type of trade and might encourage parties to engage in it. On the other hand, it was said that an appreciable share of international

trade was conducted by the use of countertrade arrangements and that such arrangements gave rise to legal difficulties to which parties often did not find optimal solutions. Such difficulties were particularly troublesome in developing countries, which were often compelled to resort to countertrade because of a shortage of foreign exchange.

248. One suggestion was that the Commission should discontinue work in the area. Another suggestion was that the Commission should postpone its work until the Economic Commission for Europe, which was preparing a guide on legal aspects of commercial compensation contracts and industrial compensation contracts, had completed its work. At that time the Commission would be in a better position to decide on the work to be undertaken by it.

249. The prevailing view was that a legal guide on drawing up international countertrade contracts should be prepared by the Commission. The fact that the Commission was a specialized legal body that included States at different levels of economic development meant that its work would not duplicate work undertaken by other bodies. The Commission requested the secretariat to prepare for the next session of the Commission draft chapters of the legal guide. The Commission considered that the draft outline of the possible content and structure of such a legal guide already prepared by the secretariat provided a good basis for the commencement of its future preparatory work.

VII. CO-ORDINATION OF WORK

250. The Commission had before it a report of the Secretary-General on current activities of international organizations related to the harmonization and unification of international trade law (A/CN.9/324). That report updated the information contained in an earlier report on the same subject submitted to the Commission at its nineteenth session (A/CN.9/281). The current report dealt with the activities under the following headings: international commercial contracts in general; commodities; industrialization; transnational corporations; transfer of technology; industrial and intellectual property law; international payments; international transport; international commercial arbitration; private international law; trade facilitation; and other topics of international trade law, congresses and publications.

251. The Secretary of the Commission noted that, while it had been the practice to submit a report on the current activities of international organizations every three years, the secretariat intended in the future to submit such reports on a more frequent basis.

252. The observer for ICC reported that an ICC working party was currently updating the 1980 edition of Incoterms, the ICC standardized trade terms for international sales contracts. The purpose of the revision was to replace certain terms in the 1980 edition with terms that were

¹³*Ibid.*, Forty-first Session, Supplement No. 17 (A/41/17), paras. 241 and 243.

¹⁴*Ibid.*, Forty-third Session, Supplement No. 17 (A/43/17), para. 35.

relevant to modern trade practices, such as the use of containers and roll-on roll-off techniques. The new edition would also take into account the substitution of paper-based transport documents by electronic documentation. In addition to introducing new terms, the new edition would present Incoterms in a rearranged order to allow uninitiated users to be able to identify terms on the basis of their departure and arrival character. The observer for ICC stated that, as had been the practice with respect to the Uniform Customs and Practice for Documentary Letters of Credit, the updated Incoterms would be submitted to the Commission for its endorsement.

253. The observer for the Council for Mutual Economic Assistance (CMEA) stated that work was continuing on the improvement of the legal foundations for co-operation among States members of CMEA and their organizations. At its forty-third session, in October 1987, CMEA recognized the advisability of improving the contract law rules and general conditions for economic and scientific and technical co-operation among economic organizations of the States members of CMEA, and also of the convergence or harmonization by the concerned countries of the related national legal rules. In 1988 a revised text of the General Conditions Governing Delivery of Goods among Organizations of CMEA member States was completed, with a view to its application as from 1 July 1989. The preparation of the legal guide for the formulation of contracts on production co-operation between economic organizations of the States members of CMEA has been completed. The countries concerned have adopted a model article on international *ad hoc* arbitration and the rules for such arbitration. A comparative study of the provisions of the general conditions of CMEA deliveries and the United Nations Convention on Contracts for the International Sale of Goods would be prepared within the CMEA Standing Commission on Legal Matters. Other CMEA activities included the preparation of information and reference materials on the legislation of the States members of CMEA governing the establishment and operations of joint ventures, combines and institutions, and also the establishment of direct production and scientific-technical links between economic organizations of States members of CMEA.

254. The observer for the International Maritime Committee (CMI) referred to the ongoing preparation by that organization of draft uniform rules for incorporation into sea waybills. CMI was also studying the possibility of developing electronic means for the transfer of rights to goods in transit. With respect to the CMI Committee on the Unification of the Law of the Carriage of Goods by Sea in the 1990s, it was expected that guidelines would be prepared for submission to the 1990 Congress of CMI to be held in Paris concerning problems not adequately covered by the current legal régimes.

255. The observer for the International Institute for the Unification of Private Law (UNIDROIT) reported that the Governing Council of UNIDROIT had expressed its satisfaction at the progress of work in the Commission 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 subse-

quently taken over by the Commission. The observer for UNIDROIT also referred to the expected adoption in October 1989 by the Inland Transport Committee of the Economic Commission for Europe of a Convention on Liability for Damage Caused during the Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels. Work on that text had also been initiated within UNIDROIT. With respect to the Convention on International Financial Leasing and the Convention on International Factoring, developed within UNIDROIT and adopted in May 1988 at Ottawa, the observer for UNIDROIT reported that a number of States had signed the two instruments and that their early entry into force was expected.

256. As to the current work of UNIDROIT, the observer for UNIDROIT stated that the study group on progressive codification of international trade law was nearing the completion of its work on general principles applicable to international commercial contracts. Work was also proceeding within UNIDROIT relating to the international protection of cultural property. Other topics on the current work programme relating to international trade law included franchising, security interests in mobile equipment and commercial agency.

257. The observer for the Asian-African Legal Consultative Committee (AALCC) spoke of the fruitful co-operation between the Commission and AALCC. He noted that AALCC at its annual sessions regularly considered the work of the Commission from the Asian-African perspective and that observations made with respect to that work were of mutual benefit. He also noted the contribution of the Commission and its secretariat to the seminars on international trade law organized by AALCC and pointed out the importance of such seminars for the promotion of the results of work of the Commission in the Asian-African region. With respect to the work of AALCC, the observer informed the Commission that AALCC was preparing a legal guide on industrial joint ventures, and that it was considering legal norms and principles for restructuring Third World indebtedness. He said that in 1989 AALCC established a regional centre for arbitration at Lagos.

258. The observer for the Cairo Arbitration Centre, which was established under the auspices of AALCC, reported that the Centre had held its first training programme for African and Asian arbitrators in November 1988. The International Development Law Institute, the American Arbitration Association, ICC and the International Centre for the Settlement of Investment Disputes had participated in the programme and arbitrators from seven African and Asian countries had attended. Additional training programmes were scheduled to be held at Jeddah in November 1989 and, provisionally, at Cairo in January 1990. The Cairo Centre was also planning to establish an international institute for investment and arbitration to provide training for lawyers, businessmen and government officials from Africa and Asia.

259. The observer for the Inter-American Commercial Arbitration Commission (IACAC) informed the Commission of the last meeting of the Council of IACAC, which

was held on 9 May 1989 at Cartagena, Colombia. He pointed out the continuing efforts of IACAC in promoting the acceptance of the Inter-American Convention on International Commercial Arbitration (Panama, 1975) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). He informed the Commission that IACAC was to hold in the last days of September 1989 the tenth inter-American commercial arbitration conference.

260. The observer for the Hague Conference on Private International Law informed the Commission of topics on the programme of work of the Conference that were relevant to the work of the Commission. Those topics included the preparation of a convention on the law applicable to negotiable instruments. The Permanent Bureau of the Conference was drawing up a report dealing on the one hand with the revision of the Geneva Conventions of 1930 and 1931 on certain conflicts of laws concerning bills of exchange and promissory notes and concerning cheques, and on the other hand with the specific problems of conflict of laws that might be raised by the United Nations Convention on International Bills of Exchange and International Promissory Notes. Furthermore, the Conference was considering private international law issues of automatic data processing, multimodal transport of goods, and of contractual obligations in general.

261. The observer for the Latin American Federation of Banks informed the Commission that one of the resolutions of the General Assembly of Governors held in April 1989 was that banks in Latin America should encourage the adherence by their countries to the United Nations Convention on International Bills of Exchange and International Promissory Notes.

VIII. STATUS OF CONVENTIONS

A. Convention on the Limitation Period in the International Sale of Goods

262. The Commission noted that upon the coming into force on 1 August 1988 of the Convention on the Limitation Period in the International Sale of Goods and of the 1980 Protocol that amended the Convention, the Secretary-General, as the depositary of the Convention, was called on by article XIV (2) of the Protocol to prepare a text of the Convention as amended by the Protocol. The Commission further noted that by depositary notification dated 17 April 1989 the Secretary-General had circulated a text of the Convention as it was proposed to be amended. The depositary notification indicated that, if the Secretary-General received no objections to the proposed text of the Convention as amended, it would be published as the definite text.

263. The Secretary informed the Commission that the proposed text of the amended Convention had been established in the five languages in which the diplomatic conference had been held in 1974. Since Arabic had not been one of the languages of the diplomatic conference,

the Convention did not exist in that language. However, the 1980 Protocol amending the Convention did exist in Arabic.

264. The Commission decided that it should request that an Arabic language version of the Convention as amended should be established. To this end, it requested the Secretary-General to prepare a translation of the Convention as amended into Arabic. The translation would be reviewed at the twenty-third session of the Commission in 1990 at which time the Commission would propose a text to the Secretary-General that might be circulated by depositary notification, giving all States the opportunity to comment on the proposed text before it was published as the definitive Arabic language version of the Convention as amended.

B. Signatures, ratifications, accessions and approvals

265. 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, the Protocol amending the Limitation Convention, the United Nations Convention on the Carriage of Goods by Sea (1978, the Hamburg Rules), and the United Nations Convention on Contracts for the International Sale of Goods. 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 at 16 May 1989 (A/CN.9/325).

266. The Commission noted with great satisfaction that since the report submitted to the Commission at its twenty-first session, in 1988, an additional four States had ratified or acceded to the United Nations Sales Convention: Australia, Denmark, German Democratic Republic and Norway. This brought the number of States that had ratified or acceded to the Convention to 19. Representatives and observers of a number of other States reported that official action was being taken that was expected to lead to the ratification of or accession to the Convention in the near future.

267. The Commission expressed its great pleasure at the fact that an additional seven States had ratified or acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Algeria, Antigua and Barbuda, Argentina, Bahrain, Dominica, Kenya and Peru. Not only was this the largest number of States that had ratified or acceded to the Convention in any comparable period in its 30-year history, but the geographical distribution demonstrated the widespread appreciation of the benefits to be gained by being party to the Convention. The hope was

expressed that those States which had not as yet acceded to the Convention would do so in the near future.

268. In addition, the Commission was informed that since the last report in 1988 legislation based on the UNCITRAL Model Law on International Commercial Arbitration had been enacted in Australia, Bulgaria and Nigeria, in the Canadian Provinces of Ontario and Saskatchewan and in the State of California in the United States of America.

269. In respect of the Hamburg Rules, the Commission was informed that Nigeria and Sierra Leone had ratified or acceded to the Convention, bringing the total to 14. In view of the number of States that were expected to complete the process leading to ratification of or accession to the Convention in 1989, the Secretary of the Commission re-affirmed the expectation of the secretariat stated at the twenty-first session of the Commission, in 1988, that by the end of 1989 at least the 20 States necessary for the Convention to come into force would have ratified or acceded to it.

270. A number of representatives and observers indicated that their Governments were following developments in respect of the Hamburg Rules with interest and that they would review their position once the Convention came into force with a view to ratifying or acceding to it.

271. The Secretary informed the Commission that the United Nations Convention on International Bills of Exchange and International Promissory Notes had been prepared in its definitive form and was available for signature, ratification, acceptance, approval and accession. True copies had been distributed to the treaty sections of the ministries of foreign affairs, and copies of the Convention had been distributed at the session of the Commission. Several representatives and observers stated that the consultation process had been undertaken to determine whether their Governments would sign the Convention. The Secretary stated that the report on the status of conventions to be submitted to the twenty-third session of the Commission would contain information on actions taken in respect of the Convention.

IX. TRAINING AND ASSISTANCE

272. The Commission had before it a note by the secretariat that set out the activities that had been carried out in respect of training and assistance during the prior year as well as possible future activities in that field (A/CN.9/323). The note indicated that since the Commission had stated at its twentieth session in 1987 "that training and assistance was an important activity of the Commission and should be given a higher priority than it had in the past",¹⁵ the secretariat had endeavoured to plan a more extensive programme of activities than had previously been carried out. In doing so the secretariat had kept in

mind the decision of the Commission at its fourteenth session, in 1981, that a major purpose of the training and assistance activities should be the promotion of the texts that had been prepared by the Commission.¹⁶

273. The Commission had been informed at its twenty-first session, in 1988, that the secretariat was planning to organize a seminar at Maseru in 1988 in co-operation with the Government of Lesotho and the Preferential Trade Area of Eastern and Southern African States (PTA). The Seminar was held from 25 to 30 July 1988.

274. A total of 34 individuals, amongst whom were senior government officials, representatives from chambers of industry and commerce and from the universities, from 14 countries (Burundi, Djibouti, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Mozambique, Rwanda, Swaziland, Uganda, United Republic of Tanzania, Zambia and Zimbabwe), along with an additional 36 persons from Lesotho, participated in the seminar. The seminar considered the conventions and other legal texts prepared by the Commission.

275. The Commission noted that the results of the seminar had been discussed at the meeting of the PTA Committee of Legal Experts held at Lusaka from 6 to 8 October 1988, where the Committee had concluded that, "considering the relevance of these texts to the success of the PTA economic arrangement, the PTA member States should be urged to consider and possibly adopt these texts" (report of the first meeting of the Committee of Legal Experts, PTA/TC/LEG/I/9, para. 66). The report of the seminar was noted by the PTA Council of Ministers at its thirteenth meeting, held at Arusha, United Republic of Tanzania, from 26 to 29 November 1988. As the Council noted:

"The most important aspect of the Seminar was that the participants appreciated that the adoption by member States of the UNCITRAL legal texts would contribute to the objectives of the PTA because they were intended to minimize discrepancies in existing national legislations. Council was informed that the participants would recommend to their Governments that they adopt the different UNCITRAL texts."

(Report of the thirteenth meeting of the Council of Ministers, PTA/CM/XIII/5, paras. 347-348.)

276. The Commission expressed its satisfaction with the results of the seminar. It requested the secretariat to remain in contact with the secretariat of PTA and with the participants in the seminar with a view to maintaining their interest in the work of the Commission and of the consideration and possible adoption by the States concerned of the texts prepared by the Commission.

277. The Commission, at its twenty-first session, in 1988, had expressed its agreement with the plan of the secretariat to hold a symposium on the work of the Commission in connection with the twenty-second session

¹⁵*Ibid.*, Forty-second Session, Supplement No. 17 (A/42/17), para. 335.

¹⁶*Ibid.*, Thirty-sixth Session, Supplement No. 17 (A/36/17), para. 109.

of the Commission.¹⁷ The symposium was held during the second week of the Commission's session, from 22 to 26 May 1989.

278. Approximately 250 applications for the seminar were received from 90 countries. Funds had been available to award 32 scholarships to cover the travel expenses of participants from developing countries. An additional 48 individuals participated without financial support.

279. Lectures on the conventions and other legal texts prepared by the Commission were given by representatives and observers who had participated in the preparation of the texts and by members of the secretariat.

280. The secretariat reported that the participants had expressed their appreciation of the opportunity to learn more about the work of the Commission. Participants from developing countries, in particular, had emphasized that activities such as those at the Commission were an important vehicle through which to spread knowledge and expertise in international trade law and to promote the adoption and use of the texts prepared by the Commission.

281. Representatives and observers at the session who had given lectures to the symposium expressed their satisfaction with the interest shown by the participants and with the high quality of the questions posed and of the discussion at the symposium.

282. The Commission expressed its appreciation to all those who had participated in the organization of and who had given lectures at the seminar in Lesotho and at the symposium. In particular, the Commission expressed its appreciation to Denmark, Finland, Netherlands, Norway, Sweden and United States of America, which had contributed to the financing of the seminar in Lesotho, and to Austria, Canada, Denmark, Finland and Sweden, which had contributed to the financing of the symposium. The Commission took note with appreciation that Finland had pledged the sum of 100,000 markkaa (approx. 23,000 United States dollars) per year for a period of four years for the support of the Commission's programme of training and assistance. The Commission also noted with appreciation that Switzerland had pledged the sum of 50,000 francs per year for a period of four years for the support of the general programme of the Commission, and that it had been possible to use some of those funds for the symposium.

283. The Commission was informed that the secretariat expected to intensify even further its efforts to organize or co-sponsor seminars and symposia on international trade law, especially for developing countries. In view of the interest in the symposium held during the current session and of the advantages of holding symposia in connection with the sessions of the Commission when they were held at the location of the Commission's secretariat at Vienna, it was intended to organize a symposium on the occasion of the twenty-fourth session of the Commission, in 1991.

284. A seminar for the purpose of promoting the texts prepared by the Commission among the Asian member States of the Asian-African Legal Consultative Committee would be held at New Delhi in October 1989 jointly with AALCC. The secretariat had been invited to participate in two seminars to be organized during 1989 by the Caribbean Community on the carriage of goods by sea at which the Hamburg Rules would be one of the major subjects of consideration.

285. A seminar on the work of the Commission was planned to be held in Moscow in March 1990 for participants from developing countries. The seminar would be financed from a trust fund established by the Soviet Union with the United Nations Development Programme for training of individuals from developing countries.

286. The secretariat reported that it was holding discussions for further seminars to be held in developing countries in different parts of the world. It was hoped that financing would be available both for larger seminars and symposia based on the model of the seminar in Lesotho and the symposium held at the current session and for smaller events that might involve fewer participants and a more restricted list of subjects. It was said that both types of events were useful in a programme of seminars and symposia for the promotion of the work of the Commission.

287. The Commission expressed its approval of the efforts of the secretariat to conduct an increased programme of seminars and symposia. It recalled the invitation of the General Assembly in paragraph 5(c) of resolution 43/166 of 9 December 1988 to Governments, the relevant United Nations organs, organizations, institutions and individuals to make voluntary contributions to the United Nations Commission on International Trade Law Symposia Trust Fund for the financing of such activities. The Commission also recalled its own invitation made at its twenty-second session that such voluntary contributions be made, where possible, on an annual basis.¹⁸

X. RELEVANT GENERAL ASSEMBLY RESOLUTIONS AND OTHER BUSINESS

A. General Assembly resolutions on the work of the Commission

288. The Commission took note with appreciation of General Assembly resolution 43/166 of 9 December 1988 on the report of the United Nations Commission on International Trade Law on the work of its twenty-first session and resolution 43/165 of 9 December 1988 on the United Nations Convention on International Bills of Exchange and International Promissory Notes.

¹⁷*Ibid.*, Forty-third Session, Supplement No. 17 (A/43/17), para. 92.

¹⁸*Ibid.*, para. 97.

B. Future programme of work

289. It was noted that at the twenty-first session of the Commission, in 1988, wide support had been expressed for the proposal 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.¹⁹ The Secretary of the Commission stated that preliminary inquiry into the subject had been made, but that the secretariat still lacked sufficient information to prepare a study. Some delegations expressed the readiness of their Governments to provide relevant information to the secretariat. The Commission requested the secretariat to prepare a preliminary study on the topic for the next session of the Commission.

C. Publications

290. The Secretary of the Commission reported on the status of the publication of the *Yearbook of the United Nations Commission on International Trade Law* in the four languages in which it appeared. The intention was to publish the *Yearbook* for a given year by the end of the following year. On that basis the 1987 edition of the *Yearbook* would have been published by the end of 1988. The Secretary reported that the English and Russian versions of the 1986 edition, covering the work of the nineteenth session of the Commission, had been published. In Spanish, the 1985 *Yearbook* had been issued, while in French publication had only reached 1983. The current expectation was that by the end of 1989 the *Yearbook* would be available in English through 1987 and in French, Russian and Spanish through 1986.

291. The Commission expressed its concern about the long delay in the publication of the *Yearbook*, and especially of the French language version. It noted that the *Yearbook* was the only effective means by which the drafting history of the legal texts prepared by the Commission could be made generally available. It was considered to be of great importance to the promotion of the work of the Commission that legal scholars and officials in States that were not members of the Commission, and who might therefore not have adequate files of the documents of the Commission available to them in their original form, should have those documents available to them by means of the *Yearbook* as promptly as possible. The Commission therefore requested the Secretariat to take the necessary actions so that by the end of 1991 the *Yearbook* for 1990 would be published in all four language versions and that in the following years the *Yearbook* for a given year would be published by the end of the following year. The Commission requested that the secretariat report to it at its twenty-third session in 1990 on the progress made towards that goal.

292. The Secretary of the Commission stated that the secretariat planned to issue in 1991 an updated edition of

UNCITRAL: The United Nations Commission on International Trade Law, a publication issued in 1986 to acquaint readers with the work of UNCITRAL for the harmonization and unification of international trade law. Designed to be of use to scholars, practitioners and researchers, as well as those with more general interests, the book gave a history and description of UNCITRAL, discussed the Commission's work programme and contained the legal texts and other material emanating from that work. The Secretary anticipated that an updated edition would include several additional legal texts that had been developed since the last edition or were expected to be in existence by 1991. Those included the United Nations Convention on International Bills of Exchange and International Promissory Notes, the Convention on the Limitation Period in the International Sales of Goods, as amended by the 1980 Protocol, the Convention on the Liability of Operators of Transport Terminals in International Trade, the draft of which had been adopted by the Commission at the current session, and the Model Law on International Credit Transfers currently being prepared.

293. The Commission noted with appreciation a bibliography of recent writings related to the work of the Commission contained in document A/CN.9/326.

D. Liability limits and units of account in international transport conventions

294. The Commission took note with appreciation of an analytical compilation of liability limits and units of account in international transport conventions contained in document A/CN.9/320.

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

295. It was decided that the Commission would hold its twenty-third session for a period of up to three weeks from 18 June to 6 July 1990 in New York with the major agenda item being consideration of the preparatory work by the secretariat on the proposed legal guide on drawing up international countertrade contracts. The Commission recognized that it would place a heavy burden on the secretariat to prepare the necessary documentation. Therefore, the Commission decided that if sufficient preparatory work could not be submitted to the Commission in time for the twenty-third session, the secretariat was authorized to shorten the session by one week.

F. Sessions of the working groups

296. It was decided that the Working Group on International Payments would hold its nineteenth session from 10 to 21 July 1989 in New York, its twentieth session from 27 November to 8 December 1989 at Vienna and its twenty-first session from 9 to 20 July 1990 in New York. It was decided that the Working Group might hold its twenty-second session from 26 November to 7 December

¹⁹*Ibid.*, paras. 46 and 47.

1990 if, in the judgement of the Working Group, an additional session was required to complete its work on the Model Law on International Credit Transfers.

297. The Commission decided that the thirteenth session of the Working Group on International Contract Practices would be held from 8 to 19 January 1990 in New York and that the fourteenth session would be held from 3 to 14 September 1990 at Vienna.

298. It was decided that the Working Group on the New International Economic Order would hold its eleventh session from 5 to 16 February 1990 in New York and its twelfth session from 8 to 19 October 1990 at Vienna.

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-sixth session (TD/B/1234 (Vol. II))*

"C. Progressive development of the law of international trade: twenty-second annual report of the United Nations Commission on International Trade Law

318. For its consideration of agenda item 7(c), the Board had before it the report of the United Nations Commission on International Trade Law on its twenty-second session (A/44/17), circulated under cover of TD/B/1224.

Consideration in Sessional Committee I

319. The spokesman for the Group of 77 (Philippines) stated that the Group of 77 noted the report of UNCITRAL on its twenty-second session, including the decision adopted by UNCITRAL to submit to the General Assembly at its forty-fourth session the draft convention on the liability of operators of transport terminals in international trade, with a recommendation for the convening of an international conference of plenipotentiaries to conclude, on the basis of the draft convention approved by the Commission, a Convention on the Liability of Operators of Transport Terminals in International Trade. In view of the importance of the subject, it deserved careful and serious consideration by all Governments in the appropriate United Nations forum. Recalling that General Assembly resolution 2205 (XXI) called for close collaboration between UNCITRAL and other United Nations bodies, she said that such collaboration needed to be strengthened.

320. Finally, on the occasion of the twenty-fifth anniversary of UNCTAD, the Group of 77 reaffirmed its support for the work of the United Nations system, including UNCITRAL and UNCTAD, in the promotion of the harmonization of international trade law as an integral part of international development law to which the Group of 77 attached great importance.

321. The representative of the German Democratic Republic said that the report of UNCITRAL provided proof of UNCITRAL's efforts to contribute to the unification and harmonization of the law in different areas of international economic relations. The draft convention on the

ANNEX I

Draft Convention on the Liability of Operators of Transport Terminals in International Trade

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

ANNEX II

List of documents before the Commission at its twenty-second session

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

liability of operators of transport terminals in international trade, annexed to the report, aimed at filling a long-standing gap in liability regulations.

322. He added that his delegation endorsed the intention of UNCITRAL to prepare a legal guide on the drawing up of international countertrade contracts. He supported the continuation of the work on that topic independently of the efforts being made in that field by the Economic Commission for Europe, where the problems of developing countries would not be considered. UNCITRAL's approach was based on the assumption that a considerable part of international trade was at present, and would most probably be in the future, effected under countertrade contracts which would give rise to legal problems that often could not be settled in a satisfactory manner by the parties involved.

323. Finally, he believed that UNCITRAL did very useful work on international credit transfers, rules for guarantees, and procurement law (tenders). All in all, the report of UNCITRAL met with the approval of his delegation.

Action by Sessional Committee I

324. At its 4th meeting, on 6 October 1989, the Sessional Committee took note of the report of the United Nations Commission on International Trade Law on its twenty-second session (A/44/17) and of the comments made thereon.

Consideration in plenary

Action by the Board

325. At the 761st meeting, the Board took note of the report of the United Nations Commission on International Trade Law on its twenty-second session and of the comments thereon in Sessional Committee I."

*Official Records of the Trade and Development Board, Thirty-sixth session, First Part, Supplement No. 1A. (Part II).

**C. General Assembly: report of the United Nations Commission on International Trade Law
on the work of its twenty-second session: status of conventions: report of the Secretary-General
(A/44/453 and Add.1)**

[A/44/453]

I. INTRODUCTION

1. On 7 December 1987, the General Assembly adopted resolution 42/152, entitled "Report of the United Nations Commission on International Trade Law on the work of its twentieth session". Paragraphs 9 and 10 of the resolution read as follows:

"The General Assembly,

"...

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

(a) Convention on the Limitation Period in the International Sale of Goods, of 14 June 1974;

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

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

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

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

2. The Secretary-General notified all States of the content of paragraphs 9 and 10 of resolution 42/152 by notes verbales of 28 April 1988 and 29 March 1989. The notes requested by 1 June 1989 such information as the Governments might be able to furnish as to their intention to become party to the conventions to which they will not already have become party by that time.

3. Replies to the request for information have been received from Australia, Austria, Canada, Cuba, Denmark, Finland, Federal Republic of Germany, Greece, Japan, Mexico, Netherlands, Philippines, Sweden, Switzerland and United Kingdom of Great Britain and Northern Ireland. That information is summarized below.

4. It is known that action has been initiated in a number of additional States leading towards ratification or accession to one or more of the Conventions, including submission of the Conventions for parliamentary approval or even, in several cases, the adoption of the necessary legislation. Such information is not included in the present report if it was not officially transmitted to the Secretary-General in response to the notes verbales.

II. STATUS OF CONVENTIONS

**A. Convention on the Limitation Period in the
International Sale of Goods, of 14 June 1974,
and Protocol amending the Convention
on the Limitation Period in the
International Sale of Goods, of 11 April 1980**

1. Current status

5. On 7 December 1987, when resolution 42/152 was adopted, neither the Convention nor the 1980 amending Protocol were in force. As at that date nine States, Argentina, Czechoslovakia, Dominican Republic, Egypt, Ghana, Hungary, Norway, Yugoslavia and Zambia, were contracting States to the Convention while Argentina, Egypt, Hungary and Zambia were contracting States to the Protocol.

6. Mexico deposited its instrument of accession to the Convention and to the Protocol on 21 January 1988, bringing both into force on 1 August 1988.

7. Article XIV (2) of the Protocol provides that, on the coming into force of the Convention and the Protocol, the Secretary-General should prepare a text of the Convention as amended by the Protocol. By depositary notification dated 17 April 1989, the Secretary-General circulated a proposed text of the Convention as amended indicating that if no objections were received from signatory or contracting States within 90 days of its circulation, the text would be considered approved.

2. Reported intentions

8. Australia has written to its States and to the Northern Territory and to all other interested bodies and individuals seeking their views, by the end of September 1989, as to whether Australia should become a party to the Convention and Protocol.

9. In Cuba the Convention and Protocol are being studied by specialists in order to determine the possibility of recommending accession in the shortest possible time.

10. In Finland the Convention and Protocol were sent for comment to interested circles in 1988. The results were positive and the Government of Finland intends to commence preparations for ratification of the instruments in the near future.

11. Greece reported that its Government was considering ratifying the Convention and Protocol.

12. Austria, Canada, Denmark, Federal Republic of Germany, Netherlands, Sweden, Switzerland and United Kingdom indicated that they were not contemplating

action at this time. The Netherlands stated that a change of circumstance might lead to a review of that position. The Philippines reported that the Government had been unable to reach a decision by 1 June 1989.

B. United Nations Convention on the Carriage of Goods by Sea, of 31 March 1978

1. Current status

13. As at 7 December 1987, 11 States, Barbados, Chile, Egypt, Hungary, Lebanon, Morocco, Romania, Senegal, Tunisia, Uganda and United Republic of Tanzania, were contracting States. Between 7 December 1987 and 30 June 1989 Botswana, Nigeria and Sierra Leone became contracting States, bringing the total to 14.

14. The Convention requires 20 contracting States to come into force.

2. Reported intentions

15. Australia is preparing legislation to implement the Convention, the legislation to be brought into effect at some future date when it is decided that Australia should become a party to the Convention.

16. In Cuba the Convention is being studied by specialists in order to determine the possibility of recommending accession in the shortest time possible.

17. Denmark does not contemplate ratifying the Convention so far; however, the most important parts of the Convention will be incorporated into Danish Maritime Law.

18. Finland has submitted the Convention for study to a governmental committee. A report of the committee is expected by the end of 1989. The question as to whether Finland will ratify the Convention remains open until the report has been examined by the interested circles and their comments have been studied by the Government.

19. The Federal Republic of Germany reported that the final decision of the Federal Government as to whether and when to ratify the Convention would be subject to further development in maritime law. The advisability of incorporating the so-called Hamburg Rules into the law of carriage of goods by sea is a controversial issue in the Federal Republic of Germany and is still called in question by commercial interests. The Federal Republic of Germany acknowledges the necessity of modernizing the regulations contained in the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Hague Rules) of 25 August 1924. Therefore, national legislation passed in 1986 has to a large extent implemented the Brussels Protocol of 23 February 1968 amending the aforementioned Convention (Visby Rules). However, after due deliberation, the Federal Republic of Germany has refrained from ratifying the 1968 Protocol in order not to preclude further developments in maritime

law. Further decisions by the Federal Government will be taken with a view to the main object of the relevant conventions, i.e. the unification of maritime law. To achieve this aim the Hamburg Rules will have to be generally accepted by many of the major seafaring countries. For the time being this cannot be taken for granted. Consequently, the Federal Republic of Germany has not yet taken any steps to ratify the United Nations Convention on the Carriage of Goods by Sea.

20. Greece reported that its Government was considering ratifying the Convention.

21. Japan stated that it would be difficult to accede to the Convention in the near future, since Japan is a party to the Hague Rules (the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, Brussels, 1924). As it is realistic for Japan to take a step-by-step approach, Japan is now examining the Visby Rules (the Protocol amending the Hague Rules, Brussels, 1968) aiming at acceding to it. Therefore, accession to the Hamburg Rules is a future subject that should be studied after the accomplishment of examination of the Visby Rules.

22. Mexico continues to carry on consultations in respect of the Convention.

23. Sweden is presently considering whether to become a party to the Convention.

24. Switzerland could consider adhering to the Convention once it has entered into force.

25. Austria, Canada, Netherlands and United Kingdom are not contemplating becoming contracting States at this time. The Netherlands stated that a change of circumstances might lead to a change in that position. The Philippines reported that the Government had been unable to reach a decision by 1 June 1989.

C. United Nations Convention on Contracts for the International Sale of Goods, of 11 April 1980

1. Current status

26. As at 7 December 1987, 11 States, Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syrian Arab Republic, United States of America, Yugoslavia and Zambia, were contracting States. The Convention entered into force for those 11 States on 1 January 1988.

27. Later in the month of December 1987, four States, Austria, Finland, Mexico and Sweden, deposited their instruments of accession or ratification. Between 1 January 1988 and 30 June 1989, four additional States became contracting States, Australia, Denmark, German Democratic Republic and Norway. As at 30 June 1989, there was a total of 19 contracting States to the Convention.

2. *Reported intentions*

28. Canada is seriously considering accession to the Convention. As at 8 May 1989, implementing legislation had been adopted in four provinces and one territory.

29. In Cuba the Convention is being studied by specialists in order to determine the possibility of recommending accession in the shortest possible time.

30. The Federal Republic of Germany adopted national legislation with respect to the Convention in the spring of 1989. The promulgation of the statutory law will follow in due course. It is the intention of the Federal Government to take the necessary steps towards ratification of the Convention after promulgation of the statute.

31. Greece reported that its Parliament, in its next session, would proceed to the ratification of the Convention.

32. Japan is considering an examination of the Convention for the purpose of acceding to it in the near future.

33. In the Netherlands the Convention will be submitted to Parliament for approval in the course of 1990.

34. The Philippines reported that the Government had been unable to reach a decision by 1 June 1989.

35. In Switzerland the question of accession to the Convention is before Parliament.

36. The United Kingdom of Great Britain and Northern Ireland has noted that the Convention came into force on 1 January 1988, that some 19 countries were contracting States and that a number of others were likely to become so shortly. Her Majesty's Government is therefore taking the opportunity to present a consultative document to interested parties in the future.

[A/44/453/Add.1]

Addendum

1. Replies to the request for information as to the intention to become party to the conventions to which they had not already become party have also been received from Burkina Faso, Czechoslovakia and Kenya. The information is summarized below.

Protocol, of 11 April 1980, amending the Convention on the Limitation Period in the International Sale of Goods, of 14 June 1974

2. Czechoslovakia, being a party to the Convention, is considering accession to the Protocol according to the constitutional procedures.

United Nations Convention on the Carriage of Goods by Sea, of 31 March 1978

3. Between 1 July and 15 September 1989 Kenya and Burkina Faso became Contracting States, bringing the total to 16.

4. Czechoslovakia stated that the question of the ratification of the Convention was being studied by the Czechoslovak authorities.

United Nations Convention on Contracts for the International Sale of Goods, of 11 April 1980

5. Czechoslovakia is considering ratification of the Convention according to the constitutional procedures.

D. General Assembly: report of the United Nations Commission on International Trade Law on the work of its twenty-second session: report of the Sixth Committee (A/44/723)

I. INTRODUCTION

1. The item entitled "Report of the United Nations Commission on International Trade Law on the work of its twenty-second session" was included in the provisional agenda of the forty-fourth session of the General Assembly pursuant to paragraph 1 of General Assembly resolution 43/166 of 9 December 1988.

2. At its 3rd plenary meeting, on 22 September 1989, 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 26 September 1989. The Sixth Committee also had before it the report of the Secretary-General on the status of conventions (A/44/453 and Add.1). In addition, a letter dated 19 July 1989 from the Chargé d'affaires a.i. of the Permanent Mission of Zimbabwe to the United Nations addressed to the Secretary-General (A/44/409-S/20743 and Corr. 1 and 2) was circulated under the item.

¹Official Records of the General Assembly, Forty-fourth Session, Supplement No. 17 (A/44/17).

4. The Sixth Committee considered the item at its 4th to 6th and 38th meetings, from 26 to 28 September and on 10 November 1989. The summary records of those meetings (A/C.6/44/SR.4-6 and 38) contain the views of the representatives who spoke on the item.

II. CONSIDERATION OF PROPOSALS

5. At the 38th meeting, on 10 November, the representative of Austria introduced a draft resolution entitled "Report of the International Trade Law Commission on the work of its twenty-second session" (A/C.6/44/L.5), sponsored by Austria, Brazil, Canada, Cyprus, Czechoslovakia, Denmark, Egypt, Finland, France, German Democratic Republic, Germany, Federal Republic of Guyana, Hungary, Italy, Lesotho, Libyan Arab Jamahiriya, Morocco, Netherlands, Poland, Sweden, Turkey and Yugoslavia, later joined by Argentina, the

Byelorussian Soviet Socialist Republic, Kenya and Spain.

6. The Committee had before it a statement submitted by the Secretary-General (A/C.6/44/L.8) of the programme budget implications of the draft resolution.

7. At the same meeting, the Committee adopted draft resolution A/C.6/44/L.5 without a vote (see para. 8).

III. RECOMMENDATION OF THE SIXTH COMMITTEE

8. The Sixth Committee recommends to the General Assembly the adoption of the following draft resolution:

[Text not reproduced in this section. The draft resolution was adopted, with editorial changes, as General Assembly resolution 44/33 (see section E, below).]

E. General Assembly resolution 44/33 of 26 January 1990

44/33. REPORT OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ON THE WORK OF ITS TWENTY-SECOND SESSION

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it created the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade, as well as its resolution 43/166 of 9 December 1988,

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

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

Noting that the Commission adopted a draft convention on the liability of operators of transport terminals in international trade² and recommended in the decision in paragraph 225 of its report that the General Assembly should convene an international conference of plenipotentiaries

for a duration of three weeks in 1991 to conclude, on the basis of the draft convention, a convention on the liability of operators of transport terminals in international trade,

Recognizing the need for the Commission to have adequate sources of funding for its programme of training and assistance in international trade law,

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

2. Reaffirms the mandate of the Commission, as the core legal body within the United Nations system in the field of international trade law, to co-ordinate legal activities in this field in order to avoid duplication of effort and to promote efficiency, consistency and coherence in the unification and harmonization of international trade law and, in this connection, recommends that the Commission, through its secretariat, should continue to maintain close co-operation with the other international organs and organizations, including regional organizations, active in the field of international trade law;

3. Calls upon the Commission to continue to take account of the relevant provisions of the resolutions concerning the new international economic order, as adopted by the General Assembly at its sixth³ and seventh⁴ special sessions;

4. Expresses its appreciation to the Commission for the valuable work done in preparing a draft convention on the liability of operators of transport terminals in international trade;

¹Official Records of the General Assembly, Forty-fourth Session, Supplement No. 17 (A/44/17).

²Ibid., annex I.

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

⁴Resolution 3362 (S-VII).

I. INTERNATIONAL PAYMENTS

A. Report of the Working Group on International Payments on the work of its seventeenth session (New York, 5-15 July 1988) (A/CN.9/317) [Original: English]

INTRODUCTION

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

2. The Working Group undertook the task at its sixteenth session (Vienna, 2 to 13 November 1987), at which it considered a number of legal issues set forth in a note of the Secretariat (A/CN.9/WG.IV/WP.35). The Group requested the secretariat to prepare draft provisions based on the discussions during its sixteenth session for consideration at its seventeenth session.

3. The Working Group held its seventeenth session in New York from 5 to 15 July 1988. The Group is composed of all States members of the Commission. The session was attended by representatives of the following States members: Algeria, Argentina, Australia, Austria, Brazil, China, Cyprus, Czechoslovakia, France, German Democratic Republic, Hungary, India, Iraq, Italy, Japan, Libyan Arab Jamahiriya, Mexico, Netherlands, Nigeria, Spain, Sweden, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America and Yugoslavia.

4. The session was attended by observers from the following States: Barbados, Canada, Colombia, Finland, Germany, Federal Republic of, Israel, Malta, Mozambique, Niger, Peru, Philippines, Poland, Republic of Korea, Switzerland and Venezuela.

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

6. The Working Group elected the following officers:

Chairman: Mr. José María Abascal Zamora
(Mexico)

Rapporteur: Mr. Ross Burns (Australia)

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

(a) Provisional agenda (A/CN.9/WG.IV/WP.36);

(b) Draft Model Rules on electronic funds transfers: report of the Secretary-General (A/CN.9/WG.IV/WP.37).

8. 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.

I. DELIBERATIONS AND DECISIONS

9. The Working Group decided to commence its work at the current session by considering the draft provisions for Model Rules on electronic funds transfers as submitted in document A/CN.9/WG.IV/WP.37. Chapter II of the present report reflects the substance of the considerations and the decisions of the Group with respect to the draft provisions.

10. At the close of its considerations, the Working Group requested the secretariat to prepare a revised draft of the Model Rules taking into account the considerations and the decisions of the Group.

II. CONSIDERATION OF DRAFT PROVISIONS FOR MODEL RULES ON ELECTRONIC FUNDS TRANSFERS

General comments

11. There was general agreement that the preparation of Model Rules for electronic funds transfers was both important and urgent. The rapid growth in international funds transfers and the entry of foreign parties into domestic financial systems increased the need for clear rules. It was stated that the function of the Model Rules would not be to harmonize existing legislation, which hardly existed on the subject, but to furnish a model for new legislation.

12. It was suggested that the Model Rules would have to take account of the fact that some forms of funds transfers

¹See *Official Records of the General Assembly, Forty-First Session, Supplement No. 17 (A/41/17)*, para. 230.

were governed by well established national payment systems whereas other forms of transfers were not subject to such systems. Another important factor was that modern technology made it possible for a customer or a group of customers to effect related funds transfers successively in different markets and in different time zones, thereby increasing the importance of having harmonized legal rules governing those various funds transfers.

13. It was suggested that the Model Rules should, on the one hand, provide legal certainty and uniform treatment to the forms of funds transfers that were being developed in practice, but that, on the other hand, the Model Rules should not create a necessity for extensive or radical revisions of existing and well established national payment systems. It was stated in reply that the primary criterion in the considerations of the Working Group should be world-wide acceptability of the Model Rules, and only secondarily should the Group be concerned with the effect the Model Rules might have on the need to revise certain national payment systems.

14. It was also suggested that the Model Rules should avoid dealing with legal issues arising from the relationship between a bank and its customer. Such legal issues touched upon questions of consumer protection, questions that were often subject to divergent national policies or policies that the States sought to implement by different means. It was stated in reply that bank-customer relationships were constituent elements of funds transfers and that, therefore, the Model Rules should deal with them as well as with some aspects of the protection of the bank customers. It was stated that in doing so the Rules should avoid providing solutions that might conflict with national rules on the protection of individual consumers.

15. It was stated that it would be desirable for the Working Group to consider as its fundamental approach the adoption of a set of rules that encompassed the concepts of delivery, acceptance or rejection, and execution of a payment order. That would permit the Model Rules to reflect banking practice and, importantly, to preserve the ability of each bank to make the necessary intra-day credit, operational and other judgments at each point in the transaction.

Article 1. *Sphere of application*

16. The text of article 1 as considered by the Working Group was as follows:

"These rules apply to funds transfers made pursuant to a payment order [or to a debit transfer instruction] [where the originator's bank and the beneficiary's bank are in different countries]."

Exclusion of debit transfers

17. The Working Group agreed that the Model Rules should not, at least for the time being, deal with debit transfers, i.e. transfers where the account of the originating bank or its customer was to be credited and the account of the destination bank or its customer was to be debited. It was pointed out that systems of debit transfers were

normally not international and that, therefore, there existed little need for harmonizing the rules on such transfers at this time.

Coverage of international and domestic segments of a funds transfer

18. In the discussion of the question of the extent to which the Model Rules should cover domestic aspects of funds transfers in addition to the international aspects of such transfers, it was noted that an interbank funds transfer consisted of individual segments and that some of the segments may be between parties in the same State and some between parties in different States. Different views were expressed on the question of which segments should be covered by the Model Rules.

19. Under one view, the Model Rules should cover only those segments in which the parties were located in different States, or where the payment order crossed a national border. Some proponents of that view stated that domestic segments of an international funds transfer were dealt with by national laws and that the Model Rules should not interfere with those laws. Others stated that, while the unification of the rules by the Commission should be restricted to the international segments of a funds transfer, it should be left to the national legislature whether it wished to extend the unified régime to the domestic segments.

20. Under another view, the Model Rules should cover the domestic as well as international segments constituting a funds transfer. It was stated that it would be particularly difficult to exclude a domestic segment when it occurred between two different international segments, as was apt to happen whenever the currency of the funds transfer was not that of either the country of the originator's bank or the beneficiary's bank. Moreover, according to that view, it would be necessary for the Model Rules to cover purely domestic funds transfers as well as the domestic segments of international funds transfers. Otherwise, funds transfers transiting certain domestic systems would be subject to two different sets of legal rules depending on whether the funds transfer was purely domestic or had an international element.

21. It was suggested that the preliminary views of delegations on that point might depend in part on the extent to which they believed that their banking systems could isolate the domestic segments of international funds transfers from purely domestic funds transfers. The Working Group decided to proceed with the discussion under the assumption that the Model Rules would cover funds transfers between the originator and the beneficiary, thereby including domestic segments of international funds transfers and leaving open the question of purely domestic funds transfers.

22. A suggestion was made that, among the domestic segments, it might be appropriate to exclude from the scope of the rules certain customer-bank relationships such as those between the customer who was the originator of the first payment order and its bank, and the

relationship between the ultimate party to be credited or paid as a result of the funds transfer and its bank.

23. Another suggestion was that the Model Rules should deal with rights and obligations of customers of banks, whether such customers were business entities or individual consumers. In that connection, the Working Group noted that there might exist a need for providing special solutions that would apply only to consumers. However, the Group considered that such special solutions should be elaborated on a regional or national level rather than on the universal level. The Group was of the opinion that it would be useful to express in an appropriate way that the Model Rules did not prevent States from enacting supplementary legislation dealing with rights and obligations of consumers in funds transfers, however consumers might be defined by those States.

24. It was suggested that the wording of article 1 should reflect more clearly the fact that a funds transfer might be effected in different segments. However, it was suggested that that should not have consequences for the determination of the responsibility for the orderly execution of an electronic funds transfer or for the irrevocability of a funds transfer.

Form of Model Rules

25. Pending a decision to be taken at a later time on the form of the Model Rules, the Working Group decided to proceed under the working assumption that the outcome of the work would be model legislation.

Article 2. Definitions

26. The Working Group agreed that the sequence of items defined in article 2 should be based on a logical order rather than the alphabetical order in English found in the current draft.

27. It was suggested to substitute in article 2 and, where appropriate, elsewhere in the Model Rules the term "person" for the term "party".

28. The definitions as considered by the Working Group were as set out below.

"(a) 'Bank' means a financial institution which, as an ordinary part of its business, engages in funds transfers for itself or other parties [, whether or not it is recognized as a bank for other purposes];".

29. The Working Group agreed that the definition should be based on a functional approach, i.e. that it should encompass all financial institutions that effected funds transfers, whether or not such institutions were termed as banks and whether or not such institutions accepted financial deposits from the public. It was therefore decided that consideration should be given to using an alternative word to the word "bank". It was observed that doing so might create problems because the term would encompass a securities firm and a futures broker and possibly other institutions as well.

30. It was observed that a decision might have to be made on whether a branch of an institution and an independent subsidiary of the institution should be considered to be separate entities for the purposes of the Model Rules. It was noted that that decision could be made only in the light of the substance of the Model Rules. (See later discussion in paragraphs 95 to 97.)

31. A suggestion was made that the words "itself or" should be deleted from the definition so that only those financial institutions that engaged in funds transfers for other persons would be included. In that connection the question was raised whether the Model Rules should cover funds transfers between the subsidiaries of a financial holding company that were effectuated by the company when the company did not offer its services to the public.

"(b) 'Beneficiary' means the ultimate party to be credited or paid as a result of a funds transfer;".

32. The Working Group approved the definition.

"(c) 'Cover' means reimbursement of a bank that has acted on a payment order;".

33. The Working Group approved the definition subject to making it clear that the provision of cover might precede or follow an action on a payment order. The view was expressed that the Model Rules should not use a concept of cover but instead should create an obligation to pay (or reimburse the receiver for) the payment order.

"(d) 'Entry date' means the date when entries are made in the records of an account;".

34. The Working Group noted that the term defined in the subparagraph was placed between square brackets so as to indicate that it had not been used in the text of the Model Rules but that there might be a need for using it in a subsequent revision of the text.

35. The Working Group approved the definition.

"(e) 'Execution date' means the date the sender has instructed the receiving bank to execute the payment order;".

36. It was suggested that it should be made clearer that the definition referred to the date of the execution of the payment order and not to the date when the order was given.

"(f) 'Funds' or 'money' includes credit in an account kept by a bank whether denominated in a national currency or in a monetary unit of account that is established by an intergovernmental institution or by agreement of two or more States, provided that these Rules shall apply without prejudice to the rules of the intergovernmental institution or to the stipulations of the agreement;".

37. The Working Group approved the substance of the definition subject to making it clear in all language versions that the wording of the definition included the case where credit was denominated in a currency other than the national currency of the State in which the account was kept.

"(g) 'Funds transfer' means the movement of funds between the originator and the beneficiary;"

38. It was noted that the definition of "funds transfer" did not incorporate the entire text of ISO 7982-1. It was suggested that the shortened text did not properly convey the idea that the funds transfer might be composed of segments. Therefore, it was decided that the full ISO definition should serve as the basis for the next revision.

"(h) 'Funds transfer transaction' means the movement of funds directly between two parties involving no intermediaries other than a payment or communications service;"

39. It was noted that the term was not used in the current draft of the Model Rules but that it was used in the definition of "funds transfer" in ISO 7982-1. Therefore, if the definition of "funds transfer" in the Model Rules were made to conform to the ISO definition, it was suggested that it might be appropriate to include the ISO definition of "funds transfer transaction" as well.

40. However, the Working Group was not satisfied with either the term or its definition. As to the term, it was noted that in French the word "transaction" had a specific legal content that was far removed from the meaning attributed to it in the context of funds transfers. As to the definition, it depended on the definition of "payment service" and "communication service" in ISO 7982-1, which presented additional problems. As a result, it was decided to delete the term.

"(i) 'Intermediary bank' means a bank between the originator's bank and the beneficiary's bank through which the funds transfer passes;"

41. It was suggested that the definition should make it clear that it included all banks executing a payment order in the course of a funds transfer, including those banks that served only as reimbursing banks. A suggestion was made that that might be achieved by providing that an intermediary bank included any bank executing a payment order other than the originator's bank and the beneficiary's bank. It was noted that, as a consequence of the earlier decision to reconsider reference to the word "bank" in the next version of the Model Rules, there was the danger of including payment and communications services within the group of entities currently referred to as intermediary banks. The Working Group requested the secretariat to take the suggestions into account in preparing the revised draft of the subparagraph.

"(j) 'Originator' means the issuer of the first payment order in a funds transfer;"

42. The Working Group approved the subparagraph.

"(k) 'Pay date' means the date when the funds are to be freely available to the beneficiary as specified by the originator;"

"(l) 'Payment date' means the date when the funds are made available to the beneficiary;"

"(p) 'Value date' means the date when funds are to be at the disposal of the receiving bank."

43. The Working Group requested the secretariat to consider harmonizing in subparagraphs (k), (l) and (p) the words expressing the idea of availability of funds to the designated person. It was observed that the subparagraphs should take into account that the mere fact that the designated person's account was credited did not always mean that the designated person had a free access to the cash equivalent of the credit in the designated currency.

"(m) 'Payment order' means an instruction addressed to a bank directing it to pay, or to cause another bank to pay, to the beneficiary a fixed or determinable amount of money [either in cash or by credit to an account];"

44. The following suggestions were made during the discussions: (a) to delete reference to money and to forms in which payment might be made; (b) to replace the expression "beneficiary" by the term "specific person" or "designated person"; and (c) to make it clear that the expression "payment order" as used in the Model Rules did not include orders for debit transfers. The Working Group noted that the draft rules of the International Chamber of Commerce (ICC) used the term "funds transfer message" where the current draft of the Model Rules used "payment order". It was felt that "funds transfer message" as defined in the ICC draft rules, which was consistent with ISO 7982-1 on that point, was a broader term than "payment order" and was not appropriate for use in that context. The Working Group requested the secretariat to prepare alternative provisions reflecting the discussion.

"(n) 'Receiving bank' means the bank to which a payment order is delivered;"

45. An observation was made that the word "delivered" in the definition might not cover the situation in which the payment order was sent but was not delivered. The Working Group requested the secretariat to take the observation into account in the preparation of the revised text of the subparagraph.

"(o) 'Sender' means the party who sends a payment order [, including the originator and any 'sending bank'];"

46. The Working Group approved the subparagraph. It was suggested that the term "sender" should not cover the originator.

New subparagraph on "authentication"

47. It was suggested that article 2 should contain a definition of "authentication" that emphasized that, as used in the Model Rules, it was a technique to validate the source of a message. That was stated to be particularly important since in some legal systems the term conveyed the idea of formal authentication by notarial seal or the equivalent, while it was used in the electronic data interchange context, including in ISO 7982-1 (see "message authentication"), to refer to the technique used between the sender and the receiver to validate the source and part of or all the text of a message. It was suggested that either in the definition or in another appropriate place some

standard should be established as to what would be an acceptable authentication, e.g. "commercially reasonable", that did not enter into the technical means of authenticating a payment order.

Article 3. *Form and content of payment order*

48. The text of article 3 as considered by the Working Group was as follows:

"(1) A payment order may be in any form [including both written and oral form,] and may be transmitted between the sender and the receiving bank by any means of communication.

"(2) A payment order must be properly authenticated and contain at least the following data:

"(a) an order to a bank to make the transfer and, if payment is not by credit to an account at the beneficiary's bank, the method of payment to the beneficiary;

"(b) the identification of the sender;

"(c) the identification of the receiving bank;

"(d) the amount of the funds transfer, including the currency or unit of account, if that is not otherwise self-evident;

"(e) the identification of the beneficiary;

"(f) the identification of the beneficiary's bank.

"(3) Any required or optional data may be represented by words, figures or codes. If a data element is represented by any combination of words, figures or codes and there is a discrepancy between them, each form of representation is equally valid and the sender shall be responsible for the payment order as executed by the receiving bank and any intermediary payment or communications service, unless the receiving bank or intermediary payment or communications service knew or ought to have known of the discrepancy."

Paragraph (1)

49. Divergent views were expressed on the question of whether the Model Rules should apply to payment orders in any form, as was currently provided in paragraph (1), or whether the payment orders governed by the Model Rules should be only those in electronic form.

50. There was considerable support for the view that the scope of application of the Model Rules should require at least one, and possibly the international, segment of the funds transfer to be initiated by a payment order in electronic form. Supporters of that view stated that (a) the reason for undertaking the project was the growing use of electronic means in funds transfers and the possibility that the existing rules on paper-based funds transfers might not always be appropriate for such cases; (b) the mandate given to the Working Group by the Commission was based on the assumption, expressed in the title of the Model Rules, that the legal text to be prepared would apply to electronic funds transfers; and (c) in national legal systems there existed rules on paper-based funds transfers and there was no evidence that there was a need for modifying such national rules.

51. The prevailing view, however, was that the Model Rules should apply to payment orders irrespective of the form in which they were made and the means by which they were transmitted from the sender to the receiving bank. In support of that view it was stated that (a) it may be difficult for a customer, and often also for banks, to know whether a segment of the funds transfer had been or would be effected in a particular form, and that in such cases the customer or the bank should not be exposed to the uncertainty as to the applicable legal régime; (b) the legal issues arising from funds transfers were essentially the same irrespective of the form of the payment order and the means of transmission used; (c) whenever special rules needed to be formulated that depended on the form or means of transmission, they could be accommodated in the text of the Model Rules; (d) a dichotomy of the legal régime on funds transfers was undesirable; and (e) rules on paper-based as well as electronic funds transfers were in need of modernization and harmonization.

52. It was recognized by the Working Group that the arguments adduced in favour of and against the current draft of article 3, paragraph (1), were essentially those relating to the scope of application of the Model Rules. That was a result of the fact that article 1, on the scope of application, referred to payment orders. It was also observed that, since the scope of application of the Model Rules did not depend upon there being any electronic link, consideration might be given to deleting the word "electronic" from the title of the Model Rules.

53. It was observed that paragraph (1) did not preclude the parties from agreeing on a particular form for a payment order and that such an agreement would be binding on the parties. It was suggested that such prevalence of the will of the parties should be expressed in paragraph (1). Another suggestion was that, since the paragraph stated the obvious, it might be deleted. Yet another suggestion was that, if the paragraph was to be retained, the words in square brackets might be deleted since the idea was adequately expressed without those words.

Paragraph (2)

54. It was suggested that the content of paragraph (2) should be moved to the definition of a "payment order" in article 2. Those messages that did not contain all of the requisite data elements would not be considered to be a payment order and the Model Rules would not apply.

55. Under another approach it was not necessary to include a list of the required elements in a payment order. While it might be agreed that a receiving bank would find it difficult to execute a payment order if it did not have all of the data elements listed in subparagraphs (a) to (f), that was essentially a question of responsibility. A bank that repaired an incomplete order did so at its own risk and knew that it took such a risk. Furthermore, different payment systems normally established their own required data elements, and the insertion of a list of such elements in the Model Rules would constitute an interference with freedom of contract. The view was expressed that authentication was a liability issue and should be covered in article 4 of the Model Rules.

56. Under yet another approach the Model Rules should contain a list of minimum data elements, even if the Model Rules could be drafted in such a way as to achieve the same legal result without such a list. The Model Rules would have an educational function beyond the strictly legal one, and a list of required data elements would be one way of carrying out that function.

57. During the discussion of the minimum content of a payment order, there was frequent reference to the rule expressed in article 5, paragraph (2), that a receiving bank was bound not to execute an incomplete order. Most delegates were of the view that the receiving bank should have the possibility not to execute the order, a result which was already expressed in article 5, paragraph (1), rather than be bound not to execute it. (For further discussion see paragraph 84.)

Subparagraph (a)

58. According to one view, a payment order should specify the method of payment in all cases, including the usual case where the payment was to be made by credit to an account. According to another view, there was no need for subparagraph (a) to refer to the method of payment since article 7 dealt with the method of execution of a payment order. Yet another view was that it was in the nature of a payment order that it contained an order for the transfer of funds and that, therefore, there was no need to express that element in the form of a requirement.

Subparagraph (b)

59. It was suggested that, if the sender was not the originator, subparagraph (b) should require the identification of the originator. In response it was stated that the identification of the originator should not be obligatory.

Subparagraph (d)

60. A suggestion was made for the deletion of the phrase "if that is not otherwise self-evident" since it might give rise to differences in interpretation. Another suggestion was to provide a rule of interpretation for the cases where the order did not specify the currency.

61. An observation was made that there might exist rules restricting the freedom of the parties to determine the currency of the funds transfer, and that subparagraph (d) should not be understood as affecting such a restriction.

Paragraph (3)

62. It was suggested that the first sentence of paragraph (3) permitting the use of words, figures or codes was self-evident and that it might be eliminated.

63. It was noted that the first part of the second sentence provided a rule of interpretation whenever the same data was represented in more than one way and there was a discrepancy between the data as so represented. It was suggested that a distinction might be drawn between the case in which the same data element, e.g. the amount, was

represented in two or more different ways and when there were two different data elements relating to the same ultimate item, e.g. name of account and number of account.

64. In regard to the account to be credited, under one view the originator would have intended the credit to be made to the named account. The number of the account would have little meaning except as a convenience. Under another view an account number was precise in a way that an account name could not be, and the use of such numbers for account identification should be encouraged.

65. It was suggested that new technology permitted computers to compare different data fields and note discrepancies. Therefore, consideration should be given to putting receiving banks on notice of all such discrepancies. In response it was stated that such technology would certainly not be universally available and it would be unrealistic to base rules of law on an assumption as to its existence.

66. It was suggested that the last part of the second sentence, which allocated responsibility for the consequences flowing from discrepancies in payment orders, did not belong in article 3 but should be placed in article 4 or 5, depending on the person to bear the loss.

67. A general observation was made that, to the extent possible, the orientation of the Model Rules should be the elimination of any discrepancy, e.g. by obligating the receiver of the message to get in touch with the sender, rather than allowing the receiver of the message to rely on the form of representation of data of his choice.

68. It was noted that the current draft of the Model Rules did not contain any provisions on the right or duty of a receiving bank to reverse entries arising out of error or fraud. The matter had been discussed at the last meeting of the Working Group at Vienna (see A/CN.9/297, para. 79) and should be included in the next revision.

Article 4. Obligations of sender

69. The text of article 4 as considered by the Working Group was as follows:

"(1) A sender is bound by authorized payment orders as issued or transmitted by it, and for any error or delay during the transmission of the order to the receiving bank, except as set forth in article 5(2).

"(2) A payment order is authorized when it is sent or given to the receiving bank by the sender or by a person authorized to act for the sender in regard to orders of the type in question.

"(3) A sender is bound by an unauthorized order when it was sent or given to the receiving bank by a person who was able to do so because of present or past employment with the sender or because of the negligence or bad faith of the sender or of an employee or agent of the sender.

"(4) If the sender denies having authorized the order, the receiving bank has the burden of proof that the

order was authorized by the sender or that the sender is bound by an unauthorized order under paragraph (3). If the sender denies that the order sent contained the data said to have been received, the receiving bank has the burden of proof of the content of the order received.

"(5) A [sender] [sending bank] is bound to adhere to any message structure prescribed by the transmission system used or agreed between the parties [and is liable for any loss resulting from a failure to do so].

"(6) A sender which has not made previous arrangements with the receiving bank as to how the receiving bank will be reimbursed for executing its instructions shall ensure that adequate cover is in place and duly advised to the receiving bank on or before the value date.

"(7) A sender is bound to reimburse the receiving bank to the extent the receiving bank has properly executed the payment order of the sender [including any fees or costs charged or incurred by the receiving bank]."

70. It was suggested that the article attempted to cover too many different problems. A distinction should be drawn between, on the one hand, the basic obligation of a sender, which was to reimburse the receiving bank as provided in paragraph (7), and, on the other hand, the responsibility of a sender for the payment order.

71. It was suggested that consideration should be given to whether the originator and sending banks should be subjected to the same régime in regard to the matters covered in article 4. In that regard, it was noted that in paragraph (5) the possibility of making such a distinction was specifically envisaged.

72. It was stated that consideration would have to be given at a later time to the consequences of errors or delays in transmission. The suggestion was made that the rule stated in paragraph (1) might be too absolute, especially if it was the receiving bank that had chosen the means of communication. That suggestion was said to be particularly pertinent to originators, and especially to consumers.

73. The Working Group engaged in an extensive discussion as to whether the basic test should be whether a payment order had been authorized or whether it had been authenticated. It was noted that authorization was a legal concept and authentication was a procedure undertaken by the sender to permit the receiving bank to assure itself as to the source of the payment order. The question of authorization focused on whether the specific person sending the message and the purpose for which it was sent were appropriate from the sender's point of view. The question of authentication focused on whether the receiving bank could rely on the payment order it had received.

74. It was suggested that paragraph (2) was unnecessary because it was essentially circular. It would be difficult to define briefly when a payment order was authorized without engaging in such circularity.

75. As for paragraph (3), it was suggested that it attempted to provide a rule for what might be better left to the national law of agency. Questions were raised as to specific aspects of the provision such as for how long a former employer would remain responsible for the fraudulent payment orders of a former employee.

76. The prevailing view was that the problem posed in paragraphs (2) and (3) should be dealt with in the Model Rules, but that more explicit consideration should be given as to whether the payment order had been authenticated. Under one analysis that was widely accepted in the Working Group, the sender would be responsible for the payment order as acted upon by the receiving bank if the payment order had been authorized, whether or not it had been authenticated. If the payment order had been neither authorized nor authenticated, the sender would not be responsible. If the payment order had not been authorized but it had been authenticated, the sender would generally be responsible for it, but there would be exceptions that would have to be elaborated at a later date.

77. In regard to paragraph (4), a question was raised whether the receiving bank should have the burden of proof that the payment order was authorized. It was noted, however, that the issue of burden of proof would be framed differently if paragraphs (2) and (3) were redrafted to rely more on authentication.

78. There was a difference of opinion as to whether paragraph (5) was necessary. Under one view, the matter could be left to the contract between the parties. Moreover, paragraph (5) raised questions as to the person to whom the duty was owed. Under another view, paragraph (5) served an important educational function and should be retained. If it was felt that originators that were not banks should not be subject to the same rules in regard to adhering to particular message structures, it would be easy to make that distinction in the revision of the paragraph.

79. A question was raised as to the duty of a sender to have cover in place and to notify the receiving bank of that fact on or before the execution date. When the funds transfer was in United States dollars and the beneficiary's bank was in the Eastern hemisphere, the cover might be given in New York during banking hours in New York but long after the close of business where the beneficiary's bank was located. As a result, it was suggested that the sending bank's duty should be to have cover in place at an earlier time so that notification of the cover could be effected by the execution date.

Article 5. *Obligations of receiving bank*

80. The text of article 5 as considered by the Working Group was as follows:

"(1) A receiving bank is bound either to execute the payment order or to notify the sender that it will not do so. If a receiving bank intends to delay executing a payment order beyond the time required by article 8 in order to await notification that cover was available, it must notify its sender of that fact. If within the required time a receiving bank does not give notice that it will

not act on a payment order, it may no longer give such notice and is bound to act on the order.

"(2) A receiving bank is bound not to execute a payment order that it knows or ought to know to be in error or incomplete. If a receiving bank would have discovered an error or that the payment order was incomplete through the proper use of an error checking procedure that was required by the funds transfer system or was agreed upon with the sender, the bank ought to have known of the error or incompleteness."

Paragraph (1)

81. Some support was expressed for the idea contained in paragraph (1) that the receiving bank should in all cases be bound either to execute the payment order or to notify the sender that it would not do so. A suggestion was made that a possible exception to the duty to notify might be the case when it was not practicable or reasonable for it to make the notification. However, the prevailing view was that the solution should depend on whether there existed a prior relationship between the sender and the receiving bank, e.g. in the form of a contract or course of dealing between the parties. When no such relationship existed, the bank should not be bound to react to a payment order, although it would be free to do so. It was also suggested for consideration that, instead of providing that the receiving bank could become bound by a payment order through passivity even when there had been no prior relationship, the receiving bank should in those cases only be held to the damages caused to the sender by the receiving bank's failure to notify that it would not act.

82. The suggestion was also made that the receiving bank should not have to react to a payment order when the problem was that the sender did not have sufficient funds with the receiving bank. The sender should be considered to be under a duty to know the balance of its account at all times. In any case, receiving banks would normally prefer to wait and see whether sufficient funds would arrive so that they could execute the payment order. Since doing so was to the benefit of both the originator and the beneficiary, banks should not be encouraged by the Model Rules to reject the payment order rather than wait for the receipt of additional funds.

83. It was suggested that the Model Rules should recognize the possibility that the manner of acceptance or rejection of a payment order might be covered by the contract or course of dealing between the parties.

Paragraph (2)

84. With reference to the discussion on article 3, paragraph (2) (see paragraph 57), the Working Group adopted the position that in the case of an order in error or an incomplete order the Model Rules should not prescribe a duty for the bank not to execute the order, but should provide that the bank was not bound to execute such an order. It was noted that such a rule would already be subsumed in paragraph (1). In view of that position, it was suggested that there might be no need for retaining the second sentence of paragraph (2).

Article 6. Execution by receiving bank that is not beneficiary's bank

85. The text of article 6 as considered by the Working Group was as follows:

"(1) A receiving bank that is not the beneficiary's bank properly executes a payment order when, within the required time, it provides or arranges for cover and

"(a) transmits the order to the beneficiary's bank or to the required or an appropriate intermediary bank,

"(b) issues its own payment order containing instructions and other data consistent with the order received, or

"(c) otherwise provides for completion of the funds transfer in an appropriate manner.

"(2) If the payment order received contains an instruction as to the intermediary bank or banks, the funds transfer system or the means of transmission to be used, the receiving bank as sender shall execute the order received in compliance with that instruction. The payment order issued by the receiving bank as sender shall include any instructions for action of the receiving bank of that order necessary to implement the order in an appropriate manner.

"(3) The receiving bank is not bound to follow an instruction of the sender specifying an intermediary bank, funds transfer system or means of transmission to be used in carrying out the funds transfer if the receiving bank, in good faith, determines that it is not feasible to follow the instruction or that following the instruction would cause excessive delay in completion of the funds transfer. The receiving bank acts within the time required by article 8 if it, in good faith and in the time required by that article, enquires of the sender as to the further actions it should take in light of the circumstances."

Paragraph (1)

86. It was noted that subparagraphs (a) to (c) made provision for different forms in which the intermediary bank might have received or forwarded payment orders. A suggestion was made that it might be possible to cover all possible instances with one generally worded provision.

Paragraph (2)

87. A suggestion was made to cover also instructions for any subsequent intermediary bank in the second sentence of subparagraph (c).

Paragraph (3)

88. The Working Group noted that the receiving bank was deemed to have acted within the time required by article 8 if it dispatched the inquiry within that time.

Article 7. Execution by beneficiary's bank

89. The text of article 7 as considered by the Working Group was as follows:

"(1) If the beneficiary maintains an account at the beneficiary's bank into which funds transfers are normally credited, the bank executes the order by:

"(a) crediting the beneficiary's account;

"(b) making the funds available for withdrawal or for transfer; and

"(c) notifying the beneficiary as agreed between them of the availability of the funds.

"(2) If the beneficiary does not maintain such an account, the bank executes the order by:

"(a) making payment by the means specified in the order or by any commercially reasonable means; or

"(b) giving notice to the beneficiary that it is holding the funds for the benefit of the beneficiary."

90. It was suggested that the Model Rules should not deal with the manner of execution of payment orders by a beneficiary's bank, and that it would be more appropriate to leave the matter to bank practice and to the contracts between banks and customers. However, the Working Group adopted the view that it was useful to maintain the substance of article 7 in the Model Rules, since its solutions were relevant to provisions on the discharge of the underlying obligation, currently contained in article 16.

Paragraph (1)

91. It was noted that inter-bank agreements might provide limitations on the right of a receiving bank to execute a payment order. Specific mention was made of the rules in the United States establishing bilateral credit limits and net debit caps. It was suggested that the Model Rules should take into account such practices.

92. It was suggested that the Model Rules should recognize that the payment order might not direct credit to an account but might instruct the receiving bank to purchase securities or undertake some other obligation for the originator. Furthermore, the crediting of an account did not necessarily mean that the funds were immediately available for withdrawal by the beneficiary. Funds might not be available as a result of, for example, a decision by a court, the right of a creditor or of the beneficiary's bank itself to use the funds to cover a claim, or exchange control regulations. Moreover, it might sometimes be difficult to establish the moment when the account was credited, in particular when bookkeeping was in electronic form and the processing of a given payment order was done in different stages.

Paragraph (2)

93. The Working Group approved the substance of paragraph (2).

Article 8. Time to execute payment order or give notice

94. The text of article 8 as considered by the Working Group was as follows:

"(1) A receiving bank shall execute the payment order received, or give notice that it will not do so, within the time consistent with the terms of the order.

"(2) When the payment order states a pay date, a receiving bank that is not the beneficiary's bank shall execute the order at such time as to assure in the ordinary course of events receipt by the beneficiary's bank of the payment order and cover by the pay date. The beneficiary's bank shall execute the order not later than on that date.

"(3) When the payment order states an execution date, the receiving bank shall execute the order not later than on that date. When the payment order states a value date but no execution date, the execution date shall be deemed to be at the value date. Unless otherwise agreed, the receiving bank may not charge the sender's account prior to the execution date.

"(4) When no execution, value or pay date is stated, the execution date shall be deemed to be the date the order is received, unless the nature of the order indicates that a different execution date is appropriate.

"(5) A receiving bank that receives a payment order after the receiving bank's cut-off time for that type of payment order is entitled to treat the order as having been received on the following day the bank executes that type of payment order.

"(6) A receiving bank that receives a payment order too late to execute it in conformity with the provisions of paragraphs (2) and (3) nevertheless complies with those provisions if it executes the order on the day received regardless of any execution, value or pay date specified in the order.

"(7) A notice that a payment order will not be executed must be given on the day the decision is made, but no later than the day the receiving bank was required to execute the order."

Branches as banks

95. The Working Group returned to the question of whether branches of banks should be considered to be separate entities for the purposes of the Model Rules (see paragraph 30). It was generally agreed that it was difficult to discuss the time limits applicable to funds transfers unless it was clear how those time limits would apply to branches.

96. It was stated that the issue was complex, especially if one took into account the related issue of whether deposits placed in a branch in a foreign country were obligations of that branch alone or were obligations of the bank as a whole.

97. There was general agreement that for the purposes of the Model Rules, branches should be considered to be separate institutions. It was recognized that when the branches were within the same country and were linked by an on-line computer system, there was some reason to consider the bank with all its branches to be one institution. However, in the context of the Model Rules individual branches served as links in a funds transfer chain. If

the branches were in different time zones, the application of time limits would have to take that into account. Moreover, when the branches were in different countries, they were subject to different legal régimes and to different banking supervision.

General structure of the article

98. It was suggested that, since paragraph (1) stated a general rule that was amplified by paragraphs (2) to (7), those paragraphs might be re-drafted as subparagraphs of paragraph (1).

99. It was suggested that it would be easier to understand the relationship between paragraphs (2) and (3) and paragraph (6) if they were closer together. It was also suggested that the order of paragraphs (2) and (3) might be reversed.

Paragraph (2)

100. There was general agreement that paragraph (2) addressed an important problem since it was important to reconcile the interest of bank customers in being able to rely on the payment system when effecting time-sensitive funds transfers and the concerns of the banks that excessive duties and liabilities might be imposed upon them.

101. It was suggested that, since the pay date first manifested itself in the payment order from the originator to the originator's bank, that bank alone should be considered, by accepting the payment order, to have undertaken an obligation that the funds would be available to the beneficiary by the stated pay date. There was general agreement that the obligation of intermediary banks should be stated in such a way that they did not find it more advantageous to reject a payment order than to run the risk of failing to meet the requisite time limit with consequent liability.

102. It was stated that it would often be difficult for a receiving bank, and especially an intermediary bank, to know how long it would take in the ordinary course of events for the beneficiary's bank to receive the payment order. It was also suggested that receipt of cover by the beneficiary's bank should not be part of the obligation in respect of the pay date.

103. An alternative approach to the matter of time limits was put forward, namely that the primary obligation of the originator's bank and subsequent intermediary banks should be an obligation to use their best efforts to effect the transaction by the due date. That obligation might need to be supported where necessary by more specific rules.

104. It was suggested that intermediary banks should undertake an obligation only in respect of the time within which they would act, and not, as currently stated, an obligation in respect of the time when the funds transfers would be completed. Although there was some support for a rule that intermediary banks should use their best efforts to execute payment orders the day received, the prevailing

view was that intermediary banks should have a firm obligation to execute payment orders within a somewhat longer period of time, such as the next day.

105. It was noted that any final decision as to the nature of the time limit within which various actions should be taken could be made only in the light of the liability of a receiving bank for failing to meet those time limits. In that connection, it was stated that it was common for banks to pay interest to one another when they failed to execute high value payment orders within the expected time periods.

106. It was suggested that the last sentence of both paragraphs (2) and (3) should indicate that no execution of the payment order in favour of the beneficiary should take place prior to the indicated date since the originator might have had reasons outside the funds transfer for wishing to delay completion until that date.

Paragraph (3)

107. It was noted that the last sentence of paragraph (3) seemed to be the only occasion where it was specifically mentioned that the rule might be varied by agreement. That was said to raise a question as to whether any of the other provisions could also be varied by agreement. It was suggested that there might be a general provision on that point.

108. It was observed that book-keeping entries were independent from the funds transfers.

Paragraph (5)

109. It was suggested that care should be given to harmonizing the concept of calendar days and days on which the bank executed payment orders in the various provisions. Under one suggestion the concept of "date" might be treated separately, perhaps in article 2 on definitions.

Paragraph (7)

110. Several suggestions were made to assure that the time limit in regard to the giving of a notice of failure to execute a payment order would correspond to the time limit for executing the order.

Article 12. Liability of receiving bank

111. It was decided to consider article 12 out of numerical sequence because the extent of the liability régime to be adopted in the Model Rules was a major factor in any further consideration of the obligations to be imposed on receiving banks. The text of article 12 as considered by the Working Group was as follows:

"A receiving bank, other than the beneficiary's bank, that fails to execute a payment order, executes it improperly or executes it when it is bound not to do so is liable

"(a) to the originator and to its sender for loss of interest that may have occurred as a result;

"(b) to the originator, beneficiary or any other bank for loss caused by a change in exchange rates;

"(c) to the originator and to its sender for any other loss that may have occurred as a result, but not for more than the amount of the originator's payment order."

112. A suggestion was made to include among the categories of damage covered by article 12 any expenses for a new payment order and any attorney's fees.

113. In view of the earlier decision taken in the context of article 5(2) that the Model Rules should not prescribe a duty for the bank not to execute a payment order (see paragraph 84), the Working Group decided to delete in the opening phrase of article 12 the words "or executes it when it is bound not to do so".

114. The Working Group discussed the question of whether the liability of the receiving bank under article 12 should be based on negligence or whether the liability should be strict. As regards the instances of liability covered by subparagraphs (a) and (b), the Working Group agreed that the policy seeking to protect effectively the persons that had suffered the loss called for a solution according to which those persons should not be required to show negligence on the part of the receiving bank. It was suggested that the solution should be clearly expressed in the article. It was also suggested that the same rule would apply to other direct damages.

115. As regards the liability for indirect loss, which was covered by subparagraph (c), the Working Group was in agreement that the liability should not be a strict one. However, it was noted that the concept of indirect loss, which article 12(c) attempted to cover, concerned only some legal systems. There was broad agreement that the person claiming indirect loss should be required to show more than mere negligence on the part of the receiving bank. Under one view, the claimant should be required to show gross negligence. In support of that view it was stated that, according to general principles of liability of a number of legal systems, gross negligence triggered the liability for indirect loss and that the same principle should be incorporated into subparagraph (c).

116. The view was contested on the ground that the concept of gross negligence was uncertain in many legal systems. Moreover, such a standard of liability was unreasonable in economic terms. It was said that the extent of the risk of indirect economic loss depended on the circumstances of the case that were known to the parties to the underlying transaction but seldom to the bank. Thus, it was more appropriate to leave it to the originator to protect itself against such loss, rather than to compel the bank to seek insurance for a risk that often depended on facts unknown to it and on the operation of a foreign liability régime, and that was normally very difficult to assess before the event.

117. Under another view, for there to exist a liability for indirect loss, the claimant should be required to show that the receiving bank had caused the damage by a wilful or

reckless action. A suggestion was made that a model for describing such an action might be found in article 8 of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg).

118. An observation was made that, as a result of the receiving bank's failure to execute a payment order or its improper execution, the originator might be responsible to the beneficiary for damages arising out of the underlying relationship. Such damages might concern, for instance, lost interest, loss caused by a change in exchange rates, or in some circumstances even indirect loss. The question was raised whether the claim of the originator to recover such damages from the receiving bank was adequately covered by the wording of article 12.

119. The Working Group discussed the question of who should be the persons entitled to claim damages under article 12. There was support for giving a right of recovery only to persons who were in the direct chain of contractual relationship with the bank that had caused the loss. There was also support for recognizing such right to persons to be specified in article 12 even in the absence of such contractual relationship. A further suggestion was that the provision should be drafted in such a way that it would furnish the exclusive rule of liability. Otherwise, claimants would be able to rely upon non-uniform doctrines of liability under national law, even in respect of foreign banks. It was stated that the relationship between doctrines of liability based on breach of contract and liability based on tort was unclear in many legal systems.

Article 9. *Revocation and amendment of payment order*

120. The text of article 9 as considered by the Working Group was as follows:

"(1) A revocation or amendment of a payment order issued to a receiving bank that is not the beneficiary's bank is effective if it is received in sufficient time for the receiving bank to act on it before the receiving bank has transmitted the order received or has issued its own order implementing the order received.

"(2) A sender may require a receiving bank that is not the beneficiary's bank to revoke or amend the payment order the receiving bank has transmitted or issued. A sender may also require a receiving bank to instruct the subsequent bank to which it transmits or issues an order to revoke or amend any order that the subsequent bank may in turn have transmitted or issued.

"(3) A revocation or amendment of a payment order issued to the beneficiary's bank is effective if it is received in time for the bank to act on it before the earliest of the following:

"(a) the bank receives the payment order, where the sender and the bank have agreed that the bank will execute payment orders received from the sender without notification that cover is in place;

"(b) the bank receives both the payment order and notice that cover is available;

"Variant A"

"(c) the bank credits the beneficiary's account [without reserving a right to reverse the credit if cover is not furnished] or otherwise pays the beneficiary;

"Variant B"

"(c) the bank gives the beneficiary the [unconditional] right to withdraw the credit or the funds [whether or not a fee or payment in the nature of interest must be paid for doing so];

"Variant C"

"(c) the bank gives notice to the beneficiary that it has the right to withdraw the credit or the funds;

"(d) the bank applies the credit to a debt of the beneficiary owed to it or applies it in conformity with an order of a court.

"(4) A sender may revoke or amend a payment order after the time specified in paragraph (1) or (3) only if the receiving bank agrees.

"(5) A sender who has effectively revoked a payment order is not obligated to reimburse the receiving bank [except for costs and fees] and, if the sender has already reimbursed the receiving bank for any part of the payment order, it is entitled to recover from the receiving bank the amount paid.

"(6) Any revocation of a payment order under the applicable law resulting from the death of the sender or of the originator or from determination of legal incapacity by a competent authority is binding on a receiving bank only if the bank knows of the death or determination of legal incapacity before the time specified in paragraph (1) or (3) of this article.

"(7) A bank has no obligation to release the funds received if ordered by a competent court not to do so [because of fraud or mistake in the funds transfer.]"

Paragraph (1)

121. The Working Group was in general agreement with paragraph (1). A suggestion was made that the last part of the paragraph should refer only to transmitting the payment order.

Paragraph (2)

122. Different views were expressed as to whether a sender should be able to stop the funds transfer after the receiving bank had already transmitted the payment order only by pursuing the payment order through the same chain of intermediary banks as had been used to transmit the payment order or whether the originator or the originator's bank could notify an intermediary bank or the beneficiary's bank that the payment order had been revoked.

123. In favour of permitting the sender to notify an intermediary bank or the beneficiary's bank it was stated that it would increase the possibility that the revocation would be received before the beneficiary's bank received the payment order and acted on it. It was stated that such a possibility was of particular importance in cases of fraud.

124. In reply it was stated that neither an intermediary bank nor the beneficiary's bank would have any reason to know whether the revocation was genuine or not.

125. The prevailing view was that any revocation of a payment order should be permitted only by sending the revocation through the same chain of banks as the payment order was sent. Such a rule would mean that a payment order for any given segment of the funds transfer could be revoked only by the sender of that payment order. It was suggested that the Model Rules should make it clear that messages revoking payment orders were subject to the same rules as to authentication and liability for failure to follow the instruction to revoke as were payment orders themselves. It was suggested that the word "require" should be replaced by the word "request".

126. The question was raised whether the problem under discussion continued to be of importance in an environment in which payment orders passed through computers in fractions of a second, making it impossible to catch up with a payment order once sent. In reply it was stated that not all payment orders were processed by computer or were for immediate execution. Telex transfers and value dated funds transfers continued to give the possibility of revocation.

Paragraph (3)

127. It was noted that paragraph (3) and article 16(3) expressed different aspects of the finality of the funds transfer and that the events of finality were drafted with identical words. There was general agreement that this was appropriate, although the question was raised on whether article 16 should contain any rule on discharge of the underlying obligation.

128. The Working Group noted that each of the subparagraphs was relevant to a different factual situation. Subparagraph (a) was intended for systems such as CHAPS, where net settlement occurred at the end of the day but a receiving bank was obligated to execute a payment order when it was received. Subparagraph (b) was intended especially for telex or SWIFT transfers, when prior arrangements for cover were in effect between the beneficiary's bank and its sender. Subparagraph (c) in the different variants was intended for various situations where subparagraphs (a) and (b) did not apply and the earliest basis for finality was an action taken by the beneficiary's bank itself.

129. The Working Group engaged in a general discussion of the various subparagraphs, in some cases making comments on the drafting as it applied to particular situations. There was, however, agreement that the subject was complex and that the Working Group would have to gain a better understanding of the banking practices and of the legal conceptions in different countries before it would be prepared to make policy choices in this regard.

Paragraph (4)

130. It was suggested that there should be a more complete provision in the Model Rules permitting or requiring

a receiving bank to reverse a credit in certain cases, and especially those involving obvious errors. It was suggested that the secretariat present a draft provision to that effect for consideration by the Working Group at its next session.

Paragraph (5)

131. The Working Group had no comments on the paragraph.

Paragraph (6)

132. There was general agreement that the paragraph should be redrafted to provide that death or incapacity of an originator should have no effect on the continuing legal value of a payment order. The legal incapacity of a receiving bank was understood to be of particular relevance to its bankruptcy. Although there was some sentiment for considering that problem, the general agreement was that there should be no attempt to do so at this time.

Paragraph (7)

133. Since the paragraph was included for the purpose of raising the issue, pending any decision by the Commission at a later time, of whether it would undertake consideration of the related problem in the context of stand-by letters of credit and guarantees, it was decided to place the paragraph in square brackets.

Article 10. Statement of debits and credits to an account

134. The text of article 10 as considered by the Working Group was as follows:

"(1) A bank shall make available to its account holders [at least every . . . month[s]] a notice or statement of the debits and credits to the account together with such information as is reasonably available to the bank that will enable the account holder to identify the source of the entries. The notice or statement shall be available as agreed between the bank and the account holder, and may be available by computer access.

"(2) An account holder shall notify the bank within [. . .] [days] [months] after the statement is available of any error or of any unauthorized debit or credit.

"(3) An account holder who fails to notify the bank as provided in paragraph (2) of this article shall be precluded from asserting any claim against the bank arising out of the error or unauthorized debit or credit and shall bear any loss to the bank or to any other person that results from such failure."

135. The prevailing sentiment was that the application of article 10 to the relationship of bank customers with their banks went beyond what was necessary to include in the Model Rules on funds transfers. Therefore, it was agreed that the article should be deleted.

136. Nevertheless, the view was expressed that the article would serve a useful function in regard to the relationship of the banks among themselves. It was suggested

that the differences in practice in different countries sometimes made it difficult to reconcile international funds transfers.

Article 11. Responsibility for proper execution of payment order

137. The text of article 11 as considered by the Working Group was as follows:

"(1) The originator's bank and each intermediary bank is responsible to the originator for the proper execution of the funds transfer as ordered in the originator's payment order. An intermediary bank has fulfilled its responsibility to the originator if the payment order received by the beneficiary's bank was consistent with the payment order received by the intermediary bank and it executed the payment order it received within the time required by article 8.

"(2) The funds transfer is properly executed if a payment order consistent with the payment order issued by the originator is received by the beneficiary's bank and cover is available to the beneficiary's bank for the order,

"(a) when a pay date was stated on the originator's payment order, in sufficient time for the beneficiary's bank to execute the order on or before that date;

"(b) when no pay date was stated on the originator's payment order, within an ordinary period of time for the type of payment order issued by the originator.

"(3) A receiving bank [, other than the beneficiary's bank,] is responsible to its sender for the proper execution of the funds transfer as ordered in the sender's payment order."

138. It was noted that the first sentence of paragraph (1) expressed the decision made by the Working Group at its sixteenth session that the originator's bank should be responsible to the originator for the proper execution of the funds transfer. That was said, however, to be contrary to the law in some countries where the originator's bank and each intermediary bank was directly responsible to the originator for properly executing its own segment of the funds transfer.

139. The question was raised of whether the originator, in addition to being able to hold the originator's bank responsible for the proper execution of the funds transfer, should also have a right to hold each intermediary bank directly responsible, as was provided in the current draft. In support it was stated that there might be reasons why the originator could not recover directly from the originator's bank, such as the bankruptcy of that bank. In reply it was suggested that there might be problems if the trustee in bankruptcy of the originator's bank recovered the damages caused by the intermediary bank to which it had sent its payment order and the originator subsequently claimed recovery from the same intermediary bank.

140. A similar question was raised in the context of paragraph (3) in respect of the beneficiary's bank. There was a general sentiment that the beneficiary's bank should

be responsible to its sender for the proper execution of the payment order it received, which would be achieved by deleting the words in square brackets. Some who supported that position were in favour of providing that the beneficiary's bank should also be responsible to the originator.

141. It was noted that, under the structure of the current draft of the Model Rules, it was appropriate for the beneficiary's bank to be responsible only to the beneficiary since the various rules on finality of the funds transfer, including articles 9(3), 16(3) and paragraph (2) of the article under discussion, proceeded on the assumption that a funds transfer was complete when the payment order and cover arrived at the beneficiary's bank.

142. The Working Group noted that as a result the beneficiary's bank would in effect have no right to reject the payment order, contrary to the rule adopted in article 5 in respect of all other banks. It was stated that such a result was inappropriate because the beneficiary's bank, as any other bank, might have its reasons for wishing to reject the payment order or to reject the cover that was offered to it. However, any right of the beneficiary's bank to reject the payment order under the Model Rules would be tempered by contractual obligations to the beneficiary.

143. Another suggestion was that, if the current rule contained in article 11 was maintained, the assumption that the beneficiary had chosen the beneficiary's bank should be made explicit. Where that bank was chosen by another party, most likely by the originator's bank, it should be made clear that the beneficiary's bank would have the right to reject the payment order so that it need not become obligated to a beneficiary with which it had not previously dealt. A view was expressed that the beneficiary's bank should not be liable to the sender and the originator unless that bank had been chosen by the originator.

144. It was pointed out that the function of paragraph (2) was not clear in some language versions. The paragraph was intended to explain when a payment order was properly executed for the purposes of paragraph (1).

145. It was suggested that paragraph (2) was inadequately drafted in a number of respects and was not in complete conformity with articles 9(3) and 16(3).

Article 13. *Responsibility of beneficiary's bank*

146. The text of article 13 as considered by the Working Group was as follows:

"The beneficiary's bank is responsible to the beneficiary for the proper execution of the payment order it has received and, if it will not or cannot execute the payment order, to its sender to give notice of that fact."

147. The suggestion that had originally been made in respect of article 11 that the beneficiary's bank should be responsible for the proper execution of the payment order not only to the beneficiary but also to the sender of the payment order, in particular when the beneficiary's bank

was chosen by the originator, was reiterated in the context of article 13.

Article 14. *Liability of beneficiary's bank*

148. The text of article 14 as considered by the Working Group was as follows:

"A beneficiary's bank that fails to execute a payment order or executes it improperly is liable to the beneficiary to the extent provided by the law governing the [account relationship] [relationship between the beneficiary and the bank]."

149. The Working Group was in agreement with the substance of article 14.

150. It was observed that article 14 had been prepared for the sake of symmetry and completeness of the system of the Model Rules, but that the issue might be thought to be beyond the sphere of application of the Model Rules and that it might be deleted at a later time.

Article 15. *Exemption from liability*

151. The text of article 15 as considered by the Working Group was as follows:

"Variant A

"A receiving bank and any bank to which the receiving bank is directly or indirectly responsible under article 11 is exempt from liability for a failure to perform any of its obligations if the bank proves that the failure was due to an impediment beyond the bank's control and that the bank could not reasonably be expected to have taken into account at the time of the funds transfer or to have avoided or overcome it or its consequences.

"Variant B

"A receiving bank and any bank to which the receiving bank is directly or indirectly responsible under article 11 is exempt from liability for any failure to execute an order or to give notice or for delay in doing so after the required time if the failure or delay was caused by the order of a court, interruption of communication facilities or equipment failure not involving a lack of ordinary care by the receiving bank, suspension of payments by another bank, war, emergency conditions or other circumstances beyond the control of the receiving bank, and the receiving bank exercised the diligence the circumstances required."

152. Under one view, article 15 should be based on variant A. That variant was preferred since it was considered to contain a stricter standard of liability than did variant B, in particular, in that it did not refer to the standard of ordinary care as did variant B. It was suggested that such a standard was of particular importance in respect of equipment failure. It was stated that, under theories of vicarious liability, employers were generally responsible for the failures of their employees. When equipment, including computers, were substituted, the employer should continue to be responsible for any resulting failure.

153. Under another view, article 15 should be based on variant B. It was said that variant A contained concepts, such as "impediment" and "expected to have taken into account", which were unclear and would give rise to disputes. Moreover, the concept of "a lack of ordinary care" in variant B was known in many legal systems and, above all, it indicated that the banks would be subject to a standard that was developing together with the development of the technology of funds transfers. It was suggested that it might be necessary to clarify the issue of burden of proof in similar terms as that in variant A.

154. It was observed that the choice between the two approaches was to some extent a matter of legal tradition and that the application of the two approaches to a given case would not necessarily produce different results. It was thus suggested that consideration should be given to presenting article 15 in two alternative versions so as to allow States to adopt the solution that was suitable to their legal system.

155. During the discussion there was growing support for combining variants A and B. It was noted that the concept of variant A was appropriate as the general principle, but that it would be useful to clarify the operation of that principle by examples pertinent to funds transfers. It was pointed out that the general principle was not based on the concept of negligence and that the examples to be added to the principle should remain within that framework.

156. The Working Group noted its discussion of article 12 on the question whether to delete any reference to liability for indirect loss (paragraphs 115 and 116) and that the primary liability of receiving banks would be the amount of lost interest and loss caused by a change in exchange rates. In view of that it was thought to be acceptable to subject banks to a higher standard of performance than what might otherwise be appropriate.

Article 16. Payment and discharge of monetary obligations; obligation of bank to account holder

157. The text of article 16 as considered by the Working Group was as follows:

"(1) Payment of a monetary obligation may be made by a funds transfer [to any account] [to any of the financial institutions in which the creditor has an account] [denominated in the currency of the obligation] [in the country where the obligation is payable], unless [the creditor of the obligation has indicated that] the obligation is to be discharged by payment in a certain way or by transfer to a certain account.

"(2) A creditor may terminate the right to discharge an obligation by payment into any one or more of the accounts indicated in paragraph (1) by notification to the bank or banks in respect of a single obligation, a class of obligations or by blocking the account if done so in such a manner and in sufficient time for the bank to act on it prior to discharge of the obligation under paragraph (3). If a creditor terminates the right to discharge an obligation by payment to an account, the

obligation of a debtor who had originated a funds transfer to that account prior to notice of the creditor's action is suspended until the debtor is reimbursed for the funds transferred. The creditor is responsible for any loss and for all costs that arise out of the funds transfer and its termination.

"(3) The obligation of the debtor is discharged and the beneficiary's bank is indebted to the beneficiary to the extent of the payment order received by the beneficiary's bank at the earliest of the following:

"(a) the bank receives the payment order, where the sender and the bank have agreed that the bank will execute payment orders received from the sender without notification that cover is in place;

"(b) the bank receives both the payment order and notice that cover is available;

"Variant A

"(c) the bank credits the beneficiary's account [without reserving a right to reverse the credit if cover is not furnished] or otherwise pays the beneficiary;

"Variant B

"(c) the bank gives the beneficiary the [unconditional] right to withdraw the credit or the funds [, whether or not a fee or payment in the nature of interest must be paid for doing so];

"Variant C

"(c) the bank gives notice to the beneficiary that it has the right to withdraw the credit or the funds;

"(d) the bank applies the credit to a debt of the beneficiary owed to it or applies it in conformity with an order of a court.

"(4) If one or more intermediary banks have deducted charges from the amount of the funds transfer, the obligation is discharged by the amount of those charges in addition to the amount of the payment order as received by the beneficiary's bank. The debtor is bound to compensate the creditor for the amount of those charges.

"(5) To the extent that a receiving bank has a right of reimbursement from a sender by debit to an account held by the receiving bank for the sender, the account shall be deemed to be debited [and the obligation of the bank to the sender reduced or the obligation of the sender to the bank increased] when a revocation or amendment of the payment order would no longer be effective under article 9."

Paragraphs (1) and (2)

158. Under one view, paragraph (1) was not necessary. The right of a debtor to discharge a monetary obligation by transferring funds to an account of the creditor, in the absence of any provision to the contrary in the underlying contract, could be left to national law. An example was given of one recent national statute that specifically provided for such a right. Under the prevailing view the existence of such a statute illustrated that the problem was real. Since the Working Group had already agreed that it was proceeding on the working assumption that it was

preparing model legislation, it decided that it would be appropriate to include such a rule.

159. There was general agreement that the words in brackets in paragraph (1) as well as the entire text of paragraph (2) introduced complications that were unnecessary. Therefore, it was agreed to delete paragraph (2) and to restrict paragraph (1) to providing that an obligation could be discharged by means of a funds transfer.

Paragraph (3)

160. The Working Group was agreed that it would not decide at the current session whether it was appropriate to retain in the Model Rules a provision on discharge of the underlying obligation. However, in discussing paragraph (3), it reiterated its position that the rules on discharge, whether under the Model Rules or under national law, and the rules governing finality should be consistent. In that respect, it noted that the Model Rules had been drafted on the basis that those rules would be identical.

161. The Working Group took note of the fact that in some legal systems an underlying obligation was considered to be discharged when the originator gave the payment order with cover to the originator's bank. The discharge was conditional on the completion of the funds transfer. However, since the originator's bank already had cover, it was unlikely that the funds transfer would not be completed. In some other legal systems the same rule applied to certain restricted categories of funds transfers, such as for the payment of insurance premiums. Such a legal doctrine served to restrict the possibility that an insurance policy would lapse because of late payment of the premium.

162. The Working Group decided to consider at a future session what effect such national laws on discharge of the underlying obligation might have on the appropriate rules on finality of the funds transfer.

Paragraph (4)

163. It was suggested that the words "unless otherwise agreed" should be added to the second sentence of paragraph (4) since it was common for beneficiaries (creditors)

to agree to be responsible for such charges. When it was pointed out that under the second sentence of paragraph (4) the originator (debtor) would have to send a second payment order, which in turn might have charges deducted from it, it was suggested that the rule might be reversed by deleting the sentence.

Paragraph (5)

164. Concern was expressed as to whether paragraph (5) would work properly in the context of article 9(2). It was suggested that paragraph (5) should state that the debit would be deemed to have been made upon the issue of the payment order, but that if the payment order was revoked, the debit would be reversed.

Additional matters to be covered in the Model Rules

165. It was noted that in the document containing the draft Model Rules (A/CN.9/WG.IV/WP.37, paragraph 7), the secretariat had listed several subjects on which no provision had been included but on which provisions might be included in a future draft. Of those subjects, it was suggested that the secretariat attempt to prepare provision on the conflict of laws for the next session of the Working Group and that that might be done either by the secretariat alone or in conjunction with the Hague Conference on Private International Law. In reply the observer for the Hague Conference stated that the question of whether the subject of conflict of laws in electronic funds transfers should be placed on the programme of work had been considered by a Special Commission in January, and would be on the agenda of the sixteenth session of the Conference in October. At the meeting of the Special Commission it had been thought that it was not yet appropriate to undertake a study of the subject until the substantive rules to be applied were more clearly determined.

III. FUTURE SESSIONS

166. The Working Group noted that the eighteenth session would be held at Vienna from 5 to 16 December 1988 and that the nineteenth session would be held in New York from 10 to 21 July 1989.

B. Draft model rules on electronic funds transfers: report of the Secretary-General^a (A/CN.9/WG.IV/WP.37) [Original: English]

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^aWorking paper submitted to the Working Group on International Payments at its seventeenth session.

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INTRODUCTION

1. In conjunction with its decision at the nineteenth session in 1986 to authorize the Secretariat to publish the UNCITRAL Legal Guide on Electronic Funds Transfers as a product of the work of the Secretariat, 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 Payments.¹

2. The Working Group undertook this task at its sixteenth session held at Vienna from 2 to 13 November 1987. At that session the Working Group reviewed a number of legal issues set forth in a report prepared by the Secretariat (A/CN.9/WG.IV/WP.35). At the conclusion of the session the Working Group requested the Secretariat to prepare draft provisions based on the discussions during that session for its consideration at its next meeting (A/CN.9/297, para. 98).

3. This report contains the draft provisions requested by the Working Group together with a commentary.

4. The Commission made two fundamental decisions at its nineteenth session as to the general nature of the Model

Rules to be developed by the Working Group. Firstly, the Model Rules should be flexible and should be drafted in such a way that they did not depend upon specific technology. Secondly, the Model Rules should deal with both the relationship between banks, even though at the present time these relationships may be largely governed by inter-bank agreements, and the relationship between banks and their customers, even though both parties to that relationship would normally be from the same country (A/41/17, para. 231).

5. The Working Group at its sixteenth session decided that the Model Rules should not be drafted narrowly, covering only a few precise points that would be welcomed by the banking community, but that they should be drafted so as to cover a wide 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 (A/CN.9/297, para. 12).

6. These basic decisions of the Commission and the Working Group have been carried out in the draft provisions for the Model Rules presented in this report. Several aspects are reflected in article 1 on the sphere of application and in article 3 on the content and form of the payment order. Others are contained in articles 11 to 15 on the responsibility and liability of banks for improper execution of a payment order received. A difficult question is to

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.

know the degree to which the civil consequences of a funds transfer, such as the extent to which a funds transfer discharges an underlying obligation, should be reflected in the Model Rules. Such a provision has been included in article 16.

7. Subjects on which no provision is included for the present in these draft provisions include:

(a) The extent to which a rule might be modified by contract, since it will be possible to decide whether the Model Rules should be mandatory only as each issue is considered and when it is decided what legal form these Rules should take (A/CN.9/297, para. 31);

(b) Interpretation of the Model Rules (see A/CN.9/297, para. 32; but see article 3(3));

(c) Conflict of laws (A/CN.9/297, para. 36);

(d) Permitting a bank to correct an error by debiting an account without the consent of the customer (A/CN.9/297, para. 79; see article 9);

(e) Permitting a bank to reverse a credit to an account because it fails to receive cover (A/CN.9/297, paras. 95-96; see articles 9 and 16);

(f) Problems of evidence in case of dispute.

DRAFT PROVISIONS FOR MODEL RULES ON ELECTRONIC FUNDS TRANSFERS

I. General provisions

Article 1. *Sphere of application*

These rules apply to funds transfers made pursuant to a payment order [or to a debit transfer instruction] [where the originator's bank and the beneficiary's bank are in different countries].

Comment

1. The Working Group decided that the rules should first be prepared to apply to credit transfers, with the decision as to whether they should apply to debit transfers to be left to a later date (A/CN.9/297, para. 19). A payment order as defined in article 2 is a credit transfer instruction. The words "debit transfer instruction" have been inserted in square brackets to indicate that the decision on this issue is yet to be made.

2. The Working Group also decided that the Model Rules should not apply to the truncation of negotiable instruments (A/CN.9/297, para. 16). There is no specific exclusion in the text of the draft Model Rules on the belief that the sphere of application as now drafted does not include truncation.

3. As noted in comment 2 to article 3, the Model Rules are to apply without regard to the technology involved. This raises a question as to whether the title to the Model Rules should continue to refer to electronic funds transfers.

4. The Working Group decided 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 transfers. A decision would be made at a later time, perhaps after the substance of the Rules had been determined, on the extent to which the Rules should be considered to be applicable to domestic funds transfers (A/CN.9/297, para. 15; see also discussion in the Commission at its twenty-first session, A/43/17, para. 13). If the Model Rules were to be restricted to international funds transfers, the bracketed words at the end of the article would serve to so state and to define what is meant by an international funds transfer.

Article 2. *Definitions*

In these Rules:

(a) "Bank" means a financial institution which, as an ordinary part of its business, engages in funds transfers for itself or other parties [whether or not it is recognized as a bank for other purposes];

(b) "Beneficiary" means the ultimate party to be credited or paid as a result of a funds transfer;

(c) "Cover" means reimbursement of a bank that has acted on a payment order;

[(d) "Entry date" means the date when entries are made in the records of an account;]

(e) "Execution date" means the date the sender has instructed the receiving bank to execute the payment order;

(f) "Funds" or "money" includes credit in an account kept by a bank whether denominated in a national currency or in a monetary unit of account that is established by an intergovernmental institution or by agreement of two or more States, provided that these Rules shall apply without prejudice to the rules of the intergovernmental institution or to the stipulations of the agreement;

(g) "Funds transfer" means the movement of funds between the originator and the beneficiary;

[(h) "Funds transfer transaction" means the movement of funds directly between two parties involving no intermediaries other than a payment or communications service;]

(i) "Intermediary bank" means a bank between the originator's bank and the beneficiary's bank through which the funds transfer passes;

(j) "Originator" means the issuer of the first payment order in a funds transfer;

(k) "Pay date" means the date when the funds are to be freely available to the beneficiary as specified by the originator;

[(l) "Payment date" means the date when the funds are made available to the beneficiary;]

(m) "Payment order" means an instruction addressed to a bank directing it to pay, or to cause another bank to pay, to the beneficiary a fixed or determinable amount of money [either in cash or by credit to an account];

(n) "Receiving bank" means the bank to which a payment order is delivered;

(o) "Sender" means the party who sends a payment order [, including the originator and any "sending bank"];

(p) "Value date" means the date when funds are to be at the disposal of the receiving bank.

Comment

In conformity with the decision of the Working Group, the terminology in English and French used in ISO 7982-1 (International Organization for Standardization, "Bank telecommunication—Funds transfer messages—Part 1: Vocabulary and data elements") has been used to the extent it was found to be consistent with the purposes and needs of the Model Rules (A/CN.9/297, para. 28). The source of the terms and their definitions is indicated below.

"Bank"—definition from EFT Legal Guide. The term "bank" is defined by ISO 7982-1 as "a depository financial institution".

"Beneficiary"—ISO 7982-1.

"Cover"—ISO 7982-1 uses "cover payment" with a slight difference in definition.

"Entry date"—ISO 7982-1.

"Execution date"—new term.

"Funds"—adaptation of definition of "money" in draft Convention on International Bills of Exchange and International Promissory Notes, article 6(1).

"Funds transfer"—ISO 7982-1.

"Funds transfer transaction"—ISO 7982-1.

"Intermediary bank"—same term as in ISO 7982-1 but definition differs. The definition here used includes all banks between originator's bank and beneficiary's bank. ISO 7982-1 includes only those banks between receiving bank and beneficiary's bank. The two definitions are consistent in spite of their formal differences.

"Originator"—slight modification of definition in ISO 7982-1.

"Pay date"—new term.

"Payment date"—slight modification of definition in ISO 7982-1.

"Payment order"—major modification of definition in ISO 7982-1, but consistent with it.

"Receiving bank"—ISO 7982-1.

"Sender"—used but not defined in ISO 7982-1.

"Value date"—ISO 7982-1.

(2) A payment order must be properly authenticated and contain at least the following data:

(a) an order to a bank to make the transfer and, if payment is not by credit to an account at the beneficiary's bank, the method of payment to the beneficiary;

(b) the identification of the sender;

(c) the identification of the receiving bank;

(d) the amount of the funds transfer, including the currency or unit of account, if that is not otherwise self-evident;

(e) the identification of the beneficiary;

(f) the identification of the beneficiary's bank.

(3) Any required or optional data may be represented by words, figures or codes. If a data element is represented by any combination of words, figures or codes and there is a discrepancy between them, each form of representation is equally valid and the sender shall be responsible for the payment order as executed by the receiving bank and any intermediary payment or communications service, unless the receiving bank or intermediary payment or communications service knew or ought to have known of the discrepancy.

Comment

1. Article 3 on the content and form of a payment order should be read in conjunction with the definition of a payment order in article 2. A payment order is a credit transfer instruction. No special term or definition has been given for a debit transfer instruction awaiting any later decision as to whether debit transfers will be covered by these Model Rules. The term "debit transfer instruction" is used in a bracketed provision in article 1.

2. At the Commission's direction, these Model Rules do not depend on specific technology. Although the reason for the preparation of the Model Rules is the development of electronic means of transmission and storage of payment orders, the Model Rules will also apply to other forms of transmission, including optical, paper or verbal. Many funds transfers that are electronic between banks commence with a paper-based payment order from the originator to its bank. In other cases one of the inter-bank payment orders may be paper-based even though all other aspects of the funds transfer may be electronic. The inclusion of verbal payment orders is not intended to authorize their use wherever they may now be prohibited. However, since verbal payment orders, and particularly those over the telephone, are known in some countries and those orders may order funds transfers to be made to other countries, it has been thought to be preferable to include them within the coverage of the Model Rules.

3. Normally a payment order goes only from the sender to the receiving bank. If the receiving bank is not the beneficiary's bank, it must send its own payment order (and thereby become a sender) to its receiving bank. The new payment order must have terms consistent with those in the payment order received (article 6(1)).

II. Form and content of payment order

Article 3. *Form and content of payment order*

(1) A payment order may be in any form [, including both written and oral form,] and may be transmitted between the sender and the receiving bank by any means of communication.

4. If the payment order received is paper-based, it may be possible for the bank to transmit the payment order received without issuing its own order. However, it would still take on the duties of a sender of a payment order (article 4(1)).

5. A message is a payment order if it meets the definition in article 2(m) whether or not it contains all of the data specified in article 3(2). However, all of the data specified in article 3 is necessary for the proper execution of the payment order and a sender that omits any of it must bear the consequences. Some of the data may be implied rather than stated, such as the currency when the payment order is transmitted over a transmission system restricted to a single currency.

6. Paragraph (2) requires the payment order to be authenticated, but no particular method or level of authentication is prescribed (A/CN.9/297, para. 42).

7. If the payment order is incomplete, the receiving bank is bound not to execute it (article 5(2)), but must give notice of its failure to act under article 8(1). If the receiving bank does act upon the incomplete order, it does so at its own risk.

8. A payment order may contain additional data, including additional instructions in regard to execution date, pay date or intermediary bank or transmission system to be used. For the obligation of the receiving bank in respect of such instructions, see articles 6(2) and (3), and 8.

9. Paragraph (3) provides that the data may be in words, figures or codes, the latter being often used in electronic message systems. If a given data element such as the amount or the account to be debited or credited is represented in more than one form, there may be a discrepancy between the two. Paragraph (3) provides that the receiving bank and any intermediary payment or communications system may rely on any one of these forms of data representation. This rule is to protect the bank that is programmed to read data elements that are represented in a particular way. However, if the bank knows or ought to know of the discrepancy, this provision would require it to enquire as to the correct data element. While this is a nuisance and will delay execution of the payment order, it is considerably easier with electronic communications than at an earlier time. One occasion when a bank ought to know of an error in a funds transfer (*viz.* discrepancy) is set out in article 5(2). For discussion in the Working Group, see A/CN.9/297, para. 33.

III. Duties of the parties

Article 4. *Obligations of sender*

(1) A sender is bound by authorized payment orders as issued or transmitted by it, and for any error or delay during the transmission of the order to the receiving bank, except as set forth in article 5(2).

(2) A payment order is authorized when it is sent or given to the receiving bank by the sender or by a person authorized to act for the sender in regard to orders of the type in question.

(3) A sender is bound by an unauthorized order when it was sent or given to the receiving bank by a person who was able to do so because of present or past employment with the sender or because of the negligence or bad faith of the sender or of an employee or agent of the sender.

(4) If the sender denies having authorized the order, the receiving bank has the burden of proof that the order was authorized by the sender or that the sender is bound by an unauthorized order under paragraph (3). If the sender denies that the order sent contained the data said to have been received, the receiving bank has the burden of proof of the content of the order received.

(5) A [sender] [sending bank] is bound to adhere to any message structure prescribed by the transmission system used or agreed between the parties [and is liable for any loss resulting from a failure to do so].

(6) A sender which has not made previous arrangements with the receiving bank as to how the receiving bank will be reimbursed for executing its instructions shall ensure that adequate cover is in place and duly advised to the receiving bank on or before the value date.

(7) A sender is bound to reimburse the receiving bank to the extent the receiving bank has properly executed the payment order of the sender [including any fees or costs charged or incurred by the receiving bank].

Comment

1. Under paragraph (1) a sender is bound by authorized payment orders as issued or transmitted by it. Errors made by the sender, by the sender's instructing party or by any previous party do not give a basis for the sender to deny its obligation to reimburse the receiving bank. Although article 5(2) may on occasion constitute an exception to this rule, it will seldom be applicable on the facts of the case. A sender is also liable for any error occurring during the transmission of the order. Article 5(2) will often constitute an exception to this rule since error checking procedures to be used by the receiving bank would often discover the error that had occurred.

2. The restriction in paragraph (2) that a payment order sent or given by a person other than the sender is authorized only if the person was authorized to act in regard to orders of the type in question is mitigated by paragraph (3) on unauthorized orders.

3. Paragraph (3) places a heavy burden of responsibility on a sender when the unauthorized instruction was issued by a person who was able to do so because of past or present employment. This does not restrict the category to persons who in their employment worked with payment orders. The employee may have simply had access to passwords or other means of issuing payment orders because of their presence in the place of employment.

4. While the sender carries the responsibility for many unauthorized payment orders and for errors caused in transmission, under paragraph (4) the receiving bank has the burden of proof of showing that the sender is responsible if such responsibility is denied.

5. Paragraph (5) is intended to strengthen the obligation to follow prescribed message structures. If the word "sender" is used, it would include non-bank originators. The last clause is in square brackets to indicate that this article may not be the proper location for a provision on liability of a party.

6. While paragraphs (6) and (7) are similar, they relate to somewhat different problems. Paragraph (6) is the requirement to make cover available before the receiving bank is required to act (see article 8(3)), unless previous arrangements have been made between the sender and the receiving bank.

7. Paragraph (7) has two elements: the sender must reimburse the receiving bank once the bank has acted and the sender must reimburse the receiving bank only to the extent the receiving bank has properly executed the payment order of the sender. It is to be noted that, although the possibility to effect reimbursement may be required prior to the receiving bank's execution of the order by the furnishing of cover, the obligation to reimburse the receiving bank arises as a result of the execution of the payment order.

8. The words "to the extent" in paragraph (7) may be seen in terms of the monetary amount to be reimbursed. If the sender's order is for 1,000 units and the receiving bank sends a new order for 10,000 units by mistake, or sends two orders for 1,000 units each, the sender needs to reimburse only 1,000 units. If the receiving bank sends a new order for 100 units, the sender needs to reimburse only for 100 units. Only when the receiving bank corrects its error by amending its payment order to 1,000 units or by sending a second payment order for 900 units would the sender be obligated to reimburse for the entire 1,000 units.

9. The words "to the extent" also limit the duty to reimburse if the receiving bank sends a new order to an incorrect subsequent bank and that error is never corrected so that the original order is not carried out.

10. The costs charged by the receiving bank relate to its charges for its services to the sender. The costs incurred by the receiving bank are the costs charged to it by the subsequent receiving bank. Except for the costs charged by the beneficiary's bank, those costs should cascade back to the originator. For the case in which those costs are deducted from the amount of the funds being transferred, see article 16(4).

Article 5. *Obligations of receiving bank*

(1) A receiving bank is bound either to execute the payment order or to notify the sender that it will not do so. If a receiving bank intends to delay executing a payment order beyond the time required by article 8 in order

to await notification that cover was available, it must notify its sender of that fact. If within the required time a receiving bank does not give notice that it will not act on a payment order, it may no longer give such notice and is bound to act on the order.

(2) A receiving bank is bound not to execute a payment order that it knows or ought to know to be in error or incomplete. If a receiving bank would have discovered an error or that the payment order was incomplete through the proper use of an error checking procedure that was required by the funds transfer system or was agreed upon with the sender, the bank ought to have known of the error or incompleteness.

Comment

1. Article 5 states the basic obligation of a receiving bank, i.e. to react to the payment order by executing the order or by giving notice that it will not do so (A/CN.9/297, para. 49). This obligation exists whether or not the bank had a prior relationship with the sender. A sender of a payment order expects it to be executed at the time indicated and in the manner indicated. The receiving bank may have reasons for not executing the payment order. These Rules do not attempt to distinguish between legitimate reasons and those that are not. However, if it is not going to execute the order, the receiving bank must notify the sender of that fact so that the sender can find another means of having the funds transfer carried out.

2. The means by which the receiving bank acts in conformity with a payment order are set out in articles 6 and 7. The time within which it must act or give notice are set out in article 8.

3. The Working Group decided that the receiving bank should not be required to give any reason for its refusal to act, although it would often be advantageous to the sender—or the originator—to know the reason (A/CN.9/297, para. 51).

4. In general, a sender is responsible for assuring that the payment order is complete. In order for it to be complete it must have all the data required by article 3(2). Article 6(2) may require that a receiving bank include other data in its payment order; the non-inclusion of such data does not render the payment order incomplete, even though it may make the bank responsible for any adverse consequences arising out of such non-inclusion.

5. Since a sender is responsible for any errors in the payment order as sent by it or that may have occurred in the transmission, a receiving bank is normally bound to act on a payment order in the terms in which that order was received. However, according to paragraph (2), a receiving bank should not execute a payment order that it knows or ought to know to be incomplete or in error. It is difficult to imagine the situation in which the receiving bank could claim not to have known of incompleteness. Whether the receiving bank knows or ought to know of an error depends on a number of factors, of which the type of error and the type of payment order are the most important.

6. The second sentence of paragraph (2) considers only one of the possible situations in which a bank ought to have known of an error, i.e. the use of an error checking procedure was required by the funds transfer system or had been agreed upon with the sender and the error was of such a type that it would have been discovered through proper use of the procedure.

Article 6. Execution by receiving bank that is not beneficiary's bank

(1) A receiving bank that is not the beneficiary's bank properly executes a payment order when, within the required time, it provides or arranges for cover and

(a) transmits the order to the beneficiary's bank or to the required or an appropriate intermediary bank,

(b) issues its own payment order containing instructions and other data consistent with the order received, or

(c) otherwise provides for completion of the funds transfer in an appropriate manner.

(2) If the payment order received contains an instruction as to the intermediary bank or banks, the funds transfer system or the means of transmission to be used, the receiving bank as sender shall execute the order received in compliance with that instruction. The payment order issued by the receiving bank as sender shall include any instructions for action of the receiving bank of that order necessary to implement the order in an appropriate manner.

(3) The receiving bank is not bound to follow an instruction of the sender specifying an intermediary bank, funds transfer system or means of transmission to be used in carrying out the funds transfer if the receiving bank, in good faith, determines that it is not feasible to follow the instruction or that following the instruction would cause excessive delay in completion of the funds transfer. The receiving bank acts within the time required by article 8 if it, in good faith and in the time required by that article, enquires of the sender as to the further actions it should take in light of the circumstances.

Comment

1. A receiving bank that is not the beneficiary's bank acts in conformity with the payment order received by becoming a sender of its own conforming order and arranging for cover within the required time. On occasion it may act in conformity with the order by sending a cheque rather than a payment order or by otherwise providing for completion of the funds transfer. Paragraph (1)(c) anticipates such possibilities.

2. In general, the instructions received must be followed, and the receiving bank is always authorized to do so. However, the receiving bank must be able to exercise some professional judgment whether it would be better to act in some other way. It is a delicate line as to the degree of discretion that should be given. The reasons for the instruction as to intermediary bank, funds transfer system or means of transmission to be used may have an importance to the sender that is not obvious to the receiving

bank. The receiving bank's wish—or perceived need—to act in some other manner may be personal to it (e.g. its relationship with the indicated intermediary bank) or may be general (e.g. the means of transmission indicated is not functioning for technical reasons out of the control of the receiving bank).

3. Paragraph (3) offers the receiving bank two alternatives to following the instructions received. It may exercise its good faith judgment that it is not feasible to follow the instruction or that doing so would cause excessive delay in completion of the funds transfer. In that case it may take the action it considers appropriate. Alternatively, it may enquire of the sender as to the further actions it should take in the circumstances.

Article 7. Execution by beneficiary's bank

(1) If the beneficiary maintains an account at the beneficiary's bank into which funds transfers are normally credited, the bank executes the order by:

(a) crediting the beneficiary's account;

(b) making the funds available for withdrawal or for transfer; and

(c) notifying the beneficiary as agreed between them of the availability of the funds.

(2) If the beneficiary does not maintain such an account, the bank executes the order by:

(a) making payment by the means specified in the order or by any commercially reasonable means; or

(b) giving notice to the beneficiary that it is holding the funds for the benefit of the beneficiary.

Comment

1. The purpose of a funds transfer is to effect payment to the beneficiary, usually by credit to its account, but also by payment in cash, issuing of a negotiable instrument or by other commercially reasonable means. Therefore, even though articles 13, 14 and 16 make it clear that the originator has fulfilled its obligation to the beneficiary, and the banking system has fulfilled its obligation to the originator, when the beneficiary's bank receives a correct payment order and cover has been arranged, it is appropriate for these Model Rules to set forth the obligations of the beneficiary's bank to the beneficiary in respect of the funds transfer. Article 7 is the first of the articles that considers this matter.

2. Article 7 distinguishes between the situation where the beneficiary maintains an account with the beneficiary's bank into which funds transfers are normally credited and where the beneficiary does not maintain such an account. In the former case prior to the deadline in article 8 the beneficiary's bank must take three actions to execute the instruction: credit the account, make the funds available and give notice. In the latter case the beneficiary's bank must take only one action prior to the deadline: either pay the amount in an appropriate manner or notify the beneficiary that it holds the funds available.

3. When the beneficiary maintains more than one account to which the payment order might be credited, and the payment order itself does not designate the appropriate account, this provision would permit the bank to make the designation. Article 16(1) is relevant to the related question as to the account that may be credited in order to discharge an underlying obligation.

4. The notification required by paragraph (1)(c) is "as agreed between [the beneficiary and the bank] of the availability of the funds." This rule presupposes the general desirability that bank customers receive prompt notice of credits to their account and that such notice is part of the funds transfer process. Paragraph (1)(c) permits banks and their customers to agree on the means by which such notice would be given. It also permits banks and their customers to agree that no notice need be given where, for example, the account was a numbered account. This rule should be compared to article 10.

Article 8. *Time to execute payment order or give notice*

(1) A receiving bank shall execute the payment order received, or give notice that it will not do so, within the time consistent with the terms of the order.

(2) When the payment order states a pay date, a receiving bank that is not the beneficiary's bank shall execute the order at such time as to assure in the ordinary course of events receipt by the beneficiary's bank of the payment order and cover by the pay date. The beneficiary's bank shall execute the order not later than on that date.

(3) When the payment order states an execution date, the receiving bank shall execute the order not later than on that date. When the payment order states a value date but no execution date, the execution date shall be deemed to be at the value date. Unless otherwise agreed, the receiving bank may not charge the sender's account prior to the execution date.

(4) When no execution, value or pay date is stated, the execution date shall be deemed to be the date the order is received, unless the nature of the order indicates that a different execution date is appropriate.

(5) A receiving bank that receives a payment order after the receiving bank's cut-off time for that type of payment order is entitled to treat the order as having been received on the following day the bank executes that type of payment order.

(6) A receiving bank that receives a payment order too late to execute it in conformity with the provisions of paragraphs (2) and (3) nevertheless complies with those provisions if it executes the order on the day received regardless of any execution, value or pay date specified in the order.

(7) A notice that a payment order will not be executed must be given on the day the decision is made, but no later than the day the receiving bank was required to execute the order.

Comment

1. Payment orders may contain three different types of dates: execution dates when the receiving bank is to act; pay dates when the beneficiary's bank is to act and value dates when the receiving bank is to receive cover. A value date may also have the effect according to paragraph (3) of functioning as an execution date. In each case the receiving bank must act within the time consistent with the terms of the order.

2. Many payment orders contain no execution, value or pay date. In that case, according to paragraph (4), the payment order is normally to be effected on the day it is received.

3. Paragraphs (5) and (6) state two different types of relief from the time limits stated in the first four paragraphs. Paragraph (5) relates to payment orders received too late in the day for execution as part of that day's receipts. While paragraph (5) might normally apply to payment orders of a type that should receive same-day treatment, it might also apply to payment orders that are processed on a fixed multi-day (e.g. three-day) time schedule.

4. When a receiving bank receives a payment order too late to meet the obligatory execution date, paragraph (6) states that it must be executed on the day received.

5. If a receiving bank is not going to execute a payment order, article 5(1) states that it must give notice. Paragraph (7) states that at the latest the notice must be given when execution of the payment order would have been required. However, if the decision not to execute the order is made earlier, the notice must be given on the day the decision is made.

Article 9. *Revocation and amendment of payment order*

(1) A revocation or amendment of a payment order issued to a receiving bank that is not the beneficiary's bank is effective if it is received in sufficient time for the receiving bank to act on it before the receiving bank has transmitted the order received or has issued its own order implementing the order received.

(2) A sender may require a receiving bank that is not the beneficiary's bank to revoke or amend the payment order the receiving bank has transmitted or issued. A sender may also require a receiving bank to instruct the subsequent bank to which it transmits or issues an order to revoke or amend any order that the subsequent bank may in turn have transmitted or issued.

(3) A revocation or amendment of a payment order issued to the beneficiary's bank is effective if it is received in time for the bank to act on it before the earliest of the following:

(a) the bank receives the payment order, where the sender and the bank have agreed that the bank will execute payment orders received from the sender without notification that cover is in place;

(b) the bank receives both the payment order and notice that cover is available;

Variant A

(c) the bank credits the beneficiary's account [without reserving a right to reverse the credit if cover is not furnished] or otherwise pays the beneficiary;

Variant B

(c) the bank gives the beneficiary the [unconditional] right to withdraw the credit or the funds [, whether or not a fee or payment in the nature of interest must be paid for doing so];

Variant C

(c) the bank gives notice to the beneficiary that it has the right to withdraw the credit or the funds;

(d) the bank applies the credit to a debt of the beneficiary owed to it or applies it in conformity with an order of a court.

(4) A sender may revoke or amend a payment order after the time specified in paragraph (1) or (3) only if the receiving bank agrees.

(5) A sender who has effectively revoked a payment order is not obligated to reimburse the receiving bank [except for costs and fees] and, if the sender has already reimbursed the receiving bank for any part of the payment order, it is entitled to recover from the receiving bank the amount paid.

(6) Any revocation of a payment order under the applicable law resulting from the death of the sender or of the originator or from determination of legal incapacity by a competent authority is binding on a receiving bank only if the bank knows of the death or determination of legal incapacity before the time specified in paragraph (1) or (3) of this article.

(7) A bank has no obligation to release the funds received if ordered by a competent court not to do so [because of fraud or mistake in the funds transfer.]

Comment

1. Only a payment order (and not a funds transfer) can be revoked or amended. Paragraphs (1) and (3) recognize this fact and give the rules in respect of revocation or amendment of a payment order issued to a receiving bank that is not the beneficiary's bank and to a receiving bank that is the beneficiary's bank respectively.

2. Paragraph (1) marks the end of the time for revocation of a payment order issued to a receiving bank that is not the beneficiary's bank as being the time when the bank sends its own order implementing the order received. It is at that time that the receiving bank becomes committed to the next bank in the chain. The paragraph also recognizes that the receiving bank will need a certain period of time to act on the revocation or amendment. It does not attempt to quantify the length of this period, which might be as short as seconds and might be as long as hours or, perhaps, even days.

3. Paragraph (3) recognizes that the originator's obligation is only to have a proper payment order with adequate cover arrive at the beneficiary's bank. Therefore, once that has happened, it is too late for the sender to revoke the order. In addition, the three versions of subparagraph (c) recognize that the beneficiary's bank may act on the order before it receives cover and that, having acted, it is too late for the sender to revoke or amend the order.

4. Paragraph (4) recognizes that on occasion a receiving bank will allow a payment order to be revoked or amended even though the time has passed because it knows that its credit party will permit the necessary reversal entries to be made.

5. Paragraph (2) gives a procedure whereby a sender can attempt to revoke a funds transfer even though it is too late for the sender to revoke its own payment order. The sender may require its receiving bank to revoke or amend the instruction that that bank has given and, if that revocation is too late, may require the order to revoke or amend to be sent from bank to bank until either a payment order is caught or the funds transfer is completed. There are essentially two alternative rules that could be adopted in place of the procedure proposed in paragraph (2). One possibility is that a sender could not revoke or amend the funds transfer once the time limit in paragraph (1) had passed in respect of its receiving bank, i.e. in most cases the originator's bank. A second possibility is that the originator or originator's bank could be given the right to notify the beneficiary's bank directly of the revocation or amendment. This would increase by a large factor the likelihood that the revocation or amendment would arrive at the beneficiary's bank prior to the payment order.

6. Revocation of a payment order is intended to return the parties to the situation they were in prior to the issue of the order. However, cover may already have been given for the order, in which case the cover must be repaid. Furthermore, the receiving bank would have a right to charge its costs and fees in receiving and processing the order and the revocation. Paragraph (5) considers these matters.

7. The death or determination of legal incapacity of the sender may revoke the payment order by operation of law. Paragraph (6) treats a revocation by operation of law in the same manner as a revocation by act of the sender. Accordingly, it is binding on the bank only when the bank knows of it.

8. Many revocations and amendments of payment orders are intended to correct errors, including the sending of the same order twice. Occasionally, a revocation or amendment is intended to stop a fraud. If the revocation or amendment is too late to be binding, it may still be effective because the receiving bank agrees to it in accordance with paragraph (4). If the receiving bank itself had a credit party, the receiving bank would undoubtedly have sought the approval of the credit party to the revocation or amendment. On occasion the credit party will refuse to co-operate, especially if fraud was involved. In that case, the sender (or originator) may have no choice but to sue for

return of the funds. In order to be sure that the funds remain available, the sender or originator may secure a court order that blocks the funds in some way.

9. In some countries it would be appropriate to include in the law of funds transfers a provision authorizing the courts to issue such orders and to set out the conditions under which they could be issued. In other countries such provisions would not be included in the law of funds transfers but only in the law of civil procedure. A similar question is faced in respect of allegedly fraudulent documentary letters of credit, standby letters of credit and guarantees (see discussion in A/CN.9/301, paras. 84-90). Paragraph (7) of this draft is limited to a statement that recognizes the effect on a bank of a court order not to release the funds. A revised provision may be considered in the light of the further work of the Commission in the field of standby letters of credit and guarantees.

Article 10. *Statement of debits and credits to an account*

(1) A bank shall make available to its account holders [at least every . . . month[s]] a notice or statement of the debits and credits to the account together with such information as is reasonably available to the bank that will enable the account holder to identify the source of the entries. The notice or statement shall be available as agreed between the bank and the account holder, and may be available by computer access.

(2) An account holder shall notify the bank within [. . .] [days] [months] after the statement is available of any error or of any unauthorized debit or credit.

(3) An account holder who fails to notify the bank as provided in paragraph (2) of this article shall be precluded from asserting any claim against the bank arising out of the error or unauthorized debit or credit and shall bear any loss to the bank or to any other person that results from such failure.

Comment

1. It is to the advantage of all parties that errors and fraud in funds transfers be discovered as soon as possible. The errors and fraud that are not discovered prior to the completion of the funds transfer will often be discovered only by the reconciliation of accounts by the sender (including originator), receiving bank and beneficiary. Errors that affect a sender may be discovered only by reconciliation of the beneficiary's account. In order to be sure that all parties are in a position to reconcile their accounts, paragraph (1) requires banks to make available to their account holders a statement of the debits and credits with sufficient information to identify the source of the entries (A/CN.9/297, para. 77). Account holders would include other banks as well as non-bank customers. No attempt is made to state what information would suffice.

2. While the bank is required to make the statement available, the paragraph does not say how it will be made available, except that it be as agreed between the bank and the account holder. Paragraph (1) specifically recognizes that the statement might be available by computer access;

it might also be sent in the mail or available at the bank itself.

3. The paragraph also does not specify when or how often the statement must be made available, although the suggestion that such a rule might be appropriate is contained in bracketed words. In some countries it is common practice to send such a notice on any day there is a debit or credit to the account. In other countries it is common practice for statements to be sent periodically, while in yet others no statement may be sent.

4. When the customer can access the record of account activity by computer terminal, especially if it can be done from the home or business establishment, the statement would be available as soon as the entries were made to the account.

5. The rule in paragraph (3) that an account holder who failed to notify the bank of any error or unauthorized debit or credit within the period of time set out in paragraph (2) would be responsible for losses that occurred should have the consequence of encouraging banks to send such notices as early as possible and to encourage account holders to review their statements and notify the bank of incorrect entries.

6. Paragraphs (2) and (3) apply to failure to notify that credits to the account were incorrect as well as that debits were incorrect. Therefore, they apply to failure to report errors in favour of the account holder as well as to its detriment. The provisions also applies to errors that result in the failure of a debit or credit to be reported by the bank. This rule is easy to apply to missing debits since the account holder should have a record of most of such debit items. On the other hand, failure to report a missing credit poses more difficult problems since the beneficiary often does not know when to expect the credit or, in some cases, whether to expect a credit.

IV. Responsibility and liability

Article 11. *Responsibility for proper execution of payment order*

(1) The originator's bank and each intermediary bank is responsible to the originator for the proper execution of the funds transfer as ordered in the originator's payment order. An intermediary bank has fulfilled its responsibility to the originator if the payment order received by the beneficiary's bank was consistent with the payment order received by the intermediary bank and it executed the payment order it received within the time required by article 8.

(2) The funds transfer is properly executed if a payment order consistent with the payment order issued by the originator is received by the beneficiary's bank and cover is available to the beneficiary's bank for the order,

(a) when a pay date was stated on the originator's payment order, in sufficient time for the beneficiary's bank to execute the order on or before that date;

(b) when no pay date was stated on the originator's payment order, within an ordinary period of time for the type of payment order issued by the originator.

(3) A receiving bank [, other than the beneficiary's bank,] is responsible to its sender for the proper execution of the funds transfer as ordered in the sender's payment order.

Comment

1. Article 11 states the basic rule of responsibility; in conformity with the prevailing view in the Working Group (A/CN.9/297, para. 60), the originator's bank is responsible to the originator for the proper execution of the funds transfer. Each intermediary bank is also responsible to the originator in the same terms. Proper execution of the originator's order is defined in paragraph (2) as receipt by the beneficiary's bank within the proper time of a payment order for the correct amount, ordering payment or credit to the correct account.

2. Although the first sentence of paragraph (1) makes the originator's bank and every intermediary bank responsible to the originator for the proper execution of the funds transfer, that responsibility should not attach to an intermediary bank that received the payment order after any error that might have been made by another bank. Therefore, the second sentence of paragraph (1) states that a bank has fulfilled its responsibility if the payment order eventually received by the beneficiary's bank was consistent with the payment order received by the intermediary bank in question.

3. The purpose of the rule in paragraph (1) that the originator's bank is responsible for the proper execution of the funds transfer is to make it possible for the originator to turn to the only bank with which it has contact if the funds transfer is not executed properly. The originator is not required to find out why the funds transfer went wrong or by the actions or inactions of which bank. This is of particular importance in international funds transfers when the error or delay may have occurred in a foreign country.

4. The strictness of this rule is mitigated in three ways: by the exemption in article 15 of all banks from responsibility for circumstances beyond the control of the bank where the error or delay causing event occurred; the limit on liability for indirect losses in article 12; and the right of a bank under paragraph (3) of this article to hold its receiving bank responsible for the losses if it can show that the payment order that arrived at its receiving bank was consistent with the payment order it had received itself. By this mechanism the responsibility can be passed through the chain of banks until it reaches the bank where the error occurred.

Article 12. Liability of receiving bank

A receiving bank, other than the beneficiary's bank, that fails to execute a payment order, executes it improperly or executes it when it is bound not to do so is liable

(a) to the originator and to its sender for loss of interest that may have occurred as a result;

(b) to the originator, beneficiary or any other bank for loss caused by a change in exchange rates;

(c) to the originator and to its sender for any other loss that may have occurred as a result, but not for more than the amount of the originator's payment order.

Comment

1. If a receiving bank executes the payment order improperly, including the execution of an order it knew or ought to have known was incomplete or in error, the sender has no obligation under article 4(7) to reimburse the receiving bank. If it has already done so, it should be able to recover the reimbursement under general principles of law. Therefore, this article does not mention recovery of the principal amount of the funds transfer as a matter of liability.

2. The usual consequence of an error in the implementation of a funds transfer is that there is a delay in payment to or credit to the account of the beneficiary, i.e. there is an increase in the period of time between the time the originator's account is debited and the beneficiary's account is credited. The resulting loss in interest may be seen as having been suffered by the originator or sender, because its account was debited too early, or by the beneficiary, because its account was credited too late. Article 12 treats it as a loss suffered by the originator or sender as the case may be.

3. Subparagraph (b) considers an adverse movement of exchange rates as a result of a delay as a source of liability. A similar result would occur if the banks concerned were directed to effect the exchange at the better rate prevailing on the date the exchange did occur or on the date it should have occurred. Such a rule is contained in the draft Convention on International Bills of Exchange and International Promissory Notes, article 76(3). However, in the context of credit transfers such a rule might not give the proper result if delay at one bank caused a delay in effecting the exchange at a different bank.

4. The most controversial question in respect of the liability of banks for errors or delays in implementing funds transfers is whether they should be liable for indirect damages. See discussion in Working Group, A/CN.9/297, paras. 84-86. In most cases, the bank does not know the purpose of the funds transfer or the possible consequences arising out of delay. However, in some cases the originator's bank does know, and, where significant losses could occur, it could be argued that it would be the originator's bank's duty to notify any subsequent bank of the possible loss. It could also be argued that the existence of a pay date in the payment order informed all banks that payment by a particular date was important to the originator, but it would not tell them why or the consequences. In any case, it is evident that bank customers have grown increasingly dependent on the proper implementation of payment orders by the banking system and that those customers often suffer indirect damages when there is error or delay in effecting funds transfers.

5. Subparagraph (c) is an attempt to formulate a standard of liability for indirect damages that, nevertheless, has a built-in limit of liability. In no case could the bank be liable for more than the amount of the originator's payment order. While the limitation of liability is arbitrary, because it need not relate to the amount of the loss, it offers the advantage of being objective and of giving a basis for calculating liability insurance premiums. It is to be noted that the limit of liability is equal to the loss that could be suffered by a bank that caused an incorrect account to be credited from which it could not recover the funds. Since the bank would have no right of reimbursement for the amount credited, its loss would be the amount of the transfer.

6. A different approach to limiting the exposure of banks to indirect losses would be to provide that they would be liable for such losses only if the loss arose out of their gross negligence or, to reverse the burden of proof, they would be liable for such losses unless they proved that they had not been grossly negligent. Such a text was not proposed because the standard of gross negligence is subjective and is bound to differ in different countries, and because the maximum amount of liability in any one case would be undeterminable and, therefore, premiums for liability insurance would be difficult to calculate on anything approaching an actuarial basis.

Article 13. *Responsibility of beneficiary's bank*

The beneficiary's bank is responsible to the beneficiary for the proper execution of the payment order it has received and, if it will not or cannot execute the payment order, to its sender to give notice of that fact.

Comment

Since the originator fulfills its obligation to the beneficiary when the beneficiary's bank receives a proper payment order and cover, as of that time the obligations of the beneficiary's bank run only to the beneficiary. Even though the beneficiary's bank need not execute a payment order if no cover has been provided, and may not be able to do so if there has been an error in designation of the beneficiary, the beneficiary's bank remains responsible to its sender to give notice under article 5.

Article 14. *Liability of beneficiary's bank*

A beneficiary's bank that fails to execute a payment order or executes it improperly is liable to the beneficiary to the extent provided by the law governing the [account relationship] [relationship between the beneficiary and the bank].

Comment

For the sake of symmetry and completeness, the Model Rules might contain a provision referring to the liability of the beneficiary's bank to the beneficiary. The substance of the provision, however, may be thought to be beyond the sphere of application of the Model Rules.

Article 15. *Exemption from liability*

Variant A

A receiving bank and any bank to which the receiving bank is directly or indirectly responsible under article 11 is exempt from liability for a failure to perform any of its obligations if the bank proves that the failure was due to an impediment beyond the bank's control and that the bank could not reasonably be expected to have taken into account at the time of the funds transfer or to have avoided or overcome it or its consequences.

Variant B

A receiving bank and any bank to which the receiving bank is directly or indirectly responsible under article 11 is exempt from liability for any failure to execute an order or to give notice or for delay in doing so after the required time if the failure or delay was caused by the order of a court, interruption of communication facilities or equipment failure not involving a lack of ordinary care by the receiving bank, suspension of payments by another bank, war, emergency conditions or other circumstances beyond the control of the receiving bank, and the receiving bank exercised the diligence the circumstances required.

Comment

1. While the receiving bank has a contractual duty of results, it is not liable for a failure to execute an order or to give notice or for delay in doing so if the cause of the failure or delay was beyond its control. Two alternative versions are presented. Variant A is almost identical to the equivalent provision in the United Nations Convention on Contracts for the International Sale of Goods, article 79(1).

2. Variant B is drafted in the context of funds transfers. Interruption of communication facilities and equipment failure exempt a receiving bank from liability if two conditions are met: the interruption or equipment failure did not itself arise out of lack of ordinary care by the receiving bank and, as for all sources of exemption from liability, the receiving bank must exercise the diligence required by the circumstances. This may mean that the bank was required to have anticipated the possibility of the interruption or equipment failure that occurred and provided alternative means of executing payment orders in those circumstances.

3. Even though the bank is exempt from liability under article 12, it would not have executed the payment order properly and may have no right to be reimbursed by its sender. As a result it is possible that the receiving bank could suffer the loss of the principal amount of the transfer.

V. *Civil consequences of funds transfers*

Article 16. *Payment and discharge of monetary obligations; obligation of bank to account holder*

(1) Payment of a monetary obligation may be made by a funds transfer [to any account] [to any of the financial

institutions in which the creditor has an account] [denominated in the currency of the obligation] [in the country where the obligation is payable], unless [the creditor of the obligation has indicated that] the obligation is to be discharged by payment in a certain way or by transfer to a certain account.

(2) A creditor may terminate the right to discharge an obligation by payment into any one or more of the accounts indicated in paragraph (1) by notification to the bank or banks in respect of a single obligation, a class of obligations or by blocking the account if done so in such a manner and in sufficient time for the bank to act on it prior to discharge of the obligation under paragraph (3). If a creditor terminates the right to discharge an obligation by payment to an account, the obligation of a debtor who had originated a funds transfer to that account prior to notice of the creditor's action is suspended until the debtor is reimbursed for the funds transferred. The creditor is responsible for any loss and for all costs that arise out of the funds transfer and its termination.

(3) The obligation of the debtor is discharged and the beneficiary's bank is indebted to the beneficiary to the extent of the payment order received by the beneficiary's bank at the earliest of the following:

(a) the bank receives the payment order, where the sender and the bank have agreed that the bank will execute payment orders received from the sender without notification that cover is in place;

(b) the bank receives both the payment order and notice that cover is available;

Variant A

(c) the bank credits the beneficiary's account [without reserving a right to reverse the credit if cover is not furnished] or otherwise pays the beneficiary;

Variant B

(c) the bank gives the beneficiary the [unconditional] right to withdraw the credit or the funds [whether or not a fee or payment in the nature of interest must be paid for doing so];

Variant C

(c) the bank gives notice to the beneficiary that it has the right to withdraw the credit or the funds;

(d) the bank applies the credit to a debt of the beneficiary owed to it or applies it in conformity with an order of a court.

(4) If one or more intermediary banks have deducted charges from the amount of the funds transfer, the obligation is discharged by the amount of those charges in addition to the amount of the payment order as received by the beneficiary's bank. The debtor is bound to compensate the creditor for the amount of those charges.

(5) To the extent that a receiving bank has a right of reimbursement from a sender by debit to an account held by the receiving bank for the sender, the account shall be deemed to be debited [and the obligation of the bank to the sender reduced or the obligation of the sender to the

bank increased] when a revocation or amendment of the payment order would no longer be effective under article 9.

Comment

1. This article contains a number of important rules that are associated with the funds transfer, though they do not have to do with the funds transfer itself. In many countries such rules would not be included in a law governing funds transfers, while in others they would be included. They are included in this draft because it is important to keep the problems in mind even if it were decided at a later time to exclude this article from the final text of the Model Rules.

2. Paragraphs (1) and (2) deal with the important rule that monetary obligations can be discharged by interbank funds transfers leading to credit to an account. While this general proposition is widely recognized today, remnants of the objections arising out of legal tender legislation still arise on occasion. Furthermore, in some countries it is not clear that any person other than the account holder has the right to deposit funds to an account. Paragraph (1) would overcome both objections.

3. Where payment to a specific account is specified in the contract, the obligation could be discharged only by credit to that account. Paragraph (1) offers certain alternatives if a creditor maintains more than one account and there is no specific account specified in the contract.

4. Whether an account to which payment is to be made has been specified or there are several alternative accounts to which payment might be made, the creditor may no longer wish payments to be made to a given account. The creditor may, for example, wish to close the account, in which case no further transfers to that account would be acceptable. The creditor may wish a particular payment made to a different account. Paragraph (2) recognizes the right of the creditor to make such changes at will until the obligation has been discharged under paragraph (3).

5. Article 16 does not consider problems that might arise for a debtor under exchange control regulations if the creditor designates payment in a different country from that originally designated. Article 16 does consider the problems that arise if the debtor has already commenced the funds transfer.

6. The time when the obligation is discharged is the same time when the sender would lose the right to revoke the payment order to the beneficiary bank under article 9(3). In many cases, the obligation would be discharged when the beneficiary's bank received the payment order because arrangements would be in existence between the sender and the beneficiary's bank whereby cover was automatically available.

7. Paragraph (3) also provides that at the same time the payment is discharged, the beneficiary's bank owes the beneficiary to the extent of the payment order received. From this amount the beneficiary's bank may deduct its

fees for executing the payment order, but those fees are the responsibility of the beneficiary and do not affect the originator of the funds transfer or the discharge of the obligation. Determination of the time the beneficiary's bank owes the beneficiary also determines the time when the funds would be subject to legal process against the assets of the beneficiary.

8. Paragraph (4) is concerned with a difficult problem when funds transfers pass through several banks. The originator is responsible for all charges up to the beneficiary's bank. So long as those charges are passed back to the originator, there are no difficulties. When this is not easily done, a bank may deduct its charges from the amount of the funds transferred. Since it may be impossible for an originator to know whether such charges will be deducted or how much they may be, especially in an international funds transfer, it cannot provide for this eventuality. Therefore, paragraph (4) provides that the obligation is discharged by the amount of the charges that have been deducted as well as by the amount received by

the beneficiary's bank; the originator would not be in breach of contract for late or inadequate payment. Nevertheless, it would be obligated to reimburse the beneficiary for those charges.

9. Paragraph (5) is the corollary to paragraph (3) in that it gives the rule as to when the account of a sender, including but not limited to the originator, is to be considered debited, and the amount owed by the bank to the sender reduced or the amount owed by the sender to the bank increased. That point of time is when the sender can no longer revoke or amend the payment order under article 9. It may be before or after the bookkeeping operation of debiting the account is accomplished. Paragraph (5) may have its most important application in determining whether credit is still available in the account holder's account against which there might be legal process. In the usual situation for a receiving bank that is not the beneficiary's bank that point of time is when it executes the payment order by sending a new payment order to the next bank.

C. Report of the Working Group on International Payments on the work of its eighteenth session (Vienna, 5-16 December 1988) (A/CN.9/318) [Original: English]

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INTRODUCTION

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

¹See *Official Records of the General Assembly, Forty-first Session, Supplement No. 17 (A/41/17)*, para. 230.

2. The Working Group undertook the task at its sixteenth session (Vienna, 2 to 13 November 1987), at which it considered a number of legal issues set forth in a note of the Secretariat (A/CN.9/WG.IV/WP.35). The Group requested the Secretariat to prepare draft provisions based on the discussions during its sixteenth session for consideration at its seventeenth session (A/CN.9/297). At its seventeenth session (New York, 5 to 15 July 1988) the Working Group considered draft provisions prepared by the Secretariat as submitted in document A/CN.9/WG.IV/WP.37. At the close of its discussions the Working Group

requested the Secretariat to prepare a revised draft of the Model Rules taking into account the considerations and the decisions of the Group (A/CN.9/317, para. 10).

3. The Working Group held its eighteenth session in Vienna from 5 to 16 December 1988. The Group is composed of all States members of the Commission. The session was attended by representatives of the following States members: Argentina, Australia, Austria, China, Czechoslovakia, Egypt, France, German Democratic Republic, Hungary, India, Iraq, Italy, Japan, Mexico, Netherlands, Nigeria, Spain, Sweden, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay.

4. The session was attended by observers from the following States: Bulgaria, Canada, Finland, Germany, Federal Republic of, Indonesia, Israel, Kuwait, Philippines, Poland, Qatar, Republic of Korea, Saudi Arabia, Switzerland and Thailand.

5. The session was attended by observers from the following international organizations: International Monetary Fund, Bank for International Settlements, Commission of European Communities, Hague Conference on Private International Law, Banking Federation of the European Community, and Latin American Federation of Banks.

6. The Working Group elected the following officers:
Chairman: Mr. José María Abascal Zamora (Mexico)
Rapporteur: Ms. Veronique Ingram (Australia).

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

- (a) Provisional agenda (A/CN.9/WG.IV/WP.38)
- (b) Draft Model Rules on electronic funds transfers: report of the Secretary-General (A/CN.9/WG.IV/WP.39).

8. 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.

CONSIDERATION OF DRAFT PROVISIONS FOR MODEL RULES ON ELECTRONIC FUNDS TRANSFERS

9. The Working Group decided to commence its work at the current session by considering the draft provisions as revised by the Secretariat and submitted in A/CN.9/WG.IV/WP.39. The draft provisions as revised by the Working Group, together with those provisions submitted by the Secretariat that were not considered by the Working Group, are to be found in the annex to this report.

Title of Model Rules

10. The title of the Model Rules as considered by the Working Group was as follows:

"Draft Provisions for Model Rules on Credit Transfers"

11. The Working Group recalled that at its seventeenth session it had decided to proceed under the working assumption that the outcome of the work would be model legislation (A/CN.9/317, para. 25). It was suggested that the continuing use of the term model rules suggested that the text might be addressed to private individuals for their adoption to govern their individual relationships, whereas it was intended that the text should be addressed to legislative bodies for adoption as statutory law.

12. The view was expressed that the text should be prepared in the form of a model law and not in the form of a convention. It was suggested that a higher degree of agreement on appropriate solutions would have to be found to prepare a convention than to prepare a model law. A model law could be more flexible than a convention because States could take those parts of it that they found useful and could adapt it to their needs. Under another view it was too early to decide on the final legal form of the text to be developed. After deliberation the Working Group decided that the text should not for the time being be in the form of a convention.

13. The Working Group decided to use the words "Model Law" in the title to reflect the fact that the text was for use by national legislators.

14. The question was raised whether it was appropriate to have changed the title from Model Rules on Electronic Funds Transfers to Model Rules on Credit Transfers. The Working Group was in agreement that the change in the title from "funds transfers" to "credit transfers" correctly reflected the decision of the Working Group at its seventeenth session to exclude debit transfers, at least for the time being, from the scope of the Model Law (A/CN.9/317, para. 17). It was noted that a similar change had been made to most of the references to "funds transfer" in the draft provisions and it was decided that the term "credit transfer" should be used consistently.

15. It was suggested, however, that the word "electronic" should continue to be used in the title of the Model Law. In support of this view it was pointed out that the mandate given to the Working Group by the Commission was to prepare rules on electronic funds transfers. In further support it was stated that the Model Law should be restricted to credit transfers carried out by electronic means. Under one suggestion the Model Law would apply only to those segments of the credit transfer carried out by electronic means. Moreover, it was suggested, the purpose of the preparation of the Model Law would be to regulate those legal issues where the rules developed in the context of paper-based credit transfers that should be changed as a result of the use of electronics. It was stated that it was neither necessary nor desirable to contemplate preparing a Model Law for paper-based credit transfers, since they were already well provided for under national law.

16. In reply it was stated that few countries had statutory rules governing paper-based credit transfers. It would be difficult to ask a legislature to adopt a law of exception to otherwise existing law when the existing law did not exist in statutory form. Furthermore, since most of the legal issues were the same whether a payment order was in paper or electronic form, it would be possible to have a single set of rules to govern all credit transfers, with such special rules for paper or electronic payment orders as seemed appropriate. This was said to be particularly important because a single credit transfer might include one or more payment orders in electronic form and one or more payment orders in paper-based form.

17. After deliberation the Working Group decided not to include the word "electronic" in the title of the Model Law or in the provision on the scope of application.

18. The Working Group decided to include the word "international" in the title, and to include a test of internationality in article 1.

19. As a result the Working Group agreed that the title should be "draft Model Law on International Credit Transfers".

Article 1. *Scope of application*

20. The text of article 1 as considered by the Working Group was as follows:

"(1) These rules apply to credit transfers [where the originator's bank and the beneficiary's bank are in different countries or where the originator's bank and the beneficiary's bank are in the same country, but the currency in which the funds transfer is denominated is not the currency of that country].

"(2) A State may adopt supplementary legislation dealing with the rights and obligations of [consumers] [originators and beneficiaries]."

Paragraph (1)

21. The Working Group considered the test of internationality that should be applied for the Model Law to attach to a credit transfer. It was noted that the second of the two tests set forth in the draft article provided that a credit transfer would be international, even though the originator's bank and the beneficiary's bank were in the same country, if the currency in which the credit transfer was denominated was that of a different country. The Working Group was in agreement that this test of internationality should not be retained. It was suggested that those cases in which the transfer would be implemented by payment orders to a bank in the country of the currency involved would probably fall automatically under the test of internationality that would be finally adopted, even though they would not fall under the other test of internationality in the current draft. However, where the same bank served both as originator's bank and as beneficiary's bank or where the two banks in the same country could settle the foreign currency transfer within that country, as was increasingly frequent, there was no reason to consider the transfer as being international.

22. The Working Group noted that the principal test of internationality was that the originator's bank and the beneficiary's bank were not in the same country. In that context it was noted that a branch of a bank was to be treated as a separate bank. Therefore, credit transfers between two branches of the same bank in different countries would fall under the Model Law. (See paragraphs 53-54 and 107-109, below, for further discussion of a branch as a separate bank.)

23. The discussion focussed on the situation where the originator resident in country A sent a payment order to a bank in country B to make a credit transfer to the beneficiary at the same or a different bank in country B. It was noted that under the current text this would not be an international credit transfer and would not be governed by the Model Law.

24. It was suggested that such a credit transfer should be considered to be international. Under one view the fact that the originator was in a foreign country should be the essential test. A somewhat similar suggestion was that a credit transfer should be international if a payment order was sent from one country to another. It was stated that the current text determined the internationality of a credit transfer by whether a second payment order, the one sent from originator's bank to beneficiary's bank, was sent from one country to another; it was illogical for the test of internationality to exclude the first payment order.

25. To further illustrate the point it was suggested that instead of reimbursing the originator's bank in country B by instructing it to debit the originator's account, the originator might have requested another bank in country A to instruct the bank in country B to make the credit transfer. In such a case the credit transfer would be governed by the Model Law.

26. Under yet another variant of the example the originator in country A would send a payment order to the bank in country B instructing the bank to make the credit transfer in country B and would inform the bank that it would have funds sent from country A to cover the payment order. Some hours later it would send a payment order to its bank in country A to send sufficient funds to the bank in country B to provide funds to enable the first payment order to be effected. It was stated that in this latter case it was clear that the credit transfer to reimburse the bank in country B would fall under the Model Law; however, it was not clear whether the entire transaction was brought under the Model Law or whether there should be considered to be two separate credit transfers of which one was international and the other was not.

27. In favour of retaining the current test it was stated that relying on whether the payment order from the originator was sent from one country to another would mean that the Model Law would apply to credit transfers that were otherwise completely domestic if the originator happened to be outside his home country when he sent the payment order.

28. In respect of the different variants of the fact situation that had been discussed it was stated that it was

natural that the same underlying economic transaction might be subject to different laws if the transaction was structured in different ways.

29. After discussion the Working Group decided to keep the first test of internationality. Consequently, the text of article 1(1) as adopted by the Working Group was:

"This law applies to credit transfers where the originator's bank and the beneficiary's bank are in different countries."

Paragraph (2)

30. The Working Group considered whether paragraph (2) should be retained. Under one view it was unnecessary since the nature of a model law was that each State could adopt such portions of the text that it wished and modify them in any way it considered desirable. The text of paragraph (2) as proposed was stated to be inappropriate because a model law should be addressed to the parties to the transactions and not to the States themselves. Such a provision was particularly inappropriate in this text, since the Model Law might be considered for adoption by many States that did not have consumer protection legislation. If it was desirable to retain the message that a State might adopt other or additional rules to protect consumers, it was suggested that the message should be outside the text of the Model Law itself.

31. Under another view paragraph (2) served a useful function and should be retained. Under that view national legislation on funds transfers often contained express provisions either subordinating, or giving priority to, other types of legislation, existing or future; article 1(2) would provide that type of provision for the Model Law. Under yet another view, while it was true that paragraph (2) was not a necessary provision from a legal point of view, the alternative might be the complete exclusion of consumer credit transfers from the scope of application of the Model Law. Not only would the inclusion of paragraph (2) in the Model Law help to retain the basic uniformity of the law governing credit transfers, it would avoid the difficult task of defining consumer credit transfers. Such a definition would have to be undertaken if consumer credit transfers were to be excluded from the scope of application of the Model Law. At the same time the inclusion of paragraph (2) would make it clear that States were free to adopt different and higher standards of protection for those bank customers who were consumers as defined by the local law. It was suggested that in this way the Model Law might serve an educational function in regard to consumer protection. It was also suggested that retention of the provision would have a psychological effect in some States that would make the Model Law more acceptable.

32. As to the content of the provision, a question was raised whether supplementary legislation could be in contradiction with the basic rules in the Model Law. It was decided not to restrict potential consumer legislation in this manner and to delete the word "supplementary" from the text. It was also suggested that any reference to originators and beneficiaries should be deleted. On the one hand such a reference might suggest that the Model Law

was dealing with the underlying transaction and not only the credit transfer. On the other hand any questions relating to the account relationship of the originator and beneficiary with their banks was a matter for local law.

33. A new formulation of paragraph (2) was suggested as follows:

"This law is subject to any national legislation dealing with the rights and obligations of consumers."

It was decided to retain this formulation but to place it in a footnote to article 1. In that manner the message would remain attached to the text of the Model Law and would not become lost, as might a similar statement in a commentary or in the resolution by which the Model Law was adopted by the Commission, but it would not be a part of the Model Law itself.

34. It was decided that the question as to the extent to which the provisions of the Model Law would be subject to the contrary agreement of the interested parties would be considered in connection with the individual provisions.

Article 2. Definitions

35. The text of the definitions in subparagraphs (a) to (f) and (h) was considered by the Working Group, after which it decided to consider the remaining definitions as they arose in connection with the substantive articles in which they occurred. It was noted that in several of the definitions the word "party" should be replaced by "person", as had been suggested at the previous session of the Working Group but had been overlooked in the redrafting. The text of subparagraph (a) as considered by the Working Group was as follows:

"(a) 'Credit transfer' means a complete movement of funds from the originator to the beneficiary. A credit transfer may consist of one or more segments."

36. The suggestion was made to add to the end of the first sentence the words "pursuant to a payment order received by the originator's bank directly from the originator" as a means of clarifying the difference between a credit transfer and a debit transfer. Although a question was raised as to whether the proposed addition would make the definition clearer, there was general agreement that it would be helpful. Nevertheless, because there was a concern that the word "directly" might exclude some types of transfers that should be considered to be credit transfers, it was decided to place the word in square brackets.

37. Under one suggestion the second sentence should be deleted as referring only to banking procedure. Under another suggestion that received general support the sentence should state that the credit transfer might involve one or more payment orders rather than one or more segments. It was also suggested that a distinction should be made between the originator's payment order and the execution of that order. Later in the session concern was expressed about the use of the term "complete movement".

38. As a result the text of subparagraph (a) as approved by the Working Group was as follows:

"(a) 'Credit transfer' means a complete movement of funds from the originator to the beneficiary pursuant to a payment order received by the originator's bank [directly] from the originator. A credit transfer may involve one or more payment orders."

39. The text of subparagraphs (b) and (c) as considered by the Working Group was as follows:

"(b) 'Originator' means the issuer of the first payment order in a credit transfer.

"(c) 'Beneficiary' means the ultimate party to be credited or paid as a result of a credit transfer."

40. It was noted that a bank would be included as an originator or a beneficiary if it otherwise met the definition. As an alternative to the current definition, a bank that was the issuer of the first payment order might be considered to be the "originator's bank" and similarly a bank that was the ultimate party to be credited might be considered to be the "beneficiary's bank". The Working Group noted that the significance of such a change in the definitions could be determined only by a review of the substantive provisions of the Model Law as they might eventually be adopted.

41. A suggestion was made to replace the word "issuer" by the word "sender" in the definition of "originator". Under another suggestion the word "issuer" should be used in place of "sender" throughout the Model Law. The Working Group adopted the text of subparagraph (b).

42. There was general agreement to replace the words "to be credited or paid" in the definition of beneficiary by "intended to receive the funds" as a means of making it clearer that a person whose account was credited in error was not a beneficiary. Consequently the text of subparagraph (c) as adopted by the Working Group was as follows:

"(c) 'Beneficiary' means the ultimate person intended to receive the funds as a result of a credit transfer."

43. The text of subparagraph (d) as considered by the Working Group was as follows:

"(d) 'Sender' means the party who sends a payment order [including the originator and any sending bank]."

44. Under one view the definition of a sender should be restricted to a sending bank and should exclude a non-bank originator. This was stated to be of particular importance in respect of article 4 on the duties of a sender and article 9 on the liabilities of a receiving bank. Under the prevailing view, it was of particular importance that all senders, including non-bank originators, should have the obligations of article 4. Consequently, it was decided to keep the words but to delete the square brackets at the end of the sentence.

45. The text of subparagraph (e) as considered by the Working Group was as follows:

"(e) 'Bank' means a financial institution which, as an ordinary part of its business, engages in credit transfers for other parties. For the purposes of these Rules a branch of a bank is considered to be a separate bank."

46. It was agreed that the word "bank" was a convenient word to use in the Model Law since it was short, well-known and covered the core concept of what was intended. It was recognized, however, that any definition in the Model Law would deviate from the definition used in national legislation. It was also noted that in some countries there was more than one legal definition of bank for different purposes.

47. It was noted that the definition of a "bank" would have an effect on the scope of application of the Model Law, since under article 1 as revised the originator's bank and the beneficiary's bank had to be in different countries for the Model Law to apply.

48. There was strong support for a broad definition of "bank". As one means of achieving that result, it was suggested that the word "financial" might be deleted. It was also stated that it was not clear what was the full range of institutions that were encompassed within the term financial institutions.

49. In opposition to deleting the word "financial" it was stated that the term "financial institution" was used in the United Nations Convention on International Bills of Exchange and International Promissory Notes, article 47(4), relating to the giving of a guarantee, without being defined. Furthermore, while the term might not be totally clear, it did serve the purpose of distinguishing between an enterprise whose function was the furnishing of financial services from an enterprise whose function was the furnishing of services in relation to real goods, such as an agency for a seller of goods, that might engage in credit transfers for its principal as one of those services.

50. It was suggested that only deposit taking institutions should be characterized as banks in the Model Law. This would serve to exclude from the Model Law the credit transfers made by some post offices and private enterprises that made credit transfers for others only by taking and paying cash rather than by debiting or crediting the accounts of the originators and beneficiaries. Such a definition would also affect transfers made by or to non-depositary financial institutions, such as dealers in securities, which could debit or credit accounts of their customers. Such a restrictive definition would exclude some transfers made by those institutions from the scope of application of the Model Law; in other cases when a customer of the institution had directed that a transfer be made, a restrictive definition would change the status of the institution from, for example, originator's bank to originator and the rights of its customer would be determined by some law other than the Model Law. In opposition to the suggestion, it was stated that requiring that the financial institution be a deposit taker to qualify as a bank under the Model Law would restrict the application of the Model Law unduly.

51. A suggestion that received strong support, but that was not adopted, was that the end of the first sentence should read that the institution "as an ordinary part of its business, sends and executes payment orders for others". Another suggestion was that a bank should be an institution "engaged in the business of banking".

52. After extensive discussion the Working Group decided to retain the first sentence unchanged.

53. In respect of the second sentence, it was stated that not all branches should be treated as separate banks under the Model Law, especially where some or all of the branches were on-line and could access the same data bases. In order to decide the appropriateness of a rule that all branches should be considered to be separate banks, it would be necessary to examine each of the substantive rules of the Model Law and make the decision separately for each of them.

54. After discussion the Working Group decided to delete the second sentence from the definition of "bank", to consider in regard to the individual substantive articles whether branches should be treated as banks, and to add to article 1 a new paragraph as follows:

"For the purpose of determining the sphere of application of this Law, branches of banks in different countries are considered to be separate banks."

55. The text of subparagraph (f) as considered by the Working Group was as follows:

"(f) 'Receiving bank' means the bank to which a payment order is delivered."

56. Under one view a receiving bank should be the bank to which a payment order was addressed, but that was opposed by those who noted that the term would thereby include a bank to which a payment order was addressed but which did not receive it. Under another view a receiving bank should be a bank that received a payment order, but that was opposed by those who noted that the term would thereby exclude from the definition a bank to which a payment order was addressed even though the payment order did not arrive while including in the definition a bank that received a payment order that was not addressed to it. Under yet another view a receiving bank should be restricted to a bank that received a payment order addressed to it.

57. The Working Group decided that a receiving bank should be a bank that received a payment order, and that the responsibility of a bank that received a payment order not intended for it would be discussed in the context of article 5. (See paragraphs 119 and 121 to 125, below.) Consequently the text of subparagraph (f) as adopted by the Working Group was as follows:

"(f) A 'receiving bank' is a bank that receives a payment order."

58. The text of subparagraph (h) as considered by the Working Group was as follows:

"(h) 'Funds' or 'money' includes credit in an account kept by a bank. The credit may be denominated in any national currency or in a monetary unit of account that is established by an intergovernmental institution or by agreement of two or more States, provided that these Rules shall apply without prejudice to the rules of the intergovernmental institution or the stipulations of the agreement."

59. The question was raised whether the definition was sufficient to cover the ECU as it was currently used in private transactions, since the ECU had taken on a quality of being something more than a unit of account. In response it was noted that the definition was modelled on the definition contained in the United Nations Convention on International Bills of Exchange and International Promissory Notes and that the Commission had adopted the definition with the private use, *inter alia*, of the ECU in mind.

Article 3. Interpretation of data elements

60. It was stated that the two alternative provisions placed before the Working Group in A/CN.9/WG.IV/WP.39 did not adequately address the kinds of problems that arose in practice. It was stated that the problems to be resolved could be divided into discrepancies in the representation of data by words and by figures that arose at the time of origination of a payment order and those that arose during transmission. The discrepancies occurring at origination or during transmission might be in respect of the amount of the payment order or in respect of the designation of the beneficiary where the name of the beneficiary did not correspond with the account number.

61. It was stated that discrepancies in amount arose only at the origination of credit transfers and not during transmission because interbank electronic funds transfers transmitted the amount only in figures. Those figures might be changed by error or fraud during the transmission, but there would be no discrepancy between two different representations of the amount in the payment order as received. In contrast, the beneficiary was often represented both by name and by the account to be credited. It was stated that discrepancies between the two representations that arose during transmission often were the result of the fraud of a third party.

62. It was suggested that the differences in the various types of problems should be recognized in the text. It was decided to entrust the consideration of these matters to an open ended working party. The working party recommended the following text:

"Article 3. Discrepancies within a payment order

"(1) If there is an inconsistency in a payment order between the words and figures that describe the amount of money, the receiving bank is required to notify the sender of the discrepancy unless the sender and the receiving bank had agreed that the receiving bank would rely upon either the words or the figures, as the case may be.

"(2) Where the beneficiary is described by both word and figures, and the intended beneficiary is not

identifiable with reasonable certainty, the beneficiary's bank must notify, within the time prescribed in article 7, paragraph (4), its sender, and also the originator's bank if it is identified on the payment order."

63. In explanation of the text submitted it was said that it had been agreed that the legal rules governing the allocation of loss arising out of the actions of a fraudulent third party between banks in the credit transfer should be considered in the provisions on liability. As to proposed paragraph (1), it was believed that the problem arose only between the originator and originator's bank since, as stated before, interbank electronic payment orders transmit the amount in figures only. As between the originator and originator's bank it was conceivable that there would be an agreement that the bank would read only one data field, which would probably be the field expressing the amount in figures in the case of electronic credit transfers.

64. In regard to paragraph (2) it was said that the working party was conscious that allowing or requiring the beneficiary's bank to identify the beneficiary or its account either in words or in figures or, alternatively, to credit the person identified by words, raised the possibility that the wrong account would be credited. On the other hand, stopping the credit transfer while inquiries were being made delayed the time before which the beneficiary would be credited. The working party had opted for the latter solution, with the guarantee that the time limit specified in article 7(4) applied to the time when the notice had to be given and that the beneficiary's bank had to notify the originator's bank, if that bank was identified on the payment order.

65. Concern was expressed that paragraph (1) stated an objective test that a discrepancy in amount existed in fact. It was suggested that, since the problem would have been caused by the error in the sender's payment order, the rule placing obligations on the receiving bank should apply only if the receiving bank knew or ought to have known of the discrepancy.

66. The following text was proposed to implement a suggestion that where there was a discrepancy in the amount the bank should exercise its judgment on the basis of its knowledge of the circumstances:

"(1) If there is a discrepancy in a payment order between the words and figures that describe the amount of the transfer, and if the sender and the receiving bank have agreed that the receiving bank can rely on the basis of either of the two, the words or the figures, as the case may be, the receiving bank shall execute the payment order in accordance with that agreement. Lacking such an agreement, the receiving bank may, at its responsibility, execute the payment order according to the words or the figures. If in this last case the receiving bank decides not to execute the payment order, it is obliged to notify the sender of the discrepancy."

67. In reply to the observation that the only difference between the new proposal and the text recommended by the working party was that the new proposal made it clear

that the receiving bank had the possibility to execute the payment order, it was stated that the difference in emphasis was important in that the new proposal explicitly recognized established bank practice. Moreover, it was suggested, such a bank practice should be encouraged. It was also suggested that the general conditions of the banks might provide specific provisions as to what the banks would do when faced with the situations envisaged.

68. It was noted that paragraph (2) provided that the beneficiary's bank was required to notify the originator's bank even though there might be no contractual relationship between them. It was suggested that where there was no contract between them, there would be no duty of the beneficiary's bank to the originator's bank. This was said to be important for determining whether the beneficiary's bank would be liable to the originator's bank if the required notice was not given.

69. After discussion the Working Group decided to adopt the text as proposed by the working party.

Article 4. *Obligations of sender*

70. The text of article 4 as considered by the Working Group was as follows:

"(1) A sender is bound by a payment order or by the revocation or amendment of a payment order [as] [that has been] received by the receiving bank if the sender authorized the order or is otherwise bound by it pursuant to the law of agency [or other applicable law].

"(2) A purported sender is bound by an unauthorized payment order or by the revocation or amendment of a payment order if the purported sender had available a commercially reasonable procedure for authentication that would permit the receiving bank to verify that the payment order was sent by the purported sender and if the receiving bank complied with the requisite verification.

"(3) A [sender] [sending bank] is obligated to adhere to any message structure prescribed by the transmission system used or agreed between the parties.

"(4) A sender is obligated to reimburse the receiving bank to the extent the receiving bank has properly executed the payment order of the sender [including any fees or costs charged or incurred by the receiving bank]."

Paragraph (1)

71. It was noted that paragraph (1) contained three separate rules: (1) a sender is bound by a payment order when it has been received by the receiving bank; (2) the sender is bound by the terms of the payment order as received, thereby leaving the risk of errors in transmission on the sender; (3) the sender is bound by the payment order if he authorized it or was bound by it pursuant to the law of agency or other applicable law. It was stated that the paragraph should be limited to the circumstances that led to the sender being bound, leaving the two other matters to other provisions.

72. It was suggested that the paragraph envisaged three categories of factual situation: (1) the sender sent the payment order himself; (2) the payment order was sent under the proper authorization of the person, including legal person, sought to be held as sender; (3) the sender should be held responsible for the payment order because of the role of the person who in fact sent or authorized the sending of the payment order. It was recognized that the third category would be the most difficult to determine because it might include employees or other persons who had innocently acted beyond their instructions as well as such persons as current or former employees who used information they had gained in the course of their employment in order to send a fraudulent payment order.

73. Various suggestions were made as to how the second and third categories of cases should be described. Under one suggestion, instead of determining whether the payment order was "authorized", the provision should refer to whether the person sending had the "power" to do so. Under another suggestion reference to the law of agency should be deleted. Not only did it raise the question of conflict of laws between the law of agency of the sender and that of the receiving bank, but it raised the difficult problems of the different concepts of agency in different systems of law. It was suggested that one method by which reference to the concept of agency could be eliminated was to end the sentence after the words "or is otherwise bound by it". Although the question was raised as to whether a provision that read "The sender is bound by a payment order ... if the sender ... is otherwise bound by it" conveyed any meaning, it was suggested that those words would lead to the desired result.

74. It was suggested that many of the marginal cases would in fact be covered by paragraph (2), because the payment order would have been authenticated. It was also suggested that the primary rule should be set forth in the provision on authentication and that resort to the provision on authorization should be necessary only in those cases in which the sender or purported sender would not be bound as a result of the authentication of the payment order. Consequently, the Working Group decided to consider paragraph (2) as an aid to understanding paragraph (1).

Paragraph (2)

75. It was stated that authentication was more than a technique, as was provided in the definition of "authentication" in article 2(j); authentication was the product of an agreement between the sender and the receiving bank. The terms of the agreement might be limited by law. For example, the law might provide that the authentication procedure had to meet some minimum standard before it was acceptable. That standard was expressed as "commercially reasonable" in the current text. The law might provide that the receiving bank could agree to provide an authentication procedure that was more secure than the minimum that would be commercially reasonable. The law might also provide that the parties could change the allocation of responsibility determined by the law, but only in favour of the sender.

76. Without questioning the conclusion that authentication procedures in respect of payment orders transmitted electronically were currently the product of agreement, it was noted that if public key encryption became a functioning reality, authentication would not depend on prior agreement between sender and receiving bank.

77. The discussion in the Working Group proceeded on the basis that it was the receiving bank that determined the type of authentication that it was prepared to receive from the sender. Under one view a non-bank sender should never be bound by an unauthorized payment order even if the authentication procedure used was commercially reasonable. It was stated that the receiving bank was in a better position than the sender to guard against third party fraud. In response it was stated that, while such a rule or some variant of it (such as a low limit of liability for fraudulent payment orders) might be appropriate for consumer credit transfers, it would not be appropriate where the non-bank sender was a large commercial or financial organization that was as sophisticated in authentication techniques as a bank might be. It was also stated that, if banks would be held responsible for unauthorized credit transfers even though the authentication procedure followed had been commercially reasonable, banks would not be willing to engage in electronic funds transfers.

78. It was stated that the standard of commercially reasonable was unclear. In response it was stated that this was necessarily the case because the procedures that were commercially reasonable would change over time. It was stated that the requirement that the security procedure had to be commercially reasonable was a stricter standard than might appear because, if an authentication had been successfully falsified without the collusion of employees of either the sender or the receiving bank, the bank would have a difficult time convincing the court that the authentication procedure had been commercially reasonable.

79. It was suggested that the sender should be bound by a payment order where the authentication procedure was commercially reasonable even if the receiving bank did not comply with the requisite verification but the authentication would have tested as genuine had the receiving bank complied.

80. There was general agreement that the sender should not be bound by the payment order if the knowledge as to how to falsify the authentication was gained from an employee of the receiving bank. It was suggested that it would be difficult for a sender to prove that an employee of the receiving bank had been the source of the information about the authentication procedure. In reply it was stated that the matter could be left to the court to weigh the evidence. It was also stated that the experience in one country was that the dishonesty of the bank's employees was usually easy to determine, often because they had left the country with the proceeds of the fraud.

81. As a further comment on the allocation of loss in such cases, it was noted that when the fraud occurred between two banks, the loss automatically fell on the banking system. When the loss occurred as a result of fraud between the originator and the originator's bank, the

loss to the originator could be no greater than the maximum debit that could be entered to the account. Customers of banks could limit the extent of their potential loss by reducing the amount of funds they held in the account and by reducing the overdraft lines automatically applied to the account.

82. A working party was asked to redraft the two paragraphs in the light of the discussion. The text proposed by the working party consisting of three new paragraphs and a new definition of "authentication" was as follows:

"(1) A purported sender is bound by a payment order, if he authorized it or if it was issued by a person who, pursuant to the applicable law [of agency], otherwise had the power to bind the purported sender by issuing the payment order.

"(2) Notwithstanding anything to the contrary in paragraph (1), when a payment order is subject to authentication, a purported sender of such an order is bound if:

(a) the authentication provided is a commercially reasonable method of security against unauthorized payment orders;

(b) the amount of the order is covered by a withdrawable credit balance or authorized overdraft in an appropriate account of the sender with the receiving bank; and

(c) the receiving bank complied with the authentication.

Commercial reasonableness is to be determined by considering the circumstances of the sender, including the size and frequency of payment orders normally issued by the sender, alternative authentication offered to the sender, and authentication generally in use.

"(3) Variant A

A purported sender [that is not a bank] is, however, not bound by a payment order under paragraph (2) if

- (i) the actual sender was a person other than a present or former employee of the purported sender, and
- (ii) the actual sender had gained access to the authentication procedure without fault on the part of the purported sender.

Variant B

No sender may become bound under paragraph (2) if the sender proves that the payment order was executed by

(a) a present or former employee or agent of the receiving bank, or

(b) a person acting in concert with a person described in (a), or

(c) any other person who, without the sender's authorization, obtained confidential information about the authentication from a source controlled by the receiving bank, regardless of fault.

"Article 2. Definitions

(j) 'Authentication' means a procedure to determine whether all or part of a payment order is authorized, and which is the product of an agreement."

83. In respect of paragraph (1) of the proposal, the concerns expressed previously about referring in this context to the applicable law or to the concept of agency were repeated. A new proposal was made as follows:

"(1) A purported sender is bound by a payment order if it was issued by the purported sender or by another person who had the authority to bind the purported sender."

The proposal received considerable support and it was decided to retain it as a possible formulation of the paragraph.

84. In respect of paragraph (2), a number of suggestions were made to the effect that subparagraph (b) was too absolute. One suggestion was to delete the subparagraph. In response it was stated that the subparagraph provided a measure of customer protection since the debit to the account could be no greater than the withdrawable credit balance or authorized overdraft. However, it was also pointed out that in some countries the general conditions of the banks permit a bank, but do not require it, to create an overdraft when it receives a payment order from its customer.

85. It was also suggested that subparagraph (b) as drafted could cause problems in a net settlement system since the sending bank in such a system had no account relationship with the receiving bank. In order to accommodate this situation it was proposed that the following words should be added to the end of subparagraph (b):

"or there is an agreement between the sender and the receiving bank that such payment orders are to be executed despite the absence of such balances or overdrafts".

86. There was some discussion of the effect of the proposed wording on the relations between the originator and the originator's bank. Under one view the provision should be restricted to interbank relationships by using the words "sending bank" rather than "sender". Under another view the provision as drafted seemed to cover the situation already discussed of the agreement that a bank could create an overdraft when it received a payment order.

87. Following the discussion the Working Group decided to adopt paragraph (2) with the proposed addition to subparagraph (b).

88. In respect of paragraph (3), the advantages and disadvantages of the two variants were discussed. In general, those who were in favour of placing on the receiving bank the major risk that an authentication had been falsified by a known or unknown third person favoured variant A, while those who were in favour of placing the major risk on the sender favoured variant B.

89. In favour of variant A it was stated that the receiving bank usually designed the authentication procedure. Placing the major risk on the receiving bank would act as an incentive to the bank to improve the authentication procedures offered by that bank to its sender. Variant A was also said to reflect the general policy in respect of paper-based payment orders and of negotiable instruments that the bank can act only on a proper signature.

90. In favour of variant B it was stated that senders choose the method of transmission of the payment order. Variant B was said to reflect the general policy that the party that chooses the transmission system should bear the risks associated with that transmission system. Moreover, variant B would act as an incentive to senders to protect the authentication or encryption key in their possession. It was also stated that in some cases, if the receiving bank had to bear the major risk of loss in such cases, it might find it necessary to deny funds transfer services to certain customers whose payment orders had been falsified without it having been determined who was the culprit. Even if it could not be presumed legally that the fraudulent person was associated with the sender, the receiving bank would have to act on that assumption.

91. It was stated that even variant A placed a heavy burden on the sender since, if it was alleged that the authentication of a payment order had been falsified but the source of the fraud was unknown, the sender would have to show that the fraudulent party had not been a present or former employee of the purported sender and that the actual sender had not gained access to the authentication through the fault of the purported sender.

92. It was noted that the style of the two variants was not the same and it was suggested that variant A should be re-written in the style of variant B, essentially stating what would have to be proven and by whom, before a decision should be made between the two variants.

93. After discussion the Working Group decided to retain both variants and to return to the matter at its next session.

Definition of "authentication"

94. The Working Group adopted the proposed definition of "authentication".

Paragraph (3)

95. The Working Group decided to delete paragraph (3) of the text submitted by the Secretariat (paragraph 70, above) since it served only to reiterate an obligation arising out of the agreement of the parties.

Paragraph (4)

96. The discussion in the Working Group focused on two separate but related questions, i.e. when the obligation of the sender to furnish funds to the receiving bank arose and when the sender was required to make the funds available to the receiving bank. It was noted that the text of paragraph (4) before the Working Group indicated that the sender's obligation arose when the receiving bank

properly executed the payment order it had received, but the provision did not indicate when the funds had to be made available to the receiving bank.

97. The use of "properly executed" was criticized as being too broad a term, taking into consideration the provisions of article 5(3) and (4) as to when a payment order had been properly executed by a receiving bank.

98. The view was expressed that paragraph (4) should indicate that the sender's obligation should be to make the funds available to the receiving bank by the time the receiving bank was to act on the payment order. Reference was made to the discussion at the last session of the Working Group (A/CN.9/317, para. 79). Another similar suggestion was that the word "cover" might be used instead of "reimburse" since, according to the definition of "cover" in article 2(k), "the provision of cover might precede or follow execution of the order by the receiving bank." However, the definition of "cover" raised certain reservations in the Working Group.

99. In reply it was said that any provision stating that the receiving bank had no obligation to accept or execute a payment order unless it had received cover in a form satisfactory to it should be set forth in article 5. However, the obligation of the sending bank to the receiving bank should arise only at the time the receiving bank had committed itself to execute the order. It was noted that the primary factor the receiving bank would rely upon to decide to make such a commitment would be its evaluation of the creditworthiness of the sender or of the quality of the cover furnished. It was suggested that the time the receiving bank had committed itself should be expressed as the time when the receiving bank had "accepted" the payment order. It was said that use of the concept of acceptance would be consistent with the banking practice whereby receiving banks often execute the order even though cover has not yet been furnished. (For the Working Group's later discussion of "acceptance" see paragraphs 126 to 143, below.)

100. It was suggested that the time when the second obligation of the sender should be due, i.e. when it should make the funds available to the receiving bank, should be the execution date. It was stated that this was of particular importance in the case of a value dated transaction where the receiving bank might accept the payment order on day 1 with an execution date of day 5. The obligation of the sender to pay the receiving bank would, therefore, arise on day 1 while it would be obligated to make the funds available on day 5.

101. The Working Group was in agreement that the obligation of the sender should be subject to any contrary agreement of the sender and receiving bank and that this should be expressed in the provision.

102. The text of paragraph (4) as adopted by the Working Group was as follows:

"A sender becomes obligated to pay the receiving bank for the payment order when the receiving bank accepts it, but payment is not due until the execution date, unless otherwise agreed."

Definition of "execution date"

103. It was noted that the definition of "execution date" as set forth in article 2(1) was as follows:

"(1) 'Execution date' means the date when the receiving bank is to execute the payment order, as specified by the sender."

104. The use of "execution date" in article 4(4) to express when the sender should be obligated to make the funds available to the receiving bank was questioned on grounds that the definition expressed the date when the receiving bank was obligated to act and not when the receiving bank had performed that obligation.

105. It was noted that article 7(1)(b) provided that

"(b) When no execution, value or pay date is stated on a payment order, the execution date of that order shall be deemed to be the date the order is received, unless the nature of the order indicates that a different execution date is appropriate."

106. It was decided that the provision as it related to the lack of an execution date on the payment order should be made part of the definition of "execution date". Since it was not clear as to the proper disposition of the provision in respect of a lack of a value or pay date on the payment order, it was decided that article 7(1)(b) would continue as before with the word "execution" deleted until those aspects of the provision could be considered in their proper context.

Branch of a bank

107. It was noted that the decision had been made to delete from the definition of the word "bank" the statement that a branch of a bank was to be considered to be a separate bank, to include a statement in article 1 that for the purposes of the scope of application branches of a bank in different countries were to be considered separate banks and to consider the question in regard to individual substantive provisions.

108. The proposal was made that branches of a bank should be considered to be separate banks for the purposes of article 4. In support it was stated that such a rule was of particular importance when the banks were in different countries, since exchange control and other regulations might interfere with the ability of one branch to fulfill its obligations to another branch. It was remarked that the headquarters of a bank might not have responsibility for the acts of its foreign branches.

109. The prevailing view was that no special provision in regard to branches, whether domestic or foreign, needed to be made in article 4. It was stated that the Model Law was neither a tax nor a supervisory law. As to the relationships between the branches, it was difficult to understand why there should be private law obligations between them. This was a separate problem from whether the obligations of a branch to a customer were the obligations of that branch alone and should be satisfied only from the assets of the branch or whether they were the obligations of the

entire bank. It was stated that article 4 was not relevant to that problem.

Article 5(1). Obligations of receiving bank

110. As a preliminary comment, the view was expressed that the discussion of acceptance in article 6 should precede the discussion of article 5(1) since the passage of time, at least in certain circumstances, might be considered to give rise to acceptance. If the passage of time might be so considered, all of the obligations of the receiving bank would arise on acceptance. Under another view, even if the concept of acceptance based on the actions of the receiving bank was eventually adopted by the Working Group, it would not be appropriate to mix the obligations of the receiving bank prior to its acceptance of the payment order with its obligations subsequent to its acceptance of the payment order.

111. After discussion the Working Group decided that it would first consider article 5(1) on the extent of the obligation of a bank to comply with a payment order it had received or to give notice that it would not do so. It decided that following its consideration of article 5(1), it would discuss the concept of acceptance, including both the usefulness and the content of the concept, before it returned to the obligations of a bank that had accepted a payment order.

112. The text of article 5(1) as considered by the Working Group was as follows:

"(1) A receiving bank that receives a payment order from a sender with which there was a prior relationship is obligated within the time required by article 7 either to accept the order or to notify the sender that it will not do so, unless the reason for failing to accept the payment order was that the sender did not have sufficient funds with the receiving bank to reimburse it or that the receiving bank was precluded by an inter-bank agreement from executing the payment order. If within the required time a receiving bank does not give notice that it will not act on a payment order, it may no longer give such notice and is bound to execute the order."

113. The Working Group considered the nature of the various relationships that might be included within the term "prior relationship". It was suggested that the question related entirely to inter-bank payment orders, since the existence or not of a prior relationship would be clear in regard to a non-bank sender.

114. Under one view any bank that received a payment order from another bank should have an obligation to comply with it or to give notice that it would not do so. Under another view prior to actions constituting acceptance of the order, the receiving bank should have obligations to a sending bank only if there was a prior contractual relationship.

115. It was suggested that such a rule would be insufficient because banks often established correspondent relations with one another by exchange of telex keys or other authentication or encryption keys without the existence of a contract between them. It was also suggested

that banks that were members of the same clearing house or communications system, such as SWIFT, should be considered to have a prior relationship whether or not there was a specific contract between them.

116. The view was expressed that having a prior relationship was too vague a concept to be useful, since two banks whose only contact had been litigation could be said to have had a prior relationship. Under that view, which was adopted by the Working Group, it was better not to limit the obligation of the receiving bank to cases in which there existed a prior relationship.

117. Under one view the receiving bank should be obligated to inform the sender that it was not going to comply with the payment order because of a lack of cover as well as for any other reason. In support of that view it was stated that the sender might believe that there were sufficient funds available to cover the payment order and that both it and the originator might be seriously prejudiced if there was no notification to it.

118. Under the prevailing view the receiving bank should not have to notify the sender if its reason for not complying with the payment order was that there were insufficient funds to cover it. It was suggested that, if the concept of acceptance was retained, the word "acceptance" could be substituted for the word "comply".

119. The Working Group discussed what obligation the bank should have to notify the sender if, in addition to insufficient funds, it had another reason not to comply with the payment order, such as that the payment order had been misdirected and it could not, therefore, execute the order. Although there was strong support for a provision that the receiving bank should have to notify the sender if it had an additional reason for not complying with the order, the Working Group decided that article 5(1) should provide that no notice needed to be given if one of the reasons for failing to comply was insufficient cover. It also decided to add a new provision on the obligation of a receiving bank that received a payment order that had clearly been misdirected.

120. The Working Group adopted paragraph (1) as follows:

"(1) In the absence of an agreement otherwise,

(a) a receiving bank is not required to comply with the sender's payment order;

(b) a receiving bank that decides not to comply with a sender's payment order is required to notify the sender of its decision, within the time required by article 7, unless one of the reasons for non-compliance is insufficient funds.

If a receiving bank does not notify the sender within the required time that it will not comply, it may no longer give such notice and is bound to execute the order."

121. The Working Group considered a new paragraph on misdirected payment orders as follows:

"(1 bis) When a payment order is received that contains information which indicates that it has been

misdirected, the receiving bank shall notify the sender of the misdirection. [If the receiving bank fails to notify, and the credit transfer is delayed, the receiving bank shall be liable:

(a) if there are funds available, for interest on the funds that are available for the time they are available to the receiving bank; or

(b) if there are no funds available, for interest on the amount of the payment order for an appropriate period of time, not to exceed 30 days.]"

122. There was general agreement with the statement of duty in the first sentence of the proposal. It was stated that the duty there imposed would help to assure that the funds transfer system would function as intended. Nevertheless, some concern was expressed that the fact that the payment order contained information that indicated that it had been misdirected was stated in an objective fashion, thereby raising the possibility that a bank might breach the duty unknowingly. A question was also raised as to how the provision would apply if the sender was not a bank and the payment order did not indicate the sender's address. A further suggestion was that a time limit should be imposed as to when the notice should be given.

123. The suggestion was made that the provision should go into or following article 3 rather than into article 5.

124. In respect of the second sentence, under one view it should be deleted and the consequences of a breach of duty should be left to the civil law. Under another view the sanctions for a breach of the duty should be set forth in article 9. As to the content of the second sentence, a suggestion was made to include a third case, i.e. when the funds available to the receiving bank were in an account that did not pay interest.

125. After discussion the Working Group decided to retain the second sentence unchanged and to consider its content and final location at the next session. Therefore, the proposed new paragraph was adopted as submitted.

Article 6. *Acceptance of a payment order*

126. The text of article 6 as considered by the Working Group was as follows:

"(1) A payment order is accepted by a receiving bank that is not the beneficiary's bank at the earliest of the following times:

"(a) when the bank sends a payment order intended to carry out the payment order received;

"(b) when the bank receives both the payment order and notice that cover is available, provided that there was a prior relationship with the sender.

"(2) The beneficiary's bank accepts a payment order at the earliest of the following times:

"(a) when the bank receives the payment order, provided that the sender and the bank have agreed that the bank will execute payment orders received from the sender without notification that cover is in place [or a course of action to that effect has been established between them];

"(b) when the bank receives both the payment order and notice that cover is available;

"(c) *Variant A*

when the bank credits the beneficiary's account [without reserving a right to reverse the credit if cover is not furnished] or otherwise pays the beneficiary;

Variant B

when the bank gives the beneficiary the [unconditional] right to withdraw the credit or the fund [, whether or not a fee or payment in the nature of interest must be paid for doing so];

Variant C

when the bank gives notice to the beneficiary that it has the right to withdraw the credit or the funds;

"(d) when the bank otherwise applies the credit as instructed in the payment order;

"(e) when the bank applies the credit to a debt of the beneficiary owed to it or applies it in conformity with an order of a court."

127. The Working Group discussed whether the concept of acceptance was useful in the context of the Model Law. It was pointed out that it served the purpose of describing in a single word a number of different actions of different receiving banks, so that the word might be used in various substantive provisions. By way of example, a credit transfer through one intermediary bank was hypothesized. In such a transfer there would be three payment orders and three receiving banks, namely the originator's bank, an intermediary bank and the beneficiary's bank. In each case the obligation of the sender under article 4 to pay its own payment order would be the same, even though the obligation would arise on the performance of different kinds of acts by the originator's bank and intermediary bank on the one hand and the beneficiary's bank on the other. It was stated that the use of the concept of acceptance permitted clarity of analysis and economy of drafting.

128. Doubts were raised by some delegations as to whether the concept was useful. It was suggested that it would be better to rely on the execution of the payment order by the receiving bank. Furthermore, the use of the term "acceptance" caused difficulties in many legal systems because it seemed to suggest that a contract was created as a result of the receiving bank's actions. It was recognized that in other legal systems that also spoke of an offer and acceptance in contract formation the use of this word did not cause the same difficulties. It was also recognized that, if the concept was retained, another word could eventually be chosen in place of acceptance.

129. The Working Group agreed to reconsider the question at a later time when the consequences of "acceptance" might be seen more clearly and the Working Group might have been sufficiently enlightened in regard to the concept in order to decide whether it would be convenient to retain or to abandon it. Consequently, any references to acceptance in the current text were understood not to bind the Working Group in respect of the concept itself.

130. Without prejudice to the decision that may be made as to the retention or abandonment of the concept, the Working Group considered the drafting of article 6.

Paragraph (1)

131. The Working Group decided to delete subparagraph (b). In support it was stated that it had been decided in the discussion on article 5(1) that all banks, including the originator's bank, should have the right under the Model Law not to comply with a payment order even if cover was available.

132. A suggestion was made to add a statement that acceptance would also occur when an express notice of acceptance was given.

133. A suggestion was made that acceptance should occur when the receiving bank should have sent its payment order to carry out the payment order it received and not when it actually did send the order. In reply it was stated that that was a matter for the provision on improper execution. However, it was stated, in the light of the decision in regard to article 5(1) (see paragraph 120), acceptance should also be considered to have occurred when the receiving bank should have given the notice required by that provision. The Working Group adopted that suggestion.

134. After discussion the Working Group adopted paragraph (1) as follows:

"(1) A receiving bank that is not the beneficiary's bank accepts the sender's payment order at the earliest of the following times:

(a) when it sends a payment order intended to carry out the payment order received; or

(b) when it should have given the notice required by article 5(1)."

Paragraph (2)

135. It was noted that paragraph (2) could be divided into two groups of subparagraphs, since subparagraphs (a) and (b) both described events relating to reception of the payment order by the beneficiary's bank while subparagraphs (c), (d) and (e) related to actions of the beneficiary's bank subsequent to receipt of the payment order. It was also noted that all five subparagraphs were intended to describe objective acts so that in case of subsequent dispute over the relevant rights and obligations of the parties, it would not be necessary to determine the subjective intention of the beneficiary's bank or the subjective intention of the relevant official of that bank in regard to the payment order.

136. There was general agreement that the policy already adopted in respect of article 5(1) that a receiving bank should not be required to comply with the sender's payment order even if the receiving bank had received adequate cover should apply to the beneficiary's bank as well as to all other receiving banks. It was suggested that in addition to the reasons for refusing to comply with a payment order that were common to all receiving banks,

such as that it was not satisfied with the cover or that it believed that the particular payment order was part of a money laundering operation, the beneficiary's bank might have received instructions from the beneficiary not to accept the particular payment order or that category of payment orders. As an example of the latter situation, it was noted that in the United States some beneficiaries for some kinds of transactions authorize their banks to accept only Fedwire transfers, since the credit to the beneficiary's bank and, therefore, to the beneficiary is irreversible for any reason while a credit to their account arising out of a transfer through CHIPS would be reversible if there was a failure to achieve settlement at the end of the day.

137. As a result the Working Group decided to delete subparagraph (b) and to retain subparagraph (a) but to modify it by adding an additional volitional requirement.

138. In regard to subparagraph (c), it was suggested that, although the three variants were presented as being mutually exclusive, variants A and C were compatible. It was stated that in a given case the bookkeeping operation of crediting the account of the beneficiary might occur before or after the notice of the right to withdraw the funds had been given to the beneficiary. Since either action would signify the intention of the beneficiary's bank to accept the payment order, both should be included in the Model Law. Therefore, the Working Group decided to delete variant B.

139. Subparagraph (d) was accepted by the Working Group.

140. The view was expressed that the reference to applying the credit in conformity with an order of a court should be deleted. Not only did it contradict the basic proposition that the beneficiary's bank should act in conformity with the payment order, but it raised questions of conflict of laws as to the court whose orders would have to be followed. In reply it was stated that it was natural that the beneficiary's bank would have to follow court orders addressed to it. It was also suggested that the issue might not be of importance because the natural procedure for a bank to follow would be to credit the beneficiary's account and then to take the actions directed by the court order. Therefore, those situations would in fact fall under subparagraph (c). The prevailing view was that subparagraph (e) was useful and should be retained.

141. It was decided that a new subparagraph should be added reflecting that acceptance would take place whenever there was an objective act signifying acceptance by the beneficiary's bank.

142. A small working party was requested to prepare a new version of paragraph (2) in conformity with the decisions. In preparing the new text the working party was requested to include the following points: the beneficiary should retain the power to refuse the crediting of particular transfers or of particular categories of transfers to his account; the beneficiary's bank should retain the right to refuse to comply with payment orders sent to it without giving reasons for its refusal, subject to its contractual

obligations to the beneficiary or to the sender; if the beneficiary's bank refused to comply with the payment order, it would have a duty to notify the sender. The text proposed by the working party was as follows:

"(2) If the beneficiary's bank has an agreement with the sender or the beneficiary, or is bound by an inter-bank agreement, settling the terms and conditions upon which it will or will not execute payment orders, it has no obligation to execute a payment order that is within the scope of that agreement, except as provided in that agreement.

"(3) In the absence of such agreement, the beneficiary's bank is under no obligation to execute or to give reasons for refusing to execute any payment order. It becomes bound to execute a payment order when it performs an act evidencing its irrevocable intention to be bound, such as:

(a) when the beneficiary has an account with the beneficiary's bank to which the funds may be credited, upon the first to occur of the following events:

- (i) when the bank
 - prepares a credit to be entered into the account in the ordinary course of the bank's operations except when such credit is provisional or subject to reversal at the option of the bank;
 - or
 - enters a credit to the account;

- (ii) when a provisional or reversible credit becomes irrevocable or irreversible except for the purpose of correcting an error in the amount or the account credited;

- (iii) when the bank notifies the beneficiary that the funds are available to and freely disposable by the beneficiary;

(b) where the beneficiary has no account with the beneficiary's bank to which the funds may be credited, upon the first to occur of the following events:

- (i) when the bank notifies the beneficiary that it is holding the funds for him;
- (ii) when the bank pays the beneficiary;
- (iii) when the bank applies the funds as directed by the beneficiary."

143. The Working Group noted the proposal but did not have time to consider it in substance.

Article 5(2)-(4). *Obligations of receiving bank*

144. Following its discussion of the concept of acceptance in article 6 the Working Group returned to its consideration of article 5, paragraphs (2) to (4). The text of those paragraphs as considered by the Working Group was as follows:

"(2) A receiving bank that accepts a payment order is obligated to execute it in a proper manner in accordance with the instructions.

"(3) A receiving bank that is not the beneficiary's bank properly executes a payment order if:

(a) another bank accepts a payment order from the receiving bank that is consistent with the contents of the payment order received by the receiving bank and that contains the instructions necessary to implement the credit transfer in an appropriate manner, and

(b) the other bank is the beneficiary's bank or an appropriate intermediary bank; and

(c) (i) the receiving bank is the originating bank and the funds transfer is completed within the time required by article 7, or

(ii) the receiving bank is an intermediary bank, and the other bank accepts the payment order within the time required by article 7.

"(4) A receiving bank that is the beneficiary's bank properly executes a payment order

(a) if the beneficiary maintains an account at the beneficiary's bank into which funds are normally credited, by, in the manner and within the time prescribed by law, including article 7, or by agreement between the beneficiary and the bank;

(i) crediting the account,

(ii) placing the funds at the disposal of the beneficiary, and

(iii) notifying the beneficiary; or

(b) if the beneficiary does not maintain an account at the beneficiary's bank, by

(a) making payment by the means specified in the order or by any commercially reasonable means; or

(b) giving notice to the beneficiary that the bank is holding the funds for the benefit of the beneficiary."

Paragraphs (2) and (3)

145. Paragraph (2) was considered in connection with the discussion of paragraph (3).

146. It was noted that the policy decision made by the Working Group at its sixteenth session and affirmed at its seventeenth session that the originator's bank and each intermediary bank should be responsible to the originator for the performance of the credit transfer was implemented in paragraph (3).

147. Under one view that policy decision should be reversed and each receiving bank should be responsible only for its own activities, including the selection of an appropriate intermediary bank. It was inappropriate to hold one bank responsible for the actions or failures of another bank that it could not control.

148. Under another view the policy expressed by article 5 should be re-affirmed. It was said that it was particularly important in international funds transfers for the originator to be able to look to its bank for the proper performance of the entire credit transfer because of the difficulties a non-bank customer would have to investigate the causes for a credit transfer not being carried out as instructed, especially in a foreign country. The difficulties of claiming against a bank with which the originator

had no direct contractual or banking relationship were mentioned. In some legal systems the originator would not be able to claim successfully against a bank with which it had no contract. If the claim had to be litigated in a foreign court, differences in language and legal procedure might add to the difficulties for the originator. In this respect it was noted that some countries might have doctrines in regard to court jurisdiction and to the responsibility of an intermediary bank as the agent of the originator that would increase the likelihood of a successful legal action in the courts of the originator against a foreign intermediary bank but that those doctrines were not available in other countries. It was stated that similar problems in the transport industry had led to the widespread rule that the consignor of goods could hold the carrier with which it had contracted responsible for damage occurring throughout the voyage. In that regard it was stated that a distinction should be made between the obligations of the originator's bank and those of other receiving banks.

149. In reply it was stated that it was a matter of balancing costs and benefits. If the burden on the originating banks was too high, banks would have to increase their fees for making credit transfers, and they might even withdraw in whole or in part from the activity. It was stated that the concern in the Working Group had been to aid the originator in investigating and correcting transfers that had not been carried out properly and in pursuing its claim against the bank where the error or delay had occurred. Several proposals were made to express such a duty of aid in the investigation and pursuit of claims.

150. It was stated that such a duty would not be sufficient; not only would its practical implementation be unclear, but the decision at the last session of the Working Group to accept a restricted liability of the bank for indirect damages was linked to the broad statement of responsibility of the originator's bank.

151. It was suggested that the structure of article 5 as presented was incorrect. Article 5 should contain only the provisions relevant to the actions the banks should take to carry out the credit transfer and the actions necessary to rectify the situation if problems had arisen. It was stated that provisions on liability, including the party who should be liable and the amount of liability, should probably be grouped together in article 9.

152. It was proposed that the actions a receiving bank that was not the beneficiary's bank should be obligated to do could be grouped into three categories: (1) to send a proper payment order to a proper bank within the proper time, (2) to refund what it had been paid by its sender if the credit transfer was not successfully carried out, and (3) to assist in seeing that a credit transfer that was originally carried out for an amount less than that provided in the originator's payment order is successfully carried out. Another suggestion was that receiving banks should have the obligation to transmit to their senders any notice they received that a bank would not comply with the payment order.

153. In regard to the obligation of the receiving bank to refund what it had been paid if the credit transfer was not

successfully carried out, it was proposed that a new article 5 *bis* should be adopted as follows:

"(1) If a payment order is not issued to the beneficiary's bank, the receiving bank is required

(a) to assign its right of reimbursement against its receiving bank to the sender, and

(b) to assist the sender to obtain such reimbursement.

"(2) The obligation to reimburse the sender arises only to the extent that the receiving bank has itself received the funds."

This proposal was not adopted.

154. After discussion the Working Group decided to delete paragraph (2) as being unnecessary and to adopt paragraph (3) as follows:

"(3) A receiving bank other than the beneficiary's bank that accepts a payment order is obligated under that payment order:

(a) to issue a payment order, within the time required by Article 7, to either the beneficiary's bank or an appropriate intermediary bank, that is consistent with the contents of the payment order received by the receiving bank and that contains the instructions necessary to implement the credit transfer in an appropriate manner;

(b) where a payment order consistent with the contents of the payment order issued by the originator and containing instructions necessary to implement the credit transfer in an appropriate manner is not issued to or accepted by the beneficiary's bank—to refund to its sender any funds received from its sender, and the receiving bank is entitled to the return of any funds it has paid to its receiving bank; and

(c) where a payment order is issued to a beneficiary's bank in an amount different from the amount in the payment order issued by the originator to the originator's bank—to assist the originator and each subsequent sending bank, and to seek the assistance of its receiving bank, to obtain the issuance of a payment order to the beneficiary's bank for the difference between the amount paid to the beneficiary's bank and the amount stated in the payment order issued by the originator to the originator's bank."

155. It was suggested that article 5 should also include a provision similar to article 7(1)(c), first sentence and article 7(1)(d) spelling out that the originator's bank was responsible to the originator for the proper completion of the credit transfer. The Working Group agreed to consider that suggestion at its next session.

Paragraph (4)

156. It was noted that the deletion of paragraph (2) would require a modification of the introductory words of paragraph (4) consistent with the modification of the introductory words of paragraph (3). The Working Group adopted the following text for the introductory words:

"A beneficiary's bank that accepts a payment order fulfills its obligations under that payment order" . . .

157. Since article 5(4) was the last matter to be considered by the Working Group at this session, the Working Group did not have time to give the paragraph full consideration. It was noted that this paragraph concerned the relationship of the beneficiary with the beneficiary's bank. It was stated that the propriety of including it within the Model Law might depend upon the decision as to whether the credit transfer was considered to be completed, with the legal consequences that would follow, when the beneficiary's bank accepted the payment order or only when the beneficiary's bank credited the beneficiary's account or performed a similar act. In the first case paragraph (4) might not be needed, leaving those rules to the law that governed the account relationship. In the latter case, paragraph (4) would fulfill an important role in defining the obligations of the beneficiary's bank in regard to the credit transfer.

158. A number of questions of drafting were raised. It was pointed out that the words "prescribed by law" in subparagraph (a) referred to any law that might set forth the manner by or the time in which the beneficiary's bank had to perform the actions described in regard to the account. It was suggested that the words "into which funds are normally credited" in subparagraph (a) might be replaced by the words "to which funds may be credited".

159. At the close of the discussion it was agreed that aside from the change to the introductory words, paragraph (4) would remain unchanged until the next session of the Working Group when it would again be reviewed.

Exchange controls

160. It was noted that article 76(1) of the United Nations Convention on International Bills of Exchange and International Promissory Notes contained a provision that nothing in the Convention prevented a Contracting State from enforcing exchange control regulations applicable in its territory or provisions relating to the protection of its currency, including regulations to which it was bound by virtue of international agreements to which it was a party. It was suggested that a similar provision should be included in the Model Law, probably in connection with article 12 on conflict of laws.

161. It was agreed that the matter should be considered when the Working Group considered article 12.

FUTURE SESSIONS

162. The Working Group noted that the nineteenth session would be held in New York from 10 to 21 July 1989 and that the twentieth session would be held in Vienna from 27 November to 8 December 1989.

ANNEX

Draft Model Law on International Credit Transfers [para. 19]

Resulting from the eighteenth session of the
Working Group on International Payments²

CHAPTER I. GENERAL PROVISIONS

Article 1. *Sphere of application**

(1) This law applies to credit transfers where the originator's bank and the beneficiary's bank are in different countries. [para. 29]

(2) For the purpose of determining the sphere of application of this Law, branches of banks in different countries are considered to be separate banks. [para. 54]

Article 2. *Definitions*

(a) "Credit transfer" means a complete movement of funds from the originator to the beneficiary pursuant to a payment order received by the originator's bank [directly] from the originator. A credit transfer may involve one or more payment orders. [para. 38]

(b) "Originator" means the issuer of the first payment order in a credit transfer. [para. 41]

(c) "Beneficiary" means the ultimate person intended to receive the funds as a result of a credit transfer. [para. 42]

(d) "Sender" means the person who sends a payment order including the originator and any sending bank. [para. 44]

(e) "Bank" means a financial institution which, as an ordinary part of its business, engages in credit transfers for other persons. [para. 52]

(f) A "receiving bank" is a bank that receives a payment order. [para. 57]

(g) "Intermediary Bank" means any bank executing a payment order other than the originator's bank and the beneficiary's bank. [WP.39]

(h) "Funds" or "money" includes credit in an account kept by a bank. The credit may be denominated in any national currency or in a monetary unit of account that is established by an inter-governmental institution or by agreement of two or more States, provided that this Law shall apply without prejudice to the rules of the intergovernmental institution or the stipulations of the agreement. [para. 59]

(i) "Payment order" means a message, whether written or oral, that contains either explicitly or implicitly at least the following data:

- (i) an order to the receiving bank to pay, or to cause another bank to pay, to a designated person a fixed or determinable amount of money;

²The Working Group considered the title and aspects of articles 1 to 6 as set out in this annex. Where a decision was made in respect of the title, an article, paragraph or subparagraph, the paragraph number of this report where the decision was made is set forth in square brackets following the provision. Where no decision in respect of those articles was made by the Working Group, the text is that as presented to the Working Group in A/CN.9/WG.IV/WP.39, and is so indicated by "[WP.39]" following the provision. The Working Group did not consider articles 7 to 12, and the text is that as contained in WP.39, except that article 7(1)(b) was modified in para. 106 in connection with its consideration of article 2(h).

*This law is subject to any national legislation dealing with the rights and obligations of consumers. [para. 33]

- (ii) identification of the sender;
- (iii) identification of the receiving bank;
- (iv) the amount of the transfer, including the currency or the unit of account;
- (v) identification of the beneficiary;
- (vi) identification of the beneficiary's bank. [WP.39]

(j) "Authentication" means a procedure to determine whether all or part of a payment order is authorized, and which is the product of an agreement. [para. 94]

(k) "Cover" means the provision of funds to a bank to reimburse it for a payment order sent to it. The provision of cover might precede or follow execution of the order by the receiving bank. [WP.39]

(l) "Execution date" means the date when the receiving bank is to execute the payment order, as specified by the sender. When no execution date is stated on a payment order, the execution date of that order shall be deemed to be the date the order is received, unless the nature of the order indicates that a different execution date is appropriate. [paras. 104 and 106]

(m) "Pay date" means the date when funds are to be at the disposal of the beneficiary, as specified by the originator. [WP.39]

(n) "Value date" means the date when funds are to be at the disposal of the receiving bank. [WP.39]

Article 3. *Discrepancies within a payment order*

(1) If there is an inconsistency in a payment order between the words and figures that describe the amount of money, the receiving bank is required to notify the sender of the discrepancy unless the sender and the receiving bank had agreed that the receiving bank would rely upon either the words or the figures, as the case may be.

(2) Where the beneficiary is described by both words and figures, and the intended beneficiary is not identifiable with reasonable certainty, the beneficiary's bank must notify, within the time prescribed in article 7, paragraph (4), its sender, and also the originator's bank if it is identified on the payment order. [para. 69]

CHAPTER II. DUTIES OF THE PARTIES

Article 4. *Obligations of sender*(1) *Variant A*

A purported sender is bound by a payment order, if he authorized it or if it was issued by a person who, pursuant to the applicable law [of agency], otherwise had the power to bind the purported sender by issuing the payment order. [paras. 82 and 83]

Variant B

A purported sender is bound by a payment order if it was issued by the purported sender or by another person who had the authority to bind the purported sender. [para. 83]

(2) Notwithstanding anything to the contrary in paragraph (1), when a payment order is subject to authentication, a purported sender of such an order is bound if:

(a) the authentication provided is a commercially reasonable method of security against unauthorized payment orders,

(b) the amount of the order is covered by a withdrawable credit balance or authorized overdraft in an appropriate account of the sender with the receiving bank or there is an agreement

between the sender and the receiving bank that such payment orders are to be executed despite the absence of such balances or overdrafts, and

(c) the receiving bank complied with the authentication. [paras. 85 and 87]

(3) Variant A

A purported sender [that is not a bank] is, however, not bound by a payment order under paragraph (2) if

(a) the actual sender was a person other than a present or former employee of the purported sender, and

(b) the actual sender had gained access to the authentication procedure without fault on the part of the purported sender. [para. 93]

Variant B

No sender may become bound under paragraph (2) if the sender proves that the payment order was executed by

(a) a present or former employee or agent of the receiving bank, or

(b) a person acting in concert with a person described in (a), or

(c) any other person who, without the sender's authorization, obtained confidential information about the authentication from a source controlled by the receiving bank, regardless of fault. [para. 93]

(4) A sender becomes obligated to pay the receiving bank for the payment order when the receiving bank accepts it, but payment is not due until the execution date, unless otherwise agreed. [para. 102]

Article 5. Obligations of receiving bank

(1) In the absence of an agreement otherwise,

(a) a receiving bank is not required to comply with the sender's payment order;

(b) a receiving bank that decides not to comply with a sender's payment order is required to notify the sender of its decision, within the time required by article 7, unless one of the reasons for non-compliance is insufficient funds.

If a receiving bank does not notify the sender within the required time that it will not comply, it may no longer give such notice and is bound to execute the order. [para. 120]

(1 bis) When a payment order is received that contains information which indicates that it has been misdirected, the receiving bank shall notify the sender of the misdirection. [If the receiving bank fails to notify, and the credit transfer is delayed, the receiving bank shall be liable:

(a) if there are funds available, for interest on the funds that are available for the time they are available to the receiving bank; or

(b) if there are no funds available, for interest on the amount of the payment order for an appropriate period of time, not to exceed 30 days.] [para. 125]

(2) Deleted

(3) A receiving bank other than the beneficiary's bank that accepts a payment order is obligated under that payment order:

(a) to issue a payment order, within the time required by Article 7, to either the beneficiary's bank or an appropriate

intermediary bank, that is consistent with the contents of the payment order received by the receiving bank and that contains the instructions necessary to implement the credit transfer in an appropriate manner;

(b) where a payment order consistent with the contents of the payment order issued by the originator and containing instructions necessary to implement the credit transfer in an appropriate manner is not issued to or accepted by the beneficiary's bank—to refund to its sender any funds received from its sender, and the receiving bank is entitled to the return of any funds it has paid to its receiving bank; and

(c) where a payment order is issued to a beneficiary's bank in an amount different from the amount in the payment order issued by the originator to the originator's bank—to assist the originator and each subsequent sending bank, and to seek the assistance of its receiving bank, to obtain the issuance of a payment order to the beneficiary's bank for the difference between the amount paid to the beneficiary's bank and the amount stated in the payment order issued by the originator to the originator's bank. [para. 154]

(4) A beneficiary's bank that accepts a payment order fulfills its obligations under that payment order [para. 156]

(a) if the beneficiary maintains an account at the beneficiary's bank into which funds are normally credited, by, in the manner and within the time prescribed by law, including article 7, or by agreement between the beneficiary and the bank

(i) crediting the account,

(ii) placing the funds at the disposal of the beneficiary, and

(iii) notifying the beneficiary; or

(b) if the beneficiary does not maintain an account at the beneficiary's bank, by

(i) making payment by the means specified in the order or by any commercially reasonable means, or

(ii) giving notice to the beneficiary that the bank is holding the funds for the benefit of the beneficiary. [WP.39]

(5) The receiving bank is not bound to follow an instruction of the sender specifying an intermediary bank, funds transfer system or means of transmission to be used in carrying out the funds transfer if the receiving bank, in good faith, determines that it is not feasible to follow the instruction or that following the instruction would cause excessive delay in completion of the funds transfer. The receiving bank acts within the time required by article 7 if it, in good faith and in the time required by that article, enquires of the sender as to the further actions it should take in light of circumstances. [WP.39]

Article 6. Acceptance of a payment order

(1) A receiving bank that is not the beneficiary's bank accepts the sender's payment order at the earliest of the following times:

(a) when it sends a payment order intended to carry out the payment order received; or

(b) when it should have given the notice required by article 5(1). [para. 134]

(2) The beneficiary's bank accepts a payment order at the earliest of the following times:

(a) when the bank receives the payment order, provided that the sender and the bank have agreed that the bank will execute payment orders received from the sender without notification that cover is in place [or a course of action to that effect has been established between them];

(b) Deleted

(c) *Variant A*

When the bank credits the beneficiary's account [without reserving a right to reverse the credit if cover is not furnished] or otherwise pays the beneficiary;

Variant B

Deleted

Variant C

When the bank gives notice to the beneficiary that it has the right to withdraw the credit or the funds;

(d) when the bank otherwise applies the credit as instructed in the payment order;

(e) when the bank applies the credit to a debt of the beneficiary owed to it or applies it in conformity with an order of a court. [WP.39 as modified in paras. 135-143]

Article 7. *Time to accept and execute payment order or give notice*

(1) A receiving bank that is obligated under article 5 to accept a payment order or to give notice that it will not do so must accept and execute the payment order or give the required notice within the time consistent with the terms of the order, in particular, as follows:

(a) When a payment order states an execution date, the receiving bank is obligated to execute the order on that date. When the payment order states a value date but no execution date, the execution date shall be deemed to be the value date. Unless otherwise agreed, the receiving bank may not charge the sender's account prior to the execution date.

(b) When no value or pay date is stated on a payment order, the execution date of that order shall be deemed to be the date the order is received, unless the nature of the order indicates that a different date is appropriate. [WP.39 as modified in para. 106]

(c) When a pay date is stated on the payment order accepted by the originator's bank, the obligation of the originator's bank is that the beneficiary's bank accept the payment order by that date. An intermediary bank that accepts a payment order with a pay date is obligated to use its best efforts to cause the beneficiary's bank to accept the payment order by that date. A beneficiary's bank that accepts a payment order on or before the pay date is obligated to place the funds at the disposal of the beneficiary on that date.

(d) When no pay date is stated on the payment order accepted by the originator's bank, the obligation of the bank is that the beneficiary's bank accept a payment order within an ordinary period of time for that type of order.

(2) A receiving bank that receives a payment order too late to execute it in conformity with the provisions of paragraph (1) nevertheless complies with those provisions if it executes the order on the day received regardless of any execution, value or pay date specified in the order.

(3) A receiving bank that receives a payment order after the receiving bank's cut-off time for that type of payment order is entitled to treat the order as having been received on the following day the bank executes that type of payment order.

(4) A notice that a payment order will not be accepted must be given on the day the decision is made, but no later than the day the receiving bank was required to execute the order.

(5) If a receiving bank is required to take an action on a day when it is not open for the execution of payment orders of the

type in question, it must take the required action on the following day it executes that type of payment order.

Article 8. *Revocation and amendment of payment order*

(1) A revocation or amendment of a payment order issued to a receiving bank that is not the beneficiary's bank is effective if it is received in sufficient time for the receiving bank to act on it before the receiving bank has re-transmitted the order.

(2) A sender may require a receiving bank that is not the beneficiary's bank to revoke or amend the payment order the receiving bank has re-transmitted. A sender may also require a receiving bank to instruct the subsequent bank to which it re-transmitted the order to revoke or amend any order that the subsequent bank may in turn have re-transmitted.

(3) A revocation or amendment of a payment order issued to the beneficiary's bank is effective if it is received in time for the bank to act on it before the bank has accepted the order.

(4) A sender may revoke or amend a payment order after the time specified in paragraph (1) or (3) only if the receiving bank agrees.

(5) A sender who has effectively revoked a payment order is not obligated to reimburse the receiving bank [except for costs and fees] and, if the sender has already reimbursed the receiving bank for any part of the payment order, it is entitled to recover from the receiving bank the amount paid.

(6) Neither the death nor incapacity of either the sender or the originator affects the continuing legal validity of a payment order.

(7) The beneficiary's bank may reverse the credit entered to the beneficiary's account to the extent that the credit was in excess of the amount in the originator's payment order, was the result of a duplicate credit arising out of the same payment order by the originator or was entered to an account other than the account specified by the originator.

[(8) A bank has no obligation to release the funds received if ordered by a competent court not to do so [because of fraud or mistake in the funds transfer.]]

CHAPTER III. LIABILITY

Article 9. *Liability of receiving bank*

(1) A receiving bank that fails in its obligations under article 5 is liable therefor to its sender and to the originator.

(2) The originator's bank and each intermediary bank that accepts a payment order is liable to its sender and to the originator for the losses as set out in paragraph (5) of this article caused by the non-execution or the improper execution of the credit transfer as instructed in the originator's payment order. The credit transfer is properly executed if a payment order consistent with the payment order issued by the originator is accepted by the beneficiary's bank within the time required by article 7.

(3) An intermediary bank is not liable under paragraph (2) if the payment order received by the beneficiary's bank was consistent with the payment order received by the intermediary bank and it executed the payment order received by it within the time required by article 7.

(4) The beneficiary's bank is liable

(a) to the beneficiary for its improper execution or its failure to execute a payment order it has accepted to the extent provided by the law governing the [account relationship] [relationship between the beneficiary and the bank], and

(b) to its sender and to the originator for any losses caused by the bank's failure to place the funds at the disposal of the beneficiary in accordance with the terms of a pay date, execution date or value date stated in the order, as provided in article 7.

(5) If a bank is liable under this article to the originator or to its sender, it is obliged to compensate for

(a) loss of interest,

(b) loss caused by a change in exchange rates,

(c) expenses incurred for a new payment order and for reasonable costs of legal representation,

(d) any other loss that may have occurred as a result, if the improper [or late] execution or failure to execute resulted from an act or omission of the bank done with the intent to cause such improper [or late] execution or failure to execute, or recklessly and with knowledge that such improper [or late] execution or failure to execute would probably result.

(6) Banks may vary the provisions of this article by agreement to the extent that it increases or reduces the liability of the receiving bank to another bank and to the extent that the act or omission would not be described by paragraph (5)(d). A bank may agree to increase its liability to an originator that is not a bank but may not reduce its liability to such an originator.

(7) The remedies provided in this article do not depend upon the existence of a pre-existing relationship between the parties, whether contractual or otherwise. These remedies shall be exclusive and no other remedy arising out of other doctrines of law shall be available.

Article 10. *Exemption from liability*

A receiving bank and any bank to which the receiving bank is directly or indirectly liable under article 9 is exempt from liability for a failure to perform any of its obligations if the bank proves that the failure was due to the order of a court or to interruption of communication facilities or equipment failure, suspension of payments by another bank, war, emergency conditions or other circumstances that the bank could not reasonably be expected to have taken into account at the time of the funds transfer or if the bank proves that it could not reasonably have avoided the event or overcome it or its consequences.

CHAPTER IV. CIVIL CONSEQUENCES OF FUNDS TRANSFER

Article 11. *Payment and discharge of monetary obligations; obligation of bank to account holder*

(1) Unless otherwise agreed by the parties, payment of a monetary obligation may be made by a credit transfer to an account of the beneficiary in a bank.

(2) The obligation of the debtor is discharged and the beneficiary's bank is indebted to the beneficiary to the extent of the payment order received by the beneficiary's bank when the payment order is accepted by the beneficiary's bank.

(3) If one or more intermediary banks have deducted charges from the amount of the credit transfer, the obligation is discharged by the amount of those charges in addition to the amount of the payment order as received by the beneficiary's bank. Unless otherwise agreed, the debtor is bound to compensate the creditor for the amount of those charges.

(4) To the extent that a receiving bank has a right of reimbursement from a sender by debit to an account held by the receiving bank for the sender, the account shall be deemed to be debited when the receiving bank accepts the payment order.

CHAPTER V. CONFLICT OF LAWS

Article 12. *Conflict of laws*

(1) Persons who anticipate that they will send and receive payment orders may agree that the law of the State of the sender, of the receiver or of the State in whose currency the payment orders are denominated will govern their mutual rights and obligations arising out of the payment orders. In the absence of agreement, the law of the State of the receiving bank will govern the rights and obligations arising out of the payment order.

(2) In the absence of agreement to the contrary, the law of the State where an obligation is to be discharged governs the mutual rights and obligations of an originator and beneficiary of a credit transfer. If between the parties an obligation could be discharged by credit transfer to an account in any of one or more States or if the transfer was not for the purpose of discharging an obligation, the law of the State where the beneficiary's bank is located governs the mutual rights and obligations of the originator and the beneficiary.

D. Draft model rules on electronic funds transfers: report of the Secretary-General^{*}
(A/CN.9/WG.IV/WP.39) [Original: English]

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^{*}Working paper submitted to the Working Group on International Payments at its eighteenth session.

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INTRODUCTION

1. In conjunction with its decision at the nineteenth session in 1986 to authorize the Secretariat to publish the UNCITRAL Legal Guide on Electronic Funds Transfers as a product of the work of the Secretariat, the Commission decided to begin the preparation of Model Rules on electronic funds transfers and to entrust the task to the Working Group on International Payments (A/41/17, para. 230).

2. The Working Group undertook the task at its sixteenth session held at Vienna from 2 to 13 November 1987. At that session the Working Group reviewed a number of legal issues set forth in a report prepared by the Secretariat (A/CN.9/WG.IV/WP.35). At the conclusion of the session the Working Group requested the Secretariat to prepare draft provisions based on the discussions during that session for its consideration at its next meeting (A/CN.9/297, para. 98).

3. At its seventeenth session held at New York from 5 to 15 July 1988 the Working Group considered a text of draft provisions for Model Rules on Electronic Funds Transfers that had been prepared by the Secretariat (A/CN.9/WG.IV/WP.37). At the close of the session the Working Group requested the Secretariat to prepare a revised draft of the provisions for the Model Rules (A/CN.9/317, para. 10).

4. This report contains revised provisions as requested by the Working Group. When reference is made to a prior version of an article, it is the version found in A/CN.9/WG.IV/WP.37 and in the report of the seventeenth session of the Working Group, A/CN.9/317.

DRAFT PROVISIONS FOR MODEL RULES ON CREDIT TRANSFERS

Comment

1. The prior draft of the Model Rules was entitled "Model Rules on Electronic Funds Transfers", as is the title of this report. However, it was suggested by the Working Group at its seventeenth session that, in accordance with the decision taken by it that the Model Rules should apply to payment orders irrespective of the form in which they were made and the means by which they were transmitted from the sender to the receiving bank, consideration might be given to deleting the word "electronic" from the title of the Model Rules (A/CN.9/317, paras. 51 and 52).

2. The title that would result from a simple deletion of the word "electronic", i.e. "Model Rules on Funds Transfers", also does not seem appropriate, since such a title would encompass debit transfers in general, which the Working Group decided not to include for the time being (A/CN.9/317, para. 17), and funds transfers by means of bills of exchange and cheques, which the Working Group agreed at its sixteenth session should be completely excluded from the Model Rules (A/CN.9/297, para. 16). Therefore, it might be thought appropriate to make a direct reference to credit transfers in the title to the Model Rules.

3. At its seventeenth session the Working Group decided to proceed under the working assumption that the outcome of the work would be model legislation (A/CN.9/317, para. 25). Subject to a later decision as to the exact nature of the model legislation, i.e. convention, uniform law or model law, it may be thought that the words "Model Rules" remain appropriate.

4. Consequently, subject to any later decision on scope of application, it may be thought that the title that most adequately expresses the nature of the Model Rules is "Model Rules on Credit Transfers".

Chapter I. General Provisions

Article 1. *Sphere of application*

(1) These rules apply to credit transfers [where the originator's bank and the beneficiary's bank are in different countries or where the originator's bank and the beneficiary's bank are in the same country, but the currency in which the funds transfer is denominated is not the currency of that country].

(2) A State may adopt supplementary legislation dealing with the rights and obligations of [consumers] [originators and beneficiaries].

Comments

1. Since the Working Group agreed that the Model Rules should not, at least for the time being, deal with debit transfers (A/CN.9/317, para. 17), article 1 has been redrafted to indicate that it applies only to credit transfers as defined in article 2(a). The definition of "payment order" in article 2(i) has also been modified to make it clear that it covers only credit transfers.

2. At its seventeenth session the Working Group decided to proceed under the assumption that the Model Rules would cover the domestic segments of international credit transfers (A/CN.9/317, para. 21). It left open the question whether purely domestic credit transfers would be covered. All credit transfers would be covered by the Model Rules if the words in brackets were deleted. Only international credit transfers would be covered if the words in brackets were retained. However, domestic as well as international segments of those transfers would be covered.

3. The test of internationality is based fundamentally on whether the originator's bank and the beneficiary's bank are located in different countries. The credit transfer is international even if the originator and the beneficiary are located in the same country and even if the originator and the beneficiary are the same person.

4. There are, however, credit transfers that should be considered to be international even though both the originator's bank and the beneficiary's bank are from the same country. Such credit transfers normally have two characteristics: they are denominated in a currency other than the currency of the country in which the two banks are located and, as a result, one or more intermediary banks in the credit transfer chain are located outside the country where the originator's bank and the beneficiary's bank are located.

5. Nevertheless, it should be noted that in some countries and for some foreign currencies or units of account as described in article 2(h) the originator's bank

and the beneficiary's bank may settle directly between themselves or through a domestic settlement system without having to pass through a foreign intermediary bank.

6. Paragraph (2) was added at the suggestion of the Working Group (A/CN.9/317, para. 23). An explicit statement such as this is necessary within the text of the Model Rules only if they take the form of a convention.

Article 2. *Definitions*

(a) "Credit transfer" means a complete movement of funds from the originator to the beneficiary. A credit transfer may consist of one or more segments.

(b) "Originator" means the issuer of the first payment order in a credit transfer.

(c) "Beneficiary" means the ultimate party to be credited or paid as a result of a credit transfer.

(d) "Sender" means the party who sends a payment order [including the originator and any sending bank].

(e) "Bank" means a financial institution which, as an ordinary part of its business, engages in credit transfers for other parties. For the purposes of these Rules a branch of a bank is considered to be a separate bank.

(f) "Receiving bank" means the bank to which a payment order is delivered.

(g) "Intermediary Bank" means any bank executing a payment order other than the originator's bank and the beneficiary's bank.

(h) "Funds" or "money" includes credit in an account kept by a bank. The credit may be denominated in any national currency or in a monetary unit of account that is established by an intergovernmental institution or by agreement of two or more States, provided that these Rules shall apply without prejudice to the rules of the intergovernmental institution or the stipulations of the agreement.

(i) "Payment order" means a message, whether written or oral, that contains either explicitly or implicitly at least the following data:

- (i) an order to the receiving bank to pay, or to cause another bank to pay, to a designated person a fixed or determinable amount of money;
- (ii) identification of the sender;
- (iii) identification of the receiving bank;
- (iv) the amount of the transfer, including the currency or the unit of account;
- (v) identification of the beneficiary;
- (vi) identification of the beneficiary's bank.

(j) "Authentication" means a technique used between the sender and receiver to validate the source of a message.

(k) "Cover" means the provision of funds to a bank to reimburse it for a payment order sent to it. The provision of cover might precede or follow execution of the order by the receiving bank.

(l) "Execution date" means the date when the receiving bank is to execute the payment order, as specified by the sender.

(m) "Pay date" means the date when funds are to be at the disposal of the beneficiary, as specified by the originator.

(n) "Value date" means the date when funds are to be at the disposal of the receiving bank.

Comments

Credit Transfer

1. The Working Group requested that the full definition of "funds transfer" from ISO 7982-1 be used (A/CN.9/317, para. 38). That definition has been adapted to the term "credit transfer" so as to make it somewhat clearer that the funds flow is from the originator to the beneficiary, which is the nature of a credit transfer, and not merely between them, which could encompass a flow of funds in either direction.

2. At its seventeenth session the Working Group requested that the Model Rules be more specific in pointing out that the credit transfer might be composed of segments (A/CN.9/317, paras. 24 and 38). Moreover, the Working Group decided to delete the term "funds transfer transaction" because it was not satisfied with either the term or with its definition (A/CN.9/317, para. 40). As a result the word "segment" has been used instead. The word is not defined, both because in context its meaning is clear and because any attempted definition would encounter difficult conceptual problems.

Originator, beneficiary

3. The definitions of "originator" and "beneficiary" were approved by the Working Group at its seventeenth session (A/CN.9/317, paras. 32 and 42). "Beneficiary" is the same as in ISO 7982-1 while "originator" differs from it in wording but not in intended meaning. The originator or beneficiary of a credit transfer may be a bank or it may be a non-bank customer of a bank.

Sender

4. Although it was suggested in the Working Group that the term "sender" should not cover the originator (A/CN.9/317, para. 46), the definition has been left unchanged. Since both the originator and banks send payment orders, it would seem that their rights and obligations in this capacity should be the same, unless specifically provided otherwise (see article 4(3)). This is accomplished in part by including both in the definition of sender.

Bank

5. Although the Working Group requested that consideration be given to the use of an alternative to the word "bank", no other suitable word has been found that met the criteria for the definition agreed upon by the Working Group (A/CN.9/317, paras. 29 and 41).

6. As suggested in the Working Group, the definition has been narrowed to include only those financial

institutions that engage in transfers for other parties (A/CN.9/317, para. 31). As noted in the Working Group, this leaves open several questions as to when a bank engages in transfers for other parties. However, under the current definition, once a financial institution meets the definition of being a bank, transfers that it effectuates for itself would also be covered by the Model Rules.

7. As decided by the Working Group at its seventeenth session, for the purposes of the Model Rules, a branch of a bank is considered to be a separate bank (A/CN.9/317, para. 97).

Receiving Bank

8. Under this definition, which has been retained unchanged, the receiving bank becomes responsible for a payment order only when that payment order has been delivered to it. The observation was made in the Working Group that if the word "delivered" was used, the definition might not cover the situation where the payment order was sent but not delivered (A/CN.9/317, para. 45). However, until the payment order has been delivered, the sender has not effectuated the communication.

Intermediary Bank

9. The definition was proposed by the Working Group at its seventeenth session (A/CN.9/317, para. 41). It differs from the definition in ISO 7982-1 in three substantial respects: first, it includes all banks other than the originator's bank and the beneficiary's bank, whereas ISO 7982-1 includes only those banks between the given receiving bank and the beneficiary's bank; secondly, ISO 7982-1 includes only those banks between the receiving bank and the beneficiary's bank "through which the transfer must pass if specified by the sending bank"; and thirdly, reimbursing banks are included in this definition, even though the transfer may be considered not to pass through them and they are not in the flow of the payment order.

Funds, money

10. This definition, taken from the draft Convention on International Bills of Exchange and International Promissory Notes, article 6(1), contains the phrase "any national currency" rather than the previous "a national currency", so as to meet the suggestion at the seventeenth session of the Working Group that it be made clear that the credit might be in a currency other than the national currency of the State in which the account was kept (A/CN.9/317, para. 37). It may be questioned whether this change is necessary or whether it may not be possible to revert to the prior text so as to be consistent with the draft convention. Neither this definition nor the inclusion of the currency of the credit transfer as one of the necessary data elements affects any national rules that might restrict the freedom of the parties to determine the currency of the credit transfer (A/CN.9/317, para. 61).

Payment order

11. In accordance with a suggestion made in the Working Group, the minimum data elements necessary to

constitute a payment order have been included in the definition of the term (A/CN.9/317, para. 54). Inclusion of these data elements in the Model Rules will have an educational function. Other data elements may be required by a particular funds transfer system (see comment 15). The sender's failure to include one of the necessary data elements will be a factor in allocating loss in case the transfer is not carried out, is carried out late or is carried out incorrectly. Such failure does not, however, affect the scope of application of the Model Rules.

12. Authentication has been deleted as a required data element in a payment order. It is, however, defined in subparagraph (j). In accordance with the suggestion in the Working Group the consequences of a failure to authenticate a payment order or other message are considered in article 4 on the obligations of a sender (A/CN.9/317, para. 55). The words "an instruction" have been changed to "a message", which brings the definition into accord with the definition of "authentication". The definition has also been made to accord to the other suggestions made in the Working Group (A/CN.9/317, para. 44).

13. Although there was some hesitancy in the Working Group as to whether it was necessary to specify that the payment order could be either written or oral (A/CN.9/317, para. 53), the words have been retained since they seem to add clarity to the definition.

14. The fact that the required data elements could be contained in the payment order "either explicitly or implicitly" would also seem to make it clear that communicating parties can agree on specific formats, as was suggested in the Working Group (A/CN.9/317, para. 53). The further suggestion that the parties should be bound by any such agreement is contained in article 4(3).

15. A preliminary version of ISO Draft Proposal 7982-2, "Universal Set of Data Segments and Elements for Electronic Funds Transfer Messages" contained in document ISO/TC68/SC5/N230, dated 8 August 1988, proposes a set of mandatory data elements. Under the proposal those mandatory data elements that would always be required to appear in the message are labeled Mandatory Explicit. The data elements that would be required either to appear in the message or be derivable from another mandatory data segment and/or data element in the message used are referred to in the proposal as Mandatory Implicit. The document lists several data elements as being either mandatory explicit or mandatory implicit that are not set forth in the current definition of payment order, e.g. the date and time the message was delivered to the receiver by a communications service.

Authentication

16. As requested by the Working Group at its seventeenth session, a definition of "authentication" is included (A/CN.9/317, para. 47). The definition makes it clear that it does not refer to formal authentication by notarial seal or the equivalent, as it might otherwise be understood in some legal systems. The definition differs from the definition of "message authentication" in ISO 7982-1 in one

important respect. The important difference is that "authentication" as here defined does not include the aspect of validating "part or all of the text" of a payment order. This is appropriate, even though most electronic authentication techniques do both, since these Rules also apply to paper-based payment orders. Although the definition does not contain any standard as to what constitutes an acceptable authentication, such a standard is implied in article 4(2).

Cover

17. The definition has been further modified from that of "cover payment" in ISO 7982-1 on the suggestion of the Working Group in order to make it clear that the provision of cover might precede or follow execution of the order by the receiving bank (A/CN.9/317, para. 33). While the obligation of the sender under article 4(4) is only to reimburse the receiving bank after it has executed the order, failure to have received cover would be a major reason why a receiving bank might refuse to accept, and therefore to execute, the order. Moreover, if that is the reason for its refusal to accept the order, under article 5(1) the receiving bank is not required to notify the sender of that failure. A further reference to cover is found in article 6 where receipt of reimbursement (paragraph (1)) or of notice of cover (paragraph (2)) may be an element in a passive acceptance of the payment order by the receiving bank.

Execution date

18. The definition has been modified as suggested in the Working Group to make it clear that the date in question is the date when the payment order is expected to be executed and not when the instruction is given (A/CN.9/317, para. 36).

Pay date, value date

19. The definition of "value date" is that used in ISO 7982-1. The words expressing the idea of availability of funds to the designated person in the definitions of pay date and value date have been made to conform, as suggested by the Working Group (A/CN.9/317, para. 43). The definitions leave open the question when and under what circumstances funds are at the disposal of the beneficiary or receiving bank, as the case may be.

Article 3. Interpretation of data elements

Alternative A

If a data element is represented by any combination of words, figures or codes and there is a discrepancy between them, the receiving bank may consider each form of representation to be equally valid, unless the bank knew or ought to have known of the discrepancy.

Alternative B

(1) If there is a discrepancy between the amount of the transfer expressed in words and the amount of the transfer expressed in figures, the amount of the transfer is the amount expressed in words.

(2) If the amount is expressed more than once in words, and there is a discrepancy, the sum payable is the smaller amount. The same rule applies if the amount is expressed more than once in figures only, and there is a discrepancy.

(3) If the amount is expressed in a currency having the same description as that of the State where the bank or the account from which the receiving bank is to be reimbursed is located and of at least one other State, and the specified currency is not identified as the currency of any particular State, the currency is to be considered to be the currency of the State where the reimbursing bank or the reimbursing account is located.

(4) If the account that is to be debited or credited is expressed both by the name of the account holder and by an account number and there is a discrepancy between them, the account to be debited or credited is considered to be the account as expressed by name.

Comments

1. Paragraphs (1) and (2) of prior article 3 have been consolidated into the definition of "payment order" in article 2(i). Former paragraph (3) has been re-written as a rule of interpretation as suggested in the Working Group (A/CN.9/317, paras. 62 to 66). It is placed before the Working Group in two alternatives.

2. Alternative A, which consists of only one paragraph, reproduces the rule of interpretation in largely the same wording as prior article 3(3). Alternative B, in its first two paragraphs, essentially reproduces article 9(1) and (2) of the draft Convention on International Bills of Exchange and International Promissory Notes. The third paragraph is adapted from article 9(3) of the draft Convention while the fourth paragraph is new. Alternative A could be combined with the third paragraph of Alternative B, and perhaps with the fourth paragraph as well.

3. The advantage of Alternative A is that it can be applied both to paper-based payment orders and telexes that would be read visually and to electronic payment orders that would be read by computer. It does not assume whether the computer would be programmed to read the data elements in one form or the other, nor would it require re-programming of any existing computers.

4. The disadvantage of Alternative A is that, as drafted, the first portion would seem to permit a receiving bank that was in a position to read the data elements in their different representations to choose which form of representation it would wish to consider as the correct one. The last clause would preclude a bank from doing so knowingly, but it raises the question when a bank ought to know of the discrepancy. The Working Group was not in agreement as to the feasibility or desirability of assuming that the computer could and ought to be programmed to read the data elements in both words and figures and to compare them (A/CN.9/317, para. 65).

5. Although, in order to be consistent with the draft Convention, paragraph (1) of Alternative B provides that the amount of the transfer in words prevails over the

amount of the transfer in figures, the rule could be reversed if it was thought appropriate, since most inter-bank payment orders are in electronic form. It might also be possible to have different rules for payment orders that must be read visually and payment orders that could be read electronically. It must be recognized that all payment orders can be reproduced so that the receiving bank could read them visually. Paragraph (2) of Alternative B could remain the same in either case.

6. Paragraph (3) of Alternative B would have the effect that, if a transfer is from an Italian bank to a Swiss Bank for 10,000 francs and the Swiss Bank is to be reimbursed by a French Bank, the transfer is to be considered to be in French francs. If the transfer is from the Italian Bank to the Swiss Bank for 10,000 francs and the Swiss Bank is to be reimbursed by debiting an account of the Italian Bank held with the Swiss Bank, the transfer is to be considered to be in Swiss francs. It would seem that the nature of reimbursement to the receiving bank is a clearer indication of the intended currency than is the location of the receiving bank or of the beneficiary's bank, which are the other two main possibilities.

Chapter II. Duties of the Parties

7. The Working Group suggested that there might be a difference between the case in which the same data element, e.g. the amount, was represented in two or more different ways and the case in which two different data elements related to the same ultimate item, e.g. name of account and number of account. The Working Group did not, however, reach agreement whether there should be a difference in result (A/CN.9/317, paras. 63-65). Paragraph (4) of Alternative B provides the basis for such a distinction.

Article 4. Obligations of sender

(1) A sender is bound by a payment order or by the revocation or amendment of a payment order [as] [that has been] received by the receiving bank if the sender authorized the order or is otherwise bound by it pursuant to the law of agency [or other applicable law].

(2) A purported sender is bound by an unauthorized payment order or by the revocation or amendment of a payment order if the purported sender had available a commercially reasonable procedure for authentication that would permit the receiving bank to verify that the payment order was sent by the purported sender and if the receiving bank complied with the requisite verification.

(3) A [sender] [sending bank] is obligated to adhere to any message structure prescribed by the transmission system used or agreed between the parties.

(4) A sender is obligated to reimburse the receiving bank to the extent the receiving bank has properly executed the payment order of the sender [including any fees or costs charged or incurred by the receiving bank].

Comments

1. The Working Group engaged in an extensive discussion of the basis on which a purported sender of a payment order should be bound by the order (A/CN.9/317, paras. 73-77). Paragraphs (1) and (2) of this draft attempt to reflect the general understanding of the Working Group.

2. Paragraph (1) reflects the basic position that a sender is bound by an authorized payment order once received by the receiving bank, whether or not the order was authenticated. Authorized non-authenticated payment orders are more likely if the payment order is paper-based or is in the form of a telex than if it is in the form of data transfer. The most difficult question arises in respect of improper authorizations given by a dishonest employee, former employee or other person with a relationship to a purported sender that facilitates the fraud. The prior draft attempted to set forth specific occasions when the purported sender would be bound. This approach was not accepted in the Working Group. Under one suggested approach the matter should be left to the national law of agency (A/CN.9/317, para. 75). Under another suggested approach the question should be left to the effectiveness of the authentication.

3. In effect, both suggestions are followed in this draft. The words in paragraph (1) "or is otherwise bound by it pursuant to the law of agency [or other applicable law]" should be understood to refer only to proper authorizations by agents. Unauthorized payment orders bind the purported sender under paragraph (2), which relies on the authentication used in the payment order.

4. The Working Group suggested that if the payment order had not been authorized but had been authenticated, the sender would generally be responsible for it, but that there would be exceptions that would have to be elaborated at a later date (A/CN.9/317, para. 76). It also suggested that a standard should be established as to what would be an acceptable authentication, e.g. "commercially reasonable", that did not enter into the technical means of authenticating a payment order (A/CN.9/317, para. 47).

5. The Working Group may find it difficult to establish a standard of a commercially reasonable authentication procedure. The law governing authentication of paper-based payment orders by signature does not establish any such standard. Banks may furnish their customers with payment order forms on special paper that is difficult to alter, but those same banks may accept payment orders sent by letter as well. (See ISO 6260 for the recommended form to be used for mail payment orders between banks.)

6. Telexes may be considered to be authenticated when the number of the sending machine shown on the print-out is shown to be that of the purported sender. In addition, the name of the sending individual or organization is usually appended at the end. Questions have been raised in some countries whether this in itself is sufficient to indicate the source of a message if the purported sender denies having sent it. The use of a tested telex key would probably be required for the authentication to be a "commercially reasonable" means of verification.

However, even that means of authentication is not highly secure.

7. Use of a Message Authentication Code for payment orders sent by data transfer gives a high degree of confidence in the source and content of the payment order (see ISO 8730 of 15 November 1986 and proposed revision).

8. Assuming that a commercially reasonable procedure for authentication that would permit the receiving bank to verify the source of the payment order is technically possible for the form of payment order used, there remains the question whether it is available to the sender of the particular payment order. Any system of authentication that depends on the exchange of keys to be used by the sender and the receiver can be used only between parties which have previously established relations, which does not cover the entire universe of inter-bank payment orders. Even the verification of a signature requires the prior exchange of examples of authorized signatures.

9. Since banks can expect to be both senders and receivers, it is probably the case that the authentication technique to be used for inter-bank payment orders is usually reached by true mutual consent. However, it is likely that the available authentication procedures for payment orders from the non-bank originator to the originator's bank are determined by the bank, even where the non-bank customer is a large corporation. This suggests that the originator's bank should bear the risk if the authentication techniques available are not commercially reasonable. Nevertheless, the non-bank customer may decide that between several levels of security it wishes a lower level at a commensurate lower cost. In such a case it may be that the customer should bear the risk. As a result, paragraph (2) provides that one element in deciding whether the sender would be bound by the payment order is whether "the sender had available" such a procedure.

10. The second element is that the receiving bank complied with the requisite verification. If it did so and the authentication used was correct, the receiving bank would have no reason to question whether the payment order was authorized. This aspect of the rule can be applied to all forms of electronic payment orders, whether by telex or data transfer, as well as for paper-based payment orders authenticated by a mechanical form of signature. In respect of a manual signature the equivalent rule would be that the signature was compared and that it appeared to be genuine.

11. It was suggested at the Working Group that the rule expressed in paragraph (2) would be subject to some exceptions that would be elaborated at a later time (A/CN.9/317, para. 76).

12. It was also suggested in the Working Group that the rules governing authorization and authentication of payment orders should also apply to their revocation or amendment (A/CN.9/317, para. 125).

13. Paragraph (3) is reproduced from the prior text of article 4(5). Although there was support for deleting it,

there was also the view that it served an important educational function (A/CN.9/317, para. 78). The paragraph is intended to strengthen the obligation to follow agreed to or prescribed message structures. (Compare the definition of "payment order" in article 2(i) and its comment 14.) If the word "sender" is used, it would include non-bank originators. The last clause that was in square brackets relating to liability has been deleted.

14. Article 4(6) of the prior draft, which set forth an obligation of the sender to assure adequate cover before the value date, has been deleted as unnecessary. Under article 5 a receiving bank is not obligated to execute a payment order. One reason it may decide not to do so is that cover is not yet in place and notified to the receiving bank. Nevertheless, it may be noted that in the Working Group it was suggested that a sending bank's duty should be to have cover in place in sufficient time so that there could be notification by the execution date, which is often the value date (A/CN.9/317, para. 79).

15. Paragraph (4) reproduces article 4(7) of the prior draft without material change. Paragraph (4) has two elements: the sender must reimburse the receiving bank once the bank has acted and the sender must reimburse the receiving bank only to the extent the receiving bank has properly executed the payment order of the sender. The payment order of the sender is, according to paragraph (1), the payment "[as] [that has been] received by the receiving bank". It was suggested in the Working Group that later consideration would have to be given to whether such a rule should apply where the transmission system had been chosen by the receiving bank (A/CN.9/317, para. 72).

16. The words "to the extent" in paragraph (4) may be seen in terms of the monetary amount to be reimbursed. If the sender's order is for 1,000 units and the receiving bank sends a new order for 10,000 units by mistake, or sends two orders for 1,000 units each, the sender needs to reimburse only 1,000 units. If the receiving bank sends a new order for 100 units, the sender needs to reimburse for 100 units. Only when the receiving bank corrects its error by amending its payment order to 1,000 units or by sending a second payment order for 900 units would the sender be obligated to reimburse for the entire 1,000 units.

17. The words "to the extent" also limit the duty to reimburse if the receiving bank sends a new order to an incorrect subsequent bank and that error is never corrected so that the original order is not carried out.

18. The costs charged by the receiving bank relate to its charges for its services to the sender. The costs incurred by the receiving bank are the costs charged to it by the subsequent receiving bank. Except for the costs charged by the beneficiary's bank, those costs should cascade back to the originator, unless the beneficiary has agreed with the originator to pay them. For the case in which those costs are deducted from the amount of the funds being transferred, see article 11(3).

Article 5. *Obligations of receiving bank*

(1) A receiving bank that receives a payment order from a sender with which there was a prior relationship is ob-

ligated within the time required by article 7 either to accept the order or to notify the sender that it will not do so, unless the reason for failing to accept the payment order was that the sender did not have sufficient funds with the receiving bank to reimburse it or that the receiving bank was precluded by an inter-bank agreement from executing the payment order. If within the required time a receiving bank does not give notice that it will not act on a payment order, it may no longer give such notice and is bound to execute the order.

(2) A receiving bank that accepts a payment order is obligated to execute it in a proper manner in accordance with the instructions.

(3) A receiving bank that is not the beneficiary's bank properly executes a payment order if:

(a) another bank accepts a payment order from the receiving bank that is consistent with the contents of the payment order received by the receiving bank and that contains the instructions necessary to implement the credit transfer in an appropriate manner, and

(b) the other bank is the beneficiary's bank or an appropriate intermediary bank, and

(c) (i) the receiving bank is the originating bank and the funds transfer is completed within the time required by article 7, or

(ii) the receiving bank is an intermediary bank, and the other bank accepts the payment order within the time required by article 7.

(4) A receiving bank that is the beneficiary's bank properly executes a payment order

(a) if the beneficiary maintains an account at the beneficiary's bank into which funds are normally credited, by, in the manner and within the time prescribed by law, including article 7, or by agreement between the beneficiary and the bank;

(i) crediting the account,

(ii) placing the funds at the disposal of the beneficiary, and

(iii) notifying the beneficiary; or

(b) if the beneficiary does not maintain an account at the beneficiary's bank, by

(a) making payment by the means specified in the order or by any commercially reasonable means; or

(b) giving notice to the beneficiary that the bank is holding the funds for the benefit of the beneficiary.

(5) The receiving bank is not bound to follow an instruction of the sender specifying an intermediary bank, funds transfer system or means of transmission to be used in carrying out the funds transfer if the receiving bank, in good faith, determines that it is not feasible to follow the instruction or that following the instruction would cause excessive delay in completion of the funds transfer. The receiving bank acts within the time required by article 7 if it, in good faith and in the time required by that article, enquires of the sender as to the further actions it should take in light of circumstances.

Comments

1. The obligations of a receiving bank to act on a payment order as set out in paragraph (1) have been reduced from those in prior article 5 in three ways:

(a) A receiving bank is required to give notice of any failure to accept the payment order only if it has had a prior relationship with the sender. That prior relationship may be contractual or may arise out of a course of dealing (A/CN.9/317, para. 81).

(b) Even if there was a prior relationship, the receiving bank is not required to give notice of its failure to accept the payment order if the sender did not have sufficient funds with the receiving bank to reimburse it. A sender should be considered to be under a duty to know the balance of its account at all times. In any case, when the sender does not have sufficient funds with the receiving bank, including that notification has not arrived of receipt of cover by a correspondent bank, both sender and receiving bank would normally prefer to wait for the receipt of funds rather than to reject the payment order (A/CN.9/317, para. 82, but see para. 79).

(c) Even if there is a prior relationship, the receiving bank is not required to give notice of its failure to accept the payment order if it was precluded from executing it by an inter-bank agreement. The example given in the seventeenth session of the Working Group was the rules adopted in the United States requiring limits to be established by each bank for the net credit exposure it would extend as a receiving bank to each other bank with which it dealt and net debit caps limiting the total by which a bank could commit itself as a sending bank in excess of the amount committed by other banks to it (A/CN.9/317, para. 91). These two limits (bilateral credit limits and net debit caps) are currently applied in the United States only to the two high-value on-line funds transfer systems, CHIPS and FEDWIRE.

2. The first two changes in paragraph (1) can apply to the failure of the originator's bank to execute a payment order received from the originator. These situations fit well within the policies suggested in the Working Group.

3. All three changes in paragraph (1) can also apply to the failure of an intermediary bank or of the beneficiary's bank to execute a payment order received from a sending bank. The third change can apply only to inter-bank relations. However, the credit transfer that is delayed or not carried out at all, without notice by the receiving bank to the sending bank, is the transfer from the originator to the beneficiary. The Working Group may wish to consider the effect of these changes on the expectations of originators that their payment orders will be carried to completion within a predictable period of time. The Working Group may also wish to consider the effect of such rules on the proper allocation of responsibility when a payment order is not executed within the appropriate period of time.

4. Paragraph (2), which states the obligations of a receiving bank that has accepted a payment order, is based upon prior article 11(3). What constitutes acceptance of a payment order is set forth in article 6. Contrary to the prior

provision, but similar to paragraph (1), paragraph (2) applies to all receiving banks, including the beneficiary's bank (A/CN.9/317, para. 140).

5. Paragraph (3) covers the subject matter of prior article 6. That text made provision for different forms in which the originator's bank or an intermediary bank might have received or forwarded payment orders. At the suggestion of the Working Group, these different situations have been combined into one generally worded provision (A/CN.9/317, para. 86). The three subparagraphs contain the three elements of the bank's duty.

6. Subparagraph (3)(a) relates to the content of the payment order. In essence it includes prior article 6(1)(b) and the second sentence of (2). The content of the payment order is that as received by the receiving bank, thereby making the sender responsible for errors in transmission. This rule is contained in article 4(1). Nevertheless, subparagraph (3)(a) of this article applies only to sending banks (see comment 15 to article 4 and A/CN.9/317, para. 72).

7. Subparagraph (3)(c) distinguishes between the responsibility of an originator's bank for performance of the entire funds transfer within the required time and the responsibility of an intermediary bank for performance of the individual link within the required time. The required periods of time are set forth in article 7. Compare the duties of an intermediary bank in prior articles 6(1), 8 and 11(1) and comment by Working Group in A/CN.9/317, paras. 101-104.

8. The duty of the intermediary bank could be stated to be only to send an appropriate payment order within a required period of time. In such a case delays in communication or arising out of the delay or failure of the receiving bank to accept the payment order would be at the risk of the originator's bank. The duty could be stated to be fulfilled when a proper payment order is received by the receiving bank. Subparagraph (3)(c)(ii) goes somewhat further in providing that a sending bank is responsible for the acceptance of the payment order by its receiving bank. This flows from the assumption that delays or refusals by a receiving bank to accept a payment order will normally be the result of an error on the part of the sending bank or of its failure to have adequate cover in place.

9. Paragraph (4) contains the substance of prior article 7. Although it was suggested in the Working Group that the Model Rules should not deal with the manner of execution of a payment order by a beneficiary's bank, and that it would be more appropriate to leave the matter to bank practice and to the contracts between banks and customers, the Working Group decided to retain the substance of prior article 7 since its solutions were relevant to provisions on the discharge of the underlying obligation (A/CN.9/317, para. 90).

10. The substance of prior article 7 has been retained with the following changes:

(a) A beneficiary's bank is obligated under this article only if it has accepted the payment order under article 6.

(b) While the article sets forth the type of actions to be taken, it sets out neither the manner in which they are to be accomplished nor the time when they are to be accomplished. Those two elements are left to other rules of law or to agreement between the beneficiary and the bank, with the single exception that reference is made to certain provisions in article 7 as to when the beneficiary's bank must act.

11. Paragraph (4) explicitly recognizes that it is unlikely that rules of law could be drafted on a worldwide level specifying how and when the beneficiary's bank should take the various actions necessary for the beneficiary to have useful access to the funds arising out of a funds transfer. Such recognition supports the rule in article 11(2) that an obligation is discharged when the beneficiary's bank accepts the payment order. Nevertheless, article 9(4)(b) states a liability of the beneficiary's bank to its sender and to the originator for failure to place funds at the disposal of the beneficiary in accordance with a pay date or execution date.

12. Paragraph (5) reproduces prior article 6(3) without change.

Article 6. *Acceptance of a payment order*

(1) A payment order is accepted by a receiving bank that is not the beneficiary's bank at the earliest of the following times:

(a) when the bank sends a payment order intended to carry out the payment order received;

(b) when the bank receives both the payment order and notice that cover is available, provided that there was a prior relationship with the sender.

(2) The beneficiary's bank accepts a payment order at the earliest of the following times:

(a) when the bank receives the payment order, provided that the sender and the bank have agreed that the bank will execute payment orders received from the sender without notification that cover is in place [or a course of action to that effect has been established between them];

(b) when the bank receives both the payment order and notice that cover is available;

Variant A

(c) when the bank credits the beneficiary's account [without reserving a right to reverse the credit if cover is not furnished] or otherwise pays the beneficiary;

Variant B

(c) when the bank gives the beneficiary the [unconditional] right to withdraw the credit or the fund [, whether or not a fee or payment in the nature of interest must be paid for doing so];

Variant C

(c) when the bank gives notice to the beneficiary that it has the right to withdraw the credit or the funds;

(d) when the bank otherwise applies the credit as instructed in the payment order;

(e) when the bank applies the credit to a debt of the beneficiary owed to it or applies it in conformity with an order of a court.

Comments

1. Under article 5 of the prior draft a receiving bank was always bound to act on a payment order it had received either by executing it or by giving notice within the time required by prior article 8 (currently article 7). If it did not act within the required time, it could not later give notice that it would not execute the order. In that context it did not seem necessary to define the time when the receiving bank became obligated under the payment order.

2. Since article 5 was modified at the suggestion of the Working Group so that a receiving bank is not always under an obligation to act on a payment order or to do so within a required time, it is necessary to determine when its obligations under the payment order arise. In this draft those obligations arise when a receiving bank "accepts" the payment order. After a receiving bank has accepted a payment order, it can no longer reject it. Furthermore, the time of acceptance by a second receiving bank serves to determine under article 5 when a first receiving bank has completed its obligations to execute it.

3. The time of acceptance should be the earliest point of time when an objective act has occurred that permits one to say that the receiving bank should no longer be permitted to reject the order. In the case of a receiving bank that is not the beneficiary's bank, that objective act will often be that the receiving bank sends its own payment order with the intention of carrying out the order received. It is of no relevance in this context whether the order sent is for the correct amount, contains the correct instructions or is sent to the correct addressee; it is the intention to carry out the instruction that is relevant.

4. Under subparagraph (1)(b) the objective act is the receipt of notice of cover from a sender with which there is a prior relationship. In many cases reimbursement will involve debiting an account of the sender with the receiving bank, in which case notice is automatic. In other cases reimbursement will consist of receiving notice of credit in an account the bank holds with the sender or in a correspondent bank.

5. Devising an appropriate rule in respect of the beneficiary's bank is more complex. It is clear that the beneficiary's bank must have the right to reject a payment order, at least under some circumstances. As regards any conscious decision whether to accept a given payment order, a class of payment orders or payment orders from a particular sending bank, a bank probably does not act any differently whether it is an intermediary bank or a beneficiary's bank. However, the beneficiary's bank has a unique role in the credit transfer. It owes duties to the beneficiary to receive credit transfers for the beneficiary's credit. It is a necessary link in the credit transfer chain permitting value to be transmitted from the originator to the beneficiary, whether that credit transfer is for the purpose of discharging an obligation, purchasing securities or simply shifting funds from one account to another when

the originator and the beneficiary are the same person. Therefore, while the beneficiary's bank may have the right to reject the payment order, that right of rejection should be limited either as to the reasons for which it can be rejected or the time within which it can be rejected or both.

6. This draft of paragraph (2) has the effect of limiting the time within which the payment order can be rejected. It is based upon prior article 9(3), which dealt with the time after which a payment order could no longer be revoked or amended. The Working Group was in agreement at its seventeenth session that the subject was complex and that the Working Group would have to gain a better understanding of the banking practices and of the legal conceptions in different countries before it would be prepared to make policy choices in this regard (A/CN.9/317, para. 129).

Article 7. Time to accept and execute payment order or give notice

(1) A receiving bank that is obligated under article 5 to accept a payment order or to give notice that it will not do so must accept and execute the payment order or give the required notice within the time consistent with the terms of the order, in particular, as follows:

(a) When a payment order states an execution date, the receiving bank is obligated to execute the order on that date. When the payment order states a value date but no execution date, the execution date shall be deemed to be the value date. Unless otherwise agreed, the receiving bank may not charge the sender's account prior to the execution date.

(b) When no execution, value or pay date is stated on a payment order, the execution date of that order shall be deemed to be the date the order is received, unless the nature of the order indicates that a different execution date is appropriate.

(c) When a pay date is stated on the payment order accepted by the originator's bank, the obligation of the originator's bank is that the beneficiary's bank accept the payment order by that date. An intermediary bank that accepts a payment order with a pay date is obligated to use its best efforts to cause the beneficiary's bank to accept the payment order by that date. A beneficiary's bank that accepts a payment order on or before the pay date is obligated to place the funds at the disposal of the beneficiary on that date.

(d) When no pay date is stated on the payment order accepted by the originator's bank, the obligation of the bank is that the beneficiary's bank accept a payment order within an ordinary period of time for that type of order.

(2) A receiving bank that receives a payment order too late to execute it in conformity with the provisions of paragraph (1) nevertheless complies with those provisions if it executes the order on the day received regardless of any execution, value or pay date specified in the order.

(3) A receiving bank that receives a payment order after the receiving bank's cut-off time for that type of payment order is entitled to treat the order as having been received

on the following day the bank executes that type of payment order.

(4) A notice that a payment order will not be accepted must be given on the day the decision is made, but no later than the day the receiving bank was required to execute the order.

(5) If a receiving bank is required to take an action on a day when it is not open for the execution of payment orders of the type in question, it must take the required action on the following day it executes that type of payment order.

Comments

1. As suggested by the Working Group, the article has been restructured. Prior paragraphs (2), (3) and (4) of article 8, are now set forth as subparagraphs of paragraph (1). The order of prior paragraphs (2) and (3) has also been changed to conform to the re-drafting (see, A/CN.9/317, para. 98 and 99). Since the definition of a bank in article 2(e) considers a branch to be a separate bank, these time limits apply to each branch (A/CN.9/317, para. 97).

2. In contrast to former article 8(2), paragraph (1)(c) on the obligations arising out of acceptance of a payment order that contains a pay date separates the obligations of a receiving bank that is not the beneficiary's bank into the obligations of the originator's bank and those of an intermediary bank, as suggested in the Working Group (A/CN.9/317, paras. 101 to 104). Consistent with the provisions of article 9(2), the originator's bank is responsible for the timely execution of a funds transfer when the payment order it received contains a pay date. Timely execution as far as the originator's bank is concerned is that the beneficiary's bank accepts the payment order by that date. An intermediary bank has an obligation only of using its best efforts. The obligation of the beneficiary's bank to make the funds available to the beneficiary by that date is also set forth in article 7(1)(c).

3. Subparagraph (1)(d) places an obligation on the originator's bank for the timely completion of the credit transfer when no special instructions have been given to it by the originator by means of an execution or pay date. No standard is provided for determining what is an ordinary period of time, but it could be expected that in many situations an ordinary period of time would be determinable with reasonable objectivity. Intermediary and beneficiary's banks would bear the consequences only of their own actions.

Article 8. Revocation and amendment of payment order

(1) A revocation or amendment of a payment order issued to a receiving bank that is not the beneficiary's bank is effective if it is received in sufficient time for the receiving bank to act on it before the receiving bank has re-transmitted the order.

(2) A sender may require a receiving bank that is not the beneficiary's bank to revoke or amend the payment order the receiving bank has re-transmitted. A sender may also

require a receiving bank to instruct the subsequent bank to which it re-transmitted the order to revoke or amend any order that the subsequent bank may in turn have re-transmitted.

(3) A revocation or amendment of a payment order issued to the beneficiary's bank is effective if it is received in time for the bank to act on it before the bank has accepted the order.

(4) A sender may revoke or amend a payment order after the time specified in paragraph (1) or (3) only if the receiving bank agrees.

(5) A sender who has effectively revoked a payment order is not obligated to reimburse the receiving bank [except for costs and fees] and, if the sender has already reimbursed the receiving bank for any part of the payment order, it is entitled to recover from the receiving bank the amount paid.

(6) Neither the death nor incapacity of either the sender or the originator affects the continuing legal validity of a payment order.

(7) The beneficiary's bank may reverse the credit entered to the beneficiary's account to the extent that the credit was in excess of the amount in the originator's payment order, was the result of a duplicate credit arising out of the same payment order by the originator or was entered to an account other than the account specified by the originator.

[(8) A bank has no obligation to release the funds received if ordered by a competent court not to do so [because of fraud or mistake in the funds transfer.]]

Comments

1. Paragraphs (1) and (2) reproduce prior article 9(1) and (2) except for editing changes (A/CN.9/317, para. 121).

2. The substance of paragraph (3) remains unchanged. However, under the current draft the limit on the time when a payment order can be revoked or amended in the hands of the beneficiary bank is when that bank has "accepted" it. The content of prior article 9(3) is now to be found in article 6(2) on when a beneficiary's bank accepts a payment order.

3. The credit transfer comes to an end when the beneficiary's bank accepts a payment order, even though there may be additional acts to be performed as a result of the credit transfer. As a result it is the appropriate time for the sender's right to revoke or amend a payment order, whether on its own initiative or on that of a prior sender, to come to an end. However, in respect of other banks, the payment order should be revocable under paragraph (1) so long as it has not been re-transmitted, even though it may have been accepted at an earlier time. This is consistent with the policy of paragraph (2).

4. Paragraph (6) has been redrafted in conformity with the suggestion of the Working Group (A/CN.9/317,

para. 132). The Working Group agreed that, although legal incapacity was of particular relevance to bankruptcy, there should be no attempt at this time to deal with that problem.

5. Paragraph (7) has been added at the request of the Working Group (A/CN.9/317, paras. 68 and 130). If the credit to the beneficiary's account is not in accord with the originator's payment order, one of the banks in the credit transfer chain has made an error or there has been fraud. Paragraphs (1) to (4) on revocation or amendment of the payment order are relevant if the error was made by a bank prior to the beneficiary's bank and was found prior to acceptance of the payment order by the beneficiary's bank. Paragraph 7 is relevant if the error was made by the beneficiary's bank or, if made by a prior bank, was found too late to revoke or amend the payment order prior to acceptance by the beneficiary's bank.

6. Paragraph (7) permits the beneficiary's bank to reverse the credit it has entered to the beneficiary's account and, as such, goes beyond a provision that would give the beneficiary's bank a right of recovery that might have to be exercised in judicial proceedings if the beneficiary was not willing to allow the debit to be made to the account.

7. The Working Group decided to place paragraph (8) in square brackets pending a decision by the Commission whether it would undertake consideration of the problem in the context of stand-by letters of credit and contract guarantees.

Chapter III. Liability

Article 9. Liability of receiving bank

(1) A receiving bank that fails in its obligations under article 5 is liable therefore to its sender and to the originator.

(2) The originator's bank and each intermediary bank that accepts a payment order is liable to its sender and to the originator for the losses as set out in paragraph (5) of this article caused by the non-execution or the improper execution of the credit transfer as instructed in the originator's payment order. The credit transfer is properly executed if a payment order consistent with the payment order issued by the originator is accepted by the beneficiary's bank within the time required by article 7.

(3) An intermediary bank is not liable under paragraph (2) if the payment order received by the beneficiary's bank was consistent with the payment order received by the intermediary bank and it executed the payment order received by it within the time required by article 7.

(4) The beneficiary's bank is liable

(a) to the beneficiary for its improper execution or its failure to execute a payment order it has accepted to the extent provided by the law governing the [account

relationship] [relationship between the beneficiary and the bank], and

(b) to its sender and to the originator for any losses caused by the bank's failure to place the funds at the disposal of the beneficiary in accordance with the terms of a pay date; execution date or value date stated in the order, as provided in article 7.

(5) If a bank is liable under this article to the originator or to its sender, it is obliged to compensate for

- (a) loss of interest,
- (b) loss caused by a change in exchange rates,
- (c) expenses incurred for a new payment order and for reasonable costs of legal representation,
- (d) any other loss that may have occurred as a result, if the improper [or late] execution or failure to execute resulted from an act or omission of the bank done with the intent to cause such improper [or late] execution or failure to execute, or recklessly and with knowledge that such improper [or late] execution or failure to execute would probably result.

(6) Banks may vary the provisions of this article by agreement to the extent that it increases or reduces the liability of the receiving bank to another bank and to the extent that the act or omission would not be described by paragraph (5)(d). A bank may agree to increase its liability to an originator that is not a bank but may not reduce its liability to such an originator.

(7) The remedies provided in this article do not depend upon the existence of a pre-existing relationship between the parties, whether contractual or otherwise. These remedies shall be exclusive and no other remedy arising out of other doctrines of law shall be available.

Comments

1. Article 9 has been substantially modified from the prior article 12 in both substance and presentation by combining in one article the content of former articles 11, 12, 13 and 14. The prior draft distinguished between the parties to whom a receiving bank was responsible (articles 11 and 13) and the amount of the liability (articles 12 and 14).

2. Paragraph (1) sets forth the liability of a receiving bank for its own failure to accept a payment order or give notice that it would not do so, if the bank was obligated to accept or give notice under article 5.

3. The basic rule of paragraph (2) is that the originator's bank is liable to the originator for the proper execution of the credit transfer. The question was raised in the Working Group whether the originator should also have the right to hold each intermediary bank liable (A/CN.9/317, para. 139). However, such a rule has been maintained for those cases in which the originator may not be able to recover from his bank the losses he has suffered.

4. Paragraph (2) also provides for an obligation of each intermediary bank to its sender for the proper

execution of the credit transfer. This aspect of the rule, based upon prior article 11(3), permits the liability to be passed through the chain of banks until it reaches the bank where the error occurred.

5. The second sentence of paragraph (2) is based on former article 11(2). By placing it in the same paragraph as the first sentence, its purpose may now be clearer than in the prior draft (see A/CN.9/317, paras. 144 and 145).

6. Paragraph (3) is based on the second sentence of prior article 11(1).

7. Paragraph (4) is based on prior articles 13 and 14. Although subparagraph (a) may be thought to fall outside the scope of application of the Model Rules, the Working Group decided to defer any decision to delete it until a later time (A/CN.9/317, para. 150).

8. Paragraph (4)(b) must be considered in the context of the rule on finality of the credit transfer and the rule on discharge of obligations contained in article 11. If the rule continues that the credit transfer is final when the beneficiary's bank accepts the payment order and any underlying obligation is discharged at or before that time, the originator and the sender to the beneficiary's bank will seldom have any reason to complain if the beneficiary's bank credits the wrong account or credits the beneficiary's account late. However, it may be important to the originator that the funds are at the disposal of the beneficiary by a certain date or even by a certain time of day. Therefore, if the beneficiary's bank accepts a payment order with a pay date, execution date or value date, it should be liable to the originator for its failure to make the funds available by that date.

9. As suggested in the Working Group, paragraph (5)(d) is based on the wording found in article 8 of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules).

10. A new paragraph (6) has been added describing the extent to which the provisions of this article can be varied by agreement. In essence, it provides that between themselves banks can vary the liability of the receiving bank in either direction, but that as to an originator that is not a bank, the liability can only be increased not decreased.

11. Paragraph (7), making the liability provisions of this article not dependent on a contractual relationship and making them exclusive, was added at the suggestion of the Working Group (A/CN.9/317, para. 119).

Article 10. *Exemption from liability*

A receiving bank and any bank to which the receiving bank is directly or indirectly liable under article 9 is exempt from liability for a failure to perform any of its obligations if the bank proves that the failure was due to the order of a court or to interruption of communication facilities or equipment failure, suspension of payments by another bank, war, emergency conditions or other circumstances that the bank could not reasonably be expected to

have taken into account at the time of the funds transfer or if the bank proves that it could not reasonably have avoided the event or overcome it or its consequences.

Comment

1. As suggested by the Working Group article 15 has been re-drafted to contain the standard of liability set forth in Variant A of prior article 15 with the examples from Variant B pertinent to funds transfers (A/CN.9/317, para. 155).

2. The Working Group was of the view that it was appropriate to impose on banks a higher standard of performance in view of the decision to restrict severely any reference in article 12 to indirect loss (A/CN.9/317, para. 156).

Chapter IV. Civil Consequences of Funds Transfer

Article 11. *Payment and discharge of monetary obligations; obligation of bank to account holder*

(1) Unless otherwise agreed by the parties, payment of a monetary obligation may be made by a credit transfer to an account of the beneficiary in a bank.

(2) The obligation of the debtor is discharged and the beneficiary's bank is indebted to the beneficiary to the extent of the payment order received by the beneficiary's bank when the payment order is accepted by the beneficiary's bank.

(3) If one or more intermediary banks have deducted charges from the amount of the credit transfer, the obligation is discharged by the amount of those charges in addition to the amount of the payment order as received by the beneficiary's bank. Unless otherwise agreed, the debtor is bound to compensate the creditor for the amount of those charges.

(4) To the extent that a receiving bank has a right of reimbursement from a sender by debit to an account held by the receiving bank for the sender, the account shall be deemed to be debited when the receiving bank accepts the payment order.

Comments

1. This article contains a number of important provisions that are associated with the credit transfer, though they do not have to do with the credit transfer itself. In many countries such provisions would not be included in a law governing funds transfers, while in others they would be included. They are included in this draft because it is important to keep them in mind even if it is decided at a later time to exclude some or all of this article from the final text of the Model Rules.

2. Paragraph (1) deals with the important rule that monetary obligations can be discharged by interbank credit transfers leading to credit to an account. While this general proposition is widely recognized today, remnants

of the objections arising out of legal tender legislation still arise on occasion. Furthermore, in some countries it is not clear that any person other than the account holder has the right to deposit funds to an account. As a result the Working Group agreed that it would be appropriate to include such a rule (A/CN.9/317, para. 158).

3. The Working Group agreed that paragraph (1) should be restricted to providing that an obligation could be discharged by a transfer without considering to what account the debtor-originator might have the funds sent (A/CN.9/317, para. 159).

4. Paragraph (2) provides that the obligation of the debtor is discharged when the beneficiary's bank accepts the payment order. While this is a substantial change in wording from prior article 16(3), it is not a change in substance since the time of acceptance under article 7 is essentially the same as the times specified by prior article 16(3).

5. In the Working Group it was pointed out that in some countries an obligation was considered to be discharged when the originator's bank received the payment order with cover from the debtor-originator. Since such rules were considerably earlier than the rule in paragraph (2) and other countries might have rules on discharge that would be later than the rule in paragraph (2), the Working Group decided to consider at a future session what effect such national laws on discharge of the underlying obligation should have on the appropriate rules on finality of the credit transfer, keeping in mind its position that the rules on discharge, whether under the Model Rules or under national law, and the rules governing finality should be consistent (A/CN.9/317, paras. 160-162).

6. Paragraph (3) is concerned with a difficult problem when credit transfers pass through several banks. The originator is responsible for all charges up to the beneficiary's bank. So long as those charges are passed back to the originator, there are no difficulties. When this is not easily done, a bank may deduct its charges from the amount of the funds transferred. Since it may be impossible for an originator to know whether such charges will be deducted or how much they may be, especially in an international credit transfer, it cannot provide for this eventuality. Therefore, paragraph (4) provides that the obligation is discharged by the amount of the charges that have been deducted as well as by the amount received by the beneficiary's bank; the originator would not be in breach of contract for late or inadequate payment. Nevertheless, unless the beneficiary agrees to pay these charges, which often occurs, the originator would be obligated to reimburse the beneficiary for them.

7. Paragraph (4) is the corollary to paragraph (2) in that it gives the rule as to when the account of a sender, including but not limited to the originator, is to be considered debited, and the amount owed by the bank to the sender reduced or the amount owed by the sender to the bank increased. That point of time is when the receiving bank accepts the payment order. It may be before or after the bookkeeping operation of debiting the account is

accomplished. Paragraph (4) may have its most important application in determining whether credit is still available in the account holder's account against which there might be legal process. In the usual situation for a receiving bank that is not the beneficiary's bank, that point of time is when it executes the payment order by sending a new payment order to the next bank.

Chapter V. Conflict of Laws

Article 12. *Conflict of laws*

(1) Persons who anticipate that they will send and receive payment orders may agree that the law of the State of the sender, of the receiver or of the State in whose currency the payment orders are denominated will govern their mutual rights and obligations arising out of the payment orders. In the absence of agreement, the law of the State of the receiving bank will govern the rights and obligations arising out of the payment order.

(2) In the absence of agreement to the contrary, the law of the State where an obligation is to be discharged governs the mutual rights and obligations of an originator and beneficiary of a credit transfer. If between the parties an obligation could be discharged by credit transfer to an account in any of one or more States or if the transfer was not for the purpose of discharging an obligation, the law of the State where the beneficiary's bank is located governs the mutual rights and obligations of the originator and the beneficiary.

Comments

1. The Working Group requested the secretariat to prepare a draft provision on conflict of laws (A/CN.9/317, para. 165).

2. Paragraph (1) governs the conflict of laws in regard to the segments of a credit transfer. Paragraph (2) governs the conflict of laws in regard to the credit transfer itself between the originator and the beneficiary. Both provisions recognize the right of the parties to choose the applicable law.

II. NEW INTERNATIONAL ECONOMIC ORDER

A. Report of the Working Group on the New International Economic Order on the work of its tenth session (Vienna, 17-25 October 1988) (A/CN.9/315) [Original: English]

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Introduction

1. At its nineteenth session in 1986, the Commission had before it a note by the Secretariat (A/CN.9/277) setting forth possible topics in the context of the new international economic order that the Commission might take up upon the completion of its work on the *UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works*.¹ Among the conclusions of the note was a suggestion that the Commission should undertake work on procurement. The note proposed that, at least as an initial stage of that work, the Commission might engage in a study of the major issues arising in connection with procurement. After considering the note the Commission decided to undertake work in the area of procurement as a matter of priority and entrusted this work to the Working Group on the New International Economic Order.² It was noted at the twenty-first session of the Commission that the Working Group might be expected at its tenth session to outline the nature of the work to be performed.³

2. The Working Group, which was composed of all States members of the Commission, held its tenth session at Vienna from 17 to 25 October 1988. The session was attended by representatives of the following States members of the Working Group: Argentina, Austria, China, Czechoslovakia, Egypt, France, German Democratic Republic, Hungary, Iran (Islamic Republic of), Japan, Kenya, Mexico, Netherlands, Nigeria, Spain, Sweden, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America and Yugoslavia.

3. The session was attended by observers from the following States: Bolivia, Bulgaria, Canada, Colombia, Denmark, Finland, Germany, Federal Republic of, Greece, Holy See, Indonesia, Morocco, Oman, Pakistan, Philippines, Republic of Korea, Romania, Switzerland, Thailand and Venezuela.

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

- (a) *United Nations organizations*
International Bank for Reconstruction and Development
United Nations Development Programme
- (b) *Intergovernmental organizations*
Asian-African Legal Consultative Committee
Commission of the European Communities
General Agreement on Tariffs and Trade
League of Arab States
- (c) *International non-governmental organisations*
International Bar Association
International Progress Organization
Pax Christi International

5. The Working Group elected the following officers:

- Chairman:* Mr. Robert HUNJA (Kenya)
- Rapporteur:* Mrs. Adriana AGUILERA DE RODRIGUEZ (Mexico)

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

- (a) Provisional agenda (A/CN.9/WG.V/WP.21);
- (b) Procurement (A/CN.9/WG.V/WP.22).

7. The Working Group adopted the following agenda:

- (a) Election of officers
- (b) Adoption of the agenda
- (c) Procurement

¹United Nations publication, Sales No. E.87.V.10.

²Report of the United Nations Commission on International Trade Law on the work of its nineteenth session, *Official Records of the General Assembly, Forty-first Session, Supplement No. 17 (A/41/17)*, para. 243.

³Report of the United Nations Commission on International Trade Law on the work of its twenty-first session, *Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17)*, para. 37.

- (d) Other business
- (e) Adoption of the report.

Deliberations and Decisions

I. FOCUS AND DIRECTION OF DISCUSSIONS

8. The Working Group decided to base its discussions on the study of procurement prepared by the Secretariat (A/CN.9/WG.V/WP.22). In order to provide a focus and direction for those discussions it was agreed that it would be desirable to establish at the outset, on a provisional basis, the nature of the work in the area of procurement that would be recommended to the Commission. After considering various possibilities, the Working Group agreed that its discussions should be directed towards the preparation of a model procurement law. Such a model law would set forth basic legal rules governing procurement which could be supplemented with detailed rules by a State implementing it. An implementing State would be able to tailor its detailed rules governing procurement procedures to its own particular needs and circumstances while keeping within the overall framework established by the model law.

9. It was noted that a model procurement law would be helpful to countries, developed as well as developing, in restructuring or improving their procurement laws and procedures or in establishing procurement laws where none presently existed. An internationally-agreed model procurement law based upon sound and equitable principles would benefit international trade by promoting greater international confidence in procurement. It would also assist in relationships between countries of different levels of economic development and between countries with different economic systems. The Working Group agreed that the model procurement law should be drafted so as to take into account the particular needs of foreign participants in procurement proceedings and their opportunity to participate in such proceedings.

10. The preparation of a model procurement law as described above was generally regarded as preferable to the preparation of detailed rules of procurement procedure, since it would not be feasible to formulate such detailed rules to be applicable in countries with widely varying legal and economic systems, administrative structures and other circumstances. The preparation of a model procurement law was also regarded as preferable to preparing a set of general principles governing procurement, such as a "code of conduct", since a set of normative legal rules in the form of a model procurement law would be of greater assistance to States and was more likely to achieve the desired results.

11. There was general support for a suggestion that the model procurement law should be accompanied by a commentary to assist States in implementing and applying the model law and in formulating detailed regulations. The commentary, much of which could be drawn from A/CN.9/WG.V/WP.22, would also be helpful to procuring entities as well as to scholars in the area of procurement.

12. It was observed that some States were parties to the GATT Agreement on Government Procurement in which they undertook various obligations in respect of procurement by their Governmental entities towards nationals of other parties to the GATT Agreement. The view was expressed that a model procurement law prepared by UNCITRAL should avoid conflicts with the GATT Agreement, since that could make it difficult for a State party to the GATT Agreement to implement the model procurement law. It was observed, however, that an UNCITRAL model procurement law would be intended to have a broader application than the GATT Agreement. In any event, the obligations of a party under the GATT Agreement would not be impaired by a conflicting provision in the model procurement law implemented by that party, since in the event of such a conflict the party's international obligation under the GATT Agreement would prevail. Those remarks were also applied in respect of the obligations of member States of the European Communities and the European Free Trade Area under the public procurement rules of those organizations.

II. POSSIBLE OBJECTIVES OF NATIONAL PROCUREMENT POLICIES

13. The Working Group agreed that the identification and discussion of procurement policy objectives in paragraphs 15 to 29 of A/CN.9/WG.V/WP.22 were generally appropriate and balanced. The objectives identified were regarded as important. It was observed that the procurement procedures in the model procurement law would have to be structured in a way to achieve those objectives. It was also observed that the objectives in certain respects conflicted with one another (e.g., promoting the integrity of the procurement process required a system of administrative control over procurement proceedings, which could conflict with the objective of economy and efficiency); the model law should provide States with guidance as to how to reconcile such conflicts in an appropriate manner.

14. In connection with the objective of economy and efficiency in procurement, a view was expressed that it would be useful to provide guidance to procuring entities in choosing the optimum pricing method for their contracts (e.g., lump sum or cost reimbursable methods). In response to that suggestion it was noted that A/CN.9/WG.V/WP.22 had sought to address only the procedures for procurement rather than matters relating to the substance of the contract. There were a number of contractual terms that a procuring entity would have to consider and decide upon in preparing for the procurement. In connection with construction contracts, guidance in formulating contractual terms was provided by the *UNCITRAL Legal Guide on Drawing up International Contracts for the Construction of Industrial Works*. Further, rules regulating various contractual terms in international sales contracts were contained in the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980).

15. In connection with the objective of promoting the integrity of and confidence in the procurement process, it was agreed that the model procurement law should deal not only with the problem of misapplication or abuse of procurement procedures by procuring entities, but also with the problem of abuse by contractors or suppliers participating in procurement proceedings (e.g., collusive tendering).

16. In connection with specific economic and social objectives, such as the promotion of national economic development or the promotion of certain national economic sectors, groups or regions, it was noted that parties to the GATT Agreement on Government Procurement as well as parties to the European Economic Community and European Free Trade Area treaties would be unable in many cases covered by the GATT Agreement or those treaties to give special treatment in procurement proceedings to domestic contractors or suppliers.

III. NATURE OF MODEL PROCUREMENT LAW

17. It was observed that procurement laws in various countries differed as to whether and the extent to which a contractor or supplier participating in procurement proceedings had a right to require compliance with the procurement laws by the procuring entity. It was generally agreed that the model procurement law should contain a mutuality of obligations between the procuring entity and participating contractors and suppliers; accordingly, contractors and suppliers should have a right to require compliance with the law by procuring entities.

18. It was observed that a related issue was whether a participant in procurement proceedings should have a right of recourse in the event of a failure of the procuring entity to comply with the procurement law. The view was expressed that the right of a participant in procurement proceedings to require compliance by the procuring entity with the procurement law would not be effective unless the participant had a means of obtaining redress for a failure by the procuring entity to comply with the law. It was stated, however, that the question of redress must be approached with caution so as not unduly to interfere with or disrupt the procurement process.

19. It was observed that this issue raised a number of important questions, such as the existence of and relationship between redress under administrative law and under other legal rules, the extent of review to be exercised by a court or administrative body and the type of remedy that could be given. It was agreed to return to the issue at the end of the discussion of the model procurement law.

20. It was stressed that, to promote transparency, laws and regulations relating to procurement should be clear and accessible to all participants in procurement proceedings.

IV. SCOPE OF APPLICATION OF MODEL PROCUREMENT LAW

A. Types of procuring entities to be covered

21. The Working Group discussed the types of procuring entities that should be covered by the model procurement law. It was generally agreed that procurement engaged in directly by governmental departments or agencies should be covered. It was regarded not to be feasible to attempt to provide in a model procurement law, designed for application in countries with widely differing economic systems and administrative structures, a single definition or itemization of other types of procuring entities to which the law would apply. Instead, it was considered desirable to leave it to each implementing State to determine to which entities the model law should apply but to provide in the commentary to the model procurement law criteria to guide States in making that determination. However, some delegations considered that the model procurement law should apply to all public procurement.

22. Criteria suggested during the discussion involved the underlying question of whether the State had an interest in requiring particular types of entities to conduct their procurement in accordance with the formalities and under the competitive conditions provided by the State's procurement law. One suggested criterion was whether or not the entity, or the procurement engaged in by it, was financed by public funds. Other criteria involved consideration of operational aspects of an entity, such as whether it was in a monopolistic position and whether it was subject to substantial governmental influence, such as by being granted exclusive rights or a license to operate. Yet other criteria were whether the entity engaged in procurement for a public purpose, and whether procurement by the entity was subject to satisfactory controls by market forces or other commercial factors.

23. It was generally agreed that whether or not an entity was owned by the State was not a desirable criterion for the application of the model procurement law. For example, in several countries with centrally planned economies, most or all procuring entities were owned by the State, but the State would not necessarily wish to subject all of them to its procurement law. In addition, such a criterion could lead to anomalies in situations where the State sold its ownership interest in an entity to private buyers.

24. It was agreed that it was not necessary for the model procurement law to deal with the question of its applicability to political subdivisions of a State. This issue would depend upon the allocation of governmental competence within each State. Moreover, it was stated that a sound and equitable model procurement law would be acceptable not only to national Governments, but also to regional and local governments. It would also be acceptable to international organizations.

B. Types of procurement to be covered

25. It was generally agreed that, at the present stage, the Working Group should concentrate on the procurement of works and goods, and should not attempt to deal with the procurement of services. It was noted, however, that it was difficult in some cases clearly to differentiate services from works or goods, as in the case of construction services in connection with the supply of works, or the supply of computer software. In addition, there existed other types of situations that did not easily fit into any of those categories, such as leasing, licensing or the formation of a joint venture. One suggested approach was to specify in the model law in a general manner the types of procurement to be covered and then to exclude specific types that were not to be covered.

V. ADMINISTRATIVE CONTROL OVER PROCUREMENT

26. It was observed that the issue of administrative control over procurement concerned matters relating to the internal administrative law of a country and the structure of its governmental administration. It was generally agreed that the model procurement law should not attempt to deal with such matters. Instead, Governments should be advised generally of the desirability of administrative control over procurement and of a system of checks and balances to ensure the economical, efficient and fair functioning of the procurement process, and they should be advised to examine the adequacy of their administrative control mechanisms in that light.

27. It was generally agreed that the commentary to the model procurement law should provide guidance to States in the evaluation and structuring of their own administrative control mechanisms. Attention should be drawn to possible functions to be exercised by administrative bodies, such as those discussed in paragraphs 46 to 49 of A/CN.9/WG.V/WP.22.

28. It was suggested that, in addition to the functions referred to above, the commentary should also deal with functions performed by an administrative body in connection with disputes arising in connection with procurement. In relation to that function it was suggested that the commentary should address not only claims by contractors or suppliers arising from a failure of the procuring entity to comply with the procurement law, but also with administrative proceedings arising from improper conduct by contractors or suppliers, such as collusive tendering. It should also address the issue of possible sanctions that an administrative body could impose for such conduct (e.g., disqualification from participating in subsequent procurement proceedings). According to another view, the question of administrative proceedings or sanctions against contractors or suppliers did not need to be dealt with extensively.

VI. METHODS OF PROCUREMENT

29. The tendering method was generally recognized to maximize competition in procurement. It was stated, however, that competition could also be achieved when the negotiation method was used.

30. A view was expressed that, in addition to the methods of procurement referred to in A/CN.9/WG.V/WP.22, the model procurement law should refer to a method provided for in some countries whereby the procuring entity selected enterprises that fulfilled certain conditions and engaged in consultations with them with a view toward entering into a contract with one of them. It was also suggested that the model procurement law should deal with the use of intermediaries in tendering, a practice that was permitted in some countries but precluded in others. A further suggestion was that the model procurement law should deal with two-stage tendering methods.

31. It was stated that the model procurement law should provide for open as well as restricted methods of procurement. Restricted tendering was said to be no less competitive than open tendering; it was a more efficient means of achieving competition in particular cases (e.g., where there were few contractors or suppliers capable of fulfilling the procuring entity's procurement needs). A question was raised as to whether the "jury" or "concours" method should be provided for. It was noted that those methods seemed to be of a different nature than the other methods discussed in A/CN.9/WG.V/WP.22.

32. A view was expressed that the model procurement law should manifest a preference for tendering; the use of other methods should be treated as exceptional and should be authorized only in specified circumstances. In opposition to that view it was observed that a requirement that the tendering method be used might in some cases be contrary to the interests of the procuring entity. For example, in a construction project it might be in the procuring entity's interest to enter into a turnkey contract with a single contractor. However, the tendering method might not be suitable for procurement of a turnkey contract, and a requirement that tendering be used might compel the purchasing entity to enter into multiple contracts for the construction.

33. The initial view was that the model procurement law should not favour any particular method of procurement. Instead, it should provide for various methods, with the tendering method as a base, and set forth criteria to guide procuring entities in the choice of the most appropriate method to be used in particular cases. Once the procuring entity decided to use a particular method it should be required to conform to the rules in the model procurement law relating to that method.

34. Among the suggested criteria for the choice of a method of procurement were whether the procuring entity could formulate sufficiently precise specifications to serve as a basis for tendering, and whether there existed a sufficiently broad range of potential contractors or suppliers to participate in tendering. An additional suggested

criterion was the relative efficiency of the various methods in respect of the procurement in question. It was agreed that in drafting the model procurement law the Secretariat should set forth the criteria on the basis of the discussion in paragraphs 64 to 74 of A/CN.9/WG.V/WP.22.

VII TENDER PROCEDURES

A. Formal eligibility requirements

35. It was generally agreed that in dealing with the issue of formal eligibility requirements the policies of free competition and the non-admissibility of restrictive commercial practices should be respected to the greatest extent possible. It was stated that formal eligibility requirements were sometimes used in a manner that infringed upon those policies. It was mentioned, for example, that requirements that enterprises participating in procurement be from particular countries, and that foreign enterprises form joint ventures with local ones, were sometimes applied abusively. In addition, it was noted that such restrictions violated the obligations of national and non-discriminatory treatment incumbent upon parties to the GATT Agreement on Government Procurement. According to another observation, however, formal eligibility requirements were frequently used to protect legitimate interests of the procuring entity or its State. It was also observed that those requirements helped to lay a proper basis for the conduct of the procurement proceedings.

36. It was generally agreed that eligibility requirements that excluded certain types of enterprises from participating in tender proceedings should be kept to a minimum, and that a procuring entity should be able to apply only those requirements that were specifically set forth in the model procurement law. A suggestion was made that the model procurement law should set forth various types of permissible exclusionary requirements, designed to further legitimate governmental policy objectives. An implementing State could choose the requirements that it wished to entitle a procuring entity to impose. The commentary to the model law should assist in that choice; further, it should point out the possible effects of certain types of requirements and should recommend that the requirements should not be used abusively or in a manner that unduly restricted competition.

37. It was also agreed that the procedures and formalities by which a procuring entity established its eligibility should be kept to a minimum. It was said to be desirable for the model procurement law to standardize those procedures and formalities.

38. The Working Group agreed that, to promote transparency, the model procurement law should require the purchasing entity to set forth in the tender documents the eligibility requirements that would be applied to tenderers.

39. There was support for the view that it was desirable to avoid excluding tenderers at the outset of tender

proceedings merely on the basis of their failure to establish that they met formal eligibility requirements. It was stated, however, that it was preferable to require tenderers to establish their eligibility at an early stage, since it could delay the procurement if it were discovered later that an otherwise acceptable tenderer was not eligible.

B. Qualifications of tenderers

40. The Working Group agreed that the establishment of the qualifications of tenderers should be dealt with in the model procurement law. It was stressed in particular that, in the interest of transparency, the procuring entity should be required to set forth in the tender documents the criteria and methods to be used to evaluate the qualifications of tenderers. It was also agreed that in drafting the model procurement law the Secretariat could rely upon the discussion in paragraphs 85 to 89 of A/CN.9/WG.V/WP.22.

41. It was generally agreed that in the model procurement law the evaluation of the qualifications of tenderers should be treated as a separate matter from the evaluation of tenders.

C. Pre-qualification of tenderers

42. It was agreed that even if an enterprise had been pre-qualified, the procuring entity should nevertheless be able to examine the qualifications of the enterprise at a later stage and reject its tender if the enterprise was found to be unqualified.

43. It was noted that pre-qualification proceedings were sometimes used in an abusive manner to exclude certain enterprises from tendering. To help avoid such practices, as well as other abuses, it was suggested that the model procurement law should require procuring entities to act in good faith and in accordance with principles of fair dealing. According to another view, however, such a provision would be meaningless unless an aggrieved enterprise could claim against a procuring entity that violated the provision. It was stated that an effective system of administrative control over procurement could help to ensure fair treatment of enterprises by procuring entities.

D. Lists of approved contractors and suppliers

44. A view was expressed that the model procurement law should not deal with lists of approved contractors and suppliers, as such lists were used in practice only in connection with domestic procurement. In addition, the lists were sometimes used abusively to exclude certain contractors or suppliers or those from certain countries. The prevailing view, however, was that the lists were used in international procurement and that they should be dealt with in the model procurement law. It was noted that the lists could be beneficial to procuring entities by enabling them to identify reputable and competent contractors and suppliers. In response to that point it was observed that there existed other, less potentially abusive, means by

which a procuring entity could identify such contractors or suppliers. The view was expressed that, to promote free competition, the model procurement law should enable contractors or suppliers to participate in procurement proceedings even if they were not included in such a list.

E. Solicitation of tenders

45. The Working Group was in general agreement with the approaches reflected in paragraphs 95 to 99 of A/CN.9/WG.V/WP.22 relative to the procedures and requirements for soliciting tenders.

F. Tender documents

46. It was generally agreed that the model procurement law should require the procuring entity to inform tenderers in the tender documents of laws and regulations, including all amendments thereto, pertinent to the procurement and to the tender procedures. It was agreed that it should not be necessary for the tender documents to reprint the laws and regulations; they need only contain references to enable tenderers to locate them. A view was expressed that the procuring entity should not incur liability to a tenderer for failing to provide this information.

47. The foregoing approach was regarded to achieve a balance between the interests of procuring entities and of tenderers. On the one hand, it was regarded as unfair to impose too heavy a burden on procuring entities to inform tenderers of every law and regulation that might be relevant. It was also pointed out that tenderers had opportunities to obtain their own legal advice about relevant laws and regulations. On the other hand, it was believed that disclosure of relevant laws and regulations would help to promote fairness and transparency, particularly in relation to foreign tenderers that were unfamiliar with the legal system in the country of the procuring entity. It was regarded as important in particular for information to be provided about laws and regulations that gave rise to liabilities on the part of tenderers, and other laws and regulations that were not contained in the State's procurement law or that would not otherwise ordinarily come to the attention of tenderers.

48. With respect to the inclusion of contractual terms and conditions in the tender documents, a view was expressed that it would be useful for the model procurement law to promote the standardization of terminology used in contracts, e.g., on the basis of internationally recognized trade terms such as INCOTERMS. It was also suggested that the procuring entity should be required to inform tenderers of any mandatory legal rules concerning contractual terms, e.g., certain rules relating to the applicable law or to jurisdiction over disputes arising from the contract.

49. It was generally agreed that the contractual terms and conditions contained in the tender documents should coincide with those contained in the contract ultimately entered into between the procuring entity and the successful tenderer. In addition, it was generally agreed that the

relationship and hierarchy among the various portions of the tender documents that were to become parts of the contract (e.g., specifications, drawings and contractual terms and conditions) should be made clear.

50. In connection with the portions of the tender documents eliciting information about the qualifications of tenderers, it was suggested that the procuring entity should be required to inform tenderers if post-qualification procedures were to be used.

51. With respect to the price charged for tender documents, it was generally agreed that the procuring entity should be able to charge a sum to cover the costs of producing and distributing the tender documents to tenderers.

G. Preparation and formulation of tender documents

52. The Working Group agreed that the model procurement law should set forth the essential requirements to be observed by procuring entities in preparing the tender documents.

53. It was agreed that the procuring entity should be required to formulate the tender documents in an objective and clear manner, particularly with respect to the description of the works or goods to be procured and the criteria and methods to be used for the evaluation and comparison of tenders. This requirement was stated to be fundamental to the tendering method.

54. The Working Group agreed that the model procurement law should require technical specifications to be formulated objectively, by reference to their functional or performance characteristics, as discussed in paragraph 112 of A/CN.9/WG.V/WP.22. A view was expressed that the provisions of the model procurement law on this issue should take into account the need for the protection of intellectual property. It was also agreed that international standards should be used, if available, in the formulation of technical specifications; however, where national standards were more stringent, those standards should be applied.

55. In other respects the Working Group was in general agreement with the approaches reflected in paragraphs 111 to 114 of A/CN.9/WG.V/WP.22.

H. Clarification and amendment of tender documents

56. It was generally agreed that the model procurement law should enable the procuring entity to amend the tender documents prior to the deadline for submission of tenders if it reserved the right to do so in the tender documents.

57. A view was expressed that the model procurement law should set forth consequences that would arise if the tender documents were amended, such as providing for the

procuring entity to extend the deadline for submission of tenders and entitling tenderers to recover additional costs incurred by them as a result of the amendments. It was stated that if the tender documents were amended prior to the deadline for submitting tenders a tenderer should be able to withdraw or modify its tender.

58. It was stated that the term "material amendments" used in paragraph 119 of A/CN.9/WG.V/WP.22 would require clarification if used in the model procurement law or in the commentary.

I. Formulation and submission of tenders

1. Language of tenders

59. The Working Group was in general agreement with the approaches reflected in paragraphs 121 and 122 of A/CN.9/WG.V/WP.22 regarding the language or languages in which tenders were to be formulated when foreign participation in the tender proceedings was anticipated or sought. Those approaches sought to avoid obstacles to such participation that could arise from the language to be used in formulating tenders.

2. Formulation of tender price

60. It was generally agreed that the model procurement law should require the procuring entity to specify in the tender documents the manner in which tenderers were to formulate their tender prices. This would contribute to transparency and fairness and enable tenders to be evaluated on a common basis.

61. A view was expressed that the procuring entity should be required to make known to tenderers information concerning taxes, customs duties and similar charges levied by its country that would affect their tender prices. With respect to the question of whether such charges should be included in or excluded from tender prices, it was said to be more equitable to foreign tenderers for the charges to be excluded and for the successful tenderer to be able to claim the charges separately from the procuring entity. The reason for this was that new or additional charges that were not foreseeable at the time of tendering might be imposed during the performance of the contract and, if tender prices were deemed to include all applicable charges, the tenderer might not be able to claim reimbursement from the procuring entity.

62. Suggestions were made that, in addition to the charges mentioned in paragraph 124 of A/CN.9/WG.V/WP.22, the model procurement law should take into account customs duties, export taxes, local taxes, and taxes imposed on domestic tenderers in connection with imported components.

63. It was noted that when tenderers were allowed to formulate their tender prices in their own currencies or in a third currency, the risk of exchange rate fluctuations was reduced for the tenderers but increased for the procuring entity. It was generally agreed that the model procurement

law or the commentary should mention the possibility of expressing the tender price in a relatively stable unit of account such as the European Currency Unit (ECU) or the Special Drawing Right (SDR) or in freely convertible national currencies.

64. Reference was made to the risk faced by foreign contractors and suppliers of substantial changes in exchange rates after the contract had been entered into. It was stated, however, that this matter could be addressed in the contract and need not be dealt with in the model procurement law.

65. Suggestions were made to take into account in the model procurement law and commentary other factors affecting the formulation of the tender price, such as payment conditions, interest (if credit was to be given by the tenderer to the procuring entity), banking charges for letters of credit, and the costs of various forms of insurance in addition to transport insurance. According to another suggestion, the model procurement law should deal with the formulation of the price in tenders for construction. It was noted that in formulating such prices it was often necessary to take into account the costs of various types of services and supplies obtained by the contractor from a number of different sources.

66. It was observed that procuring entities sometimes required tenderers to disclose the components and calculations of their tender prices, including the way in which profit was factored into the tender prices, but that tenderers often regarded such information as confidential. It was suggested that the commentary to the model procurement law should deal with this issue and should discuss the various considerations involved.

3. Manner, place and deadline for submission of tenders; consideration of late tenders

67. It was stated that the deadline by which tenders must be submitted should be clearly defined in the model procurement law. A view was expressed that it should be possible to submit tenders until the time of opening of tenders.

68. It was generally agreed that late tenders should be considered by the procuring entity only in exceptional cases, e.g., where a tenderer could not submit its tender on time due to reasons beyond its control. A view was expressed that the situation mentioned in paragraph 134 of A/CN.9/WG.V/WP.22, whereby a tenderer could obtain the approval of a higher supervisory authority to submit a tender late, was not desirable since it could produce uncertainty and would be unjust to tenderers that had submitted their tenders on time.

69. A view was expressed that, in preparing provisions of the model procurement law on the issue of the time for submitting tenders, modern approaches should be considered. For example, a tender might be regarded as timely if its essential features were communicated to the procuring entity by any means (e.g., communicated by telephone) prior to the deadline for submission as long as a

complete written tender was submitted within a specified period of time (e.g., 24 hours) thereafter.

J. Alternative tenders and partial tenders

70. There was broad support for the view that the issue of alternative tenders should be treated with caution in the model procurement law. It was stated to be contrary to the principle of competition, which was a fundamental attribute of the tendering method, to allow the procuring entity to consider and accept an alternative tender with which other tenderers did not have an opportunity to compete. It was generally agreed that the model procurement law should strike a balance between allowing a procuring entity to benefit from an advantageous alternative tender and preserving fairness and competitiveness in tender proceedings.

71. A procedure whereby a procuring entity could consider and accept an alternative tender only from the tenderer that had submitted the most advantageous responsive tender was criticized. It was stated that the fact that a tenderer had submitted the most advantageous responsive tender did not necessarily ensure that its alternative tender would also be the most advantageous tender for that version. It was conceivable that other responsive tenderers might be able to offer more advantageous tenders based on the alternative.

72. A proposal was made that a procuring entity should be permitted to consider an alternative tender if it gave the other responsive tenderers an opportunity to tender based upon the alternative version. In opposition to that proposal, it was stated that such a procedure would delay the procurement. In addition, it would discourage tenderers from developing and submitting potentially innovative and advantageous alternative tenders if other tenderers were allowed to tender on the basis of the alternative.

73. According to another view, when the works or goods to be procured involved both design and execution, the procuring entity should be able to consider an alternative tender even if the tenderer had not submitted a responsive tender.

74. It was generally agreed that the procuring entity should be required to specify in the tender documents the conditions under which alternative tenders could be considered. The Working Group returned to the question of alternative tenders, and their relationship to deviations and to the concept of "responsiveness", during its discussion of examination of tenders (see paragraphs 88 and 89, below).

75. With respect to partial tenders, it was generally agreed that the procuring entity should be required to specify in the tender documents the portions of the works or goods to be supplied for which tenders could be submitted. It should not be able merely to reserve the right to decide to divide the entirety of the works or goods to be supplied into separate contracts as it saw fit after tenders had been submitted.

K. Period of validity of tenders

76. A view was expressed that the model procurement law should require tenders to remain valid for a period of time to be specified in the tender documents. It was suggested that the law should regulate the period of time that a procuring entity might specify and that the commentary should provide guidance in that regard. According to a further view, the model procurement law should inhibit the procuring entity from seeking extensions of the period of validity unreasonably.

L. Withdrawal and modification of tenders

77. A view was expressed that a tenderer should not be allowed to withdraw its tender after a certain point in time, i.e., after the deadline for submission of tenders or after the commencement of opening of tenders, and that it should forfeit its tender guarantee if it did so. It was pointed out that in one country a tenderer had an absolute right to withdraw its tender until it was accepted by the procuring entity. This resulted from general rules of law in that country relating to the formation of contracts.

78. According to another view, the issue of the modification of tenders was of greater practical significance than the issue of the withdrawal of tenders. It was stated that the usual reasons for modifying tenders were either that the procuring entity had discovered errors in the tenderer's calculation or that the tenderer had made an error in assessing a factor on which its tender was based. It was suggested that the model procurement law might permit modifications to be made in the former case, but might be more circumspect with respect to modifications in the latter case.

M. Tender guarantees

79. It was noted that the terminology with respect to the instruments referred to in A/CN.9/WG.V/WP.22 as "tender guarantees" differed in various legal systems, and it was suggested that the terminology be unified in the model procurement law.

80. Views were expressed that the model procurement law and the commentary should clarify the uses of tender guarantees, the obligations that they secured and defaults that they covered, and the grounds upon which the procuring entity was entitled to call the guarantee. With respect to the defaults covered by the tender guarantee, it was suggested that the model procurement law should clarify that withdrawal of a tender prior to the deadline for submission would not constitute a default.

81. It was stated that one of the underlying purposes of a tender guarantee was to cover at least part of the losses that the procuring entity could suffer if the tenderer withdrew its tender during the period of validity of tenders or if it failed to enter into a contract with the procuring entity or to supply a performance guarantee. Those losses could include, for example, the cost of engaging in new procurement proceedings, delay of the procurement and a higher contract price.

82. A view was expressed that the model procurement law should clarify the relationship, if any, between the amount of loss suffered by the procuring entity and the amount that the procuring entity could claim under the tender guarantee, and whether the procuring entity could recover an additional amount from the tenderer if its losses exceeded the amount of the guarantee. It was observed that this issue was dealt with by rules of national law, and there was general agreement not to deal with it in the model procurement law.

83. It was noted that different approaches were followed in national legal systems with respect to the return or expiry of a tender guarantee. Various suggestions were made to deal in the model procurement law with some of the legal problems that had arisen in that regard (e.g., from the failure of the procuring entity to return a guarantee) and to attempt to put the relevant legal rules on a more contemporary basis. Other suggestions were made to deal with the problems that had arisen in connection with the improper call of first-demand guarantees. However, noting that many of those issues would be addressed by the Working Group on International Contract Practices in its work on the topic of stand-by letters of credit and guarantees, the Working Group agreed not to deal with the issues pending the outcome of that work.

84. With respect to the last sentence of paragraph 145 in A/CN.9/WG.V/WP.22, a view was expressed that tenderers that were State enterprises should not be given preferential treatment with respect to the requirement to provide a tender guarantee.

N. Opening of tenders

85. It was generally agreed that the model procurement law should deal with the procedures for opening tenders, such as the keeping of minutes of the proceedings, the requirement that tenders be sealed until they were opened and the question of whether the proceedings for the opening of tenders should be public or closed. With respect to the latter question, the prevailing view was that it was desirable for representatives of the tenderers to be able to be present at the proceedings. That approach was said to promote transparency as well as confidence in and the integrity of the procurement process. In addition, it made the choice by the procuring entity of the successful tenderer less subject to challenge. A view was expressed, however, that the decision of whether proceedings for the opening of tenders should be public or closed might differ depending upon whether the tender proceedings were open to participation by all interested tenderers or restricted to tenderers selected by the procuring entity.

86. The main reasons for conducting closed proceedings were said to be to preserve the confidentiality of tenderers and their tenders (e.g., to protect know-how) and to avoid revealing information which formed a basis of the decision of the procuring entity as to which tender to accept.

87. A view was expressed that the model law should deal with procedures for opening tenders to be followed when the two-envelope system was used.

O. Examination of tenders

88. It was generally agreed that the meaning of the term "deviation" and the relationship of deviations to alternative tenders and to the concept of "responsiveness" required clarification. One suggestion was to regard an alternative tender as one that modified in a fundamental way, or that completely replaced, the technical specifications or contractual terms and conditions set forth in the tender documents; deviations were regarded as less fundamental departures from the tender documents.

89. In principle, there was general agreement that deviations and alternative tenders should be permitted only to the extent that they were expressly authorized by the tender documents. (For the discussion of the Working Group with respect to alternative tenders, see paragraphs 70 to 75, above). Accordingly, a tender that contained unauthorized deviations, and unauthorized alternative tenders, should be regarded as non-responsive and should be rejected. However, it was generally agreed that the model procurement law should permit a procuring entity to consider a tender that contained minor deviations, and that the nature of such permissible deviations should be clearly defined in the model procurement law. It was noted that some guidance in that respect might be derived from article 19 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980).

P. Evaluation and comparison of tenders

1. Criteria and methods for evaluation and comparison of tenders

90. It was generally agreed that for the procurement of simple, routine goods it might be adequate to base the choice of which tender to accept on the tender price alone. However, for other works or goods, criteria in addition to the tender price would have to be taken into account.

91. Various views were expressed as to the nature of those additional criteria. According to one view, they should be objective and quantifiable in monetary terms, such as the ones referred to in paragraph 171 of A/CN.9/WG.V/WP.22. That approach was said to preserve the essential element of competition in tendering by enabling tenders to be evaluated and compared on a common basis, thereby promoting confidence in the tender proceedings. In that connection, it was stated that subjective criteria were sometimes applied abusively by procuring entities to the prejudice of certain tenderers.

92. According to another view, it was essential for procuring entities from developing countries to be able to take into account subjective criteria, such as those mentioned in paragraph 176 of A/CN.9/WG.V/WP.22, in order to promote the development objectives of their countries. In this connection it was noted that the GATT Agreement on Government Procurement called upon parties, in the implementation and administration of the Agreement, to take into account the development, financial and trade needs of developing countries. In accordance with this

view the opinion was expressed that the model procurement law should enable procuring entities from developing countries to take such subjective criteria into consideration; another opinion was that procuring entities should be given complete freedom to take into account any criteria they deemed appropriate.

93. The trend of the discussion revealed support for an approach whereby priority would be given in the model procurement law to objective and quantifiable criteria, but the law would take into account that developing countries needed to be able to permit their procuring entities to use subjective criteria as well in order to promote national development objectives. It was stated that such an approach would enable the model procurement law to be acceptable to countries of all levels of economic development. It was noted, however, that where social or economic development considerations were important factors in a particular procurement the tendering method might not be the most appropriate method of procurement. It was generally agreed that the model procurement law should require the procuring entity to specify clearly in the tender documents the criteria that it would apply in evaluating and comparing tenders.

94. A suggestion was made that, since the criteria to be applied by the procuring entity in relation to a particular procurement would depend upon what was being procured, the model procurement law should set forth various possible criteria from which the procuring entity could choose. It was stated that the criteria should be as precise as possible, and that a general provision enabling the procuring entity to accept, for example, the tender that it found to be most advantageous, was not sufficient. It was believed wise for all objective non-price factors to be subject to the application of a mathematical formula, if feasible, and for the result to be combined with the tender price to determine the lowest tender.

2. Conversion of tenders to single currency

95. It was generally agreed that the model procurement law should set forth specific rules concerning the conversion of tender prices expressed in several currencies to a single currency for the purpose of evaluating and comparing tenders. The approach set forth in paragraph 179 of A/CN.9/WG.V/WP.22 was regarded as suitable. It was suggested that the rules applied by the World Bank might also provide examples. There was also general agreement that the procuring entity should be required to set forth in the tender documents the methodology and rules according to which the conversion would be effected.

96. A distinction was noted between the currency in which tenders were evaluated (which was typically the currency of the procuring entity) and the currency or currencies in which the tenderer was to be paid (e.g., its own currency or the currencies in which it incurred its costs). This distinction reflected, among other things, different allocations between the tenderer and the procuring entity of the risk of exchange rate fluctuations. It was suggested that in dealing in the model procurement law with the conversion of tenders to a single currency

consideration should be given to the possibility of converting tenders to one of the internationally used units of account consisting of a basket of currencies or to a freely convertible national currency.

Q. Two-envelope system

97. It was generally agreed that the model procurement law should deal with the two-envelope system of procurement, since that system was frequently used in some regions. In particular, it was agreed that the procedures for that system should be elaborated. A view was expressed, however, that the two-envelope system was not really of the same nature as competitive tendering, and therefore it should be treated separately in the model procurement law. For example, it was stated that in some applications of the system the procuring entity selected the tender essentially on the basis of the technical proposal, and did not necessarily choose the one offering the lowest price.

R. Preferences for procurement from domestic sources or of domestic works or goods and other provisions to achieve economic and other objectives

98. It was noted that the issue of preferences could have implications with respect to international obligations of States, such as those under the General Agreement on Tariffs and Trade and under the GATT Agreement on Government Procurement. It was noted, however, that the GATT Agreements contained means to accommodate the interests of developing countries within the framework of free competition. It was generally agreed that the model procurement law should be structured so that States could implement it in a manner that was consistent with their international obligations.

99. According to one view, the model procurement law could do little more than require the procuring entity to specify in the tender documents any preference that would be applied and the criteria for its application. Another view was that the model procurement law should permit preferences to be given to tenders proposing to use domestic resources, but should not permit domestic tenderers to be preferred over foreign ones.

100. In response to the latter view it was noted that many States, representing every level of economic development, applied various types of preferences for domestic tenderers. It was said that, although those practices could not be ignored, the work of UNCITRAL in the area of procurement presented a good opportunity to try to restrict their disadvantageous aspects. For example, the model procurement law might contain provisions directed to ensuring that the preferences and the criteria for their application were as objective as possible. In addition, it could encourage States to treat the preferences as exceptions, to be applied only in cases of proven objective facts showing that domestic industries, regions or groups needed protection.

S. Negotiations with tenderers

101. It was generally agreed that, in the model procurement law, negotiations between the procuring entity and tenderers should be restricted to certain cases. It was stated that the possibility of wide-ranging negotiations could be abused by the procuring entity and could undermine confidence in and the integrity of the tender process. The Secretariat was requested to prepare a suitable provision dealing with this question for inclusion in the first draft of the model procurement law.

T. Rejection of all tenders

102. It was generally agreed that the procuring entity should have the right to reject all tenders and terminate the tender proceedings for reasons unrelated to the merits of the tenders or the eligibility or qualifications of the tenderers (e.g., because its needs have changed, because of a change in government policy, or for its convenience), as long as that action was not taken for a fraudulent purpose. It was also agreed that if the procuring entity reserved the right to reject all tenders it should expressly so provide in the tender documents.

103. A question was raised as to whether the procuring entity should be required to give tenderers the reasons for rejecting all tenders. It was also questioned whether the procuring entity should be required to give to tenderers in completed tender proceedings (i.e., where a tender was accepted by the procuring entity) the reasons for rejecting their tenders. It was generally agreed that, in both cases, the procuring entity should be required to give the reasons for rejection upon the request of a tenderer, but that the procuring entity should not have to justify its reasons.

104. It was generally agreed that when the procuring entity rejected all tenders the tenderers should not be able to recover from the procuring entity the costs of preparing and submitting their tenders. The possibility that a procuring entity might change its mind about the procurement was said to be a normal commercial risk that should not give rise to a right of recovery. It was also generally agreed that unsuccessful tenderers in completed tender proceedings should not be able to recover their costs from the procuring entity. A view was expressed, however, that they should be able to recover their costs if the reasons for rejecting their tenders were not adequate.

U. Acceptance of tender and formation of contract

105. A view was expressed that, due to the varying approaches in national legal systems to the issue of when a contract between the procuring entity and the successful tenderer came into existence, it would be useful for the issue to be clarified in the model procurement law. According to another view, however, there was no need for the model procurement law to deal with that issue since it would be governed by rules of national law and of international conventions (e.g., the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)) relating to the formation of contracts, which the model procurement law should not try to alter.

106. A view was expressed that the treatment of the issues related to the formation of the contract should be amplified in the model procurement law; for example, the rights and obligations of the parties after the acceptance of a tender but before the contract came into existence should be dealt with. A further view was that the model procurement law should clarify procedural aspects of the formation of the contract (e.g., the hierarchy of contract documents).

107. It was stated that the model procurement law should not follow the approach adopted in one country where, when the lowest tenderer failed to conclude the contract or supply a performance guarantee, the procuring entity could try to persuade the next lowest tenderer to agree to the terms offered by the lowest tenderer (see A/CN.9/WG.V/WP.22, paragraph 199). It was observed that in such cases the procuring entity could contract with the next lowest tenderer upon the terms of its tender and call the tender guarantee supplied by the lowest tenderer, or claim from the lowest tenderer the difference between its tender price and the price of the next lowest tender.

108. A view was expressed that any requirement in the model procurement law that the procuring entity disclose or make public information relating to the tender proceedings should take into account laws in the country of the procuring entity relating to commercial confidentiality.

VIII. NEGOTIATION AND OTHER PROCEDURES IN NATIONAL PROCUREMENT LAWS

109. There was broad support for the view that the model procurement law need not deal in great detail with procurement by negotiation, for the following reasons: in contrast to the tendering method, which was *sui generis* and required specific rules, negotiation was an ordinary commercial activity; the procedures for negotiation were not amenable to regulation; negotiation gave rise to no significant legal issues except for those relating to the formation of the contract, which were satisfactorily dealt with by national law and international conventions.

110. Nevertheless, since basic rules relating to negotiation could be of help to developing countries desiring such rules, the Working Group requested the Secretariat to include general rules on negotiation in its first draft of the model procurement law. These rules should maintain to the greatest extent possible the freedom of the procuring entity to pursue its negotiations as it saw fit. The Working Group would then determine whether it was necessary to deal with negotiation in the model procurement law. It was also agreed that the rules should define the cases in which one could resort to negotiation rather than the tendering method.

111. A suggestion was made that the model procurement law should contain rules to prevent a procuring entity from avoiding the rules and procedures relating to tendering by deciding to engage in procurement by negotiation. For example, the procuring entity might be required to justify to a higher authority its decision to

engage in procurement by negotiation. A view was expressed, however, that it was not necessary to deal with this issue since it was an internal matter for States to deal with in the context of constraining public entities in the expenditure of public funds, and did not concern the relationship between procuring entities and contractors or suppliers participating in procurement proceedings.

112. With respect to the question of whether contractors or suppliers negotiating with the procuring entity should be required to disclose certain types of information (discussed in paragraph 209 of A/CN.9/WG.V/WP.22), a suggestion was made that the Secretariat review the reference to this issue in the *UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works* to determine whether and, if so, how the issue might usefully be dealt with in the model procurement law. An additional suggestion was to deal in the model procurement law with bribery and similar illegal practices by the procuring entity in connection with negotiations.

113. With respect to the methods of procurement referred to in paragraph 213 of A/CN.9/WG.V/WP.22, a view was expressed that competitive negotiation should be treated in the model procurement law as a form of tendering. It was generally agreed that the other methods should be treated in a much briefer and more general manner than the tendering method, mainly from the standpoint of when those other methods could be used.

IX. RIGHT OF RECOURSE BY AGGRIEVED PARTICIPANTS IN PROCUREMENT PROCEEDINGS

114. It was generally agreed that the model procurement law should provide a right of recourse for participants in procurement proceedings aggrieved by actions or decisions by the procuring entity contrary to the law. Such a right was regarded as an essential underpinning of mandatory rules of law, such as those to be contained in the model procurement law; it was also regarded as necessary in order to promote confidence in and the integrity of the procurement process.

115. It was agreed that the model procurement law should deal with the ability of a tenderer to seek recourse before administrative bodies, courts and arbitral tribunals. Suggestions were made with respect to other possibilities that might be taken into account. For example, it was noted that actions by public procuring entities might in some cases violate obligations of the State and that the Government of the State of an aggrieved tenderer might be able to protest to the Government of the State of the procuring entity. It was also noted that in some States certain administrative organs could challenge violations of the procurement laws pursuant to their obligation to oversee the proper functioning of the law, rather than on behalf of an aggrieved tenderer.

116. It was observed that the question of the forum where recourse could be sought depended upon the legal and administrative structures of States. It was therefore

agreed that the model procurement law should provide generally formulated alternatives from which a State could choose those that it wished to implement. It was further agreed that the commentary to the model procurement law should discuss the various possibilities in detail and should provide guidance to States in making that choice.

117. A view was expressed that the model procurement law should contain various alternative possibilities with respect to the issue of whether or not the commencement of recourse proceedings should interrupt the procurement proceedings. One opinion was that, as a rule, the procurement proceedings should not be interrupted, since an interruption would delay the procurement and could lead to disruptive tactics on the part of tenderers whose claims might not be well-founded.

118. According to another opinion, however, it was said that the right of recourse would lose much of its effectiveness if the procurement proceedings were allowed to continue despite a claim of irregularity. It was observed that the model procurement law could incorporate safeguards against abuses of the interruption of the procurement proceedings, e.g., by requiring the tenderer to supply a security to cover possible losses of the procuring entity if the claim was determined to be unfounded, by establishing strict time limits for the resolution of claims, and by requiring the tenderer to establish the existence of certain conditions to justify an interruption (e.g., that the interruption was necessary to prevent irreparable harm to the tenderer and that the interruption would not cause undue or irreparable harm to the procuring entity).

119. It was generally agreed that the model procurement law should outline the various types of remedies that could be given to aggrieved tenderers. It was stated that it would not be possible for the model procurement law to deal with the remedies in detail due to the differences that existed in national legal systems. It was agreed that the commentary to the model procurement law should discuss the various remedies and provide guidance with respect to the inclusion of various remedies by implementing States.

120. It was generally agreed that the remedies to be dealt with in the model procurement law should include requiring the recommencement of procurement proceedings, substituting the tender submitted by the aggrieved tenderer for the tender that was accepted by the procuring entity, and requiring the procuring entity to pay compensation to the aggrieved tenderer. A view was expressed that compensation should in this case be limited to the costs of the tenderer in preparing and submitting its tender; the tenderer should not be entitled to compensation for its lost profits since that would expose the procuring entity to claims for potentially large sums.

121. A view was expressed that the remedies available to a tenderer might be made to depend upon the nature of its claim. For example, if the claim was based on a procedural irregularity, it might be appropriate to require the procurement proceedings to be recommenced; if the claim was that the procuring entity had not appropriately applied the criteria for the decision as to which tender to accept,

and that the aggrieved tenderer's tender should have been accepted, it might be appropriate to enable the tenderer to recover compensation.

X. CONCLUDING DISCUSSION

122. It was generally agreed that the model procurement law should not be confined to international procurement; rather, it should be suitable for application both to domestic and to international procurement. Implementing States could decide whether to apply it to procurement in general or only to international procurement. It was also agreed that the model procurement law should take into account the particular needs and interests of foreign participants in procurement proceedings.

123. A view was expressed that the number of alternative versions of provisions in the model procurement law should be kept to a minimum. In that connection it was noted that the mandate of the Commission was to harmonize the law relating to international trade, rather than to perpetuate the existing disparities in national laws. Thus, the Working Group should endeavour to agree upon and formulate specific provisions reflecting the appropriate solutions to the issues addressed in order to assist States in improving their procurement laws or introducing new laws on a sound basis.

124. According to another view, it was important for the model procurement law to contain alternative versions of provisions dealing with various issues, particularly those that involved fundamental features of the legal and administrative systems of States, so that States could adopt versions that were compatible with those systems.

125. The Working Group requested the Secretariat to prepare a first draft of the model procurement law and an accompanying commentary, taking into account the discussions and decisions at the present session. It was generally agreed that the model procurement law should not attempt to be too detailed or set forth too many rules, since that would make it less acceptable to States.

126. It was observed by the Working Group that it would have been desirable to have had at the present session greater participation by developing countries. The hope was expressed that more developing countries would be able to contribute to the further stages of the work on the model procurement law.

127. It was noted that drafts of the model procurement law to be considered at sessions of the Working Group would be circulated to Governments as a matter of course, and a suggestion was made that developing countries that faced difficulties in sending delegations or observers to those sessions should send to the Secretariat their written comments on those drafts.

B. Procurement: report of the Secretary-General* (A/CN.9/WG.V/WP.22) [Original: English]

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*Working paper submitted to the Working Group on the New International Economic Order at its tenth session.

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INTRODUCTION

1. At its nineteenth session in 1986, the Commission had before it a note by the Secretariat (A/CN.9/277) setting forth possible topics in the context of the new international economic order that the Commission might take up upon the completion of its work on the *UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works*.¹ Among the conclusions of the note was a suggestion that the Commission should undertake work on procurement. The note proposed that, at least as an initial stage of that work, the Commission might engage in a study of the major issues arising in connection with procurement. Such a study would be valuable in informing Governments and government entities of relevant policy considerations in relation to procurement and would enable them to assess the adequacy of their procurement laws and practices. It would also help Governments in improving their procurement laws and practices or in formulating procurement laws where none presently exists. Furthermore, the study would assist in evaluating whether further work in the area of procurement was desirable and feasible and would serve as a basis for any further work decided upon. After considering the note by the Secretariat, the Commission decided to undertake work in the area of procurement as a matter of priority and entrusted this work to the Working Group on the New International Economic Order (A/41/17, para. 243).² It was noted at the twenty-first

session of the Commission that the Working Group might be expected at its present session to outline the nature of the work to be performed (A/43/17, para. 37).

2. In December, 1987, the UNCITRAL secretariat convened a group of experts on procurement, composed of individuals from various countries experienced in this field from the points of view of procuring entities and of contractors and suppliers, and representatives of international financing and other organizations. The group of experts assisted the secretariat in identifying and analyzing the significant issues in connection with procurement policies and practices.

3. The present report contains a study of procurement along the lines envisaged in the note by the Secretariat. In preparing the study the UNCITRAL secretariat consulted a number of sources, for example, guidelines and similar documents of global and regional lending institutions and of bilateral development funding agencies governing procurement with funds provided by them; procurement agreements, directives, practices and other texts formulated by intergovernmental economic and trade organizations; national procurement laws of a number of countries, selected so as to be representative of the major legal and economic systems of the world and of various levels of economic development; and actual tender documents issued in connection with procurement. The secretariat also consulted literature on procurement by academics and practitioners in the area.

4. The Working Group may wish to use the present report as a basis for its recommendation to the Commission as to what further work in the area of procurement should be undertaken, and as a basis for that work. In

¹United Nations publication, Sales No. E.87.V.10.

²Report of the United Nations Commission on International Trade Law on the work of its nineteenth session, *Official Records of the General Assembly, Forty-first Session, Supplement No. 17* (A/41/17), para. 243. Hereinafter references to reports of the Commission to the General Assembly will refer only to the document symbols of the relevant *Official Records of the General Assembly* (A/17).

particular, it may wish to propose to the Commission the formulation of a model procurement code in order to assist countries in evaluating their procurement laws and practices and in improving their procurement laws or establishing such laws where none presently exist. These suggestions are more fully discussed below in paragraphs 227 to 235.

I. PROCUREMENT AND PROCUREMENT LAW

A. Definition of "procurement"

5. In this study the term "procurement" refers to the systematized acquisition by an entity, on a commercial basis, of the items or services it needs in order to perform its functions or fulfil its objectives. Entities engaging in procurement include those in the public sector, such as ministries and other organs of the governmental administration, State enterprises (e.g., a telecommunications service) and State-owned independent enterprises (e.g., a State-owned airline or manufacturing enterprise), as well as enterprises in the private sector. The term covers the full range of items and services acquired by those entities, including, for example, industrial works (e.g., a hydro-electric plant; a pharmaceutical plant); civil works (e.g., a dam; a highway), buildings, equipment (e.g., a generator; motor vehicles), supplies (e.g., spare parts; furniture) and services (e.g., consultant services; insurance).

B. Procurement law

6. Procurement law which is the subject of this study is the body of legal rules regulating the procedures for procurement. More particularly, these rules regulate the procedures for selecting the contractor or supplier from which the works, goods or services are to be procured, for settling the price and other terms of the contract between the procuring entity and the contractor or supplier, and for entering into the contract by the parties. The rules also sometimes deal with the rights of recourse by participants in procurement proceedings who are aggrieved by actions or decisions of the procuring entity that are contrary to the applicable rules and procedures. While procurement is basically governed by national procurement laws, international procurement rules are becoming increasingly important.

1. National procurement laws

7. There exist in many countries laws, regulations and other legal norms (hereinafter collectively referred to as "procurement laws") regulating public procurement. The sources, form and nature of these laws are discussed more fully in paragraphs 30 to 38, below. In some countries procurement laws and procedures are subject to overriding rules of constitutional law and other legal rules (e.g., rules of natural justice or rules prohibiting government entities from acting arbitrarily or in bad faith). In addition, there have emerged in some countries bodies of decisional law from courts or administrative tribunals interpreting and applying the country's procurement laws.

8. Procurement laws in some developing countries that were formerly colonies were promulgated prior to independence by their former colonial powers. Some of these laws may in certain respects be inappropriate for post-independence conditions, or may take insufficient consideration of the needs of developing countries or of procuring entities in those countries.

2. International procurement rules

9. Many global and regional lending institutions and bilateral development funding agencies have established guidelines or other requirements governing procurement with funds provided by them. These institutions and agencies usually require proceedings for the procurement to be conducted in accordance with their guidelines or requirements, even if national procurement laws differ. Loans by international lending institutions and grants by some development funding agencies are made pursuant to agreements entered into between the institution or agency and the borrower or recipient country. In these agreements the borrower or recipient country usually undertakes to conduct proceedings for procurement with funds provided by the institution or agency in accordance with the institution's or agency's guidelines or requirements (see, also, paras. 38 and 54, below). However, some international lending institutions permit borrowing countries to conduct the procurement proceedings in accordance with national procurement laws in cases where there is likely to be little interest by foreign contractors or suppliers in participating in the proceedings, as long as the national procurement laws are acceptable to the institution.

10. In some cases, States are obligated to conform their procurement procedures to international agreements entered into by them or to rules issued by international institutions of which they are members. For example, several States and the European Economic Community (EEC) are parties to the Agreement on Government Procurement adopted in 1979 by the General Agreement on Tariffs and Trade (GATT).³ The Agreement provides an agreed framework of rights and obligations with respect to laws, regulations, procedures and practices regarding the procurement of products by governmental entities designated by each party to the agreement, when the procurement exceeds a stipulated value. Also, the Council of the EEC has adopted a series of directives dealing with the liberalization and the co-ordination of procedures for the procurement of works⁴ and of supplies⁵ over stipulated values by Governments, local authorities and entities subject to public law in member States of the EEC.

³GATT document MTN/NTM/W/211/Rev. 1. The Agreement entered into force on 1 January 1981.

⁴Council Directive 71/305 of 26 July 1971, *Official Journal of the European Communities* 1971, L 185/5.

⁵Council Directive 77/62 of 21 December 1976, *Official Journal of the European Communities* 1977, L 13/1, amended by Council Directive 80/767 of 22 July 1980, *Official Journal of the European Communities* 1980, L 215/1.

II. SCOPE OF STUDY

11. The present study focuses on national procurement laws governing the procurement of works and goods by entities in the public sector. Reference will also be made to requirements or guidelines of international lending institutions and of bilateral development funding agencies, where relevant. In terms of value, public sector procurement is substantial in all countries, and accounts for the greatest proportion of all procurement in a number of countries. Although private sector procurement is not covered by the study, private enterprises might nevertheless derive benefit from it since private and public sector enterprises and entities will often have similar overall procurement policy objectives (e.g., economy and efficiency; see section III, below), and will take into account similar considerations in structuring their procurement procedures.

12. This study covers laws governing the procurement of works and goods, but does not cover laws governing the procurement of consultants or other services. Under national procurement laws the procurement of works and the procurement of goods are generally subject to the same or similar procedures, in which price is usually a major factor. The procurement of consultants and other services, however, is subject to different considerations. Instead of price, the qualities of the providers of the services and of their proposals are of prime importance. Procurement laws in some countries treat the procurement of services separately from the procurement of works and goods, and laws in other countries do not deal with the procurement of services at all. Nevertheless, procurement laws covering the procurement of works and goods often also cover services that are incidental to the works and goods (e.g., transport; insurance).

13. Research and consultations by the secretariat have revealed that the procurement of consultant services is of great importance to economic development and industrialization, and it has been suggested that the Commission could make a valuable contribution by undertaking work in that area. However, due to the considerations discussed above, an effort to deal at the present stage with the procurement of consultant services would require a separate study of a depth comparable to the present study of the procurement of works and goods, as well as commensurate attention by the Working Group and the Commission. The judgment of the secretariat is that it would be preferable and more feasible at the present stage for the Commission to devote attention to the procurement of works and goods. After completing its work in that area, the Commission could, if it wished, turn to the procurement of consultant services.

14. The present study covers public procurement in general, and is not restricted to international procurement. It is not possible to draw a clear delineation between "international" procurement and "domestic" procurement. Rather, one can only identify situations in which participation by foreign entities in procurement proceedings is anticipated or sought. Until tenders or offers have been received, it will not be known whether or not foreign

entities will participate in individual procurement proceedings. National procurement laws normally do not have separate sets of rules or procedures governing international procurement on the one hand and domestic procurement on the other. Instead, they typically establish a single procedural framework by which they seek to attract participation by competent contractors and suppliers in general—whether foreign or domestic. Many national procurement laws include certain procedural details to facilitate foreign participation in cases where such participation is anticipated or sought (e.g., where the value of the works or goods to be procured exceeds a specified amount), or leave it to the procuring entity to incorporate into the procedures details of that nature when it believes that foreign participation would be desirable. This is true even in cases where preferences are given to procurement from domestic sources (see, also, para. 25, below).

III. POSSIBLE OBJECTIVES OF PROCUREMENT POLICIES

A. Possible national procurement policy objectives

15. National procurement laws and procedures are usually designed to advance various policy objectives. The possible objectives are to a large degree interrelated and in some cases come into conflict with one another. The task of drafters of procurement laws is therefore to identify the objectives sought to be achieved, to establish priorities with respect to those objectives, and to structure the procurement laws and procedures so as to maximize the prospects of achieving their objectives and to minimize the conflicts between them. Possible procurement policy objectives are discussed in the following paragraphs.

1. *Economy and efficiency in procurement*

16. Economy and efficiency in expenditures of public funds are important to all countries; but they are particularly important to developing countries where public funds are scarce. Economy refers to procurement of an item of the desired quality at the most advantageous price and upon the most advantageous contractual terms. It is promoted by procedures that provide a favourable climate for participation in the procurement process by competent contractors or suppliers, and that provide incentives to them to offer their most advantageous quality, price and other terms.

17. In many cases, economy is best achieved by means of procedures that promote competition among contractors or suppliers. Competition provides incentives to contractors or suppliers to offer their most advantageous quality, price and other terms, and it can encourage them to adopt efficient or innovative technologies or production methods in order to do so.

18. In some cases, economy will be maximized by allowing all interested contractors and suppliers to compete

for the supply of the works or goods. In other cases, it may be preferable for the competitive field to be restricted, e.g., to keep the numbers of tenders or offers with which the procuring entity must deal to a manageable level, or to establish a core of contractors or suppliers that are familiar with the needs of the procuring entity and the procurement procedures followed by it.

19. Economy in procurement can often be promoted through participation by foreign contractors or suppliers in procurement proceedings. Not only can foreign participation expand the competitive base, it can also lead to the acquisition by the procuring entity and its country of technologies that are not available locally. Foreign participation in procurement proceedings may be necessary where there exist no domestic sources for certain works or goods needed by the procuring entity. A country desiring to achieve the benefits of foreign participation should ensure that its procurement laws and procedures are conducive to such participation, or at least do not hinder it.

20. Efficiency refers to procurement of the desired item within a reasonable amount of time, with minimal administrative burdens and at reasonable costs both to the procuring entity and to participating contractors or suppliers. In addition to the losses that can accrue directly to the procuring entity from inefficient procurement procedures (e.g., due to delayed procurement or high administrative costs), excessively costly and burdensome procedures could lead contractors or suppliers to offer higher prices than they would be able to offer if the procedures were more efficient. Some competent contractors or suppliers could even be discouraged from participating altogether in procurement proceedings where the procedures are excessively burdensome or costly.

2. Promotion of integrity of and confidence in procurement process

21. Another important objective of procurement policies is to promote the integrity of and confidence in the procurement process. Thus, procurement laws often contain provisions designed to ensure fair treatment of contractors and suppliers participating in procurement proceedings, to reduce or discourage unintentional or intentional abuses of the procurement process by persons administering it or by contractors or suppliers participating in it, and to ensure that procurement decisions are taken on a proper basis.

22. Promoting the integrity of the procurement process will help to promote public confidence in the process, and in the public sector in general. Confidence in the procurement process on the part of competent contractors and suppliers is necessary for their participation in procurement proceedings, and thus to achieve economy in procurement. Contractors and suppliers, particularly foreign ones, will often refrain from spending the time and sometimes substantial sums of money to participate in procurement proceedings unless they are confident that they will be treated fairly and that their tenders or offers have a reasonable chance of being accepted. Those that do participate in procurement proceedings in which they do not have that confidence have a tendency to increase their

prices to cover the higher risks and costs of participation. Ensuring that procurement proceedings are run on a proper basis could reduce or eliminate that tendency and result in more favourable prices to the procuring entity.

3. Specific economic and social objectives

23. In many countries procurement laws and procedures are used as a vehicle to advance specific economic and social objectives in addition to those already mentioned. Procurement procedures in these countries contain features designed, for example, to stimulate national economic development, encourage the development of indigenous industries and improve the competitiveness and profitability of those industries, develop national economic self-reliance, promote the transfer of technology, improve the country's balance of trade, conserve foreign exchange, or promote the development of certain economic sectors (e.g., engineering; research and development), groups (e.g., small businesses; artisans) or regions (e.g., economically disadvantaged regions) within the country. These features typically involve preferences for procurement from domestic contractors or suppliers or those from the economic sectors or regions which the procurement policies seek to benefit, or for the procurement of domestically-produced works or goods, as well as other types of advantages given to those sources in the procurement process (see paras. 145 and 182 to 188, below).

24. The economic and social objectives sought to be promoted by such provisions are important matters of policy in a number of countries, both developed and developing. Indeed, various provisions of that nature are contained in the procurement laws of countries of virtually every level of economic development. These objectives, especially the development of indigenous industries and of national economic self-reliance, are of particular importance to developing countries. However, the procurement law features used to advance those objectives restrict competition and could in some cases result in the procuring entity having to pay higher prices or to settle for a lower level of quality, and thus conflict with the objective of economy in procurement. Nevertheless, these consequences are often regarded by Governments as legitimate costs of pursuing the desired objectives. It is for each country to determine the appropriate balance to be maintained between economy and efficiency and other economic and social objectives.

25. It is not necessarily inconsistent for national procurement laws to contain some features designed to promote foreign participation in procurement proceedings and other features, such as preferences for procurement from domestic contractors or suppliers, designed to promote the development of indigenous industries and to achieve similar objectives. Indeed, this may be a desirable combination in many cases. It would enable procuring entities to take advantage of participation by foreign contractors or suppliers when their tenders or offers are so superior to tenders or offers from domestic sources that they outweigh the benefits of procuring from domestic sources.

4. *Transparency of procurement laws and procedures*

26. Transparency of procurement laws and procedures will help to achieve various of the policy objectives already mentioned. Transparent laws are those in which the rules and procedures to be followed by the procuring entity and by contractors and suppliers participating in the procurement proceedings are fully disclosed, particularly to such participants. Transparent procedures are those which enable a participant to ascertain what procedures have been followed by the procuring entity and the basis of decisions taken by the procuring entity.

27. Transparent procurement laws and procedures create predictability, enabling contractors and suppliers to calculate the costs and risks of their participation in procurement proceedings and thus to offer their most economical prices. They also help to guard against arbitrary or improper actions or decisions by the procuring entity or its officials and thus help to promote confidence in the procurement process. Transparency of procurement laws and procedures is of particular importance where foreign participation in procurement is sought, since foreign contractors and suppliers may be unfamiliar with a country's procurement practices.

B. Policy objectives of international lending institutions, bilateral development funding agencies and international trade and economic institutions

28. Rules formulated by international lending institutions, bilateral development funding agencies and international trade and economic institutions are designed to advance particular policy objectives of those institutions and agencies, which in some respects may coincide with policy objectives of their individual borrower, recipient or member countries, but in other respects may differ from those objectives. Guidelines and rules of international lending institutions often seek to promote economy and efficiency in procurement with funds provided by them. They also often seek to ensure that contractors and suppliers from countries that are members of the institutions have an opportunity to compete on an equal basis with contractors or suppliers from the borrowing country in proceedings for procurement with funds provided by the institutions. In addition, they frequently seek to promote the development of the economies of borrower countries and of industries in those countries. Bilateral development funding agencies, too, seek to promote economic and industrial development in recipient countries. It is also often a strong policy of those agencies that procurement with funds provided by them should be from contractors or suppliers from their countries, or at least that those contractors or suppliers should have an opportunity to compete in the procurement.

29. With respect to the policy objectives of international trade and economic institutions, the GATT Agreement on Government Procurement (see para. 10, above) seeks to promote freer trade by eliminating discrimination in procurement by governmental procuring entities from one party to the Agreement against contractors or suppliers

from other parties to the Agreement, both in the form of express discriminatory practices and in the form of procedures that *de facto* discriminate against those contractors or suppliers. It also seeks to address the special needs of developing countries. The directives of the EEC (see para. 10, above) seek to promote the freedom of movement of goods, the right of establishment and the right to perform services within member countries and competition within those countries in the area of public works and supply contracts by liberalizing and co-ordinating the procedures for procurement in connection with those contracts.

IV. MAIN FEATURES OF NATIONAL PROCUREMENT LAWS AND DISCUSSION OF THESE FEATURES IN CONTEXT OF POSSIBLE OBJECTIVES OF PROCUREMENT POLICIES

A. Sources, form and nature of national procurement laws

30. The sources, form and nature of national procurement laws are generally influenced by such factors as the legal and constitutional system of the country concerned, its legislative and administrative practices and traditions, and the size and complexity of its public administration. Thus, the sources, form and nature of national procurement laws throughout the world are by no means uniform. Nevertheless, it is possible to identify certain patterns, as discussed in the following paragraphs.

31. In many countries there exists one or more legislative texts governing procurement. Depending upon the country, the text may be in the form, for example, of a statute emanating from the parliament or a decree emanating from the Government or head of State. In some countries there exists a single legislative text setting forth procurement procedures. In other countries, particularly those with large and complex administrative structures, there exist separate legislative texts covering procurement by different elements of the Government or public sector (e.g., defence procurement; civilian procurement).

32. In some countries the legislative text or texts contain all of the country's procurement laws. In other countries, the legislative texts set forth a basic legal framework with respect to procurement procedures that is implemented by detailed regulations issued by administrative authorities. The procurement laws established by legislative texts or administrative regulations may be further supplemented by rules contained in internal memoranda and circulars within each procuring entity. In some countries, there exists no legislative text and the procurement laws are contained only in administrative regulations.

33. Administrative regulations concerning procurement are, in some countries, issued by a governmental authority whose central function is to administer the procurement laws or to supervise procurement in the country, such as a national procurement board (see paras. 43 to 50, below). In other countries, the administrative regulations are

issued by the ministries or other governmental authorities responsible for financial or commercial matters. In still others, regulations are issued by individual ministries or authorities that engage in procurement or under whose auspices procurement is engaged in.

34. The technique of establishing a basic procedural framework by means of a legislative text and implementing that framework by means of more detailed administrative regulations may present certain advantages in some countries. For example, it may be an efficient division of law-making functions for the legislative organ to set forth a basic text reflecting the underlying policies and objectives relating to procurement, and for a specialist administrative organ, composed of persons with experience in the field of procurement, to implement that text by detailed regulations that reflect the practical aspects of procurement. In addition, it may become desirable from time to time to change certain details of procurement procedures, and it may be easier to do so by amending administrative regulations than by amending a legislative text.

35. The procurement laws discussed in the foregoing paragraphs are normally binding both on the procuring entity on the one hand and on contractors and suppliers participating in procurement proceedings on the other hand, and create mutual legal obligations of those parties towards each other. The laws are usually mandatory, in the sense that the procuring entity and participating contractors or suppliers cannot waive or depart from them by agreement. In general, contractors and suppliers wishing to participate in procurement must do so in accordance with procurement laws of the country of the procuring entity.

36. Some countries do not have laws governing procurement in the sense described above. The underlying principle in those countries is that the Government and public entities should be able to contract with other parties through whatever procedures and upon whatever terms they deem appropriate. However, there sometimes exist in those countries, either for the governmental administration as a whole or specifically for individual governmental or public entities, rules and regulations of internal management that officials of procuring entities must observe in performing their procurement functions. In general, those internal rules and regulations do not create obligations towards or confer rights on contractors or suppliers participating in procurement proceedings. In many cases the internal rules and regulations are not readily available, or are not available at all, to contractors or suppliers. In the case of a violation of an internal rule or regulation by a procuring entity, a contractor or supplier that is aware of the rule or regulation might be able to bring the violation to the attention of the procuring entity or of a supervisory authority, which could in some cases result in a rectification of the violation or in disciplinary measures being taken against the official responsible for the violation. However, the contractor or supplier has no legal right to redress for the violation.

37. Establishing a binding and mandatory legal framework for the conduct of public procurement can help to

create predictability and confidence in the procurement process, thus promoting the policy objectives mentioned in paragraphs 16 to 22, above. Transparency of procurement laws is promoted when the laws are published and kept up to date and made available to potential participants in procurement procedures.

38. The rules and procedures established by national procurement laws may differ from those which the country is bound to apply pursuant to its international obligations (see paras. 9 and 10, above). In order to avoid a legal conflict between national procurement laws and those international obligations, and to establish the primacy of the international obligations, the procurement laws of some countries contain a general provision to the effect that international obligations with respect to procurement that are binding on the country prevail over the country's procurement laws.

B. Scope of national procurement laws

1. Types of procuring entities covered by national procurement laws

39. National procurement laws usually apply only to procurement by entities in the public sector. Thus, in most countries, private enterprises generally have much greater freedom with respect to the procedures that they follow for their own procurement. However, some national procurement laws cover procurement by private enterprises in certain limited situations, e.g., in cases of procurement by private enterprises that participate in joint ventures or other associations with public enterprises or that receive government subsidies for work in connection with which the procurement is engaged in, or where the Government of the procuring entity provides a credit or a guarantee with respect to the procurement.

40. National procurement laws usually apply to procurement by ministries, departments and agencies of the central Government. Most procurement laws also apply to procurement by State-owned enterprises, although in some countries those enterprises are allowed to establish their own procurement rules and procedures.

41. In many countries, the procurement laws cover procurement by regional and local governments and authorities; in other countries those governments and authorities follow their own rules and procedures. In countries with federal systems, units of the federation (e.g., states, provinces) usually have their own procurement laws governing procurement carried out by them.

2. Types of procurement covered by national procurement laws

42. National procurement laws typically apply to the procurement of both works and goods. Some procurement laws apply only to the procurement of works and goods over a stipulated value. Below that value the procuring entity may have the freedom to follow whatever procedures it considers appropriate for the procurement.

Procurement laws following this approach sometimes contain provisions designed to prevent the procuring entity from dividing the procurement into several individual contracts, each below the stipulated value, in order to avoid the application of the procurement laws.

C. Administrative control over procurement laws and procedures

1. Governmental bodies and bodies within procuring entities

43. There exists in many countries a centralized governmental authority with responsibility over procurement by the public sector and the administration of the procurement laws. In some countries this responsibility is vested in a particular ministry or department, such as the ministry of planning, the ministry of finance, the ministry of foreign trade, or in the financial controller. In a number of other countries, an interministerial or interdepartmental body—hereinafter referred to as a national procurement board—performs this role.

44. Typically, a national procurement board is composed of the heads of various relevant ministries or departments or their designees, (e.g., those mentioned in the previous paragraph, the ministries of public works, labour, industry, and justice, and the central bank). In some cases a representative of the head of Government is also a member of the board.

45. The specific functions of national procurement boards vary from country to country. The functions of most boards fall within the following categories.

46. *Formulation and development of procurement laws.* This may include formulating and amending procurement laws, monitoring implementation of procurement laws and making recommendations for their improvement, and issuing interpretations of those laws.

47. *Rationalization and standardization of procurement.* This may include co-ordinating procurement by government entities and State-owned enterprises; serving as a centralized procuring entity for governmental departments; and preparing standardized tender documents, specifications and conditions of contract.

48. *Monitoring procurement and the functioning of procurement laws from the standpoint of broader government policies.* This may include examining the impact of procurement on the national economy, rendering advice on the effect of particular procurements on prices and other economic factors, and verifying that a particular procurement falls within the programmes and policies of the Government.

49. *Participating in or exercising supervisory authority over individual procurements by public entities.* This may include examination of tender documents issued by a procuring entity and the procedures followed by the entity to verify their conformity with the procurement laws;

soliciting and opening tenders for a procuring entity; rendering advice to a procuring entity on tenders received by the entity; approving of a decision of a procuring entity to accept a tender or offer; examining, evaluating and comparing tenders and deciding upon the acceptance or rejection of tenders; and auditing expenditures of funds in connection with the procurement.

50. *Handling disputes arising in connection with procurement.* This may include adjudicating claims by contractors or suppliers that have been aggrieved as a result of a failure of the procuring entity to comply with the procurement laws or imposing sanctions on contractors or suppliers for violations of the procurement laws.

51. In some countries, regional or local governmental units have their own procurement boards. Typically, the composition of these boards is, like that of the national procurement board, interministerial or interdepartmental, and the boards have functions in relation to procurement carried out by those governmental units comparable to the functions of the national procurement board. Often, however, procurement by regional or local governmental units in excess of a certain value is placed under the jurisdiction of the national procurement board, rather than of the regional or local board.

52. It is common in many countries for each ministry, department, State-owned enterprise and other procuring entity to have its own internal body or bodies to exercise functions with respect to procurement engaged in by those entities. These functions often include, for example, soliciting tenders or offers; opening, examining, evaluating and comparing tenders; rendering advice to the competent decision-making authority as to the acceptance or rejection of tenders; deciding upon the acceptance or rejection of tenders; rendering advice as to the overall procurement policy of the ministry, department, enterprise or other procuring entity concerned.

53. A system of administrative control over procurement laws and procedures and of checks and balances can help ensure the economical, efficient and fair functioning of the procurement process. It is advantageous in many cases for the body exercising control to be independent of the procuring entity, or at least independent of the section and personnel of the procuring entity that carry out the procurement. A control mechanism should itself be structured with the objectives of economy and efficiency in mind, since mechanisms that are excessively costly or burdensome to either the procuring entity or to participants in procurement procedures, or that result in undue delays in procurement, will be counterproductive. In addition, excessive control over decision-making by officials who carry out the procurement procedures could in some cases stifle their ability to act effectively.

2. Supervisory and other functions performed by international lending institutions

54. It is useful to mention in the present context the supervisory and other functions performed by international

lending institutions in respect of procurement carried out with funds provided by them. For example, many of these institutions review the procurement procedures proposed to be followed by the procuring entity and the documents to be used by it to ensure that the procurement is carried out in accordance with the institution's guidelines or requirements. The institution may require the procuring entity to modify non-conforming procedures or documents. Many institutions also review the procuring entity's examination, evaluation and comparison of tenders and its intended decision to accept a particular tender or offer to ensure consistency with the institution's guidelines or requirements. The ultimate sanction for non-compliance with the guidelines or requirements of many institutions is withholding of the borrowed funds or cancellation of the loan agreement.

55. Some institutions perform other functions in relation to procurement, such as providing for advertisement of the solicitation of tenders, approving a margin of preference to be granted to domestic tenderers (see paras. 185 to 187, below) and approving the use of procurement methods other than open competitive tendering.

D. Methods of procurement

56. Two main methods of procurement are provided for in national procurement laws—tendering and negotiation. Within each of these methods there exist certain variants. In addition, some procurement laws provide for methods that do not fit easily within either category, such as competitive negotiation, "shopping" and single-source procurement, and "jury" or "concours" methods. The essential features of the various methods will be considered in the following paragraphs.

1. Tendering

57. The tendering method is characterized by competition among contractors and suppliers within structured, formal procedures. The following basic features are typical of this method. The procuring entity solicits tenders from a range of contractors or suppliers. Tenderers must formulate their tenders on the basis of technical specifications and contractual terms and conditions specified by the procuring entity in tender documents made available by it to tenderers. Tenders are examined, evaluated and compared and the decision of which tender to accept is made in accordance with essentially objective criteria and procedures that are set forth in the procurement laws or in the tender documents.

58. There exist two basic systems of the tendering method: open tendering and restricted tendering. In open tendering the procuring entity solicits tenders by means of a widely advertised invitation to tender directed to all contractors or suppliers wishing to participate in the tender proceedings. In restricted tendering the procuring entity solicits tenders only from certain contractors or suppliers selected by it.

2. Negotiation

59. Under the second main method of procurement, the procuring entity engages in negotiations with one or more contractors or suppliers with a view to entering into a contract with one of them. In contrast to the tendering method, procurement by negotiation is characterized by a high degree of flexibility as to the procedures involved and discretion on the part of the procuring entity. Procurement laws that deal with procurement by negotiation establish few rules and procedures governing the process by which the parties negotiate and conclude their contract. Many procurement laws allow procurement to be conducted by negotiation only in specifically defined, exceptional cases. In countries that do not have procurement laws, most or all procurement is done by negotiation.

3. Other methods of procurement

(a) Competitive negotiation

60. It is sometimes believed to be difficult to use the tendering method in cases where the procuring entity cannot formulate its requirements as to the works or goods to be procured in terms of sufficiently detailed and precise technical specifications or contractual terms and conditions to permit tenders to be formulated, evaluated and compared uniformly on the basis of those specifications, terms and conditions. An example may be a case where the procuring entity seeks to procure a piece of non-standardized, technologically-advanced equipment for which only general performance criteria can be set forth, and relies on contractors or suppliers to propose designs and develop technologies to meet those criteria. Procurement laws in some countries provide for a method of procurement to be used in such cases that combines certain basic features of the tendering and negotiation methods. In at least one national procurement law this method is referred to as "competitive negotiation". In one developed country, where most procurement by the Government is of complex equipment involving advanced technologies, a major portion of government procurement is conducted using this method.

61. When this method of procurement is used, the procuring entity solicits proposals from a limited number of contractors or suppliers believed to have the appropriate qualifications and expertise. It also sets forth general criteria that proposals are requested to meet (e.g., general performance objectives; time for delivery). The procuring entity identifies the proposals that appear to meet those criteria, and engages in discussions with the author of each such proposal in order to refine and improve upon the proposal to the point where it is satisfactory to the procuring entity. The price of each proposal does not enter into those discussions. When the proposals have been finalized, the purchasing entity requests the author of each proposal to submit a firm price offer in respect of its proposal. The procuring entity selects the proposal of the contractor or

supplier offering the lowest price or lowest evaluated price (see para. 171, below).⁶

(b) *"Shopping"; single-source procurement*

62. Some national procurement laws provide particular procedures for the procurement of standardized or mass-produced items of relatively low value, the prices of which are essentially non-negotiable. In these procedures, sometimes referred to as "shopping", the procuring entity solicits quotations from a small number of suppliers and purchases the item from the supplier that quotes the lowest price. Procurement laws that provide for this procedure usually set forth a very few basic rules to govern it. For example, some procurement laws require the procuring entity to solicit a certain number of quotations; others require generally that a sufficient number of quotations be solicited to ensure competition. Some procurement laws authorize the procuring entity to approach a single source to obtain the works or goods in limited circumstances (see para. 68, below).

(c) *Special methods for procurement of items involving basic research, or aesthetic or artistic aspects ("jury" or "concours" methods)*

63. There exist in some procurement laws particular procedures specially designed for procurement involving basic technical or scientific research, or involving essentially aesthetic or artistic aspects. These procedures typically function as follows. Proposals are solicited by the procuring entity. The proposals are evaluated by a jury composed of experts in the relevant field according to the technical, aesthetic or artistic merit (as relevant) of the proposals. In some countries adopting such methods a contract is concluded with the author of the proposal selected by the jury; in other countries the jury merely recommends a particular proposal to the procuring entity. Procurement laws that provide for this method set forth few rules to govern it; the applicable procedures are usually established by the procuring entity.

4. *Circumstances in which particular methods of procurement or their variants may be used*

64. National procurement laws often provide for two or more methods of procurement or variants thereof. In a typical basic pattern, the procurement laws provide for both open and restricted tendering and for procurement by negotiation. Many national procurement laws contain refinements or expansions of this basic pattern. For example, in some countries the procurement laws provide for more than one variant of the tendering method (e.g., one variant in which the tender offering the lowest tender price must be accepted and another in which the procuring entity may take into account criteria in addition to the tender price)

and for both open and restricted tendering in respect of each variant. Some procurement laws also provide for one or more of the additional methods of procurement described in the preceding sub-sections.

65. Some national procurement laws leave to the discretion of the procuring entity the choice of which method to use for a particular procurement. However, once the procuring entity chooses a particular method, it must conform to the rules and procedures set forth in the procurement law with respect to that method. Other national procurement laws set forth certain criteria relative to the choice of the method to be used. Sometimes these criteria simply serve to guide the procuring entity in the exercise of its discretion. In other cases, however, the criteria are exclusive and mandatory and the procuring entity must make its choice on the basis of those criteria alone. Where more than one variant of the tendering method is provided for, procuring entities usually have the discretion to choose the variant most appropriate for a particular procurement.

66. Tendering is the preferred method of procurement in many procurement laws. This reflects a policy determination that procurement policy objectives (e.g., economy and efficiency) are best promoted by the formal competitive procedures of the tendering method. In at least one country tendering and competitive negotiation are equally-preferred methods and the procuring entity may use whichever method it considers to be appropriate.

67. Within the tendering method, some procurement laws prefer open tendering, and permit the use of restricted tendering only in limited cases, such as when the item to be procured is available only from a limited class of contractors or suppliers; when, due to the existence of a limited market, open tendering will not facilitate competition; when an international agreement (e.g., with a bilateral development funding agency) requires the item to be procured from a contractor or supplier from a particular country or region; when the works or goods to be procured are below a certain value; or when participation in the procurement proceedings must be limited to certain contractors or suppliers in order to promote or preserve their research or production capacity so as to be available in cases of national need or emergency or to prevent other contractors or suppliers from gaining a monopoly. Some procurement laws require the procuring entity to obtain the approval of a higher supervisory authority for the use of restricted tendering. In other countries, the decision of whether to use open or restricted tendering is left to the discretion of the procuring entity.

68. Many national procurement laws permit the negotiation method to be used only in exceptional cases. Procurement laws typically specify some or all of the following situations: where the value of the works or goods to be procured is below a certain value (reflecting a policy decision that in respect of those works and goods, procurement policy objectives are less compelling than with respect to works or goods over that value and that the cost and time involved in administering more formal and competitive tendering procedures are not justified); where

⁶In some countries a procedure similar to this is followed for certain types of procurement, except that, in addition to the technical aspects of each proposal, price is also discussed with the contractor or supplier. Such a procedure is regarded in this study as a variant of the negotiation method.

the works or goods are available only from one or very few sources (e.g., due to patent or other proprietary rights); where there is a need for confidentiality or secrecy in respect of the procurement making more widespread publication of the procuring entity's procurement needs inappropriate; in cases of national emergency or other cases of urgency, where there is no time to engage in more time-consuming tendering procedures; where the procurement is for spare parts which it is necessary or desirable to procure from the original supplier of the goods or works; where uncompleted works are to be completed, or existing works are to be extended, and it is desirable for the work to be done by the original contractor; where tendering procedures have not been successful (some procurement laws require two attempts at tendering before negotiation can be resorted to); where tendering procedures would not be appropriate (e.g., where the contract involves research and development); where it is necessary to maintain particular sources of supply or their capacity to ensure their availability in cases of national need or emergency. Some procurement laws require the procuring entity to obtain approval of a higher supervisory authority for the use of the negotiation method. Procurement laws that provide for procurement by "shopping" and for single-source procurement restrict the use of those methods to situations generally similar to those that justify the use of the negotiation method.

69. Under some procurement laws, as an exception to a general requirement to use the tendering method, the procuring entity is permitted to procure from certain categories of domestic contractors or suppliers (e.g., artisans, production co-operatives, agricultural producers, small businesses owned by minority groups) by the negotiation method or by the single-source procurement method. The purpose of such provisions is to promote the growth and development of the categories of contractors or suppliers to which the provisions apply.

70. In practice, there appears to be some correlation between the level of a country's economic development and the methods of procurement used by its public sector. Tendering is the method more frequently used for procurement in many developing countries; open tendering is often used. In developed countries, less competitive methods (e.g., restricted tendering and methods involving negotiation) seem to predominate. These tendencies are probably due in part to the fact that a high proportion of public procurement in developed countries involves technologically advanced works or goods, for which tendering may be less well-suited than other methods, while the proportion of that type of procurement in developing countries is significantly less. In addition, in several developed countries, a high proportion of public sector procurement is of items for military application, which are usually procured through negotiation or similar methods because of their technologically advanced nature, the limited number of military contractors or suppliers, the need for secrecy and other considerations of national security. In developing countries with broad public sectors, that type of procurement constitutes a proportionally smaller component of total public sector procurement.

5. Methods of procurement and their variants in context of promotion of procurement policy objectives

71. In many cases, economy and efficiency in procurement are best promoted through competition among a range of contractors and suppliers (see paras. 17 to 19, above). The formal procedures and the objectivity and predictability that characterize the tendering method generally provide optimal conditions for this competition. These characteristics also increase the prospects of fair and equal treatment of participants in procurement proceedings and minimize the scope for improprieties or abuse by procuring entities, thus promoting the integrity of and confidence in the procurement process. It is therefore desirable for national procurement laws to include tendering among the methods of procurement provided for in those laws.

72. Although open tendering will maximize the competitive base, considerations of efficiency may make it desirable for procurement laws to enable restricted tendering to be used in appropriate cases. Open tendering may produce a large number of tenders—some from contractors or suppliers that may not be qualified to supply the works or goods—that the procuring entity will have to examine, evaluate and compare. This can be costly and time-consuming. In addition, competent contractors or suppliers are sometimes deterred from participating in open tendering, particularly for the procurement of high value works or goods. Firstly, the statistical odds of their tenders being accepted are reduced. Secondly, they face the risk that their tenders will be undercut by an unrealistically low price offered by an unqualified or disreputable contractor or supplier. For these reasons, it may be useful for national procurement laws to provide for both open and restricted tendering, and to contain rules or guidelines as to when restricted tendering may be used.

73. Restricted tendering procedures can be designed so as to promote competition and economy as much as possible. For example, the procurement laws could require procuring entities to solicit tenders from a minimum number of contractors or suppliers, or to solicit a sufficient number of tenders to ensure effective competition.

74. Since the circumstances of some types of procurement may make it difficult or inappropriate to use the tendering method, or make it more appropriate to use some other method, it is often useful for procurement laws also to provide for methods such as those discussed in paragraphs 59 to 63, above. It is desirable for procurement laws to establish rules or guidelines as to when the various methods provided for may be used, particularly where tendering is a preferred method of procurement, so that less formal and competitive methods would be used only when appropriate, and would not be used to the detriment of procurement policy objectives.

E. Tendering procedures in national procurement laws

75. This section discusses specific features of tendering procedures that are typically dealt with in national

procurement laws. It should be noted that certain of these features (e.g., provisions relating to formal eligibility requirements (sub-section 1, below), lists of approved contractors and suppliers (sub-section 4, below) and approval and formation of the contract (sub-section 16, below)) also often apply in respect of other methods of procurement.

1. *Formal eligibility requirements*

(a) *Affirmative and exclusionary requirements*

76. Many national procurement laws establish formal eligibility requirements for participation by contractors and suppliers in procurement proceedings. Eligibility requirements found in a number of national procurement laws include the following: that a participant have the legal capacity to enter into a contract; that a participant be registered on a commercial or trade register in the country of the procuring entity; that a foreign contractor or supplier be associated with a domestic enterprise in the form of a joint venture or similar association (requirements such as these seek to promote the development of domestic industries and the transfer of technology); and that a foreign contractor or supplier have a local agent (the policy of this requirement is to ensure a local presence and accountability in the event of problems concerning the performance of the contract).

77. National procurement laws often disqualify contractors or suppliers from participating in procurement proceedings on various grounds. These grounds include the following: defective performance of a previous procurement contract or non-performance of such a contract without justification; fraud, obstruction or dishonesty in connection with previous procurement proceedings or the performance of a previous contract (e.g., bribery, collusion); conviction of a serious crime, or of a crime in relation to the State. In addition, some procurement laws disqualify bankrupts or insolvents, debtors to the State who are in arrears in their payments and delinquents with respect to tax and social security payments (some procurement laws permit such debtors or delinquents to participate if they furnish a security to cover their obligations) and civil servants (some procurement laws restrict this exclusion to civil servants involved in the procurement proceedings).

78. In some countries participation in certain procurement proceedings is restricted to domestic contractors or suppliers. Such restrictions are discussed below in paragraphs 183 and 184.

79. In some cases participation in procurement proceedings is restricted to contractors or suppliers from certain countries pursuant to an international agreement, such as an agreement with an international lending institution that requires procurement with funds provided by it to be open only to participants from member States of the institution, an agreement with a national development funding agency requiring procurement to be from sources from the country of the agency, and an agreement pertaining to a regional

or international project (e.g., an agreement among countries of a particular region for the joint development and production of an aircraft).

(b) *Certification of formal eligibility*

80. Procurement laws that establish formal eligibility requirements usually require participants to submit with their tenders appropriate evidence that they meet those requirements. Some procurement laws require certifications to that effect to be obtained from relevant governmental officials or institutions in the country of the procuring entity (e.g., commercial or trade registries, courts, tax authorities, police).

(c) *Formal eligibility requirements in context of procurement policy objectives*

81. Formal eligibility requirements are imposed to protect or promote certain interests of the procuring entity or of the State. However, since the effect of these requirements is to preclude certain contractors or suppliers, or categories thereof, from participating in procurement proceedings, they have the potential of reducing the competitive field and thus inhibiting economy in procurement. This consequence can be reduced by limiting such requirements to those that are necessary to protect or promote clearly identified relevant interests where the importance of the interests to be protected outweighs the potential disadvantages of such requirements. In addition, formulating the requirements as clearly and explicitly as possible would help to avoid uncertainty and would reduce the possibility of misapplication or abuse by officials of procuring entities. Eligibility requirements that are vague present the possibility of being improperly applied to favour or exclude particular contractors or suppliers.

82. If participation in procurement proceedings is restricted to contractors and suppliers that are registered on a commercial or trade register, the potential hindrances to competition and economy would be reduced if the opportunity to register were made available to all interested and qualified contractors or suppliers and if registration formalities were not too costly or burdensome.

83. It may be advantageous to purchasing entities to permit a contractor or supplier to participate in tender proceedings even if it had not satisfied certain eligibility requirements or proved its eligibility by the time its tender was submitted, as long as it appeared to be capable of satisfying those requirements or proving its eligibility. This would enable a procuring entity to consider an advantageous tender from a qualified contractor or supplier that did not have sufficient time to fulfil the eligibility requirements or provide the required proof by the deadline for submitting tenders, or was unable to do so for other reasons, so long as it did fulfil all the requirements by the time the contract was to be entered into if it was the successful tenderer. Foreign participants in particular can encounter delays or difficulties in meeting such requirements.

84. It is desirable that the means by which a contractor or supplier must establish its formal eligibility not be

complex or lower value contracts. In addition, competent tenderers are sometimes reluctant to participate in tendering proceedings for high value contracts, where the cost of preparing the tender may be high, if the competitive field is too large and they run the risk of having to compete with unrealistic tenders submitted by unqualified or disreputable tenderers. For less complex or lower value contracts, it is often more efficient to evaluate the qualifications of tenderers after the opening of tenders than to conduct separate pre-qualification proceedings.

91. The procedures for pre-qualification provided for by national procurement laws are typically as follows. The procuring entity advertises an invitation to pre-qualify. The requirements with respect to the scope and method of the advertisement are often similar to those in respect of the advertisement of the invitation to tender (see paras. 96 and 97, below). The advertisement contains basic information about the procurement and the contract to be concluded, such as the name and address of the procuring entity, a description of the works or goods to be procured, the desired time for performance of the contract, the criteria for pre-qualification, the place and means for obtaining the pre-qualification documents, and the place and deadline for submitting the application to pre-qualify. The pre-qualification documents supplied by the procuring entity to applicants typically include a questionnaire as described in paragraph 89, above. They also include further information and instructions with respect to the matters addressed in the invitation to pre-qualify (e.g., the manner in which the qualifications of contractors or suppliers will be evaluated).

92. The applications to pre-qualify are opened by personnel of the procuring entity and evaluated in accordance with the criteria set forth in the procurement laws or in the pre-qualification documents. After this evaluation the procuring entity notifies applicants as to whether or not they have been pre-qualified, and provides a full set of tender documents to applicants who have been pre-qualified.

93. Since pre-qualification is intended to reduce expenses for tenderers and for the procuring entity and is not intended to reduce competition among qualified tenderers, it is desirable that the pre-qualification procedures be open to all eligible contractors or suppliers that wish to apply. When it is desired to restrict participation in tendering, restricted tendering procedures may be appropriate; when those procedures are used, pre-qualification will be unnecessary. In addition, when maximum competition is desired, the pre-qualification procedures should be designed to encourage, and to avoid obstacles to, broad participation. For example, the invitation to pre-qualify should be given widespread publicity, and the deadline for submitting applications to pre-qualify should allow sufficient time for the completion and submission of applications by potentially diverse and distant applicants. Attention to aspects such as these is particularly important when it is desired to attract the participation of foreign contractors or suppliers. The desirability that the qualifications of contractors or suppliers be evaluated in accordance with objective criteria and in an objective manner, and that the

criteria and methods of evaluation be set forth in the pre-qualification documents, has already been mentioned (see paras. 87 and 88, above).

4. *Lists of approved contractors and suppliers*

94. Government departments and individual procuring entities sometimes maintain lists of approved contractors and suppliers that are found to be qualified to perform particular types of contracts. In some cases, contractors and suppliers are not eligible to participate in procurement procedures unless they are on such a list. In other cases, the list merely serves as a mailing list for the distribution of invitations to tender in open tendering or as one source for the selection of contractors or suppliers to be invited to participate in restricted tendering, negotiation, shopping or single-source procurement proceedings. The criteria for being included on the list are usually fairly basic; thus a procuring entity will normally evaluate the qualifications of tenderers in a more detailed manner in one or more of the ways mentioned in paragraph 85, above, even if a tenderer has been included in an approved list of contractors and suppliers. Many of the considerations discussed in paragraph 93, above, with respect to pre-qualification procedures, are also generally relevant with respect to lists of approved contractors and suppliers.

5. *Solicitation of tenders*

95. Except where pre-qualification proceedings are conducted, a procuring entity begins tender proceedings by issuing an invitation to tender. The purpose of the invitation to tender is to provide potential tenderers with basic information about the procurement to enable them to determine whether to obtain the tender documents and pursue the matter further. Many national procurement laws specify the types of information that must be contained in an invitation to tender. Typically, this includes the name and address of the procuring entity; a basic description of the works or goods to be procured; the eligibility requirements, if any; the technical, financial and other qualifications required of tenderers; the amount of the tender guarantees, performance guarantees, and other guarantees, if such guarantees are required; the means of obtaining the tender documents and the price of those documents; the place and deadline for submitting tenders; and the place and time where the tenders will be opened.

96. National procurement laws usually require an invitation to tender in connection with open tendering to be advertised in a manner designed to bring it to the attention of prospective tenderers. These laws typically require the invitation to be advertised in a newspaper of national circulation and in the country's official gazette. Many laws also require the invitation to be advertised in relevant trade publications or technical journals and to be posted on official or public notice boards.

97. When foreign participation in the tender proceedings is desired, it is important for the invitation to receive international distribution. Thus, procurement laws often

require the invitation to tender in connection with the procurement of works or goods over a specified value to be advertised in internationally circulated newspapers, trade publications or technical journals. If the procurement is with funds provided by an international lending institution, the institution will often require advertisement of the invitation to tender in particular publications. Some institutions, for example, require advertisement in the business edition of *Development Forum*.⁷ It may also be advantageous to circulate the invitation to tender to chambers of commerce, foreign trade missions in the country of the procuring entity and trade missions abroad of the country of the procuring entity.

98. In restricted tendering, the invitation to tender is typically sent to the contractors or suppliers that have been selected by the procuring entity. Some procurement laws regulate the choice of contractors or suppliers from which tenders will be solicited. For example, procurement laws sometimes require a minimum number of tenders to be solicited (e.g., 3; 5); they also sometimes require tenders to be solicited only from contractors or suppliers on a list of approved contractors or suppliers maintained by the procuring entity or by the Government. The invitation is sometimes accompanied by a set of the tender documents; in other cases the invitation specifies the manner of obtaining the documents.

99. When pre-qualification procedures have been used there is usually little need to issue an invitation to tender. Many national procurement laws merely provide for a set of the tender documents to be provided to contractors or suppliers that have been pre-qualified.

6. Tender documents

(a) Types of tender documents

100. National procurement laws usually require the procuring entity to provide a set of tender documents to prospective tenderers. These documents are intended to provide tenderers with the information they need to prepare their tenders and to inform the tenderer of the rules and procedures according to which the tender proceedings will be conducted. The types of documents that are typically included are discussed in the following paragraphs.

101. *Instructions to tenderers.* Procurement laws usually require the procuring entity to provide to prospective tenderers various types of information in relation to the procurement and to the formulation and submission of tenders. Much of this information is contained in a tender document often referred to as instructions to tenderers. The required information typically includes the following: a description of the works or goods to be procured; the desired or required time for completion of construction or delivery; the eligibility requirements, if any; the technical, financial and other qualifications required of tenderers and the criteria according to which these qualifications will be

evaluated; certifications and documents to be submitted with the tender in order to establish the tenderer's eligibility and qualifications; the manner of formulating tenders (e.g., the language to be used; the manner and currency in which the price is to be expressed); the requirements as to the signature of tenders; the manner in which the various documents comprising the tender are to be organized (e.g., where a two-envelope system is used—see paras. 180 and 181, below); the manner, place and deadline for submitting tenders; the nature, amount, terms and conditions of guarantees required (e.g., tender guarantees, performance guarantees, guarantees for the repayment of an advance payment (hereinafter referred to as "repayment guarantees")); the period of time during which tenders must remain valid; matters in addition to price in respect of which offers are sought; the procedures that will be followed for opening, examining, evaluating and comparing tenders and for concluding the contract; the criteria and methods according to which tenders will be examined, evaluated and compared; the extent to which tenders deviating from the specifications, terms, conditions and other requirements set forth in the tender documents will be considered; and the means by which tenderers can obtain clarifications of the tender documents. Procurement laws that authorize procuring entities to reject all tenders (see para. 193, below) may require the instructions to tenderers to contain a statement to that effect. Transparency of procurement procedures will be promoted by requiring the instructions to tenderers to alert tenderers to any relevant laws or regulations relating to the procurement (e.g., relating to taxes, import restrictions, and exchange control regulations) and to any formalities relating to the procedures (e.g., a requirement that a copy of the tender be provided to a particular government office) that may not appear in the main texts of the country's procurement laws.

102. *Technical specifications, drawings, plans, designs.* These will be necessary for procurement in connection with a complex construction or manufacturing contract. In less complex supply contracts, the description in the instruction to tenderers of the goods to be procured may suffice.

103. *Contractual terms and conditions.* These include general conditions of contract and special conditions for the particular contract in question. The procuring entity may seek from tenderers offers with respect to particular terms and conditions (e.g., the time of completion of construction or of delivery of the goods; terms and conditions governing the payment of the price or portions thereof (hereinafter referred to as "payment conditions")).

104. *Qualification questionnaire.* This may be required in cases where the technical and financial qualifications of the tenderers are to be evaluated after the opening of tenders or in post-qualification proceedings.

105. *Form of tender.* This is the form on which tenderers are to set forth their tender prices and other basic elements of their tenders, and which tenderers are to sign. Providing such a form is often desirable in order to achieve uniformity of presentation and efficiency in the examination, evaluation and comparison of the tenders.

⁷*Development Forum* is published by the Division for Economic and Social Information of the United Nations Department of Public Information, and the United Nations University.

106. *Forms of any required guarantees.* These may include, for example, tender guarantees, repayment guarantees and performance guarantees. Providing forms for these guarantees with the tender documents will inform tenderers as to the nature of the guarantees required and will ensure that the guarantees submitted by the tenderers meet the procuring entity's requirements.

(b) *Price charged for tender documents*

107. A set of tender documents for large or complex contracts can be voluminous and costly to produce. National procurement laws frequently authorize procuring entities to charge prospective tenderers for sets of tender documents supplied to them. Charging for the tender documents could also help to ensure that the documents are distributed only to those with a *bona fide* interest in the procurement.

108. Some procurement laws provide that the price for the tender documents is to be based only on the cost of producing and mailing them. Under other procurement laws, the price is a stipulated percentage of the anticipated value of the works or goods to be procured. Still other procurement laws establish a fixed charge for the tender documents, which is sometimes graduated in accordance with the value of the works or goods to be procured.

109. From the point of maximizing competition and promoting economy and efficiency in procurement, it is desirable that the prices that procuring entities may charge for tender documents be sufficient to cover the costs of producing and mailing the documents but not so high as to discourage qualified contractors or suppliers (particularly those from developing countries) from participating in the tendering proceedings.

(c) *Preparation and formulation of tender documents*

110. In general, the procuring entity is responsible for formulating and preparing the tender documents. In many countries, however, the procuring entity uses certain standard forms or models prepared by other authorities. For example, in a number of countries administrative authorities have prepared standardized general contractual conditions for particular types of procurement, and model forms of various other tender documents (e.g., instructions to tenderers; tender guarantees). In addition, for some types of procurement a procuring entity will use standard forms or models prepared by relevant trade organizations. However, even when standard forms or models are used, the procuring entity will usually have to supplement the standard forms or models and formulate additional documents with relevant details in respect of a particular procurement.

111. Although responsibility for formulating and preparing many or all of the tender documents normally rests with the procuring entity, it is possible, and often desirable, for procurement laws to set forth certain requirements to help ensure that the tender documents are formulated in an optimal manner. One requirement may be that, to the greatest extent possible, tender documents should be

formulated in a clear, complete and objective manner, particularly with respect to the description of the works or goods to be procured and the criteria and methods to be used for the evaluation and comparison of tenders. Tender documents with these characteristics enable tenderers to formulate tenders that respond to the needs of the procuring entity, to forecast accurately the risks and costs of their participation in the procurement proceedings and of the performance of the contract to be concluded and thus to offer their most advantageous prices and other terms and conditions. They enable tenders to be evaluated and compared on a common basis, which is one of the essential requirements of the tendering method. They also contribute to transparency and reduce possibilities of erroneous, arbitrary or abusive actions or decisions by the procuring entity.

112. National procurement laws frequently require in particular that technical specifications for the works or goods to be procured be formulated objectively, by referring to their functional or performance characteristics, rather than by referring to particular brand names, catalogue numbers of a particular supplier, or other devices that can favour particular tenderers. These laws often further provide that, where the use of brand names and similar devices cannot be avoided, the specifications must provide that works or goods of an equivalent standard are also acceptable. In these cases, the procuring entity may require the tenderer to provide adequate information about the equivalent works or goods offered.

113. In addition, procurement laws frequently require the use of recognized standards prepared by technical or trade organizations—when relevant standards exist—in the formulation of technical specifications. Under some procurement laws national standards must be used; if no national standards exist, recognized regional or international standards must be used. Where participation by foreign contractors or suppliers in tendering proceedings is anticipated or sought, it may be preferable to require international standards to be used, if available, since using national standards might give an advantage to contractors or suppliers from that country.

114. When foreign participation in tender proceedings is anticipated or sought, procurement laws often regulate the language in which the tender documents must appear. In general, foreign participation is facilitated when the tender documents are issued in at least one language customarily used in international trade. Some national procurement laws require the tender documents to be issued in such a language in addition to the official language or languages of the country.

(d) *Clarification and amendment of tender documents*

115. National procurement laws frequently provide for a mechanism whereby tenderers can obtain clarifications of discrepancies, ambiguities or inconsistencies in the tender documents. Some procurement laws provide that tenderers may seek such clarifications by addressing their requests in writing to the procuring entity by a stipulated deadline. The procuring entity is to provide the clarifications in a

written response. In the interests of fairness, the procuring entity is required to provide a copy of the response to all contractors and suppliers that have received the tender documents. The procurement laws specifically provide that the response is deemed to be a part of the tender documents. It might be useful for procurement laws to require the procuring entity to designate in the tender documents a particular officer (e.g., the procuring entity's chief procurement officer) to whom written inquiries should be directed and to provide that only responses and clarifications issued by him are valid.

116. Some procurement laws provide for a pre-tender conference to be held by the procuring entity for the purpose of clarifying the tender documents. The conference is to be held at the place and time stipulated in the tender documents and all contractors and suppliers that have received the tender documents are entitled to participate. Written minutes of the conference must be prepared and they become part of the tender documents. In some procurement laws this procedure is provided for as an alternative to the written inquiry procedure, and the procuring entity is to use whichever is more appropriate for a particular procurement. A pre-tender conference may be more appropriate for the procurement of high value or complex works or goods.

117. Foreign tenderers may experience difficulties in participating in a pre-tender conference. Therefore, if that procedure is used, it may be desirable to give tenderers the option to submit inquiries in writing prior to the conference and for the procuring entity's response to be included in the written minutes.

118. Some procurement laws require responses to written inquiries to be issued or the pre-tender conference to be held sufficiently in advance of the deadline for submitting tenders to enable tenderers to take the clarifications into account in formulating their tenders.

119. Sometimes, a procuring entity may need to make material amendments to the tender documents (e.g., to the technical specifications, the design or the contractual terms and conditions). Some national procurement laws permit the procuring entity to do so prior to the deadline for submission of tenders. These laws usually require amendments to be communicated in writing to all contractors or suppliers that have received the tender documents. It may be useful for such laws to provide that, where it is necessary for the purchaser to make material amendments to the tender documents at a time close to the date for submitting tenders, the procuring entity may extend the date in order to enable tenderers to evaluate the amendments and amend their tenders. If the date is extended, however, the time of opening of tenders will also have to be extended (see para. 157, below) and the procuring entity may have to request tenderers to extend the period of validity of their tenders (see para. 141, below; see, also, para. 153, below). Other procurement laws provide that if the tender documents must be amended materially the procuring entity must engage in a new solicitation of tenders.

7. Formulation and submission of tenders

120. National procurement laws usually contain rules as to the formulation and submission of tenders by contractors and suppliers. Matters typically dealt with are discussed in the following paragraphs.

(a) Language of tenders

121. The language in which tenders are to be formulated is dealt with by procurement laws where foreign participation is anticipated or sought. Most of those laws require the tenders to be formulated in an official language of the country of the procuring entity. Where an official language is not one customarily used in international trade, requiring tenders to be formulated in that language could inhibit participation by foreign contractors or suppliers to which the language is unfamiliar, and thus have an anti-competitive effect. Therefore, procurement laws in some countries permit tenders to be formulated in a specified language that is customarily used in international trade.

122. Some laws that permit tenders to be formulated in a language other than that of the country of the procuring entity require those tenders also to be translated into an official language of the country. Such a requirement could in some cases place a difficult burden on foreign tenderers. If that approach is adopted, it would be desirable for the procurement laws to provide that, in the event of discrepancies between the two language versions, one of the versions is to prevail.

(b) Formulation of tender price

123. Many national procurement laws set forth requirements as to the manner in which the tender price is formulated; in particular, the role of taxes, customs duties and similar charges levied by the country of procurement, pricing terms (e.g., whether on ex-works, FOB or CIF terms) and the currency in which the price is to be expressed are often dealt with. Such provisions can help ensure that tender prices will be formulated on a common basis and that they will therefore be susceptible of uniform comparison. They are useful in particular when tendering by foreign contractors or suppliers is anticipated or sought. It is desirable for applicable requirements of this nature to be set forth in the tender documents.

124. Various approaches are found in national procurement laws with respect to the role of taxes, customs duties and similar charges levied by the country of the procuring entity. Under one approach tenderers are required to include all such charges in their tender prices, and tenderers may not claim reimbursement from the procuring entity for any charges not included. Another approach requires tenderers to formulate their prices excluding such charges, and permits them to claim reimbursement from the procuring entity for any charges actually paid by them. The latter approach may be more desirable when foreign participation in the tendering proceedings is anticipated or sought. It may be difficult and time-consuming for foreign tenderers to obtain the information necessary to calculate those charges, particularly with respect to taxes imposed by the

country of the procuring entity. In addition, charges such as those are sometimes uncertain; for example, procuring entities are sometimes able to obtain tax reductions or other fiscal advantages, particularly where high value contracts or other contracts of special interest to the Government are involved. Thus, different tenderers may calculate these charges differently, making it difficult or impossible to make a true comparison of their tender prices. It may be useful for a procurement law to allow the procuring entity to decide which approach to follow in respect of a particular procurement, as long as all tenderers are required to formulate their tender prices on the same basis.

125. With respect to pricing terms, various approaches are found in national procurement laws. Under one approach the price is to be the total price for delivery to the procuring entity, including, for example, freight and insurance charges. In some cases, however, the procuring entity may wish to provide the transport or insurance (e.g., it may wish to use domestic carriers or insurers in order to promote these domestic industries or to conserve foreign exchange). Thus, some procurement laws permit the procuring entity to require tenderers to base their prices on, for example, FOB terms, or to base their prices on CIF terms but to show separately the FOB price, freight charges to the port of entry in the procuring entity's country, costs of delivery to the procuring entity, and insurance costs. In the latter case the procuring entity can then decide whether to contract with the successful tenderer on the CIF terms or to contract on the FOB terms and to provide its own transport or insurance. Here, too, it may be useful for the procuring entity to be allowed to decide which approach to adopt for a particular procurement, as long as all tenderers are required to formulate their tender prices on the same basis.

126. Procurement laws frequently specify the currency or currencies in which tender prices must be expressed. These include, for example, the currency of the country of the procuring entity, the currency of the tenderer's country and a currency customarily used in international trade. Some procurement laws also specify that a tenderer may express portions of the tender price in two or more different currencies in which it will incur its expenditures in respect of the works or goods that it offers to supply. Permitting tender prices to be expressed in currencies other than the currency of the country of the procuring entity can promote economy in procurement when foreign tenderers participate in the tendering procedures because they enable those tenderers to reduce the risk of exchange rate fluctuations to which they would be subject if their tenders were expressed in the currency of the country of the procuring entity. This can enable the tenderers to offer their most economical prices, without having to include an increment to cover the exchange rate risk. On the other hand, the submission of tenders with tender prices expressed in various currencies will complicate the process of evaluating and comparing tenders, since the tender prices will have to be converted to a single currency (see para. 179, below).

(c) *Manner, place and deadline for submission of tenders; consideration of late tenders*

127. Procurement laws often stipulate the manner by which and the place where tenders must be submitted. These laws typically require tenders to be submitted by post addressed to a particular office of the procuring entity, and that tenders be received at that office by the stipulated deadline. Some tender documents also permit tenders to be hand delivered by depositing the tenders in a locked box supplied for that purpose at the office stipulated in the tender documents. When widespread or foreign participation in tendering is anticipated or sought, it may be desirable not to require tenders to be hand delivered, since distant tenderers may have difficulties in complying. Other tender laws leave it to the procuring entity to decide upon the manner and place for the submission of tenders. Whether or not the time, place and deadline for submission of tenders are specified in the procurement laws, it is desirable to require that they be specified in the tender documents.

128. National procurement laws usually provide for a deadline by which tenders must be submitted to the procuring entity. Some procurement laws fix particular periods of time for particular types of works. Other procurement laws leave it to the procuring entity to determine the period of time that is reasonable taking into account the circumstances of each procurement. Those laws, however, sometimes establish general guidelines that the procuring entity must follow in fixing the deadline.

129. The deadline is usually expressed as a period of time after the date of advertising (for open tendering) or issuing (for restricted tendering) the invitation to tender. It is generally desirable that the period of time be long enough to enable potential tenderers to obtain and adequately analyze the tender documents, prepare their tenders, and accomplish any necessary formalities that are pre-conditions to tendering (see, however, para. 83, above), and for procedures such as pre-tender conferences or (in the case of works) site visits to be conducted. A period of time that is too short could serve to inhibit participation in the tendering proceedings by some qualified contractors or suppliers.

130. The appropriate amount of time will vary depending upon the type of procurement. For example, for the procurement of simple, low value goods, which is not likely to attract the interest of foreign suppliers, a period of 30 days may be sufficient. However, for the procurement of complex, high value works, in which foreign participation is anticipated or sought, considerably more time—e.g., 90 days or more—may be reasonable for the submission of tenders.

131. Procurement laws often permit the procuring entity to extend the deadline for the submission of tenders in certain exceptional cases, such as when the tender documents need to be amended at a time too close to the deadline (see para. 119, above) or when, due to unforeseen circumstances, it is not possible for tenderers to submit their tenders by the stipulated deadline. Allowing the deadline to be extended too liberally or too frequently

could result in inefficiency and facilitate abuse (e.g., by enabling the procuring entity to favour a particular late tenderer).

132. Under many national procurement laws tenders submitted after the deadline for submission cannot be considered. However, in some countries where the opening of tenders does not take place until some time after the deadline for submission (see para. 157, below), tenders received after the deadline but before the commencement of the opening may be considered.

133. A rule prohibiting the consideration of late tenders is intended to promote economy and efficiency in procurement and the integrity of and confidence in the procurement process. Permitting the consideration of late tenders after the commencement of the opening would enable tenderers to learn of other tenders before submitting their own tenders (which could happen whether the proceedings for opening tenders are open or closed). This could lead to higher prices and could facilitate collusion between tenderers. It would also be unfair to the other tenderers. In addition, it could interfere with the orderly and efficient process of opening tenders.

134. A few procurement laws permit the procuring entity to consider tenders received after the deadline for submission in exceptional circumstances (e.g., where the tender was submitted late due to reasons beyond the tenderer's control). In at least one country the procuring entity must obtain the approval of a higher supervisory authority to consider a late tender, which may be given only if the late submission was for *bona fide* reasons and would not result in an undue preference or advantage to the tenderer. In some other countries, the procuring entity has greater discretion to consider late tenders.

8. Alternative tenders and partial tenders

135. As a general rule, under most national procurement laws tenders must be responsive to the specifications and contractual terms and conditions set forth in the tender documents, although under some procurement laws tenders that deviate in certain respects from those specifications, terms and conditions may be considered (see paras. 164 to 168, below). However, some procurement laws allow tenderers to submit alternative tenders if they believe they can offer substantially superior works or goods or substantially more favourable terms and conditions than those set forth in the tender documents. These procurement laws usually require the tenderer to submit one tender that is responsive to the specifications, terms and conditions in the tender documents, and another tender containing its alternative offer. The procuring entity must first evaluate and compare the responsive tenders and identify the most acceptable of those tenders in accordance with the criteria and methods set forth in the tender documents. It may then accept an alternative tender submitted by the tenderer that submitted the most acceptable responsive tender.

136. The policy underlying this procedure is to enable the procuring entity to consider and take advantage of a

more favourable alternative tender while maintaining optimum competitive conditions in the tendering proceedings and fairness to tenderers. In principle, it would be contrary to the competitive nature of tendering for a procuring entity to be able to consider and accept a tender that did not conform to the terms of the competition, and it would be unfair to tenderers that submitted tenders conforming to those terms and that did not have an opportunity to compete on the basis of the alternative. Enabling the procuring entity to accept an alternative tender only if the tenderer had submitted the most acceptable responsive tender would to a large degree neutralize these uncompetitive and unfair aspects.

137. For procurement of works or goods containing two or more separate elements (e.g., a hydroelectric plant consisting of construction of a dam and supply of the generator), some procurement laws authorize tenderers to submit tenders either for the entire works or goods or for different combinations of elements, at their option. This approach has the advantage of encouraging participation by large contractors or suppliers, including foreign ones, that prefer to tender for higher value contracts and would be attracted by the ability to tender for the entire works or goods, as well as by smaller contractors or suppliers, that may have the capacity to tender only for certain elements. The procuring entity evaluates and compares all tenders in accordance with the criteria and evaluation methods set forth in the tender documents to ascertain the most advantageous tender or combination of tenders.

9. Period of validity of tenders; withdrawal and modification of tenders

(a) Period of validity of tenders

138. National procurement laws usually provide that tenders are to remain valid for a period of time beyond the deadline for submitting tenders. This is because it usually takes some time after the opening of tenders for them to be processed and for the contract to be entered into. The procuring entity must be assured that, after completion of these procedures, the tenderer chosen by the procuring entity will remain obligated to enter into a contract on the terms of its tender. In addition, the procuring entity must be sure that if, for some reason, the chosen tenderer fails to enter into a contract other tenders will remain valid and available to be accepted (see para. 199, below).

139. Some procurement laws leave it to the procuring entity to establish the period of validity appropriate for each procurement, subject to certain guidelines. Other procurement laws establish minimum periods of validity for particular types of contracts (e.g., 1 month for the procurement of simple, routine supplies; 3 months for the procurement of complex equipment; 6 months or more for the procurement of works).

140. It is desirable that the period of validity be long enough to cover the amount of time it should realistically take to open, evaluate and compare the tenders, decide upon which tender to accept, obtain all necessary approvals (which may include the approval of a lending

institution) and enter into the contract. However, if the period of validity is excessively long, higher tender prices may result since tenderers will have to include in their prices an increment to compensate for the costs and risks to which they are exposed during such a period (e.g., the costs of the tender guarantee; the necessity to keep their resources committed to the project; the risks of higher construction or manufacturing costs).

141. In cases where the tender proceedings cannot be concluded and the contract cannot be entered into within the specified period of validity of tenders, the procuring entity will have to seek an extension of the period. Under many procurement laws, tenderers continue to be bound by their tenders after the expiration of the stipulated period of validity only if they so agree. Under other laws, however, the procuring entity can extend the period of validity by so notifying tenderers prior to the expiration of the original period. Although that approach may provide greater security for procuring entities, it may result in higher tender prices for reasons expressed in the previous paragraph. It may therefore be more consistent with the objectives of economy and efficiency to fix a period of validity that is realistic and to provide that tenderers will not be bound by their tenders after the period expires unless they so agree.

(b) Withdrawal and modification of tenders

142. Many national procurement laws permit tenderers to withdraw or modify their tenders only up to the deadline for submission or the commencement of the opening of tenders (which should be soon after the deadline for submission). Withdrawal or modification of tenders after that time could conflict with the objective of economy in procurement and could impair confidence in the procurement process. For example, where tenders are opened in public, it would enable a tenderer that offered a substantially lower tender price than the others to raise its price to a level just below that of the next lowest tender; it would also be unfair to other tenderers. Even where tenders are not opened publicly or in the presence of representatives of tenderers, permitting tenders to be withdrawn or modified after the submission deadline or the commencement of the opening of tenders could complicate and prolong the process of examining, evaluating and comparing tenders. At least one country permits tenders to be modified after the opening in the event of a genuine and honest mistake.

143. Several national procurement laws permit certain minor corrections to be made to tenders and clarifications of tenders to be given after the opening of tenders. For example, these laws permit the procuring entity to correct arithmetical errors, in some cases on its own initiative and in other cases in consultation with the tenderer. They also permit the tenderer to correct other clerical errors (e.g., by affixing tax stamps that have been omitted). In addition, some laws permit the tenderer to change information in the tender that is obviously erroneous (e.g., a figure for a price component that has been mistranscribed), and permit the procuring entity to obtain clarifications from the tenderer as to ambiguities in or omissions from the tender

(see, however, paras. 189 to 192, below, relative to negotiations with tenderers).

10. Tender guarantees

144. Most national procurement laws require tenderers to submit tender guarantees with their tenders in certain or all types of procurement. The basic purpose of a tender guarantee is to provide funds to cover at least a portion of the losses that a procuring entity would suffer if the tender was withdrawn prematurely, or if the tenderer whose tender had been accepted failed to enter into a contract with the procuring entity or to provide a performance guarantee, if such a guarantee was required. These losses could include, for example, the costs of having to engage in new tendering procedures, the difference between the tender price of the defaulting tenderer and a higher price that the procuring entity ultimately must pay, and losses due to delays in procurement. Other possible purposes of requiring a tender guarantee are to discourage the tenderer from committing one of the above-mentioned defaults and to discourage financially unsound contractors or suppliers from participating in the procurement (e.g., because of the cost of providing a tender guarantee and because, if the guarantee must be issued by a third person, such as a financial institution, a financially impaired contractor or supplier could have difficulties in obtaining the guarantee).

145. The security provided by tender guarantees is usually important when the procurement is of relatively high-value works or goods. In the procurement of low-value items, the risks faced by the procuring entity and its potential losses are generally lower, and the cost of providing a tender guarantee—which will normally be reflected in the contract price—will be less justified. A number of procurement laws therefore require tender guarantees only when the item to be procured exceeds a specified value. In at least one country, the procuring entity may relieve a particular tenderer of the obligation to provide a guarantee if the procuring entity determines that the tenderer presents no risk of committing one of the defaults mentioned above. However, such a provision could lead to undesirable consequences if it were used improperly to favour a particular tenderer. Some national procurement laws favour particular categories of tenderers (e.g., State-owned enterprises in the country of the procuring entity; workers' and artisans' co-operatives) by exempting them from the requirement of providing a tender guarantee.

146. Tenderers often have several tender guarantees outstanding at the same time in connection with several different tendering proceedings. Since a tenderer will recover the cost of providing a tender guarantee only if its tender is accepted and it enters into a contract with the procuring entity, a tender price may include an increment reflecting not only the cost of providing the guarantee in respect of that particular tender, but also the cost of providing guarantees in respect of unsuccessful tenders. It may therefore be desirable to require tender guarantees only when needed to protect the interests of the procuring entity.

147. Many procurement laws require the tender guarantee to be in the form of a guarantee from a bank, surety company or other financial institution, although in at least one instance the guarantee of a State-owned enterprise has been accepted. A number of these procurement laws stipulate that the institution must be one that has been designated or approved by a relevant government department for the issuance of tender guarantees, such as the ministry of finance or the central bank.

148. Under a few procurement laws, the institution issuing a tender guarantee must be in the country of the procuring entity. Such a requirement could hinder the submission of tenders by foreign contractors and suppliers and thus may be undesirable where foreign participation is anticipated or sought, since foreign tenderers may have difficulty in obtaining tender guarantees from institutions in the country of the procuring entity. In addition, it could result in higher tender prices in cases where foreign tenderers could obtain satisfactory guarantees at lower cost from institutions in their own countries. Thus, some procurement laws permit foreign tenderers to provide a tender guarantee issued by a reputable foreign bank. In at least one procurement law the foreign bank must issue the guarantee through a local correspondent bank. In countries where there exists a policy to require that tender guarantees be issued by local institutions, it would be desirable to offer a range of institutions from which guarantees would be acceptable.

149. Several procurement laws permit the tenderer to supply a tender guarantee in a form other than a guarantee issued by a financial institution, such as an irrevocable letter of credit, bank draft, certified cheque, cash deposit with a financial institution as stake-holder, or cash deposit with the procuring entity. This flexibility may facilitate participation by some tenderers; it could also result in somewhat lower tender prices where a particular form (e.g., a certified cheque) is less costly to provide than others.

150. It is desirable that the required amount of the tender guarantee be high enough to give the procuring entity a reasonable level of protection, but not so high that the cost of obtaining it dissuades qualified tenderers, including those from developing countries, from participating in the tender proceedings. The amounts of tender guarantees in connection with the procurement of works typically fall within the range of 1 to 3 per cent of the tender price; for goods, the amounts typically range from 2 to 5 per cent. Some tender laws specify the amount of the tender guarantee that must be supplied. Sometimes a range of amounts is specified, and the procuring entity is to fix the amount required for a particular procurement. Some of those laws specify different amounts for works and for goods, and in some laws the required percentage is graduated in accordance with the tender price.

151. It may be desirable in some cases for the required amount of the tender guarantee to be expressed as a specified sum of money, rather than as a percentage of the tender price. The percentage approach could enable a tenderer to ascertain the tender prices offered by other

tenderers if it were able to discover the amounts of the tender guarantees supplied by them.

152. National procurement laws typically provide that the procuring entity may claim the amount of the tender guarantee if the tender commits one of the defaults mentioned in paragraph 144, above. Guarantees that are to be issued by a third party, such as a financial institution, and guarantees in the form of a sum of money deposited with a third party, are usually required to be first demand guarantees—that is, those under which the issuer of the guarantee or the depositary of the sum of money is obligated to make payment upon a simple demand by the procuring entity or its bare statement that the tenderer has committed one of the specified defaults. The issuer or depositary is normally not to question or verify whether a default entitling the procuring entity to claim the guarantee has in fact been committed; however, a tenderer whose guarantee is called by the procuring entity without justification would be able to claim against the procuring entity. In some legal systems, the issuer or depositary may be able to refuse to pay the guarantee sum, or the contractor or supplier may be able to obtain a court order that the sum not be paid, in limited circumstances.

153. It is generally desirable to require the tender guarantee to be valid for the entire period of time during which tenders must remain valid, plus an additional short period of time to enable the procuring entity to take action to claim the guarantee amount. In some national procurement laws the validity period of the tender guarantee and the validity period of tenders are not co-ordinated, which can create difficulties for procuring entities. It is desirable to provide that, if the period of validity of tenders is extended, the validity period of the tender guarantees should also be extended.

154. Many procurement laws provide that the tender guarantees must be returned to the tenderers when the successful tenderer enters into the contract with the procuring entity and provides the performance guarantee, if one is required. Even if a guarantee is not returned, it will expire at the time provided for in the guarantee. A few laws provide that the guarantees must be returned to unsuccessful tenderers when a tender is accepted. Those provisions may not give sufficient protection to the procuring entity (e.g., where the contract does not come into existence until a formal contract document is signed (see para. 197, below); or where the successful tenderer fails to provide the performance guarantee). In some cases a procuring entity may be sufficiently protected if, after a tender is accepted, it is permitted to retain the tender guarantees only of the successful tenderer and of the next two acceptable tenderers, and is required to return the guarantees submitted by the other tenderers. It may be desirable for a procurement law to give to the procuring entity flexibility with respect to whether and under what circumstances the tender guarantees of unsuccessful tenderers are to be returned prior to the time the contract with the successful tenderer comes into existence, as long as the practice to be followed in individual tender proceedings is made known to tenderers in the tender documents.

11. *Opening, examination, evaluation and comparison of tenders*

155. Under many national procurement laws, the opening, examination, evaluation and comparison of tenders, particularly in connection with the procurement of complex or high value works or goods, is under the responsibility of a committee, sometimes referred to as a tender committee. In addition to representatives of the procuring entity, some tender committees also include representatives of various relevant ministries, departments or other governmental organs, such as the ministries of trade and of finance, the central bank and the financial controller. However, for the procurement of simple works or goods, where the opening, examination, evaluation and comparison of tenders is routine (e.g., where the only variable in tenders is the tender price and where the procuring entity must accept the tender of the eligible and qualified tender offering the lowest price), these functions may be performed by a single official of the procuring entity, often referred to as the procurement officer. The procedures and other aspects of the opening, examination, evaluation and comparison of tenders typically provided for in national procurement laws are described in the following sub-sections.

156. Many national procurement laws require the procurement officer or the tender committee to prepare minutes of the proceedings for the opening, examination, evaluation and comparison of tenders. These minutes are to contain, for example, the names of the tenderers, the eligibility and qualifications of tenderers, the tender prices of each tender, a summary of each tender (when the decision of which tender to accept is to be made on the basis of criteria in addition to price), the decision of which tender to accept and the reasons for the decision. The minutes also sometimes contain or summarize the report of the evaluation committee (see para. 161, below). The requirement that minutes be prepared can help to promote transparency of procurement proceedings, especially if the minutes are made public (see paras. 159 and 200, below).

(a) *Opening of tenders*

157. National procurement laws typically provide that tenders are to be opened at the time and place stipulated in the tender documents. It is desirable for the time of opening to be at or promptly after the deadline for the submission of tenders.

158. Procurement laws vary as to the extent to which the proceedings for opening tenders are open to the public. In some countries, the proceedings may be attended by any person who wishes to be present. In other countries, only representatives of tenderers may attend. In still other countries the proceedings are closed, even to representatives of tenderers.

159. Permitting at least representatives of tenderers to be present at the opening proceedings, where they can learn who the other tenderers are and the tender prices and other aspects of the tenders (see para. 160, below), contributes to transparency of procurement procedures. Open proceedings enable tenderers to observe that the procure-

ment laws are being complied with, and help to promote confidence that decisions will not be taken on an arbitrary or improper basis. A rationale that is sometimes given for closing the proceedings to outside participation is that the possibility of collusion between tenderers will be reduced if they do not know the identities of other tenderers or the contents of their tenders. However, that objective might be achieved equally well by requiring tenders to remain sealed until the time of opening and prohibiting tenderers from withdrawing or modifying their tenders after that time. If the proceedings are closed, transparency could nevertheless be promoted by requiring minutes of the proceedings to be prepared and made public (see paras. 156, above, and 200, below).

160. In proceedings that are open to the public or to representatives of tenderers, it is common for the official who opens the tenders to announce the name of each tenderer, the tender price and other relevant aspects of the tender. After all the tenders have been opened, they are examined, evaluated and compared.

(b) *Examination, evaluation and comparison of tenders*

161. In many cases, where the examination, evaluation and comparison of tenders will be a complex process or will involve technical factors, the tenders are submitted to an evaluation committee to perform those tasks. This committee is typically composed of technicians or engineers in the relevant fields and, in some cases, representatives of relevant ministries or governmental departments or organs. The deliberations of the evaluation committee are usually confidential and closed to non-members of the committee. The evaluation committee reports its conclusions, which may include a recommendation as to which tender should be accepted, to the tender committee or the procurement officer. On the basis of that report, the tender committee or procurement officer decides which tender it wishes to accept. The procedures and sequence of events in the examination, evaluation and comparison of tenders is in many cases as follows (see, however, paras. 180 and 181, below, concerning the two-envelope system).

(i) *Examination of tenders*

162. Tenders are first examined for completeness, that is, to verify that all required components of the tender (e.g., documents relative to the tenderer's eligibility and qualifications, the tender form, a tender guarantee and a power of attorney) have been included. Tenders are also examined for compliance with the other formal requirements set forth in the procurement laws and the tender documents (e.g., requirements with respect to signature). Tenders that are incomplete or that do not comply with the formal requirements are eliminated. Computational errors and other errors and ambiguities in tenders are resolved (see para. 143, above).

163. Next, the eligibility of tenderers is verified. In some cases, the qualifications of tenderers are also evaluated at this stage (see, however, para. 172, below). Tenders submitted by tenderers that are not eligible or that are not qualified in accordance with the established qualification criteria are eliminated.

164. The remaining tenders are then examined to determine whether or not they are responsive, i.e., whether they are based upon and conform to the specifications, contractual terms and conditions and other substantive requirements set forth in the tender documents. Some national procurement laws do not permit any deviations from those specifications, terms, conditions or other requirements, and provide that tenders that contain deviations must be rejected as non-responsive. (This situation should be distinguished from the situation where the tender documents seek the tenderer's offer with respect to certain specifications, terms or conditions; see para. 103, above). Some laws, however, permit tenders to be considered if they are substantially responsive, that is, if they contain only minor deviations which do not materially alter the specifications, contractual terms and conditions or other requirements set forth in the tender documents. In the evaluation process those deviations are quantified and added to or subtracted from the tender price, as appropriate.

165. The approach described in the preceding paragraph seeks to create optimal competitive conditions for tender proceedings and to maximize fairness to tenderers. The underlying theory is that allowing tenders with deviations to be considered would distort the competition among tenderers, and would be unfair to tenderers that submitted tenders responsive to the stipulated specifications, terms, conditions and other requirements and that did not have an opportunity to compete on the basis of the deviating specifications, terms, conditions or requirements.

166. In many procurement laws that require tenders to be rejected if they contain deviations, the requirement applies even when the tender offers to supply works or goods with technical characteristics superior to those specified by the procuring entity in the tender documents, or offers more advantageous contractual terms or conditions than those specified by the procuring entity. The theory behind this policy is that the tender documents should set forth the procuring entity's requirements with sufficient accuracy and precision so that more favourable specifications, terms and conditions—which could be more costly—are not necessary to meet the procuring entity's needs. Other procurement laws, however, permit tenders to be considered if the deviations are advantageous to the procuring entity.

167. Still other national procurement laws permit the procuring entity to consider tenders that contain deviations if the tender documents so provide. Under some of these laws it is sufficient for the procuring entity simply to stipulate that tenders containing deviations may be considered. Under others, the tender documents are to stipulate the matters in respect of which deviations will be considered (e.g., time for completion or delivery; payment conditions). Deviations that are accepted by the procuring entity are quantified and added to or subtracted from the tender price, as appropriate.

168. The approach under which tenders may be considered even if they contain deviations seeks to give the purchasing entity the flexibility to take advantage of the most favourable offer received. The distortion of

competition and the unfairness to tenderers that could potentially arise from that approach are sought to be minimized by requiring the procuring entity to disclose to tenderers in the tender documents that tenders with certain deviations may be considered.

(ii) *Evaluation and comparison of tenders*

a. *Criteria and methods for evaluation and comparison of tenders*

169. National procurement laws provide for varying degrees of flexibility, specificity and objectivity with respect to the criteria and methods that the procuring entity is to use in evaluating and comparing tenders. Under some procurement laws the decision of which tender to accept is based exclusively on the tender price, i.e., the tender offering the lowest tender price must be accepted. Some of these laws provide for the procuring entity to establish maximum or minimum prices or estimated prices; tenders that fall outside the maximum or minimum prices or outside a specified range based on the estimated price are to be rejected. Of the remaining tenders, the one offering the lowest tender price is to be accepted.

170. The rationale for establishing a maximum price is to set a limit to the amount that the procuring entity will pay for the works or goods. This limit sometimes reflects a maximum budgetary appropriation for the procurement. The rationale for establishing a minimum price is that a tenderer would be unlikely to be able to perform the contract at a price below that amount, or could do so only by using substandard workmanship or materials or by suffering a loss. An abnormally low price could also in some cases indicate collusion between tenderers. From the point of view of transparency, it would be desirable for the procurement laws to require the tender documents to disclose that a maximum or minimum price or a range of prices will be applied.

171. Some procurement laws provide for criteria in addition to the tender price to be taken into account in evaluating and comparing tenders. Under one typical pattern, the procurement laws set forth objective and quantifiable criteria, including, for example, the cost of operating, maintaining and servicing the works or goods over their expected useful life (including, e.g., the cost of spare parts); the efficiency and productivity of the works or goods; the time for completion of construction or for delivery of the goods; the payment conditions; the extent to which the price may be adjusted (e.g., in accordance with a price adjustment formula); the terms and conditions of the quality guarantee and the length of the guarantee period. Although, in individual tender proceedings, the procuring entity need not necessarily use all of the criteria set forth in the procurement laws, the procuring entity has relatively little flexibility to use criteria other than those set forth. It must specify in the tender documents for each tender proceedings the criteria that it will use for evaluating and comparing tenders. With respect to the method to be used for evaluating and comparing tenders, the procuring entity is to calculate the "evaluated price" of each tender by quantifying the various aspects of each tender in relation to the criteria set forth in the tender documents

and combining these quantifications with quantifications of permitted deviations in the tender (see paras. 164 and 167, above) and with the tender price. The tender offering the lowest evaluated price is to be accepted. Sometimes the choice of the lowest evaluated price is subject to maximum, minimum or estimated prices.

172. Under another pattern, the procurement laws provide that the procuring entity is to accept the tender that it finds to be the most "interesting" or "advantageous". These laws, too, set forth certain criteria that the procuring entity may take into consideration in making that determination. These criteria typically include many of those mentioned in the preceding paragraph, and sometimes also include criteria relative to the qualifications of tenderers. However, the criteria are, in general, intended merely to provide guidance to the procuring entity; the procuring entity may use criteria other than those set forth in the procurement law as long as it specifies in the tender documents the criteria that it will use. With respect to the method to be used for evaluating and comparing tenders, some of these procurement laws provide for the procuring entity to assign relative weightings (e.g., "coefficients" or "merit points") to the various aspects of each tender in relation to the criteria set forth in the tender documents. Other procurement laws provide little or no guidance as to the method to be used. Under yet another pattern, the procurement laws provide that the procuring entity is to accept the most advantageous tender without providing any guidance or imposing any restrictions as to the criteria or methods to be used for evaluating and comparing tenders.

173. Among the various approaches described above, basing the decision of which tender to accept on the tender price alone provides the greatest objectivity and automaticity in the choice of which tender to accept. However, it is also the least flexible of the approaches discussed, since factors other than price that may make certain tenders more or less advantageous than others cannot be taken into account. Under this approach, therefore, the procuring entity must take care to formulate its technical specifications and contract terms and conditions with sufficient completeness and precision so that all tenders conforming to them will satisfactorily meet the procuring entity's needs, and so that the relative advantages of the tenders will be reflected in the tender prices alone.

174. This approach has the additional advantage of being the easiest to administer. It may therefore be attractive to countries that do not have personnel with sufficient expertise and experience with more complex criteria and methods of evaluating and comparing tenders. However, a procuring entity wishing to employ one or more complex approaches might engage a professional experienced in the evaluation and comparison of tenders to assist and advise it. This could have an additional advantage of enabling the country to develop its own expertise and experience in the evaluation and comparison of tenders.

175. An approach under which the procuring entity may take into account criteria in addition to the tender price offers greater flexibility than the approach based on tender

price alone. It permits the relative advantages of tenders to be compared along a broader spectrum of parameters, and thus with greater subtlety. This may be increasingly important the less standardized are the works or goods to be procured and the higher their value. From the point of view of various procurement policy objectives it would be desirable for the procurement laws to require that the criteria be formulated and applied in an objective manner, that the criteria and the methods of their application for the evaluation and comparison of tenders be set forth in the tender documents and that the procuring entity evaluate and compare tenders strictly in accordance with those criteria and methods. It would be useful for the procurement laws either to set forth the applicable criteria and methods, or at least to provide guidance to the procuring entity in formulating the criteria and methods to be used in individual tender proceedings.

176. Some procurement laws call for the procuring entity, in evaluating tenders from foreign tenderers, to take into consideration certain criteria relating to broad national economic interests. These include, for example, the impact of the acceptance of a particular tender on the national economy, the extent to which domestic industry will participate in the manufacture of components of the works or goods to be procured and the degree of transfer of technology to the country of the procuring entity that will result from the tender. Under a few procurement laws an advantage in the evaluation and comparison of tenders may be given to tenders that offer credit terms. Under other laws an advantage may be given to tenders offering "offset" terms, that is, offering to purchase works, goods or services from the procuring entity or its country or to invest in that country.

177. Although criteria such as those mentioned in the preceding paragraph are intended to advance certain important national policy objectives, the use of such criteria in evaluating and comparing tenders can in some cases impair competition, economy in procurement and confidence in the procurement process, since they do not easily lend themselves to objective quantification. In particular, giving advantages to tenders that offer credit or offset terms are sometimes criticized as distorting competition.⁸ Some procurement laws expressly discourage the use of certain of these criteria.

178. When criteria such as those are to be used, their undesired consequences could be reduced somewhat by requiring the procuring entity to indicate in the tender documents the weight that will be given to them. Alternatively, instead of incorporating such criteria in the evaluation process, the desired objectives might be achieved by setting forth the criteria as affirmative, concrete obligations that a successful tenderer would have to undertake (e.g., by requiring a foreign tenderer to form a joint venture with local contractors or suppliers, or to engage local subcontractors; see para. 188, below).

⁸With respect to credit terms, it is said that such a provision would favour tenderers from countries that have export guarantee schemes. With respect to offset terms, it is said that such a provision would distort competition both in respect of the procurement by the procuring entity and the offsetting procurement by the tenderer.

b. *Conversion of tenders to single currency*

179. When foreign tenderers participate in tender proceedings and different currencies are used in expressing tender prices (see para. 126, above), the tender prices will have to be converted to a single currency in order to permit tenders to be compared on a common basis. It appears that few national procurement laws deal with this matter, with the result that the procuring entity has the discretion to make the conversion applying whatever exchange rate it deems appropriate. It may be desirable for procurement laws that anticipate or seek participation by foreign tenderers to require the procuring entity to specify in the tender documents the currency that will be used for evaluating and comparing tenders and either to specify the exchange rate that will be used for the conversion or to specify that the rate issued by a named institution prevailing on a specified date (e.g., the deadline for submission of tenders; the date of expiration of the period of validity of tenders) will be used. Restricting in this manner the discretion of the procuring entity would, for example, prevent the procuring entity from arbitrarily selecting an exchange rate during the process of evaluating and comparing tenders so as to favour particular tenderers, and would reduce the necessity for tenderers to include increments in their tender prices to cover the greater uncertainties and risks that would exist without such a restriction.

12. *Two-envelope system*

180. For tender proceedings where tenderers are called upon to submit proposals that are to be evaluated and compared on the basis of technical criteria as well as price, a "two-envelope system" is sometimes used. Under this system the tenderer must organize its tender into two envelopes. The first envelope is to contain the tenderer's proposal concerning the technical aspects of its tender, and the second envelope is to contain the tender price. In some cases (e.g., where pre-qualification procedures have not been used), the documents and information relative to the tenderer's qualifications are also to be included in the first envelope. During the evaluation process the procuring entity begins by opening the first envelope and examining and evaluating the tenders. Where the first envelope contains documents and information relative to the tenderer's qualifications, those qualifications are also evaluated. The second envelope of the tenders found to be responsive are opened and the tender offering the lowest tender price or lowest evaluated price is selected.

181. The two-envelope system is sometimes favoured because it permits the procuring entity to evaluate the technical quality of tenders without being influenced by price. However, the method has been criticized as being contrary to the objective of economy in procurement. In particular, there is said to be a danger that, by selecting tenders initially on the basis of technical merit alone and without reference to price, a procuring entity might be tempted to select upon the opening of the first envelopes tenders offering technically superior works or goods that, however, exceeded the procuring entity's requirements and that were relatively expensive and to reject tenders offering less sophisticated works or goods that neverthe-

less met its needs at a lower cost. That danger might be reduced, however, to the extent that the technical specifications of the works or goods were formulated in a precise and objective manner.

13. *Preferences for procurement from domestic sources or of domestic works or goods and other provisions to achieve economic and social objectives*

182. Many national procurement laws grant preferences or accord other advantages to favour procurement from domestic contractors or suppliers, or certain categories thereof, or to favour the procurement of domestically produced works or goods. Provisions of this nature are designed to promote various economic and social objectives, as discussed in paragraphs 23 to 25, above. Some laws also contain other requirements designed to promote those objectives.

183. Some procurement laws require the procuring entity to procure works or goods from domestic contractors or suppliers, or from particular categories of domestic contractors or suppliers (such as economically weak contractors or suppliers, contractors or suppliers from regions of unemployment, State-owned enterprises, artisans, production co-operatives, agricultural groups, blind or handicapped persons) unless there exists no such qualified contractor or supplier that can supply the works or goods. Similarly, under some procurement laws, the works or goods to be procured must have a minimum amount of domestic content or domestic value-added (e.g., 50 per cent).

184. Requirements of that nature are used by several countries, representing nearly every level of economic development, to further national economic and social policies. It may be noted, however, that such requirements often have the effect of inhibiting economy in procurement, not only because they reduce the competitive field, but also more particularly because the prices of works or goods from domestic sources can in some cases be higher than those from foreign sources. It may therefore be desirable for the use of such requirements to be considered carefully. For example, a country might consider limiting the application of such requirements to types of procurement where that protection is really needed (e.g., to particular industries or particular types of works or goods). In addition, it may be preferable in some cases to employ less exclusionary techniques to achieve the desired objectives, such as those discussed in the following paragraphs. Although techniques of that nature restrict competition to a certain extent and potentially reduce economy in procurement, they usually do so to a lesser degree than the restriction of procurement to domestic sources or to works or goods with minimum domestic content.

185. A commonly used method of promoting the development of domestic industry and related economic objectives is to grant a margin of preference to tenders submitted by domestic tenderers or by specific categories of domestic tenderers that it is sought to benefit (such as

those mentioned in para. 183, above), or to tenders offering to supply works or goods having a certain minimum domestic content or value added, when comparing those tenders with tenders submitted by foreign tenderers. A margin of preference is also sometimes applied to the benefit not only of domestic tenderers or domestically produced works or goods but also of tenderers, works or goods from countries that participate in regional economic groupings with the country of procurement.

186. Typically, the margin of preference is applied by adding to the foreign tender a stipulated percentage (which in several countries is 15 per cent, but in at least one country is as high as 50 per cent in certain cases) of the tender price excluding customs duties, import taxes and similar levies. In several countries the amount of customs duties, import taxes and similar levies is applied if that amount is lower than the margin of preference. Tenders are then compared on the basis of the resulting prices.

187. When a margin of preference is to be applied, greater transparency and objectivity will be achieved if the amount of the margin is quantified (i.e., as a percentage of the tender price) in the procurement law and in the tender documents, and if the method by which the margin is to be applied is described.

188. Other techniques employed in some procurement laws to promote the economic and social objectives in question include, for example, requiring foreign tenderers to use domestic labour, components or materials in constructing the works or in manufacturing the goods to be supplied, to the extent that domestic labour, components or materials are available; to engage domestic subcontractors; to use domestic carriers and insurers; to be associated with a domestic contractor or supplier in the form of a joint venture or similar associations; and to purchase works, goods or services from the procuring entity or from the country of procurement or to invest in that country. In at least one country where the procurement law requires the procuring entity to accept the tender offering the lowest tender price, if the lowest tender price is offered by a foreign tenderer, the procuring entity may accept the tender of a domestic tenderer offering a higher tender price if that tenderer agrees to supply the works or goods at the lower tender price offered by the foreign tenderer. Yet other techniques have been mentioned above in paragraphs 69 and 145.

14. Negotiations with tenderers

189. Under some national procurement laws, the procuring entity is not permitted to negotiate with tenderers with a view towards obtaining a lower price, more favourable contractual terms or conditions or more favourable technical characteristics with respect to the works or goods to be procured. These laws seek to maximize the competitive aspects of tendering, on the assumption that such competition will automatically induce tenderers to submit their most favourable tenders.

190. Other national procurement laws, however, permit the procuring entity to negotiate with tenderers under

certain conditions. These laws seek to give a degree of flexibility to the procuring entity in order to enable it to obtain the most favourable price, contractual terms or conditions or technical characteristics with respect to the works or goods to be procured. For example, some of these laws permit the procuring entity to negotiate a lower price with the tenderer that submits the lowest tender price if that tender price exceeds a maximum price established by the procuring entity, or if the tender price exceeds by a substantial amount an estimated price established by the procuring entity. Under other procurement laws, the procuring entity may negotiate a lower price with two or more tenderers that have submitted identical lowest tender prices, or can request those tenderers to offer rebates. Yet other laws permit the procuring entity to negotiate with the tenderer offering the lowest tender price with respect to certain technical or contractual aspects of the tender, e.g., to remove deviations from the technical specifications or contractual terms or conditions set forth in the tender documents. Still other procurement laws provide a significantly broader scope for negotiations between the procuring entity and tenderers.

191. In considering whether or not the procuring entity should be permitted to negotiate with tenderers, and if so, to what extent, it may be useful to take note of the fact that some tenderers may be reluctant to participate in formal tender proceedings when their tenders are subject to negotiations of a broad scope, particularly when a high value contract is involved or where the tenderer does not have experience in dealing with the procuring entity and, therefore, does not have confidence that the negotiations will be conducted on a fair commercial basis. Tenderers that do participate may have a tendency to submit inflated tender prices, expecting that the prices will be reduced during the negotiations.

192. It follows from the foregoing that, when it is desired to give a degree of flexibility to the procuring entity to negotiate with tenderers without significantly undermining the nature and aims of the tendering method, it is desirable for the scope of and conditions for the negotiations to be restricted (see, e.g., para. 190, above). For procurements where negotiations of a greater scope may be appropriate, the procurement law might provide for, in addition to the tendering method, a method involving such negotiations (see paras. 59 to 63, above). It is generally desirable to prevent the procuring entity from conducting an "auction" within the framework of the tendering method, in which a tender offered by one tenderer is used in the negotiations to extract a lower price or an otherwise more favourable tender from another tenderer. Many contractors and suppliers, particularly those in the international market, refrain from participating in tendering where such techniques are used.

15. Rejection of all tenders

193. Some procurement laws permit the procuring entity to reject all tenders for the convenience of the procuring entity or of the State, or in the public interest. From the point of view of promoting confidence in the procurement

process and encouraging participation by contractors or suppliers in procurement proceedings, it may be useful for the procurement laws to contain provisions designed to prevent the procuring entity from exercising the right to reject all tenders in an arbitrary or abusive manner (e.g., by using the pricing or other information derived from the tenders to purchase the works or goods elsewhere). To this end, the procurement laws might contain an illustrative list of situations in which the right to reject all tenders might be exercised. For example, procurement laws might specify that the procuring entity may reject all tenders where there exists a lack of competition in the tendering proceedings or collusion between tenderers, where the procuring entity's need for the works or goods ceases, where fewer than a stipulated minimum number (e.g., 2; 3) of tenders have been submitted,⁹ or where all of the tenders exceed a maximum price fixed by the procuring entity. In addition, it would be useful for the procurement laws to require the procuring entity to set forth in the tender documents the circumstances in which all tenders may be rejected, and the procedures to be followed thereafter.

194. With respect to the procedures to be followed if no tender is accepted, some procurement laws require new tendering procedures to be conducted, and, if the new procedures are also unsuccessful, permit the procuring entity to procure the works or goods by other methods (e.g., negotiation; single-source procurement). Other procurement laws permit the procuring entity to resort to those other methods even if the initial attempt at tendering is unsuccessful. In some countries, only the original tenderers may participate in the subsequent proceedings; in other countries no such restriction exists.

16. Acceptance of tender and formation of contract

195. Under some national procurement laws, the procuring entity takes the final decision as to which tender (if any) to accept. Under other procurement laws, the decision of the procuring entity to accept a tender is only provisional and is subject to approval by a higher authority. Under yet other laws the final decision is to be taken by the procuring entity when the works or goods are below a stipulated value and is subject to approval by a higher authority when they are over that value. The approving authorities under different national procurement laws vary and include, for example, the ministers of economy, finance or industry or the national procurement board. Some procurement laws require decisions with respect to major contracts to be approved (or further approved) by the prime minister, the president or parliament. When approval of a higher authority is required, it would be desirable for the procurement laws to require that the tender documents so stipulate.

⁹The appropriateness of requiring a minimum number of tenders is sometimes questioned on the theory that it is the knowledge of tenderers that tender proceedings are open to competition among a range of potential tenderers, and not the existence of a minimum number of actual tenders, that induces tenderers to offer their most competitive tenders; according to this view, even a single tender should be sufficient and should be accepted if it is responsive and if the tenderer is eligible and qualified.

196. Many national procurement laws establish when the contractual relationship between the tenderer and the procuring entity comes into existence. It is often very useful for the procurement laws to clarify this point. Otherwise, the time at which the contract comes into existence will be governed by general legal rules, which in many cases have evolved to deal with the formation of simple contractual relationships and which may not clearly indicate the relevant time in relation to the formation of a contract as a result of tender proceedings. It would be particularly useful for this matter to be clarified for foreign tenderers that may be unfamiliar with the applicable general legal rules relating to the formation of a contract.

197. Under some procurement laws, the contract comes into existence when the tenderer is notified that its tender is accepted (e.g., upon a final decision by the procuring entity that is not subject to approval or upon the giving of final approval by a higher authority). This approach may be satisfactory when there are no outstanding issues concerning the contract to be resolved and where the contract covers all relevant terms. With respect to the form in which the notice must be given, it would be desirable for national procurement laws to take account of modern data transmission techniques. Under other procurement laws, the tenderer, upon notification that its tender has been accepted, becomes obligated to sign a formal contract document; no contract exists until the document has been signed by both parties. However, a tenderer that fails to sign the contract forfeits its tender guarantee and may otherwise be liable to the procuring entity for the failure.

198. In a few countries, the procuring entity sometimes issues to the successful tenderer a "letter of intent" to enter into a contract. This may be done, for example, when the procuring entity wishes the tenderer to begin to perform the contract immediately, without waiting for the details of the contract to be finally settled and the contract to be signed. It may be unclear in some legal systems what legal consequences, if any, arise from a letter of intent. For example, in some legal systems, it creates no contractual obligations, but may constitute authority to the tenderer to incur expenses preliminary to commencing to perform the contract, and to be compensated under the contract if one is entered into or to be reimbursed if a contract is not entered into. In other legal systems, a letter of intent might be regarded as obligating the procuring entity to enter into a contract with the tenderer. If a procurement law authorizes the issuance of a letter of intent, it would be desirable for the law to specify the legal consequences of the letter.

199. Some national procurement laws specify the procedures to be followed if the tenderer whose tender has been accepted fails to sign the contract document or to supply a performance guarantee, when those actions are required, or improperly withdraws its tender. Under some laws the procuring entity is to conduct new tender proceedings. Other laws authorize the procuring entity to accept the next most favourable tender. Under at least one law the tenderer may offer to the tenderer submitting the next most favourable tender to enter into a contract upon the terms and conditions offered in the most favourable tender.

200. Some procurement laws require the name of the successful tenderer, the tender price and other basic information about the accepted tender and the tender procedures to be publicized (e.g., in the country's official gazette). Some countries go further by providing that the minutes of the opening, examination, evaluation and comparison of tenders, and in some cases the tenders themselves and all other documentation relating to the tender proceedings, become public information at the conclusion of the proceedings. In at least one country, an unsuccessful tenderer may request the procuring entity to supply it with the reasons for the rejection of its tender. Provisions of this nature help to promote transparency of procurement procedures and to ensure that procurement officials will act in accordance with the procurement laws, and may be of particular importance where proceedings for the opening, evaluation and comparison of tenders are closed (see paras. 158 and 161, above). Such provisions will also assist an aggrieved tenderer to exercise a right of recourse against improper procedures used or decisions taken by the procuring entity. Under other procurement laws, however, the tender documentation and the reasons for rejecting a tender are confidential and may not be disclosed.

F. Negotiation and other procedures in national procurement laws

1. Negotiation

201. The negotiation method of procurement accounts for a significant proportion of procurement in some countries. In countries that do not have procurement laws, most or all procurement is done by negotiation. However, due to its nature, the procedures for this method of procurement are far less formal and subject to far less regulation in national procurement laws than tendering procedures. It is for this reason alone that the treatment of procurement by negotiation in this study is substantially shorter than the treatment of procurement by tendering.

202. Some procurement laws that provide for procurement by negotiation allow procuring entities virtually unrestricted freedom to conduct the negotiations as they see fit. Other procurement laws establish basic legal frameworks, of varying degrees of comprehensiveness and formality, within which the negotiations are to take place. One objective of such a framework is to incorporate a degree of competition into the negotiation proceedings. In fact, some procurement laws contain a general instruction to procuring entities to select their negotiating partners and to conduct the negotiations in a manner that promotes competition to the greatest extent possible. Some of the matters relating to procurement by negotiation addressed in procurement laws are discussed in the following paragraphs.

(a) Selection of negotiating partners

203. The same formal eligibility rules that apply to participants in tender proceedings usually also apply to participants in negotiation proceedings (see paras. 76 to 84, above).

204. Under many procurement laws, subject to the formal eligibility requirements set forth in these laws, the procuring entity has complete freedom to choose the contractors or suppliers with which it will negotiate. It will often make its choice on the basis of its past dealings with particular contractors or suppliers, or on the basis of the reputations of various contractors and suppliers, without taking further steps to verify their qualifications. The procuring entity may ask potential negotiating partners with which it is not familiar to establish that they have sufficient technical and financial resources and capacity to perform the contract in question. Sometimes a procuring entity will select its negotiating partners from a list of approved contractors or suppliers (see para. 94, above) (this is required by a few procurement laws).

205. Under some procurement laws the procuring entity simply contacts the contractors or suppliers with which it wishes to negotiate by whatever means it deems appropriate and invites them to participate in negotiations or to submit offers or proposals. In order to introduce an element of competition, some laws require the procuring entity to negotiate with, or to solicit offers or proposals from, a minimum number of contractors or suppliers (e.g., 3), unless this is not practicable. A few procurement laws establish more formalized procedures, and require the procuring entity to solicit offers or proposals by means designed to bring the solicitation to the attention of a range of contractors and suppliers (e.g., by publication). From the responses received the procuring entity may establish a short list of contractors or suppliers with which it will negotiate.

(b) Rules and procedures relating to conduct of negotiations

206. Some procurement laws establish basic rules and procedures relating to the conduct of negotiations. Even when the procurement law does not establish such rules and procedures, it is often desirable for the procuring entity to do so in order to help ensure that the negotiations proceed in an efficient manner.

207. For the procurement of complex, non-standardized works or goods, it is often desirable for the procuring entity to prepare various documents to serve as a basis for the negotiations, including documents setting forth the desired technical characteristics of the works or goods to be procured, and the desired contractual terms and conditions. Although many of these characteristics, terms and conditions will be subject to negotiation, they at least can serve as an indication of the desires of the procuring entity and a starting point for the discussions. Documents of this nature will be particularly useful where the procuring entity solicits proposals from contractors or suppliers.

208. It is useful in many cases for the procuring entity, prior to the commencement of negotiations, to establish an estimated price for the works or goods to be procured. That price should cover the cost to the contractor or suppliers of constructing, manufacturing or supplying the works or goods, plus a reasonable profit. Establishing an estimated price will serve as a guideline to the procuring entity in negotiating and agreeing upon a price that is fair

and reasonable. Such a guideline is desirable because the competitive forces that would lead to a fair and reasonable price in the tendering method are generally absent in the negotiation method.

209. Some procurement laws require contractors or suppliers to disclose to the procuring entity certain types of information, such as details regarding pricing and profit with respect to the work or goods that are the subject of negotiations. This is intended to enable the procuring entity accurately to estimate a fair and reasonable price, and otherwise to negotiate satisfactory terms and conditions. Some laws require contractors or suppliers to permit the procuring entity to inspect their relevant books or financial records, and their construction, manufacturing or supply facilities. Certain contractors or suppliers may, however, object to such inspections by the procuring entity, and may be inhibited from participating in negotiations where such inspections must be permitted, except in certain cases (e.g., where the contract is to be priced on a cost-reimbursable basis).

210. With respect to the criteria to be applied by the procuring entity in the negotiations, many procurement laws leave it to the procuring entity to negotiate the most advantageous contract according to whatever criteria it deems appropriate, it being assumed that the procuring entity will do so consistently with its own interests. Some laws, however, specify certain general criteria for the procuring entity to follow, e.g., by requiring it to negotiate the most "economical" contract, or to take into account factors such as price and operating and maintenance costs, as well as the effect of the contract terms on the contractor or supplier and its profitability and development potential.

211. As further guidelines for the negotiations, it may be useful for the procurement laws to establish, or for the negotiating parties to agree at the outset, that the parties are not to be contractually bound unless and until they execute a written contract. In addition, it is sometimes considered desirable to provide that, when the procuring entity negotiates with more than one contractor or supplier, the offer of and discussions with each contractor or supplier are to be confidential and are not to be revealed to other contractors or suppliers.

212. A few national procurement laws establish a much more elaborate procedural framework for the conduct of negotiations for use where particularly complex works or goods are to be procured. These laws, for example, regulate the solicitation of offers or proposals, establish time limits for the submission of offers or proposals, require the procuring entity to disclose the criteria to be considered and the relative weights to be given to the criteria, and regulate the conduct of the discussions between the negotiating parties.

2. *Competitive negotiation; "shopping"; single-source procurement; other methods*

213. The general procedures for procurement by these methods have been outlined in paragraphs 60 to 63, above.

Procurement laws that provide for competitive negotiation establish rules and procedures that address many of the matters addressed by the rules and procedures governing procurement by tendering. Procurement laws that provide for "shopping" and single-source procurement usually set forth few, if any, rules and procedures to govern those methods other than the ones mentioned in paragraph 62, above.

G. *Recourse by aggrieved participants in procurement proceedings*

214. Many national procurement laws provide a means of recourse for contractors and suppliers that have been aggrieved as a result of a failure of the procuring entity to comply with the procurement laws. In many cases these will be participants in tender proceedings whose tenders have been rejected, as well as contractors and suppliers that have been denied pre-qualification when pre-qualification procedures are employed. In some cases a tenderer whose tender has been found to be the most acceptable might be aggrieved if, for example, it is required to sign a formal contract document that contains terms or conditions that differ materially from those in its tender.

215. A tenderer might also claim to be aggrieved prior to a decision to reject its tender if the procuring entity follows procedures that do not conform to the procurement laws. It may be advantageous to enable or require such a tenderer to bring its claim when it arises, so that the alleged nonconformity can be remedied at an early stage, rather than requiring the tenderer to wait until after its tender has been rejected. The tenderer would be assisted in bringing such a claim if the procedures used by the procuring entity were transparent, e.g., open or otherwise ascertainable by the tenderer. On the other hand, to the extent that the bringing of such claims can interrupt the tender proceedings (see paragraphs 224 and 225, below), the ability to bring them at an early stage could be disruptive and could be abused by tenderers.

216. Participants in procurement proceedings other than tender proceedings can also be aggrieved by a failure of the procuring entity to conform to the applicable rules and required procedures; although, the less a procurement method is formalized and regulated by the procurement laws, and the more the procedures to be followed and the decision-making are left to the discretion of the procuring entity, the less scope there will be for a participant to obtain redress for a failure of the procuring entity to conform to the applicable rules and required procedures. In fact, a few procurement laws expressly provide a means of recourse only in respect of tender proceedings. Even where the procurement laws do not expressly provide a means of recourse, an aggrieved participant can in some legal systems seek redress under general legal principles (e.g., on grounds of arbitrary governmental or administrative actions, abuse of rights or denial of fundamental justice).

217. Providing an effective means of recourse against procurement procedures and decisions that are not in

conformity with the procurement laws is frequently regarded as necessary in order to promote the integrity of and confidence in the procurement process and to provide a favourable climate for participation by contractors and suppliers in procurement proceedings. Indeed, the lack of an effective means of recourse seems to be a significant factor that discourages participation in procurement proceedings, particularly by foreign contractors and suppliers. Moreover, the effectiveness and benefits of a framework of mandatory procurement rules and procedures will be reduced if there exist no means to ensure compliance with it.

218. In some countries an underlying principle of procurement policy is that a procuring entity should have the freedom to engage in procurement in the manner it deems most appropriate without the possibility of challenge or recourse by an aggrieved participant, except perhaps in limited cases (e.g., in cases of arbitrary governmental or administrative actions, abuse of rights or denial of fundamental justice). In most of these countries, however, procurement is subject to few or no mandatory legal rules (in several of these countries procurement is governed only by rules and regulations of internal management; see para. 36, above); thus, in these countries there is little basis for a legal provision granting a right of recourse for a failure to comply with applicable rules and procedures.

1. *Forum for recourse*

219. Procurement laws that provide a means of recourse usually designate the forum or forums where recourse may be sought. In most countries an aggrieved participant can in the first instance protest an allegedly nonconforming procedure or decision to the procurement officer or other official of the procuring entity concerned, or to the minister or head of the governmental department that has direct authority over the procuring entity, and seek to have the alleged nonconformity corrected. In some countries this is a precondition to further rights of recourse.

220. In addition to the procedures just mentioned, laws in some countries provide for recourse to be made to designated administrative bodies (e.g., the national procurement board, the financial controller or other government department exercising financial oversight over the activities of governmental organs, or a special tribunal established within a relevant ministry or government department). Laws in some countries provide for hierarchical levels of recourse within the administrative structure, and in at least one country an appeal can be made to the President when the value of the works or goods in question exceeds a stipulated amount.

221. In other countries procurement claims are dealt with judicially within the court system. In still other countries both administrative and judicial proceedings are available—in some cases as optional means of recourse and in other cases as hierarchical levels of recourse (e.g., the claimant being compelled to exhaust its administrative remedies before seeking judicial relief).

222. In some countries procurement claims are to be resolved before an arbitral tribunal, the composition of which is sometimes provided for in the procurement law. In at least one country this procedure applies in particular in respect of tender proceedings involving participation by foreign contractors or suppliers.

223. It may be generally useful for a procurement law to include an independent administrative body within the recourse mechanism. This would enable procurement claims to be dealt with by persons with particular expertise in the area of procurement and who are familiar with the often complex procedural, technical and financial aspects involved. These claims might be handled more efficiently and expeditiously by such an administrative body than by a court whose jurisdiction covers a range of subject matters much broader than just procurement. Administrative review may be desirable in particular in countries where an aggrieved participant can request a *de novo* review of a procurement decision (see para. 226, below).

2. *Status of procurement proceedings during recourse proceedings*

224. Some procurement laws provide that the commencement of recourse proceedings prior to the time when contract is entered into interrupts the procurement proceedings. A contract cannot be entered into until the recourse proceedings have ended. In at least one country, if the recourse proceedings are commenced after the contract has been entered into (this can be done only if the claimant did not know and could not reasonably have known before the contract was entered into of the grounds giving rise to the right of recourse), the performance of the contract is interrupted until the recourse proceedings have ended.

225. Competing considerations may be relevant to the question of the status of the procurement proceedings when recourse proceedings are commenced before the contract is entered into. On the one hand, a recourse mechanism would lose much of its effectiveness if the contract could be entered into notwithstanding the fact that the procurement procedures or decision had been challenged and might be defective. On the other hand, permitting the procurement proceedings to be interrupted will usually delay the procurement and could result in losses to the procuring entity (particularly where the delay prevents the contract from being entered into within the period of validity of tenders), which would be unjustified if the procedures or decision complained of were found to be proper. It may be possible to reconcile these competing considerations by, for example, requiring a claimant that seeks an interruption of the procurement proceedings to meet whatever requirements are imposed by general rules of the legal system with respect to the availability of interim judicial relief (e.g., by requiring the claimant to show a reasonable probability that its claim will succeed and to show that an interruption would not cause undue or irreparable harm to the procuring entity), or by making the claimant responsible for losses of the procuring entity if the claim is not successful and by requiring it to post a bond or other security to cover those possible losses.

3. Nature of review and of relief

226. In many countries, the mandate of the forum seized of the recourse claim is limited to determining whether or not the applicable legal rules and required procedures were complied with. When the recourse proceedings are commenced before the procurement proceedings have been completed, the forum may require the procuring entity to comply with the required procedures and to take its decisions in conformity with the procurement laws. If the procurement proceedings have been completed but a contract has not been entered into, the forum may require new procurement proceedings to be conducted. If a contract has been entered into, the forum can often require the payment of damages to the claimant. In some countries, when a recourse claim is brought before a court, the court in extreme cases may declare the contract to be void or cancelled, in which case the procuring entity will have to engage in new procurement proceedings. The procurement laws of at least one country empower an administrative body to engage in a *de novo* review of the entire procurement proceedings and order that a particular tender be accepted.

V. CONCLUSIONS

227. This seems to be an opportune time for Governments to review their policy objectives in relation to procurement, and to evaluate their procurement laws and procedures in the light of those objectives or to consider the desirability of introducing procurement laws where none presently exists. Some Governments are already undertaking such a review and evaluation. It is hoped that the study of procurement contained in this report will assist in this process. The Working Group may consider it desirable to assist further by proposing to the Commission the preparation of a model procurement code. A model procurement code could serve as a standard for the evaluation by countries of existing procurements laws and a model for the improvement or formulation of procurement laws on a sound basis.

228. A model procurement code could be of benefit both to individual countries and to international trade as a whole. It could, for example, assist countries whose objectives call for participation in procurement proceedings by foreign contractors and suppliers to make their procurement laws and procedures more conducive to such participation. Countries whose objectives call for favouring procurement from domestic sources could be assisted in devising ways to do so and yet to minimize unnecessary restrictions on participation by foreign contractors and suppliers in procurement proceedings. In addition, greater harmonization of national laws relating to procurement would facilitate international trade.

229. It would seem to be feasible to formulate a model procurement code acceptable to a broad range of countries. As revealed in the foregoing study, although national procurement laws differ widely in numerous respects, they reflect few differences of basic principle. The major difference of that nature is between countries that consider

that their procurement policy objectives can best be realized by means of a comprehensive and mandatory legal framework governing procurement, and those that consider that their objectives are best realized by imposing minimal or no controls on procurement by governmental and public entities. Differences in national procurement laws often reflect differing priorities with respect to procurement policy objectives. It does not appear that there exist among national procurement laws differences of a fundamental juridical nature.

230. An approach to the formulation of a model procurement code that the Working Group might wish to consider is to prepare a "framework law", which would set forth basic mandatory legal rules governing public procurement to be implemented by detailed regulations. It could be envisaged that these detailed regulations would in many cases be promulgated by administrative authorities. Other countries might consider it more appropriate or desirable for the regulations to be promulgated by the same legislative authority that enacted the code, either as separate regulations or as an expanded procurement law based upon the model procurement code.

231. The approach just described might be regarded as desirable for the following reasons. Firstly, it would be very difficult, if not impossible, to regulate procurement procedures in detail in a code designed for worldwide application. Instead, it would be preferable for the code to establish basic mandatory legal rules and enable enacting countries to tailor the detailed rules and procedures to their own procurement policy priorities and their other needs and circumstances (e.g., their governmental and administrative structures). The study of procurement contained in the present report could assist countries in the formulation of detailed regulations. Secondly, the technique of enacting a framework law to be implemented by detailed administrative regulations is familiar to many countries. Thirdly, this technique could make the model procurement code acceptable even in countries that considered it desirable to establish only basic legal rules governing procurement and to leave broad discretion to procuring entities with respect to detailed procurement procedures; these countries might, for example, adopt the model procurement code without promulgating any further implementing regulations.

232. The formulation of a model procurement code could complement the activities of other international organizations in the area of procurement. Mention has been made above, for example, of the existence of procurement guidelines and other requirements issued by international lending institutions (see paras. 9 and 28, above). Those guidelines and requirements generally cover only procurement conducted in connection with projects funded by them, which are usually projects of high value; they thus cover only a relatively small portion of procurement by public entities throughout the world. With most public procurement conducted in accordance with national procurement laws and practices, there remains substantial scope for useful work by the Commission directed towards assisting countries to create an improved and more harmonious climate for public procurement.

233. In addition, some of these institutions permit certain types of procurement with funds provided by them to be carried out in accordance with the borrowing country's own procurement laws, rather than the institution's guidelines, as long as those laws are acceptable to the institution (see para. 9, above). Work by the Commission directed towards assisting countries to improve or formulate national procurement laws on a sound basis could help borrowing countries in their relations with lending institutions.

234. The formulation of a model procurement code would not duplicate the work of organizations such as GATT or the EEC. The orientations of the GATT Agreement on Government Procurement and the EEC directives on the subject (see paras. 10 and 29, above) are narrower than that of the envisaged UNCITRAL model procurement code. The central policy behind those instruments is to remove discriminatory practices and other barriers to participation by contractors and suppliers from parties to the GATT Agreement or members of the EEC, respectively, in proceedings for procurement by a procuring entity from another such party or member country. In contrast, the UNCITRAL model procurement code would take into account a variety of possible national policy objectives. Participation by foreign contractors or suppliers in procurement proceedings would play a role in some of those objectives, but would be regarded as only one feature to be considered and weighed together with others in the formulation of procurement laws and procedures that met national procurement policy objectives.

Furthermore, as a model for national procurement laws, the UNCITRAL model procurement code would not be based on the element of reciprocity that is inherent in the GATT Agreement and the EEC directives. In addition, the scope of the GATT Agreement and the EEC directives is, as a result of their particular orientations mentioned above, narrower than that of the envisaged UNCITRAL model procurement code. The GATT Agreement and the EEC directives apply only in respect of procurement exceeding stipulated values, and the GATT Agreement applies only in respect of procurement by certain governmental procuring entities designated by each party to the Agreement.

235. The Working Group may wish to use the study of procurement in this report as a basis for its formulation of the model procurement code. In order to prepare for the drafting of the model procurement code, the Working Group may wish to discuss the general principles that should underlie the code. It might regard, in particular, the suggested principles for sound national procurement laws relating to the procurement of works and goods, which have been distilled from the study of procurement and which are set forth in the annex to this report, as a useful basis for that discussion. The Working Group may also wish to discuss the issues to be addressed in the model procurement code and the approaches to be taken with respect to those issues. Upon completing those discussions the Working Group may wish to request the secretariat to prepare a first draft of the model procurement code.

ANNEX

SUGGESTED PRINCIPLES FOR SOUND NATIONAL PROCUREMENT LAWS RELATING TO THE PROCUREMENT OF WORKS AND GOODS

1. It is desirable for the procedures for public procurement to be governed by national procurement laws that are mandatory and binding on procuring entities and on contractors and suppliers participating in procurement proceedings.

2. National procurement laws and the procedures established by them should be designed to maximize economy and efficiency in procurement and to promote the integrity of and confidence in the procurement process.

3. National procurement laws may also be designed to achieve other specific economic and social objectives, such as national economic development, development of domestic industries, and development of particular geographic regions or economic sectors.

4. It is for each country to determine the priorities to be accorded to the various objectives referred to in Principles number 2 and 3, taking into account its needs and interests.

5. National procurement laws and procedures should be "transparent". Procurement laws should make known to contractors and suppliers participating in procurement proceedings the rules and procedures to be followed by the procuring entity and by the participants. Procurement laws should be published and kept up to date and made available to those participants. Participants in procurement proceedings should be able to ascertain

what procedures have been followed by the procuring entity and the basis of its decisions.

6. National procurement laws and procedures should not be excessively detailed or complex, or unnecessarily costly or burdensome to procuring entities or to contractors or suppliers participating in procurement proceedings.

7. Where participation by foreign contractors or suppliers in procurement proceedings is anticipated or sought, the procurement laws and procedures should avoid unnecessary obstacles to their participation.

8. It is desirable for national procurement laws to include competitive tendering among the methods of procurement provided for. It would be desirable for tender procedures to be formulated, in particular, in accordance with the following principles:

(a) tender procedures should be designed to maximize competition among a range of contractors or suppliers;

(b) requirements and provisions that have the effect of restricting participation in tender proceedings should be included in national procurement laws and in tender documents only when the desirability of such requirements and provisions overrides their potential disadvantages. Such requirements and provisions should be carefully formulated so as to limit the

restrictions on participation to those that are needed in order to achieve the intended aims of the requirements and provisions;

(c) except to the extent necessary to achieve relevant and clearly defined national policy objectives, procuring entities should be required to deal with all tenderers and tenders on the basis of equality. This principle of equality should not be departed from except as authorized by the procurement laws, and any such departure should be specified in the tender documents;

(d) procuring entities should be required to set forth in the tender documents in a clear and complete manner all rules and procedures to be followed in the tendering; a description of the works or goods to be procured, which should be formulated by reference to objective characteristics, specifications and standards; the criteria and the methods to be used in evaluating the qualifications of tenderers and in evaluating and comparing tenders; and all other information necessary to enable tenderers to formulate their tenders;

(e) procuring entities should be required to base their evaluation of the qualifications of tenderers and their evaluation and

comparison of tenders on objective criteria, and to conduct the evaluation and comparison in an objective manner;

(f) procuring entities should be required to examine, evaluate and compare tenders strictly in accordance with the criteria, methods and procedures set forth in the procurement laws and in the tender documents.

9. When a national procurement law provides for two or more methods of procurement, it should set forth rules or guidelines to govern the choice of the method to be used. It would be desirable for the procurement laws to require that procurement by methods other than competitive tendering be conducted in accordance with procedures that result in a reasonable price and that otherwise promote economy and efficiency in procurement and the integrity of and confidence in the procurement process.

10. National procurement laws should provide for an effective means of recourse against actions taken or decisions made by the procuring entity that are not in conformity with the procurement laws or with the rules and procedures set forth in the tender documents.

III. LIABILITY OF OPERATORS OF TRANSPORT TERMINALS

A. Liability of operators of transport terminals: compilation of comments by Governments and international organizations on the draft Convention on the Liability of Operators of Transport Terminals in International Trade: report of the Secretary-General (A/CN.9/319 and Add. 1 to 5)

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Introduction

1. The Commission, at its seventeenth session in 1984, assigned to its Working Group on International Contract Practices the task of preparing uniform rules on the liability of operators of transport terminals.¹ The Working Group commenced its work at its eighth session in 1985 with a comprehensive consideration of the issues arising in connection with the liability of operators of transport terminals (A/CN.9/260). At its ninth session in 1986 the Working Group engaged in an initial discussion of draft articles of uniform rules prepared by the secretariat, and prepared draft articles 1, 2, 3 and 4 to serve as a basis for further consultations by delegations and for its future work (A/CN.9/275). At its tenth session in 1987 the Working Group discussed the draft articles prepared by it and additional draft articles revised or prepared by the secretariat (A/CN.9/287). At its eleventh session in 1988 the Working Group considered all articles of the draft uniform rules and recommended that the uniform rules be adopted in the form of a convention (A/CN.9/298). It convened a drafting group during that session to incorporate the decisions taken by the Working Group and to establish corresponding versions of the draft Convention on the Liability of Operators of Transport Terminals in International Trade in the six languages of the United Nations. The Working Group then reviewed and approved the articles and the title of the draft Convention. The draft Convention is reproduced in annex I to document A/CN.9/298.

2. The Commission, at its twenty-first session in 1988, requested the Secretary-General to transmit the draft Convention to all States and interested organizations for comments, and requested the Secretariat to prepare and distribute a compilation of the comments as early as possible before the twenty-second session of the Commission.² The present compilation is submitted pursuant to that decision by the Commission.

¹Report of the United Nations Commission on International Trade Law on the work of its seventeenth session, *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 17 (A/39/17)*, para. 113.

²Report of the United Nations Commission on International Trade Law on the work of its twenty-first session, *Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17)*, para. 29.

3. As of 18 January 1989, the Secretariat had received replies from the following States and international organizations:

States: Canada, Denmark, Philippines, Poland, Spain, Sweden, Union of Soviet Socialist Republics and United States of America;

Intergovernmental international organizations: Economic Commission for Latin America and the Caribbean, International Civil Aviation Organization and United Nations Environment Programme;

Non-governmental international organizations: Council of European and Japanese Shipowners' Associations, International Chamber of Shipping, International Federation of Freight Forwarders Associations, International Rail Transport Committee and International Union of Railways.

Compilation of comments

States

CANADA

[Original: English]

1. General comments

The Government of Canada welcomes the opportunity to comment on the draft Convention on the Liability of Operators of Transport Terminals in International Trade as prepared by the Working Group on International Contract Practices.

The Government of Canada notes the draft Convention will prohibit contracting out of liability or contracting lower liability limits than set out in the Convention, matters heretofore addressed in Canada solely by the parties to a contract. The Government of Canada has therefore consulted widely with industry advisers in order to seek their views on the Convention's impact on their existing freedom of contract. Further consultations with industry will be necessary in order to reconcile the views expressed during the consultative process. These observations, therefore, reflect only the preliminary views of the Government of Canada on the draft Convention.

Both the operators of transport terminals in Canada and the consumers of their transport-related services do not have unanimous views in favour of the limits of liability

proposed in the draft Convention. As a general matter, it would appear to be useful to further review the limits of liability in the draft Convention with regard to their compatibility with the prevailing limits applicable internationally to carriers, in particular, to ocean carriers.

In addition to seeking the views of the affected industry, the Government of Canada has consulted with the provincial and territorial governments of Canada on the subject of the draft Convention. It has concluded that implementation of the Convention in Canada would be expedited by the inclusion of a federal State clause in the Convention.

In principle, the Government of Canada does not see the need to permit reservations to be made to conventions such as the draft Convention on the Liability of Operators of Transport Terminals in International Trade, subject to, of course, the final wording of the proposed Convention.

In preparing its observations, the Government of Canada has borne in mind the necessity to maintain terminal costs at a reasonable level. The clause-by-clause comments that follow have been prepared on the understanding that reasonable, adequate compensation for damage can help to create the conditions within which international trade can develop and prosper. It is the view of the Government of Canada that the Convention must respect the needs of the key participants in a field that is rapidly changing both with respect to the applicable technology and the complexity of the operations of terminal operators.

2. Clause-by-clause commentary

Article 1. Definitions

Further clarification should be provided on why the term "goods" in paragraph 1(b) should be defined as including a container, particularly in a case where the container is supplied by the carrier as opposed to the cargo interest. If containers are to be included in the definition of goods, consideration should be given to distinguishing the treatment of containers in the Convention from that given their contents.

The adjective "two" modifying "different States" is tautological and should be deleted.

Article 2. Scope of application

The scope of application is based on the definitions of "transport-related service" and "international carriage" and ultimately under article 2(a) on the operator's "place of business". It would appear to be preferable to apply the Convention when the transport-related services are rendered in a State party to the Convention. Such a criterion would conform with the conflict rules in private international law referred to in paragraph 2(b) as well as the existing international carriage conventions. It would pose fewer problems of application. As drafted, the scope of application may fail to cover all operators of transport terminals in Canada involved in international trade, impeding the goal of harmonization.

Article 4. Issuance of document

In the case of containerized cargo, it is generally impossible for the operator to form any opinion as to the

accuracy of any document describing the goods and their condition. The imposition of detailed inspection procedures and the issuance of receipts would increase the costs of container handling and markedly decrease the efficiency of that handling. The absence of inspections and receipts has not resulted in dissatisfaction among container terminal customers and others interested in the cargo they carry. It would appear to be preferable to exempt containerized cargo from the requirements of article 4.

As a general matter, the issuance of a receipt for the incoming goods would be a novel situation and could result in potentially large increases in the liability of terminal operators.

Further consideration should be given to the need to require the issuance of a document at the customer's request more particularly in order to clarify the application of the rebuttable presumption in paragraph (2).

Article 5. Basis of liability

The addition of the words "subject to article 10" to article 5 would be useful in order to cross reference at this point the operator's right to retain the goods in certain circumstances.

Article 6. Limits of liability

The draft Convention may be more broadly accepted if the standardized limits of liability it establishes are compatible with the prevailing limits of liability applicable to carriers, and to ocean carriers in particular.

It may be the case that separate limits of liability should be established for containers so that the weight of the container is not added to the weight of the contents when determining liability on a per weight basis for cargo.

Article 8. Loss of right to limit liability

This provision would appear to indicate that the operator would lose the protection of the limits of liability to be established under the Convention for his own as well as the tortious or delictual or quasi-delictual acts of agents or servants acting outside the scope of their employment. The goal of harmonization and broad acceptability of the draft Convention may be better assisted if the operator would lose the right to limit responsibility only where it is proven that the loss, damage or delay in delivery resulted from his own acts or omissions, done with intent to cause loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result. Such a rule would include the acts or omissions of servants or agents acting within the scope of their employment but not the acts or omissions of servants and agents committed outside that scope. In doing so, the liability régime to be established by the draft Convention would be similar in this respect to the Hague, Hague/Visby and Hamburg Rules.

Article 9. Special rules on dangerous goods

There is an implication that the operator may not take the protective measures contemplated in paragraph 9(a) where the goods are marked as being dangerous or where the operator knows they are dangerous. There would appear to be sound policy grounds for expressly permitting

the operator to take such actions even where he has knowledge that the goods are dangerous or where they are properly marked because of some latent defect or inherent vice in the goods themselves or in their packaging or through the fault of a third party.

Article 10. Rights of security in goods

In some Canadian jurisdictions, the operator is now entitled to retain the container as well as the goods. Thus, the article, which is designed to assist the operator, would place some Canadian operators in a more onerous position than they are under existing law.

The nexus created in the article between the operator and the owner of the goods does not exist elsewhere in the draft Convention. In other articles, it is clear that the operator is an intermediary. In the normal course, the operator will have no dealings with the owner and will often not know, nor need to know, who the owner is. Moreover, in international dealings, the issue of who is the owner and when ownership passes is often a vexed question. Quaere whether the operator should not be required to attempt to solve that question or, in the alternative, to await a determination by a court before he is entitled to exercise his remedy. Quaere also if notice to the owner should be required prior to the exercise of a right of retention by the operator.

Article 11. Notice of loss, damage or delay

Paragraph 11(1) could be amended to read "the person entitled to take delivery of the goods from the operator" in order to avoid uncertainty in cases of combined transport operation or containerized cargo.

Paragraph 11(2) could be amended to read "if notice to the operator is not given . . .".

Article 12. Limitation of actions

In the case of recourse actions, the operator is placed in a position of considerable uncertainty by paragraph 12(5). Further study of the limitation period for recourse actions would appear to be warranted. As it is drafted, an action for indemnity could be instituted several years after the performance of transport-related services by the operator so long as it is commenced within 90 days of settlement or resolution of the base claim. A more restrictive period for recourse actions may be desirable. In the alternative, compliance with the rules of procedure of the State where the proceedings are instituted might be added to the provision in order to provide greater certainty for the operator.

DENMARK

[Original: English]

Before turning to a few specific points regarding the individual articles in the draft Convention, the Danish Government would like to emphasize its sincere appreciation of any attempt to promote the progressive harmonization and unification of the law of international trade.

It should be borne in mind, however, that the final position of the Danish Government on the possible ratification of this specific Convention would depend on the final decision with regard to the 1978 United Nations Convention on the Carriage of Goods by Sea, the so-called "Hamburg Rules", and the 1980 United Nations Convention on International Multimodal Transport of Goods, the so-called "Multimodal Convention". The Danish Government has not yet decided on the possible ratification of these Conventions.

The following points regarding the individual articles in the draft Convention are submitted without prejudice to any final position the Danish Government will take on this issue.

The title of the Convention

The draft Convention does not only deal with the liability of operators of transport terminals, but also with the question of the operators' rights of security in goods. It would be preferable to include this in the main title of the Convention.

Articles 1 and 2. Definitions and scope of application

The scope of application is not entirely clear. It should be considered to confine the period of liability to the actual period of "warehousing" in order to avoid the very likely risk of a conflict with other transport conventions.

Article 6. Limits of liability

It could be problematic that the limitation amounts in this article are proposed to be different depending on whether the international carriage of goods involves carriage by sea or inland waterways or not. Furthermore, it is of vital importance that the amounts are in conformity with limitation amounts in other transport conventions.

Article 8. Loss of right to limit liability

It is not clear why article 8(1) goes further to limit liability than similar provisions in the Hamburg Rules (article 8(1) and the Multimodal Convention (article 21(1)), in that it leads to unlimited liability for the operator when loss, damage or delay result from a grossly negligent act or omission of his servants or agents with knowledge that such loss, damage or delay would probably result.

Article 10. Rights of security in goods

It might be prudent to state expressly that the operator's retention and subsequent sale of the goods can't be exercised further than to secure his actual costs and claims.

Article 12. Limitation of actions

The proposed limitation period of two years is not in conformity with other existing transport conventions, nor is the provision on recourse action in subparagraph (5). It is preferable to have conformity in this regard.

PHILIPPINES

[Original: English]

General comment

The draft Convention is timely. It is essential to fix the rights and obligations of operators of transport terminals in international trade. Provisions of the draft Convention will guide the parties accordingly.

Specific comment

Article 12. Limitation of actions

Article 12 should, perhaps, include a provision that will allow the parties in arbitration proceedings to agree on the place of arbitration, the language of arbitration, who the arbitrators could be, the procedural law to be followed (such as UNCITRAL, ICC, or AAA Rules) and the specific substantive law to be applied to a particular controversy.

POLAND

[Original: English]

Contrary to the principles expressed in the Convention on the Carriage of Goods by Sea (1978) and the Convention on International Multimodal Transport of Goods (1980), operator's liability has been correctly extended to cover also his servants or agents. In such case the operator loses the right to limit his liability.

It should be mentioned in this context that the article No. 474 of the Civil Code of the Polish People's Republic also contemplates liability of the debtor for acting or omission of the third party entrusted with or helping to perform the obligation.

There are serious reservations concerning principles of liability in respect of damages to the container itself.

In particular it is not clear whether "... kilogram of gross weight of the goods lost or damaged ..." concerns also the container itself and how the container's weight should be calculated (with or without its contents).

This extension of operator's liability will result in an increase of service charges as well as of insurance premiums. Certain reservations also concern the one day limit given to notice of loss or damage.

SPAIN

[Original: Spanish]

First comment

Article 7(3), first line

The word "accruable" ("acumulable") should be inserted in front of the words "aggregate of the amounts" towards the end of the mentioned line.

This comment is intended to give the text better clarity than in the present wording, which is ambiguous with

regard to the possibility of the claimant exceeding the liability limit laid down by the Convention.

Second comment

Article 8(1), last line

A final phrase worded as follows should be added to the end of this paragraph: "... provided such occur during the fulfilment of his contractual obligations".

The proposed addition provides an equitable solution for the loss by the operator of his right to a liability limit.

The basis of the operator's liability and its scope through a fraudulent violation committed by his subordinates is the traditional doctrine of "*culpa in eligendo*", *inter alia*. Without doubt it is excessive to blame him to an unlimited extent when the fraudulent and damaging activity of his servant or agent is suffered by his client not only on the occasion of the performance by them of their professional activities, but also on the fringe of such. In the latter case the operator should be in a position to benefit from the liability limit.

SWEDEN

[Original: English]

General observations

The Swedish Government welcomes the work that has been carried out by the Working Group on International Contract Practices. The draft Convention constitutes a solid basis for further negotiations aiming at elaborating a liability régime for operators of transport terminals.

The Swedish Government realizes—and would like to underline—that the draft Convention represents a compromise between different views and between various legal systems. Therefore, the solutions chosen to solve different problems do not necessarily represent the position that the Swedish Government would have preferred in the first place.

The interest of establishing a liability régime in this field of transport law and filling out the existing gaps in the chain of transport must, however, be considered to be of such importance that the draft could basically be accepted.

As regards the form of the proposed régime, the Working Group has recommended a convention. In previous stages of the negotiations within the Working Group, the form of a model law has also been considered.

An important factor, when making the choice between these two alternatives, is the fact that the Hamburg Rules and the Multimodal Convention, which to a great extent have served as models for the proposed Convention, have not yet entered into force. This should not, however, be the determinant factor for the choice to be made. Of major interest is the desirability of achieving the greatest possible uniformity in this field of transport law.

The Swedish Government can accept that the liability régime in question is laid down in the form of a convention. For States which are not prepared to accept this solution and the internationally binding nature of a

convention the proposed Convention could serve as a model for national legislation. Such States could later on decide whether or not to ratify the Convention. This could also be a way to reach uniformity.

After these general remarks, the Swedish Government would like to make a few comments on some of the proposed articles of the Convention, keeping in mind as mentioned above their nature of well reasoned compromise solutions.

Comments on specific articles

Article 1

(a) One of the requirements for regarding a person as an operator of a transport terminal is that he undertakes to "take in charge" goods . . . etc. The meaning of the expression "take in charge" should be clarified to make it perfectly clear in what situation the régime is applicable or not. Would for instance some activity from the operator be required with regard to the receipt of the goods, or would it be sufficient that the goods are left on the quay for later instructions concerning their destination etc. to make the rules apply?

(b) The definition of "goods" is not entirely clear on some points. Would the definition for instance cover live animals and furniture removal (cf. article 1, paragraph (4), in the CMR)? Some clarification seems to be needed in this respect.

(e) (f) The definitions under these two paragraphs exclude the possibility of using oral notices and requests under several draft articles in the Convention. The Swedish Government is not in favour of this exclusion. It had been preferable to leave it to the parties involved to determine the appropriate form of notice to use in accordance with good commercial practice and to protect their interests. To require a specific form would furthermore create confusion within those legal systems, among them the Swedish one, where it is left to the courts to decide upon the value of the evidence presented before them, whether in writing or orally by a witness.

Article 2

The rules apply only to goods which are involved in international carriage. It could be argued that, for logical reasons, this is not the best solution. Different rules could apply to the same kind of goods in a terminal depending on the place of destination. This could cause confusion and have the result that "national goods" are treated with less care than goods headed abroad. However, the Swedish Government will not oppose the proposed solution.

Article 3

With regard to the use of the words "taken in charge" the same arguments could be put forward as under article 1.

The period of responsibility for the goods expires when the operator has handed them over or "made them available to" the person entitled to take delivery of them. This seems to be a very strict rule from the customer's point of view. It implies that the operator does not have to take care of the goods and has no responsibility for them if

there is a delay in collecting the goods within the agreed period of time. It could be argued that the operator's responsibility should not be allowed to expire unless he has notified the recipient and urged him to collect the goods. If the reasoning behind the present stipulation is to avoid terminals being used for lengthy storage, it would of course be possible to counteract such practice by increasing the storage fees.

Article 5

The word "loss" in the opening words of paragraph (1) "The operator is liable for loss resulting from loss of or damage to the goods" might well be and has been interpreted to include consequential loss. Against this background, it has been observed that this makes the extent of the operator's liability uncertain. In the Working Group, however, it was probably thought that whether or not a claimant could recover consequential loss in a particular case would be dependent on the rules of the applicable legal system. Since the wording has given cause for some doubt, it could prove valuable to give the paragraph some further consideration.

Article 6

The Swedish Government can support the approach chosen in paragraph (1) which implies a limitation per kilogram and not—as an alternative—based on the number of packages or shipping units. As regards the arguments in favour of this solution, the Swedish Government would like to refer to those contained in the report from the tenth session of the Working Group in Vienna (A/CN.9/287, paragraph 34).

The Swedish Government would, for the time being, like to reserve its position with respect to the specific limitation amounts. It should, however, be stressed that the amounts ought to be adjusted to other limitation amounts in the field of transport legislation in order to make recourse actions possible on a back-to-back basis between operators and carriers.

Furthermore, it seems to be important to note that the final decision on the amounts will, among other things, depend on the reservation clauses to be elaborated by the Commission (cf. paragraphs 45 and 96 of the report of the Working Group on its eleventh session, A/CN.9/298).

Final remarks

In the view of the Swedish Government, it would have been preferable, had the draft Convention contained rules that put an obligation on the operator to cover his liability with insurance. Proposals to introduce such an obligation have not, however, met with great sympathy in the Working Group. Unfortunately, the liability régime could prove to be of less value, should the operator turn out to lack the financial means to cover claims that are made against him.

UNION OF SOVIET SOCIALIST REPUBLICS

[Original: Russian]

Although, on the whole, the draft in question serves as an acceptable basis for discussion at UNCITRAL's

twenty-second session, it seems appropriate, in connection with certain of its provisions, to express the following considerations, which may be examined during the forthcoming discussion, with the relevant conclusions reflected either in the actual text of the draft Convention or in the report of the Commission.

1. While article 4, paragraph (1), of the Convention provides for the indication by the operator of the "condition" of the goods which he receives from the customer, paragraph (2) of the same article states that in the absence of such indication the goods are presumed to have been received "in apparently good condition". Would it not be useful, as a means of avoiding any differences of interpretation, to provide in paragraph (1) that in the event the operator indicates the condition of the goods, he is entitled, specifically, to do so only on the basis of the external appearance of the goods received? Although, obviously, a more detailed description by the operator of the condition of the goods received is not excluded, it is correct to consider that the operator has also fulfilled his function when he limits his indication to a reference to the external condition of the goods.

2. According to article 6, paragraph (4), the operator "may agree" to "limits of liability exceeding those provided for in paragraphs (1), (2) and (3)" of that article. The draft Convention, however, does not specify when or in what form this "agreement" may be expressed. Would it not be useful to supplement this paragraph by a reference to the fact that if this agreement has been expressed in writing at any time prior to the loss of or damage to the goods or delay in their handing over by the operator, it becomes an obligation on him?

3. In article 7, paragraph (3), there is established the impossibility of the customer's claiming an aggregate amount exceeding "the limits of liability provided for in this Convention". From the point of view of interpretation, this limitation evidently also includes the case when the operator, by virtue of article 6, paragraph (4), has assumed higher limits of liability. In order to avoid doubt and in the interest of greater accuracy, it would be useful to consider the question of supplementing article 7, paragraph (3), by a reference to article 6, paragraph (4).

4. Unlike other transport conventions, including article 13 of the United Nations Convention on the Carriage of Goods by Sea, article 9 of the draft of the new Convention does not directly provide that, when handing over dangerous goods, the customer is obliged and liable to inform the operator accordingly. Although it is understood that in the case of the operator one is dealing with a situation different from that when dangerous goods are loaded directly onto a maritime vessel or some other means of transport, nevertheless a reference to the obligation and liability of the customer might be desirable in this draft also, because of considerations *inter alia* of ecological protection. In addition, is there justification for exempting the operator from payment of compensation only for "damage to or destruction of" dangerous goods?

5. In article 9, subparagraph (b), the discussion is limited to the right of the operator himself to receive

reimbursement for all costs which he may incur as the result of taking precautions, including measures for the destruction of dangerous goods. This provision, however, as it must be understood, in no way implies the elimination of the customer's liability to the owners of other goods which are located at the terminal and may be damaged by the dangerous goods. This understanding, which flows from the scope of application of the Convention (article 2, paragraph (1)), might usefully be specified, if not in the text of article 9, at least in the UNCITRAL report devoted to the discussion of the draft.

In the event that the discussion of the entire draft of the new Convention is concluded at UNCITRAL's twenty-second session, it would be necessary, in the course of the work of that session, to set up a drafting group to be responsible for the finalizing of the draft text so as to ensure its authenticity in all languages.

UNITED STATES OF AMERICA

[Original: English]

I. Preliminary issues

A. Terminal operator's period of responsibility: filling the gaps

The purpose of the instrument is to fill gaps between existing legal régimes. Nevertheless, not all the gaps are effectively treated. Accordingly we propose a major change for article 3 which describes the terminal operator's period of responsibility for goods as being "from the time he has taken them in charge until the time he has handed them over or made them available to the person entitled to take delivery of them". This formulation would not fully fill the gap between the terminal operator and the maritime carrier in those countries (such as the United States) which continue to be subject to the Hague Rules). Thus we advocate a formulation which would make the new instrument applicable whenever another régime does not apply. We propose the following period of responsibility formulation for article 3:

The operator shall be responsible for the goods from the time when the applicable rules of law governing carriage cease to apply until the rules applicable to the next carriage begin to apply.

The United States is open to other formulations which would accomplish the objective of matching the application of the Hague Rules to the application of the terminal operator's régime. However, we emphasize strongly the need to consider the application of the Hague Rules. Failure to close this gap would weaken the terminal operator régime seriously.

The argument may be made that the terminal operator's régime should be designed to fit the Hamburg Rules only. We disagree. The instrument on the terminal operator's liability should not be viewed as an extension of the Hamburg Rules. It is a totally independent instrument. We are of the view that the terminal operator's régime must be designed to apply up to the point when any carrier régime applies. The instrument will be more versatile and

thus more broadly acceptable if it is designed to fit either the Hague, Visby or Hamburg Rules.

B. Application of draft instrument to stevedores who are covered by the applicable rules of law governing carriage

This issue is related to the previous issue. The United States views the terminal operators' liability régime as being separate and distinct from the carriers' liability régimes. Consequently, to the extent that the rules of law governing carriage apply, the terminal operator's régime need not and should not apply.

Maritime carriers have established a degree of uniformity by providing in their bills of lading that each bailee of goods subject to the bill of lading have the benefit of the defenses available to a carrier under the bill. Presumably negotiations between the carriers and the stevedores might reduce the cost of loading and unloading the vessel by eliminating double insurance. However case law is not yet uniform on this point. Thus terminal operators at ports of loading and discharge of cargo moving under a port-to-port bill of lading, and those terminal operators plus others at inland points for cargo under through intermodal bills of lading, are all subject to the same liability rules. They are all treated the same as carriers. The terminal operators, including stevedores, would prefer a uniform liability régime where it can be achieved by a bill of lading clause.

The United States therefore proposes a modification of the last sentence of article 1(a) as follows:

However, a person shall not be considered an operator to the extent that he is responsible for the goods under applicable rules of law governing carriage.

This modification would assure stevedores, when they handle goods under maritime bills of lading which extend to them the benefits possessed by the carriers, that they are treated no less favourably under the proposed Convention than are the carriers.

II. Detailed comments

Article 1.

1. See the comment under I, subparagraph B, above.
2. The United States does not believe that the proposed Convention extends to container depots where empty containers are stored and repaired. This view is based on the definition of "goods" which includes containers only if cargo is "consolidated or packaged therein". The records of the proposed Convention should clearly reflect this understanding.
3. Traditional paper documentation is being replaced by a new paperless system called the Electronic Data Interchange for Administration, Commerce and Transport (EDIFACT). Electronic documents are faster, safer and less costly than traditional paper documents. UNCITRAL, the Customs Co-operation Council (CCC) and the United Nations Economic Commission for Europe are coordinating the universal adoption of EDIFACT, and most countries are introducing paperless documentation.

The United States supports the conversion to paperless documentation and proposes that all documentation under the Convention on the liability of operators of transport terminals be adaptable to computer communication without the necessity of the use of paper. It is urged that both the "notice" and the "request" in Article 1(e) and (f) be adaptable to paperless communication.

Article 2. Scope of application

No comment.

Article 3. Period of responsibility

See the comment under I(A) above.

Article 4. Issuance of document

Article 4, subparagraph (1)(a), established too onerous a documentation burden on terminal operators, particularly on stevedores, who often handle the goods only for a few minutes. Therefore the United States proposes for subparagraph (1)(a) a simple receipt for the goods without further requirements regarding description of the condition and quantity of the goods. In consequence the reference to subparagraph (1)(a) in subparagraph (2) should be deleted.

Article 4, subparagraph (1)(b), would not require a terminal operator to open sealed containers in his charge. The operator would not be required to ascertain the condition and quantity of the goods received, except "in so far as they can be ascertained by reasonable means of checking".

A similar situation exists under subparagraph (1)(a) for the terminal operator who is asked to acknowledge "his receipt of the goods by signing a document produced by the customer". This terminal operator should also not be required to open sealed containers to ascertain condition and quantity of goods received. Therefore the United States proposes that the words "in so far as they can be ascertained by reasonable means of checking" also be added to subparagraph (1)(a).

Article 5. Basis of liability

No comment at this time.

Article 6. Limits of liability

It is the view of the United States that limits of liability should be established at the diplomatic conference. However, we believe that stevedores should be treated no less favourably than carriers. Only for that reason would the United States support a per package limit on liability for goods involved in maritime carriage. However, with the adoption of a limit per package we would accept a definition of "package" which excludes the container when the discrete packages therein are adequately described on the bill of lading.

Article 7. Application to non-contractual claims

No comments at this time.

Article 8. Loss of right to limit liability

It is the view of the United States that the approach towards breakability of liability limits contained in the

Hamburg Rules should not be adopted in the Convention on the liability of transport terminal operators as a matter of course. In fact the subject matter of the terminal operators' Convention differs from that of the Hamburg Rules. For example there simply is no issue of negligent navigation in the terminal operators' convention whereas negligent navigation was a significant bargaining chip in the Hamburg Rules negotiation. Consequently the United States believes that the participating States should take a fresh look at the issue of breakability and decide what is the best solution for the terminal operators. The Commission should consider economic efficiency and insurance preferences in determining whether liability limits should be breakable.

Furthermore, the United States proposes that article 8, paragraph (1), be clarified to make explicit that this paragraph is limited to the operator himself, his servants or agents and does not apply to independent contractors.

Article 9. Special rules on dangerous goods

No comments at this time.

Article 10. Rights of security in goods

The terminal operator is sometimes inconvenienced by unclaimed goods which occupy space needed for other purposes. Therefore, the United States proposes that a new subparagraph be added stating that the terminal operator may consider goods in its charge abandoned if not claimed within thirty (30) days after (i) the day until which the operator had agreed to keep the goods, or (ii) the date as to which notice of availability of the goods had been given by the operator to the person entitled to take delivery of the goods.

Article 11. Notice of loss, damage or delay

Article 11, subparagraph (b), requires notice of non-apparent damage within 7 days after the day when the goods reached their final destination but in no case later than 45 days after the day when the goods were handed over to the person entitled to take delivery. In practical experience it may take considerably longer than 45 days for the goods to reach their final destination and be subject to inspection for concealed loss or damage. Therefore, the United States proposes a 90 day time period in order to provide adequate time for the final consignee to inspect the goods for concealed loss or damage.

Article 12. Limitation of actions

No comment at this time.

Article 13. Contractual stipulations

This article should be clarified to conform to the principle inherent in article 1, subparagraph (a), that the terminal operator may be employed as a bailee by a carrier. If the terminal operator elects to conclude such an arrangement with a maritime carrier, then the applicable rules of law governing the carrier apply. (See discussion of this issue under I above). Consequently, the United States proposes a clarification of article 13 specifically excepting the right to extend the bill of lading to cover

terminal operators from the prohibition on contractual stipulations.

Article 14. Interpretation of the convention

No comment at this time.

Article 15. International transport conventions

This article is neither clear as drafted nor necessary. It is merely a restatement and reformulation of the principle the United States proposes for article 1, subparagraph (a), that a person shall not be considered to be a terminal operator to the extent that the operator is responsible for the goods under applicable laws governing carriage. There is no need to restate that principle in article 15 if it is firmly stated as proposed by the United States in I above. On that basis the United States proposes deletion of article 15.

Article 16. Unit of account

No comment at this time.

Article 17. Revision of limits of liability

No comment at this time.

Intergovernmental international organizations

ECONOMIC COMMISSION
FOR LATIN AMERICA AND THE CARIBBEAN
(ECLAC)

[Original: English]

[In the introductory remarks to its comments on the draft Convention, the organization expresses its congratulations for a carefully prepared instrument which should find wide acceptance.]

Article 1. Definitions

The definition at subparagraph (c) of article 1 seems to have two parts which appear unrelated. First, "International carriage" is defined as "... any carriage in which the place of departure and the place of destination are identified as being located in two different States ...", which is immediately followed by "... when the goods are taken in charge by the operator;". Whether or not the latter part is included, "International carriage" would seem to be adequately defined for purposes of the draft Convention. In fact, the latter part of subparagraph (c) might be construed as a limiting factor on the definition of "International carriage"; that is, an "International carriage" between two different States does not fall within the scope of application of the draft Convention unless the goods are also taken in charge by an operator of a transport terminal (OTT). Thus, consideration might be given to determining if the second part of subparagraph (c) would be adequately covered by subparagraph (a) entitled "Operator of a transport terminal", where it provides that "... a person who ... take(s) in charge goods involved in international carriage ...".

Article 4. Issuance of document

The draft Convention does not provide explicit standards for the safekeeping of goods. Such standards are implicit and appear satisfied if goods are delivered by the OTT in the same condition in which they were received. It might be useful to include a clause which states that any standards of care a potential bailor might want beyond this implied norm would have to be specified in the agreement between him and the OTT.

Article 10. Rights of security in goods

Paragraph (2) limits the OTT's right to retain goods if a sufficient guarantee is provided or "... an equivalent sum deposited with a mutually accepted third party or with an official institution ...". We have some difficulty understanding exactly what the draft Convention seeks to convey with the term "official institution". Is it a country's Central Bank? Is the "official institution" to be nominated by a contracting party to the Convention? Due to these and other difficulties, you might wish to give consideration to including a definition of "official institution" in article 1.

Paragraph (3) presents two difficulties. The wording of the first sentence is not clear. Does the phrase "... the operator is entitled to sell the goods ... to the extent permitted by the law ..." refer to the amount of goods which may be sold or to the existence of a national régime which provides for their sale? To clarify this important provision you might wish to evaluate the possibility of altering the sentence to read "... the operator is entitled to sell part or all of the goods ... in accordance with the law of the State ...".

The second sentence of paragraph (3) precludes OTTs from selling containers which are owned by persons other than carriers or shippers, unless they have carried out repairs or improvements to such units. The first part of this sentence extends the right of retention of goods to containers, provided that they are owned by either the carriers or shippers to whom "Transport-related services", as defined in subparagraph (d) of article 1, are rendered. Subparagraph (b) of article 1 includes containers within the definition of "Goods", thus making OTTs responsible for the safekeeping of containers they have received from persons other than carriers and shippers.

The latter part of the second sentence of paragraph (3) appears unrelated to the overall scope of the draft Convention. It permits OTTs to sell containers owned by persons other than carriers or shippers, if they have carried out repairs or improvements to such units. If an OTT offers container repair and improvements services, in addition to the "Transport-related services", he is engaged in two different activities. On the one hand, the OTT receives, conserves and delivers goods, which may include containers; and on the other he may repair and improve containers. In the first situation the document issued in accordance with article 4 and/or customary trade practices will govern his activities, while in the latter a contract will be executed between container owners and the OTT. For additional information concerning such contract, we would direct your attention to pages 79-82 of the enclosed document entitled *Establishing container repair and maintenance enterprises in Latin America and the Caribbean* (E/CEPAL/G.1243), May 1983. [The pages referred to

contain the text of a depot agency agreement, which is not reproduced here.] This phrase might also give rise to widely differing interpretations of the draft Convention. For example, is an OTT entitled to the benefits of article 6, limits of liability, where he has repaired or improved containers? It would appear that consideration might be given to either reformulating or removing this part of the sentence.

INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO)

[Original: English]

The draft Convention has been reviewed by the competent ICAO officials. While they have no specific comments to offer, they have observed that the draft Convention is, from a legal point of view, a well-balanced and sound instrument and appears to cover realistically every known aspect of liability of operators of transport terminals in international trade. It is noted that the different instruments of the Warsaw system relating to international carriage by air have been retained for possible inclusion in the draft Convention with respect to the revision of the limits of liability.

UNITED NATIONS ENVIRONMENT PROGRAMME (UNEP)

[Original: English]

UNEP's concern is that the environmental consequences of trade in hazardous wastes are fully taken into account in the UNCITRAL draft Convention. In that regard, our comments will be limited to that aspect of the draft.

In recent years there has been an expansion of the international trade in hazardous wastes. UNEP's Working Group of Legal and Technical Experts with a Mandate to Prepare a Global Convention on the Control of the Transboundary Movements of Hazardous Wastes have had meetings for over a year in an attempt to hammer out a Global Convention on this topic. At the most recent session in Geneva (7-16 November 1988) in his address to the Working Group, the Executive Director noted that many and varied national and international agreements and regulations already existed on the carriage and transport of hazardous goods. He underlined that the aim of the Convention was to establish control measures that would:

1. lead to major reduction in the generation of hazardous wastes and thus eliminate the need for their movement;
2. make it very difficult to get approval of movement of hazardous wastes with the goal of reducing to a minimum their transboundary movement and of ensuring that such movement is only permitted when it is equally or more environmentally sound to dispose of waste far from rather than close to where it is generated; and

3. ensure that what is internationally transported is moved and is ultimately disposed of under the most environmentally safe conditions available.

The UNEP draft, therefore, is mostly concerned with notification, rights and obligations of exporting, transit and importing States and ensuring the environmentally sound disposal of hazardous wastes. In regards to the safety of the transport itself, the UNEP draft largely defers to existing international controls on the transportation of dangerous goods. The UNEP draft in Article IV "General obligations" provides, *inter alia*: "The Contracting Parties shall:

(a) Prohibit all persons under the national jurisdiction from transporting or disposing of hazardous wastes which are the subject of a transboundary movements, unless they are authorized or allowed to perform such types of operations;

(b) Require that in all transboundary movement, hazardous wastes be packaged, labelled, and transported in conformity with generally accepted and recognized international rules and standards in the field of packaging, labelling, and transport, and taking into account international recommendations and practices;

(c) Require that all transboundary movements of hazardous wastes are accompanied by a hazardous wastes movement document from the point at which a transboundary movement commences to the point of disposal."

It must be emphasized, however, that the UNEP draft contains a number of brackets around provisions relating to the convention's "fit" with other conventions.

Thus, the UNEP draft contemplates that the rules regulating the transport of hazardous wastes should rely on such "generally accepted and recognized rules" on the transport of dangerous goods (i.e. the "Orange Book" of the United Nations Committee of Experts on the Transport of Dangerous Goods) in lieu of providing detailed rules on transport safety in international trade in hazardous wastes in the draft itself.

The UNEP draft also provides in Article VIII "Duty to reimport" that the country of export and the exporter "take wastes back" if the transboundary movement "cannot be completed as foreseen."

1. "Losing" of hazardous wastes can be a very profitable enterprise, as disposal often costs hundreds of dollars per tonne. While the UNCITRAL draft was clearly not prepared with this problem in mind, it is one that can, and does occur. There is the possibility that hazardous wastes may be shipped to a transfer site and simply not picked-up. While the provisions of the UNEP draft do provide certain rules in such cases, particularly as regards the obligations of exporters/exporting countries to re-import the wastes, it is important that the UNCITRAL draft dovetail with those provisions by not limiting the duties of "operators" to deal with hazardous wastes properly.

For example, article 9 of the UNCITRAL draft "Special rules on dangerous goods" provides, *inter alia*, that: "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 ... *destroying the goods* ..." (emphasis added).

In the case of hazardous wastes, this response to the new situation may not be a reasonable one. As noted, the environmentally sound disposal of hazardous wastes is neither simple nor inexpensive.

2. *Liability* in the UNCITRAL draft understandably deals with liability to the owner for loss of value of the goods. In the case of hazardous wastes, this value is most often negative. The UNCITRAL draft does not make any provision for liability to third parties for injury to persons, property or the environment resulting from the escape into the environment of hazardous wastes. While there is no necessary reason that the UNCITRAL draft should make such a provision, it should be drafted so as to ensure that such liability provisions imposed by international or national rules will not be limited by the UNCITRAL draft.

At present, Article XV "Consultations on liability" of the UNEP draft provides only that the parties shall "co-operate with a view to adopting appropriate rules and procedures ... in the field of liability and compensation". While no contradiction now exists between the UNEP provisions on liability and the UNCITRAL draft, this is an area in which the UNCITRAL draft must be clear.

We assume that any provision relating to either of the above points under the UNEP draft or any subsequent protocol to it would be covered by article 15 "International transport conventions" of the UNCITRAL draft. However, as the UNEP draft is not technically a "transport convention", provision should be specifically made for the UNEP draft under that article in order to assure that the controls contemplated by the UNEP draft are not diluted.

Non-governmental international organizations

COUNCIL OF EUROPEAN AND JAPANESE
NATIONAL SHIPOWNERS' ASSOCIATIONS
(CENSA)

[Original: English]

The general view of CENSA is that a Convention on terminal operator's liability is unnecessary because:

i. The subject is a matter of commercial contract between the parties concerned and such commercial agreements are an important factor in the competitiveness of the terminals and in determining the relative effectiveness of ports and terminals and in promoting efficiency.

ii. The Hague and Hague/Visby rules do not require standard terms and conditions for terminal operators' liabilities.

Nevertheless, CENSA would not oppose the concept of *guideline* Model Rules provided they did not discourage competition between terminals.

INTERNATIONAL CHAMBER OF SHIPPING (ICS)

[Original: English]

1. The International Chamber of Shipping (ICS) is grateful for the opportunity of commenting on the draft Convention on the Liability of Operators of Transport Terminals in International Trade completed by the UNCITRAL Working Group on International Contract Practices at its eleventh session.

2. At first sight the shipping industry might appear to benefit from this Convention, since the principle of uniformity is generally to be supported. However, the considered view of ICS is that in the case of terminal operators' liability a convention is neither needed nor favoured, for the following reasons:

a. Agreement on the liability of terminal operators is a matter of commercial contract, and an important ingredient in competitiveness, in determining the relative effectiveness of ports and terminals and in promoting efficiency.

b. The Hague and Hague/Visby Rules do not require standard terms and conditions for terminal operators' liabilities.

3. Notwithstanding the above, ICS would not be averse to the concept of Model Rules, as long as they did not discourage the ability of terminals to compete. Such rules could be useful in promoting harmonization and ICS would hope that UNCITRAL would give further favourable consideration to this concept at its twenty-second session.

4. ICS reserves the right to revert to this matter at a later stage if necessary.

INTERNATIONAL FEDERATION OF FREIGHT FORWARDERS ASSOCIATIONS (FIATA)

[Original: English]

The relevant bodies of FIATA have studied the text and find it all in all acceptable. However, since freight forwarding requires—in the interest of our customers, the shippers—a great deal of flexibility, we want to point out that FIATA would favour that such a convention be applicable on a voluntary basis between the commercial parties concerned rather than mandatorily.

INTERNATIONAL RAIL TRANSPORT COMMITTEE

[The International Rail Transport Committee (Comité international des transports ferroviaires, CIT) informed the secretariat that the comments of the International Union of Railways (set forth below) should also be considered as comments of the International Rail Transport Committee.]

INTERNATIONAL UNION OF RAILWAYS

[Original: French]

1. The Convention may affect the railways from two standpoints. Firstly, as transport enterprises the railways may be customers of a terminal operator; secondly, they may also become operators by virtue of article 1 if they take in charge goods during international carriage, without themselves acting as carriers or multimodal transport operators. Currently, cases where railways merely provide storage or warehousing of goods are not very common in practice. This situation could change if the railways strongly develop their services.

2. For an operator who takes in charge goods by virtue of article 1, it is a question of knowing how he will determine whether the goods are involved in international or national carriage. Application of the Convention or of national law is thus liable to be uncertain. The Convention should thus define the *objective* criteria for its application clearly.

3. Our understanding is that the notion of "multimodal transport", as defined in article 1(a), is identical to that in article 1 of the 1980 United Nations Convention on International Multimodal Transport of Goods.

4. The definition embodied in article 1(c) gives rise to ambiguity regarding the rules governing segmented carriage. There is doubt about whether or not the place of departure and the place of destination correspond to the beginning and end of the journey indicated on each individual carriage document or to the beginning and end of the whole chain of carriage operations. We therefore recommend that the provision in question be supplemented to make it clearer.

5. Our understanding is that the notion of "carrier" in the second sentence of article 1(a) covers both the carrier who effects the carriage himself and the principal carrier who uses one or more subcontractors to carry out all or part of the operation.

6. We do not see why the liability under article 6 should differ depending on whether carriage is by land, by sea or by inland waterway. In our view, only certain specific categories of goods could justify different limits of liability and not the mode of carriage.

The limits of liability in the Convention concerning International Transport by Rail (COTIF) are far higher than those indicated in the draft.

7. In article 9 we suggest that the following passage:

"without being marked, labelled, packaged or documented in accordance with any applicable law or regulation relating to dangerous goods . . ."

be replaced by:

"without being marked, labelled, packaged or documented in accordance with any law or regulation relating to dangerous goods that is applicable in the country in which the terminal is located".

8. We have noted the comments about the new wording of the final sentence of article 10, paragraph (4). This provision lays down that the right of sale of goods must be exercised in accordance with the law of the State where the operator has his place of business. The reference to place of business does not specify whether it concerns the legal head office of the enterprise or the place in which the entrepreneur carries out his activity with regard to the goods (terminal). We are concerned that a rule based on the criterion of the legal head office may lead to abuse, since entrepreneurs may be encouraged to select for the head office of their place of business a country whose legislation governing the right of sale of goods is most favourable to them. The right of the sale should thus be based in principle on the law of the State where the entrepreneur has rendered the transport-related services in pursuance of article 1(d).

[A/CN.9/319/Add.1]

This addendum to document A/CN.9/319 contains a compilation of the comments received between 18 January 1989 and 17 March 1989.

Compilation of comments

States

FEDERAL REPUBLIC OF GERMANY

[Original: English]

The Permanent Mission of the Federal Republic of Germany to the Office of the United Nations and to the other International Organizations in Vienna [...] wishes to communicate that the Federal authorities have no basic objections as to the contents of the draft Convention.

Attached, however, are observations by the Government of the Federal Republic of Germany which should find their entry into the draft.

I.

The Federal Government forwarded the draft Convention on Liability of Operators of Transport Terminals in International Trade to the competent Federal and State authorities and to the economic organizations concerned.

Views differ widely on the question whether it is advisable to unify the law governing the liability of transport terminal operators—as provided by the draft Convention.

Those who think that there is no need for such a Convention point out, *inter alia*, that cases of an international transport, which entail transport-related services in the sense of the draft Convention, tended to be exceptional. In the majority of cases these services were caused by the necessities of transport and traffic conditions and were therefore—as a mere transit operation—already covered by other rules of international transport law. Consequently, there was hardly a gap that had to be filled.

Moreover, the expediency of a single set of mandatory liability provisions for transport terminal operators is called in question on the grounds that the operators of transport terminals supply a great variety of services that could hardly be covered by one set of rules only.

However, cargo owners strongly support the draft Convention, which they consider a consequential supplement to the international conventions relating to liability in road transport as well as in carriage by rail, by sea and by air.

The views expressed on the probable economic effects of the proposed Convention are controversial as well.

It is argued that an increase of indemnity insurance contributions payable by transport terminal operators would not automatically result in an equal reduction of transport insurance costs. Since transport-related services in the sense of the draft Convention were only a small segment of the whole transport operation there could be no substantial decrease in insurance premiums for carriage. Therefore it was fair to say that the carriage charges for the whole transport operation might increase rather than decrease.

However, those supporting the draft Convention insist that uniform rules that limit contracting out by transport terminal operators would enlarge their liability to recourse so that damages paid by carriers, forwarders or insurers could be more easily recoverable. Accordingly, transport insurance premiums and carriage charges would decrease.

It appears from the conflicting statements that the question whether, and how, to unify the law which governs the liability of transport terminal operators is closely interrelated with the further development of international transport law in general. In this respect the Government of the Federal Republic of Germany considers it to be reasonable that the present draft Convention conforms as far as possible with the various conventions on international carriage. However, some of these conventions have not yet been implemented by many countries. Thus, it is once more suggested that the present draft should—for the time being—merely serve as a model law. Moreover, the factual situation of transport terminals is still subject to substantial changes which require a flexible set of rules instead of a binding international instrument. Therefore, the provisions of the draft should be put to the test in the form of a model law first, i.e. before they are adopted as an international convention.

II.

As to the specific articles of the draft Convention the Federal Government submits the following observations:

1. Article 1

a) According to the proposed definition of an international terminal operator, the draft Convention also covers activities, which are performed in German ports not always by terminal operators as such, but also by independent entrepreneurs as, e.g., self-employed stowers. However, given that the actual handling of cargo is subject to quick changes, the Federal Government does not recommend limiting the scope of application of the Convention accordingly, but considers the delimitation contained

in letter (a), sentence 2, as to carriers and multimodal transport operators to be sufficient.

b) In the opinion of the Federal Government, however, a clarifying provision with regard to segmented transport is advisable. The Federal Government draws attention to the fact that so far this specific case has not been regulated explicitly by the Convention. In view of the present definition of international carriage in letter (c), the Federal Government presumes that in the case of segmented transport the decisive place of departure and of destination will be that of each segment. Thus, segments within domestic territory are not governed by the Convention. However, for these cases as well, it is up to every member State to declare the Convention applicable.

c) Due to its wide scope of application, the draft Convention also presently covers the direct handling of cargo, i.e. without intermediate safekeeping. It appears advisable to add a corresponding clarification.

2. Article 4

a) In accordance with the draft Convention's objective of unifying the system of liability for international transport, a regulation should be added to article 4, following the example of article 16, para. (1), of the Hamburg Rules and article 9, para. (1), of the United Nations Convention on International Multimodal Transport of Goods. Accordingly, the entrepreneur should make a reservation if he knows or has sufficient reasons to suspect that the indications contained in the document produced by the customer are not correct, or if he does not have sufficient opportunity to check these indications. In any case, it seems advisable for there to be clarification to the effect that the entrepreneur has at least the *right* to make a corresponding reservation. There should also be a determination of the legal consequences where the entrepreneur—in spite of the previously described conditions—does not make a corresponding reservation.

b) In addition, consideration should be given to regulating the question as to who is going to bear the costs of the examination of the cargo undertaken by the entrepreneur in accordance with article 4, para. (1), letter (b).

3. Article 6

a) The Federal Government would like to suggest, once again, that article 6 be approximated to the model contained in the Convention on the Carriage of Goods by Sea (article 4, para. (5), of the Convention of August 25, 1924 as amended by the Protocol of February 23, 1968; article 6, para. (1), letter (a), of the Hamburg Rules). These articles provide an alternative limit of liability per package or per kilogram of gross weight of the goods lost or damaged, whichever is higher. If one proceeds on the assumption that the desired Convention should also facilitate the recourse of the carrier—who is liable for damages to the forwarder—against the terminal operator, the regulation provided by the draft Convention is difficult to understand. There, the carrier—even if he himself is liable for a *higher* amount per package or unit—can only recover damages from the terminal operator up to the amount per kilogram of gross weight of the goods lost or damaged.

b) Furthermore, the Federal Government suggests setting up a limit of liability in accordance with the Convention on Limitation of Liability for Maritime Claims (1976) for all claims for damages resulting from a specific event. In the case of major damage, e.g. through explosion or fire, the liability per kilogram—as well as an alternative limit of liability per kilogram or package—could lead to an incalculable loss and thus to a barely insurable risk of damage. The limit of liability probably cannot be fixed uniformly for all facilities. One could consider, as a reference quantity, a certain amount per square metre of safekeeping area or the annual turnover.

4. Article 8

In article 8, para. (1), second alternative, the right of the international terminal operator to limit his liability should be inapplicable only if the servant acted within the scope of his employment (cf. article 25 of the Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air, as amended by the Hague Protocol, 1955). A corresponding clarification in the wording of the Convention appears advisable.

5. Article 10

a) Article 10, para. (1), should be formulated more precisely to the effect that the right of retention and the right to sell the goods over which the operator has exercised the right of retention is limited to claims that are *due*.

b) The restriction in article 10, para. (3), sentence 2, applicable to containers should be extended to all transport equipment listed in article 1, letter (b). Special pallets or similar transport equipment can be of considerable value and need not belong to the owner of the cargo.

6. Article 11

It appears questionable whether a one-day notice will be sufficient even in cases of manifest damage. Frequently, the evaluation of the condition of the cargo and the decision to give notice involve several persons, whose coordination requires some time. Therefore, it is suggested that the time-limit be extended to a period of three working days.

III.

The foregoing observations should not be regarded as exhaustive. The Federal Government reserves the right to submit further proposals during the session of the United Nations Commission on International Trade Law.

MEXICO

[Original: Spanish]

The Mexican Government views with favour the efforts of the Working Group on International Contract Practices in connection with the preparation of a draft Convention on Liability of Operators of Transport Terminals in International Trade. It does so, in the first place, because such

a convention may be seen as supplementing the various instruments already developed by UNCITRAL and other international organizations regarding the international carriage of goods, and, in the second place, because there is a need for an international document to regulate the liability of transport terminal operators. Until now, the international instruments that apply to the carriage of goods have been limited to regulating only certain aspects of the carriage contract, and this despite the fact that it is during the intermediate stages of carriage and, above all, before and after it that goods are most frequently damaged or lost. It is to be hoped that the new Convention will have the effect of filling this legal gap in the area in question.

With regard to the text of the future Convention, it may be said that, in article 1, it would be useful to define the "person entitled to take delivery of the goods". This term is used in articles 3, 4 and 5. Particularly when one considers that article 4 also speaks of the "customer", it would be useful to make it clear who the customer is—the shipper, the carrier or the consignee. The person entitled to take delivery of the goods may be a carrier, another operator, the consignee or the holder of the bill of lading. Consideration might also be given to the definition of "customer".

Referring to article 2 of the draft, it is recommended that the Convention should define when the operator: (a) takes the goods in charge; (b) delivers the goods; and (c) makes the goods available to the person entitled to take delivery of them.

The circumstance that the precise moment at which these events occur is left undetermined may give rise to uncertainty in commercial practice. It would be useful to explore the possibility of inserting a rule similar to that of article 4 of the "Hamburg Rules", regarding the carrier's period of liability, which deals with the same problem in the context of the carriage of goods. It would also be advisable to take into account article 14 of the United Nations Convention on International Multimodal Transport of Goods.

Article 4, paragraph (1), provides for the operator's option—which becomes an obligation if the customer requests it—of issuing a document. What is not clear are the reasons why, when the person presenting the document is the "customer", the receipt must identify the goods and state the condition and quantity; on the other hand, if the document is produced by the operator, the document acknowledging the receipt of the goods must bear the date thereof and state their condition and quantity in so far as can be ascertained by reasonable means of checking.

Another point is that it is also not clear who determines what kind of document is to be issued—whether in accordance with subparagraph (a) or with subparagraph (b).

With regard to paragraph (4), it is noted that article 14, paragraph (3), of the "Hamburg Rules" contains a similar definition of signature, but one that differs in some respects from that given in the draft Convention with which we are dealing; a similar definition can be found in article 5, paragraph (3), of the Multimodal Convention.

On the other hand, article 5, point (k), of the United Nations Convention on International Bills of Exchange and International Promissory Notes contains yet another definition of signature, making it necessary to bring these concepts into alignment.

For all of these reasons, it is recommended: (1) to eliminate the uncertainty surrounding the concept of signature (there are three different definitions); and (2) to adopt the definition given in the United Nations Convention on International Bills of Exchange and International Promissory Notes, because of its advantages over the others.

In article 5, paragraph (1), the operator is released from responsibility if he proves that he took the measures that could reasonably be required to avoid the occurrence and its consequences. Consideration should be given to the possibility of including also reasonable measures to "reduce" the consequences. There are occasions when it is not possible to avoid the damage, but when its effects can well be reduced. Consideration might be given to the possibility of including a rule similar to that of article 77 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980).

In article 5, paragraphs (1) and (2), it is stated that the operator is liable for "loss" ["*los perjuicios*"]. In accordance with the concept of "loss" in Mexican law and, apparently, in various countries of the continental law system, damage ["*daños*"] represents "property loss" and loss ["*perjuicios*"] the "expected profit". The terminology of article 5, paragraphs (1) and (2), may lead to confusion and undesired results if a judge understands the terms that have been commented on in accordance with his national law. Two alternative solutions are recommended: (1) the use of a more descriptive formula for the phenomenon; and (2) the definition in article 1 of the term "loss" ["*perjuicios*"].

Article 5, paragraph (4), does not indicate who may declare the goods as lost. It should be made clear that the person who may declare their loss is the person entitled to take delivery of them. It is not logical that it should be the operator who can do this, since he could then take advantage of a situation when the goods exceed the value of the limit of liability. In any case, the right of prolonging the period should belong to the person with an interest in receiving the goods.

Article 6 establishes limits of liability that are low if one considers the limits that appear in all the international conventions—for example, article 6 of the "Hamburg Rules" and article 18 of the Multimodal Convention. To this must be added the fact that experience shows that loss and damage occur most frequently during the stages that will be covered by the Convention. For all of these reasons, it is desirable that the limits of responsibility should be raised at least to the limits stipulated in the other conventions previously mentioned.

On another point, it should be borne in mind that a protracted period of time may elapse from the moment of the occurrence of the events giving rise to the liability to the moment when compensation is actually paid. This being so, it is reasonable to stipulate, similarly to what has been done in other instruments (e.g., article 72 of the United Nations Convention on International Bills of Exchange and International Promissory Notes and article 78 of the 1980 Vienna Sales Convention), the obligation to pay interest and even to make compensation for losses due to possible fluctuations in exchange rates. Otherwise, even in the event the damaged party can bring a claim in respect of these considerations under a national law, the

party liable could argue that the limit of his liability also covers the matter of interest and losses due to exchange rates.

With respect to liability for delay in handing over the goods, which is set as part of the total of the charges payable to the operator, it seems that the limit is very low, considering that the operator risks only the payment of the charges due him.

The same article speaks of the charges payable to the operator, and in this connection it should be remembered that other additional amounts that the operator may charge do not count in forming the limit. It would be reasonable, therefore, to review this question.

Article 7, paragraph (1), provides for actions founded in contract, in tort or otherwise. The mention of the two categories of liability actions, founded in contract or in tort, would appear to exhaust the hypothetical cases. Unless there are other grounds outside this line of reasoning, it must be considered, under this comment, that the mention of "otherwise" should be deleted.

With regard to article 8, note has been taken of the arguments for and against the inclusion, in paragraph (1), of the words "other persons engaged by the operator". Taking into account that it is unlikely that these other persons will have sufficient assets, that they do not usually take out insurance, that they are frequently located in a distant country, and that it is the operator who engages them, it is preferable that they should be covered in paragraph (1) of this article.

Paragraphs (1) and (2) of article 8 employ the expression "recklessly and with knowledge", which, although it is true that it is used in the "Hamburg Rules", is open to objection. The following considerations are in order on this point. The word "temerariamente" ["recklessly"] has a connotation in Spanish that implies two elements: lack of prudence, and bravery or boldness. In the English text, the word "recklessly" is used. According to Longman's dictionary, "reckless (of a person or his behaviour—too hasty, not caring about danger)". As a consequence, the person affected, once the employee proves that he caused the damage while engaged in the normal performance of his functions, has the burden of proving that:

(a) The person who caused the damage acted *bravely* ["valientemente"], in an imprudent manner;

(b) He knew that the damage or delay would probably result.

If to this it is added that the operator can, in order to escape the hypothesis posed in paragraph (1), resort to the limiting phrase "person of whose services [he] makes use" (as it appears in the draft), as a practical matter the person affected will always have to bear the loss. As a consequence, it is recommended that the expression "recklessly and with knowledge or with a reasonable obligation to know..." ["con imprudencia y sabiendo o debiendo razonablemente saber..."] should be used.

In article 10, paragraph (3), the arguments adduced in document A/CN.9/298, para. 63, to justify that the sale of the goods should be governed by the law of the State where the operator has his place of business are valid. Nevertheless, this provision might dissuade some States from acceding to the Convention, for the reasons set forth in that paragraph. For example: The goods are located in

State A, whose law prohibits the parties from selling goods not their own without judicial authorization. On the other hand, if the operator's place of business is located in State B, whose law permits the sale of the goods by the operator, the consequence will be that if State A is a party to the Convention, it will have to tolerate the goods being sold in accordance with a special law. This would be the situation in the case of Mexico, which would have to consider the consequences of this provision before signing and before acceding to the Convention. The difficulty noted could be eliminated if the text were to read: "... to the extent permitted by the law of the State where the operator has his place of business *and provided that the sale does not violate the law where the goods are located*" (the underlined words express the proposed modification).

The consequence of article 11, paragraph (2), is that, if the consignee is subject to the "Hamburg Rules" and to this Convention, he will have two different rules for the same situation. The time-period stipulated in article 19, paragraph (2), of the "Hamburg Rules" is 15 days and does not have a limit of 45 days. It is proposed that these provisions be brought into harmony.

Finally, and with regard to article 14, it should be mentioned that in general it is true that reference to "good faith" can create problems of interpretation in the international juridical community. Further, such reference serves no purpose, since it is obvious that international trade must be based on the principle of good faith. It should be noted that different texts have been used in the UNCITRAL conventions, which is undesirable. For example: the "Hamburg Rules" (article 3), the Convention on the Limitation Period in the International Sale of Goods (article 7) and this draft use one text, while on the other hand the 1980 Vienna Sales Convention (article 7, paragraph (1)) and the United Nations Convention on International Bills of Exchange and International Promissory Notes (article 4) use other language.

MOROCCO

[Original: French]

Observations on the text of the draft Convention in the order of the articles

Article 1. Definitions

1. Paragraph (a): Operator of a transport terminal

1.1 The definition of "operator" as presented in the first sentence of this paragraph is in conformity neither with commercial practice and usages in this field nor with the different aspects characteristic of "the contract" implied in the activity of a transport terminal operator. Under the terms of this definition, the operator is the person in charge of the goods when he performs or procures the performance of such services as loading, unloading, stowage, ... (see paragraph (d) of the same article). The transport-related services performed by the operator fall into two categories, each of which is viewed differently by the law: on the one hand, there is warehousing or storage, which implies the custody (taking in charge) of the goods, and, on the other, there are handling operations, which are performed with no transfer in custody. Thus, an operator

may carry out handling services while the goods are in the charge either of the shipper or of the carrier. Hence, the notion of custody (taking in charge) ought not to be adopted as the basic criterion for defining the activities of a transport terminal operator.

The definition of "operator" should be more general, like the definition of "carrier" contained in the Hamburg Rules (article 1, paragraph (1)).

It is necessary to take into account the "contracts" binding the operator to the shipper or the carrier for the performance of transport-related services.

Definitions of the terms "contract", "shipper" and "carrier" should be added in light of the legal relationship that exists between the operator and the parties to the contract for the carriage of goods in international transport.

1.2 The second sentence of paragraph (a) of article 1 introduces an exception, namely, that the person who performs or procures the performance of transport-related services 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.

This exception is unjustified for the reason that it is contrary to the applicable principles of law governing contracts. The fact is that when the same person accumulates several capacities, his rights, his obligations and his liability are those that flow from the contract in the process of execution at the time of the occurrence of the event capable of leading to a claim or an action for liability. What is involved here is a definition of "operator" that in fact covers the activity of handling/storage, independently of the other capacities or activities in which the operator may be engaged.

Furthermore, this exception introduces an ambiguity in the sense that it goes beyond the requirements of a "definition" and deals implicitly with the question of the legal relationships between the operator and the parties to the contract for carriage, specifically the carrier.

As it happens, in the maritime area, loading and unloading on board vessels are carried out under the responsibility of the carrier, but are performed by handling enterprises to which the definition of "transport terminal operator" adopted in the draft Convention is applicable.

2. Paragraph (d): Transport-related services

The transport-related services are not defined, but are enumerated in a non-exhaustive manner.

These services include storage and warehousing, which imply the reception and custody (taking in charge) of the goods, as well as loading, unloading, stowage, etc., which involve simple handling of the goods. In maritime commerce, goods may be handled at the time of loading or unloading without being stored or taken in charge (as in the case of direct shipments and departures).

Paragraph (d) is in contradiction with paragraph (a) of the same article and confirms the observations offered above with regard to paragraph (a).

3. Omission of a definition of the term "customer"

The draft Convention mentions the term "customer" in article 4.

This is a very important notion within the framework of the operator's legal relationships.

This term must, therefore, be defined in such a way as to take account of the legal rules and practices governing the storage or "bailment" of goods that have been unloaded or are to be loaded aboard a vessel.

Notwithstanding the general rules applicable to "bailment contracts", which define the relationships between the bailor and the bailee, the draft Convention must not neglect this point, which is of great importance with respect to the storage or bailment of goods in a port zone.

Port terminal operators who take in charge goods that have been or are to be involved in carriage by sea necessarily have legal ties with the maritime shippers and carriers, having regard to the transfer of custody over the goods and to the legal rules applicable to the contract for carriage by sea.

The term "customer" can only designate the person who turns over the goods to the operator, namely, the carrier and his servants and agents at the time of their import, and the shipper and his servants and agents at the time of their export.

Article 3. Period of responsibility

This article provides that "The operator shall be responsible for the goods from the time he has taken them in charge until the time he has handed them over or made them available to the person entitled to take delivery of them".

The terms of this article are too vague in the sense that they do not precisely specify any of the essential notions that constitute the actual subject of the article.

The period of responsibility of a "person who takes in charge" cannot be validly defined unless the commencement of the custody and the modalities for taking the goods in charge, as well as the end of the custody and the modalities for releasing the goods from charge, are clearly specified.

Moreover, the operator takes the goods in charge in his capacity as bailee. Now, the bailee at a port can only receive goods that are to be placed on board a particular vessel or goods that have been taken from on board a particular vessel. Consequently, the operator is performing a "bailment" contract that places him in a relationship with the bailor, namely the carrier in the case of import and the shipper in the case of export. The bailment or taking in charge begins then from the time the carrier receives the goods from the shipper or the carrier, as the case may be.

With regard to the "person entitled to take delivery" of the goods, it should be made clear that the bailee at the port may turn over the goods only to the person designated by the "bailor" on the "delivery order" or the "shipping order".

There are implications here arising out of the legal rules applicable to carriage contracts that must be taken into account, considering that the bailee has no way of knowing who is the person "entitled" to take delivery of the goods until that person has presented himself, in possession of the aforementioned documents.

This article needs to be revised in detail and should be at least as precise as, for example, article 4 of the Hamburg Rules.

Article 4. Issuance of document

This article deals with the question of the "checking of the goods".

The rule is that the "bailor" must account for what he has actually turned over to the "bailee", in the same way that the bailee must account for what he has actually received from the bailor. This rule constitutes the basis of the double check that proves the transfer of custody to the operator.

The term "customer" used in paragraph (1) is too general. In view of the importance of the double check in the settlement of disputes, the persons entitled to issue the "document" must be specified (see observations regarding article 1 and the term "customer").

Furthermore, the bailee at the port cannot reasonably acknowledge the receipt of goods until they have been sorted out and can be counted and identified. For this reason it is necessary to add "the receipt of the goods placed in storage".

The question of the issuance of a document must be carefully considered in order to protect the interests of the operator, specifically for unloaded goods. In effect, in view of the increasingly current practice of the letter of guarantee, handed over by the shipper to the carrier, and its institutionalization in the Hamburg Rules, the interests of the maritime carrier are protected even when the goods he has received on departure have not been verified. Now, since it will scarcely be possible for the bailee at the port to require a "letter of guarantee" from the carrier, the document envisaged in subparagraph (a) of paragraph (1) of article 4 must be a document produced at the time the goods are turned over to the operator.

Article 5. Basis of liability

A certain parallelism will be noted between the provisions of this article and those regarding the carrier, specifically in the Hamburg Rules. Here too, however, the conditions governing the liability of the operator are not set out with sufficient precision.

Paragraph (1)

This paragraph speaks of "the period of the operator's responsibility for the goods as defined in article 3...".

The inadequate precision of the notion of "custody" ("taking in charge") is evident in this article as well.

In fact, it should be made clear that the operator is responsible if the event which caused the loss, damage or delay occurred "while the goods were in his charge, under the terms of article 3" (see observations on article 3).

Considering the observations offered regarding paragraphs (a) and (d) of article 1, it will be seen that the draft Convention introduces an element of ambiguity with respect to the legal definition of the various "transport-related services".

The operator is certainly responsible for the handling and storage of the goods; still, it is the storage or "bailment" of the goods that implies the notion of custody (taking in charge) along with the rights, obligations and liability that flow therefrom.

Paragraph (2)

The principle adopted as the basis of the operator's liability is the same as that adopted by the Hamburg Rules for the maritime carrier, namely presumed fault or negligence. The terms of paragraph (1) above are practically the same as those of article 5, paragraph (1), of the Hamburg Rules.

One will also note the similarity between the present paragraph (2) and article 5, paragraph (7), of the Hamburg Rules.

However, while in the case of the carrier the principle of fault or neglect is expressly asserted (article 5, paragraph (7), of the Hamburg Rules), for the operator this principle is formulated under the term "failure".

One is again confronted with the inadequate precision that characterizes the draft Convention regarding the transport terminal operator.

Fault is a legal notion defined in internal law, whereas "failure" is a notion that will be left to the judgement of jurisprudence and practice. "Failure" can be interpreted too broadly and may lead to abuses on the part of claimants, which would contribute to an added burden of liability on the part of the bailee, contrary to the principle of equity.

Paragraphs (3) and (4)

These paragraphs envisage a new situation for the operator, but one that is provided for in the carriage conventions, namely, a delay in the delivery of the goods and the possibility of treating the goods as lost after a certain period of delay.

With regard to the operator, the period of delay is subject to the request for the handing over of the goods by the person entitled to take delivery of them. It should be made clear that the request may be addressed to the operator only after the goods in carriage have been unloaded and the document provided for in article 4 of the draft Convention has been issued.

Omissions. Exceptions to the operator's liability

As a general rule, the bailee is released from liability for loss or damage due to a cause that may not be attributed to him, such as acts of God or *force majeure*, the inherent or hidden defects of the goods, the negligence of the bailor or, as the case may be, the shippers and carriers, improper indications regarding the weight and markings of the packages and the nature of the goods, etc.

As far as a port bailee is concerned, these exceptions from liability are all the more justified in that he receives goods which have been the object of carriage by sea and for which the carrier enjoys exceptions.

Since the exceptions are linked to the notion of "custody" both of the carrier and of the "operator", the principle of equity requires that there be a balance between the liability of the maritime carrier and the port bailee. These two participants in the carriage chain are, each for his own part, jointly responsible *vis-à-vis* the rightful claimants of the goods. It would, therefore, be improper to impose a heavier liability on the maritime assistant (bailee) than on the carrier. In terms of compensation claims, this would have the effect of increasing the number of actions

brought against the bailee, at a time when the current trend is towards the simplified settlement of disputes.

It should be noted that, having regard to the specific nature of the profession of port bailee, and his links with the maritime carrier, the new maritime codes governing handlers/bailees have extended to the bailee the carriers' conditions of liability with respect to exceptions, the limits of liability and the limitation of liability actions.

Article 6. Limits of liability

This article, which sets the limits of the operator's liability, distinguishes between the limits applicable for goods involved in carriage by sea and the limit for goods "involved in international carriage which does not, according to the contracts of carriage, include carriage of goods by sea or by inland waterways".

For the first time, the draft Convention speaks of contracts of carriage and distinguishes carriage by sea from other forms of carriage.

However, the limits of liability stipulated for the operator at the port are not at all in harmony with those of the carrier, as provided for in the Hamburg Rules.

In accordance with this latter Convention on the Carriage of Goods by Sea, the carrier's liability is limited to an amount equivalent 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 liability of the operator at the port is limited to 2.75 units of account per kilogram of gross weight.

Now, the limit per package or other shipping unit is important with respect to the containers, pallets or any similar article of transport used to consolidate goods.

It is necessary, therefore, that an operator receiving goods involved in carriage by sea should enjoy the same limits of liability as the carrier.

This article should adopt the provisions of article 6, paragraphs (1)(a), (2) and (3), of the Hamburg Rules.

It should be noted that paragraphs (2), (3) and (4) of article 6 of the present draft adopt as their principles the provisions of article 6, paragraph (1)(b) and (c) and paragraph (4), of the Hamburg Rules.

Article 10. Rights of security in goods

This article deals with the operator's right of retention over the goods.

In accordance with this right, paragraph (3) of the article provides for the possibility for the operator to sell the goods over which he has exercised the right of retention to the extent permitted by the law of the State where the operator has his place of business.

However, an exception is provided for "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 of or improvements to the containers by the operator".

This exception is not justified in the case of the operator because of the fact that the containers constitute "goods". The operator handles and stores the containers as such, whether they are empty or full.

Further, the operator receives the goods that have been unloaded or are to be loaded, independently of the

identification of their owner. This distinction between containers according to whether they belong to the shipper, the carrier or any other person lacks an explanation.

The basis of the operator's right of retention is to enable him to recover his costs and claims in respect of the goods which he has stored and which have been the object of his services.

Now, even if the containers have not been the object of repairs or improvements by the operator, it is none the less true that they are the object of "transport-related services" in the same way as any other goods.

It should be noted that article 1 of this draft states in paragraph (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".

Finally, we call attention to the case of empty containers handled by the operator.

Paragraph (4) of article 10 lays down the modalities governing the sale of the goods.

It should be pointed out that in Morocco goods stored at a port are, if necessary, sold by the customs service in accordance with customs legislation, even if the sale takes place at the request and for the account of the operator.

Article 11. Notice of loss, damage or delay

Paragraph (2)

This paragraph provides for the case of loss or damage that is not apparent at the time when the goods are turned over by the operator to the person entitled to take delivery of them.

These provisions repeat those laid down for the carrier in article 19, paragraph (2), of the Hamburg Rules.

However, the operator's situation differs on this point from that of the carrier.

With specific reference to the carriage of goods by sea, the relationships between shipper and carrier are regulated in detail, as well as the obligations and guarantees arising out of the carriage documents, bill of lading or other document.

As far as the operator is concerned, he can only answer for that which has been openly turned over to him, and he himself is not in a position to ascertain losses or damage that are not apparent, particularly in the case of goods received at the time of unloading, after numerous handling operations and transport by sea.

Furthermore, the delivery modalities in the case of the operator are not the same as those provided for the carrier.

The person entitled to take delivery of the goods is either the consignee or his agent. This person has the opportunity to establish loss or damage at the time the goods are turned over by the operator.

Moreover, the physical turning over of the goods to the person entitled to receive them discharges the operator of his obligation of custody. Because of this, he cannot be liable for damage or losses incurred by the goods following their departure from the port warehousing area.

For these reasons, paragraph (2) cannot be applied to the operator at the port, all the more since the periods contemplated—namely, seven days after the day when the goods reach their final consignee and 45 days after the day

when the goods are handed over to the person entitled to take delivery of them—are too long.

Paragraph (2) is a potential source of arbitrary behaviour and can only lead to abuses and a proliferation of actions against the operator.

It should be noted, as a secondary consideration, that the period specified for the carrier is 15 days from the day when the goods are handed over to the consignee (article 19, paragraph (2), of the Hamburg Rules).

Paragraph (4)

This paragraph discusses the "reasonable facilities" which "the operator and the person entitled to take delivery of the goods must give . . . to each other for inspecting and tallying the goods".

The same provision is stipulated for the "carrier and the consignee" in the Hamburg Rules (article 19, paragraph (4)).

The draft thus establishes a parallelism between the ties that exist, on the one hand, between the carrier and the consignee and, on the other, between the operator and the person entitled to take delivery of the goods.

This parallelism is without foundation, considering the legal relationships that flow, respectively, from a carriage contract and from a "bailment" contract.

The bailee has an obligation to the bailor, i.e., the person who turns over the goods to him.

Because of this fact, the inspection and tallying of the goods can only be carried out properly with the actual participation of the bailor and, in particular, the carrier, for the reason that losses or damage are generally detected when the goods arrive at the port at which they are unloaded.

It is thus essential to take into account the rules applicable in the area of carriage by sea and port warehousing. This paragraph must make it clear that "the operator, the carrier and the person entitled to take delivery of the goods must give all reasonable facilities . . .".

Paragraph (5)

This paragraph contemplates the case of compensation for loss resulting from delay in delivery, whereby the claimant must give notice to the operator within 21 days after the day when the goods are handed over to the person entitled to take delivery of them.

It is necessary here to add the words: "or made available to him".

The provisions of the draft Convention that deal with "delays in handing over the goods" in article 5, paragraphs (3) and (4), specify this point.

In effect, the operator may make the goods available to the rightful claimant within the period specified without the person entitled to take delivery of them coming forward to do so.

The period of 21 days provided for in this paragraph must begin on the day on which the goods are turned over or made available to the person entitled to take delivery of them.

Article 12. Limitation of actions

This article deals with the question of claims for liability against the operator.

The conditions provided in the draft Convention are clearly to the operator's disadvantage:

- They open the way to principal actions, which may be instituted by the "person entitled to make a claim", and to recourse actions, which may be instituted by the carrier or any other persons;
- It provides for periods longer than those specified for the maritime carrier in the Hamburg Rules, a fact that affords the possibility of bringing a larger number of actions against the operator.

The problem of judicial recourse is closely linked to the question of the relationship between the port bailee and the parties to the contract for carriage by sea. This is one of the issues that has raised the most controversy.

What is involved, in fact, is the need to preserve the interests of the parties involved, namely, the person with a claim to the goods, the carrier and the operator.

It is thus essential to take account of the following factors:

- The problem of the joint causality of the damage attributable to the carrier and the bailee;
- The ties existing between the carrier/"bailor" and the operator/"bailee";
- The problem of access to evidence making it possible to determine, in the same proceedings, the respective liabilities of the carrier and the operator, having regard to the transfer of custody of the goods;
- The need for the consignee or his insurer to exercise his right of recourse against the carrier, under the carriage contract.

Recourse exercised against the operator alone can only partially protect the interests of the consignee, since the operator can only be liable for such loss or damage as is attributable to him.

- The court costs and cost of settling disputes, which it is not in the interest of either party to increase by a proliferation of actions and by long and costly proceedings.

In the light of these factors, the most satisfactory solution consists in:

- Applying the same period of limitation in the case of the maritime carrier and the bailee at the port;
- Allowing for a combined action against the maritime carrier and the bailee at the port on behalf of the person entitled to claim the goods.

Article 12 must be revised along these lines and cannot, in its current wording, be applied to the operator at the port.

We might also note, as a secondary consideration, the divergencies in the periods contemplated for the carrier in the Hamburg Rules and those specified for the operator in the present draft Convention:

- The limitation period for the carrier begins on the day when he has "delivered" the goods either to the consignee or to the operator, if the consignee does

not appear. The time spent by the goods in storage at the port is not included in the period.

- For the operator, the period begins on the day the goods are turned over to the person entitled to receive them. If that person withdraws his goods after several months of storage, the limitation period is extended by that additional amount.

The limitation period should thus begin for the operator on the day when he has received the goods, which coincides with the "delivery" by the carrier.

- The period provided for recourse action against the carrier even after the expiration of the limitation period subordinates this action to the period determined by the law of the State where proceedings are instituted.

Moreover, this period may not be less than 90 days commencing from the day when the person instituting the recourse action has been served with process in the action against himself, i.e., at the beginning of the proceedings.

- In the case of the operator, there is no reference to the time determined by the law of the State where proceedings are instituted.

The period provided for the recourse action is set at 90 days after the person instituting the recourse action has been held liable, i.e., at the end of the action against that person.

The period of 90 days provided for the operator is thus extended by the duration of the principal action brought against the person who may institute a recourse action against the operator.

Logic requires that even if a recourse action on the part of the operator is admitted, it should be instituted within a reasonable period from the day when the person instituting the recourse action has himself been served with process.

Non-governmental international organization

INTERNATIONAL ROAD TRANSPORT UNION (IRU)

[Original: French]

[The covering letter to the comments by IRU states that, on the whole, the draft Convention corresponds to the views of the International Road Transport Union.]

Article 1(b)

The International Road Transport Union (IRU) approves the definition of "goods" adopted by the Working Group (A/CN.9/298, para. 18).

Article 2(b)

Add: "When, according to the rules of private international law, the transport-related services performed by an operator are governed by the law of a contracting State."

Article 6

Article 6 should be revised in the sense that it is not satisfactory that the operator should be held to limits of liability which are different when the same goods are involved, but carried by different modes of transport.

If, however, article 6 is not revised, it would be preferable to alter the wording of the second sentence of article 6(1):

"However, if the goods are involved in international carriage by rail or by road, the liability of ...".

It should also be borne in mind that, by virtue of the flexibility of road transport, it may happen that during the journey the choice of the itinerary is changed by the adoption, when this is possible over part of the journey, of alternative sea or land routes without this being explicitly mentioned in the transport contract or in the consignment note.

Article 8

Should there not be a clause included exempting the operator from liability, for example, when the loss, damage or delay results entirely from the fact that a third party deliberately acted or omitted to act with the intent to cause loss, damage or delay? The same applies to causes relating to, *inter alia*, an act of war, hostilities, civil war, insurrection or a natural disaster of an exceptional and irresistible nature.

Article 9(b)

The reimbursement for all costs to the operator of taking the measures in subparagraph (a) is not enough. It would be desirable to add "and all expenses, loss or damage arising out of the handing over of the goods" by analogy with article 22 of the Convention on the Contract for the International Carriage of Goods by Road (CMR Convention).

[A/CN.9/319/Add.2]

NORWAY

[Original: English]

General observations

The Norwegian Government recognizes the general need for uniform rules in connection with international carriage of goods. Today the safekeeping of the goods may come within the scope of conventions dealing with the liability of carriers. In other cases, no existing instrument is applicable. The draft Convention on Liability of Operators of Transport Terminals may fill a gap between existing instruments. It provides a suitable basis for further discussions and elaborations, and the Norwegian Government appreciates the work of the Working Group on International Contract Practices.

It is essential that a convention dealing with the liability of operators of transport terminals takes due account

of solutions in existing transport conventions. The Norwegian Government favours conformity within this area. From that point of view, we can support the idea of using existing conventions as models for an OTT convention.

The Norwegian Government would also like to give some brief comments to the different articles of the draft Convention. The comments are submitted without prejudice to our final position.

Comments on the different articles

Article 3

According to article 3, the operator shall be responsible until he has handed over the goods or, alternatively, "made them available". In our opinion, consideration should be given to extending the period of responsibility in cases where the goods are not handed over. The words "made available" should in any case be clarified.

Article 6

The different limitation amounts for carriage by sea and inland waterways on the one hand, and other kinds of carriage on the other, might cause problems. It may prove to be difficult to calculate the limitation amounts for delay according to paragraph (2). In principle, the limitation amounts should be high in order to provide adequate compensation. However, it is important that the amounts as far as possible are in conformity with limitation amounts in other transport related legal instruments.

Article 9

This article protects the operator from damage caused by dangerous goods. Paragraph (2) gives the operator the right to reimbursement for all costs of taking preventive measures as mentioned in paragraph (1). The scope of paragraph (2) might be too limited and should be considered further.

Article 11

The article differs from similar provisions in other transport conventions. The Norwegian Government would prefer a greater extent of conformity.

[A/CN.9/319/Add.3]

This addendum to document A/CN.9/319 contains a compilation of the comments received between 22 March 1989 and 28 April 1989.

Compilation of comments

States

FINLAND

[Original: English]

The Government of Finland welcomes the opportunity to express considerations on the draft Convention on the

Liability of Operators of Transport Terminals in International Trade. The following points are, nevertheless, submitted without prejudice to any final position the Government will take on this issue. The possible ratification of this specific Convention would *i.a.* depend on whether the 1978 United Nations Convention on the Carriage of Goods by Sea and the United Nations Convention on International Multimodal Transport of Goods will come into force.

The Government supports the idea that the international liability régime in question is laid down in the form of a convention. This solution does not prevent States which are not prepared to accept this form of implementation from using the Convention as a model law. The solution proposed in article F of the draft final clauses, according to which the Convention enters into force after five ratifications, is also acceptable to the Finnish Government.

Comments on specific articles

Article 1

Paragraph (d). The Government understands that the wide definition of "transport-related services" in this paragraph reflects the purpose to cover with this Convention all possible gaps between the scope of application of different international transport conventions. Nevertheless, due to this broad definition, the scope of application of the Convention seems to cover even such operations to which the application of various articles of the Convention (e.g. articles 4 and 10) does not seem to be well-founded. It can also be questioned whether the policy underlying the Convention justifies that activities which are usually performed either under the supervision of the master of the vessel or in connection to loading and unloading also should be included in the scope of the Convention. The Finnish Government, therefore, proposes that the words "stowage, trimming, dunnaging and lashing" are deleted from the subparagraph.

Article 3

According to this article, the period of responsibility of the operator expires when he has handed the goods over or made them available to the person entitled to take delivery of them. The Finnish Government proposes that the words "made them available" are replaced with words "placed them at the disposal of". A delay in collecting the goods within the agreed period of time should not lead to complete expiration of the operator's responsibilities unless he has notified the recipient and urged him to collect the goods. The Finnish Government emphasizes that the provisions of this article on the period of responsibility should not preclude the application of the general principles of liability of the law of torts and damages to the operator.

Article 6

Paragraph (1). The limitations of liability in the article should correspond to other limitation amounts in the field of transport legislation in order to make recourse actions possible on a back-to-back basis between operators and carriers. It might therefore be preferable to include in the

article an alternative based on the number of packages and shipping units. The application of per package limitations to containers and similar cases should in this Convention be resolved similarly as in the conventions on the carriage of goods by sea.

It might be preferable to clarify the Convention in cases where the goods have been lost but found afterwards. The Convention should not be construed so that the operator *eo ipso* obtains ownership to the presumptively lost goods merely by paying compensation for total loss of goods according to article 6 after his period of responsibility has expired. If the goods are found after compensation has been paid, the question of ownership to the goods should be resolved by the applicable law. The Convention should not prevent the consignee from claiming the goods and recovering compensation for delay if he agrees to redress the operator the difference between the compensation for total loss of goods and the compensation for delay.

Article 8

Paragraph (1). In principle the Finnish Government agrees with the solution adopted in article 8, paragraph (1), according to which the operator loses his right to limit the liability in a case in which loss, damage or delay intentionally or by gross negligence was caused by a servant or an agent of the operator. Nevertheless, the operator should be entitled to benefit from the limitation of liability in cases in which his servant or agent has caused damage and there is no causal link between the damages and the performance of the professional activities of the servant. An example of this is the case in which an employee of the operator burgles the premises of the operator and steals the goods outside of working hours.

Accordingly, the loss of right to limitation of liability for damage caused by a servant of the operator should be limited to cases in which the servant or agent has acted in his capacity as such. These limits should be left to be defined by the relevant national legislation on the contracts of employment and agency.

Article 10

The operator's right of security in goods in article 10, paragraph (1), is tied to the 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. He is also entitled to sell the goods in order to obtain the amount necessary to satisfy his claim (paragraph (3)).

It is proposed that the right of retention and the right to sell the goods should cover costs and claims relating to the transport-related services performed by the operator *after* his period of responsibility has commenced. It is possible that the costs and claims have been incurred partly or entirely after the operator's period of responsibility has expired according to article 3 of the Convention, e.g., if the goods have not been collected from the operator within the agreed period of time and the storage fees for the agreed period of time have been paid in advance. There is no reason to deny the right of retention for this kind of costs and claims.

The operator should also have the possibility to extend his right to sell the goods to unclaimed goods even if he,

e.g., due to a payment in advance, has no uncovered costs and claims. Therefore a new subparagraph should be added to the article according to which unclaimed goods may be sold if (i) the operator has notified the person entitled to take delivery of the goods of the availability of them and his intention to exercise the right to sell the goods and (ii) a period which is stated in the notice and which is not shorter than 30 days has expired and the goods have not been claimed.

An addition to the words "pallets or similar articles of packaging or transport if the goods are consolidated or packaged therein" should be made in paragraph (3) after the word "containers" in order to obtain uniformity with article 1, subparagraph (b), in this respect.

Article 17

Paragraph (4). The Finnish Government proposes the following wording to paragraph (4): "Amendments shall be adopted by the Committee by a two-thirds majority of its members present and voting, on the condition that at least one half of the members shall be present at the time of voting."

GERMAN DEMOCRATIC REPUBLIC

[Original: English]

The Government of the German Democratic Republic is of the opinion that the draft Convention as contained in document A/CN.9/298 provides a suitable basis for further discussion. Nevertheless, we believe that some of the draft articles could be further improved. In the following you will find a number of proposed amendments.

Article 2

We suggest to reformulate article 2:

"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 who has at least one place of business in a Contracting State, or

(b) when the transport-related services are performed in a Contracting State, or

(c) when, according to the rules of private international law, the transport-related services are governed by the law of a Contracting State."

The paragraphs (2) and (3) should be deleted.

Article 3

It is suggested to replace the words "made them available to" by "placed them at the disposal of".

Article 4, para. (1)

It is suggested to replace the word "produced" by "presented".

Article 5, para. (4)

The period of "30 consecutive days ..." should be extended to a period of "60 consecutive days ...".

Article 8, para. (1)

It is suggested to include the words "... or another person of whose services the operator makes use for the performance of the transport-related services" after the word "agents":

(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, agents or another person of whose services the operator makes use for the performance of the transport-related services 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(b)

... "all costs to the operator" should be replaced by "all his costs".

Article 10, paras. (1), (3), (4)

In all these paragraphs the applicable law should be the law of the place where the goods are located.

Article 11, para. (2)

It is suggested to make a full stop after the words "... when the goods reached their final destination." If the last part of this paragraph is maintained, the period of 45 days should be extended.

Article 12, para. (5)

In order to avoid an unnecessary increase of legal actions, a carrier or another person should be able to institute a recourse action against an operator also within a 90-day period after a claim has been settled if no action had been brought against him.

Article 14

An additional paragraph is proposed:

"(2) Questions concerning matters governed by this Convention and which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."

Article 17, para. (1)

An additional subparagraph is suggested:

"(c) If the present Convention enters into force more than five years after it was opened for signature, the Depositary shall convene a meeting of the Committee within the first year after it entered into force."

Article 17, para. (3)

This paragraph could be deleted or—if maintained—get another wording:

"In determining whether the limits should be amended, and if so, by what amount, any criteria considered to be relevant shall be taken into account determined on an international basis, among them such as the following: ...".

Article 17, para. (6)

Both periods of "18 months" should be changed to periods of "12 months".

NETHERLANDS

[Original: English]

General comments

The Netherlands Government has taken note of the draft Convention with much interest and appreciation. The principal reason for unifying the rules relating to the liability of terminal operators is to fill gaps in the liability régimes left by the international transport conventions before, during and after carriage as well as between different stages of the transport. On the one hand the draft Convention gives due protection to persons with interests in cargo and on the other hand it facilitates recourse by carriers, multimodal transport operators, freight forwarders and similar entities against terminal operators, when they are held liable for loss of or damage to the goods caused by the terminal operator during the period that they are responsible for the goods.

The draft Convention is applicable to terminal operators handling goods involved in international carriage by sea, air, rail, road and inland waterway. There exists a wide variety of types of operators dealing with different types of goods and performing different types of services. Furthermore the operators represent a wide range of technical and operational sophistication. In view of these different factual circumstances in which terminal operators perform their services, the Netherlands Government is not convinced that the different branches of terminal operators should necessarily be governed by the same liability régime. The draft Convention should leave the possibility to the national legislator to apply the draft Convention according to special circumstances. In the following a proposal will be made in this respect.

The following comments made on certain articles do not constitute a definitive and final expression of views of the Netherlands Government. The Government reserves the right to make further proposals for changes in these and other articles at the twenty-second session of the United Nations Commission on International Trade Law. Thus, the absence of comment now does not imply that the Netherlands Government will necessarily accept any particular article.

Articles 1 and 3. Definitions and period of responsibility

The identification of precise points of time when the responsibility of a carrier under an international transport convention begins and ends is extremely complex and subject to different interpretations. According to the

Warsaw Convention, the Hamburg Rules and the Multimodal Convention the carrier is responsible for the goods from the time he takes them in charge to the time of their delivery. According to article 3 of the draft Convention the terminal operator is responsible for the goods from the time he has taken them in charge. In view of the possibility that both the carrier and the terminal operator are in charge at the same time, the Netherlands Government assumes that the text of the articles 1, subparagraph (a), and 3 permits the draft Convention to apply when the goods are still in charge of the carrier and during this period the terminal operator performs transport-related services with respect to the goods. If the goods suffer loss or damage during this period, the carrier would be liable to the cargo interest and would seek recourse from the terminal operator.

It should be made clear that the term "transport-related services" means the physical handling of the goods and not, for example, financial services with respect to the goods. The Netherlands Government therefore would like to replace the definition of transport-related services by the following definition:

"(a) 'Transport-related services' means services regarding the physical handling of the goods such as storage, warehousing, loading, unloading, stowage, trimming, dunnaging and lashing;"

Article 4. Issuance of document

It should be made clear which person is meant by the customer. The Netherlands Government would prefer to replace the word "customer" by: the other party to the contract.

Article 8. Loss of right to limit liability

The inclusion of servants or agents in article 8 encounters serious objections.

The operator should lose the benefit of the limits of liability only in the case of his own intentional or reckless conduct and not in the case of such conduct by his servants or agents. The loss of right to limit his liability must be considered an important factor in the distribution of the risks between cargo interest, carriers and terminal operators. According to article 8, para. 1, Hamburg Rules, the carrier is not entitled to the benefit of the limitation of liability only in the case of his own intentional or reckless conduct. For insurance purposes it is important for the terminal operator to know that he can rely on the limits expressed in the uniform rules and that these limits will only be disregarded in exceptional cases.

Article 9. Dangerous goods

In case dangerous goods are handed over to the terminal operator and he has not been informed of the dangerous nature of the goods, the terminal operator is entitled to take the necessary precautions according to article 9, subparagraph (a). He is entitled to receive reimbursement for all his costs of taking these measures. It is not clear, however, who is to reimburse him for all his costs. The Netherlands Government proposes to replace subparagraph (b) by the following:

(b) to receive reimbursement for all his costs of taking the measures referred to in subparagraph (a) from the person who failed to meet his obligations to inform him of the dangerous nature of the goods under any international convention or national legislation.

Article 11. Notice of loss or damage

The Netherlands Government prefers that the uniform rules require the notice to be given in writing to the terminal operator.

The Netherlands Government would like to make the following proposal as stated under the General comments:

New article

"Any State may declare at the time of signature, ratification, acceptance, approval or accession that it shall restrict the application of the rules of this Convention to certain types of terminal operators."

TRINIDAD AND TOBAGO

[Original: English]

The Government of Trinidad and Tobago welcomes the elaboration of the Convention on the Liability of Operators of Transport Terminals in International Trade. It is the view of the Government that the implementation of the Convention, when adopted, would impact positively on international trade by giving the benefit of a unified direction to the very volatile issue of operator's liability.

Comments on specific articles are submitted for consideration.

Article 3. Period of responsibility

The period of liability remains vague and should be so worded as to result in the shortest time available after discharge of goods, i.e. one or two clear days after discharge.

Article 4. Issuance of document

There needs to be included another article which confers a responsibility on the shipper or his agent to submit proper documents to the operator within a reasonable time frame. This article does not cover this aspect at all.

Article 5. Basis of liability

Paragraph (2). This article may be difficult to administer. Though the total effect of combined causes may be easily identifiable, allocation of effect by cause is not likely to follow mathematical rules of addition and subtraction. This may lead to a proliferation of practices among member States. Perhaps more specific guidelines could be generated for this article.

Article 10. Right of security in goods

Rights of security in goods should be so worded as to result in the minimum of cargo being retained. In other words, a guarantee for the sum claimed is preferable to the warehousing and retention of cargo in contention matters.

Article 11. Notice of loss, damage or delay

Time frame may be somewhat short for large consignments.

Article 16. Unit of account

This conversion may confer a definite disadvantage to developing countries or other nations, the currencies of which are "weak", comparatively speaking.

[A/CN.9/319/Add.4]

INTERNATIONAL ASSOCIATION OF PORTS
AND HARBORS (IAPH)

The following communication has been received by the Secretary of the United Nations Commission on International Trade Law from the Secretary General of the International Association of Ports and Harbors:

[Original: English]

1: I, as in the capacity of the Secretary General of the International Association of Ports and Harbors, respectfully submit the "Resolution Concerning a Proposed Convention to Limit Liability of Terminal Operators", which was adopted at the Plenary Session of the 16th Biennial Conference of this Association convened in Miami on April 28, 1989.

2: The text of the Resolution (numbered as Resolution No. 2 of the 16th Biennial Conference of IAPH) reads:

RESOLUTION CONCERNING A PROPOSED CON-
VENTION TO LIMIT LIABILITY OF TERMINAL
OPERATORS

WHEREAS the Committee on Legal Protection of Port Interests has studied a Proposed Convention on Liability of Operators of Transport Terminals which will be placed before the United Nations Commission on International Trade Law at its 1989 meeting; and

WHEREAS, the Board of Directors has approved the Committee's Report on that Proposed Convention;

NOW, THEREFORE, BE IT RESOLVED by the INTERNATIONAL ASSOCIATION OF PORTS AND HARBORS, at its Second Plenary Meeting held during the Sixteenth Conference on the 28th day of April, 1989, that IAPH hereby expresses its support of the principle of clarifying and limiting the liability of operators of transport terminals for loss of or damage to goods subject to the

reservation that it wishes UNCITRAL to consider carefully the proposed concept of the operator being made responsible for intentional damage or delay to goods by the servants or agents of the operator and subject to the further reservation that the monetary limits should be set at reasonable and insurable levels.

[A/CN.9/319/Add.5]

IRELAND

[Original: English]

While the continuing increase in international trade is likely to generate increased needs for transport terminals and related operations especially in mainland Europe with the completion of the Single Market of the European Communities, Ireland sees no pressing need for an international instrument to regulate such terminals. Such an international instrument could, however, have benefits if widely implemented.

Ireland notes that earlier attempts by the Comité Maritime International to devise such an instrument were unsuccessful, due to lack of support internationally, and questions whether such support would be forthcoming now to warrant undertaking the detailed work required to finalize the text of a convention. (This obviously has a bearing on when the Convention, if adopted, should come into force internationally.)

Ireland also questions the proposed inclusion in article 17(1)(b) of the draft Convention of the "UN Convention on the Carriage of Goods by Sea, 1978 (Hamburg)" which has not yet been adopted by a sufficient number of States for it to come into effect internationally. Indeed, the major maritime States have not given any indication of an intention to adopt that Convention.

With regard to the scope of the proposed Convention, Ireland considers the present draft to be defective in that it does not address the vital issue of how perishable goods (notably foodstuffs) should be dealt with, and does not make any provision in relation to customs, or duties applicable to goods.

As Irish port authorities provide facilities for goods to remain in open or covered accommodation, without acceptance of responsibility and free of charge, it is Ireland's contention that a port authority does not "in the course of business, undertake to take in charge goods involved in international trade" and that, therefore, the terms of the draft Convention would not apply to Irish port authorities. Ireland seeks confirmation that this interpretation is also that of other delegations.

**B. Limits of liability and units of account in international transport conventions:
report of the Secretary-General (A/CN.9/320) [Original: English]**

INTRODUCTION

1. During the consideration by the Commission of the draft Convention on the Liability of Operators of Transport Terminals in International Trade at the twenty-first session (1988), it was noted that the General Assembly

might decide to convene a diplomatic conference to conclude the Convention. A suggestion was made that the diplomatic conference might present a good opportunity to consider a possible revision of the limits of liability and the provisions pertaining to the units of account in the United Nations Convention on the Carriage of Goods by

Sea, 1978 (Hamburg) and the United Nations Convention on International Multimodal Transport of Goods. After discussing that suggestion, and noting that the possibility of revising the conventions might cause States that were considering becoming parties to them to postpone their decision, the Commission agreed that there was no need to decide on the suggestion and that it might be taken up at a later stage. Nevertheless, it was felt that detailed information on the limits of liability and the units of account used in various transport conventions could be useful to the Commission; thus, the Secretariat was requested to prepare an analytical compilation of such provisions for the twenty-second session.¹

2. The present report contains the analytical compilation requested by the Commission. In view of the context in which the Commission's request was made, the compilation includes only international conventions and protocols thereto relating to the transport of goods or, where a convention or protocol covers the transport of goods as well as of passengers or luggage, only to those provisions relating to the transport of goods. The conventions and protocols are presented in chronological order according to the mode of transport.

3. Most of the conventions included in the compilation have been amended by protocols adopting the Special Drawing Right (SDR) of the International Monetary Fund (IMF) as the basic unit of account for expressing the limits of liability for loss of or damage to goods. Prior to those amendments, the conventions expressed the limits of liability in gold francs, using either the Poincaré franc, which consists of 65.5 milligrams of gold of millesimal fineness 900, or the Germinal franc, which consists of 10/31 of a gram of gold of millesimal fineness 900. The relative value of these units is approximately 5 Poincaré francs = 1 Germinal franc.

4. Following the compilation is a summary comparison of the limits of liability for loss of or damage to goods expressed in SDR under the conventions and protocols that have adopted the SDR. Those conventions and protocols reflect the most recent expressions by the international community of the level of the limits under the various conventions. The comparison shows the quantitative relationship among the levels of the limits of liability under each convention and protocol. In addition, since the conventions and protocols contain various provisions to promote uniformity in the conversion of the limits into national currencies, the comparison gives an accurate indication of the relative values of the limits in national currencies.

5. The limits of liability expressed in gold francs have not been included in the summary comparison for the following reasons. Firstly, the comparison of the limits expressed in SDR also shows the quantitative relationship among the limits expressed in gold francs. This is because the number of SDR in each of the conventions and protocols has been established by converting the limits as expressed in gold francs at the rate of approximately

15 Poincaré francs equals 1 SDR, or 3 Germinal francs equals 1 SDR, as the case may be. Secondly, a comparison of the limits expressed in gold francs would not give an accurate indication of the relative values of the limits in national currencies. This is because, with the absence of an official price of gold, States have converted the limits expressed in gold francs into national currencies in disparate ways. For example, the conversion has been effected variously on the basis of the free market price of gold; on the basis of the last official price of gold in the country concerned; or by converting the amounts of gold francs into SDR on the basis of the last gold value of the SDR and then converting the resulting amounts of SDR into the national currency at the daily rate of the SDR *vis-à-vis* that currency. In addition, some countries that adhere to a convention or protocol in which the limits are expressed in gold francs have, in their legislation implementing the convention or protocol, expressed the limits in specified amounts of the national currency.

6. The Commission may wish to be informed of a recent development related to the subject of this report. A protocol to amend the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974, has been prepared by the Legal Committee of the International Maritime Organization. The protocol would replace the Poincaré franc as the unit of account for expressing the limits of liability in the Convention with the SDR. The Legal Committee has agreed that the decision on the amounts of the limits to be included in the Protocol is to be taken by the diplomatic conference at which the protocol will be adopted. The protocol would also introduce an expedited procedure for revising the limits of liability, patterned after the procedure set forth in the Protocol of 1984 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969. (Report of the Legal Committee on the work of its sixtieth session (10-14 October 1988), IMO document LEG 60/12, paragraphs 77 to 106. The text of the draft protocol resulting from the deliberations of the Legal Committee at its sixtieth session is set forth in annex I of that Report.) The Committee has recommended that the draft protocol be submitted to a diplomatic conference to be held early in 1990 (*ibid.*, paragraph 136).

I. CARRIAGE BY SEA²

A. International Convention for the Unification of Certain Rules Relating to Bills of Lading (Brussels, 1924) ("Hague Rules")

For loss of or damage to goods:

Pursuant to article 4(5), the limit is 100 pounds sterling per package or unit or the equivalent of that sum in

¹Report of the United Nations Commission on International Trade Law on the work of its twenty-first session, *Official Records of the General Assembly, Supplement No. 17 (A/43/17)*, paras. 30 and 31.

²It may be noted that, in addition to the limits set forth in the conventions and protocols included in this section, a shipowner may be able to invoke an overall limit of liability in respect of claims brought against it, e.g., under the Convention on Limitation of Liability for Maritime Claims, 1976. (The possibility of revising that Convention has been placed on the work programme of the Legal Committee of the International Maritime Organization (IMO) for the 1990-1991 biennium (Report of the Legal Committee on the work of its sixtieth session, IMO document LEG 60/12, paragraphs 146 and 157(b).)

other currencies, unless the nature and value of the goods have been declared by the shipper before shipment and inserted in the bill of lading. Another limit can be fixed by agreement between the carrier, master or agent of the carrier and the shipper, provided that the limit is not less than the one provided for in the Convention. Article 9 provides that the monetary units in pounds sterling are taken to be the gold value.

B. Protocol to amend the International Convention for the Unification of Certain Rules relating to Bills of Lading (1968) ("Visby Protocol")

For loss of or damage to goods:

Article 4(5) provides that, unless the nature and value of the goods have been declared by the shipper before shipment and inserted in the bill of lading, the limits are 10,000 Poincaré francs per package or unit or 30 Poincaré francs per kilogram of gross weight, whichever is the higher. Other limits can be fixed by agreement between the carrier, master or agent of the carrier and the shipper, provided that the limits are not less than those provided for in the Convention.

C. United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) ("Hamburg Rules") (not yet in force)

For loss of or damage to goods:

Article 6(1)(a) sets forth limits of 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.

Pursuant to article 26, the unit of account is the Special Drawing Right (SDR) as defined by the International Monetary Fund (IMF). Non-member States of the IMF whose laws do not permit the use of the SDR may apply the following limits instead of the limits expressed in SDR: 12,500 Poincaré francs per package or other shipping unit or 37.5 Poincaré francs per kilogram of gross weight.

To promote uniformity in the conversion of the limits into national currencies, the Convention includes, in article 26, the following provisions. The amounts expressed in SDR are to be converted according to the value of the currency at the date of judgement or the date agreed upon by the parties. The value in terms of SDR of the currency of a member State of the IMF is to be calculated in accordance with the method of valuation applied by the IMF in effect at the date in question. The value of a currency of a non-member State of the IMF is to be calculated in a manner determined by that State. For non-member States of the IMF whose law does not permit the use of the SDR and for which the limits expressed in Poincaré francs will apply, the conversion of those limits into the national currency is to be made according to the law of the State concerned. The foregoing calculations and conversions by non-member States of the IMF are to be made in

such a manner as to express in the national currency as far as possible the same real value as the limits expressed in SDR.

For delay in delivery:

Pursuant to article 6(1), the limit is 2 1/2 times the freight payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage. The aggregate liability of the carrier for loss, damage and delay shall not exceed the limit for total loss of the goods with respect to which liability was incurred.

Other provisions:

By agreement between the carrier and the shipper, limits of liability exceeding those provided for in the Convention may be fixed (article 6(4)).

D. Protocol amending the International Convention for the Unification of Certain Rules Relating to Bills of Lading, 25 August 1924, as amended by the Protocol of 23 February 1968 (1979)

For loss of or damage to goods:

Article 4(5) provides that, unless the nature and value of the goods have been declared by the shipper before shipment and inserted in the bill of lading, the limits are 666.67 units of account per package or unit or 2 units of account per kilogram of gross weight, whichever is higher. Other limits can be fixed by agreement between the carrier, master or agent of the carrier and the shipper, provided that the limits are not less than those provided for in the Convention.

The unit of account is the SDR. Non-member States of the IMF whose laws do not permit the use of the SDR may apply the following limits instead of the limits expressed in SDR: 10,000 Poincaré francs per package or unit or 30 Poincaré francs per kilogram of gross weight. Provisions similar to those in the Hamburg Rules are included to promote uniformity in the conversion of the limits into national currencies.

II. CARRIAGE BY AIR

A. Convention for the Unification of Certain Rules relating to International Carriage by Air (1929) ("Warsaw Convention")

As set forth in article 22, the limit is 250 Poincaré francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if required. In that case, the limit is the declared sum, unless the carrier proves that the sum is greater than the actual value to the consignor at delivery.

For objects of which the passenger takes charge himself, the limit is 5,000 Poincaré francs per passenger.

**B. Protocol done at the Hague on
28 September 1955 to amend the
Warsaw Convention
("Hague Protocol")**

Essentially the same as under the Warsaw Convention (above) (article 22).

**C. Protocol done at Guatemala City on
8 March 1971 to amend the Warsaw Convention
as amended by the Hague Protocol
("Guatemala Protocol") (not yet in force)**

Essentially the same as under the Warsaw Convention, except that:

1. the separate limit for objects of which the passenger takes charge himself is eliminated;
2. it is expressly provided that the costs of the action incurred by the claimant, including lawyers' fees, are not to be taken into account in applying the limits. (Article 22(3)(c)).

**D. Additional Protocols done at Montreal on
25 September 1975:**

**Protocol No. 1 amending the Warsaw Convention
Protocol No. 2 amending the Warsaw Convention
as amended by the Hague Protocol**

**Protocol No. 3 amending the Warsaw Convention
as amended by the Hague and Guatemala
Protocols**

**Protocol No. 4 amending the Warsaw Convention
as amended by the Hague Protocol**

(none of the Protocols is yet in force)

For the limit of 250 Poincaré francs per kilogram in the Warsaw Convention and the Hague and Guatemala Protocols, all four Montreal Protocols substitute the limit of 17 SDR per kilogram. For the limit of 5,000 Poincaré francs per passenger in the Warsaw Convention and Hague Protocol, Montreal Protocols No. 1 and 2 substitute the limit of 332 SDR per passenger.

Non-member States of the IMF whose law does not permit the use of the SDR may apply the following limits instead of the limits expressed in SDR: 250 Poincaré francs per kilogram; for objects of which the passenger takes charge himself, 5,000 Poincaré francs per passenger (the per-passenger limit is set forth only in Montreal Protocols 1 and 2).

Provisions similar to those in the Hamburg Rules are included to promote uniformity in the conversion of the limits into national currencies, except that the Protocols omit the requirement that non-member States of the IMF convert the limits into other national currencies in such a manner as to express as far as possible the same real values as the limits expressed in SDR.

III. CARRIAGE BY ROAD

**A. Convention on the Contract for the International
Carriage of Goods by Road (CMR) (1957)**

For total or partial loss of goods:

Pursuant to article 23, the limit is 25 Germinal francs per kilogram of gross weight short. Carriage charges, customs duties and other charges incurred in respect of the carriage of goods are to be refunded in addition.

For damage to the goods:

Article 25(2) provides that, if the whole consignment has been damaged, the limit is the amount that would be payable in the case of total loss; if only part of the consignment has been damaged, the limit is the amount that would be payable in the case of loss of the part affected.

For delay:

The limit is the carriage charges (article 23(5)).

Other provisions:

In the case of total or partial loss of the goods, amounts exceeding the limit specified in the Convention may be claimed where the sender has, against the payment of an agreed surcharge, stipulated in the consignment note a declaration of value of the goods (articles 23(6), 24). In the case of loss, damage or delay, amounts exceeding the limits specified in the Convention may be claimed where the sender has, against the payment of an agreed surcharge, declared a special interest in delivery and entered the amount thereof in the consignment note (articles 23(6), 26).

**B. Protocol to the Convention on the Contract
for the International Carriage of Goods by Road
(CMR) (1978)**

Article 23 replaces the limit of 25 Germinal francs per kilogram for total or partial loss of the goods with 8.33 units of account per kilogram. The unit of account is the SDR. Non-member States of the IMF whose law does not permit the use of the SDR may apply the limit of 25 Germinal francs per kilogram. Provisions similar to those in the Hamburg Rules are included to promote uniformity in the conversion of the limits into national currencies.

IV. CARRIAGE BY RAIL

**A. Agreement concerning the International
Carriage of Goods by Rail (SMGS) (1966)**

For total or partial loss of goods:

The limit, as set forth in article 24, is the price of the goods or their declared value. For total or partial loss

of household furniture with no declared value, the limit is 2.70 roubles per kilogram.

For damage to goods:

For damage to the entire consignment, the limit is the amount that would be payable in the case of total loss; for damage to a part of the consignment the limit is the amount that would be payable in the case of the loss of the goods damaged (article 25).

For delay:

Article 26 fixes the amount of compensation according to a gradation of percentages of the transport charge, ranging from 6 per cent for a delay up to 1/10 of the required delivery time to 30 per cent for a delay exceeding 4/10 of the required delivery time. Total compensation for loss, damage and delay may not exceed the amount payable in the case of total loss of the goods.

**B. Appendix B to the Convention
concerning International Carriage by Rail (COTIF)
of 9 May 1980**

For total or partial loss of goods:

Under article 40, the limit is 17 units of account per kilogram of gross mass short. Carriage charges, customs duties and other amounts incurred in connection with the carriage are to be refunded in addition.

Article 7 provides that the unit of account is the SDR. For non-member States of the IMF whose law does not permit the use of the SDR, the unit of account is equal to 3 Germinal francs. Provisions similar to those in the Hamburg Rules are included to promote uniformity in the conversion of the limits into national currencies, except that the provision concerning the time as of which the conversion is to be made is not included.

For damage to goods:

According to article 42, if the whole consignment has lost value, compensation may not exceed the amount that would be payable in case of total loss; if only part of the consignment has lost value, compensation may not exceed the amount that would be payable if that part had been lost. In addition, carriage charges, customs duties and other amounts incurred in connection with the carriage are to be refunded proportionally.

For delay:

The limit, set forth in article 43, is 3 times the carriage charges. In the case of total loss of the goods, compensation for delay is not payable in addition to compensation for the total loss. In the case of partial loss of the goods, compensation is limited to three times the carriage charges in respect of the part of the consignment not lost. In the case of damage to the goods not resulting from the delay, compensation for the delay is payable in addition to compensation for the damage. Total compensation for loss, damage and delay may not exceed the amount payable for total loss. Other forms

of compensation for delay may be specified in international tariffs or in special agreements when the transit period has been established on the basis of transport plans.

Other provisions:

According to article 45, when the railway agrees to special conditions of carriage involving a reduced carriage charge, it may limit the amount of compensation payable for loss, damage or delay, provided that such limit is indicated in the tariff.

Under article 46, in case of a declaration of interest in delivery, further compensation exceeding the limits provided for in the Convention may be claimed up to the amount declared.

V. MULTIMODAL TRANSPORT

*United Nations Convention on International Multimodal
Transport of Goods (1980)
(not yet in force)*

For loss of or damage to goods:

Pursuant to article 18, the limits are 920 units of account per package or other shipping unit or 2.75 units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher. However, if the international multimodal transport does not, according to the contract, include carriage of goods by sea or by inland waterways, the limit of liability of the multimodal transport operator is limited to 8.33 units of account per kilogram of gross weight of the goods lost or damaged.

Article 31 provides that the unit of account is the SDR. Non-member States of the IMF whose laws do not permit the use of the SDR may apply the following limits instead of the limits expressed in SDR:

13,750 Poincaré francs instead of 920 units of account

41.25 Poincaré francs instead of 2.75 units of account

124 Poincaré francs instead of 8.33 units of account.

Article 31 contains provisions similar to those in the Hamburg Rules to promote uniformity in the conversion of the limits into national currencies.

For delay in delivery:

Article 18 provides that the limit is 2 1/2 times the freight payable for the goods delayed, but not exceeding the total freight payable under the multimodal transport contract. The aggregate liability of the multimodal transport operator for loss, damage and delay shall not exceed the limit for total loss of the goods.

Other provisions:

By agreement between the multimodal transport operator and the consignor, limits for loss, damage or delay exceeding those provided for in the Convention may be fixed in the multimodal transport document (article 18 (6)).

VI. SUMMARY COMPARISON OF LIMITS OF LIABILITY FOR LOSS OF OR DAMAGE TO GOODS EXPRESSED IN SDR

<i>Convention or Protocol</i>	<i>Per package or unit</i>	<i>Per kilogram</i>
<i>Carriage by sea</i>		
Hamburg Rules (1978)	835	2.5
Protocol amending Hague Rules/ Visby Protocol (1979)	666.67	2.0
<i>Carriage by air</i>		
Montreal Protocols (1975)	not applicable	17
<i>Carriage by road</i>		
Protocol amending CMR Convention (1978)	not applicable	8.33
<i>Carriage by rail</i>		
COTIF (1980)	not applicable	17
<i>Multimodal transport</i>		
Multimodal Convention (1980)		
if transport includes carriage by sea or by inland waterways	920	2.75
if transport does not include carriage by sea or by inland waterways	not applicable	8.33

C. Liability of operators of transport terminals: draft final clauses for the draft Convention on the Liability of Operators of Transport Terminals in International Trade: report of the Secretary-General (A/CN.9/321) [Original: English]

The present document contains a draft of the final clauses to be included in the draft Convention on the Liability of Operators of Transport Terminals in International Trade. The document was prepared pursuant to a request made at the twenty-first session of the Commission.¹

FINAL CLAUSES

Article A

Depositary

The Secretary-General of the United Nations is the depositary of this Convention.

Article B

Signature, ratification, acceptance, approval, accession

(1) This Convention is open for signature [at the signing ceremony of the United Nations General Assembly on ... and will remain open for signature by all States at the Headquarters of the United Nations, New York, until ...]

[at the concluding meeting of the United Nations Conference on ... and will remain open for signature by all States at the Headquarters of the United Nations, New York, until ...].

(2) This Convention is subject to ratification, acceptance or approval by the signatory States.

(3) This Convention is open to 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 C

Application to territorial units

(1) If a Contracting State has two or more territorial units in which 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 at any time substitute another declaration for its earlier declaration.

¹Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17), para. 29.

(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, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

(4) If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

Article D

Reservations²

(1) Any State may declare at the time of signature, ratification, acceptance, approval or accession that it makes the following reservation: . . .³

(2) No reservations are permitted except [the one] [those] authorized in this Convention.

Article E

Effect of declaration

(1) Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.

(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.⁴

(4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

²If the Commission should decide not to adopt the provisions along the lines of draft article D, it may wish to provide expressly in the final clauses that no reservation may be made to the Convention.

³It may be noted that the issue of reservations to the Convention was referred to at the eleventh session of the Working Group on International Contract Practices (A/CN.9/298, paras. 45, 86 and 96).

⁴The second sentence would apply to article C and any declaration that may be allowed pursuant to article D.

Article F

Entry into force

(1) This Convention enters into force on the first day of the month following the expiration of one year from the date of deposit of the [fifth] instrument of ratification, acceptance, approval or accession.

(2) For each State which becomes a Contracting State to this Convention after the date of the deposit of the [fifth] instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the date of the deposit of the appropriate instrument on behalf of that State.

(3) Each Contracting State shall apply the provisions of this Convention to transport related services with respect to goods taken in charge by the operator on or after the date of the entry into force of this Convention in respect of that State.

Article G

Revision and amendment

(1) At the request of not less than one-third of the Contracting States to this Convention, the depositary shall convene a conference of the Contracting States for revising or amending it.

(2) Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

Article H

Revision of limits of liability

[The Commission may wish to incorporate into the final clauses the provisions of current article 17 of the draft Convention, contained in annex I of document A/CN.9/298.]

Article I

Denunciation

(1) A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at . . . , this . . . day of . . . one thousand nine hundred and . . . , 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 the present Convention.

IV. STAND-BY LETTERS OF CREDIT AND GUARANTEES

A. Report of the Working Group on International Contract Practices on the work of its twelfth session (Vienna, 21-30 November 1988) (A/CN.9/316) [Original: English]

INTRODUCTION

1. At its twenty-first session, the Commission considered the report of the Secretary-General on stand-by letters of credit and guarantees (A/CN.9/301). Agreeing 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 could be carried out in two stages, the first relating to contractual rules or model terms and the second pertaining to statutory law.¹

2. Concerning the first stage, the Commission welcomed the work undertaken by the International Chamber of Commerce (ICC) in preparing draft Uniform Rules for Guarantees and agreed that comments and possible recommendations by the 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.² Accordingly, the Commission decided to devote one session of the Working Group on International Contract Practices to a review of the ICC draft Uniform Rules for Guarantees in order 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.³

3. The Commission also asked the Working Group to examine the desirability and feasibility of any future work relating to the second stage as envisaged in the conclusions of the report, namely the idea of striving for greater uniformity at the statutory level, through work towards a uniform law.⁴

4. The Working Group, which was composed of all States Members of the Commission, held its twelfth session at Vienna from 21 to 30 November 1988. The session was attended by representatives of the following States Members of the Working Group: Argentina, Austria, China, Czechoslovakia, France, German Democratic Republic, Iran (Islamic Republic of), Italy, Japan, Mexico, Netherlands, Nigeria, Spain, Sweden, Union of

Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and United States of America.

5. The session was attended by observers from the following States: Afghanistan, Bulgaria, Canada, Colombia, Germany, Federal Republic of, Indonesia, Poland, Sudan and Thailand.

6. The session was attended by observers from the following international organizations: Commission of the European Communities, Hague Conference on Private International Law and International Chamber of Commerce.

7. The Working Group elected the following officers:

Chairman: Mr. A. S. HARTKAMP (Netherlands)

Rapporteur: Mr. LIU Daguo (China).

8. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.II/WP.61); a note by the Secretariat containing the most recent version of the ICC draft Uniform Rules for Guarantees (A/CN.9/WG.II/WP.62); and a note by the Secretariat containing tentative considerations on the preparation of a uniform law (A/CN.9/WG.II/WP.63).

9. The Working Group adopted the following agenda:

- (a) Election of officers
- (b) Adoption of the agenda
- (c) Review of the ICC draft Uniform Rules for Guarantees
- (d) Possible features and issues that might appropriately be covered in a uniform law
- (e) Adoption of the report.

DELIBERATIONS AND DECISIONS

10. The Working Group engaged in a review of the ICC draft Uniform Rules for Guarantees as contained in the note by the Secretariat (A/CN.9/WG.II/WP.62), with the understanding that the preparation of the Rules was the responsibility of ICC. The discussion of the Working Group and the suggestions on individual draft articles are set forth below in chapter I.

11. Following that discussion the Working Group proceeded to an examination of the desirability and feasibility

¹Report of the United Nations Commission on International Trade Law on the work of its twenty-first session, *Official Records of the General Assembly, Supplement No. 17 (A/43/17)*, para. 19.

²*Ibid.*, para. 20.

³*Ibid.*, paras. 21-22.

⁴*Ibid.*, paras. 22-24.

of the preparation of a uniform law. The tentative considerations of the Working Group, including its discussion on the possible scope and on the issues that might be dealt with in a uniform law, are set forth below in chapter II.

I. REVIEW OF ICC DRAFT UNIFORM RULES FOR GUARANTEES

General considerations

12. The Observer of the International Chamber of Commerce (ICC) explained to the Working Group the background, purpose and status of the ICC draft Uniform Rules for Guarantees (hereinafter referred to as "the Rules"). She noted, for example, that ICC's current work towards a new set of rules had been prompted by the limited success of the 1978 ICC Uniform Rules on Contract Guarantees (ICC Publication No. 325). The new draft Rules were the result of a serious and ongoing effort of reconciling the different interests of the parties to a guarantee operation.

13. The new draft Rules were in part modelled on other ICC texts, especially the Uniform Customs and Practice for Documentary Credits (UCP) and the 1978 ICC Uniform Rules on Contract Guarantees. The draft Rules before the Working Group, and in particular the introduction, were of a tentative nature in that they were still subject to revision by the ICC Joint Working Party and later review by its two parent bodies, namely the ICC Commission on Banking Technique and Practice and the ICC Commission on International Commercial Practices. Once the Rules were finalized, it was envisaged that model forms for the more common types of guarantees would be prepared.

14. After expressing its appreciation to the Observer of the ICC, the Working Group considered some general points before embarking on an article-by-article review of the Rules. As regards the task of the Working Group to review a text prepared by another organization, the view was expressed that this should not constitute a precedent for the future, in particular since the organization in question was non-governmental and since the text had not yet been finalized by that organization itself.

15. As regards the formulation of the topic used in the documents of the Commission and the Secretariat, a view was expressed that the wording "Stand-by letters of credit and guarantees" appeared to place emphasis on stand-by letters of credit. One should speak only of guarantees (or bank guarantees) or at least reverse the order of the two types in line with their frequency of use. It was noted in response that the above wording was not intended to convey any order of frequency or importance but had been chosen by the Secretariat in view of the fact that the original request by the Commission referred only to the use of letters of credit in non-sale transactions and that the topic had been widened to include the functional equivalents, i.e. independent guarantees (as explained in document A/CN.9/301, paras. 1-6). The Working Group agreed to consider at a later stage a different wording for any future activity of the Commission or its Working Group in this field.

16. As regards the Rules in general, appreciation was expressed for the efforts of ICC in preparing a new set of rules to be applied when so agreed by parties. The Working Group welcomed the opportunity to review the Rules and make recommendations in the spirit of co-operation. A greater degree of uniformity was desirable for international guarantee practice. Although uniform rules could not effectively deal with all current problems, of which those arising from unfair callings were mentioned by way of example, they could help to provide certainty on many substantive points as illustrated by the text under review. It was suggested that the independent nature of the guarantee and the autonomy of the parties should be the guiding principles for such uniform rules. A suggestion was made that the situations in which the Rules were intended to be used should be explained either in the introduction or in any comment accompanying the Rules.

Article-by-article review

17. The text of the draft articles reviewed by the Working Group was the one presented in document A/CN.9/WG.II/WP.62. However, as regards articles 1 to 8, and 20, the Observer of the ICC informed the Working Group about some modifications that had been made by the ICC Joint Working Party only a few days before the session of the Working Group. Those modifications are noted below, to the extent they were relevant to the discussion.

Article 1

18. The text of the draft article as considered by the Working Group was as follows:

"These Rules apply to any guarantee, however named or described (hereinafter 'Guarantee') 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) and are binding on all parties unless otherwise expressly provided in the Guarantee or any amendment thereto. Instructions for the issue of a Guarantee can also be subject to the Rules."

19. Concerns were expressed that the article did not clearly state which kinds of guarantees were covered by the Rules, in particular, whether accessory guarantees were included. The Observer of the ICC explained that the article had to be read in conjunction with other provisions, in particular articles 2 and 20. It would, thus, be seen that the Rules would not cover accessory guarantees, i.e. guarantees that were not independent from the underlying transaction. The Rules would, for example, not cover suretyships or insurance policies. They were also not intended to cover stand-by letters of credit. This latter exclusion was for a purely procedural reason since those instruments were currently covered by UCP. Otherwise all independent (or autonomous) kinds of guarantees were covered. Even though pure simple demand guarantees were not envisaged in article 20, they could also be covered by the Rules, since article 1 allowed parties to subject their guarantee to some or all of the Rules. The parties could, thus, exclude article 20. As regards the

relevant portion of article 1 ("unless otherwise expressly provided"), the Working Group suggested that the wording should be improved so as to convey more clearly the idea that partial derogation from the Rules was permitted.

20. Another concern was that article 1 did not clearly distinguish between the principal-guarantor relationship and the guarantor-beneficiary relationship and did not address the problem of any discrepancy between the instructions and the text of the guarantee. While it was stated in reply that the approach of the article was pragmatic rather than legally perfect, the Working Group felt that a clear distinction was desirable. Suggestions in this respect included the following: deletion of the second sentence; deletion of the reference to instructions in the first sentence; inclusion of a provision along the lines of article 6 UCP.

21. Yet another concern was that the Rules, in article 1 and other articles, referred to an amendment to the guarantee without regulating the amendment procedure (unlike UCP). The Working Group suggested that such a regulation should be included in the Rules, to the effect that an amendment required the consent of all parties concerned.

Article 2

22. The text of the draft article as considered by the Working Group was as follows:

"(a) (i) For the purposes of these Rules a Guarantee means a written undertaking for the payment of money given by a bank, insurance company or other body or person (hereinafter 'the Guarantor') at the request and on the instructions of a party (hereinafter called 'the Principal') to another party (hereinafter the 'Beneficiary') if the terms and conditions of the Guarantee are complied with. Such Guarantees are sometimes described as 'Direct Guarantees'.

(ii) Guarantees may also be given on the instructions of a bank, insurance company or any other body or person (hereinafter the 'Instructing Party') to a Beneficiary. Such Guarantees are sometimes described as 'Indirect Guarantees'.

"(b) Each Guarantee is independent of any underlying transaction and the terms of any such transaction shall in no way affect the Guarantor's rights and obligations under a Guarantee even if any reference whatsoever thereto is included in the Guarantee. A Guarantor's obligation of performance under any Guarantee is to pay the sum or sums specified therein if the terms and conditions of the Guarantee are complied with.

"(c) In the case of an Indirect Guarantee, the Instructing Party's request and instruction to the Guarantor for the establishment of the Guarantee will be supported by the Instructing Party's 'Counter-Guarantee' by which reimbursement is promised to the Guarantor on receipt of his notification that he has been called upon to effect payment under his Guarantee.

The Counter-Guarantee is independent of the Guarantee itself and of any underlying transaction."

23. The Working Group suggested that the requirement, in paragraph (a) (i), that the undertaking be "written" should be widened so as to include electronic and other modern means of teletransmission including computer messaging.

24. Different views were expressed as to the special mention of indirect guarantees. Under one view, there was no need since indirect guarantees were of the same nature as other guarantees, although the designation of the respective parties may have to be different. Under another view, the contexts were different in that normal guarantees tended to be accompanied by collateral or other security while indirect guarantees were given on the basis of creditworthiness alone. Under yet another view, special mention of indirect guarantees was desirable for clarity's sake. The Working Group concluded that, while indirect guarantees might be mentioned, it was inappropriate for it to be cast in terms of a definition and that, thus, the last sentence of paragraph (a) (ii), and accordingly the last sentence of paragraph (a) (i), might be deleted.

25. A number of questions were raised as to certain terms used in the article. For example, a view was expressed that the expressions "bank" and "party" were not sufficiently clear. A lack of consistency was seen in the interchangeable use of expressions like "establishment", "issue" or "giving" of a guarantee. Another drafting suggestion was to include the declaration of independence, contained in paragraph (b), into the definition of the guarantee under paragraph (a). Yet another proposal was to express more clearly that the guarantees covered were only those promising exclusively payment of money and not those promising the alternative of, for example, completing the works in the principal's stead. A concern was expressed that the reference to instructions of the principal to the guarantor seemed to exclude those cases, which were admittedly rare, where the guarantor issued the guarantee either on its own behalf or, as was possible under the vague term "bank", for its own benefit.

26. Considering, in particular, paragraph (b), the Working Group discussed the relationship between the principle of independence and the reference to "terms and conditions" of the guarantee. The Working Group suggested that those two elements should be clearly distinguished and that the "terms and conditions" should not be of a kind that would undermine the independent character of the guarantee. In this context, it was proposed that, throughout these Rules, it should be made clear that the "terms and conditions" of the guarantee had to be of a documentary character, setting out that the facts triggering the guarantee had occurred. With a view to strengthening the viability of the guarantee, the Working Group expressed preference for such documentary terms and conditions.

27. As regards the obligation of a counter-guarantor to reimburse the guarantor, objections were raised to the rule in paragraph (c), according to which the obligation crystallized upon notification by the guarantor that he had been called upon to pay the guarantee. It was stated in reply that in practice the guarantor often requested cover from the counter-guarantor before effecting payment. After deliberation, the Working Group suggested that the

¹Last part of sentence as modified by ICC Joint Working Party on 18 November.

counter-guarantor should be obligated to reimburse the guarantor only when the guarantor had effected payment. With regard to receipt of instructions from the counter-guarantor, the view was expressed that provision should be made for an acknowledgement as to whether inter-bank instructions had or had not been accepted.

Article 3

28. The text of the draft article as considered by the Working Group was as follows:

"All instructions for the issue of Guarantees and amendments thereto and Guarantees and amendments themselves should be clear, precise and avoid excessive detail. Accordingly, all guarantees should stipulate:

- (a) the name of the Principal if applicable;
- (b) the name of the Beneficiary;
- (c) the underlying transaction requiring the issue of the Guarantee if applicable;
- (d) a maximum 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 conditions for claiming payment."

29. The Working Group discussed the nature of the list of items contained in subparagraphs (a) to (f), in particular, whether the list of items was intended to be exhaustive, whether the list was mandatory and what the consequences of non-adherence would be. It was suggested that a list of items to be stipulated in a guarantee should not be included in the Rules. It was stated that such a list would conflict with the autonomy of the parties to draw up guarantee terms and that the multiplicity of possible circumstances found in individual cases made any such list of dubious value. Comments were also made concerning difficulties in identifying those items in an enumeration that appeared to be mandatory and those that were suggestive or situational. Reference was also made to article 5 UCP, which did not include any such enumeration.

30. The Observer of the ICC stated that it had been decided to include an enumeration of items to be stipulated in a guarantee in response to comments from bankers and others involved in guarantee practice that such a list would be helpful. Accordingly, the article 3 enumeration had been included for educational and informational purposes. A guarantee would not necessarily be invalid merely because it did not contain all the elements listed in article 3.

31. It was suggested that there may be additional elements which might be included in the article 3 enumeration, for example, reduction of the guarantee amount and place of availability. As in the discussion of article 2, concern was expressed about the meaning of the subparagraph (f) reference to "the terms and conditions for claiming payment".

32. The Working Group concluded its discussion of article 3 by suggesting the retention of the enumeration of items to be stipulated in a guarantee. It suggested, however, that, for the purposes of additional clarity, the words "if applicable", presently found only in subparagraphs (a) and (c), should be made to apply to all the listed items by being moved to the beginning of the second sentence of article 3.

Article 4

33. The text of the draft article as considered by the Working Group was as follows:

"The right to claim under a Guarantee is not assignable. Should an assignment take place, the Guarantor shall not be bound by such an assignment unless he and the Principal expressly agree thereto in the guarantee wording itself or in an amendment thereto. This shall, however, not affect the beneficiary's right to assign any proceeds to which he may be or may become entitled under the Guarantee."⁶

34. In the discussion, questions were raised concerning the completeness and clarity of the present draft. It was suggested that some aspects of transfer that were dealt with in the UCP provisions on transferable credits, such as the number of permitted transfers and fractional transfers, might also be addressed in the Rules for Guarantees. The Working Group suggested that the relevant provisions of the Rules for Guarantees be aligned with articles 54 and 55 UCP, which concern the transferable letter of credit and assignment of the proceeds of letters of credit.

Article 5

35. The text of the draft article as considered by the Working Group was as follows:

"All Guarantees are irrevocable."

36. The Working Group agreed with the principle laid down in this article that guarantees were irrevocable. The view was expressed that the article might be redundant. However, the prevailing view was in favour of retaining the present text since a provision to this effect would be useful.

37. The question was raised whether under the present formulation it would be possible to issue a revocable guarantee under the Rules. The answer was that, in accordance with the freedom of derogation recognized in article 1, parties to the guarantee operation would be free to exclude article 5 for the purposes of issuing a revocable guarantee. It was suggested that such a variation from the Rules would, however, have to be expressed.

Article 6

38. The text of the draft article as considered by the Working Group was as follows:

⁶Text as modified by ICC Joint Working Party on 18 November.

"A Guarantee enters into effect as from the date of its issue unless its terms expressly provide that its effectiveness is subject to conditions verifiable by the Guarantor."⁷

39. As regards the entry into effect of a guarantee, the question was raised as to whether entry into effect should take place on the date of issuance or upon receipt. Concerns were expressed that the article did not clearly indicate the circumstances intended to be covered and that the mechanism of issuance indicated was not clear. In particular, questions were raised as to the meaning of "effectiveness". Uncertainty was expressed as to whether this term referred to the commencement of the guarantor's legal obligation under the guarantee or to the availability of payment at some subsequent date. It was proposed that "effectiveness" be replaced by "availability for drawdown". Another view was that "effectiveness" was preferable because it was shorter and meant the same thing as "availability for drawdown".

40. Various questions were raised as to the nature of the conditions referred to in the article to which the effectiveness of a guarantee might be made subject. As in the earlier discussion of other articles, one concern was that the article did not clearly exclude the possibility of non-documentary conditions. Moreover, the article did not make clear whether the conditions mentioned therein were different from the conditions to be met in order to obtain payment. A further concern was that the article might inadvertently encourage the issuance of guarantees subject to conditions under the control of the principal and that such instruments might be of little value to the beneficiary. The beneficiary would have an interest in knowing when the guarantee entered into effect. It would be more complicated to do so if the validity of the guarantee was subject to conditions to be verified by the principal. In response, it was pointed out that it was for the parties to agree on the type of the guarantee to be issued.

41. A suggestion was made that the article should focus on dates rather than on conditions precedent. It was observed that, while in most cases a date would be involved, instances of non-date conditions could easily be given, e.g., receipt of advance payment monies or notification of the award of a contract. Another proposal was that, while the first part of the article (concerning entry into effect upon issuance) might be retained, the second part could be deleted. Yet another proposal was to delete the entire article, in view of the confusion as to its meaning and since it might be self-evident that conditions may be included in a guarantee.

42. After deliberation, the Working Group suggested that, due to uncertainty as to its terms, the article might be deleted.

Article 7

43. The text of the draft article as considered by the Working Group was as follows:

"Where a Guarantor has been given instructions for the issue of a Guarantee but the instructions are such that, if they were to be carried out, the Guarantor would by reason of law be unable to fulfil the terms and conditions of the relevant Guarantee, the instructions shall not be executed and the Guarantor shall immediately inform the party which gave that Guarantor its instructions by the most expeditious means of the reasons for such inability and request appropriate instructions from that party."⁸

44. Support was expressed for the purpose underlying this article, but it was doubted whether that purpose could be achieved by a legal provision in the Rules. Concerns were expressed in respect of a number of terms used in the draft article.

45. For example, in the expression "by reason of law" it was not clear to which law the article made reference. If the reference was intended to be to the law in the guarantor's country or to specific conditions in the beneficiary's country, this should be clarified. A lack of clarity was also seen in the notion of "being unable to fulfil the terms and conditions". Yet another matter that, it was suggested, might be clarified concerned the relationship between this article and article 13, as well as article 27. One could indicate more clearly that article 7 related to the preparatory phase of the issuance of a guarantee and that article 13 concerned liabilities and responsibilities once a guarantee had been issued. In this regard, a question was raised as to the appropriateness of presuming at this early stage an obligation of the guarantor to issue a guarantee. With respect to the words "by reason of law", it was asked whether there were not other, business, reasons that could result in a non-acceptance of the guarantor's obligations. Concerns about "pre-contractual" applications were raised with reference to the contractual manner in which the Rules were to be incorporated. It was observed, however, that article 1 provided for application of the Rules to instructions as well as to guarantees themselves.

46. As regards a possible suggestion of the Working Group, there was support for the retention of the article, with the above clarifications, on the ground that it concerned important issues requiring uniform regulation; there was considerable support for the deletion of the article, leaving the issues dealt with therein to solution by municipal law.

Article 8

47. The text of the draft article as considered by the Working Group was as follows:

"All documents presented under a Guarantee must be examined by the Guarantor or Instructing Party as appropriate with reasonable care to ascertain whether or not they appear on their face to conform with the terms and conditions of the Guarantee. Where such documents do not appear so to conform or appear on their

⁷Last portion of provision as modified by ICC Joint Working Party on 18 November.

⁸Last portion of provision as modified by ICC Joint Working Party on 18 November.

face to be inconsistent with one another, they shall be rejected."⁹

48. In the deliberations of this article a number of concerns were expressed. For example, while documents may be presented to the guarantor or the instructing party, it was felt that it should only be the guarantor who determined the conformity of the documents with the terms of the guarantee. The Working Group also felt that the article should apply only to documents that were called for under the guarantee.

49. Questions were also raised concerning the standard to be applied to documentary examination. A related question was whether the article addressed cases where the guarantor was aware that documents were tainted by fraud or that there was fraud in the underlying transaction. It was stated in reply that the matter of fraud was not dealt with in the article but was governed by national law.

Article 9

50. The text of the draft article as considered by the Working Group was as follows:

"(a) A 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 the Guarantor determines to reject a claim, it will give notice without delay by teletransmission or, if that is not possible, by other expeditious means to that effect to the Beneficiary."

51. The Working Group discussed the question whether it would be desirable to replace, in paragraph (a), the notion of "reasonable time" by a definite period of time within which a guarantor would be obligated to complete examination of the claim. In favour of retaining the notion of "reasonable time" it was noted that that notion was well known and took into account differences in circumstances found in individual cases as well as regional and national variations in practice. With a view to achieving certainty, various proposals were made concerning inclusion of a definite period. One compromise suggestion was to use a rebuttable presumption of a certain fixed length of time as appropriate, unless agreed or proven otherwise, with the burden being on the party alleging its reasonableness. As regards the expression "to examine a claim", a proposal was made to replace it by the expression "to examine the documents".

52. With respect to paragraph (b), it was noted that there was no provision concerning the contents of the notice of rejection. Since a beneficiary, if informed of the nature of a documentary discrepancy, might be in a position to cure and re-submit, the Working Group suggested that the notice should include a statement of the reasons for the rejection. A consequential proposal was that the article might include a "preclusion" rule, perhaps similar to the one contained in article 16 UCP, thereby limiting the right

of a guarantor to reject a submission of documents on the basis of discrepancies that could or should have been notified to a beneficiary during an earlier submission.

Article 10

53. The text of the draft article as considered by the Working Group was as follows:

"Guarantors and Instructing Parties assume no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification, or legal effect of any document presented to them under the Guarantee or for the general and/or particular statements made therein, or for the good faith or acts and/or omissions of any person whomsoever."

54. The view was expressed that the article was the first in a series of provisions that, while presented under the heading "Liabilities and responsibilities of guarantors", contained in substance exemption clauses and thus raised problems of validity and construction. The article was regarded as acceptable only if the balancing provision of article 14 was maintained.

55. The Observer of the ICC stated that it was the intention of the ICC Joint Working Party to maintain that balance. She added that article 10 was inspired by article 17 UCP but that there was no provision in the UCP equivalent to article 14 of the draft Rules. This difference might be explained by the different orientation of the two sets of rules. Even though the restriction for grossly negligent or wilful acts of banks would normally follow from the applicable national law, it was felt desirable to include a restriction in the Rules for Guarantees. The Working Group commenced a discussion on whether the standard of liability should be negligence or gross negligence.¹⁰

Article 11

56. The text of the draft article as considered by the Working Group was as follows:

"Guarantors and Instructing Parties assume no liability or responsibility for the 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. Guarantors assume no liability for errors in translation or interpretation of technical terms and reserve the right to transmit Guarantee texts or any parts thereof without translating them."

57. The view was expressed that the article unduly favoured guarantors and instructing parties, thus essentially banks. A suggestion was therefore made that this exempting provision should be deleted or drafted in a more balanced manner.

58. As regards details of the provision, various questions were raised and suggestions made for clarification. For

⁹First sentence as modified by ICC Joint Working Party on 18 November.

¹⁰As to the suggested content of article 14, see further discussion below, para. 69.

example, computer messages should be clearly included. Certainty was desirable as to the consequences of the use of leased lines or the guarantor's own equipment and of possible differences concerning the use of public lines. A more general suggestion was to take into account the results of UNCITRAL's work on electronic funds transfers.

59. The Working Group suggested to the ICC Joint Working Party to review the article in the light of the relevant conclusions set forth in the UNCITRAL Legal Guide on Electronic Funds Transfers and to have particular regard to the findings of the UNCITRAL Working Group on International Payments in its current work towards a model law on funds transfers.

Article 12

60. The text of the draft article as considered by the Working Group was as follows:

"Guarantors and Instructing Parties assume no liability or responsibility for consequences arising out of the interruption of their business by acts of God, riots, civil commotions, insurrections, wars or any other causes beyond their control or by strikes, lock-outs or industrial action of whatever nature."

61. It was noted that this article was inspired by article 19 UCP. Serious objections were raised against such an exemption provision in the context of international guarantee operations. The article was viewed as unduly favouring banks to the detriment of beneficiaries. It was noted in this connection that article 14 did not include a reference to article 12 even though the restriction in article 14 could in practical terms be relevant to some of the instances listed in article 12. Moreover, the detailed list of exempting instances was difficult to apply and, at least in respect of some of the instances, gave rise to misgivings.

62. In response to the objections, it was stated that guarantee texts often contained *force majeure* clauses and that the equivalent provision in the UCP had not given rise to considerable problems. It was noted that even without any contractual exemption for *force majeure* a similar result would obtain from the applicable national law. However, since national laws differed as to the scope of exempting impediments, it might be desirable to strive for a greater degree of harmony.

63. In the light of the above, two alternative proposals were made and each was supported by some representatives. One proposal was to recommend deletion of the article, with the result that the matter would be left to national law and contract practice within the limits of that law. The other proposal was to recommend a revision of the article along the lines of article 79 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980), covering not only guarantors and instructing parties but all parties concerned (in which case the heading of the section would have to be widened by deleting the words "of guarantors").

Article 13

64. The text of the draft article as considered by the Working Group was as follows:

"(a) Instructing Parties utilising the services of another party as Guarantor for the purpose of giving effect to the instructions of the Principal do so for the account and at the risk of the Principal.

"(b) Instructing Parties assume no liability or responsibility should the instructions they transmit not be carried out even if they have themselves taken the initiative in the choice of such other party as Guarantor.

"(c) The Principal shall be liable to indemnify the Guarantor in the case of a Direct Guarantee or Instructing Party in the case of an Indirect Guarantee against all obligations and responsibilities imposed by foreign laws and usages."

65. The Observer of the ICC stated that article 13 was inspired by article 20 UCP and that banks, when utilising the services of another party, tended to rely on their own network of correspondents.

66. Serious objections were raised against article 13 of the Rules. One objection was that the situation envisaged here was extremely remote, unlike in the documentary credit context governed by the UCP, where banks often used the services of others for examining documents. Another objection was that the exemption rule was one-sided in that it essentially limited the liability to instances of fault relating to the selection of the other party. Some representatives therefore recommended deletion of the article.

Article 14

67. The text of the draft article as considered by the Working Group was as follows:

"Guarantors and Instructing Parties shall not be excluded from liability or responsibility under the terms of Articles 10, 11 and 13 above for their grossly negligent or wilful acts."

68. In the discussion of this article, objections were raised at two levels. As regards the drafting of the provision, it was stated that the words "for their grossly negligent and wilful acts" were ambiguous and difficult to apply. For example, the concept of gross negligence was not familiar to all legal systems and the expression "wilful acts" might include deliberate acts of a positive nature. It was stated in reply that this was a familiar problem of finding a uniform terminology for conduct for which national laws, while using different concepts, tended to restrict the freedom of stipulating exemptions from liability. Reference was made to formulations used in modern transport conventions such as the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) which, in its article 8, denied the benefit of the limitation of liability for loss, damage or delay that resulted from an act or omission "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". It was

noted that this formula did not cover instances of incompetence of the person in question.

69. As regards the substantive question of the appropriate standard of care that should be used in article 14 of the Rules, wide support was expressed for the view that guarantors and instructing parties should exercise reasonable care in performing their obligations. While anticipating opposition from interested circles, it was strongly felt that this would accord with a truly professional sense of responsibility of banks and similar bodies acting as guarantors or instructing parties under the Rules. It was noted with approval that the recently adopted United Nations Convention on International Bills of Exchange and International Promissory Notes, in its articles 25 and 26, had incorporated the same standard of care required by article 1 of the ICC Uniform Rules for Collections, namely that "banks must act in good faith and exercise reasonable care".

Article 15

70. The text of the draft article as considered by the Working Group was as follows:

"A 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."

71. As in the consideration of other articles, a question was raised as to the meaning of "terms and conditions." The Observer of the ICC explained that the terms and conditions referred to were of a documentary nature.

Article 16

72. The text of the draft article as considered by the Working Group was as follows:

"In the event of a claim, the Guarantor shall, without delay, inform the Principal or its Instructing Party and where applicable the Instructing Party shall inform the Principal."

73. A suggestion was made that for the purpose of clarity the term "claim" could be defined. Concerning the mechanics of the procedure instituted by the article, a question was raised as to whether the article intended that notice be given prior to payment, or whether payment could validly be made without notice and whether the notification, if made prior to payment, should contain information concerning the guarantor's intention to honour or dishonour the claim.

74. A concern was expressed that lack of clarity in this article might invite delays in payment. Moreover, the article needed to express more clearly the distinction between the duty of information and the obligation to pay. As in the discussion of other articles, the suggestion was made that the provision concerning rapidity of communication (in this instance, "without delay") either be clarified or aligned with other similar expressions in the Rules.

75. A suggestion was made that the article institute an obligation on the part of the guarantor to submit, along with the notification of a claim under the guarantee, copies of any documents presented with the demand for payment.

Article 17

76. The text of the draft article as considered by the Working Group was as follows:

"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 of the document(s) specified for this purpose in the Guarantee."

77. The view was expressed that a provision of this type was necessary, particularly in the context of advance payment guarantees.

Article 18

78. The text of the draft article as considered by the Working Group was as follows:

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

79. A question was raised whether the article indicated that partial drawings under a guarantee were permitted. The Observer of the ICC answered in the affirmative.

Article 19

80. The text of the draft article as considered by the Working Group was as follows:

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

81. The question was raised whether in the case of a claim made after the expiry of the guarantee it was necessary to reject that claim. The Observer of the ICC stated that in strict legal terms there was no need for a formal rejection; however, in practical terms it was desirable to envisage a rejection since cases of that nature often involved claims in unfair procedures.

82. Concerns were expressed that the requirement that the claim and documents be presented to the guarantor was not easily reconciled with the practice in some countries where the guarantor would name a paying agent at a place other than the place of issue to whom the claim and documents must be presented. It was stated in reply that

any such stipulation of a different place of payment or presentment would probably constitute a derogation from article 19 as permitted by article 1. The Working Group suggested that the matter be clarified so as to accommodate the described practice.

Article 20

83. The text of the draft article as considered by the Working Group was as follows:

"In the absence of any other specific provision governing the form and content of a claim for payment, any claim presented to the Guarantor shall be made in either one of the following forms of written demand:

(a) the Beneficiary's written demand supported by his statement that and in what respect the Principal is in breach of his specified obligation(s); or

(b) the Beneficiary's written demand supported by his statement that and in what respect the Principal is in breach of his specified obligation(s) and supported by the documents which are specified in the Guarantee."

84. The Observer of the ICC stated that the draft article constituted a compromise solution between different interests concerning the crucial question of the conditions for calling a guarantee. The draft article specified two types of calling requirements. Subparagraph (a) required the beneficiary's statement about the principal's breach of his obligations and served the purpose of identification. Subparagraph (b) contained the additional condition of specified documents and served the purpose of justification. Other possible types of calling requirements could be determined by the parties under the proviso presented in the opening words of the article. The simple demand guarantee was not mentioned in the article, with a view to discouraging the use of this kind of guarantee; however, it was also not expressly excluded.

85. The Working Group considered the individual requirements as well as the structure and concept of the draft article, including its treatment of the simple demand guarantee.

86. As regards the beneficiary's statement about the principal's breach of his obligations as required under subparagraphs (a) and (b), various concerns were expressed. One concern was that the legal nature and effect of the statement was uncertain, for example, as regards any later dispute or proceedings with the principal. Clarification in this respect would be desirable. Another concern was that the breach of the principal's obligations appeared to be an essential notion. This would leave out guarantees covering risks other than the principal's default, e.g. guarantees given in case of lost bills of lading or other instruments. It was suggested that the matter should be clarified and possibly a wider notion should be adopted. In connection with the reference to the principal's default, a more general concern was expressed that it was not easily seen precisely which types of guarantees were covered, since the definition had to be gathered from various elements spread over a number of provisions.

87. The presentation of the two types of calling requirements and the relationship between subparagraphs (a) and (b) gave rise to the following questions and suggestions. It was questioned whether subparagraphs (a) and (b) truly presented two different types. The only difference lay in the requirement of supporting documents; however, this requirement had to be specified in the guarantee and would thus fall under the proviso presented in the opening words of the article. Pursuant to that analysis, there was considerable support for consolidating the two subparagraphs in either of two ways. One suggestion was to recommend deletion of subparagraph (a) since it was already contained in subparagraph (b). Another suggestion was to recommend deletion of subparagraph (b) since, if the requirement was not specified in the guarantee, the calling condition of the guarantee was the one set forth in subparagraph (a). In fact, the regulatory scope of article 20 was limited to the case where no calling conditions had been specified in the guarantee and thus the opening proviso was inapplicable. The question whether this result was also true in the case of a simple demand guarantee opened a detailed discussion of the treatment of this type of guarantee under the Rules.

88. The specific question was what the answer of article 20, in terms of calling requirements, would be in the case of a guarantee that stated that it was payable against simple demand. Under one view, subparagraph (a) would apply and the beneficiary would have to support his demand by his statement about the principal's default, unless this requirement had been expressly excluded in the guarantee text. Proponents of this view stated that it was a desirable result to require a *bona fide* statement in such circumstances. Under another view, subparagraph (a) would not apply, and reasonably so, since the type of guarantee, as known to the parties, was one that clearly provided for payment against simple demand without conditions.

89. In the light of this divergency, it was felt that article 20 was ambiguous and uncertain in its treatment of simple demand guarantees. It was recognized that the issue of how to deal in the article with this kind of guarantee touched upon delicate policy considerations. However, doubts were expressed as to whether a legal provision of the nature of article 20 could in fact discourage or encourage the use of a certain type of guarantee. Even if it had such potential, it was doubted whether a provision of contractual rules should be used for that purpose. Irrespective of the frequency with which this type of guarantee was used, it was submitted that a legal rule should take into account, and provide certainty for, all types of guarantees in use and leave the choice of the type of guarantee to be used to the credit decisions of the parties involved.

90. While there was considerable support for recommending a clearer treatment of simple demand guarantees in article 20, there was no prevailing view as to how this could best be achieved. Suggestions made in this regard were, for example, to mention simple demand as an example of "any other specific provision" referred to in the proviso or to present the simple demand guarantee as a specific type in a subparagraph of the article.

Article 21

91. The text of the draft article as considered by the Working Group was as follows:

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

92. A suggestion was made that, perhaps in this article or in the section on liabilities and responsibilities of guarantors, the Rules institute an obligation on the part of the guarantor to return rejected documents to the remitting party.

Article 22

93. The text of the draft article as considered by the Working Group was as follows:

"Expiry of a Guarantee for the presentation of claims must be upon a specified final date ('Expiry Date') or upon presentation to the Guarantor of the 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 shall have no obligation in respect of claims received after the Expiry Date or the Expiry Event specified in the Guarantee."

94. A general drafting suggestion was made with respect to the title of Section H, "Guarantee Expiry Provisions". It was observed that the articles in the Section contained provisions on a broader range of situations than mere expiry and that more appropriate terminology might be found. For example, articles 22 through 25 could be, according to this suggestion, viewed as treating termination. As regards the words "for the presentation of claims", one view was that these words were redundant, while under another view they were unduly restrictive.

95. A number of questions were raised with respect to the terminology utilized in the article. For example, it was suggested that the use of the term "expiry event" might be clarified and aligned with the same expression found in articles 23 to 25. In this connection, it was observed that, as used in article 22, an "expiry event" may be a payment, whereas in articles 24 and 25 the term was mentioned as an alternative to payment as a means of causing a guarantee to terminate. A similar question was whether the reduction referred to in article 18 constituted an expiry event.

96. With regard to termination of a guarantee upon the occurrence of an "expiry event", the question was raised whether the article might not lead to the undesirable establishment of a guarantee that might never expire. It was pointed out that typically a guarantee would stipulate an expiry date, before which an "expiry event" might be expected to occur. However, the concern was that, in view of the "date and/or event of expiry" language in article 3(e), a guarantee could be issued stipulating only

an "expiry event", to be triggered, for example, by the presentation of a document by a beneficiary. It was suggested that, in such a situation, were the beneficiary to fail or refuse to submit the document, the guarantee could remain valid for an unforeseeably long period of time.

97. The Working Group suggested that the terminology used in this article should be clarified and harmonized with that used in other articles.

Article 23

98. The text of the draft article as considered by the Working Group was as follows:

"Irrespective of any expiry provision contained therein, a Guarantee shall be cancelled prior to the Expiry Date or Expiry Event on presentation to the Guarantor of the Beneficiary's written statement of release from liability under the Guarantee, whether or not the Guarantee or any amendments thereto are returned with such statement."

99. The question was raised as to the desirability of including a requirement that the guarantee instrument be returned upon expiry, as provided for in article 6 of the 1978 ICC Uniform Rules on Contract Guarantees. The Observer of the ICC stated that such a requirement was not retained in the draft Rules because it had proven ineffective in practice and that it had therefore been decided to substitute a written statement of release for the obligation to return the guarantee instrument.

100. There was support for the suggestion that the article address the situation in which a guarantee was transferred. In particular, it was felt that the article might indicate whether a transferee of a guarantee, unlike an assignee of the proceeds, would be the appropriate party to issue the written statement of release.

Article 24

101. The text of the draft article as considered by the Working Group was as follows:

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

102. A question was raised as to whether it might not be possible to clarify the types of circumstances of termination referred to by the term "otherwise" or to delete the words between brackets.

Article 25

103. The text of the draft article as considered by the Working Group was as follows:

"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 shall so notify the Instructing Party or Principal as appropriate."

104. A suggestion was made that the article provide a specific description of how notification would be given, in particular, with respect to time requirements. It was also suggested that, if the intention was to follow the formula established in article 21 concerning transmittal by the instructing party to the principal, the drafting of the two articles should be harmonized.

Article 26

105. The text of the draft article as considered by the Working Group was as follows:

"If the beneficiary requests an extension of the Guarantee as an alternative to his demand for payment, in accordance with the terms and conditions of the Guarantee, the Guarantor shall so inform the party which gave that Guarantor its instructions in relation to the Guarantee and shall suspend payment of the claim for such time as the Guarantor shall consider reasonable to permit the Principal and the Beneficiary to reach agreement on the granting of such extension and for the Principal to arrange for such an extension to be issued. The 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.

"Even if the Principal were to agree to or request such an extension, it shall not be granted unless the Guarantor also consents thereto."

106. With respect to the precise scope of application, it was stated that the article did not specify whether it applied only to guarantees permitting a request for extension or to all guarantees to which an extension had been requested and that this might be a subject for clarification. Questions were also raised as to whether the article should be understood as applying only to simple demand guarantees.

107. It was noted that the article covered two extensions, the first being an automatic one, for a period of time considered "reasonable" by the guarantor, during which the principal and the beneficiary would have the opportunity to agree on what would be a second extension. In relation to the first, "automatic" extension, a concern was expressed as to the uncertainty of its duration and the adequacy of the "for such time as the Guarantor shall consider reasonable" formula. Another concern was that the article was too strict in forcing the guarantor in all circumstances not to honour its undertaking of prompt payment. A related concern was that the delay provided by the article could cause difficulty for the guarantor with respect to collateral securing the principal's reimbursement obligation.

108. A suggestion was made that the article be deleted because the procedure it established could provide a principal with a non-judicial remedy to prevent payment in a timely fashion. Another suggestion was that the potential for abuse of the procedure and insecurity of the guarantor as to its collateral could be mitigated by modifying the article to give the guarantor discretion as to whether or not to suspend payment upon receipt of an "extend or pay"

request, e.g. by replacing the words "shall suspend payment" by the words "may suspend payment". Yet another view was that the "automatic" extension envisaged in the article should be retained.

109. Concerning the mechanics of the procedure envisaged in the article, the question was raised whether, if an extension was refused in response to an "extend or pay" demand, a subsequent formal payment demand would still be required. It was pointed out that, if the inference of a requirement of a payment demand subsequent to a refusal to extend was correct, it would cast doubt on the meaning of "suspend payment". The need for a separate demand for payment subsequent to a refusal to extend under the article could raise the problem of expiry of the guarantee. It was suggested that the article should be clear as to whether it suspended only payment or also in some way postponed the expiry date of the guarantee extending the period of effectiveness of the payment obligation if, for example, expiry were to occur during the suspension period.

110. It was pointed out that the above-mentioned questions concerning the need for a formal payment demand subsequent to refusal of extension and the problem of expiry could be heightened where the demand for payment involved the production of supporting documents. There was some discussion in the Working Group of a proposal that the article be expressly limited to simple demand guarantees, though there was also support for leaving open the possibility of application to guarantees requiring documented claims. A view was expressed that, if the article was intended to be applicable to demands for payment involving supporting documents, it was left unclear in the article whether the "extend or pay" request should be accompanied by the documents required to obtain payment.

Article 27

111. The text of the draft article as considered by the Working Group was as follows:

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

112. The view was expressed that the Rules were contract rules whose choice-of-law clauses would not necessarily be binding on a court and that the treatment of the issue of the applicable law in the current draft article was incomplete and imprecise. Following the example of the UCP, the article should be deleted. However, the prevailing view in the Working Group was to recommend inclusion of an article of this nature, although a number of questions and suggestions were discussed concerning the existing formulation.

113. For example, a concern was expressed that the terminology used in the article ("branch") concerning filial relationships may not be adequate and that the article may not adequately cover the situation in which the guarantor

had more than one place of business. Questions were raised as to which of the relationships involved in a guarantee situation were covered by the article. For example, it was pointed out that the article did not expressly cover the relationship between guarantor and counter-guarantor. In the interest of certainty, the article should also specify the law applicable to that relationship.

114. As to which other relationships might be covered by the article, there was a suggestion that a formulation might be found that would identify appropriate relationships involved in the guarantee. For example, the article might be formulated so as to apply the law of the guarantor only to those guarantee relationships in which the guarantor was involved. A question was also raised whether there may be instances in which the principal-beneficiary relationship may be seen as involving the guarantor such that the law of the guarantor would be applicable. A possible example cited in the discussion was a principal-beneficiary agreement pursuant to article 26 on the extension of a guarantee.

Article 28

115. The text of the draft article as considered by the Working Group was as follows:

"Unless otherwise provided in the Guarantee, any dispute between the parties 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."

116. The Working Group suggested that an article of this nature should be included in the Rules. However, various questions were raised and suggestions made with respect to the existing text.

117. The question was raised whether "parties" meant only the guarantor and the beneficiary or also the principal. The Working Group suggested that this matter should be made clear. It also suggested that the term "exclusively" should be deleted since it was inappropriate. Also the expression "relating to the Guarantee", used in the article to describe the types of disputes to be covered by the jurisdiction clause, needed clarification. For example, it was not clear whether the article applied solely to disputes involving the obligations of the guarantor, the conditions for payment and the like or also to other, more remote, disputes, e.g. concerning the principal's instructions and other elements of its relationship with the guarantor.

118. As in the discussion of article 27, a question was raised as to the use of the term "branch" and a suggestion was made that the selection of language for describing filial relationships should be carefully considered. Also on the subject of filial relationships on the part of guarantors, an alternative formulation presented in the Working Group's discussion was that whenever a guarantor had more than one place of business, litigation could be

permitted either in the jurisdiction of the guarantor's main place of business or in the jurisdiction of the place of issue.

119. A view was expressed that the initial part of article 28 should be redrafted along the following lines: "Unless arbitration or the competent court is provided for in the Guarantee, . . .".

120. A general observation was made that the discussion of articles 27 and 28 as well as some previous articles had shown the impact of the character of the guarantee on the solutions to be embodied in the Rules. The answers depended, in particular, on whether there was in fact a bilateral agreement between the parties or whether the guarantee in question constituted essentially a unilaterally established undertaking. It was suggested that this difference in the legal nature, which in turn depended in large part on which of the various possible types of guarantees was being used, should be taken into account by the drafters of the Rules and perhaps be explained in the introduction to the Rules.

Suggestions for additional articles

121. Following the conclusion of the consideration by the Working Group of the draft articles, a number of further issues were mentioned which might usefully be treated in additional articles: a definition of the concept of issue of the guarantee; a description of the essential ingredients of documents commonly encountered in guarantee practice, e.g., certificates of default; operational norms for periodic renewals, revolving guarantees and guarantees with drawings by instalments; a rule on whether partial drawings were permitted; provisions similar to those contained in UCP articles 4, 6, and 51; revocable guarantees, including a definition of the character of the undertaking; the nature and consequences of a negotiation under a guarantee were that to be envisaged; and a rule on whether the guarantor was entitled to defer payment until receipt of current money from the principal.

II. DESIRABILITY AND FEASIBILITY OF PREPARATION OF UNIFORM LAW

122. Upon completion of its review of the ICC draft Uniform Rules for Guarantees, the Working Group proceeded to the second task entrusted to it by the Commission: consideration of the desirability and feasibility of any future work at the level of statutory law. It was noted that the findings and recommendations of the Working Group were intended to assist the Commission at its twenty-second session when taking a final decision on whether a uniform law should be prepared and, if so, what its scope and contents should be.¹¹ The Working Group recalled the preliminary deliberations by the Commission as reflected in the report on the twenty-first session:

"While some doubts were expressed as to the practical need and usefulness of such a uniform law, there was

¹¹A/43/17, para. 26.

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."¹²

123. The Working Group took as a basis for its deliberations the note by the Secretariat entitled "Tentative considerations on the preparation of a uniform law" (A/CN.9/WG.II/WP.63). Following the approach suggested in the note, the Working Group decided to consider first the possible scope of any future uniform law, followed by the topics and issues that might be dealt with in such law, and, thereafter, the basic question of whether a uniform law should be prepared.

A. Possible scope of uniform law

124. The Working Group was agreed that the uniform law should cover independent guarantees and, in view of their functional equivalence, stand-by letters of credit. Divergent views were expressed as to whether other instruments, in particular traditional letters of credit and accessory guarantees, should also be covered.

125. As regards traditional (or commercial) letters of credit, one view was that, in view of their different function and purpose, they should not be included, at least not for the time being. Under another view, traditional letters of credit should be included, since the guiding standard for the scope of the law should be the independence of the undertaking from the underlying transaction. Some proponents of that view stated that it would suffice to cover traditional letters of credit only in respect of certain issues and rules. After deliberation, the Working Group was agreed that the uniform law should focus on independent guarantees, including stand-by letters of credit, and that it should be extended to traditional letters of credit where that was useful in view of their independent nature and the need for regulating equally relevant issues.

126. As regards accessory guarantees (or suretyships), one view was that they should be included in the uniform law. It was stated in support that the difference between independent and accessory guarantees was, in substance, the degree of permissible objections to the payment obligation. It was also pointed out that the difference in character was less easily clarified by mere definitions than by complete regulation of the two types of guarantees. However, the prevailing view was that accessory guarantees should not be included in the uniform law, in view of their different nature and function. It was further pointed out that accessory guarantees were adequately regulated by national statutes and case law, and that national laws appeared to be too different to provide a basis for a promising unification effort. After deliberation, the Working

Group was agreed that the uniform law should not cover accessory guarantees, except perhaps in the context of a definition for the purpose of drawing a clear demarcation line between independent and accessory guarantees.

B. Possible topics and issues to be dealt with in uniform law

127. The Working Group discussed what topics and issues might be dealt with in the uniform law, following the order of the presentation in the note by the Secretariat (A/CN.9/WG.II/WP.63, paras. 9-21). The discussion was in the form of an exploratory exchange of views and ideas, with the understanding that any findings and conclusions were of a tentative nature. On many issues, the discussion went into considerable detail, often including accounts of their treatment in certain jurisdictions and even references to individual court cases. It was noted that this detailed discussion, which the report could not reflect in full, would be taken into due account and would be of great assistance to the Secretariat in the preparatory work.

(1) Recognition of party autonomy for independent undertaking

128. The Working Group was agreed that the recognition of party autonomy constituted an important principle for a future uniform law. Even without an express provision to that effect, the uniform law would by its very existence and regulation of independent undertakings recognize the freedom of the parties to establish, for example, an independent guarantee.

129. It was also agreed that the recognition of party autonomy had to be accompanied by a clear description of its limits. The uniform law could, for example, establish certain standards of accountability and set forth the requirement of good faith. Another suggestion was to disallow those variations that would undermine the fundamental nature of the undertaking. As regards restrictions to party autonomy by way of mandatory provisions, it was suggested that careful consideration should be given in respect of each future provision as to whether parties would or would not be permitted to derogate therefrom.

130. It was suggested that the uniform law in recognizing party autonomy might include a reference to the future ICC Uniform Rules for Guarantees and to the UCP. These two texts reflected the ongoing dynamism of banking and commercial practice, and a reference in the uniform law could foster their harmonizing effect. In particular as regards the UCP, care should be taken when drafting any reference so as not to take a stand, or appear to take a stand, on the controversial issue of the legal nature of such rules. It was also stated that any reference in the uniform law to usages or customs would require special consideration.

131. The Working Group was agreed that there should be no formal requirements for the independent undertakings covered by the uniform law. In line with current practice, parties should certainly not be required to use

¹²A/43/17, para. 24.

specific wording or sacrosanct language. A possible cure for the often encountered uncertainty in determining the precise nature of the undertaking could be a process of standardization by means of model forms, for example, as envisaged by ICC for independent guarantees upon its completion of the Uniform Rules. It was also felt that written form, while advisable in practical terms, should not be imposed by the uniform law. It was noted in this connection, as in respect of any signature requirement, that future consideration on what precisely that encompassed should take into account modern developments in electronic processing and the increasing use of computer links.

132. The same observation was made in respect of the establishment of a guarantee or credit and its notification to the interested party. Modern technical developments tended to blur legal concepts and distinctions based on traditional modes of communication. The Working Group discussed the question at what point of time a guarantee or credit undertaking became effective or operative. It concluded that the uniform law should provide clarity in this respect by way of a definition of "establishment" or "issue". Contrary to some existing laws, it should not depend upon the receipt of the instrument but should refer to the sending out of the signed or authenticated promise to pay.

133. The Working Group was agreed that the uniform law should not require "consideration" or "value". However, it considered whether a uniform law that did not expressly state that consideration or value was not required might create difficulties in those countries that applied the doctrine of consideration and, since exceptions were noted in this respect, applied it to letters of credit and guarantees. It was agreed that in the drafting of the uniform law account should be taken of the possibility of such difficulties.

134. The Working Group was agreed that the uniform law could usefully describe the essential rights and obligations of the parties to a guarantee. While this would naturally cover the guarantor and the beneficiary, it was less clear whether other relationships should be included, such as those between guarantor and counter-guarantor and between guarantor and principal (or account party).

135. As regards the relationship between guarantor and counter-guarantor, which was often an inter-bank relationship, it seemed appropriate to include it in view of the fact that it was in substance a guarantee relationship. It was suggested that, to the extent traditional letters of credit were to be covered, provisions on the relationship between the issuing bank and confirming bank might be useful in order to clarify the differences between their rights and obligations and those of a counter-guaranteeing and a confirming bank towards a beneficiary.

136. As regards the relationship between guarantor and principal, one view was that it should be included as one of the elements of the triangular guarantee operation. It was pointed out that, for example, the rights and obligations of the guarantor could not be determined in full

without taking into account the instructions and interests of the principal. The prevailing view was that the guarantor-principal relationship should be kept clearly separate and as such fell outside the scope of the uniform law. It was agreed, however, that the uniform law would have to make reference to the principal and might cover certain aspects of the guarantor-principal relationship.

(2) *Strict construction and compliance*

137. The Working Group agreed on the importance of the principle of strict construction of the terms and conditions of the guarantee or the credit. Divergent views were expressed on the question whether the uniform law should contain rules of interpretation for language used by the parties and, possibly, for uniform rules.

138. One view was that the uniform law could not appropriately tackle this matter of interpretation, which was a general problem to be settled in accordance with general principles of contract law. In view of the great variety of relevant circumstances, it would be extremely difficult to find an appropriate formula, and any necessarily general formula would provide little guidance for the individual case.

139. The prevailing view, however, was that the uniform law should contain some rules of interpretation, which could help to enhance certainty and uniformity. It was realized that the formulation of workable and useful rules was not an easy task. For example, a rule to construe ambiguous clauses against the drafting party had to take into account such situation as where the text had been formulated upon the insistence of another party, e.g. the beneficiary.

140. The Working Group agreed on the importance of the principle of strict compliance. However, divergent views were expressed as to whether the principle should be expressed in the uniform law and, if so, whether a workable definition could be found.

141. One view was that there was no need to state the principle of strict compliance in the uniform law. The principle as such was commonly adhered to. Its real problems lay in the area of practical application to individual cases, and here the uniform law could provide no assistance. If a standard were to be expressed in the uniform law, it should be one of truly strict or formal compliance, since banks did not want to play the role of arbitrator. Courts would be able, as they had been in the past, to determine the rare exceptions in case of absolutely immaterial deviations.

142. The prevailing view, however, was that the uniform law should embody the principle of strict compliance and provide a definition adopting, for example, the concept of professional diligence of a reasonable banker and his ability to distinguish between essential and non-essential deviations. It was felt that such a definition would be useful and sufficiently flexible to accommodate the great variety of fact situations.

143. During the discussion on a workable standard, a suggestion was made that consideration should be given to differentiate between traditional letters of credit and independent guarantees and to envisage a more flexible standard for independent guarantees, including stand-by letters of credit. One might further distinguish between those guarantees requiring presentation of documents other than the beneficiary's statement of the principal's default and those guarantees payable on simple demand or against the beneficiary's statement of breach. It was stated in reply that there appeared to be no convincing reason for such distinctions for the purposes of strict compliance.

144. Another distinction, suggested in this context, was to consider applying one standard for the payment obligation of the guarantor and another, more lenient one for his right to recovery or reimbursement from the principal. Such a dual standard was opposed on the grounds that it appeared to confound the two separate relationships to which the guarantor was a party and that the crucial element determining the guarantor's right of reimbursement was not a standard of compliance as such but was the reimbursement provisions in the contractual agreement. In this connection, the Working Group reiterated its conclusion that the uniform law should deal with the guarantor-principal relationship only to the extent that it was necessary to do so in order to clarify the different relationships and to determine the rights and obligations under the guarantee itself.

145. The Working Group considered whether the uniform law should deal with the issue of payment under reserve. It was noted that that practice had been developed in commercial letter of credit cases where the principal could not be reached in time to give his consent to payment despite deviations in the documents presented by the beneficiary. It was pointed out that any agreement between the bank and the beneficiary to payment under reserve created difficulties for the bank with respect to the principal and his instructions. Another area of possible difficulties was the relationship between an issuing bank and a confirming bank. It was noted that the practice of payment under reserve appeared to be rather uncommon in the field of independent guarantees and stand-by letters of credit, probably due to the limited use of documents. A view was expressed that the uniform law should not encourage the practice of payment under reserve in this field.

146. A suggestion was made that consideration should be given to dealing in the uniform law with the following issues mentioned in the note by the Secretariat (A/CN.9/WG.II/WP.63, paras. 12, 15): definition of "deferred payment credit" and a rule as to whether a bank is entitled to pay before the deferred payment date; appropriateness of contacts between guarantor and principal; precise scope and effect of any rule of preclusion, such as the one in article 16(e) UCP; and the allocation of the risk of any loss of documents. In relation to the last issue, it was suggested that account should be taken of modern technical developments, e.g. electronic registry of formerly paper-based documents.

(3) *Fraud and other objections to payment*

147. Turning its attention first to the area of fraud, the Working Group considered whether the uniform law should contain provisions concerning the effect of fraud on the payment obligation of a guarantor or an issuer of a letter of credit. It was pointed out that the effect of fraud on guarantees and letters of credit, both of which were based on an obligation to pay independent of what transpired in the underlying transaction, was a complex question and that there was disparity in the concepts and rules applied at the national level.

148. It was observed that an effort to harmonize the divergent approaches to the problem of fraud would be difficult, particularly in view of the existing substantive and procedural provisions of national law. Nevertheless, there was general agreement that there should be greater uniformity in the treatment of the problem of fraud and that the formulation of provisions in the uniform law would be a particularly useful contribution. With regard to the scope and effect of any fraud provision in the uniform law, it would be necessary to determine to what extent general principles of law normally applicable to fraud would remain applicable.

149. The Working Group agreed that a determination of the content of provisions in the uniform law dealing with fraud would have to be based on additional study. In its preliminary discussion, the Working Group recognized that establishing a definition would be difficult, particularly in view of the wide range of circumstances found in individual cases, variations in national law and ongoing developments in practice. There was support for the view that, on a practical basis, if the uniform law were to address fraud, it would be necessary to provide at least some minimal definition.

150. It was pointed out that there may be, on the one hand, fraud in the inducement to obtain a guarantee and, on the other hand, fraud to obtain payment. From an analytical and legal point of view, the question was raised as to what the "fraud exception" was an exception to: whether it was to the principle of the autonomy of the guarantee (or letter of credit) from the underlying transaction or whether it was to the principle of payment against a presentation of compliant documents. The question was also raised whether the uniform law would cover fraud in the documents only or also fraud in the underlying transaction. Furthermore, it was suggested that it would be necessary to develop a standard to distinguish clearly between fraud and improper execution of the underlying transaction.

151. Related to the definition of fraud, as well as to the scope of a provision in the uniform law dealing with fraud, was the discussion by the Working Group of the parties whose misconduct would be covered. The Working Group discussed variations in legal systems based on who must be the parties to a fraud in order for the obligation to pay to be avoided. It was observed that in some countries it may be necessary for the beneficiary to be directly involved, while in other countries such participation by the

beneficiary would not be deemed necessary. It was agreed that careful consideration would have to be given to the question of parties to the fraud and that it would not necessarily be advisable to limit application of the fraud provisions to misconduct by the beneficiary, particularly in view of the possibility of misconduct by principals as well as guarantors or issuers of letters of credit.

152. Following a suggestion that the uniform law should have provisions on manifestly abusive calls, the Working Group agreed that extensive study was required of the relationship between the concept of fraud and the concept of *abus de droit*, a concept which existed in certain legal systems. Questions were raised as to how the uniform law could accommodate that concept, particularly in view of the autonomy of the guarantee from the underlying transaction and the apparent agreement of the parties under a guarantee or letter of credit that the beneficiary should hold the funds while settlement of a dispute was pending. It was suggested that the Secretariat should gather information on the concept of *abus de droit* and its application in various legal systems.

153. Another question of importance to the preparatory work concerned the manner in which an interruption of the guarantor's or issuer's obligation to pay could be initiated. With respect to which party may take the initiative to block payment, the Working Group noted that there were differences among legal systems. It was pointed out that in some countries it was common for the guarantor or issuing bank with actual knowledge of fraud to refuse payment on its own initiative. In other countries it would often be the principal who attempted to secure a court order preventing payment. In instances of particular urgency, temporary *ex parte* orders might be obtainable; national laws differed on the relevant procedures and requirements, including the need to furnish a bond or other security. It was further pointed out that securing a court order against a beneficiary in order to prevent presentation of a claim for payment was more difficult since the beneficiary was often outside of the jurisdiction. The level of evidence required to obtain a court measure blocking payment was noted as an important issue to be considered in the preparation of procedural rules for the uniform law.

154. The discussion of the identity of the party on whose initiative payment could be blocked raised the question of the nature and extent of the responsibility of the guarantor or issuing bank, not only to effect payment to the beneficiary, but also to protect the interests of the principal by refusing payment when it had actual knowledge of fraud. The related issue of sanctions for failure by the guarantor or issuer to abide by such a duty was also raised.

155. In discussing the availability of judicial measures to block payment, the Working Group noted a number of other issues that would have to be taken into consideration in preparing provisions on fraud for the uniform law. Attention was drawn to the importance of protecting the interest of banks in maintaining their reputation as reliable paymasters. In this connection, it was suggested that court orders blocking payment should not come to be regarded as something that could be obtained as a matter of course.

Reference was also made to the difficult position that banks may find themselves in when a court order blocked their payment, particularly when they had assets or branches in the beneficiary's country.

156. It was suggested that the question of extraterritorial effects of court-ordered measures warranted special consideration and that a greater degree of international comity was desirable. In preparing pertinent provisions of the uniform law, account should be taken of existing international agreements and practice.

157. The Working Group next turned its attention to grounds other than fraud for avoidance of the obligation to pay under a guarantee or letter of credit. As in the consideration of fraud, there was discussion as to whether the uniform law should address this category of objections to payment. The suggestion was made that it was a complicated area better left to the existing precepts of general contract law. From the discussion which ensued, it appeared that some aspects of the problem might be more appropriate for treatment in the uniform law than others and that additional study was needed before definite decisions could be taken.

158. In the discussion, it was pointed out that "impossibility" as a ground for avoiding the obligation to pay may be recognized in national law in various instances of the guarantor's or issuer's inability to perform. For example, the obligation to pay may be avoided due to insolvency or some other form of incapacity. Foreign exchange control regulations were cited as an example of supervening local law which may prevent fulfilment of an obligation to pay under a guarantee or letter of credit.

159. With a view to the independence of the payment obligation, the question was raised whether the illegality of the underlying transaction could itself constitute a valid ground for non-payment. It was pointed out that the question of illegality highlighted the question of the extent to which the autonomy of the obligation could be considered absolute. It was observed that the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) left the question of the validity of the contract to the applicable national law and that this might be an appropriate precedent for the uniform law.

160. The Working Group also considered the related question of the impact of objections to payment based on "public policy". It was suggested that "public policy" should be viewed as an impediment to the enforceability of the payment obligation rather than a mechanism unilaterally available to a guarantor or issuer to avoid payment. A question was raised whether payment in the face of obvious illegality in the underlying transaction could be considered a violation of public policy. Doubts were expressed as to whether the uniform law could deal adequately with problems raised by the presence in national legal systems of "super-mandatory" principles of law and it was suggested that, at least in this respect, the uniform law should confine itself to the execution of the guarantee. A further suggestion was that the uniform law should indicate certain cases in which national law would remain applicable.

161. The Working Group considered the question whether the admissibility of a set-off should be dealt with in the uniform law. Allusions were made to variations in the law and practice of different countries. For example, in some countries set-off was permitted, while in others its availability may be restricted to bankruptcy situations, where it may be mandatory or at the option of the liquidator. The availability of set-off also varied according to whether the claim arose out of the principal-beneficiary relationship or out of the guarantor (issuer)-beneficiary relationship. In some countries, set-off of claims of the guarantor against the beneficiary was excluded, based on the autonomy of the payment obligation, so as not to defeat the purpose of the guarantee or letter of credit. In a number of other countries, set-off of claims of the guarantor against the beneficiary was permitted, unless expressly excluded in the terms of the instrument.

162. A view was expressed that any permitted set-off should be related to the payment transaction itself, for example to take into account an advance payment. Another view was that the discussion indicated a wide disparity of approaches to set-off and that it would therefore be difficult to establish uniformity.

(4) *Applicable law and related issues*

163. The Working Group noted that questions of applicable law and jurisdiction were likely to arise in the context of international guarantees and commercial letters of credit. While some doubts were expressed, the Working Group was agreed that the uniform law should address the question of the applicable law, in addition to the determination of its own territorial scope of application.

164. It was agreed that the future provisions on the applicable law should be composed of two elements: recognition of party autonomy to choose the applicable law, and determination of the applicable law failing agreement by the parties. The Working Group discussed the current law and practice in respect of these two elements and any special considerations to be taken into account in the formulation of future provisions.

165. As regards stipulations by the parties on the applicable law, it was noted that current practice was varied. In some countries, choice-of-law-clauses were reportedly found only in special cases, while in other countries they were used frequently. Overall they appeared to be less often found in traditional letters of credit than in guarantees and stand-by letters of credit, in particular financial stand-bys.

166. It was agreed that any future rule on party autonomy should take a stand on whether the law chosen by the parties had to have a connection with the guarantee or letter of credit transaction or whether the freedom of choice was unlimited. Other important points to be considered in preparing appropriate provisions were the basis and scope of a choice-of-law clause. Attention was drawn to the impact of the concept or nature of the guarantee in that it was difficult to conceive of an agreed choice if the

guarantee constituted a unilateral undertaking, even if the guarantor had included the choice-of-law clause as a result of a request or assent by the beneficiary or the principal. It was stated in response that, at least from a practical point of view, the choice-of-law clause in a guarantee should be given effect without the need for investigating the nature and genesis of the guarantee in question. As regards the scope of a choice-of-law clause, questions were raised as to whether it would cover not only the rights and obligations of the guarantor but also those of the beneficiary and, possibly, certain aspects of the guarantor-principal relationship.

167. As regards the possible content of a rule determining the applicable law failing agreement by the parties, it was noted that the most common solution appeared to be the law of the guarantor's country. It was suggested that the uniform law might follow this approach. However, consideration should be given to whether this solution met the interest of the parties in all circumstances.

168. Further consideration was also needed as regards the scope of the rule, in particular whether it covered all aspects of the guarantor-beneficiary relationship and, possibly, any aspects of the guarantor-principal relationship. While realizing the legal separation and independence of these two relationships, a suggestion was made that the uniform law might provide a unitary rule that would make the same law applicable to both relationships. The prevailing view, however, was that each relationship should be looked at separately in determining the most appropriate rule on the applicable law. It was further suggested that consideration be given to dealing with applicable law questions also in respect of other relationships (e.g. between guarantor and counter-guarantor or issuing bank and confirming bank) and certain special situations (e.g. syndicated or multiple guarantees).

169. Turning to the issue of settlement of disputes, the Working Group considered first the basis and scope of dispute settlement clauses. As regards the choice of either arbitration or court jurisdiction, the same observations were made as in the context of choice-of-law clauses concerning the uncertain basis and scope of the clauses in a guarantee (see above, para. 166).

170. The Working Group considered whether the uniform law should address the question of court jurisdiction for those cases where the guarantee contained neither an arbitration clause nor a choice-of-forum clause. Under one view, an attempt should be made to agree on an acceptable provision on court jurisdiction. Under another view, the uniform law should not deal with this issue.

171. The Working Group was agreed that the above questions relating to applicable law, arbitration and court jurisdiction required further consideration and study. Since difficult issues of conflict of laws were involved, it was suggested that the Secretariat, in its preparatory work, may have co-operative consultations with the Hague Conference on Private International Law.

(5) Other possible issues

172. The Working Group considered whether the uniform law should cover only international guarantees (and letters of credit) or whether it should include also instruments of a domestic character. A view was expressed that both types should be included since a distinction was neither easily drawn nor justified and since there was a need for improving the often unsettled laws in respect of domestic guarantees. The prevailing view, however, was that, in line with UNCITRAL's functions, the uniform law should be limited to international instruments, in particular, since inclusion of domestic instruments would adversely affect the world-wide acceptability of the uniform law. As regards the possible definition of internationality, various tentative suggestions were made referring, in particular, to the different places of business of the parties and the places of issue and payment.

173. A number of other issues were mentioned which, on the basis of further study, might be covered in the uniform law: fostering the independent nature of the guarantee by excluding non-documentary terms and conditions of payment; providing for irrevocability, unless expressly stipulated to the contrary; preventing adverse

effects of the submission of documents not called for under the terms of the guarantee; the risk of payment to an imposter, as regards both the right of reimbursement from the principal and any future claim by the true beneficiary; the beneficiary's warranty as to genuineness of documents; measure of damages; transferability of guarantee and assignment of proceeds; and impact of bankruptcy or insolvency on rights and obligations of parties.

C. Recommendation on future work

174. The Working Group was agreed that it was desirable and feasible to undertake work towards greater uniformity at the statutory level. While realizing that the task would be difficult and required extensive consideration and research, it was agreed that the Commission, with its expertise and balanced representation, could make an important contribution in this field.

175. The Working Group, therefore, agreed to recommend to the Commission to initiate the preparation of a uniform law, whether in the form of a model law or in the form of a convention.

B. Working papers submitted to the Working Group on International Contract Practices at its twelfth session

1. Stand-by letters of credit and guarantees: review of ICC draft Uniform Rules for Guarantees: note by the Secretariat (A/CN.9/WG.II/WP.62) [Original: English]

1. The Commission, at its twenty-first session, decided to devote one session of the Working Group on International Contract Practices to a review of the International Chamber of Commerce (ICC) draft Uniform Rules on Guarantees.¹ The purpose of that review during the twelfth session of the Working Group would be 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 Rules.

2. The present note sets forth, in the annex, the most recent version of the draft Rules received from ICC in English (with a French translation by ICC).² In the unlikely event that any further modifications would be made by ICC before the session of the Working Group, the observer of ICC attending the session would inform the Working Group about any such modifications.

Annex

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 worldwide. 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

¹Report of the United Nations Commission on International Trade Law on the work of its twenty-first session, *Official Records of the General Assembly, Supplement No. 17 (A/43/17)*, para. 22.

²An earlier version was reproduced in the annex to A/CN.9/301.

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, however named or described (hereinafter "Guarantee") 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) and are binding on all parties unless otherwise expressly provided in the Guarantee or any amendment thereto. Instructions for the issue of a Guarantee can also be subject to the Rules.

B. DEFINITIONS

Article 2

(a) (i) For the purposes of these Rules a Guarantee means a written undertaking for the payment of money given by a bank, insurance company or other body or person (hereinafter "the Guarantor") at the request and on the instructions of a Party (hereinafter called "the Principal") to another party (hereinafter the "Beneficiary") if the terms and conditions of the Guarantee are complied with. Such Guarantees are sometimes described as "Direct Guarantees".

(ii) Guarantees may also be given on the instructions of a bank, insurance company or any other body or person (hereinafter the "Instructing Party") to a Beneficiary. Such Guarantees are sometimes described as "Indirect Guarantees".

(b) Each Guarantee is independent of any underlying transaction and the terms of any such transaction shall in no way affect the Guarantor's rights and obligations under a Guarantee even if any reference whatsoever thereto is included in the Guarantee. A Guarantor's obligation of performance under any Guarantee is to pay the sum or sums specified therein if the terms and conditions of the Guarantee are complied with.

(c) In the case of an Indirect Guarantee, the Instructing Party's request and instruction to the Guarantor for the establishment of the Guarantee will be supported by the Instructing Party's "Counter-Guarantee" by which reimbursement is promised to the Guarantor on receipt of his notification that he has been called upon to effect payment under his Guarantee.

The Counter-Guarantee is independent of the Guarantee itself and is also subject to the Rules.

C. GENERAL PROVISIONS

Article 3

All instructions for the issue of Guarantees and amendments thereto and Guarantees and amendments themselves should be

clear, precise and avoid excessive detail. Accordingly all Guarantees should stipulate:

- (a) the name of the Principal if applicable;
- (b) the name of the Beneficiary;
- (c) the underlying transaction requiring the issue of the Guarantee, if applicable;
- (d) a maximum 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 conditions for claiming payment.

Article 4

The benefit of a Guarantee is not assignable. Should an assignment take place, the Guarantor cannot be bound by such an assignment unless he and the Principal expressly agree thereto.

Article 5

All Guarantees are irrevocable.

Article 6

A Guarantee enters into effect as from the date of its issue unless its terms expressly provide that its effectiveness is subject to conditions (e.g., the receipt of specified advance payment monies).

Article 7

Where a Guarantor has been given instructions for the issue of a Guarantee but the instructions are such that, if they were to be carried out, the Guarantor would by reason of law be unable to fulfil the terms and conditions of the relevant Guarantee, the instructions shall not be executed and the Guarantor shall immediately inform the Principal or Instructing Party as appropriate of the reasons for such inability and request appropriate instructions from that Principal or Instructing Party.

D. LIABILITIES AND RESPONSIBILITIES OF GUARANTORS

Article 8

All documents presented under a Guarantee to a Guarantor must be examined with reasonable care to ascertain whether or not they appear on their face to be in accordance 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 9

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

Article 10

Guarantors and Instructing Parties assume no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification, or legal effect of any document presented to them under the Guarantee 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 11

Guarantors and Instructing Parties assume no liability or responsibility for the 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. Guarantors assume no liability for errors in translation or interpretation of technical terms and reserve the right to transmit Guarantee texts or any parts thereof without translating them.

Article 12

Guarantors and Instructing Parties assume no liability or responsibility for consequences arising out of the interruption of their business by acts of God, riots, civil commotions, insurrections, wars or any other causes beyond their control or by strikes, lock-outs or industrial action of whatever nature.

Article 13

(a) Instructing Parties utilizing the services of another party as Guarantor for the purpose of giving effect to the instructions of the Principal do so for the account and at the risk of the Principal.

(b) Instructing Parties assume no liability or responsibility should the instructions they transmit not be carried out even if they have themselves taken the initiative in the choice of such other party as Guarantor.

(c) The Principal shall be liable to indemnify the Guarantor in the case of a Direct Guarantee or Instructing Party in the case of an Indirect Guarantee against all obligations and responsibilities imposed by foreign laws and usages.

Article 14

Guarantors and Instructing Parties shall not be excluded from liability or responsibility under the terms of Articles 10, 11 and 13 above for their grossly negligent or wilful acts.

E. CLAIMS*Article 15*

A 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 16

In the event of a claim, the Guarantor shall, without delay, inform the Principal or its Instructing Party and where applicable the Instructing Party shall inform the Principal.

Article 17

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 of the document(s) specified for this purpose in the Guarantee.

Article 18

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

F. SUBMISSION OF CLAIMS*Article 19*

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

Article 20

In the absence of any other specific provision governing the form and content of a claim for payment, any claim presented to the Guarantor shall be made in either one of the following forms of written demand:

(a) the Beneficiary's written demand supported by his statement that and in what respect the Principal is in breach of his specified obligation(s); or

(b) the Beneficiary's written demand supported by his statement that and in what respect the Principal is in breach of his specified obligation(s) and supported by the documents which are specified in the Guarantee.

G. PAYMENT OF THE CLAIM*Article 21*

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

H. GUARANTEE EXPIRY PROVISIONS*Article 22*

Expiry of a Guarantee for the presentation of claims must be upon a specified final date ("Expiry Date") or upon presentation to the Guarantor of the 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 shall have no obligation in respect of claims received after the Expiry Date or the Expiry Event specified in the Guarantee.

Article 23

Irrespective of any expiry provision contained therein, a Guarantee shall be cancelled prior to the Expiry Date or Expiry Event on presentation to the Guarantor of the Beneficiary's written statement of release from liability under the Guarantee, whether or not the Guarantee or any amendments thereto are returned with such statement.

Article 24

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

Article 25

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 shall so notify the Instructing Party or Principal as appropriate.

Article 26

If the Beneficiary requests an extension of the Guarantee as an alternative to his demand for payment, in accordance with the

terms and conditions of the Guarantee, the Guarantor shall so inform the party which gave that Guarantor its instructions in relation to the Guarantee and shall suspend payment of the claim for such time as the Guarantor shall consider reasonable to permit the Principal and the Beneficiary to reach agreement on the granting of such extension and for the Principal to arrange for such an extension to be issued. The 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.

Even if the Principal were to agree to or request such an extension, it shall not be granted unless the Guarantor also consents thereto.

I. APPLICABLE LAW AND JURISDICTION

Article 27

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

Article 28

Unless otherwise provided in the Guarantee, any dispute between the Parties 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.

2. *Stand-by letters of credit and guarantees: tentative considerations on the preparation of a uniform law: note by the Secretariat (A/CN.9/WG.II/WP.63)* [Original: English]

I. GENERAL CONSIDERATIONS ON PREPARATION OF UNIFORM LAW

1. The Commission, at its twenty-first session, entrusted the Working Group on International Contract Practices not only with the review of the ICC draft Uniform Rules on Guarantees but also with the examination of the desirability and feasibility of any future work towards a uniform law.¹ The present note is designed to assist the Working Group in that examination.

2. At the outset, the Secretariat wishes to emphasize that the considerations and suggestions set forth in this note are of a very tentative nature, due to the early stage of the deliberations and in line with the purpose of the Working Group's examination. The results of that examination would assist the Secretariat in preparing the study, requested by the Commission for its twenty-second session, on possible features and issues that might be covered in a uniform law.² Above all, they would help the Commission at that session to decide 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.³

3. In view of this latter question of the possible scope of any uniform law, this note, while focussing on guarantees and stand-by letters of credit, takes into account some special issues of commercial letters of credit (e.g. relationship between issuing and confirming bank, deferred payment credit). The considerations on most of the more general issues (e.g. principle of independence, strict construction and compliance, fraud exception, applicable law) would apply to guarantees and stand-by letters of credit as well as commercial letters of credit, although solutions might differ in detail.

4. This fact may be regarded as an important reason for including commercial letters of credit in any future uniform law. Another reason could be that it would allow the establishment of a clear classification of independent guarantees, stand-by letters of credit and commercial letters of credit, in particular, by separating stand-by letters of credit from commercial letters of credit and recognizing their functional equivalence with independent guarantees.⁴

5. A possible objection to such inclusion could be based on the existence and worldwide acceptance of the Uniform Customs and Practice for Documentary Credits (UCP) and, more generally, on the volatile and ever-developing nature of letter of credit law and practice. It is submitted that any such concern would be valid also in respect of the "emerging law" of stand-by letters of credit and guarantees, although the extent will depend on the success of the future ICC Uniform Rules on Guarantees. Here and there the response would be the same and constitute a guiding principle in shaping the contents of any future uniform law: The uniform law would concentrate on those matters that cannot effectively be regulated by agreement of the parties, including any uniform rules, and its treatment of issues should be sufficiently general or abstract so as to allow and foster future development of rules and practice.

6. The latter consideration would be particularly relevant to the inclusion of any definitions, rules of interpretation or other issues hitherto not satisfactorily regulated by uniform rules. Some examples are mentioned in this note and may assist the Working Group in identifying further appropriate issues during its deliberations on the ICC draft Uniform Rules on Guarantees.

7. It is hoped that the following points and suggestions are of some use in the Working Group's examination of the desirability and feasibility of preparing a uniform law. If at this early stage a tentative conclusion may be ventured, it would be that an informed and final decision on the general question of feasibility seems to require extensive deliberations of the various issues by the Commission

¹Report of the United Nations Commission on International Trade Law on the work of its twenty-first session, *Official Records of the General Assembly, Supplement No. 17 (A/43/17)*, para. 22.

²*Ibid.*, para. 25.

³*Ibid.*, para. 26.

⁴See conclusions in A/CN.9/301, paras. 91-93.

⁵Thus Kozolchik, *The Emerging Law of Standby Letters of Credit and Bank Guarantees*, 24 *Ariz. L.R.* (1982) 319.

or the Working Group; even if it is decided that preparation of a uniform law is not feasible, the very deliberations would be of value in clarifying matters.

II. SOME ISSUES POSSIBLY TO BE DEALT WITH IN A UNIFORM LAW

8. As outlined in the conclusions of the report of the Secretary-General (A/CN.9/301, paras. 97-99), greater uniformity at the statutory level seems desirable in various respects. One of the general topics suggested as being appropriate for a uniform law, convention or model law, is to recognize party autonomy and the independent nature of the promise to pay.

A. Recognition of party autonomy for independent undertaking

9. A uniform law could and should expressly recognize the parties' freedom and give full effect to their agreement, including a reference to any uniform rules on guarantees or to UCP. The need for such recognition seems greater in respect of guarantees than letters of credit, at least the traditional documentary type where care should be taken in drafting any rule of recognition so as not to preempt any current or future application of UCP as trade usage or customary law.

10. The main purpose of such recognition would be to establish firmly the independent nature of the guarantee as a product of agreed commercial practice, on an equal footing with the letter of credit. Recognition of the agreement in a special uniform law would mean, for example, doing away with current provisions of law that do not give full effect to party autonomy. A prime example would be the recognition of an agreed expiry date as prevailing over any provision of law which, as found in some States, denies the expiry effect as long as the beneficiary retains the guarantee document or as long as a statutory limitation period runs. The uniform law could further help in this matter by imposing an enforceable obligation to return or release the guarantee document.

11. A uniform law may usefully establish the characteristic requirements of independent undertakings and address the question of binding language that constitutes a commitment to honour demands for payment upon compliance with the conditions specified in the guarantee or the credit. It could, for example, specify the formal requirements and the decisive point of time of the establishment of a credit or a guarantee. In this context, consideration might be given to addressing questions of wider application such as the meaning of "signature" or "authentication".

12. It would appear advantageous to go beyond a general provision of the independent promise to pay and to distinguish between various promisors and types of credit or guarantees. This would help, for example, to clarify the differences in terms of rights and obligations between, on the one side, an issuing and a confirming bank and, on the

other side, a guaranteeing and a counter-guaranteeing bank. To mention an example concerning types of credit, one could envisage a definition of the modern "deferred payment credit" and possibly address controversial questions such as whether a bank is entitled to pay before the deferred payment date and, more generally, what precisely is the legal effect of a payment under reserve.

13. Another matter that might appropriately be covered is the designation or determination of the beneficiary as the person entitled to payment. Here it would be necessary to distinguish clearly between commercial letters of credit and guarantees, including stand-by letters of credit, in view of the considerable differences concerning the possibility and purpose of transferring the entitlement to payment. In this context, a further contribution could be made towards clarity of sometimes confused concepts, namely transfer of the credit or the guarantee itself, negotiation of any draft or commercial paper under a credit or guarantee and, possibly, assignment of proceeds.

B. Strict construction and compliance

14. Closely related to the principle of independence of the undertaking are two principles characterized by strictness or rigidity. The first one calls for strict construction of the terms and conditions of the guarantee or the credit. If the principle were to be embodied in a uniform law, consideration may be given to adding some rules of interpretation for language used by the parties (e.g. distinguishing between printed and superimposed terms; construing ambiguous clauses against the drafting party) and, possibly, for uniform rules (e.g. regard to international character and need for uniform application).

15. The second principle is that of strict compliance, in particular, of documents with the requirements set forth in the credit. A clear description of the principle, for example, elaborating the professional diligence of a reasonable banker and his ability to distinguish between essential and non-essential defects, might be useful. It could help to reduce two risks that threaten to endanger the viability of credits and guarantees, namely abusive insistence on an overly strict standard by an unwilling debtor or account party and injection of undue leniency by equitable considerations often relating to the underlying transaction. An ancillary question could be whether a dual standard would be appropriate, one for the bank's decision to pay or to refuse payment and the other for its right to reimbursement. Yet other issues would be the appropriateness of contacts (consultations or notice) with the account party, the precise scope and effect of any rule of preclusion such as the one in article 16(e) UCP and, possibly, the allocation of the risk of any loss of documents.

C. Fraud and other objections to payment

16. The most important effect of the independent nature of a guarantee or a letter of credit is that it limits the availability of objections or defenses against payment to those specified in the guarantee or credit, thus cutting off

any other objections relating, in particular, to an underlying transaction. However, at least one exception to this rule of exclusion has been widely recognized as such, namely the fraud exception.

17. As suggested in the report of the Secretary-General (A/CN.9/301, para. 98), the vexing problem of fraudulent or abusive calls and of appropriate court measures would probably be the most important topic for a uniform law. Since the problem has been discussed in that report in some detail,⁶ it may suffice here to present a kind of tentative check-list of pertinent questions:

- What constitutes fraud, and should other abuses be included
- Fraud "unravels all" or are there limits (as regards certain parties or relationships)
- Requirements of knowledge by payor, or payee, and decisive point of time (e.g. presentation of documents or payment date)
- Measure of damages for wrongful honour (to be covered, if at all, only if also generally for wrongful dishonour)
- Available procedures or court measures and their requirements (e.g. interpleader with payment into court, temporary restraining order and injunction enjoining call or payment; probably not to be covered: arrest, seizure, garnishment or freeze of funds).

18. The need for certainty about the admissible objections to payment suggests considering whether the payor may refuse to pay, or be enjoined from paying, for reasons other than those covered by the fraud exception. Such reasons might relate to illegality or violation of public policy affecting the establishment of the guarantee or credit or, more remotely, the underlying transaction. For example, the guarantee might constitute an outlawed penalty or the credit or guarantee might conflict with a wagering law, an export restriction or foreign exchange

control regulation. If any such ground for objection would be recognized in the uniform law, ancillary issues concerning the precise effects might be included (e.g. whether a payment obligation, based on a price doubled for purposes of avoiding foreign exchange control, would be unenforceable as regards the full sum or only half the amount). Finally, consideration may be given to the admissibility of a set-off and, if so, in what relationships.

D. Applicable law and related issues

19. International guarantee or credit transactions involve parties from two or more States. Thus questions arise as to the applicable law, to be answered separately for each particular relationship. As regards the possible inclusion of answers in a uniform law, the need therefor is probably greater in respect of guarantee or credit undertakings than in respect of underlying transactions or customer-bank relationships.

20. If rules for guarantee or credit undertakings were being considered, one could envisage giving effect to the parties' choice and, failing their agreement, to use as the connecting factor, for example, the promisor's place of business. Thus, to mention only one of many detailed issues, the law applicable to the guarantee obligations of an issuing bank may differ from that applicable to the rights of that bank towards a counter-guaranteeing bank; here, as in the comparable documentary credit situation of confirming and issuing bank, one may consider such disparity as undesirable and might try to overcome it (e.g. by implying a corresponding choice of law clause).

21. It may be noted in conclusion that any answers of the above kind need not necessarily be incorporated into complete conflicts of law rules. Some of them may be appropriately given in determining the territorial scope of application of any future uniform law. Similar considerations would apply to the inclusion of any rules on the jurisdiction of courts (or arbitral tribunals), at least in respect of rights, obligations and procedural measures covered by the uniform law.

⁶A/CN.9/301, paras. 60, 84-90.

V. INTERNATIONAL COUNTERTRADE

International countertrade: draft outline of the possible content and structure of a legal guide on drawing up international countertrade contracts: report of the Secretary-General (A/CN.9/322) [Original: English]

INTRODUCTION

1. The Commission, at its twenty-first session in 1988, had before it a report entitled "Preliminary study of legal issues in international countertrade" (A/CN.9/302). In connection with this study, the Commission discussed whether work should be continued in the area of international countertrade. 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 twenty-second 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.¹ The present draft outline has been prepared pursuant to that request of the Commission.

2. The outline sets forth a list of chapters proposed to be included in the legal guide, and describes and comments upon individual issues to be covered in each proposed chapter. The following chapters are suggested:

- I. Introduction to legal guide (para. 3 of the present report)
- II. Scope and terminology of legal guide (paras. 4-28)
- III. Choice of contractual structure (paras. 29-35)
- IV. Drafting of countertrade commitment (paras. 36-38)
- V. Type, quality and quantity of countertrade goods (paras. 39-42)
- VI. Pricing of goods (para. 43)
- VII. Fulfilment of countertrade commitment (paras. 44-50)
- VIII. Payment mechanisms (paras. 51-59)
- IX. Restrictions on resale of countertrade goods (paras. 60-65)
- X. Transfer of obligation to purchase goods (paras. 66-71)
- XI. Transfer of countertrade credit (paras. 72-73)
- XII. Security for performance (paras. 74-78)
- XIII. Liquidated damages and penalty clauses (paras. 79-81)

XIV. Effect of problem in a countertrade contract on the countertrade transaction (paras. 82-83)

XV. Settlement of disputes (paras. 84-87)

I. INTRODUCTION TO LEGAL GUIDE

3. The legal guide would have an introductory chapter describing the origin, purpose, approach and arrangement of the guide.

II. SCOPE AND TERMINOLOGY OF LEGAL GUIDE

A. Transactions covered by legal guide

4. The countertrade transactions to be dealt with in the legal guide may be generally described as international contractual arrangements under which one party supplies goods or other economic value, such as services or technology, to the second party, and, in return, the first party purchases or procures the purchase of an agreed amount of goods or other economic value from the second party, or from a party designated by the second party. For the sake of simplicity, it is proposed to refer throughout the legal guide only to "goods" as the subject-matter of countertrade transactions.

5. Beyond this basic definition, countertrade transactions display a number of differing features. For example, a variety of contractual structures may be used in a countertrade transaction. Often, the various segments of a countertrade transaction are drawn up by the parties as distinct contracts. In other cases, however, the reciprocal supplies are incorporated into one contract. When distinct contracts are used, the contracts sometimes do not expressly mention any relationship between the segments, although a relationship is present in the underlying commercial circumstances and motives. In other cases, a relationship between the contracts is expressly stated.

6. Furthermore, the contracts for the supply of goods in the two directions may be concluded at different points of time or simultaneously. When they are not concluded simultaneously, which is often the case, the parties conclude an agreement expressing a commitment to conclude the future contract or contracts for the supply of goods. In addition to expressing such a commitment, this agreement

¹Report of the United Nations Commission on International Trade Law on the work of its twenty-first session (1988), *Official Records of the General Assembly, Forty-third Session, Supplement No. 17* (A/43/17), paras. 32-35.

often establishes a relationship between the segments of the transaction. Such an agreement may be entered into together with the conclusion of the initial contract for the supply of goods in one direction or prior to the conclusion of any supply contract. When the parties agree simultaneously on the supplies in both directions, which is not ordinarily the case, the countertrade agreement would not contain a countertrade commitment, but would establish a relationship between the performances due from each party.

7. Another aspect of the variety of countertrade transactions is the degree of interest the parties may have in the different segments of a countertrade transaction. In some transactions one of the parties is only interested in the supply of goods in one direction and regards the supply in the other direction as a burden. In other transactions, the parties consider the supplies in both directions as being in their mutual interest. There may also be transactions in which a party, at the outset of the transaction, perceives a commitment to conclude a contract forming part of the countertrade transaction as a burden, but subsequently comes to regard the commitment as a benefit. The legal guide would be drafted keeping in mind all such varieties of interests of the parties.

8. In countertrade practice distinction is made between different commercial types of countertrade. These include barter, buy-back, counter-purchase and offset. The discussion in the legal guide would in many instances not require distinction to be made between different types of countertrade. However, in some contexts reference would be made to particular types of countertrade transactions.

B. Terminology to be used in the guide

9. The legal guide would establish a terminology to identify the parties and contracts in countertrade, as well as commercial types of countertrade.

(a) *Parties to countertrade transaction*

10. *Exporter or counter-importer* These terms would be used for the person who is — under the first contract to be concluded — the supplier, i.e. exporter, of goods or other economic value, and who has concluded an agreement to purchase, i.e. to counter-import, other goods or economic value in return. One or the other term would be used depending on the context in which the party is mentioned. It should be noted that in some countertrade transactions the exporter and the counter-importer is the same person, while in others the export and counter-import operations are performed by different persons.

11. *Importer or counter-exporter* These terms would be used for the person who is — under the first contract to be concluded — the purchaser, i.e. importer, of goods or other economic value, and who is a party to an agreement to supply, i.e. counter-export, goods or other economic value in return. One or the other term would be

used depending on the context in which the party is mentioned. Often, the same party is the importer and the counter-exporter. Sometimes, however, one party imports and another party counter-exports.

12. As it is proposed that the sequence of the contracts determine the terminology in the legal guide, it should be noted that in some writings the term "exporter" is used to denote the economically or technologically stronger countertrading party, and the term "importer" to denote the weaker party. To underline such meaning, some writings use terms such as "primary" or "western exporter" or "developing country importer", irrespective of the sequence of the conclusion of the contracts. The reason for such usage is that the party who exports first, and agrees to counter-import at a later time, is frequently from a developed country, and is assumed to be the stronger party. The party who imports first, and will counter-export at a later time, is frequently the party from a developing country, and is assumed to be the weaker party.

13. A distinction based on economic or regional considerations is not appropriate in a legal text of universal scope for a number of reasons. First of all, some countertrade is intra-regional in nature. Thus, distinctions used in discussions of interregional countertrade, in which the issues tend to be considered primarily from the perspective of one of the parties, would not be suitable since the legal guide would provide advice to both parties on how to safeguard their interests. Furthermore, particularly in the practice of some developing countries, it is often the party from the developing country that exports first to earn the convertible currency needed for a subsequent purchase. Moreover, the sequence of the conclusion and performance of the export contract, the countertrade agreement, and the counter-export contract influences the contractual roles and interests of the parties whatever may be their relative economic strength.

14. *Party to countertrade transaction* In some cases the sequence in which the parties exchange mutual contract orders does not significantly affect the contractual position and risks of the parties. This would be the case when the parties, before concluding actual contracts for the supply of goods, enter into an agreement to purchase goods mutually over a period of time so that the cumulative value of the purchases would achieve an agreed ratio. There are also cases, albeit rare, where the export contract and the counter-export contract are concluded concurrently, and thus the sequence of the contracts cannot serve as a terminological criterion. In such cases, in which it is a matter of indifference which party is referred to as the exporter and which one as the importer, the legal guide would use the term *party* or *parties* to the countertrade transaction. This term may also be used when the context does not require a distinction to be made between the exporter and the importer.

(b) *Contracts forming part of a countertrade transaction*

15. The contracts for the supply of goods entered into by the parties would be referred to by names consistent with

the names of the parties, i.e. *export* or *import contract* for the first contract entered into, and *counter-export* or *counter-import contract* for the contract entered into subsequently. These contracts may be referred to in the singular even though there may be several such contracts on both sides of the countertrade transaction.

16. In the cases mentioned above in which no clear criterion exists for distinguishing between the exporter and the importer, and in which cases the term "party" or "parties" to the countertrade transaction may be used, the contracts for the supply of goods between the parties may be referred to as *countertrade contracts*. This expression would also be used as a generic term for the export and the counter-export contracts.

17. It is proposed to use the term *countertrade commitment* for the undertaking to enter into future contracts. The term *countertrade agreement* would be used for the agreement setting forth the countertrade commitment as well as other stipulations such as clauses on the relationship between the component contracts of the countertrade transaction, the goods to be countertraded, price, payment conditions, transfer of countertrade commitment, market restrictions, or liquidated damages or penalties. When the parties agree simultaneously on the terms governing the supplies of goods in both directions, the countertrade agreement would not contain a countertrade commitment.

18. The term *countertrade transaction* would be used to refer to the combination of a countertrade agreement and the related contracts.

(c) *Types of countertrade*

19. *Barter* The legal guide would use the term *barter* for a contract involving a two-way exchange of specified goods. In such a contract, each supply of goods replaces, entirely or partly, the monetary payment for the other supply of goods. Where there is a difference in value between the two supplies, the settlement of the difference may be in money or in other economic value.

20. *Buy-back* This term would refer to a transaction in which one party supplies a production facility consisting of, for example, production equipment, technology or services such as training of personnel, and the parties agree that the supplier of the facility, or a person designated by him, will buy from the purchaser of the facility resultant products. Sometimes the supplier of the facility also provides a component part or materials to be used in the production.

21. *Counter-purchase* This term would refer to a transaction in which the parties, in connection with the conclusion of a purchase contract in one direction, enter into an agreement to conclude a sales contract in the other direction, i.e. a counter-purchase contract. Counter-purchase is distinguished from buy-back in that the goods supplied under the first purchase are not used in the production of the items sold in return.

22. *Offset* Transactions referred to as offsets normally involve the supply of goods of high value or technological sophistication. A distinction is often made between direct and indirect offset transactions. Under a "direct offset" the contract for the supply of goods in one direction is combined with an agreement that the supplier will purchase from the other party component parts of, or products related to, those goods. Sometimes the supplier would also agree to provide technology or investment for the production by the other party of the component parts. Such direct offsets are also referred to as industrial participation, licensing production, or industrial co-operation. The expression "indirect offset", or sometimes only "offset", refers to a transaction where a governmental agency that procures, or approves the procurement of, goods of high value requires from the supplier that he make counter-purchases in the procuring country. The governmental agency often stipulates guidelines, for example, as to the industrial sectors or regions from which the counter-purchases are to be made. However, within such guidelines, the party committed to counter-purchase is normally free to choose his contracting partners.

C. Restriction to questions particularly relevant to countertrade

23. Legal questions arising from the contracts for individual supplies of goods under a countertrade transaction are generally the same as those arising in similar contracts concluded as discrete and independent transactions. Therefore, there is no need to deal in the legal guide with those legal questions except to the extent they are affected by the countertrade transaction.

24. It is therefore suggested that the legal guide should focus on questions raised in the drafting of the countertrade agreement. Some of these questions should be addressed by the parties because of the very nature of the countertrade transaction. For example, the parties would have to choose a contracting approach, express in appropriate form their commitment to reciprocal trade, specify the extent of the commitment, and define or provide for defining the type, quality, quantity and price of the countertrade goods. Solutions to certain other questions, while not necessarily essential, may help to ensure proper implementation of the transaction or to provide for contingencies contemplated by the parties and would, therefore, also be addressed in the legal guide. Such questions include: time period for the fulfilment of the countertrade commitment, payment mechanisms, transfer of countertrade commitment, transfer of countertrade credit, restrictions on resale of countertrade goods, security for performance, liquidated damages and penalties, possible influence on the countertrade commitment of problems in the performance of a countertrade contract, and settlement of disputes.

D. Extent of treatment of governmental regulation

25. In some countries countertrade is subject to governmental regulation. Such regulation may affect counter-

trade in a variety of ways. For example, it may be provided 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 contracts. Other such rules may relate to exchange controls or to the authority of an administrative organ to approve a countertrade transaction. Some rules and regulations may be specifically oriented to countertrade, while others may be more general, but with an impact on countertrade. Such governmental regulation is closely linked with national economic policies and as a result varies from country to country.

26. Governmental regulation is frequently directed to one contracting party only and often does not directly affect the content or the legal effect of the contract concluded by that party. In other instances the regulation may limit the parties' freedom of contract.

27. The legal guide would advise parties to take into account such governmental regulation in so far as it may affect the freedom of contract. This would be done in the form of a *caveat*, where appropriate, rather than in any detailed discussion of the substance of the applicable rules.

E. Universal scope of the legal guide

28. It is proposed that legal issues arising from countertrade should be treated at the universal level, in view of the fact that the motives for engaging in countertrade, the interests of the parties involved, and the private law questions do not reveal regional particularities. To the extent there exist regional differences in contract practices, they concern in particular the frequency of use of certain commercial types of countertrade and the elaborateness and refinement of contractual solutions.

III. CHOICE OF CONTRACTUAL STRUCTURE

29. The preliminary question the parties have to address is the contractual structure of the countertrade transaction. The legal guide would comment on the advantages and disadvantages of possible contract approaches to structuring a countertrade transaction.

30. It is proposed that the legal guide discuss the following three basic types of contractual structures: (a) use of a single contract; (b) use of two contracts, one covering the export operation as well as some issues relating to the counter-export, and the other covering the counter-export operation; (c) use of three contracts, one for the export operation, one containing the countertrade agreement and one for the counter-export operation. On the basis of this framework an appropriate explanation can be given of the contractual position and risks of the parties arising from different contract approaches.

A. Single contract

31. The legal guide would discuss the use of a single contract to cover the entire countertrade transaction. Such a single contract could take the form of a barter contract, which, in the strict legal sense, means an exchange of goods for goods. Such an approach would often be chosen to avoid or reduce the transfer of money or to avoid the valuation of the goods in monetary terms. A single contract could also be used where the parties wish that each of the supplies in the transaction be paid for with money.

B. Two contracts

32. The legal guide would comment on the case in which the parties combine into one contract the export, the countertrade commitment and possibly some aspects of the envisaged counter-export. A separate contract would then be concluded to cover the counter-export side of the transaction.

C. Three contracts

33. The legal guide would address the common practice of embodying the export, the countertrade commitment, and the counter-export into three separate contracts. The time sequence in which these contracts are concluded can vary in the following manner: (a) the export contract and the countertrade agreement are concluded simultaneously, leaving the conclusion or finalization of the counter-export contract for a later stage; (b) the countertrade agreement is entered into prior to the conclusion of any definite contracts for the supply of goods in either direction; in such a case the countertrade agreement is likely to deal with issues such as the cumulative value of purchases to be made in each direction, the type of goods to be purchased, currency and payment mechanisms; (c) the countertrade agreement, the export contract and the counter-export contract are concluded simultaneously; in this case, which does not appear to be common, the function of the countertrade agreement would be limited to establishing the desired relationship between the two contracts.

D. Evaluation of contracting structures

34. The legal guide would identify factors which enter into selecting a contractual structure. For example, one factor is that the parties are seldom in the position to agree simultaneously on all the essential aspects of the export and the counter-export sides of the transaction. Therefore, it is typical of countertrade that the parties, because of commercial necessity, finalize contractual segments of a countertrade transaction at different times.

35. Another factor in selecting a contractual structure is the degree to which the parties wish to keep separate the individual segments of the countertrade transaction. The legal guide would discuss the following aspects of this factor: (a) the influence on the countertrade commitment

or on the counter-export contract of a problem occurring in the context of the export contract; (b) the influence on the countertrade commitment or on the export contract of a problem occurring in the context of the counter-export contract; (c) the relationship between the payment obligation under the export contract and the payment obligation under the counter-export contract. The question of the relationship between transaction segments would be discussed in this chapter only to the extent necessary to consider the choice of the contracting approaches. A detailed discussion of this question would follow later (chapter VIII on payment mechanisms would cover the case under (c), and chapter XIV discussing the effect of a problem in a countertrade contract on the countertrade transaction would cover cases (a) and (b)).

IV. DRAFTING OF COUNTERTRADE COMMITMENT

36. The legal guide would discuss the different ways in which a countertrade commitment may be expressed. On the one hand, the parties may merely agree that they will negotiate a future contract without specifying the negotiating procedure or the terms of the future contract. On the other hand, the parties may stipulate in a definite way the terms of the future contract. Often, however, the degree of completeness and definiteness of the countertrade commitment is somewhere between these two extremes. Namely, the commitment frequently contains some provisions regarding the negotiating procedure or settles some elements of the contract to be concluded, but lacks completeness or definiteness in other respects.

37. The legal guide would also discuss contractual methods for increasing the likelihood that the agreement to negotiate will actually result in the conclusion of a countertrade contract. The legal guide would first refer in a general manner to the legal aspects of the following methods: (a) establishing negotiating procedures; (b) making reference to objective factors not influenced by the will of the parties (e.g., formulae, indices, tariffs, quotations); (c) giving one party the right to influence the determination of a contract term; (d) empowering a third person to determine a contract term. Subsequently, the use of these methods in specific contexts would be referred to in the discussion of clauses in the countertrade agreement (concerning, for instance, the price, quality or quantity of goods).

38. Furthermore, the legal guide would address different ways of quantifying the extent of the countertrade commitment (e.g., as an absolute amount, as a percentage of the value of the export goods, or as a specific quantity of a given type of goods).

V. TYPE, QUALITY AND QUANTITY OF COUNTERTRADE GOODS

A. Type of goods

39. When the countertrade agreement does not refer to a particular type of goods, the goods that may be

countertraded are frequently enumerated in a list attached to the countertrade agreement. The legal guide would consider the contractual effect of such a list and discuss possible relevant contract provisions. Such provisions may concern, for instance, the origin of the goods, updating of the list or the availability of the listed goods.

B. Quality of goods

40. Since at the time of conclusion of the countertrade agreement the types of countertrade goods are often known only by broad categories, it may be impractical to make precise statements of quality in the countertrade agreement. Nevertheless, the quality of goods may become an important issue if at the time of finalization of the counter-export contract the parties cannot agree as to whether the goods offered are of suitable quality. In such a case the entire countertrade transaction may be called into question. The legal guide could discuss ways of avoiding such disagreements by including appropriate clauses in the countertrade agreement. The guide would also consider the issues particular to a buy-back transaction, in which the quality of goods to be counter-imported depends partly on the production process carried out by the importer and partly on the equipment and technology supplied by the exporter.

41. The legal guide would not deal with inspection or other aspects of quality control carried out at the time of the delivery of countertrade goods, since such a discussion would not be particular to countertrade. However, the legal guide would mention quality control to the extent it can be a factor in finalizing a counter-export contract. For example, a certificate of quality may be agreed upon as a condition for the entry into effect of a countertrade contract.

C. Quantity of goods

42. The legal guide would discuss contract clauses concerning the determination of quantity of countertrade goods, which may be used when the parties did not settle the quantity in advance. This may occur when the countertrade commitment refers to different types of goods or when the commitment is to be performed in several counter-export contracts. This discussion would refer to contract clauses assuring availability of goods of a certain type.

VI. PRICING OF GOODS

43. Determining the price of counter-export goods may present difficulties in that it is often impractical to set a price in the countertrade agreement for goods to be supplied in the future, or it is impossible to do so because the type and quality of the goods are not yet specified. Since differences over what the appropriate price should be may delay the performance of countertrade contracts, the legal guide would discuss contractual means designed to facilitate setting of prices. The methods to be discussed

include various price standards based, for example, on price quotations, production cost, counter-importer's resale price, most-favoured-customer price, competitor's price, or average price. Other methods include involving one of the contract parties or a third person in the determination of the price.

VII. FULFILMENT OF COUNTERTRADE COMMITMENT

A. Time period for fulfilment of countertrade commitment

(a) Commencement of period

44. The legal guide would discuss possible contract solutions concerning the point of time at which the fulfilment period should begin to run (e.g., the conclusion of the countertrade agreement, an event in the context of the export contract or the completion of preparatory activities such as market research).

(b) Length of period

45. The discussion would address factors that may be relevant to determining the length of the fulfilment period.

(c) Extension of period

46. The legal guide would discuss whether the countertrade agreement should address circumstances in which an extension of the fulfilment period may be granted or must be granted.

(d) Dynamics of countertrade within the fulfilment period

47. The legal guide would discuss clauses which build into the fulfilment period deadlines or various phases for actions such as marketing, placing orders, shipping goods or opening letters of credit. The fulfilment period could also be divided into subperiods with performance of the total commitment being divided into such subperiods. With respect to such arrangements, the legal guide would discuss contract clauses providing for progress reports by a party, and issues such as the content and the correctness of the reports and the legal effect of the absence of a report.

B. Recording fulfilment of countertrade commitment

48. The legal guide would discuss contractual methods that might be used by the parties to record the fulfilment of the countertrade commitment.

(a) Accounts for recording fulfilment of countertrade commitment

49. Parties to a long-term countertrade relationship may wish to facilitate control over the cumulative value of trade in each direction and eliminate individual negotiation of a countertrade commitment for each sale. For this purpose, the parties may agree that their mutual supplies of goods would be recorded in an account kept by themselves or by a controlling authority. Sometimes referred to as "evidence accounts", such mechanisms are not designed to avoid the exchange of funds by offsetting the claims for payment arising from the countertrade contracts. The contract recorded in an evidence account must be independently financed and paid for. Contractual issues which the legal guide would comment upon include eligibility of items for registration, documentation required for registration, the content of entries, procedure to be followed when entries are disputed, permitted deviation from the agreed upon ratio, and consequences of imbalance.

(b) Written confirmation of fulfilment of countertrade commitment

50. The legal guide would also discuss the merits of contract clauses providing that the party committed to purchase goods under the countertrade transaction has a right to a written confirmation of the purchases made under the transaction. Such a confirmation may take the form of a "letter of release" or a relevant clause in the counter-export contract. Such methods are often intended to avoid disagreements, which may occur after a particular contract has been performed, as to whether the contract qualifies as a counter-import for the purposes of fulfilling the countertrade commitment.

VIII. PAYMENT MECHANISMS

51. Payment for the two segments of a countertrade transaction may be kept independent, or the parties may agree that the proceeds of one segment may be used for payment under the other segment. When payments are kept independent, payment under one segment of the countertrade transaction is not affected by any circumstance which may occur in the other segment of the transaction. The legal guide would discuss the advantages and disadvantages of each approach and the factors which enter into a choice between the two.

52. It is proposed, however, that the legal guide not treat payment mechanisms (such as letters of credit or negotiable instruments) used when the payments for the export and the counter-export are independent, since issues specific to countertrade are not raised. Likewise, the legal guide would not address financing mechanisms, such as loans, export credits and export insurance, encountered in countertrade, since they do not raise issues specific to countertrade.

53. The legal guide would discuss a number of mechanisms which may be employed when payments for both segments of a countertrade transaction are to be linked since such a linkage may raise issues specific to countertrade. Such linked-payment arrangements may be designed, for example, to provide security to a party that the proceeds generated by a purchase of goods in one direction would be used for purchases in the other direction, to minimize cross-border currency transfers or to simplify contract procedures.

54. *Retention of funds by the importer* There are cases in which the proceeds of the export contract, intended to be applied to payment of the counter-export contract, are held under the control of the importer. The legal guide would discuss contractual issues the parties may wish to settle if they agree on such an arrangement.

55. *Blocked accounts* Sometimes the parties agree that the importer's payment would be deposited in an account and that the use and release of the money would be subject to certain conditions. Such accounts have been referred to as "escrow", "trustee" or "blocked" accounts. The legal guide would mention the role of the applicable law and address issues that the parties may wish to deal with in the contractual clauses relating to the use of such accounts (e.g., protection against claims of third persons with respect to the money in the account; procedures and conditions for payment under the counter-import contract; circumstances in which the money will be returned to the exporter; and security instruments that may be used in connection with such accounts).

56. *Offsetting letters of credit* A letter of credit may be opened to cover payment for the export contract and then serve as the basis for the issuance of a letter of credit to pay for the counter-export. The legal guide would describe how parties might structure such letters of credit. As in blocked accounts, the legal guide would draw attention to the importance of applicable law.

57. *Accounts for the purpose of setoff of countervailing claims for payment* Countertrade parties sometimes establish accounts in which the value of mutual supplies is recorded and on the basis of which mutual claims for payment are compensated and payment is made to cover imbalances. The legal guide would point out that such techniques may be subject to government regulation and require approval by central banking authorities. The legal guide would also cover issues the parties may wish to agree upon including: interest, settlement of imbalances, point of time at which the balance is to be struck, method of registering credits and debits, use of letters of credit, permitted imbalances and units of account.

58. *Four-party countertrade* Where the parties wish to avoid the transfer of currency across borders, it may occur that the exporter and importer involve a separate counter-exporter and counter-importer. The importer, instead of paying to the exporter the price for the goods he receives from the exporter, transfers money to the counter-exporter in the importer's country in order to pay for the supply of goods by the counter-exporter to the counter-importer in the exporter's country; the

counter-importer would transfer the price for the goods he receives to the exporter. Payment is made among the parties on each side of the border in domestic currency and, if offsetting letters of credit are used, only documents, rather than convertible currency, are exchanged internationally. The legal guide would point out the situations in which four-party countertrade might be used and discuss contracting approaches.

59. *Export with reservation of right of disposal* When an exporter, usually of goods traded on commodity markets, requires funds before the product is sold, the goods may be deposited in a warehouse and control transferred to the importer. On this basis, a lender (possibly the importer) lends a percentage of the value of the deposited goods, but the exporter, in the expectation that the price of the goods might rise, reserves a limited right to decide when the goods should be sold. This reservation is limited because the parties set a price level at which the goods may be sold in order to protect their collateral value as security for the loan. The legal guide would discuss contract clauses concerning transfer of control and emphasize the importance of applicable law.

IX. RESTRICTIONS ON RESALE OF COUNTERTRADE GOODS

60. A party purchasing goods under a countertrade agreement may be subject to restrictions regarding the resale of the goods. The restrictions may be based on a contract clause or on a government regulation. While such restrictions are not particular to countertrade, it appears useful to discuss them in the legal guide in view of their considerable commercial significance in countertrade. Issues that would be discussed in the legal guide include the following.

61. *Drafting of marketing restriction clauses* Attention would be drawn to the fact that such clauses are often phrased in a general way, which may give rise to different interpretations.

62. *Restrictions related to conditions of resale* Countertrade agreements sometimes provide that the purchaser must observe certain conditions in the resale of the countertrade goods. Such conditions may concern, for instance, packaging or marking of the goods, after-sale service, or product liability insurance.

63. *Price-related restrictions* The legal guide would mention clauses stipulating that countertrade goods should not be resold below a certain price and indicate that such clauses may implicate competition law.

64. *Geographical restrictions* Countertrade agreements often contain clauses providing that the party may not resell goods in certain geographic areas or that he may resell them only in certain areas. Such clauses may implicate competition law, in particular if they involve an agreement among different manufacturers dividing the market into separate zones.

65. *Existing exclusive distributorship agreements* The legal guide would also deal with contract clauses designed to avoid a conflict between the resale of countertrade goods and an existing exclusive distributorship agreement.

X. TRANSFER OF OBLIGATION TO PURCHASE GOODS

66. Often the exporter wishes to engage a third person, such as a trading house, to participate in the fulfilment of the obligation to purchase goods. This participation may take different forms. For example, the third person may assist or advise the exporter in marketing the counter-import goods, a relationship which would not appear to raise issues specific to countertrade. However, legal issues particular to countertrade may arise when a third person acts as a consignee of the goods purchased by the exporter or purchases the goods directly from the importer.

67. The legal guide would advise parties to examine applicable law, including any government regulations specifically concerning countertrade and any special legislation regarding foreign trade, as well as contract and agency law, to ascertain conditions for the use of third persons. Such conditions may differ depending on the manner in which the third person participates in the purchase of goods.

68. The legal guide would then point out contractual issues relating to third-person participation, which might arise in the relations between: (a) the counter-importer and the counter-exporter, (b) the counter-importer and the third person, and (c) the counter-exporter and the third person.

69. Issues relating to third person participation which the exporter and the importer might wish to address include the following: (a) whether participation of third persons is permitted; (b) the counter-exporter's requirements with respect to the choice of the third person; (c) the legal position of the counter-importer and the third person in the event of default by the third person.

70. With respect to contractual issues between the third person and the counter-importer, the legal guide could discuss undertakings on the part of the third person to indemnify the counter-importer in the event that the countertrade commitment remains unfulfilled. The legal guide could also mention issues related to payment of a commission, including the effect of a modification or termination of the export contract.

71. As to contractual questions between the third person and the counter-exporter, the legal guide would discuss the ways in which the third person would participate in the purchase of goods from the counter-exporter. The legal guide would also suggest that parties agree as to whether a modification or termination of the exporter's countertrade commitment should affect the contractual

relationship between the third person and the counter-exporter.

XI. TRANSFER OF COUNTERTRADE CREDIT

72. The importer's motive to purchase goods from the exporter may be primarily to obtain a right to sell to the exporter. Such a right is sometimes referred to as countertrade credit. The parties sometimes agree that the counter-exporter is permitted to transfer this credit to a third person. The parties may also provide that the countertrade credit could be used by the importer or his transferee to satisfy countertrade requirements associated with a sale to someone other than the exporter. The legal guide would comment on contractual aspects of such transfers.

73. The legal guide may discuss schemes designed to facilitate trading with countertrade credits by incorporating countertrade credits in transferable instruments, depending upon the degree to which such schemes have gained acceptance in practice. Examples of such schemes include the International Trading Certificate (ITC) and Central American Import Rights (*Derechos de Importaciones Centro Americanos* (DICA)).

XII. SECURITY FOR PERFORMANCE

74. The use of guarantees is common in countertrade. Guarantees may secure, for example: (a) fulfillment of the countertrade commitment or payment of an agreed sum in the event of failure to perform (e.g., a liquidated damages provision); (b) performance of the related export and counter-export contracts. It is proposed that the legal guide address only issues raised by guarantee provisions supporting the countertrade commitment since it is in securing performance of the countertrade commitment that the use of guarantees raises issues particular to countertrade.

75. It may nevertheless be useful to include in the legal guide a brief general introduction to the use of guarantees, bonds and other methods of securing performance and the nature of the guarantor's obligation under different forms of guarantees. This introduction could cover the forms and functions of guarantees, the choice of guarantor, the need to consider applicable law, and any existing uniform contractual rules.

76. With respect to guarantee provisions in countertrade agreements, the legal guide could discuss the possible legal implications of a guarantee standing alone to secure the countertrade commitment, without a clause calling for the payment of liquidated damages or a penalty. The legal guide would also address the following guarantee issues to the degree they are relevant to countertrade.

(a) *Terms of the guarantee*

77. The legal guide would discuss possible provisions in the countertrade agreement concerning the terms and conditions of the guarantee and describe how guarantee terms may vary according to the form of countertrade.

(b) *Issuance, duration and amount*

78. The legal guide would discuss provisions in the countertrade agreement concerning the point of time at which the guarantee should be issued, its duration and the amount, including mechanisms for reducing the guarantee amount as fulfilment of the countertrade commitment progresses.

XIII. LIQUIDATED DAMAGES AND PENALTY CLAUSES

79. Clauses for payment of an agreed sum in the event of failure to perform can be found in countertrade agreements as well as in the related export and counter-export contracts. The legal guide would address such clauses only as found in the countertrade agreement since their presence in export and counter-export contracts does not raise issues specific to countertrade. Nevertheless, it might be useful for the legal guide to provide a brief general introduction to the use of clauses for the payment of an agreed sum in the event of failure to perform.

80. The legal guide would advise parties that when drafting clauses for the countertrade agreement concerning payment of an agreed sum, the effect of applicable law should be kept in mind. For example, some legal systems validate clauses by which the parties, at the time of contracting, fix an agreed sum payable as compensation for losses caused by failure to perform. Some legal systems may restrict enforcement of a clause which appears to be intended to stimulate performance or penalize non-performance. In many legal systems the agreed sum is not due if failure to perform is caused by an exempting impediment or by the acts or omissions of the other party. Another issue to be considered in the light of applicable law is the relationship of the agreed sum to recovery of damages.

81. The legal guide would discuss the issues parties might consider in drafting provisions in the countertrade agreement concerning payment of an agreed sum. These include the amount to be paid, the circumstances in which the payment would be due (including whether payment would be due for non-performance or also for delay), exemptions from the obligation to pay, relationship with any actual damage, the effect of payment of the agreed sum on the countertrade commitment, operation of the clause in countertrade commitments to be fulfilled in instalments, and issuance of a supporting guarantee.

XIV. EFFECT OF PROBLEM IN A COUNTERTRADE CONTRACT ON THE COUNTERTRADE TRANSACTION

82. Since the economic motives for engaging in countertrade can be satisfied only if both the export contract and counter-export contract are concluded and performed as envisaged, those motives may suggest that a problem in the context of one countertrade contract should have an effect on another transaction segment. Sometimes, however, the parties may prefer that each transaction segment be performed according to its terms irrespective of a problem occurring in another segment. For example, in the case of the termination of the export contract for reasons of *force majeure* or a contract breach by the importer, the desired solution may be that the countertrade commitment should be terminated as well. In other cases the circumstances may suggest independence of transaction segments. For example, when the export contract has not been performed because of a breach by the exporter, it may be considered appropriate that the countertrade commitment should not be affected.

83. The law generally applicable to contracts may not provide a clear or satisfactory answer to the question whether a problem occurring in one countertrade contract should have an effect on another transaction segment. Therefore, the parties may wish to specify the circumstances in which the countertrade commitment or a countertrade contract should be terminated, or in some cases re-negotiated or modified. The legal guide would provide advice regarding the drafting techniques and the contract clauses to be used to achieve the result desired by the parties in the event that any of the following problems occurs: (a) failure to conclude the export contract; (b) termination of the export contract; (c) the exporter's failure to deliver under the export contract; (d) the importer's failure to take delivery or to pay under the export contract; (e) failure to conclude the counter-export contract; (f) termination of the counter-export contract; (g) the counter-exporter's failure to deliver under the counter-export contract; (h) the counter-importer's failure to take delivery or to pay under the counter-export contract.

XV. SETTLEMENT OF DISPUTES

84. The methods of settling disputes to be dealt with in the legal guide include negotiation, conciliation, arbitration and judicial proceedings.

Multi-contract dispute settlement

85. In view of the fact that a countertrade transaction often involves several discrete contracts between the two parties, the legal guide would discuss the question of co-ordination between the clauses on the settlement of disputes in the contracts.

Multi-party dispute settlement

86. A countertrade transaction may involve, in addition to the exporter and the importer, a third person such as a counter-importer different from the exporter or a counter-exporter different from the importer. In some cases involving more than two parties the parties would wish to be joined in one dispute settlement proceeding. However, a joinder of parties from different contracts may undermine the independence of the contracts.

87. Nevertheless, there may exist circumstances in which the solution of a dispute involving a pair of parties

may be of consequence for the relationship between a different pair of parties. For example, when it is agreed that a trading house will assume the commitment to counter-import goods from the importer, it may be provided that if the trading house fails to meet its commitment, the exporter will also be liable. In such a case, the parties might wish to provide that the exporter, being interested in the outcome of a dispute between the importer and the trading house regarding the fulfilment of the countertrade commitment, should participate in the dispute. It may thus be appropriate for the legal guide to address possible cases of multi-party disputes.

VI. CO-ORDINATION OF WORK

Current activities of international organizations related to the harmonization and unification of international trade law: report of the Secretary-General (A/CN.9/324) [Original: English]

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INTRODUCTION

1. The General Assembly, in resolution 34/142 of 17 December 1979, requested the Secretary-General to place before the United Nations Commission on International Trade Law, at each of its sessions, a report on the legal activities of international organizations in the field of international trade law, together with recommendations as to the steps to be taken by the Commission to fulfil its mandate of co-ordinating the activities of other organizations in the field.

2. In response to that resolution, detailed reports on the current activities of other organizations related to the harmonization and unification of international trade law have been issued at regular intervals, the last one having been submitted at the nineteenth session in 1986 (A/CN.9/281).

3. This report is another in the series mentioned and has been prepared in order to update and supplement the report submitted at the nineteenth session of the Commission. It is based on information available to the Secretariat about the activities of international organizations covered up to 31 January 1989. Documents referred to in this report and further information may be sought directly from the organizations concerned. After the present report, it is planned to issue reports more frequently. For that purpose the Secretariat would appreciate receiving promptly and regularly information from international and other organizations on their current activities related to the harmonization and unification of international trade law.

4. The activities of UNCITRAL related to the harmonization and unification of international trade law are referred to briefly in this report for the sake of completeness. The current work of UNCITRAL is summarized each year in the reports of the Commission's annual sessions. The reports and the background documents are subsequently reprinted in the *Yearbook of the United Nations Commission on International Trade Law*.

5. The work of the following organizations is described in the present report:

(a) *United Nations bodies and specialized agencies*

CTC:	Centre on Transnational Corporations paragraphs 49-53
ECE:	Economic Commission for Europe paragraphs 13, 124, 126
GATT:	General Agreement on Tariffs and Trade paragraphs 6-7, 124
IBRD:	International Bank for Reconstruction and Development (World Bank) paragraphs 45, 46
IMO:	International Maritime Organization paragraphs 81-85, 95, 96, 99-102, 104, 129, 131

UNCITRAL:	United Nations Commission on International Trade Law paragraphs 8, 12, 41, 42, 67, 68, 70-74, 80, 97, 112, 122, 142
UNCTAD:	United Nations Conference on Trade and Development paragraphs 23-34, 35, 40, 54-59, 76-94, 124, 132-134
UNEP:	United Nations Environmental Programme paragraph 139
UNESCO:	United Nations Educational, Scientific and Cultural Organization paragraphs 62, 65, 66
UNIDO:	United Nations Industrial Development Organization paragraphs 35-39
WIPO:	World Intellectual Property Organization paragraphs 60-64

(b) *Other intergovernmental organizations*

AALCC:	Asian-African Legal Consultative Committee paragraphs 47, 111
CCC:	Customs Co-operation Council paragraph 125
CMEA:	Council for Mutual Economic Assistance paragraphs 9-11, 98, 112
CE:	Council of Europe paragraphs 136-138
EEC:	European Economic Community paragraphs 19, 122, 123
EFTA:	European Free Trade Association paragraphs 122, 123
HAGUE CONFERENCE:	Hague Conference on Private International Law paragraphs 119-121
OTIF:	Intergovernmental Organization for International Carriage by Rail paragraph 106
UNIDROIT:	International Institute for the Unification of Private Law paragraphs 14, 18, 20, 21, 22, 65, 66, 107-110, 135, 140

(c) *International non-governmental organizations*

CMI:	Comité Maritime International paragraphs 81-84, 103
FIDIC:	Federation International des Ingénieurs Conseils paragraphs 43, 44
ICC:	International Chamber of Commerce paragraphs 15-17, 19, 48, 69, 70, 71, 75, 87, 113-116, 124

ICCA:	International Council for Commercial Arbitration paragraphs 117, 118
ISO:	International Organization for Standardization paragraph 130
UIC:	International Union of Railways paragraph 105

I. INTERNATIONAL COMMERCIAL CONTRACTS IN GENERAL

A. Procurement

1. GATT

6. The General Agreement on Trade and Tariffs (GATT) in 1979 elaborated the GATT Agreement on Government Procurement. The Agreement entered into force on 1 January 1981. Its purpose is to open to foreign suppliers contracts awarded by certain government bodies of its signatory countries. It aims to secure greater international competition in the government procurement market. It is designed to make laws, regulations, procedures and practices regarding government procurement more transparent, and to ensure that they do not protect domestic products or suppliers or discriminate among foreign products or suppliers.

7. The Agreement also makes provision for special and differential treatment for developing countries, including the least developed among them, to take into account their particular development, financial and trade needs. The 1981 Agreement has been revised and amended by a Protocol of Amendments done at Geneva on 2 February 1987 which entered into force on 14 February 1988. GATT produced in 1988 a revised text of the Agreement on Government Procurement incorporating all the amendments. In February 1989 GATT produced a revised text of the Practical Guide to the GATT Agreement on Government Procurement.

2. UNCITRAL

8. 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. From 7 to 14 December 1987 the Secretariat of UNCITRAL convened a meeting of a group of experts on procurement at Vienna to advise it on the preparation of the documentation for the Working Group. The Working Group met at Vienna from 17 to 25 October 1988. It had before it a study of national procurement policies, laws and practices prepared by the Secretariat (A/CN.9/WG.II/WP.22). The Working Group, after consideration of the study, requested the Secretariat to prepare a first draft of a model procurement law, together with a commentary, for consideration by the Working Group (A/CN.9/315).

B. CMEA: general conditions

9. During the period 1986 to 1988, the CMEA Conference on Legal Questions has been revising the General Conditions of Delivery of Goods between the Organizations of the Member Countries of the Council for Mutual Economic Assistance as well as legal guides and model contracts. The revision takes into account the practical experience gained in the application of the General Conditions. The Standing Commission has also revised general conditions relating to technical service, assembly, specialization and co-operation. It is preparing new rules on scientific and technological co-operation. The Standing Commission has also undertaken a comparative study of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) and the comparable legal texts enacted within CMEA.

10. The CMEA during the period under review continued to work on a comprehensive programme of scientific and technical progress for the CMEA Member States adopted in December 1985. The programme provides for the creation, as a joint endeavour of the CMEA countries, of new forms of equipment and technology in such priority fields as the application of electronics and comprehensive automation of the economy, new materials and the technology for processing them, atomic energy and biotechnology. The programme is open to other interested States. The CMEA in 1987 adopted proposals on the harmonization of domestic laws on inventions.

11. The Conference on Legal Questions of the CMEA completed a comprehensive study of the legal norms of the CMEA member countries as applied to contracts governed by the CMEA General Conditions. The work has been published as "The Contract Law of the CMEA member countries and the Socialist Federal Republic of Yugoslavia: General Principles". It contains a survey of the national legislation of these countries in respect of the conclusion and execution of contracts, and as regards liability for non-performance.

C. International countertrade practices

1. UNCITRAL

12. 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. It requested the Secretariat to prepare a preliminary study on the subject. At the twenty-first session in 1988, the Commission considered a preliminary study of legal issues in international countertrade (A/CN.9/302). The Commission decided that it would be desirable to prepare a legal guide on drawing up countertrade contracts. At the current twenty-second session the Commission has before it a draft outline of the possible content and structure of a legal guide on drawing up countertrade contracts (A/CN.9/322).

2. ECE

13. The ECE Committee on the Development of Trade, Working Party on International Contract Practices in Industry held its thirty-third session in Geneva from 28 to 30 November 1988. At that session it considered, *inter alia*, three documents in relation to the topic of countertrade transactions (TRADE/GE.1/R.34; TRADE/GE.1/R.38/Add.3 and TRADE/WP.5/R.3). The Working Party requested the Secretariat to prepare for the thirty-fourth session of the Working Party (June 1989) a new version of the texts on countertrade, reflecting the deliberations of the Working Party at its thirty-third session, and including sample contracts on counterpurchase and buy-back (TRADE/WP.5/28).

D. UNIDROIT: principles for international commercial contracts

14. The UNIDROIT Study Group on progressive codification of international trade law continued its work on general principles applicable to international commercial contracts. The Group held its tenth meeting from 6 to 10 June 1988 and examined the revised draft articles and draft explanatory report of chapter II on the formation of contracts. The eleventh session of the Group was held from 16 to 20 January 1989 at which consideration was given to the revised draft articles and draft explanatory report of chapter IV on the substantive validity of contracts. The Group is due to hold its next session from 3 to 7 July 1989. The session will be devoted to a final reading of chapter V (UNIDROIT 1989 CD-68-Doc.8).

E. ICC: liquidated damages and penalty clauses

15. The ICC Commission on International Commercial Practice is preparing a guide on liquidated damages and penalty clauses. The task has been undertaken by the Working Party on Liquidated Damages and Penalty Clauses. The Working Party has completed a draft of the proposed guide. The draft is being reviewed with a view to finalizing it. The draft guide examines the state of law on liquidated damages and penalty clauses in some of the legal systems most important to international trade. It also provides information and comments to practitioners concerned with the drafting of such clauses. The guide is of a summary nature and the information provided is intended to draw the attention of draftsmen of contracts to the main points in the major legal systems, and particularly to rules of a mandatory nature or otherwise representing pitfalls to an uninformed trader. It is intended to include as an appendix to the main text of the guide a brief survey or description of national penalty clauses (ICC Document No. 460-7/6).

F. ICC: Incoterms

16. An ICC Working Party is updating Incoterms, the ICC standardized trade terms for international sales contracts. The Working Party will propose that ICC remove

certain terms of the 1980 edition which have either fallen into disuse or do not reflect current business practices, and rearrange other terms to take account of changes in transport documents and electronic data interchange. The Working Party also proposes to include charts aimed at helping buyers and sellers select individual Incoterms meeting their contract needs. The new edition of Incoterms is expected to be published shortly (ICC document No. 460/351).

G. ICC: reservation of title

17. The ICC has been preparing a guide on reservation of title. A final version of the draft guide was completed in 1988. The Commission on International Commercial Practice has submitted the draft to the ICC Executive Board for approval and thereafter promulgation as an official ICC publication (Document No. 460/347).

H. Commercial agents and distributorships

1. UNIDROIT: internal relations between principals and agents

18. The Governing Council at its 67th session authorized the Secretariat to commission a study on the subject of internal relations between principals and agents. The study will be considered by the Governing Council at its 68th session (UNIDROIT 1989 Report 1988-CD-68 Doc.2).

2. ICC: commercial agency; distributorship

19. The ICC is working on an explanatory note for commercial agents and their principals on the EEC directive on the co-ordination of member States' laws relating to self-employed commercial agents. The purpose of the note will be to comment on the various national laws applicable in EEC States and in particular on the problem of loss of indemnity. ICC is also working on a guide to distributorship agreements (ICC Annual Report 1987).

I. UNIDROIT: international financial leasing

20. UNIDROIT in 1987 finalized the draft Convention on International Financial Leasing. The Convention was submitted to a diplomatic Conference hosted by the Canadian Government in Ottawa from 9 to 28 May 1988. The diplomatic Conference adopted the Convention and opened it for signature by all States at Ottawa until 31 December 1990 (Final Act of Diplomatic Conference for the Adoption of the Draft UNIDROIT Conventions on International Financial Leasing and International Factoring, Ottawa, 28 May 1988). The Convention is intended to remove legal impediments to the international financial leasing of equipment so that it can become more available. It also adapts the rules of leasing to the distinctive triangular relationship created by the financial leasing transaction. The rules elaborated in the Convention relate

primarily to the civil and commercial law aspects of international leasing.

J. UNIDROIT: international factoring

21. The diplomatic Conference hosted by the Canadian Government in Ottawa from 9 to 28 May 1988 (see above, para. 20) also adopted the draft Convention on International Factoring. The Convention will remain open for signature by all States at Ottawa until 31 December 1990. The Convention is intended to provide a legal framework that will facilitate international factoring. The Convention governs factoring contracts where the supplier may or will assign to the factor receivables arising from contracts for the sale of goods, made between a supplier and its customers (debtors), other than those for the sale of goods bought primarily for personal, family or household use and where the factor is to perform at least two of the following functions: provide finance to the supplier, including loans and advance payments; maintenance of accounts (ledgering) relating to the receivables; collection of receivables; and protection against default in payment of debtors.

K. UNIDROIT: franchising contracts

22. At its 67th session the Governing Council requested the Secretariat to obtain information on the subject of franchising particularly with regard to the actual content of franchising contracts in different countries (UNIDROIT 1989 Report 1988-CD.68 Doc.2).

II. COMMODITIES

A. UNCTAD: Common Fund for Commodities

23. The UNCTAD Agreement establishing the Common Fund for Commodities concluded on 27 June 1980 (TD/IPC/CF./CONF/25, United Nations publication, Sales No. E. 81.II.D.8) has fulfilled the requirements for entry into force. Ratification by the Maldives on 11 July, 1988 has fulfilled the main outstanding condition for entry into force, namely that ratifying countries should represent two thirds of the funds directly contributed to the capital. The Agreement provides for the setting up of a new international financial institution of major importance to international commodity trade and to developing countries. The objectives of the Common Fund are: (a) to serve as a key instrument in attaining the agreed objectives of the Integrated Programme for Commodities as embodied in resolution 93(IV) of UNCTAD and (b) to facilitate the conclusion and functioning of international commodity agreements or arrangements (ICA) particularly concerning commodities of special interest to developing countries (UNCTAD Bulletin No. 245—July 1988).

B. UNCTAD: commodity agreements

24. The aims of the international commodity agreements vary from one agreement to another. The principal

objectives, however, are price and export earnings stabilization and long-term development. The latter comprises activities related to improved market access and supply reliability, increased diversification and industrialization, augmented competitiveness of national products *vis-à-vis* synthetics and substitutes, improved marketing, and distribution and transport systems. International commodity agreements may have additional objectives, e.g. the increase of consumption, the prevention of unemployment or underemployment, and the alleviation of serious economic difficulties.

25. The following commodity agreements were adopted at various United Nations Conferences under the auspices of UNCTAD, pursuant to the objectives adopted by UNCTAD in resolutions 93(IV) and 124(V) on the Integrated Programme for Commodities:

- A new International Natural Rubber Agreement (TD/RUBBER 2/16) was adopted on 20 March 1987, replacing the 1979 International Natural Rubber Agreement.
- The 1984 International Sugar Agreement is to be replaced by a new 1987 Sugar Agreement (TD/SUGAR.11/5) which came into force provisionally on 24 March 1988 (CN.78.1988 Treaties—I (Depositary notification)). The International Sugar Organization Council, however, on 15 February 1988 extended the 1984 International Sugar Agreement until 31 March 1988 or until such time as the International Sugar Agreement, 1987, entered into force definitively.
- The International Agreement on Olive Oil and Table Olives, 1986 (CN.77.1988 Treaties—I (Depositary notification)) replaces the International Olive Oil Agreement, 1979. The International Olive Oil Council, by resolution No. 1/57-IV/87 of 17 December 1987, extended until 5 June 1988 the time-limit for the deposit of instruments of ratification, acceptance or approval.
- The International Agreement on Jute and Jute Products, 1982 (TD/JUTE/II/Rev.1; United Nations publication, Sales No. 83.II.D.3) entered into force provisionally on 1 January 1984. It remained in force until 8 January 1989.
- The United Nations Conference on Cocoa held four rounds of negotiations to replace the 1980 International Cocoa Agreement. The Conference in July 1986 reached agreement on the key issue of the price structure, price level and price adjustment mechanism to be incorporated in a new agreement with economic provisions. The new instrument (TD/COCOA.7/R.2) replaced the 1980 Agreement on 1 October 1986. It will remain in force for three years, with the possibility of further extensions for a total of three years.
- The International Tin Agreement (TD/TIN.6/14) was due to expire on 30 June 1987 but was extended for a period of two years until 30 June 1989. However, buffer stock operations under the Agreement were suspended and the issue of the responsibility for the debts of the Tin Council is

presently under litigation in the United Kingdom. Governments are now seeking a new forum where international co-operation can be maintained. As a result the United Nations Tin Conference met from 21 November to 2 December 1988 to negotiate the establishment of an international producer-consumer group for tin. It is to meet again in 1989.

- The International Tropical Timber Agreement, 1983 (TD/TIMBER/II/Rev.1; United Nations publication, Sales No. 84.II.D.5) entered into force provisionally on 1 April 1985. It will remain in force until 31 May 1990, unless terminated before that date or extended for not more than two periods of two years each.

26. Preparatory work, expected to lead to the convening of negotiating conferences for the adoption of other international commodity agreements or establishment of study groups, is continuing on the following commodities: cotton, hard fibres, manganese, bauxite, iron ore, bananas, meat, copper, nickel, phosphates, vegetable oils and seeds.

C. UNCTAD: complementary facility for commodity-related shortfalls in export earnings

27. The Group of Experts on the Compensatory Financing of Export Earnings Shortfalls, established in 1983, held its second session from 14-18 September 1987, which was devoted primarily to consideration of a Secretariat study. This study (TD/B/AC.43/5 and Add.1) sets out calculations of shortfalls according to various formulae, assesses the extent to which such shortfalls have been covered by existing schemes such as the Compensatory Financing Facility of the IMF and the EEC's Stabex, and evaluates the effects of these shortfalls on the economic development of developing countries. The Expert Group decided to defer any final recommendations on the matter until the IMF had completed its current review of its own Compensatory Financing Facility. Meanwhile, it asked that the analytical study as well as the Group's reports be submitted as a contribution to the review by the IMF.

28. Other studies carried out by UNCTAD on this topic include:

- "Compensatory facility for commodity related shortfalls in export earnings" (TD/B/C.1/221, 222 & 234).
- "Review of Stabex and Sysmin" (TD/B/C.1/237).
- "Review of the operation of the compensatory financing facility of the International Monetary Fund" (TD/B/C.1/243).
- "Compensatory financing of export earnings shortfalls" (TD/B/1029/Rev.1).
- "Commodities earnings shortfalls and an additional compensatory financing facility" (TD/B/AC.43/2 and Corr.1, and TD/B/AC.43/5 and Add.1).

D. UNCTAD: Global System of Trade Preferences (GSTP)

29. A Ministerial Meeting of the Negotiating Committee of the Global System of Trade Preferences (GSTP) held in Belgrade from 6 to 13 April 1988 adopted the Agreement on the GSTP and opened it for signature (UNCTAD GSTP/MM/BELGRADE/3). The Global System of Trade Preferences is a new trading system under which members of the Group of 77 will exchange trade concessions among each other on a wide range of products. The Agreement establishes a global framework of rules based on the principle of reciprocity and "most favoured nation treatment" encompassing components of arrangements for the exchange of concessions on tariff, part-tariff and non-tariff measures covering all types of products for direct trade measures including medium and long term contracts, and for sectoral agreements. Attached to the Agreement is the preferential tariff concession that the participants have agreed to extend to each other. The Agreement also contains provisions enabling concrete preferential measures for the least developed countries. It is intended to constitute a major instrument for the promotion of trade among developing countries, members of the Group of 77 (UNCTAD Bulletin No. 243—May 1988).

E. UNCTAD: Generalized System of Preferences (GSP)

30. The UNCTAD Special Committee on Preferences convened for its fifteenth session from 24 May to 1 June 1988. It had before it the "Eleventh General Report on the Implementation of the Generalized System of Preferences" (TD/B/C.5/111 and Add.1). The report gave a factual account of the changes and improvements in the various schemes since the last review and indicated the possibilities of making the GSP a more effective instrument of trade policy. An earlier document (TD/B/C.5/105, chapter III) provided a comprehensive study evaluating the effects of the GSP. The report recommended substantial improvements in the GSP in the form of expansion of the product coverage, in particular agricultural products, as an effective way of increasing the benefits of the less competitive beneficiaries and simplification of the schemes, particularly of Japan and the EEC, so that they can be more easily understood by exporters in the developing countries and administered at lower cost by both preference-giving and recipient countries (UNCTAD Bulletin No. 242—April 1988).

F. UNCTAD: Data Base on Trade Measures

31. The Trade and Development Board in May 1988 decided to give wide access to the UNCTAD Data Base on Trade Measures. The Data Base is a comprehensive inventory of trade control measures in the world which contains information on product-specific trade measures in over 100 developed and developing countries. It can be used for many purposes, such as the analysis of developments in national trade, policies and world trading conditions,

assistance to Governments in analysing conditions of access to external markets for export development, preparation of reference materials which help Governments in preparing their participation in multilateral trade negotiations, and research on non-tariff barriers. The system includes border trade measures which, either in practice or potentially, affect international trade by introducing differential treatment for imported and domestically produced goods. The information is contained in computerized records which can be linked with computerized information on tariffs and trade flows (UNCTAD Bulletin No. 244—June 1988).

Additional studies carried out by UNCTAD

32. The Committee on Transfer of Technology held its seventh session from 18 to 26 October 1988. It discussed the dimension, direction and nature of technology flows, particularly to developing countries, in a changing world economy. It also carried out, in the context of dynamic economic and technological change, an examination of technology-related policy and legislative responses. Two reports were before the session: Document TD/B/C.6/145—Recent trends in international technology and their implications for development, and Document TD/B/C.6/146—Technology-related legislation and technological environment.

33. A United Nations Conference on copper bringing together some 40 producing and consuming countries met from 13 to 24 June 1988 under the auspices of UNCTAD to negotiate the establishment of an international producer-consumer forum or group on copper. The Conference asked the Secretary-General of UNCTAD to reconvene the Conference as early as possible in order to conclude negotiations for the establishment of the new entity which would be an autonomous body. The possible functions identified by the Conference included consultations and exchanges of information among members on the international copper economy; improvement of copper statistics; undertaking of regular assessments of the market situation and outlook for the world copper industry; undertaking of activities related to efforts pursued by other organizations aimed at developing the market and contributing to the demand for copper (UNCTAD Bulletin No. 244—June 1988).

34. The Intergovernmental Group of Experts on Iron Ore met from 7 to 11 March 1988 to consider developments in the world iron ore market in the year 1986 and part of 1987 (CTD/B/IPC/1 IRON ORE/AC.1/8). The report noted that, despite a slight increase in world production and consumption over the previous year, the iron ore market in 1986 saw further falls in the levels of trade and prices. It identified as basic problems, which continued to adversely affect the iron ore industry, the persistent imbalance between supply and demand, the continued erosion of prices and the structural and technological factors behind the gradual contraction of demand (UNCTAD Bulletin No. 240—February 1988).

III. INDUSTRIALIZATION

A. UNIDO: system of consultations

35. A report on "Trade and trade-related aspects of industrial collaboration at the enterprise level" (ID/B/348) was submitted to the Industrial Development Board—the governing body of UNIDO—at its nineteenth session as a follow-up to the *ad hoc* UNCTAD/UNIDO Group of Experts on Trade and Trade-related Aspects of Industrial Collaboration Arrangements. In accordance with the recommendations of the Industrial Development Board, UNIDO has evolved a set of legal materials, including model contracts and clauses, guidelines and checklists for contractual arrangements, according to the requirements of each of the thirteen industrial sectors served by the system of consultations.

36. Twenty-seven consultations have been convened since 1977 covering the following industries and topics: capital goods, agricultural machinery, iron and steel, fertilizers, petrochemicals, pharmaceuticals, leather and leather products, vegetable oils and salts, food processing, industrial financing, training of industrial manpower, wool and wool products and building material. In accordance with the recommendations made at these consultations, UNIDO has formulated model contracts and clauses, guides and checklists for contractual arrangements to facilitate individual collaboration in some of these industrial sectors. A list of these model contracts can be found in the previous report (A/CN.9/281).

37. UNIDO has continued to review the documents. The documents as amended were supplied to the third consultation held in 1987 for the various sectors. The following documents have been published as a result of the review:

- Contractual arrangements for the production of pharmaceutical chemicals or intermediates and pharmaceutical formulations (ID/WG.466 (SPEC)—Additional Clauses for Inclusion in Documents ID/WG.393/1 Rev.2 and ID/WG.393/3 Rev.2).
- Items which could be included in contractual arrangements for the setting up of a turn-key plant for the production of bulk drugs (pharmaceutical chemicals) or intermediates included in UNIDO List ID/WG.466/3 (SPEC).
- Items which could be included in Contractual Arrangements for Technical Assistance for the Formulation of Pharmaceutical Dosage Forms (ID/WG.466/4 (SPEC)).

B. Guides and guidelines

1. UNIDO: guide to investors

38. UNIDO has completed a number of booklets called "investors guides". The booklets are designed to meet the special information needs of a potential investor interested in investment prospects in a given developing country. Each of the booklets contains a brief account of the

country, its people and resources, the basic infrastructure, the manner in which its economy has developed over the last few years, its industry, the policies and procedures for industrial licensing and transfer of know-how and the facilities which are available to any one interested to investing in the country.

2 UNIDO: contractual checklist

39. UNIDO is working on a draft contractual checklist for the elaboration of long-term collaboration arrangements in joint ventures, provision of know-how, training, management and marketing in the development of primary and secondary wood-processing industries.

3. UNCTAD: international trade and development statistics

40. The UNCTAD Secretariat published in April 1988 a comprehensive 1987 supplement to the *Handbook of International Trade and Development Statistics* (United Nations publication, Sales No. E/F.87.11.D.10). The handbook provides detailed data on third world issues, especially in such areas as trade and debt. It compliments other United Nations publications such as the *Yearbook of International Trade Statistics* and the *Statistical Yearbook*.

4. UNCITRAL: Legal Guide on Drawing up International Contracts for the Construction of Industrial Works

41. The UNCITRAL *Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works* was adopted by UNCITRAL at its twentieth session in 1987 and has been published by the United Nations (United Nations publication, Sales No. E.87.V.10). Designed to assist persons involved in the negotiation and drafting of industrial works contracts, the UNCITRAL Legal Guide reviews the full range of issues arising in connection with the construction of industrial works—from the initial stages of a project to its completion—and suggests possible ways in which those issues might be dealt with in the contract. By taking into account international construction and contracting practices, as well as legal rules in national legal systems that may affect the formulation of particular terms of the contract, the UNCITRAL Legal Guide is designed to be of practical benefit to users worldwide. The discussions in the UNCITRAL Legal Guide and the solutions recommended in it are intended to achieve balance with respect to the interests of the parties to the contract and to enable the parties to formulate equitable contractual provisions.

42. The intended audience of the UNCITRAL Legal Guide includes lawyers, engineers, managerial personnel of private and State-owned enterprises and government officials who are involved in the negotiation and implementation of contracts for the construction of industrial works. The UNCITRAL Legal Guide has thus far been published in Arabic, English, French, Russian and Spanish. A Chinese version will be published shortly.

5. FIDIC: conditions of contract

43. FIDIC has published the fourth edition of its Civil Conditions of Contract (Red Book). It appears in two parts. Part I contains general conditions of contract with forms of tender and agreement. Changes have been made to the following clauses: definitions, bonds and guarantees, sufficiency of tender, insurance, extension of time, claims, certificates and payment, disputes and default of the employer. There has also been an attempt to simplify the language used in the document and to bring it in line with modern practice and to clarify areas which had led to misunderstanding in the past. Part II is a comprehensive set of fully developed sample clauses containing conditions of particular application. Guidelines are provided for preparation of part II clauses. The former part III (Dredging and Reclamation) has been incorporated into part II.

44. FIDIC in 1987 prepared the third edition of its Conditions of Contract for Electrical and Mechanical Works (Yellow Book). The conditions are designed to be suitable for use in contracts between employer (owner) and contractor for the supply and erection of plant and machinery. FIDIC also published in 1988 a Guide to the Use of its 1987 third edition.

C. World Bank: Multilateral Investment Guarantee Agency (MIGA)

45. In the previous report (A/CN.9/281) it was reported that the World Bank was elaborating a Convention to establish a Multilateral Investment Guarantee Agency (MIGA). The Convention took effect on 12 April 1988. The Agreement entered into force when its ratification by the United States and the United Kingdom on that day raised subscriptions above the minimum required for it to come into force.

46. The objective of MIGA is to encourage the flow of investments for productive purposes among its member countries—in particular, to developing countries. MIGA is intended to enhance mutual understanding and confidence between host Governments and foreign investors and heighten awareness of investment opportunities. It will also increase information, knowledge, and expertise related to the investment process. To fulfil its purpose, MIGA will guarantee eligible investments against losses resulting from noncommercial risk and carry out research and promotional activities (The World Bank Annual Report 1988).

D. Joint ventures

1. AALCC: industrial joint ventures

47. The Sub-Committee on International Trade Law Matters of the AALCC is continuing its work on the legal framework for industrial joint ventures. At the twenty-seventh session of the AALCC held in Singapore in March 1988 the Committee decided to continue the work started at its Arusha session (1986). The Committee requested the

Secretariat of the AALCC to compile relevant information on joint ventures and, after such information had been collected, to embark on the preparation of a legal guide on joint ventures. In this context, it was suggested that, while making this study, the Secretariat should also examine the common elements between countertrade and joint ventures.

2. ICC: East-West joint ventures

48. The ICC has published a Guide for Joint Ventures Between Soviet State Enterprises and Western Firms. The book was produced by a task force from the ICC and the USSR Chamber of Commerce and Industry. It is a detailed guide on how to set up joint ventures. It contains informed analysis and commentary on a wide range of financial, legal and management issues, recommendations and a complete compendium of all relevant Soviet decrees and official instruments as of which joint venture partners need to know when negotiating a contract (ICC publication No. 456 ISBN No. 92-842-1070-4).

IV. TRANSNATIONAL CORPORATIONS

A. CTC: draft Code of Conduct on Transnational Corporations

49. Work on the draft Code of Conduct on Transnational Corporations being carried out by the Centre on Transnational Corporations (CTC) is continuing. The Commission on Transnational Corporations at its thirteenth regular session from 7 to 16 April 1987 decided to reconvene the Special Session of the Commission on Transnational Corporations, requested the Chairman of the Special Session together with the Bureau of the Special Session and the Secretary-General to hold intensive consultations with the aim of finalizing a draft Code of Conduct on Transnational Corporations taking into account the existing drafts and requested member States to put forward, if appropriate, in the course of the consultations, concrete formulations aimed at resolving the outstanding issues in the draft Code of Conduct (Official Records of the Economic and Social Council, 1987, Supplement No.1 (E/198/87)).

50. The matter of the Code was taken up again at the fourteenth session of the Commission on Transnational Corporations, 6 to 15 April, 1988. The Commission requested the Centre to prepare a report on the subject for the fifteenth session of the Commission. Agreement has now been reached on most of the Code. Some key issues remain to be resolved, including the question of a reference to international law/international obligations, non-interference in internal political affairs, jurisdiction and dispute settlement, nationalization and compensation and national treatment of transnational corporations (TNC's).

B. CTC: studies

51. In the studies of industry prepared by the Centre on Transnational Corporations (CTC), an overall description and analysis of the role and impact of transnational

corporations in trade in specific natural resources, manufacturing and service sectors is presented. Trends in the participation of transnational corporations in an industry against the background of the structure and characteristics of that industry are examined. In that context, market concentration, competitive structure, intra-firm relationships and the pattern of ownership and control are analysed, as are the investment, technology and marketing practices and policies of host and home countries towards firms in the industry in question. Also examined in the studies are technological changes and their impact on the structure of the industry, on the location of operations, on international competition and trade, on employment and on the future role of transnational corporations in the industry concerned in developing countries.

52. Special studies recently completed include:

- Transnational Corporations and the Electronics Industries of ASEAN Economies (UNCTC Current Studies, Series A, No.5, Sales No. E.87.11.A.13). This study examines the implications of changes in technology and in the global competitive environment and discusses relevant policy issues.
- Technology Acquisition Under Alternative Arrangements with Transnational Corporations: Selected Industrial Case Studies in Thailand (UNCTC Current Studies, Series A, No. 6, Sales No. E.87.11.A.14). This study analyses the modes and mechanisms whereby technology is acquired through various arrangements with TNC's in manufacturing enterprises in Thailand.
- Foreign Direct Investment, the Service Sector and International Banking (UNCTC Current Studies, Series A, No. 7, Sales No. E.87.11.A.15). This report examines recent trends in foreign direct investment and studies the impact that the service sector and transnational banks have on the world economy.
- Financial and Fiscal Aspects of Petroleum Exploitation (UNCTC Advisory Studies, Series B, No. 3, Sales No. E.87.11.A.10); the study analyses alternative options for taxing petroleum revenue and sharing the take from petroleum operations between Governments and companies.
- National Legislation and Regulations Relating to Transnational Corporations Volume IV (Sales No. E.85.11.A.14), Volume V (Sales No. E.86.11.A.3) and Volume VI (Sales No. E.87.11.A.6).
- License Agreements in Developing Countries; an Analysis of Key Provisions (Sales No. E.87.11.A.21). This report reviews license agreements in several countries.
- Transnational Corporations and non-Fuel Primary Commodities in Developing Countries (Sales No. E.87.11.A.17). This study provides Governments of host developing countries with objectively derived findings with which to evaluate the involvement of TNC'S in primary commodities and to develop policy options for dealing with TNC's.

- Transnational Corporations in the Man-made Fibre, Textile and Clothing Industries (Sales No. E.87.11.A.11). This report identifies the patterns of transnational activity and the strategies of TNC's in the textile and clothing industries, the technological impact on developing countries and the strategies and policy implications for developing countries.
- Transnational Corporations in the International Semiconductor Industry (Sales No. E.86.11.A.1). This study describes the structure and evolution of the world semiconductor industry and outlines the role of TNC's in this market. It also discusses the relevance of semiconductor TNC's to developing countries.
- Employment Effects of Multinational Enterprises in Export Processing Zones in the Caribbean: A joint ILO/UNCTC research project, Institute of Social and Economic Research Universities of the West Indies, Trinidad. Working paper No.42 ISBN 92-2-10 5520-5.
- Transnational Corporations in South Africa and Namibia: United Nations Public Hearings Volume II Statements and Submissions (Sales No. E.86.11.A.8). This volume contains the written statements that were submitted to the Panel of Eminent Persons.
- Transnational Corporations in South Africa and Namibia: United Nations Public Hearings Volume IV Policy Instruments and Statements (Sales No. E.86.11.A.9). A number of groups of countries as well as individual countries, their subdivisions, municipalities and other organizations have adopted measures relating to the activities of TNC's in South Africa and Namibia. This volume contains the text of a number of such laws, regulations, rules and codes of conduct and policy statements.
- Analysis of Engineering and Technical Assistance Consultancy Contracts (Sales No. E.86.11.A.4). This publication is divided into three sections. The first section deals with the analysis of engineering consultancy contracts in the industrial sector and technology transfer contracts between TNC's and developing country enterprises. The last section contains an analysis of the legal provisions that are common in the contracts studied in the first two sections.
- Transnational Corporations in World Development Trends and Prospects (Sales No. E.88.11.A.7). The report identifies the major emerging transnationalization trends and analyses the strategic responses of TNC's to the changing economic environment, evaluates the contributions of TNC's to the process of development, and several aspects related to the employment, environment and socio-cultural impact of the activities of TNC's are analysed.
- Foreign Direct Investment in the People's Republic of China (Sales No. E.88.11.A.3)
- Transnational Corporations in Biotechnology (Sales No. E.88.11.A.4).

- Bilateral Investment Treaties (Sales No. E.88.11.A.1).
- Joint Ventures as a Form of International Economic Co-operation (Sales No. E.88.11.A.12).

53. The Centre issued in February 1988 a report on international arrangements and agreements related to transnational corporations (E/C.10/1988/5). The report was prepared in response to the Economic and Social Council decision 1987/137. It reviews the main developments that occurred during the 1980s concerning the negotiation, adoption, implementation and follow-up of regional and multilateral agreements relating to foreign direct investment and transnational corporations, and their impact on the elaboration of standards of conduct and treatment for transnational corporations and the treatment of those corporations by host countries. The report examines the issues under the following general headings: principles of treatment of transnational corporations by governments; entry, ownership and financing; employment and labour; transfer of technology; protection of consumers and the environment; jurisdiction and conflicting requirements; settlement of investment disputes and investment insurance; and institutional arrangements for follow-up.

V. TRANSFER OF TECHNOLOGY

A. UNCTAD: proposed international code of conduct on the transfer of technology

54. UNCTAD has continued in its work to negotiate and adopt an international code of conduct on the transfer of technology mandated by the General Assembly by resolution 32/188 of 19 December 1977. The mandate was renewed in December 1986 and the Secretary-General of UNCTAD was invited to report to the General Assembly at its forty-second session on the progress made in the consultations in order that it would take appropriate action on the future of the negotiations (General Assembly resolution 41/166 of 5 December 1986). These consultations have not yet resulted in a concrete outcome which could serve as generally acceptable basis for reconvening the conference. Thus the Secretary-General of UNCTAD, in his report to the forty-third session of the General Assembly (TD/CODE TOT/53) affirmed his intention to pursue these consultations and report again to the General Assembly at its forty-fourth session. In its decision 43/439 of 20 December 1988, the General Assembly took note of the report of the Secretary-General of UNCTAD on an international code of conduct on the transfer of technology (A/43/763)

55. Consultations carried out in 1986 and 1987 with regional groups and interested Governments confirmed the existing divergencies of approaches in the areas of restrictive practices and applicable law. The text for chapter 4 negotiated during the last period of the Conference is no longer generally accepted as a valid approach to the regulation of restrictive practices, particularly by those countries seeking to see a clear recognition of competition as the governing test for the control of restrictive practices in transfer-of-technology transactions.

56. New factors have made a compromise on the issues outstanding more difficult to obtain. Technological changes and innovation in general are being universally recognized as fundamental to economic growth and development and as key factors in international trade and in competitiveness among nations. With that objective in mind and with a view to encouraging technological progress, antitrust legislation dealing with restrictions on technology licensing is being liberalized in key developed countries. Another significant development is the importance being attached to the reinforcement of the legal protection of technological assets particularly in high technology. Related to that factor is the importance attached by a number of countries to trade-related aspects of intellectual property protection.

57. UNCTAD recently published two reports in the area of technology transfer. These are:

- "Recent Trends in International Technology Flows and their Implications" (Document TD/B/C.6/45). This report reviews the main features of the pattern of international flows of technology in the past 25 years and analyses in great detail the incidence of the slow-down in technology flows during the 1980s in different types of developing country economies. It also discusses possible approaches for restoring the flow of technology to developing countries, as well as some of the prerequisites for more effective utilization of technology flows.
- "Technology-Related Legislation in a Changing Economic and Technological Environment" (Document TD/B/C.6/146). This report provides a review of the evolution in policies and legislation affecting the creation and use of, and access to, technology (such as those dealing with innovation, industrial property protection, technology transfer and competition) in the light of rapid economic and technological change. The report is of a more policy-oriented type: issues which might require the future attention of policy-makers are identified and discussed. An annex to the report provides tabulations of recent major policy and legal developments world-wide affecting the creation, protection and transfer of technology.

B. UNCTAD: industrial property system and transfer of technology to developing countries

58. UNCTAD continues to examine the economic, commercial and development aspects of the industrial property system, patents and trade marks and to contribute to the current revision of the Paris Convention for the Protection of Industrial Property. At its fifth session in December 1984 the UNCTAD Committee on Transfer of Technology, by resolution 28(V), requested the Secretary-General of UNCTAD to convene a meeting of governmental experts to examine the economic, commercial and development aspects of industrial property in the transfer of technology to developing countries and to report their findings and recommendations to the sixth session of the Committee. At its sixth session held in October to November 1986, the Committee, by its resolution 31(VI), decided

to convene another meeting of the group of governmental experts as appropriate.

59. The Secretariat has in 1987 and 1988 issued several studies on patents and trade marks including the following:

- "The International Patent System: the Revision of the Paris Convention for the Protection of Industrial Property" (TD/B/C.6/AC.3/2).
- "The Role of the Patent System in the Transfer of Technology to Developing Countries" (TD/B/C.6/AC.3/3 Rev.1).
- "Review of the Recent Trends in Patents in Developing Countries" (TD/B/C.6/AC.5/3).
- "Trade Marks and Generic Names of Pharmaceuticals and Consumer Protection" (TD/B/C.6/AC.5/4).

VI. INDUSTRIAL AND INTELLECTUAL PROPERTY LAW

A. WIPO: intellectual property activities; counterfeiting and piracy

60. During the period 1986 to 1988 the International Bureau of the World Intellectual Property Organization (WIPO) has been engaged in reviewing treaties administered by WIPO to take account of changing circumstances. If they or their implementing regulations seem to be in need of revision, they are submitted, after adequate preparation, to those intergovernmental bodies which are competent to decide on revisions. The Paris Convention is in a process of revision, the seventh since its conclusion more than a hundred years ago in 1883 (WIPO pub. No. 401 (E) (1988)).

61. WIPO is observing all changes in international industrial, trade and cultural relations which seem to call for adaptations not only in the treaties administered by WIPO but also in national laws, regional arrangements and contractual practices in the field of intellectual property. Thus, in the field of industrial property, during the years 1987 and 1988, WIPO was engaged, for example, in considering the possibilities of uniform provisions for national patent laws, in particular concerning the effects on the patentability of an invention of a public disclosure of the invention by the inventor prior to filing a patent application. It was also engaged in advocating laws and treaty provisions which would give more efficient protection to geographical indications (indications of source, appellations of origin) and against the counterfeiting of goods, in recommending provisions for national law and the conclusion of a possible international treaty concerning the protection of the intellectual creators of microchips or integrated circuits, and in studying means of protection of inventions in the field of technology, including genetic engineering (WIPO pub. No. 401 (E) (1988)).

62. WIPO and the United Nations Educational, Scientific and Cultural Organization (UNESCO) are jointly

engaged in a study designed to recommend solutions for national laws for the protection of computer programs, for works created by employee-authors and for expressions of folklore, in considering possibilities of a more efficient protection of authors and performers in connection with cable television, against piratical editions (of books, phonograms, videotapes) and against an excessive measure of unauthorized reproduction. They are also engaged in studying the copyright law aspects of the rental of phonograms and videotapes, of direct broadcasting satellites and of electronic libraries, and the possibility of establishing an international register of individual works. When the work is completed WIPO expects to draft model provisions for national copyright legislation based on a consistent and dynamic interpretation of the Berne Convention (WIPO pub. No. 401 (E) (1988)).

63. WIPO has continued to hold seminars in developing countries with the objective of assisting those countries in the establishment or modernization of their industrial property systems, in the areas of specialist training, creating or improving domestic legislation, creating or improving government institutions, stimulating domestic inventive activity, stimulating the acquisition of foreign patented technology, creating a corps of practitioners, and exploiting technological information contained in patent documents. A number of training courses and seminars on the development of the effective use of the industrial property system for the benefit of inventors, the industry and the commerce of developing countries were organized by WIPO.

64. WIPO is engaged in work on counterfeiting and piracy. Pursuant to a decision taken by the General Assembly of WIPO at its ninth session in September 1987 (paragraphs 88(ii) and 140 of document AB/XVIII/14), the Director General of WIPO convened the Committee of Experts on Measures Against Counterfeiting and Piracy from 25 to 28 April, 1988. Discussions at the meeting were based on two documents, entitled "Model Provisions for National Law" (C and P/CE/2) and "Provisions in the Paris, Berne and Neighbouring Rights Conventions" (C and P/CE/3). Work in this area is continuing (C and P/CE/4).

B. UNIDROIT: international protection of cultural property

65. At the request of UNESCO, UNIDROIT prepared in February 1986 a study on the international protection of cultural property in the light of the draft UNIDROIT Convention Providing a Uniform Law on the Acquisition in Good Faith of Corporeal Movables (draft LUAB 1974) and of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNIDROIT 1986, Study LXX - Doc. 1). The study concentrated on the rules of private law affecting the transfer of title where there has been acquisition in good faith of cultural property from a person other than the one entitled to dispose of it, and was submitted to numerous experts for their opinion. It was revealed that the complexity of the international protection of cultural property does not permit

any one of its different aspects to be dealt with in isolation. Reference is necessary to the rules of law governing the transfer of movable property, which comprises cultural property, in a selected number of legal systems. What is of relevance is not only the diversity of the rules but also the notion of cultural property which has a different value and is defined differently in various countries, the concept of cultural property applicable in all those States which are Parties to the 1970 UNESCO Convention having been formulated for reasons of convenience.

66. Pursuant to decisions by UNESCO and UNIDROIT, another study on the international protection of cultural property has been completed and was submitted to the 67th session of the Governing Council of UNIDROIT held from 14 to 17 June 1988 (UNIDROIT Report 1988-CD.67 Doc.8). The Governing Council decided to constitute a Study Group on the international protection of cultural property and entrusted it with the task of considering the various aspects of the subject. At its first meeting from 12 to 15 December 1988 the Group concentrated on the problems associated with the theft of cultural objects and with the illegal export of such objects. On the basis of the Group's discussion (Study LXX-Doc.10) the UNIDROIT Secretariat has prepared the text of a preliminary draft Convention on the restitution and return of cultural objects (Study LXX-Doc. 11). This text will be considered at the Group's next meeting from 13 to 17 April 1989 (UNIDROIT 1989 Report 1988-CD 68 Doc.2).

VII. INTERNATIONAL PAYMENTS

A. UNCITRAL: Convention on International Bills of Exchange and International Promissory Notes

67. A revised version of the draft Convention on International Bills of Exchange and International Promissory Notes (A/CN.9/274) was considered by the Commission at its nineteenth session (1986). It was decided that the draft Convention as finalized at that session should be transmitted to States and interested international organizations for comment and would be reviewed by the Working Group on International Negotiable Instruments prior to the twentieth session of the Commission. The comments received from Governments and international organizations are contained in documents A/CN.9/WG.IV/WP.32 and Add. 1-10, and the report of the Working Group in document A/CN.9/288. The Commission at its twentieth session (1987) approved a draft Convention on International Bills of Exchange and International Promissory Notes and transmitted it to the General Assembly with a view to its adoption.

68. The General Assembly (resolution 42/153 of 7 December 1987) 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 that end, within the framework of the Sixth Committee of the General Assembly, a Working Group that would meet at the beginning of the session in

order to consider the observations and proposals made by States. The Sixth Committee of the General Assembly on 7 October 1988 approved the draft Convention and the General Assembly on 9 December 1988 adopted the Convention by resolution 43/165 and opened it for signature until 30 June 1990.

B. Guarantees and stand-by letters of credit

1. ICC: guarantees

69. A Working Party set up by the ICC is drafting rules to cover all forms of guarantees. At the first two meetings the Working Party worked on the basis of earlier ICC rules on this subject (Publication No. 325) and on a Code of Practice presented by the British Bankers Association (BBA) on Demand Guarantees and Bonds. The draft under preparation is to cover all types of guarantees issued by banks, financial institutions and insurers. It is aimed at the needs of principals, beneficiaries and issuing institutions alike.

2. UNCITRAL: stand-by letters of credit and guarantees

70. At its twenty-first session (1988) 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 the 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. The Commission agreed with the report that a greater degree of certainty and uniformity was desirable. Work was envisaged in two stages, the first relating to contractual rules or model terms and the second pertaining to statutory law. The Commission welcomed the work undertaken by the International Chamber of Commerce (ICC) in preparing draft Uniform Rules on Guarantees. The Commission entrusted its Working Group on International Contract Practices 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.

71. The Working Group met from 21 to 30 November 1988 at Vienna (A/CN.9/316). The Working Group engaged in a review of the ICC draft Uniform Rules with the understanding that the preparation of the Rules was the responsibility of ICC. The Working Group also examined the desirability or feasibility of the preparation of a uniform law. The Working Group agreed that it was desirable and feasible to undertake work towards greater uniformity at the statutory level and agreed to recommend to the Commission to initiate the preparation of a uniform law,

whether in the form of a model law or in the form of a convention.

C. Electronic funds transfers

1. UNCITRAL: Legal Guide on Electronic Funds Transfers

72. The Commission, at its fifteenth session in 1982, decided to prepare a legal guide on problems arising out of electronic funds transfers and requested the Secretariat to undertake the task. The Secretariat prepared the Guide in co-operation with the UNCITRAL Study Group on International Payments. A completed guide was presented to the nineteenth session of the Commission in 1986. At that session the Commission adopted the Guide and authorized the Secretariat to publish the Legal Guide as a product of the work of the Secretariat. The Guide is oriented towards providing guidance for legislators or lawyers preparing the rules governing particular systems for such transfers. It was published in 1987 (United Nations publication, Sales No. E.87.V.9).

2. UNCITRAL: Model Law on International Credit Transfers

73. 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 Negotiable Instruments which it renamed the Working Group on International Payments. The Working Group commenced its work at its sixteenth session from 2 to 13 November 1987 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). The Group requested the Secretariat to prepare draft provisions based on the discussions during its sixteenth session for consideration at its seventeenth session (A/CN.9/297).

74. At its seventeenth session, 5 to 15 July 1988, the Working Group considered draft provisions prepared by the Secretariat as submitted in document A/CN.9/WG.IV/WP.37. At the close of the discussions the Working Group requested the Secretariat to prepare a revised draft of the Model Rules taking into account the considerations and the decisions of the Group (A/CN.9/317, para. 10). The Working Group held its eighteenth session from 5 to 16 December 1988 and considered the revised draft of the rules. The report of the session (A/CN.9/318) is before the Commission at the current session.

3. ICC: interbank fund transfers

75. In 1986, a majority of ICC National Committees did not approve a first set of draft ICC Rules aimed at clarifying compensation practice connected with international interbank fund transfers. It became apparent that the real need was to focus rather on interbank transfer instructions; rules to clarify procedures could be most useful for developing countries which had no transfer system of their

own. A draft was prepared at the end of 1987 setting out instructions for sending valid transfer messages covering the liabilities and responsibilities of individual banks involved in a transfer, and outlining compensation procedures for the incorrect execution of funds transfers messages. This draft was circulated to National Committees in early 1988 (ICC Annual Report 1987).

VIII. INTERNATIONAL TRANSPORT

A. Transport by sea and related matters

1. UNCTAD: United Nations Convention on Conditions for Registration of Ships

76. The United Nations Conference on Conditions for Registration of Ships on 8 February 1986 adopted an international agreement covering the conditions under which vessels should be accepted on national shipping registers. The Final Act of the Conference adopting the Convention was signed by representatives of 86 States ("Final Act of the United Nations Conference on Conditions for Registration of Ships", TD/RS/CONF/22). The Convention was opened for signature from 1 May 1986 to 30 April 1987. The Convention will enter into force when it has been ratified by 40 States representing 25 per cent of relevant gross registered tonnage. The Convention introduces new standards of responsibility and accountability for the world shipping industry. The Convention has not yet received the required number of ratifications to enter into force.

2. UNCTAD: Guidelines on Convention on a Code of Conduct for Liner Conferences

77. In accordance with provisions of the Convention on a Code of Conduct for Liner Conferences (TC/CODE/13/Add.1, United Nations publication, Sales No. 75.II.D.12) which entered into force on 6 October 1983, a Review Conference was held from 31 October to 18 November 1988 (UNCTAD Bulletin No. 244-1988).

78. The Code deals with, *inter alia*, the relationships between member lines of conferences and principles for the participation by member lines in the trade carried by conferences. The Code also contains provisions dealing with the establishment of pools and other types of trade-sharing arrangements in conferences. Furthermore, it regulates freight rate increases, promotional freight rates, surcharges and currency adjustment factors.

79. UNCTAD at the end of 1986 published Guidelines on the Clarification, Interpretation, and Application of the Provisions of the Convention on a Code of Conduct for Liner Conferences. The principal objective of the guidelines is to assist interested parties, including Governments, shippers organizations, and shipping lines, particularly of developing countries, in understanding and applying the provisions of the Code (UNCTAD/ST/SHIP/1). The report has been prepared by the UNCTAD Secretariat in co-operation with the Registrar appointed under the Code. It

is hoped that the material will not only fulfil the needs of parties but would be used as material for training seminars on the application of the Code which may be conducted in developing countries (UNCTAD/ST/SHIP/1).

3. UNCTAD/UNCITRAL: Study on the economic and commercial implications of the entry into force of the Hamburg Rules and the Multimodal Transport Convention

80. In resolution 55(XI), paragraph 8, the Committee on Shipping requested the UNCTAD Secretariat to prepare a study on the economic and commercial implications of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules) and the United Nations Convention on International Multimodal Transport of Goods (the MT Convention), 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. In resolution 60 (XII), section I, paragraph 3, the Committee on Shipping further requested the UNCTAD Secretariat to expedite the work and to submit the results to the Committee at its fourteenth session. In 1987 the UNCTAD Secretariat, in collaboration with the UNCITRAL Secretariat, prepared part one of the booklet in question (TD/B/C.4/315 (Part I)). When part two is completed the two documents will be merged and form one booklet. Part one contains a brief historical introduction to the two Conventions, the study on the economic and commercial implications of the entry into force of the Hamburg Rules; and an article by article discussion of the Hamburg Rules.

4. UNCTAD/IMO/CMI: maritime liens and mortgages

81. The UNCTAD Working Group on International Shipping Legislation at its eleventh session in October 1985 proposed that the Trade and Development Board convene, jointly with IMO, an intergovernmental group of experts to examine the subject of maritime liens and mortgages.

82. Consultations between UNCTAD and IMO took place in order to decide how best the two organizations could deal with the various aspects of the subject-matter without duplication. It was agreed that IMO would undertake studies on those aspects of maritime mortgages that are essentially ship related, such as the entry and the cancellation of mortgages on national registers. IMO would also carry out studies on maritime liens, particularly in respect of existing practices, including the need and desirability of maintaining the status for claims currently enjoying such status, the ranking of different maritime liens *inter se* and the possibility of extending the lien status to other types of claims. After these consultations, a joint governmental group of experts was established by UNCTAD and IMO entrusted with the task of elaborating a new instrument by taking into account the texts of the 1926 and 1967 Conventions on Maritime Liens and Mortgages and also CMI's draft Convention on the same subject-matter.

83. The Intergovernmental Group of experts at its first session (December 1986) agreed on organizational arrangements for its work and elucidated some of the fundamental issues which would have to be analysed in the review of the existing régime. At its second session in May 1987 the Group proceeded to an examination of a number of issues to be regulated in the new instrument. At its third session from 30 November to 11 December 1987 the Group examined the draft articles for a possible convention on maritime liens and mortgages which had been prepared by the Chairman of the Group of Experts with the assistance of the Secretariats of UNCTAD and IMO (TD/B/C.4/AC.8/10; IMO LEG/MLM/10).

84. The Group of Experts held its fourth session in May 1988 (TD/B/C.4/AC.8/15). It was decided at that session that the fifth session would be devoted to the completion of the work on the preparation of draft provisions on maritime liens and mortgages. It would then determine further work on other aspects of the terms of reference, which include the review of the maritime liens and mortgages Conventions and related enforcement procedures, such as arrest; the preparation of model laws or guidelines on maritime liens and mortgages and related enforcement procedures; and the feasibility of an international registry of maritime liens and mortgages. The fifth session will have before it a report prepared by the Chairman and the Secretariats of IMO and UNCTAD in response to the request made by the Joint Intergovernmental Group during its fourth session. The UNCTAD Committee on Shipping at its thirteenth session in March 1988 urged the joint intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects to complete the work during 1989 and to present its final report for consideration by the Committee on Shipping at its fourteenth session (TD/B/C.4/AC.8/14).

5. IMO/UNCTAD: charter parties

85. The UNCTAD Committee on Shipping at its thirteenth session in March 1988 (resolution 61(XIII) Part III) approved the convening of the twelfth session of the Working Group on International Shipping Legislation (to be scheduled in 1989) to take up the subject of charter parties (TD/B/C.4/AC.8/14).

6. UNCTAD: marine insurance

86. The UNCTAD Working Group on International Shipping Legislation concluded the preparation of Model Clauses on Marine Hull and Cargo Insurance commenced in June 1979. The final texts of the model clauses prepared by the Rapporteur of the Working Group on the basis of amendments proposed by various delegations and in consultation with insurance experts (TD/B/C.4/ISL/50) were circulated to the member States of UNCTAD, drawing their attention to the amendments by the Rapporteur and inviting them to provide comments thereon. The Committee on Shipping at its twelfth session in November 1986 recommended to the Trade and Development Board to endorse the UNCTAD non-mandatory Model Clauses on Marine Hull and Cargo Insurance as proposed by the

Rapporteur (UNCTAD/SHIP/608) and to instruct the UNCTAD Secretariat to circulate this version to the commercial parties concerned. The Trade and Development Board endorsed the model clauses and instructed the Secretariat to promote their use with the commercial parties concerned (TD/B/1123-TD/B/C.4/307).

7. UNCTAD: maritime fraud

87. The UNCTAD Committee on Shipping resolved in 1987 to establish a Maritime Fraud Prevention Exchange (MFPE). It was founded by the Baltic and International Maritime Council (BIMCO), International Chamber of Commerce (ICC), and Lloyd's of London Press Ltd. The operating companies—i.e. companies which provide replies to individual enquiries—include: BIMCO Services, the International Maritime Bureau (IMB) and Lloyd's Maritime Information Services Ltd. (LMIS). The operational activities of the MFPE are conducted by its Secretariat, which acts as a focal point for information requests by clearing and transmitting enquiries to the appropriate operating company, which then deals directly with the enquirer so as to provide the most expeditious service. It will further engage in promotional activities as defined by the Board of Management. It provides the Board of Management with periodic reports.

88. Through the operating companies of the MFPE, the following services are available: (a) information on standing and background of companies or individuals; (b) information on cases of confirmed or suspected fraud and (c) requests for investigations and information on ship characteristics, ship movements, ownership, details and casualties. It is intended to be self financing. The MFPE, is receiving interim financing until its viability is established. The MFPE started operations on 1 March 1988 (UNCTAD Bulletin No. 239—January 1988). At its 13th session the Committee on Shipping recommended to Governments that they urge their commercial parties to make maximum use of the services provided by the MFPE as a means of combating maritime fraud and requested the UNCTAD Secretariat to promote MPFE (UNCTAD Bulletin No. 239—January 1988).

8. UNCTAD: comparative study of standards applied to shipping agents

89. The second session of the *ad hoc* Intergovernmental Group to Consider Means of Combating all Aspects of Maritime Fraud, Including Piracy, requested the Trade and Development Board to instruct the UNCTAD Secretariat to make, in collaboration with the commercial parties concerned, a comparative study of the different minimum standards which are applied, at the national or international level, by professional associations of shipping agents; to consider what scope exists for the development of common guidelines for non-mandatory minimum standards for all those involved in the work of shipping agents and to prepare a draft set of standards, including financial standards if appropriate, in the light of the scope, if any, which may be found to exist. The UNCTAD Secretariat has submitted a report on the matter (UNCTAD Bulletin No. 239—January 1988).

9. UNCTAD: container standards for international multimodal transport

90. The UNCTAD Committee on Shipping at its eleventh session held from 19 to 30 November 1984 requested the UNCTAD Secretary-General to convene a meeting of a Group of Experts to develop, and recommend to the Committee at its twelfth session, model rules for multimodal container tariffs which could be used in establishing the terms and conditions of multimodal transport of containers. The first meeting of this Expert Group was convened in Geneva from 13 to 17 January 1986. The Group examined aspects of container tariff rules and agreed on a number of definitions and developed some model rules with global application for multimodal container tariffs.

91. The Group also designed some model rules to be applicable to both the segmented systems and integrated systems of multimodal transport currently being used by commercial parties. The Expert Group, at its second meeting held in Geneva from 1 to 5 December 1986, compared the model rules formulated by it at its first meeting with the existing point-to-point multimodal transport tariff rules as well as existing rules which were not covered at its first meeting. The final report on the development and recommendation of model rules for multimodal container tariffs was submitted to the Committee on Shipping at its thirteenth session in 1988.

10. UNCTAD: co-operation among developing countries in shipping, ports and multimodal transport

92. Pursuant to UNCTAD-VI resolution 144 and to resolution 53(XI) of the Committee on Shipping, the UNCTAD Secretary-General was invited to convene a meeting of an *ad hoc* intergovernmental group of senior officers to give detailed consideration to the draft programme of action on cooperation among developing countries in shipping, ports and multimodal transport (TD/B/C.4/273). The first meeting of the Intergovernmental Group was convened in Geneva from 21 to 25 September 1987. The main document prepared by the Secretariat for the meeting was "co-operation among developing countries in shipping, ports and multimodal transport" (TD/B/C.4/AC.9/2). The meeting adopted a resolution by consensus which identified eight sectors offering scope for increased co-operation among developing countries in the general field of shipping, ports and multimodal transport.

93. Among the measures that the resolution invited Governments to take were the establishment of joint marketing of shipping services and optimum utilization of existing shipping space through joint services, as well as the formation of shipowners' associations in developing countries to protect and promote their interests. Still another possibility cited was the establishment of commodity groups and shippers' councils where such bodies did not exist. In the realm of ports, port authorities were urged to cooperate with each other. Trans-shipment services in ports should be furthered, related feeder services should be developed and procedures simplified. The

exchange of information on maritime fraud through the recently established UNCTAD Maritime Fraud Prevention Exchange could also be promoted. Finally, the establishment of regional or sub-regional associations of multimodal operators should be facilitated and maritime training institutions should be upgraded on a regional or subregional basis.

94. At the thirteenth session from 14 to 22 March 1988 the Shipping Committee decided to request the Secretary-General of UNCTAD to convene in 1989 a group of experts to propose an appropriate framework and modalities for co-operation between developing countries in the area of shipping, ports and multimodal transport. This would be a follow-up to an intergovernmental meeting on this subject held in 1987 (UNCTAD Bulletin No. 242—April 1988).

11. IMO: revision of the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974

95. The IMO Council, at its fourteenth extraordinary session in November 1987, requested the Legal Committee to give priority to the amendment of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 with a view to the adoption of increased limitation amounts and the inclusion of an accelerated procedure for revising those amounts. The IMO Legal Committee held its fifty-ninth session from 24 to 29 April 1988. At that meeting the Committee began consideration of the revision of the Athens Convention. The Committee decided to limit the revision of the Convention to that of an increase of the limitation amounts and to the introduction of a rapid amendment procedure for the limitation amounts (IMO LEG 59/II). The Committee concluded consideration of the draft articles for the protocol to the Convention. The sixtieth session of the Committee examined the draft protocol (LEG 60/4) with a view to finalizing it for a diplomatic conference. The Committee's text is contained in document LEG 60/12 annex I.

12. IMO: liability for damage caused by the maritime carriage of hazardous and noxious substances

96. The IMO Legal Committee at its fifty-ninth session resumed consideration of the question of liability for damage caused by the maritime carriage of hazardous and noxious substances. The Committee is examining three alternatives: (a) exclusive shipowner liability with a general increase of global limitation amounts in the 1976 Convention on the Limitation of Liability for Maritime Claims (LLMC), (b) exclusive shipowner liability with a supplementary cover under LLMC for hazardous and noxious substances cases, and (c) shipowner liability limited under LLMC supplemented by a fund financed by cargo interests. The Committee used, as the basis for its discussions, document LEG. 59/5/3, submitted by the delegations of Australia, Canada, Cyprus, Denmark, Egypt, Federal Republic of Germany,

Finland, German Democratic Republic, Mauritius, Netherlands, Norway, Poland, Sweden, United Kingdom and United States. Reference was also made to document LEG 59/5, submitted by the Secretariat, document LEG 59/5/1, submitted by the United States, and document LEG 59/5/2, submitted by the International Association of Independent Tanker Owners (INTERTANKO) (IMO LEG/59/II).

13. *UNCITRAL: draft Convention on Liability of Operators of Transport Terminals in International Trade*

97. 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, at its seventeenth session in 1984, assigned to its Working Group on International Contract Practices the task of preparing uniform legal rules on that subject. The Working Group completed at its eleventh session 1988 its preparation of the draft Convention on the Liability of Operators of Transport Terminals in International Trade and submitted its report (A/CN.9/298) to the twenty-first session of the Commission. The draft Convention was then circulated to Governments and interested international organizations for comments. The Commission will consider at its twenty-second session the draft Convention with a view to its adoption.

14. *CMEA: merchant marine*

98. The CMEA has prepared an agreement on the standardization of individual legal rules on the merchant marine. The agreement has been opened for signature to interested parties.

15. *IMO: Convention on Facilitation of International Maritime Traffic*

99. Fifty-seven States have become parties to the Convention on Facilitation of International Maritime Traffic. At its eighteenth session the Facilitation Committee of IMO considered ways and means to encourage acceptance of the Convention. The Committee noted with appreciation information provided on the "African network of seminars on the facilitation of international maritime traffic" a project under the UNDP's fourth cycle designed to encourage acceptance of the Convention (FAL 18/5/1).

100. At its eighteenth session from 12 to 16 December 1988 the Facilitation Committee requested the Secretariat to explore the possibility of harmonized interpretation and implementation of the Convention on Facilitation of International Maritime Traffic, 1965. It has also requested the Secretariat to continue its study on the possible redrafting of the Standards and Recommended Practices where more than six differences had been received so as to remove any ambiguity and to take into account concerns of member States (FAL 18/WP.8).

16. *IMO: Convention on Salvage*

101. IMO will be holding a diplomatic Conference from 17 to 20 April 1989 to consider the adoption of the Convention on Salvage (LEG 60/12).

17. *IMO: Convention on the Prevention of Maritime Pollution by Dumping of Wastes and other Matter*

102. The eleventh consultative meeting of contracting parties to the Convention on the Prevention of Maritime Pollution by Dumping of Wastes and other Matter, 1972, convened in accordance with article XIV(3)(a) of the Convention, was held from 3 to 7 October 1988 (IMO LDC.11/14).

18. *CMI: sea waybills*

103. A sub-committee of the International Maritime Committee (CMI) has been preparing draft uniform rules for incorporation into sea waybills. The final meeting of the sub-committee was held in London on 13 October 1988. A draft set of uniform rules is to be prepared by an *ad hoc* drafting group based on the discussions and decisions taken at that meeting. The draft uniform rules will be presented to the plenary meeting of the CMI in 1990.

19. *IMO: suppression of unlawful acts against the safety of navigation*

104. An international Conference on the Suppression of Unlawful Acts against the Safety of Maritime Navigation was held from 1 to 10 March 1988. The Conference adopted the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf. The Convention and the Protocol were prepared by the *ad hoc* Preparatory Committee on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (LEG 59/II). Both the Convention and the Protocol are open for signature.

B. Transport overland and related issues

1. *UIC: Use of CIM Consignment Note as customs document*

105. The 4/C Sub-Committee of the International Union of Railways (UIC) has prepared a proposal for the use of the International Consignment Note (CIM) as an international customs document for goods, on which duty is payable, carried by rail under customs seal. This proposal has been sent to the International Rail Transport Committee (CIT) and the ECE Group of Experts on Customs Questions affecting Transport for detailed consideration within their sphere of competence (UIC 87-041).

2. OTIF: Convention concerning international transport by rail (COTIF)

106. The Member States of OTIF are called upon to decide on a possible revision of COTIF and its annexes that entered into force on 1 May 1985. Amongst the issues identified for possible modification are the following: (a) introduction of English as third official language, which could lead to adherence by Southeast Asian States, and certain budgetary and financial matters of the Intergovernmental Organization for International Rail Transport (OTIF); (b) review of the Uniform Rules concerning the international rail transport of passengers and luggage (CCIV), Appendix A, in the light of future developments in the transport of accompanied motor-vehicles; (c) approximation of the Uniform Rules Concerning the International Rail Transport of Goods (CIM), Appendix B, with the Agreement concerning the International Carriage of Goods by Rail (1966; SMGS); (d) review of time-periods for publication of tariffs and for delivery of goods, liability questions and certain other issues governed by CIM.

3. UNIDROIT: civil liability for damage caused during carriage of dangerous goods by road, rail and inland navigation vessels

107. The UNIDROIT Committee of Government Experts has continued its work on the preparation of uniform rules relating to liability and compensation for damages caused during the carriage over land of hazardous substances begun in 1981. It has elaborated a draft Convention which is still under discussion.

108. At its 65th session held in April 1986, the Governing Council authorized the UNIDROIT Secretariat to respond favourably to any request which might be forthcoming from the United Nations Economic Commission for Europe for transmission of the draft articles for a convention on civil liability for damage caused during carriage of dangerous goods by road, rail and inland navigation vessels. The Committee of Government Experts held its seventh and final session from 21 to 29 May 1986, on which occasion it completed its last reading of the draft articles. The text of those draft articles, an explanatory report thereon drawn up by the UNIDROIT Secretariat, an alternative draft submitted by the Swiss delegation in connection with the liability and compulsory insurance provisions and certain proposals and considerations relating to the list of substances to which the future Convention should apply are contained in Study LV—Doc. 80.

109. Following an exchange of letters between the Executive Secretary of the Economic Commission for Europe and the Secretary-General of UNIDROIT, the text of the draft articles was transmitted to the Economic Commission for Europe. At its forty-eighth session, held in February 1987, the Inland Transport Committee of the Economic Commission for Europe decided to entrust to an *ad hoc* meeting the task of studying questions concerning the development of an international régime of civil liability for damage caused during carriage of dangerous goods by road, rail and inland navigation vessels on the basis

both of the UNIDROIT text and of other possible approaches (CD.67—Doc.13).

110. That meeting was held from 6 to 10 July 1987, on which occasion the *ad hoc* committee proceeded to a general discussion of the problems at issue. At its second meeting, held from 14 to 18 December 1987, the committee embarked upon detailed consideration of the texts submitted to it by UNIDROIT in the light of the observations of Governments and of the interested organizations. A revised text of the UNIDROIT draft was submitted to the *ad hoc* committee at its third session, which was held from 4 to 8 July 1988 (CD.67—Doc.13).

IX. INTERNATIONAL COMMERCIAL ARBITRATION

A. AALCC: regional arbitration centres

111. The Asian-African Legal Consultative Committee (AALCC) in 1977 adopted a scheme for the establishment of regional arbitration centres. In 1978 the Kuala Lumpur Centre and in 1979 the Cairo Centre were established. A third centre in Lagos, Nigeria was inaugurated in March 1989. All three centres conduct their arbitrations under the UNCITRAL Arbitration Rules, as supplemented by internal or administrative rules of the centres.

B. CMEA: arbitration of civil law disputes

112. The Council for Mutual Economic Assistance (CMEA) at the end of 1986 completed an evaluation report on the application of the Convention on the Settlement by Arbitration of Civil Law Disputes arising from Economic, Scientific and Technical Co-operation, signed on 26 May 1972, and on the Uniform Rules for the Arbitration Courts of the Chambers of Commerce of CMEA member States, approved in 1974. Those rules have been revised, and a study was carried out in 1987-1988 on the usefulness of formulating a uniform law on arbitration for foreign trade and on the enforcement of foreign arbitral awards. The study took account of the UNCITRAL Model Law on International Commercial Arbitration.

C. ICC: interim and partial awards; dissenting opinions

113. The Working Party on Partial and Interim Awards and Dissenting Opinions established by the ICC Commission on International Arbitration in 1985 is continuing its studies on the use of interim and partial awards in international commercial arbitration with particular emphasis on the practice of the ICC Court of Arbitration and ICC arbitrators. The Working Party has discussed several reports. The second of such reports was discussed at the Commission's meeting of April 21, 1988. At this meeting the Committee determined that in the next phase of its work it would concentrate on three specific practical aspects: (1) which decisions of arbitrators should be called

"awards"; (2) what problems, if any, are created either for the parties or for the Court of Arbitration by the increasing tendency of arbitrators in ICC cases to issue interim or partial awards; and (3) what steps should be taken to harmonize the present divergent practices of arbitrators in ICC cases in classifying their decisions (ICC Document No. 420/305). The Working Party is also continuing its work on dissenting and separate opinions. At its 21 April meeting the Commission discussed the fourth report on the subject by the Working Party (ICC Document No. 420/304).

D. ICC: multiparty arbitration

114. An ICC Working Party has continued to examine the question of multiparty arbitration. The Working Party is considering the issues raised by multiparty arbitration within the context of the 1958 New York Convention, including the possibility that those issues arise only to the extent that no multiparty arbitration agreement exists, and the feasibility of devising new rules for handling the financial aspects of cases with a multiparty ingredient. In its studies the Working Party stresses the importance of avoiding the paralysing effects resulting from the multiplicity of parties inherent to multiparty arbitration. The Commission will hold a seminar from 29 to 30 May 1989 to be hosted by the Swedish National Committee of the ICC in Stockholm, on the subject of multiparty arbitration. After the seminar the Working Party will decide on any future programme (ICC Document No. 420/308).

E. ICC: arbitral referee

115. The Commission on International Arbitration in 1986 adopted a text of Rules on Arbitral Referee Procedure (ICC Document No. 410/289). A Drafting Group has been working on modifications to the 1986 text. An amended text was presented to the ICC Commission at its meeting on 26 October 1988. The amended Arbitral Referee Rules were adopted by the Commission, with the drafting group being authorized to make minor drafting changes and to bring the English and French texts into conformity. The Rules will be printed and enter into effect on a date to be fixed following their adoption by the Executive Board of the ICC and their being notified to the ICC Council. The entry into force would most likely be during the latter half of 1989 (ICC Document No. 420/308). The modifications are designed to enable parties which have so agreed to have rapid recourse to a third party to make an order designed to meet an urgent problem at hand including the power to order the preservation or recording of evidence.

F. ICC: amendments to conciliation and arbitration rules

116. In 1987, the ICC amended its Arbitration Rules, as a follow-up to the 1986 modifications in the Rules and practice related to the costs and payment of arbitration. The amendments, in force since 1 January 1988, affect

provisions related to selection of arbitrators by the ICC Court, the challenge to arbitrators, and the replacement of arbitrators by the Court and rules relating to the responsibility of arbitrators to disclose matters possibly affecting their independence *vis-à-vis* the parties (ICC Annual Report 1987). On 10 February 1987 the Executive Board of ICC adopted an amended version of the Conciliation Rules (ICC Document No. 420/291).

G. ICCA: Publications and Congresses

117. The International Council for Commercial Arbitration (ICCA) continues to publish the *Yearbook Commercial Arbitration*. The *Yearbook* provides comprehensive and up-to-date world-wide information on commercial arbitration. The contents of the *Yearbook* include national reports on arbitration law and practice, court decisions on the application of the 1958 New York Convention, abstracts of arbitral awards from arbitral institutions and *ad hoc* arbitrations, and articles on arbitration rules and practice. The *Yearbook* entered its thirteenth year in 1988; it will no longer cover national reports as these are covered in ICCA's *International Handbook on Commercial Arbitration*, a loose-leaf series of arbitration statutes and national reports.

118. The ICCA Congress Series, started in 1983, has continued to be published. In 1987 the proceedings of the ICCA VIIIth International Arbitration Congress held in New York from 6 to 9 May 1986 were published as volume no. 3. The New York Congress discussed two themes: (a) comparative arbitration practice, and (b) public policy in arbitration. The next volume will contain the proceedings of the ICCA Tokyo Conference held from 31 May to 3 June 1988. The themes of the Tokyo Conference were: (a) arbitration in settlement of international commercial disputes involving the Far East and (b) arbitration in combined transportation.

X. PRIVATE INTERNATIONAL LAW

A. Hague Conference: law applicable to negotiable instruments

119. The Hague Conference is working on the preparation of a convention on the law applicable to negotiable instruments. The Secretariat is drawing up a report dealing on the one hand with the revision of the Geneva Conventions of 1930 and 1931 dealing with certain conflicts of laws concerning bills of exchange, promissory notes and cheques, and on the other hand with the specific problems of conflict of laws which may be raised by the United Nations Convention on International Bills of Exchange and International Promissory Notes (Prel. Doc. No. 1 of November 1987). In its discussions on this matter the sixteenth session of the Hague Conference decided that this matter lends itself to application of the decision taken by the fourteenth session for the opening of the Conference to non-member States, possibly in the context of an extraordinary session.

B. Hague Conference: contract practices studies

120. The Hague Conference is working on a number of topics in the area of contract practices. These include: the law applicable to agreements on licensing of technology and on transfer of know-how (Prel. Doc. No. 4 of November 1987), the law applicable to unfair competition. With respect to the topic of the law applicable to unfair competition, the Permanent Bureau of the Hague Conference has completed an exploratory study (Prel. Doc. No. 2 of November 1987). An exploratory study has been completed by the Permanent Bureau with respect also to the extraterritorial application of laws relating to competition and similar laws of economic regulation (Prel. Doc. No. 7 of November 1987).

C. Hague Conference: electronic funds transfers

121. The Hague Conference is currently studying specific problems of private international law in the area of commercial law which may arise from the utilization of electronic processes and the law applicable to protection of privacy in connection with transfrontier data flows and conflicts of law occasioned by transfrontier data flows (Prel. Doc. No. 14 of April 1988). With respect to the topic of transfrontier data flows the Conference invited the Permanent Bureau to enter into contact with interested international organizations, taking especially into account, as regards electronic funds transfers, the work undertaken within UNCITRAL and to submit to Governments of the member States any proposals for joint work with that organization.

XI. TRADE FACILITATION

A. Administrative procedures relating to goods and documents

1. EFTA/EEC: convention to simplify formalities for EFTA-EEC trade in goods

122. Six EFTA countries and the European Economic Community concluded a Convention intended to simplify the paperwork involved in connection with EFTA-EEC trade in goods. The Convention introduces a single administrative document (SAD) for trade between the EFTA countries and the Community and among the EFTA countries. The new document will replace a multitude of national documents for imports, exports and transit. This "Convention on the Simplification of Formalities in Trade in Goods" is the first multilateral agreement between the EFTA countries and the Community. It entered into force on 1 January 1988 (EFTA 87-001).

2. EFTA/EEC: common transit procedures between the EFTA countries and the EEC

123. On 20 May 1987 representatives of six EFTA countries and the EEC Commission signed a Convention that introduces a common procedure for goods sent in transit between the EFTA countries and the EEC, and

between the EFTA countries themselves (EFTA 87-012). The Convention is entitled "Convention on a Common Transit Procedure".

3. ICC: pre-shipment inspection

124. The ICC Committee on regulations and procedures in international trade in June 1987 set up an *ad hoc* Working Party to consider the problems experienced by a growing number of firms with the activities of pre-shipment inspection (PSI) agencies acting on behalf of Governments of some 26 developing countries. The Working Party concentrated on the preparation for Government acceptance of a draft ICC model regulation aimed at governing those activities of PSI agencies which involve price controls and subsequent requests for confidential trade data. The aim is to avoid that PSI activities affect the contents of contracts and restrict international trade in the exporting and importing countries. The ICC proposals should be completed this year (ICC Annual Report 1987). A study by the Secretariat of the ECE of issues raised by pre-shipment inspection of exports by private companies on behalf of importing countries, considered by the ECE Working Party on Facilitation of International Trade Procedures (26th session, September 1987), was forwarded to ICC, GATT, UNCTAD so that the organizations could take into account the points made in the document in their discussions on the pre-shipment inspection issue (88-001, ECE).

B. Automated trade data procedures

1. CCC: draft annex to the Kyoto Convention

125. At its twenty-fifth session, held on 23-27 February 1987 in Brussels, the CCC ADP Sub-Committee agreed to transmit to the Council for adoption the draft annex to the Kyoto Convention concerning customs applications of computers. The main objectives of this annex are to facilitate international trade by encouraging the use of modern techniques to support customs procedures, to promote the use of international standards in the interchange of data among customs administrations and other participants in international trade, and to assist and guide customs administrations in the establishment of new customs systems and the improvement of existing systems (CCC: 87-013).

2. ECE: implementation of the Harmonized Commodity Description and Coding System

126. At its twenty-seventh session (March 1988) the ECE Working Party on Facilitation of International Trade Procedures adopted the following conclusions:

(a) The Harmonized Commodity Description and Coding System (HS), embodied in the Customs Cooperation Council Convention of June 1983, is an important achievement for the facilitation of international trade procedures. The usefulness of the HS is obvious and its structure is not to be questioned as the HS in itself does not create a need for long numerical codes.

(b) Although subdivisions in national tariffs are at the discretion of Governments and depend on national requirements, use of an excessive number of digits and of national subdivisions should be avoided.

(c) Developing countries should be encouraged to apply the HS, and assistance should be given to them to that effect.

(d) It is important that the private sector, e.g. carriers, manufacturers, etc. be made aware of the advantages of the HS (ECE, TRADE/WP.4/163, 1988-04-20).

3. ICC: electronic trade data

127. The ICC Special Joint Committee on Uniform Rules for Communication Agreements completed the preparation of the new ICC Uniform Rules of Conduct for Interchange of Trade Data Teletransmission (UNCID) in June 1987. UNCID were then adopted by the 51st session of the ICC Executive Board (September 1987) and simultaneously by the ECE Working Party on Facilitation of International Trade Procedures. The UNCID Rules were published early in 1988 together with an introductory note outlining both the basic premises of the Committee's work and elements which should be considered in addition to UNCID when formulating a communication agreement (TD/B/FAL/TFN.62; TRADE/WP.4/TFN.62).

4. CCC: trade data elements

128. The Customs Co-operation Council (CCC) has made recommendations concerning the use of Standards for Electronic Data Interchange (EDI), which were adopted by the Council at its seventy-first/seventy-second sessions (21 June 1988). The Standards are designed to facilitate the international exchange of data between customs administrators and trade users. It has recommended that States and autonomous customs territories, whether or not members of the Council, and customs or economic unions should use the data element names, descriptions and character representations contained in the United Nations Trade Data Elements Directory (UNTDDED) and future updated versions of this Directory in trade data exchange between customs administrations and other trade users (FAL 18/INF.7).

5. IMO: data processing

129. The fourteenth extraordinary session of the IMO Council was held on 6 November 1987, immediately prior to the fifteenth regular session of the Assembly, which was held from 9 to 20 November 1987. The Assembly having considered the general purpose of the Convention on Facilitation of International Maritime Traffic, 1965, as amended, and in particular article III, recommended that in applying standard 2.15 the introduction of methods to convey information by the use of non-paper media should be supported and encouraged; where paper documents are required, the presentation of data in any automated data processing (ADP) output should follow the layout of the standardized IMO Model FAL Forms and any substantial deviation from that layout should require prior agreement between the parties concerned (FAL 18/2).

6. ISO: UN/EDIFACT syntax rules issued as ISO 9735

130. The United Nations Syntax Rules for Electronic Data Interchange for Administration, Commerce and Transport (UN/EDIFACT) developed within the ECE Working Party on Facilitation of International Trade Procedures were adopted, under a special "fast-track procedure", by the Technical Committee ISO/TC 154, documents and data elements in administration, commerce and industry. The Syntax Rules have now been issued by ISO as International Standard 9735, dated 15 July 1988 (Trade/WP.4/TFN.65; TD/B/FAL/TFN.65).

7. IMO: Electronic Data Interchange Maritime (EDIMAR)

131. The Facilitation Committee at its eighteenth session from 12 to 16 December 1988 considered a revised version of the Electronic Data Interchange Maritime (EDIMAR) submitted by ICS (FAL 18/614). It also noted recent developments within ECE, especially the adoption of the first United Nations standard for utilizing data elements within message segments. The Committee agreed that the proposals on EDIMAR in document FAL 18/614 could be transmitted to the ECE, for processing under the procedures established for the development of EDIFACT standard messages. As to the EDIMAR version of the Cargo Declaration (IMO FAL Form 2), it was agreed to await the outcome of the work of the EDIFACT Group entrusted with the development of transport messages as that would affect the design of the cargo declaration message. Bearing in mind the current trend towards recognizing the ICS Standard Cargo Manifest as an alternative to the cargo declaration, it was agreed to include the additional data elements of the cargo manifest. Once the EDIMAR messages had been adopted they would be published.

XII. OTHER TOPICS OF INTERNATIONAL TRADE LAW; CONGRESSES AND PUBLICATIONS

A. UNCTAD: restrictive business practices

132. The Intergovernmental Group of Experts on Restrictive Business Practices, at its sixth session 11-14 December 1987, reviewed the operation of and experience arising from the application and implementation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices adopted by the General Assembly, by its resolution 35/63 of 5 December 1980, studies on restrictive business practices related to the provisions of the Set of Principles and Rules, implementation of technical assistance and advisory and training programmes on restrictive business practices. It also considered instalments of the draft handbook on restrictive business practices legislation and examined the question of a model law or laws for the control of restrictive business practices. The Group decided to continue work in all the above areas and recognized the urgent need for the provision of technical assistance and called for

more financial contributions to enable UNCTAD to meet the needs of technical assistance in the field of restrictive business practices (TD/B/1156; TD/B/RBP/43). At the seventh session held on 30 October 1988 the Group examined further instalments of the handbook on restrictive business practices legislation. To date the compilation has covered 19 countries (TD/B/RBP/49).

133. Recent studies and reports prepared by the UNCTAD Secretariat in this area include:

- "Revised Study on Tied Purchasing" (TD/B/RBP/18/Rev.1).
- "RBPs in the Services Sector by Consulting Firms and other Enterprises" (TD/B/RBP/19)
- "Restrictive Business Practices Terminology: A Handbook" published by the United Nations Office at Geneva (Term/37).
- "Collusive Tendering" (TD/B/RBP/12/Rev.2).

134. UNCTAD is in the process of preparing a number of studies in this field. The following are under preparation (TD/B/RBP/40 and TD/B/RBP/51):

- The concentration of market powers through mergers, take-overs, joint ventures and other acquisitions of control, whether of a horizontal, vertical or conglomerate nature, in particular in the markets of developing countries.
- The relationship of restrictive business practices control with industrialization policies and regional integration in developed and developing countries.
- The interaction of restrictive business practices and trade policy.
- Sectoral studies such as: the international film industry, including videotapes and material for television networks; the book publishing industry; and the food industry.
- Legislative and other developments in developed and developing countries in the control of restrictive business practices (1985-1988).

B. UNIDROIT: hotel keepers contract

135. At its 65th session in 1986 the Governing Council requested the Secretariat to prepare a fully revised text of the draft Convention on the Hotel Keepers Contract. The revision was called for after the Governing Council had examined the text adopted by a UNIDROIT Committee of Government Experts in 1978 (CD.67-Doc.7). The UNIDROIT Secretariat completed the preparation of a revised text which was considered at the 67th session of the Governing Council in June 1988. The revised draft has been sent to Governments for comments. A Committee of Government Experts will meet in 1989 to consider the draft and comments (UNIDROIT 1989 Report 1988 C.D.68 Doc.2).

C. Council of Europe: draft Convention on Certain International Aspects of Bankruptcy

136. The Council of Europe is elaborating a draft Convention on Certain International Aspects of Bankruptcy

(CDCJ (88) 1). With the aim of harmonizing some fundamental principles of member States' law relating to bankruptcy the draft Convention will attempt to regulate certain international aspects of bankruptcy such as the power of administrators and liquidators in bankruptcy to act outside the national territory, the possibility of resorting to the opening of secondary bankruptcies in the territory of other parties and the possibility for creditors to lodge their claims in the bankruptcies opened abroad.

137. The European Committee on Legal Co-operation (CDCJ) at its 50th meeting (28 November to 2 December 1988) noted that a group of countries still firmly supported the draft Convention's idea of liquidation-oriented bankruptcy whilst others were in favour of a broader scope. The CDCJ concluded that it was unable to find a solution acceptable to all delegations and that the question of scope warranted further study and negotiation. The idea was floated of enabling the States concerned to enter a reservation, but the majority were against a system of numerous reservations which would diminish the value of a multilateral convention. The CDCJ agreed to return to this question at its next meeting. There was also divergence of views on rules of competence, powers of foreign liquidators and a number of other provisions. The CDCJ decided that the Secretariat should draft a document with the changes made at the 50th session of the CDCJ and that the text should be circulated to members of the CDCJ. The text would be considered at an extraordinary meeting of the CDCJ from 4 to 7 April, 1989. The text finalized at that extraordinary meeting would be sent to the CDCJ delegations at the end of April 1989. The CDCJ would make a final decision on the draft Convention at its 51st meeting from 5 to 9 June 1989 (CDCJ (88)74).

D. Council of Europe: insider trading

138. The European Committee on Legal Co-operation (CDCJ) at its 50th meeting, from 28 November to 2 December 1988, considered a draft Convention on Insider Trading (CDCJ (88) 74). At this meeting the CDCJ adopted opinions on proposals for amendment of the draft Convention on Insider Trading as requested by the Council of Ministers. The draft Convention has annexed to it an explanatory report on the Convention (CDCJ (88)7). The offence of insider trading is not characterized by the nature of the transaction. The unlawful transaction is identical to a regular transaction. It is because the person who carried out the operation possesses, by virtue of his or her position or by reason of circumstances, information not known to the public that the operation which he or she carries out or causes to be carried out becomes unlawful. The essential aim of the Convention therefore is to create mutual assistance by an exchange of information between contracting parties to enable the supervision of the security market to be carried out effectively and to establish whether persons carrying out certain financial transactions on the stock markets are or are not insiders, which would show the fraudulent or regular nature of their transactions. The draft Convention does not require parties to set up control or supervisory bodies for the stockmarkets. However, the co-operation by the exchange of information assumes the existence at national level of an adequate

structure both in the field of legislation and in the field of institutions capable of ensuring the collection, the examination and the transmission of information. The draft Convention is expected to be finalized and adopted soon.

E. UNEP: control of transboundary movement of hazardous waste

139. The Governing Council of the United Nations Environment Programme, by its resolution 14/30 of 17 June 1987, approved the Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes (UNEP/G.C. 14/17, annex II), prepared by an *ad hoc* Working Group of Experts. The Council has called upon Governments and international organizations concerned to use the Guidelines and Principles in the process of developing appropriate bilateral, regional and multilateral agreements and national legislation for the environmentally sound management of hazardous wastes. UNEP is also preparing a draft convention on the control of transboundary movements of hazardous wastes. The draft convention would provide for the exchange of information and the control of transboundary movements of hazardous wastes in order to protect human health and the environment against the adverse effects that may result from the generation, management, handling, transport and disposal of hazardous wastes. A diplomatic conference, to be held at Basel from 20 to 22 March 1989, has been convened for the purpose of adopting and signing the convention. Further, on 17 June 1988, the Governing Council of UNEP adopted the London Guidelines for the Exchange of Information on Chemicals in International Trade (decision 14/27 of 1988). The Guidelines are addressed to Governments with a view to assisting them in the process of increasing chemical safety and enhancing the sound management of chemicals in all countries through the exchange of scientific, technical, economic and legal information on chemicals in international trade. UNEP is engaging in further work on ways of incorporating the

principle of prior informed consent into the London Guidelines and on other refinements of the Guidelines.

F. UNIDROIT: Congress on Uniform Law

140. The third UNIDROIT International Congress on Private Law, dedicated to the subject of uniform law in practice, was held in Rome from 7-10 September 1987. The Congress was divided into three general themes, namely uniform law and its introduction into national law, uniform law and its application by judges and arbitrators, and uniform law and its impact on business circles. Each of them was further divided into more specific items devoted to aspects of particular relevance in the framework of the general theme. The Congress was attended by many lawyers representing many parts of the world and different legal systems. The proceedings of the Congress have been published as "International Uniform Law in Practice, Acts and Proceedings of the 3rd Congress on Private Law held by the International Institute for the Unification of Private Law", 1988, UNIDROIT Rome, Oceana Publications, New York.

G. UNIDROIT: Uniform Law Review

141. The 1985 volume of the Uniform Law Review was published in June 1987. It contained the Report on the Activity of the Institute during 1984 as well as studies on the international protection of cultural property and on the franchising contract. The volume was completed by two introductory notes, one on the Hague Convention on the law applicable to trusts and on their recognition and the other on the UNCITRAL Model Law on International Commercial Arbitration. In 1988, the 1986 volume of the Review was published. The volume contains a report of the activities of the Institute during 1985 as well as texts of a number of Conventions elaborated by the Institute.

VII. STATUS OF UNCITRAL TEXTS

Status of Conventions: note by the Secretariat (A/CN.9/325) [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.^a

2. The present note is submitted pursuant to that decision. The annex hereto sets forth the state of signatures, ratifications, accessions and approvals as of 16 May 1989 to the following conventions: Convention on the Limitation Period in the International Sale of Goods (New York, 1974); Protocol amending the Convention on the Limitation Period in the International Sale of Goods (Vienna, 1980); United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg); United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980); and Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). The latter Convention, which has not emanated from the work of the Commission, has been included because of the close interest of the Commission in it, particularly in connection with the Commission's work in the field of international commercial arbitration. In addition, the annex sets forth those jurisdictions that have

enacted legislation based on the UNCITRAL Model Law on International Commercial Arbitration.

3. Since the most recent report in this series showing the status of conventions as of 19 February 1988 (A/CN.9/304), the United Nations Convention on Contracts for the International Sale of Goods has received four additional ratifications or accessions (Australia, Denmark, German Democratic Republic, Norway), the United Nations Convention on the Carriage of Goods by Sea, 1978 ("Hamburg Rules") has received two additional ratifications or accessions (Nigeria, Sierra Leone), and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards has received seven additional ratifications or accessions (Algeria, Antigua and Barbuda, Argentina, Bahrain, Dominica, Kenya, Peru). In addition, legislation based on the UNCITRAL Model Law on International Commercial Arbitration has been enacted in Australia, Nigeria, in the Canadian Provinces of Ontario and Saskatchewan and in the State of California (U.S.A.). Both the Convention on the Limitation Period in the International Sale of Goods and the Protocol amending that Convention entered 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.

^aReport of the United Nations Commission on International Trade Law on the work of its thirteenth session, *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17)*, para. 163.

ANNEX

1. *Convention on the Limitation Period in the International Sale of Goods* (New York, 1974)

<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
Mexico		21 January 1988	1 August 1988
Mongolia	14 June 1974		
Nicaragua	13 May 1975		
Norway	11 December 1975	20 March 1980	1 August 1988

<i>State</i>	<i>Signature</i>	<i>Ratification Accession Approval</i>	<i>Entry into Force</i>
Poland	14 June 1974		
Ukrainian SSR	14 June 1974		
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

Upon signature Norway declared, and confirmed upon ratification, 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. Denmark, Finland, Iceland, Norway 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>	<i>Entry into force</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	
Nigeria		7 November 1988	
Norway	18 April 1979		
Pakistan	8 March 1979		
Panama	31 March 1978		

<i>State</i>	<i>Signature</i>	<i>Ratification Accession</i>	<i>Entry into force</i>
Philippines	14 June 1978		
Portugal	31 March 1978		
Romania		7 January 1982	
Senegal	31 March 1978	17 March 1986	
Sierra Leone	15 August 1978	7 October 1988	
Singapore	31 March 1978		
Sweden	18 April 1979		
Tunisia		15 September 1980	
Uganda		6 July 1979	
United Rep. of Tanzania		24 July 1979	
United States of America	30 April 1979		
Venezuela	31 March 1978		
Zaire	19 April 1979		

Signatures only: 22; ratifications and accessions: 14.

Ratifications and accessions necessary to bring Convention into force: 20.

Declarations and reservations

¹Upon signing the Convention the Czechoslovak Socialist Republic declared in accordance with article 26 a formula for converting the amounts of liability referred to in paragraph (2) of that article into the Czechoslovak currency and the amount of the limits of liability to be applied in the territory of the Czechoslovak Socialist Republic as expressed in the Czechoslovak currency.

4. United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)

<i>State</i>	<i>Signature</i>	<i>Ratification Accession Approval</i>	<i>Entry into force</i>
Argentina ³		19 July 1983	1 January 1988
Australia		17 March 1988	1 April 1989
Austria	11 April 1980	29 December 1987	1 January 1989
Chile	11 April 1980		
China ⁴	30 September 1981	11 December 1986	1 January 1988
Czechoslovakia	1 September 1981		
Denmark ^{1, 6}	26 May 1981	14 February 1989	1 March 1990
Egypt		6 December 1982	1 January 1988
Finland ^{1, 6}	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	23 February 1989	1 March 1990
Germany, Federal Rep. of	26 May 1981		
Ghana	11 April 1980		
Hungary ^{2, 3}	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 ^{1, 6}	26 May 1981	20 July 1988	1 August 1989
Poland	28 September 1981		
Singapore	11 April 1980		
Sweden ^{1, 6}	26 May 1981	15 December 1987	1 January 1989
Syrian Arab Republic		19 October 1982	1 January 1988
United States of America ⁵	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: 9; ratifications, accessions and approvals: 19.

Declarations and reservations

¹Upon ratifying the Convention the Governments of Denmark, Finland, Norway and Sweden declared in accordance with article 92(1) that they would not be bound by Part II of the Convention (Formation of the Contract).

²Upon 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.

³Upon 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.

⁴Upon approving the Convention the Government of China declared that it did not consider itself bound by sub-paragraph 1(b) of article 1 and by article 11 as well as by the provisions in the Convention relating to the content of article 11.

⁵Upon ratifying the Convention the Government of the United States of America declared that it would not be bound by sub-paragraph 1(b) of article 1.

⁶Upon ratifying the Convention the Governments of Denmark, Finland, Norway and Sweden declared, pursuant to article 94(1) and 94(2), that the Convention would not apply to contracts of sale where the parties have their places of business in Denmark, Finland, Iceland, Norway or Sweden.

**5. Convention on the Recognition and Enforcement of Foreign Arbitral Awards
(New York, 1958)**

<i>State</i>	<i>Signature</i>	<i>Ratification Accession</i>
Algeria ^{1, 2}		7 February 1989
Antigua and Barbuda ^{1, 2}		2 February 1989
Argentina ^{1, 2, 7}	26 August 1958	14 March 1989
Australia		26 March 1975
Austria		2 May 1961
Bahrain ^{1, 2}		6 April 1988
Belgium ¹	10 June 1958	18 August 1975
Benin		16 May 1974
Botswana ^{1, 2}		20 December 1971
Bulgaria ^{1, 3}	17 December 1958	10 October 1961
Burkina Faso		23 March 1987
Byelorussian SSR ^{1, 3}	29 December 1958	15 November 1960
Cameroon		19 February 1988
Canada ⁴		12 May 1986
Central African Republic ^{1, 2}		15 October 1962
Chile		4 September 1975
China ^{1, 2}		22 January 1987
Colombia		25 September 1979
Costa Rica	10 June 1958	26 October 1987
Cuba ^{1, 2, 3}		30 December 1974
Cyprus ^{1, 2}		29 December 1980
Czechoslovakia ^{1, 3}	3 October 1958	10 July 1959
Democratic Kampuchea		5 January 1960
Denmark ^{1, 2}		22 December 1972
Djibouti		14 June 1983
Dominica		28 October 1988
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	10 June 1958	30 June 1961
Ghana		9 April 1968

<i>State</i>	<i>Signature</i>	<i>Ratification Accession</i>
Greece ^{1, 2}		16 July 1962
Guatemala ^{1, 2}		21 March 1984
Haiti		5 December 1983
Holy See ^{1, 2}		14 May 1975
Hungary ^{1, 2}		5 March 1962
India ^{1, 2}	10 June 1958	13 July 1960
Indonesia ^{1, 2}		7 October 1981
Ireland ¹		12 May 1981
Israel	10 June 1958	5 January 1959
Italy		31 January 1969
Japan ¹		20 June 1961
Jordan	10 June 1958	15 November 1979
Kenya ¹		10 February 1989
Kuwait ¹		28 April 1978
Luxembourg ¹	11 November 1958	9 September 1983
Madagascar ^{1, 2}		16 July 1962
Malaysia ^{1, 2}		5 November 1985
Mexico		14 April 1971
Monaco ^{1, 2}	31 December 1958	2 June 1982
Morocco ¹		12 February 1959
Netherlands ¹	10 June 1958	24 April 1964
New Zealand ¹		6 January 1983
Niger		14 October 1964
Nigeria ^{1, 2}		17 March 1970
Norway ^{1, 5}		14 March 1961
Pakistan	30 December 1958	
Panama		10 October 1984
Peru		7 July 1988
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 ¹		21 August 1986
South Africa		3 May 1976
Spain		12 May 1977
Sri Lanka	30 December 1958	9 April 1962
Sweden	23 December 1958	28 January 1972
Switzerland ¹	29 December 1958	1 June 1965
Syrian Arab Republic		9 March 1959
Thailand		21 December 1959
Trinidad and Tobago ^{1, 2}		14 February 1966
Tunisia ^{1, 2}		17 July 1967
Ukrainian SSR ^{1, 3}	29 December 1958	10 October 1960
USSR ^{1, 3}	29 December 1958	24 August 1960
United Kingdom ¹		24 September 1975
United Republic of Tanzania ¹		13 October 1964
United States of America ^{1, 2}		30 September 1970
Uruguay		30 March 1983
Yugoslavia ^{1, 2, 6}		26 February 1982

Signatures only: 2; ratifications and accessions: 82.

Declarations and reservations

(Excludes territorial declarations and certain other reservations
and declarations of a political nature)

¹State will apply the Convention to recognition and enforcement of awards made in the territory of another Contracting State.

²State will apply the Convention only to differences arising out of legal relationships whether contractual or not which are considered as commercial under the national law.

³With regard to awards made in the territory of non-contracting States, State will apply the Convention only to the extent to which these States grant reciprocal treatment.

⁴The Government of Canada has declared that Canada will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the laws of Canada, except in the case of the Province of Quebec where the law does not provide for such limitation.

⁵State will not apply the Convention to differences where the subject matter of the proceedings is immovable property situated in the State, or a right in or to such property.

⁶State will apply the Convention only to those arbitral awards which were adopted after the coming of the Convention into effect.

⁷The present Convention should be construed in accordance with the principles and rules of the National Constitution in force or with those resulting from reforms mandated by the Constitution.

6. *UNCITRAL Model Law on International Commercial Arbitration (1985)*

Legislation based on the UNCITRAL Model Law on International Commercial Arbitration has been enacted in Australia, Canada (by the Federal Parliament and by the Legislatures of all Provinces and Territories), Cyprus, Nigeria and the State of California (United States of America).

* * *

VIII. TRAINING AND ASSISTANCE

Training and assistance: note by the Secretariat (A/CN.9/323) [Original: English]

1. Since the Commission noted at its twentieth session in 1987 "that training and assistance was an important activity of the Commission and should be given a higher priority than it had in the past",¹ the Secretariat has endeavoured to plan a more extensive programme of activities than had been previously carried out. This note will describe the developments during the last two years and discuss possibilities for the future.

I. SEMINAR HELD IN LESOTHO

2. The Regional Seminar on International Trade Law, about which the Secretariat reported to the Commission at its twenty-first session, was held in Maseru, Lesotho from 25 to 30 July 1988. The Seminar was hosted by the Kingdom of Lesotho and was co-sponsored by the Preferential Trade Area for Eastern and Southern African States (PTA), a regional organization with a membership of 15 States and open to five more countries of the region. Financing was provided by contributions from Denmark, Finland, Netherlands, Norway, Sweden and United States of America.

3. A total of 34 participants, amongst whom were senior government officials, representatives from chambers of industry and commerce and from the universities, came to Maseru from twelve member States of PTA and two States eligible for membership: Burundi, Djibuti, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Mozambique, Rwanda, Swaziland, Uganda, United Republic of Tanzania, Zambia and Zimbabwe. An additional 36 persons from Lesotho participated in the Seminar.

4. The primary purpose of the Seminar was to acquaint decision makers 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. Lectures were given by members of the UNCITRAL Secretariat, by Professor Joko-Smart of Sierra Leone, Chairman of the twenty-first session of the Commission, and by Mr. Sevon of Finland, Chairman of the Working Group on the New International Economic Order throughout the period of preparation of the UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works.

5. A second purpose of the Seminar was to permit a discussion of certain developments in international trade

law that were already taking place within the context of PTA. Lectures were given by members of the PTA Secretariat on the plans for a PTA arbitration centre and the current state of the law governing arbitration in the region and on the PTA Payments Arrangement (a scheme for multi-lateral clearing of intra-PTA trade balances using a PTA unit of account equal in value to the SDR).

6. While all presentations on the UNCITRAL texts were well received by the participants, the discussions on the Legal Guide and on international commercial arbitration deserve to be mentioned specially.

7. The participants were very appreciative of the Legal Guide as a reference document for use in the negotiation of international construction contracts, as well as for many other types of long-term contracts. Examples were given where use of the Legal Guide had already been of benefit to parties from developing countries in the negotiation of such contracts. It was stated in the closing ceremonies that the Legal Guide was one of the most useful results of the work of the United Nations in respect of the new international economic order. As a result of requests from participants and from those who learned of the Legal Guide from participants, a number of copies have been distributed to individuals and offices in the PTA countries who are involved in the negotiation of such international contracts.

8. In respect of international commercial arbitration, on 21 November 1987 the PTA Federation of Chambers of Commerce and Industry had established a PTA Centre for Commercial Arbitration in Djibouti, which was not yet operational at the time of the Seminar. A decision had already been made to use the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules as the procedural rules of the Centre. There was considerable discussion in the Seminar about the national arbitration laws of the PTA States in the context of international commercial arbitration. It was noted that the law on recognition and enforcement of awards was fragmented with only a very few States being parties to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

9. At the conclusion of the discussion the prevailing view was that the PTA States should adopt the 1958 New York Convention rather than prepare a special instrument for the region, which was the alternative under consideration by the PTA Federation of Chambers of Commerce and Industry. At a meeting in Lusaka, Zambia (19-20 August 1988), in which several participants from the Seminar participated, the Council of the Federation

¹Report of the United Nations Commission on International Trade Law on the work of its twentieth session, *Official Records of the General Assembly, Forty-second Session, Supplement No. 17* (A/42/17), para. 335.

decided to recommend to its General Assembly that the States in the region adopt the 1958 New York Convention.

10. The Seminar was discussed at the first meeting of the PTA Committee of Legal Experts held in Lusaka, Zambia from 6 to 8 October 1988. The Committee concluded that "Considering the relevance of these texts to the success of the PTA economic arrangement, the PTA Member States should be urged to consider and possibly adopt these texts", i.e. the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules), Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), UNCITRAL Model Law on International Commercial Arbitration (1985), United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) and the Convention on the Limitation Period in the International Sale of Goods (New York, 1974).² The report of the Seminar was noted by the PTA Council of Ministers at its thirteenth meeting held in Arusha, Tanzania from 26 to 29 November 1988. The Council also noted "that the most important aspect of the Seminar was that the participants appreciated that the adoption by Member States of the UNCITRAL legal texts would contribute to the objectives of the PTA because they were intended to minimize discrepancies in existing national legislations. Council was informed that the participants would recommend to their governments that they adopt the different UNCITRAL texts".³

11. The UNCITRAL Secretariat has remained in close contact with the PTA Secretariat and with participants from the Seminar. Missions are scheduled to these countries in order to maintain the momentum generated towards adoption of the texts that have emanated from the work of the Commission.

II. THIRD UNCITRAL SYMPOSIUM

12. As announced to the twenty-first session of the Commission, the Third UNCITRAL Symposium on International Trade Law will be held in conjunction with the twenty-second session of the Commission during the week of 22 to 26 May 1989. The planning for the Symposium is based on the Symposium held in 1981. 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 to 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 will be accepted to the limit of available space. During the twenty-second session the Secretariat will report further to the Commission on the results of the Symposium.

²Report of the first meeting of the Committee of Legal Experts, PTA/TC/LEG/1/9, para. 66.

³Report of the thirteenth meeting of the Council of Ministers, PTA/CM/XIII/5, paras. 347-348.

III. POSSIBLE FUTURE ACTIVITIES

13. Preliminary discussions have been undertaken about the possible sponsorship in 1990 of a seminar on international trade law for participants from developing countries to be financed from a special trust fund established by a member State with the United Nations Development Programme. The discussions are still at an early stage and no firm commitments have been made.

14. Following the success of the Seminar in Lesotho and the expectation that it will lead to the adoption and use of the texts prepared by the Commission in a number of States in the region, the Secretariat would wish to sponsor further regional seminars in co-operation, where possible, with regional economic organizations. Contacts have been initiated with several such organizations and the Secretariat hopes to be able to report more definitive plans at the twenty-second session.

IV. FINANCIAL AND ADMINISTRATIVE CONSIDERATIONS

15. Planning for a continuing programme of training and assistance continues to be hampered by a lack of assured administrative and financial resources. In regard to the administrative resources, the work must be undertaken by the staff of the Commission's Secretariat in addition to its other activities servicing the Commission. This places a limit on the amount of training and assistance activities that can be undertaken. The work involved in planning a seminar away from Vienna is more extensive than planning one in Vienna. This in itself is one important reason for undertaking such seminars in co-operation with regional economic organizations. The major portion of the administrative work involved in organizing the Seminar in Lesotho was undertaken by the PTA Secretariat.

16. Although the Seminar in Lesotho was a success once held, it was uncertain until the last minute whether there would be sufficient funds for holding the Seminar. The final contribution that permitted the Seminar to take place became firm ten days before the Seminar opened. This left barely enough time to arrange for the issuance of air tickets to the participants.

17. Financial planning for a symposium for young lawyers and scholars to be held in conjunction with a session of the Commission in Vienna is less restrictive than is the financial planning for a regional seminar to be held away from Vienna. In the former case the only expenditure of funds is for the travel of the participants, and fellowships are awarded only to the level of available funding at the cut-off date. Regional seminars organized by the Commission's Secretariat require a certain amount of fixed expense and, if the seminar is for the major purpose of promoting adoption and use of the UNCITRAL texts, it would be self-defeating to deny funding at the last minute to individuals who had been solicited as participants because of the role they might play in the decision

of their country to adhere to one of the texts. Regional seminars organized by other organizations that are co-sponsored by the Commission's Secretariat normally entail little or no expense, but their occurrence, especially in developing countries, and their value to the programme of the Commission are less dependable.

18. Since there are no funds available to the Secretariat from the regular budget for training and assistance activities, whether in order to train young lawyers and scholars or to promote adoption of the UNCITRAL texts, funding must be met from voluntary contributions to the Trust Fund for UNCITRAL Symposia. In order to provide a more regular flow of funds and to ease the difficulties of financial planning that occur when contributions are made for a specific event from multiple sources, at its twenty-first session in 1988 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 (A/43/17, para. 97).

19. The invitation of the Commission that contributions be made to the Trust Fund on an annual basis, along with an earlier similar invitation of the General Assembly in paragraph 5 of resolution 42/152 of 7 December 1987, was transmitted to all States by note verbale on 25 August 1988. To date, no State has responded positively to this invitation.

20. Several States have indicated that they will contribute to the Symposium to be held in conjunction with the twenty-second session of the Commission. Although additional contributions will be necessary to fully fund the Symposium, a sufficient number of fellowships should be available to guarantee that it can be carried out.

21. The Commission may wish to consider further the nature of the programme of training and assistance it would wish the Secretariat to carry out and the means that might be taken to put the programme on a more secure financial basis than it is on at present.

I. DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE^a

Article 1

Definitions

In 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 whenever he is responsible for the goods under applicable rules of law governing carriage;

(b) Where goods are consolidated in a container, pallet or similar article of transport or where they are packed, "goods" includes such article of transport or packaging if it 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 State Party, or

(b) When the transport-related services are performed in a State Party, or

(c) When, according to the rules of private international law, the transport-related services are governed by the law of a State Party.

(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 them over to or has placed them at the disposal of the person entitled to take delivery of them.

Article 4

Issuance of document

(1) The operator may, and at the customer's request shall, within a reasonable period of time, at the option of the operator, either:

(a) Acknowledge his receipt of the goods by signing and dating a document presented by the customer that identifies the goods, or

(b) Issue a signed document identifying the goods, 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 does not act in accordance with either subparagraph (a) or (b) of paragraph (1), he is rebuttably presumed to have received the goods in apparent good condition. No such presumption applies when the services performed by the operator are limited to the immediate transfer of the goods between means of transport.

(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 referred to in paragraph (1) may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the document is signed.

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.

^aText of the draft Convention as adopted by the United Nations Commission on International Trade Law at its twenty-second session, on 2 June 1989.

(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 to or place them at the disposal of 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 to or place them at the disposal of a person entitled to take delivery of them within a period of 30 consecutive days after the date expressly 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, a person entitled to make a claim for the loss of the goods may treat them as lost.

Article 6

Limits of liability

(1) (a) 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 [8.33] units of account per kilogram of gross weight of the goods lost or damaged.

(b) However, if the goods are handed over to the operator immediately after carriage by sea or by inland waterways, or if the goods are handed over, or are to be handed over, by him for such carriage, 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. For the purposes of this paragraph, carriage by sea or by inland waterways includes pick-up and delivery within a port.

(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 against another person of whose services the opera-

tor 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 limitation 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 limitation 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 law or regulation relating to dangerous goods applicable in the country where the goods are handed over 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 lawful 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 incurred by him in taking the measures referred to in subparagraph (a) from the person who failed to meet any obligation under such applicable law or regulation to inform him of the dangerous character of the goods.

Article 10

Rights of security in goods

(1) The operator has a right of retention over the goods for costs and claims which are due in connection with 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 the 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 the extent permitted by the law of the State where the goods are located, to sell all or part of the goods over which he has exercised the right of retention provided for in this article. The preceding sentence does not apply to containers, pallets or similar articles of transport or packaging 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 claims by the operator for the cost of repairs of or improvements to the containers, pallets or similar articles of transport or packaging.

(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 all other respects be exercised in accordance with the law of the State where the goods are located.

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 third working day after the day when the goods were handed over by the operator 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 issued by the operator pursuant to paragraph (1)(b) of article 4 or, if no such document was 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 to the operator within 15 consecutive days after the day when the goods reached the final recipient, but in no case later than 60 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 shall 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:

(a) On the day the operator hands over the goods or part thereof to, or places them at the disposal of, a person entitled to take delivery of them, or

(b) 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 on the day that person may treat the goods as lost in accordance with paragraph (4) of article 5, whichever is earlier.

(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 State Party which is a member of the International Monetary Fund and the Special Drawing Right is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The equivalence between the national currency of a State Party 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 State Party as far as possible the same real value for amounts in article 6 as is expressed there in units of account. States Parties 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.

FINAL CLAUSES

Article 17

Depositary

The Secretary-General of the United Nations is the depositary of this Convention.

Article 18

Signature, ratification, acceptance, approval, accession

(1) This Convention is open for signature at the concluding meeting of the United Nations Conference on... and will remain open for signature by all States at the Headquarters of the United Nations, New York, until...

(2) This Convention is subject to ratification, acceptance or approval by the signatory States.

(3) This Convention is open to 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 19

Application to territorial units

(1) If a State has two or more territorial units in which 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 at any time substitute another declaration for its earlier declaration.

(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, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a State Party, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a State Party, unless it is in a territorial unit to which the Convention extends.

(4) If a State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

Article 20

Reservations

No reservations may be made to this Convention.

Article 21

Effect of declaration

(1) Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.

(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

(4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

Article 22

Entry into force

(1) This Convention enters into force on the first day of the month following the expiration of one year from the date of deposit of the fifth instrument of ratification, acceptance, approval or accession.

(2) For each State which becomes a Contracting State to this Convention after the date of the deposit of the fifth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the date of the deposit of the appropriate instrument on behalf of that State.

(3) Each State Party shall apply the provisions of this Convention to transport-related services with respect to goods taken in

charge by the operator on or after the date of the entry into force of this Convention in respect of that State.

Article 23

Revision and amendment

(1) At the request of not less than one third of the States Parties to this Convention, the depositary shall convene a conference of the Contracting States for revising or amending it.

(2) Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

Article 24

Revision of limitation amounts

(1) At the request of at least one quarter of the States Parties, 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.

(2) If this Convention enters into force more than five years after it was opened for signature, the depositary shall convene a meeting of the Committee within the first year after it enters into force.

(3) The meeting of the Committee shall take place on the occasion and at the location of the next session of the United Nations Commission on International Trade Law.

(4) 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 any transport-related convention have been amended;

(b) The value of goods handled by operators;

(c) The cost of transport-related services;

(d) Insurance rates, including for 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.

(5) Amendments shall be adopted by the Committee by a two-thirds majority of its members present and voting.

(6) 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.

(7) Any amendment adopted in accordance with paragraph (5) 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 States Parties 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 States Parties 18 months after its acceptance.

(8) A State Party 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 enters into force. Such denunciation shall take effect when the amendment enters into force.

(9) When an amendment has been adopted in accordance with paragraph (5) but the 18-month period for its acceptance has not yet expired, a State which becomes a State Party to this Convention during that period shall be bound by the amendment if it enters into force. A State which becomes a State Party after that period shall be bound by any amendment which has been accepted in accordance with paragraph (7).

(10) The applicable limit of liability 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.

Article 25

Denunciation

(1) A State Party may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at . . . , this . . . day of . . . one thousand nine hundred and . . . , 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 the present Convention.

II. SUMMARY RECORDS OF MEETINGS OF THE COMMISSION ON THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE^a

Summary record (partial)* of the 402nd meeting

Tuesday, 16 May 1989, 10.30 a.m.

[A/CN.9/SR.402**]

Temporary Chairman: Mr. FLEISCHHAUER
(Under-Secretary-General, The Legal Counsel)

Chairman: Mr. RUZICKA (Czechoslovakia)

The discussion covered in the summary record began at 11.05 a.m.

Draft Convention on the Liability of Operators of Transport Terminals in International Trade (A/CN.9/298, A/CN.9/319 and Add.1-4)

1. The CHAIRMAN opened the general discussion on the draft appearing in annex I to the report of the Working Group on International Contract Practices on the work of its eleventh session (A/CN.9/298) and drew attention to the compilation of comments thereon submitted by Governments and international organizations, contained in document A/CN.9/319 and Add.1-4. He indicated that the draft final clauses for the draft Convention (A/CN.9/321) would be considered at a later stage.

2. Mr. GUNN (International Chamber of Shipping) said it was his organization's considered view that a convention on the liability of transport terminal operators was not needed. In the first place, agreement on such liability was a matter of commercial contract and an important element in the competitiveness involved in determining the relative effectiveness of ports and terminals and thus in promoting efficiency. Second, the Hague and Visby Rules, which still governed most of the world's trade, did not require standard terms and conditions for terminal operators' liability. Those objections notwithstanding, the International Chamber of Shipping was not averse to the concept of model rules as long as they did not discourage the ability of terminals to compete; indeed, such rules could be useful in promoting harmonization. He expressed the hope that the Commission would give further consideration to that point at the present session.

3. Mr. LARSEN (United States of America) said that the comments by his Government set out on pages 13 and 14 of

document A/CN.9/319 were the product of extensive consultations in the United States with carriers, insurance groups, stevedores and shippers. The first fundamental point which he wished to make was that the draft instrument under consideration, while remaining independent from other conventions, should at the same time fill the gaps in the existing régimes, the Hague, Visby and Hamburg Rules and the Warsaw Convention, whenever those régimes were not applicable. The United States therefore disagreed with the prominence given in the draft to dovetailing the Convention on the Liability of Operators of Transport Terminals in International Trade (OTT) with the Hamburg Rules as opposed to other existing régimes. Another major point he wished to make was that the draft Convention should not apply to stevedores when they were already covered by applicable rules concerning carriage; in other words, there was no need to disturb existing liability régimes in so far as they were already applicable. Stevedores in the United States were anxious to retain a uniform liability régime where it could be achieved by a bill-of-lading clause. However, they were generally in support of the proposed new Convention so long as their concerns were duly reflected in the instrument finally adopted. He was prepared to submit in writing his Government's proposals on those and other points relating to the draft Convention.

4. The CHAIRMAN invited all delegations wishing to submit proposals to give them to the Secretariat in writing as soon as possible. Replying to a point raised by Mr. CHAFIK (Egypt), he said that oral proposals, too, could be made in the course of the debate and discussed by the Commission unless the absence of official translations of such proposals into all working languages proved to be a stumbling block.

5. Mr. INGRAM (United Kingdom) said that all commercial interests in the United Kingdom had expressed serious doubts about the need for a convention on the liability of operators of transport terminals and would oppose the adoption of the present draft as a convention, especially if article 8 remained unchanged. It was felt that even if the undesirable features of that article were eliminated, the points of uncertainty in the draft

^aThe summary records contained in this volume include the corrections requested by the delegations and such editorial changes as were considered necessary.

*No summary record was prepared for the meeting before 11.05 a.m.

**No summary records were prepared for the 389th to 401st meetings.

were too numerous for the convention to achieve the desired aim of producing uniformity in international trade and reducing transport and insurance costs. In his delegation's view, the Commission should bear in mind the possibility of adopting model rules and should not prejudge the issue by assuming that a convention was the necessary outcome of its work on the topic.

6. Mr. YUAN Zhenmin (China) said that his delegation supported the draft in principle but intended to come forward with specific proposals in writing, *inter alia* concerning the draft's title. In his view, it was preferable that proposals should be submitted in writing wherever possible.

7. Mr. HORNBY (Canada) said that he was in favour of giving constructive consideration to any proposals which would clarify such matters as the proposed instrument's scope of application, the extent of the operator's obligations to inspect and provide documentation, and the compatibility of liability limits with other transport conventions, including conventions other than the Hamburg Rules which the present draft seemed designed to complement. Attention should be concentrated on making the draft as broadly applicable as possible, so that it would be attractive to operators having dealings with carriers not covered by the proposed Hamburg Rules.

8. Mr. BONELL (Italy) said that his Government would be glad to see the draft Convention finalized at the present session of the Commission. He was convinced of the usefulness of the proposed new instrument precisely because of the existing situation, which was far from satisfactory for all concerned. It had been suggested that the proposed rules might prevent competition between operators of transport terminals to the benefit of users and of the business community in general. If that were the case, it would indeed be a cause for alarm; however, he was confident that the minimum approach adopted from the outset precluded any such risk. As for the relationship between the draft Convention and other rules already in existence although not necessarily yet in force, he was prepared to accept some changes which would make the interlinkage between the draft Convention and the Hamburg Rules somewhat less formal and explicit.

9. Mr. RINGER (Federal Republic of Germany) said that his Government took a positive attitude towards the contents of the draft Convention. However, as indicated in its written comments in document A/CN.9/319/Add.1, it considered that it might be premature to present the draft text under discussion in the form of a convention. He expressed his preference for a model law. The draft articles had originally been designed for the traditional type of warehousing contract but their scope had subsequently been enlarged considerably. His country was not opposed to a broader scope, as it considered that all goods and services involved in modern transport terminal operations should be regulated. However, since the situation regarding transport terminals was constantly changing, a binding convention would create a rigid structure which, once in existence, would be difficult to change or amend. The text under consideration should therefore initially take the form of a model law. The suitability of its provisions for dealing with the evolving situation of modern transport terminals could then be assessed and future developments would not be precluded. He suggested that the form which the draft articles should take might be decided only after discussion of the draft text article by article.

10. Ms. VILUS (Yugoslavia) said that there were many arguments in favour of either a convention or a model law. However, those in favour of the latter solution appeared to her especially convincing. Her country considered that rules were needed in order to fill a gap. The form given to those rules should be decided in the light of the existing instruments in the field of transportation.

11. Ms. van der HORST (Netherlands) said that her Government, like those of the United Kingdom and the Federal Republic of Germany, would prefer to see the draft articles take the form of a model law rather than that of a convention. Owing to the wide variety of transport terminal operators performing different types of services, her country was not convinced that they should all be governed by the same liability régime. In the event of a decision in favour of a convention, the text adopted should provide for the possibility of application of the instrument in the light of special national circumstances. She drew attention to a proposed new article, submitted by her country in document A/CN.9/319/Add.3, providing that "Any State may declare at the time of signature, ratification, acceptance, approval or accession that it shall restrict the application of the rules of this Convention to certain types of terminal operators".

12. Mr. SEVON (Observer for Finland) said that his country supported the draft under consideration and looked forward to the text being finalized so that it could be submitted to the General Assembly for adoption. His delegation had difficulty in understanding the problems of those States which opposed the convention form. If they felt it advantageous to secure a public law commitment of an international character in relation to the topic under consideration, they could use the convention as a model law in their domestic legislation, taking up articles they considered useful and disregarding others. However, Finland was not optimistic that those countries which favoured a model law would act in that way. The Commission had always endeavoured to accommodate States having particular needs, so long as such accommodation did not create serious difficulties. He did not see how the present draft text could cause any serious difficulties. Finland was in favour of the elaboration of a convention.

13. The text before the Commission did raise certain problems for his country in connection with the scope of its application, but those problems could doubtless be resolved in the implementing legislation to be enacted. There was also a problem in drawing a line between transportation *per se* and the operation of transport terminals and also a serious problem in regard to article 8. He felt, however, that both those problems could be resolved.

14. The CHAIRMAN said that the form to be taken by the text under discussion was indeed a serious matter. The majority of those who had spoken so far appeared to favour a convention but he hoped that further members would give their views on the question so that the nature of the document being elaborated by the Commission might be clarified.

15. Mr. BONELL (Italy) considered that the issue of the form which the text should take should be decided only later, perhaps after the examination of its different articles.

16. Mr. RUSTAND (Observer for Sweden) said that the Working Group on International Contract Practices was to be commended for its work in preparing the draft Convention before the Commission. That text constituted a sound basis for further negotiations aimed at elaborating a liability régime for operators of transport terminals. His Government realized that the draft Convention represented a compromise between different views and legal systems. The solutions chosen did not necessarily always reflect Sweden's preferences. However, the establishment of an appropriate liability régime and the closing of existing gaps was of such importance that the draft text was considered basically acceptable. With regard to the form of the instrument to be adopted, he had difficulty, like the representative of Finland, in understanding why the convention form should be considered so unacceptable. Sweden could support the idea of elaborating the text in the form of a convention.

17. The Hamburg Rules and the Multimodal Convention had to a great extent served as models for the proposed new convention; unfortunately, however, those instruments had not yet entered into force. The primary objective was to achieve the greatest possible degree of uniformity in the field of transport law and the adoption of a convention was therefore the most suitable approach. For States which were not themselves prepared to accept a convention such an instrument could at least serve as a model for their national legislation.

18. Mr. ENDERLEIN (Observer for the German Democratic Republic) considered that the convention form was best suited to meet the existing need for liability rules in international transport. He supported the views expressed by the representatives of Finland and Sweden, as well as the written comments submitted by those countries. A convention would be of no harm to countries which disliked conventions, whereas a model law would be undesirable for countries that favoured a convention. The question had been discussed on many previous occasions and he suspected that in some cases the emphasis placed on the form to be taken by the rules was designed to defer completion of the work. It was necessary to know at the outset whether the draft text was to be a model law or a convention, since model laws were based on different principles. There would, for instance, be no need for final clauses in a model law and the formulation of some of the articles would have to be different. His delegation favoured the adoption of a convention on the topic under consideration.

19. Mr. TARKO (Observer for Austria) said that his delegation's preference was for a convention. A model law might secure temporary acceptance whereas a convention would be of a more definitive nature. The discussion in the Commission should in his view not be confined to those proposals which had been submitted in writing.

20. Mr. SWEENEY (United States of America) said that his Government and 13 others had submitted in document A/CN.9/319 and its addenda a number of written proposals relating to the draft convention. He thought that it might be confusing if it were now required to resubmit all written comments as "CRP" proposals.

21. Mr. BERGSTEN (Secretary of the Commission) said that specific written proposals already made and contained in document A/CN.9/319 or its addenda could be identified by reference to those documents. Any new redrafting proposals should be circulated in writing as conference room papers.

22. Mr. SWEENEY (United States of America) said that he supported the views of the observers for Austria, Sweden, the German Democratic Republic and Finland and the representative of Italy, who preferred a convention to a model law. A large number of conventions and protocols on the international carriage of goods were already in existence and provided a framework into which a new convention could be conveniently fitted. It would, however, be necessary to meet the objections raised by the advocates of a model law. The decision as to the final form of the text should be taken only after discussion of the individual rules.

23. Mr. DOUNYA (Egypt) said that his Government regarded a convention as the more suitable form, since international carriage by sea, by air, and even by rail, was already covered by international conventions governing liability. The proposed new convention could be integrated into the existing legal structure, filling the few gaps which still remained. The decision as to the nature of the instrument to be adopted should be made at the outset, since it would affect some of the individual rules to be discussed.

24. Mr. SZASZ (Hungary) said that his Government also favoured a convention, since it would be easier for countries that preferred a model law to make use of a convention than vice versa. A decision on that fundamental point should in any case be made before the individual rules were examined.

25. Mr. HORNBY (Canada) said that the question of the choice between a convention or a model law had already been fully discussed and a decision had been reached in the Working Group on International Contract Practices. It was, in his view, too late to go back on that decision. The decision could be formally endorsed following the discussion of the individual rules.

26. Mr. ABASCAL (Mexico) said that the decision on the form of the instrument to be adopted should be taken at a later stage when all the substantive issues had been discussed. Opponents of the idea of a convention had placed considerable emphasis on the rigidity of conventions. However, a new dynamic had recently developed, and many conventions had been progressively adapted by means of protocols, in quite a flexible manner.

The meeting rose at 12.37 p.m.

Summary record of the 403rd meeting

Tuesday, 16 May 1989, 2 p.m.

[A/CN.9/SR.403]

Chairman: Mr. RUZICKA (Czechoslovakia)

The meeting was called to order at 2.10 p.m.

Draft Convention on the Liability of Operators of Transport Terminals in International Trade (A/CN.9/298, A/CN.9/319 and Add.1-4) (continued)

1. Mr. POHUNEK (Czechoslovakia) said that the point of view of his delegation remained that the uniformity of law in relation to the liability of operators of transport terminals could be achieved better by a convention than by a model law.

International law in the field of the international transport of goods was already contained in conventions. A convention on the subject under discussion was desirable and the draft Convention prepared by the Working Group would serve as a useful basis.

2. Mr. AZZIMANE (Morocco) said that his delegation had never questioned the usefulness or appropriateness of rules to

regulate the activities of operators of transport terminals, and he supported the view that such rules should take the form of a convention. However, he felt that discussion of the form that the text should take should be deferred, as suggested by the representative of Italy, until after the content had been agreed on.

3. Mr. YUAN Zhenmin (China) argued that the appropriate form of the uniform rules relating to operators of transport terminals would be a convention for two reasons. Firstly, a majority of delegations were in favour of a convention. More importantly, if the form of a convention were adopted those delegations who preferred a model law could use the convention, in their own internal legislation, as a model law. On the other hand, if the form of a model law were selected, it would not be possible for those favouring a convention to use the model law as a convention. Consequently his delegation favoured a convention.

4. Mr. VINCENT (Sierra Leone) said that his delegation preferred the form of a model law rather than a convention. However, he supported the view that consideration of the form of the uniform rules should be deferred until after the substantive issues had been discussed.

5. Mr. NESTEROV (Union of Soviet Socialist Republics) said that the uniform rules should take the form of a convention. The arguments that had been put forward by the representative of the United States of America were most convincing. All existing international law relating to transport and carriage was the subject of conventions. He was in favour of using the draft text proposed by the Working Group as a basis for the work of the Commission at the current session.

6. Mr. OCHIAI (Japan) said that at the last session of the Working Group his delegation had supported the model law approach. It continued to favour a model law but could accept a convention if that proved to be the wish of the majority. He reserved the right to comment further on the matter at a later stage.

7. Mr. GOH (Singapore) supported the view that the substantive issues should be discussed first and only subsequently should consideration be given to whether the uniform rules should be in the form of a convention or model law.

8. Mr. VENKATARAMIAH (India) thought that a convention was needed, since all other law relating to carriage and transport, such as the "Hamburg Rules", were also in the form of conventions. Any other form would cause difficulties to countries if they were adopted.

9. Ms. PERT (Observer for Australia) said that her delegation continued to favour a convention, for reasons given by other delegations, particularly those of Finland and the United States of America. The question whether the rules should be in a convention or model law should be settled now and not at a later stage.

10. Mr. TEPAVIDCHAROV (Bulgaria) supported the view that the uniform rules relating to the liability of operators of transport terminals in international trade should be contained in a convention. That approach would best satisfy the intention to fill a gap in international law relating to transport and carriage and help deal with problems hitherto experienced in that area.

11. Mr. AL-WOHAIBI (Nigeria) said that his delegation preferred the form of a model law to that of a convention. However, debate on the subject should be deferred until after full discussion of the substantive issues had taken place.

12. The CHAIRMAN, summing up, said that the majority favoured a draft convention but some delegations favoured the

model law approach. In order to facilitate the work of the session, he recommended the adoption of a convention approach, which would encourage more rigour in drafting. If the draft Convention was adopted, it should be explained that countries which preferred a model law approach need not adopt the Convention but could incorporate its provisions in their internal legislation. For the purposes of the work of the session, the model law approach did not seem a very practical one. The possibility was not excluded that the rules and regulations developed during discussion might be used as the basis of a model law. However, it would be more difficult to transform a model law into a convention than the converse.

13. Regarding the proposal to begin the discussion with the final clauses, there would only be final clauses if the form of a convention was agreed on, and prior agreement on that point would therefore be required.

14. Another possibility that could be envisaged in the discussion of the final clauses, to satisfy those countries who were not in favour of a convention, would be reservations enabling them to apply the Convention as if it were a model law.

15. He believed it was the wish of the majority that the Commission should start work on the proposed Convention on the understanding that all the questions raised so far could be discussed in relation to individual articles to which they applied.

16. Mr. SCHROCK (Federal Republic of Germany) said that his delegation preferred the model law approach but would accept the convention approach as a basis for the work of the session.

17. Ms. SKOVBY (Denmark) said that it was incorrect for the title of the draft Convention to refer only to the liability of operators of transport terminals since the draft Convention covered matters other than liability, such as those contained in articles 9 and 10.

18. Mr. YUAN Zhenmin (China), referring to the question of the title of the draft Convention, thought that the words "international trade" should be replaced by "international carriage of goods" since most of the articles concerned the carriage of goods rather than international trade.

19. Mr. SWEENEY (United States of America) said that, in the original discussion of the nature of terminal operators, the term "international trade" had been deliberately chosen because it was broader than "carriage of goods". Terminal operators were not solely concerned with the carriage of goods. The major object of the draft Convention was to close a gap in international law relating to the carriage of goods, but the use of the term "trade" was not in conflict with that. However, he could accept the adoption of the expression "carriage of goods" if that were the general wish.

20. Mr. BONELL (Italy), supported by Mr. VENKATARAMIAH (India), said that although the change of the word "liability" might be considered desirable it was not essential. He took it from the silence of the majority of delegations that they were content to keep the title as it stood; that would be the preference of his delegation.

21. The CHAIRMAN said that, as he saw no support from the suggestions for deleting the reference to "liability" or replacing the word "trade" by the words "carriage of goods", he thought that the title should be retained as drafted by the Working Group.

22. *It was so decided.*

23. The CHAIRMAN asked what method the Commission wished to adopt for the discussion of the articles.

24. Mr. DOUNYA (Egypt) proposed that the Commission should discuss each article in turn, paragraph by paragraph.

25. Mr. SCHROCK (Federal Republic of Germany) agreed that the Commission should proceed paragraph by paragraph.

Article 1.

26. Mr. SWEENEY (United States of America) said that the definition of an operator of a transport terminal raised certain issues. In particular there was the problem of stevedores. In circumstances where stevedores were employed by carriers to move goods there were often clauses in the maritime bill of lading providing that the stevedore was to be covered by the legal régime of maritime carriers. The purpose was to permit a single insurance cover for the carrier and the stevedore, which was simpler and more economical. The terminal operators, including stevedores, would prefer a uniform liability régime where that could be achieved by a bill-of-lading clause. He referred to the comments of his Government in document A/CN.9/319, page 14, and proposed that, in the last sentence of article 1(a), the words "as a carrier or multimodal transport operator" should be deleted. That modification would ensure that stevedores, when they handled goods under maritime bills of lading which extended to them the benefits possessed by carriers, were treated no less favourably under the proposed Convention than carriers would be.

27. Ms. SKOVBY (Denmark) supported the United States proposal. If the term "carrier" was deleted, it would no longer be necessary to define it.

28. Mr. BONELL (Italy) said that he did not agree with the United States proposal. A new text would give rise to difficulties in its practical implementation. If a stevedore was engaged by a carrier, he would be considered a sub-contractor and would be subject to the same rules as the carrier. The United States position was already covered in the existing text by implication. Deletion of the term "carrier" would negate the main purpose of the sentence, which was to exclude the carrier from the Convention. Neglecting to make the exclusion explicit could create misunderstandings.

29. Mr. OCHIAI (Japan) said he did not support the United States proposal. Stevedores were not treated in the same way as carriers under the "Himalaya clause", because that clause only applied to liability problems. Nor were they treated as carriers in other respects. The draft Convention covered not only liability aspects, but also issuance of documents, rights of security in goods, etc. If the United States proposal were approved, most stevedores would not be regulated by the Convention, because most bills of lading had a "Himalaya clause". In other words, if a stevedore wished to circumvent the Convention, he could do so by inserting a "Himalaya clause". That would have an adverse effect on the Convention.

30. Mr. RUSTAND (Observer for Sweden) stressed the importance of clarifying the expression "take in charge", particularly in the light of article 3. He wondered whether goods left on the quay without instructions were also to be considered as having been "taken in charge".

31. Ms. van der HORST (Netherlands) said that her delegation did not support the United States proposal. The last sentence in article 1(a) was not clear. It might mean that a carrier who was released from liability under article 7 of the Hague/

Visby Rules would become liable under the new Convention. That would be unacceptable for the Netherlands. The words "he is responsible for the goods as a carrier" in the last sentence of subparagraph (a) should therefore be replaced by "he acts as a carrier".

32. Mr. SCHROCK (Federal Republic of Germany) agreed with the representatives of Italy and Japan that the last sentence of subparagraph (a) should remain as it stood. With regard to the first sentence of that subparagraph, he suggested the use of the words "take over" rather than "take in charge". Lastly, a certain amount of confusion still remained with regard to the question of segmented transport.

33. Mr. BONELL (Italy) said that replacing the words "take in charge" by "take over" might make the clause too restrictive. It seemed clear that, if goods were left at the quay without permission, they would not have been "taken in charge" by the terminal operator. On the other hand, they could be regarded as having been taken in charge if they had been placed in an area specifically set aside to that end.

34. Mr. ENDERLEIN (Observer for the German Democratic Republic) said that the words "take in charge" might be ambiguous; he was therefore in favour of their replacement or deletion, but he was opposed to the words "take over", because when an operator undertook to procure the performance of transport-related services, it did not necessarily mean that he took over or took in charge goods. His delegation therefore proposed deleting the words "take in charge goods involved in international carriage in order to" in the first sentence of subparagraph (a) and adding the words "international carriage of" before "goods in an area under his control". He supported the United States proposal to delete the words "as a carrier or multimodal transport operator" in the last sentence of subparagraph (a).

35. Mr. HORNBY (Canada) supported the proposal by the German Democratic Republic to remove the reference to "taking in charge" while retaining a reference to international carriage. His delegation also supported the United States proposal to delete the words "as a carrier or multimodal transport operator".

36. Mr. ILLESCAS (Spain) said that the purpose of article 1(a) was to define the phrase "operator of a transport terminal" without any reference to the moment when the responsibility of the operator of a transport terminal began or ended, a matter which was dealt with under article 3. The paragraph would be improved if an operator were defined as a person who performed or procured the performance of transport-related services, and he supported the deletion proposed by the German Democratic Republic. The paragraph was, however, also acceptable as it stood. The replacement of the words "take in charge" by "take over" would make the text rather restrictive. He thought that the point should be discussed in connection with article 3. He did not support the proposal of the United States of America concerning the second sentence of subparagraph (a).

37. Mr. SWEENEY (United States of America) said that the phrase "take in charge" had constituted a problem when the Hamburg Rules were being drafted. The problem was due to the very narrow liability of open carriers under the Hague Rules, according to which ocean carriers' liability was limited to when the goods had actually crossed the deck of a vessel. In that respect, the Hague Rules were much narrower than those governing other forms of international transport, including those in the Warsaw Convention. When the Hamburg Rules were being drafted, carriers had naturally wished there to be no extension of their liability, whereas shippers had wanted carriers' liability to begin at the moment of hand-over of the bill of lading, which might in some cases occur thousands of miles from the sea. The

Hamburg Rules therefore provided that the goods should be taken in charge at a port. However, he supported the deletion suggested by the representative of the German Democratic Republic. The proposal to replace the words "take in charge" by "take over" ignored the fact that the latter expression implied the physical movement of goods.

38. Mr. EVANS (International Institute for the Unification of Private Law (UNIDROIT)) said that, in the original language of the UNIDROIT text, the phrase "take in charge" had been used in connection only with the obligation concerning supervision of goods. The inclusion of the phrase "take in charge" in article 1(a) might lead to confusion, and he supported the proposal made by the German Democratic Republic.

39. Mr. SCHROCK (Federal Republic of Germany) said that he could support the proposal by the German Democratic Republic in a spirit of compromise.

40. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that there had been general agreement in the Working Group that an operator of a transport terminal should be defined not only as a person who performed or procured the performance of transport-related services, but also as a person who took in charge goods involved in international carriage. It was thus made clear that operators' responsibility should extend to the goods, and the phrase "involved in international carriage" delimited the extent of that application. If the deletion proposed by the German Democratic Republic were adopted, the definition of a transport terminal operator in article 1 would not match the understanding of operators' responsibilities in article 3 and article 5: before an operator carried out the transport-related services enumerated in subparagraph (d) of article 1, he had to have taken the goods in charge. The first sentence of subparagraph (a) should therefore be maintained as it stood.

41. Mr. VENKATARAMIAH (India) said that, if the first sentence of subparagraph (a) of article 1 was read in conjunction with article 3, the impression was given that operators' liability was limited to taking the goods in charge and not to handling them. The problem lay in article 3, which should be amended to make it clear that responsibility extended to those handling the goods.

42. Mr. SEVON (Finland) said that article 1(a) defined operators of transport terminals, not their period of responsibility or any other related matter of liability. The essential part of the definition was that an operator should perform or procure the performance of transport-related services, and he therefore supported the proposal by the German Democratic Republic. If the reference to taking the goods in charge were maintained, the problem would arise that the operator would have no liability when not in charge of the goods. The reference to "goods involved in international carriage" was also unnecessary as the scope of application of the draft Convention was suitably defined in article 2.

43. Mr. SAMI (Iraq) said that the proposal by the German Democratic Republic could be supported only if it was assumed that article 1(a) had no connection with article 3 or 5. If, however, it was assumed that there was a connection, the question was whether an operator was responsible even before he performed or procured the performance of transport-related services. It was quite clear that operators should be responsible from the moment they took goods in charge, and if the corresponding reference were deleted, there would be a discrepancy between article 1(a) and article 3.

44. Mr. SZASZ (Hungary) said that the Commission was discussing two problems, related but not identical: namely, the

definition of an operator and the period of responsibility. His delegation fully supported the proposal made by the representative of the German Democratic Republic. He reminded members, however, that sooner or later the Commission would have to define the moment when responsibility started.

45. The CHAIRMAN noted that most delegations supported the proposal by the German Democratic Republic, although some were evidently hesitant, because the problem could be dealt with under article 3. He asked members if they agreed to the deletion of the words "to take in charge goods involved in international carriage in order" in the first sentence of article 1(a).

46. Mr. CHAFIK (Egypt) suggested that the matter should be left open until the Commission reached article 3. Articles 1 and 3 could be dealt with together.

47. Mr. JOKO-SMART (Sierra Leone) agreed with the representative of Egypt. The Hamburg Rules, unlike the present draft Convention, distinguished between the "carrier" and the "actual carrier". Article 3 meant that the operator must be physically in possession of goods before his responsibility began. The proposed deletion in article 1(a) would result in the operator being someone who merely undertook to perform services and might not take charge of the goods involved. It would be better to defer the question and if necessary deal with articles 1 and 3 together.

48. Mr. BONELL (Italy) stressed the need for a decision. He suggested that the Commission should agree to the proposed amendment and should review it only if that proved necessary after discussion of article 3.

49. The CHAIRMAN suggested that, bearing in mind that article 1(a) and article 3 dealt with different matters, the Commission should take a decision on article 1(a) and return to it only if it proved necessary in connection with article 3.

50. Mr. YUAN Zhenmin (China) said that the question had begun with a discussion of the relative merits of the expressions "take in charge" and "take over". The proposed deletion of the whole phrase went too far.

51. Mr. INGRAM (United Kingdom) shared the view that no decision could be taken on article 1(a) until the outcome of discussions on article 3 was known. At the present stage, he felt that the proposed deletion would leave what would amount to nothing more than a stevedoring contract, with little relation to transport terminals.

52. The CHAIRMAN suggested that, in view of the doubts that had been expressed, a decision on article 1(a) should be postponed until article 3 had been discussed.

53. *It was so agreed.*

54. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that it should not be forgotten that the draft Convention was concerned with goods in international carriage and that international carriage—which was defined in article 1(c)—was included in the phrase it was proposed to delete.

55. The CHAIRMAN recalled that the United States had proposed the deletion of the words "as a carrier or multimodal transport operator" in article 1(a) (see document A/CN.9/319, p. 14).

56. Mr. SWEENEY (United States of America) explained that the proposed amendment had its origin in the situation of stevedores. If they were excluded from the rules the need for a

convention dealing with terminal operations would be in question. The stevedores insisted, and the United States Government had agreed, that their treatment should not be any worse than that accorded to carriers. The question that then arose was whether stevedores were servants or agents of carriers or whether they were independent contractors. They wanted to be both: independent carriers for the purposes of regulation by government, but enjoying the same defences as carriers in respect of claims by shippers. The problem was longstanding and had not been solved by the Hague Rules, the Visby amendments or the Hamburg Rules.

57. In connection with the problem of treating stevedores in the same way as carriers in respect of defences, the aspect that the stevedores were most interested in was unit limitation of liability, which involved basic economics. It would be more efficient and economic for goods to be protected under only one liability scheme and one insurer, but neither the transport nor the insurance industry was ready for that. It might, however, be possible to cut down the number of insurers if the goods were covered by the ocean carriers' insurer during periods of ocean carriage and of waiting for ocean carriage and thereafter, but the stevedores would have to pay for such protection through the price they charged the carriers. Thus the stevedores' rates would differ according to whether the goods were covered under the ocean carriers' bill-of-lading clause or under stevedores' insurance.

58. Another question was whether the clause in ocean bills of lading extending the carriers' defences and limitations of liability to stevedores would violate public policy. Article 8 of the

Hague Rules—and a similar provision appeared in the Hamburg Rules—provided that clauses which lessened the carriers' liability were null and void and of no effect. The extension of protection to stevedores lessened the stevedores', but not the carriers', liability. It seemed therefore that the extension of bill-of-lading protection to stevedores by carriers—for a price—was not in violation of solid public policy.

59. The courts had rejected the idea that carrier defences should apply automatically to stevedores, but the highest United States court, some 35 years earlier, had stated that carefully drawn up bill-of-lading clauses, which indicated bargaining, might extend the carriers' protection to stevedores, and since 1980 there had been several instances in which ocean carrier bill-of-lading clauses had extended ocean carrier protection to stevedores. Such protection was not automatic: the stevedores had to bargain for it and the courts had to approve the wording. That extension had been a divisive issue in the Working Group. Some delegations had wanted stevedores to be excluded from the Convention, but that would leave a large gap in a convention designed to fill gaps.

60. The proposed amendment would meet the wishes of the stevedores, who did not want to be carriers for all purposes, and would give them the opportunity to argue their protection under bill-of-lading clauses. That protection and the carriers' defences would be extended to the stevedores in order to eliminate excess insurance.

The meeting rose at 5.05 p.m.

Summary record of the 404th meeting

Wednesday, 17 May 1989, 9.30 a.m.

[A/CN.9/SR.404]

Chairman: Mr. RUZICKA (Czechoslovakia)

The meeting was called to order at 9.40 a.m.

Draft Convention on the Liability of Operators of Transport Terminals in International Trade (continued) (A/CN.9/298, A/CN.9/319 and Add.1-4, A/CN.9/321)

Article 1 (continued)

1. Mr. BONELL (Italy) recognized that there were a number of cogent reasons for the position taken by the United States of America and for the modification of the last sentence of article 1, paragraph (a), proposed by that country (A/CN.9/319, page 14). Since adoption of the proposed amendment would not introduce any substantive change but would allow a certain flexibility of interpretation in certain domestic jurisdictions, his delegation could accept the United States proposal, although he personally would prefer to leave the paragraph unchanged.

2. Mr. SWEENEY (United States of America), replying to the questions raised by the representative of Hungary at the previous meeting, said that the relationship between stevedores and shipping interests lay in tort law: goods might be damaged by the stevedore, who usually had no contractual relation with the shipper or consignee. On the other hand, the relationship between the stevedore and the carrier was governed by a contract. The problem was therefore one of tort and not of contract.

In the case of damage to a cargo, the carrier might well be far away when the damage was discovered, with the result that it might be the stevedore, on the spot, against whom civil action was taken for damage, with a consequent need for insurance against that risk. That was a serious problem which deletion of the phrase "as a carrier or multimodal transport operator" would help to solve.

3. Mr. SEVON (Observer for Finland) said that he did not object to the United States proposal but was somewhat concerned by the reasons given for its submission. He could see nothing in the draft Convention to exclude its application to the relation between the stevedore and the carrier. The text dealt with the liability of a person undertaking operations such as stowage and contained no provisions to exclude the stevedore who performed such operations on the basis of a contract between himself and the carrier. If his interpretation was correct, the United States representative's concern to eliminate the need for double insurance was not entirely justified. The United States amendment was useful, however, in that it simplified the text and eliminated some possible sources of misunderstanding.

4. The CHAIRMAN asked whether there were any delegations which opposed the United States proposal.

5. Mr. OCHIAI (Japan) said that he was not convinced by the United States representative's explanation of his country's amendment and, for the reasons he had given at the previous meeting, he could not support the deletion proposed. Firstly, not all stevedores were treated the same as carriers and, secondly, the Convention could easily be made inapplicable in their case by the insertion of the "Himalaya clause" in the bill of lading. That would be detrimental to the proposed Convention.

6. Ms. EISTERER (European Shippers' Council) said that, like the observer for Finland, she found it difficult to understand the problem at issue. She assumed that if a stevedore was the employee of a carrier he was not a transport terminal operator but that if he were acting independently he would be liable. Moreover, as a rule, transport terminal operators had no contractual relation with the shipper. It was not clear to her how the deletion proposed by the United States would help the stevedores.

7. Mr. SWEENEY (United States of America), replying to the previous speaker, said that the only difficulty lay in the fact that, with the present wording of paragraph (a), the stevedore, in order not to be considered a terminal operator, must be acting as a carrier. As for the "Himalaya clause", it had not been given full effect throughout the world and in some places has been overturned by the courts as in violation of public policy. The United States proposal was designed to remove an impediment to acceptance of the draft Convention by the stevedores, who refused to be considered as carriers. In other words, the difficulty lay in the fact that the draft Convention required stevedores to be so considered. There was no insurance problem, since protection and indemnity insurance would cover any damage to the goods involved.

8. The CHAIRMAN noted that there appeared to be only limited support for the United States proposal.

9. Mr. ABASCAL (Mexico) said that his delegation had no objection to the United States proposal to amend paragraph (a). He had remained silent because the Chairman had asked whether there were any delegations which opposed that proposal.

10. Ms. SKOVBY (Denmark) supported the United States proposal.

11. Mr. BERAUDO (France) said that the United States wording improved the text from a legal standpoint in that it expressed directly what had been implied indirectly in the previous text. It dispensed with an unnecessary phrase and indicated the legal requirements for application of the Convention. He therefore supported the United States proposal.

12. Mr. JOKO-SMART (Sierra Leone) was not sure that he agreed with the United States proposal, in view of his interpretation of article 7 of the draft Convention, which referred to the agents of the operator, who would presumably include stevedores engaged by the operator, and dealt with defences founded in contract or in tort. The United States amendment should be considered in conjunction with article 7.

13. Mr. INGRAM (United Kingdom) expressed his sympathy with the United States proposal but considered that it would not achieve the desired aim and would introduce some uncertainty as to the application of the rules of the draft Convention to stevedores. He therefore preferred the text of paragraph (a) as it stood.

14. The CHAIRMAN suggested that the Commission might either consider the United States amendment in conjunction with article 7 or, in accordance with what appeared to be the desire

of the majority of members, accept the United States proposal and deal later with any points arising under article 7.

15. Mr. BONELL (Italy) was reluctant to postpone action on the United States proposal until the Commission took up article 7, which he considered not altogether relevant to article 1. There had been some qualified opposition to the United States proposal, but there appeared to be no fundamental objections to it. He felt that the Commission should seek to accommodate the views of the United States delegation.

16. Mr. SEVON (Observer for Finland) agreed with the previous speaker. Finland did not oppose the United States proposal but merely wondered whether it would achieve the desired aim. It might do so in the context of the United States but not necessarily elsewhere. However, since it would have no great effect on the draft Convention and would be of benefit to one country, it should be accepted.

17. The CHAIRMAN said he took it that the Commission agreed to the deletion of the words "as a carrier or multimodal transport operator" in paragraph (a).

18. *It was so decided.*

19. Mr. OCHIAI (Japan) said that he accepted the Commission's decision. However, he was unhappy that, as a result, most stevedores in the United States of America would not be regulated by the Convention.

20. Ms. FAGHFOURI (United Nations Conference on Trade and Development) said that the definition in article 1, paragraph (a), covered not only transport terminal operators but also every intermediary who took goods in charge and performed transport-related services. However, other provisions of the draft Convention appeared applicable only to those providing transport terminal services proper, in that they regarded storage or safekeeping as the central function. She wondered, for example, whether stevedores handling goods only for a very short period of time would have possession of the goods enabling them to exercise their rights of retention under article 10. When, moreover, under article 3, would the responsibility of a stevedore engaged in loading or trimming end and, with reference to article 4, was a stevedore expected to issue a document stating the condition and quantity of the goods he handled? It was essential, in her view, for the provisions of the draft Convention to apply to all cases for which it was intended. Finally, she wondered whether it was appropriate to consider all intermediaries and cargo handlers as transport terminal operators even though their services were not necessarily performed in a transport terminal.

21. The CHAIRMAN said that all matters such as those just raised would have to be resolved either in subsequent articles or within the context of the definitions in article 1. In the absence of objection he would take it that the Commission approved article 1, paragraph (a), as amended.

22. *It was so decided.*

23. The CHAIRMAN invited the Commission to consider article 1, paragraph (b).

24. Mr. JOKO-SMART (Sierra Leone) said that, since the text under consideration followed closely that of the Hamburg Rules, he wished to know why the important reference in those Rules to live animals had been omitted.

25. Mr. KATZ (International Trade Law Branch) said that the text before the Commission was to all intents and purposes the

formulation used by the Working Group on International Contract Practices throughout its discussions. The question of a reference to live animals had never been raised. The definition in paragraph (b) was intended simply to make it clear that packages, pallets and the like were, under the conditions specified in the paragraph, to be regarded as goods, without making any statement as to whether other items were included or excluded.

26. Mr. JOKO-SMART (Sierra Leone) said that, in his view, the definition should include a statement to the effect that goods included live animals.

27. Mr. CHAFIK (Egypt), supported by Ms. SKOVBY (Denmark), said it had been made clear that live animals were not excluded from the definition of goods. He believed that should be sufficient.

28. Mr. ENDERLEIN (Observer for the German Democratic Republic) said that in his view goods included any item which could be transported. He therefore could not accept that containers, which could be both transported and stored empty, should under certain conditions be excluded from the definition.

29. Mr. SEVON (Observer for Finland) said that a reference to live animals in the definition was unnecessary. The reference to them in the Hamburg Rules had been inserted in order to bring out clearly the difference from the Hague Rules and because the presence of live animals in moving transport could cause specific problems.

30. Mr. RUSTAND (Observer for Sweden) said that his delegation's doubts had been dispelled by the explanation given by the representative of the International Trade Law Branch.

31. Mr. SZASZ (Hungary) said that he agreed with the observer for the German Democratic Republic. The text of paragraph (b) was misleading. Under certain circumstances empty containers might be regarded as "goods".

32. Mr. YUAN Zhenmin (China) said that some differentiation had to be made between commercial goods and non-commercial goods, such as gifts or international aid to disaster-stricken populations. The concept of "goods" had to cover a wider field than commercial goods alone.

33. Mr. AZZIMAN (Morocco) said that, although the term "goods" presented no problem in itself, their definition as the contents of articles such as containers could give rise to uncertainties.

34. Mr. BONELL (Italy) agreed with the remarks of the observer for Finland and the representative of Hungary. The difficulty could perhaps be overcome by deleting the words "if the goods are consolidated or packaged therein", thus reverting to the original UNIDROIT text, on which the discussions in the Working Group had been based.

35. Mr. GOH (Singapore) said that he would prefer to see the present definition in paragraph (b) retained.

36. Mr. BERAUDO (France) said that paragraph (b) did not define "goods" but gave a list of "*objets mobiles corporels*". The French version appeared to regard containers as goods, whereas the English and Spanish texts did not. Ambiguities of that type would have to be cleared up. He supported the deletion proposed by the Italian representative.

37. Ms. SKOVBY (Denmark) also supported the Italian amendment. The question of the differentiation between commercial and non-commercial goods, raised by the representative

of China, would in her view have to be left for solution by national legislation.

38. Mr. ILLESCAS (Spain) pointed out that article 1, which was entitled "Definitions" included definitions in paragraphs (a), (c), (e) and (f), but did not provide definitions of "goods" or "transport-related services". The title of the article was therefore misleading. He was in favour of retaining the present wording for paragraph (b), possibly with the Italian amendment. However it should be made clear that empty containers were not to be subject to the Convention, unless otherwise specified in the contract concerned.

39. Mr. INGRAM (United Kingdom) supported the amendment proposed by the representative of Italy.

40. Mr. EVANS (International Institute for the Unification of Private Law) said that the corresponding provision in the original UNIDROIT draft had not been intended to exclude wild animals or empty containers from the term "goods". The relevant wording was: "Goods include the contents of containers, pallets or similar articles of packing, if not supplied by the operator of the transport terminal".

41. Mr. ENDERLEIN (Observer for the German Democratic Republic) said that it was open to doubt whether paragraph (b), which had been taken over unaltered from the Hamburg Rules, was required at all. Furthermore, the phrase "supplied by the operator" might give rise to confusion. If a customer's container became damaged and a replacement had then to be supplied by the operator, it would accordingly become "goods" and be fully covered by the Convention.

42. Mr. ABASCAL (Mexico) said that paragraph (b) was not a descriptive but an inclusive definition, similar to those in existing conventions, in which the principle adopted had been specifically to mention terms which might give rise to doubt.

43. Mr. POHUNEK (Czechoslovakia) said that he could support the Italian amendment to paragraph (b), but he would prefer to see the original UNIDROIT text adopted.

44. Mr. OCHIAI (Japan) had no difficulty in accepting an empty container as "goods", but suggested that a problem might arise where a container was used to carry goods. He favoured retention of the paragraph as drafted by the Working Group.

45. Mr. AZZIMAN (Morocco) also approved the existing wording of paragraph (b). Paragraphs (b) and (d) were simply lists concerning cases which might give rise to doubt. Paragraph (b) might perhaps be altered to begin with a phrase such as "The following should be considered to constitute goods within the meaning of the Convention: . . .".

46. Mr. JOKO-SMART (Sierra Leone) said that he accepted the explanation given by the representative of the International Trade Law Branch. The intention in the case of the Hague Rules had been to exclude live animals; the intention in the case of the Hamburg Rules had been to include them.

47. Mr. MOORE (Nigeria) suggested that the definition in paragraph (b) should be a broad one including almost everything carried by sea or other means.

48. Mr. LARSEN (United States of America) expressed concern at the possible uncertainty which might arise regarding containers stored at repair facilities while contents were being repaired. It was his understanding that the intention was that they should not then be considered "goods" under the

present draft Convention. The retention of the phrase "if the goods are consolidated or packaged therein" would avoid any ambiguity.

49. Mr. BONELL (Italy) said that he had not expected his proposal for deletion of the phrase just mentioned to raise difficulties. On further consideration of the matter, however, and in the light of the discussion, he now withdrew that proposal.

50. The CHAIRMAN noted that it appeared to be generally understood that paragraph (b) did not constitute a definition. The question of the treatment of matters such as live animals and empty containers might perhaps be considered by a drafting group, if one was established. In the absence of objection he would take it that the Commission approved article 1, paragraph (b).

51. *It was so decided.*

52. The CHAIRMAN invited the Commission to consider article 1, paragraph (c).

53. Mr. INGRAM (United Kingdom) said that transport terminal operators in his country had emphasized the importance of knowing which convention or model rules applied to goods which they received. The situation in that regard was not always clear. His delegation would like a stronger requirement in the draft Convention for identification, for the operator's benefit, of goods in international carriage. He would welcome some clarification of the intention underlying paragraph (c).

54. Mr. KATZ (International Trade Law Branch) said that the basic intention of the Working Group on International Contract Practices had been that the international rules to be formulated should apply only in the case of goods involved in carriage between different States. An earlier text had contained additional language in square brackets which attempted to deal with the situation of segmented transport. The problem was to determine, when one contract provided, for example, for the carriage of goods from point A to point B within one State, then another contract for the carriage of the goods from point B to C within the same State, then another contract for carriage by sea from point C to point D, a port in another State, whether all the individual contracts—some of which were wholly domestic in character—should be covered by the draft Convention if they were segments of an entire international transport operation. The question had been discussed at some length, and the Working Group had finally decided that the draft Convention should apply to an overall international operation even if this resulted in its application to wholly domestic segments. In reaching its decision, the Working Group had been mindful of the desirability that terminal operators should know what goods were involved in international carriage and would give rise to the application of international rules. To that end, the definition of "international carriage" required that the places of departure and of destination should be identified as being located in two different States when the goods were taken in charge by the operator. That identification could appear, for example, from markings on the goods.

55. The CHAIRMAN suggested that further discussion of article 1, paragraph (c) should be postponed pending the distribution of a written proposal relating to that paragraph.

56. *It was so agreed.*

57. The CHAIRMAN invited the Commission to consider article 1, paragraph (d).

58. Mr. INGRAM (United Kingdom) said he was surprised that paragraph (d) did not mention the packing and unpacking of goods, two of the most important transport-related services.

59. Ms. van der HORST (Netherlands) said that the wording of the paragraph did not make it clear that "transport-related services" meant services involving the physical handling of goods and not, for example, financial services. Accordingly, she reiterated the proposal contained in her Government's comments (A/CN.9/319/Add.3, page 7), viz., the replacement of the paragraph by the following definition:

"Transport-related services' means services regarding the physical handling of the goods such as storage, warehousing, loading, unloading, stowage, trimming, dunnaging and lashing;"

60. Mr. GRIFFITH (Observer for Australia) supported the United Kingdom representative's view that packing and unpacking should be included in the list of services. He suggested that fumigation should also be included in the list.

61. Mr. CHAFIK (Egypt) pointed out that paragraph (d), like paragraph (b), was an enumeration of examples rather than a definition. Since the enumeration was not exclusive, the suggestions for addition made by the representative of the United Kingdom and the observer for Australia were acceptable to his delegation. However, he would prefer the enumeration to be preceded by a proper definition phrase along the following lines: "Transport-related services' means any service which contributes towards the carriage of goods, such as . . .".

62. The CHAIRMAN suggested that the text of article 1, paragraph (d), together with the proposals made during the discussion, should be referred to the drafting group to be established with instructions for expansion as necessary.

63. *It was so agreed.*

64. The CHAIRMAN invited the Commission to consider article 1, paragraph (e).

65. Mr. TARKO (Observer for Austria) said that he had difficulty with the present text of the paragraph. Were oral notices excluded from the definition, or were they allowed if a record was produced at the same time or afterwards? If the definition was intended to serve as a rule of evidence, was it to be binding upon judges? No similar provision was to be found in comparable instruments, such as, for example, the Hamburg Rules. Both paragraph (e) and paragraph (f) were potentially confusing and should be deleted.

66. Mr. RUSTAND (Observer for Sweden) supported that proposal. His delegation understood paragraph (e) in its present form to mean that oral notice was excluded. The definition could create confusion under certain legal systems, such as that of his own country, where decisions in matters of that kind were left to the courts.

67. Mr. CHAFIK (Egypt) also supported the Austrian proposal.

68. Mr. LARSEN (United States of America) said that, in his recollection, the view in the Working Group had been that the definition did not exclude oral notices but merely required that a record should be provided at the time when notice was given or later. The provision was of value to insurance companies in connection with the payment of claims.

69. Mr. KATZ (International Trade Law Branch) said that the Working Group's discussion of paragraphs (e) and (f), which, at an earlier stage, had formed a single paragraph, had originally revolved around the question as to whether oral notice alone was sufficient. It had been argued that in the case of certain types of notice (e.g. notice of loss, damage or delay covered by

article 11) that should be the case. In the course of the discussion the view had developed that, for reasons such as those indicated by the United States representative, it was desirable that the uniform rules should provide for a record of the notice being preserved in all cases. On the question of the form which the record should take it had been felt that, in view of current rapid developments in electronic data processing and transmission, the provision should be sufficiently flexible to cover both existing and possible future techniques.

70. Mr. SEVON (Observer for Finland) said that the explanations just given had merely confirmed his view that the paragraph was misleading. No one who had not heard them could be expected to understand that oral notice was in fact permitted, provided it was recorded in some form. Moreover, the provision seemed to run counter to the principle of good faith in international trade. He saw no reason for including it in the draft

Convention if it did not appear in other similar instruments and he supported the proposal for its deletion unless the text were substantially amended.

71. Mr. BONELL (Italy), while recognizing that the language of paragraph (e) could perhaps be improved, disagreed on the issue of substance. The Hamburg Rules expressly provided that notice should be given in writing. While there had been general agreement within the Working Group that there was no need to insist on that requirement in the present case, the majority of members had felt that some record had to be provided in all cases, a computerized record being the most suitable. He would agree to amendment of the paragraph's wording but would oppose deletion of the paragraph.

The meeting rose at 12.30 p.m.

Summary record of the 405th meeting

Wednesday, 17 May 1989, 2 p.m.

[A/CN.9/SR.405]

Chairman: Mr. RUZICKA (Czechoslovakia)

The meeting was called to order at 2.10 p.m.

Draft Convention on the Liability of Operators of Transport Terminals in International Trade (continued) (A/CN.9/298 and A/CN.9/319 and Add.1-4, A/CN.9/321)

Article 1 (continued)

1. The CHAIRMAN invited members to continue their discussion of paragraphs (e) and (f). There were three possibilities: one could adopt one of the extremes of allowing complete freedom to provide information in written or oral form or of excluding all oral information, or one could pursue a middle course as in the existing text.

2. Mr. RUSTAND (Observer for Sweden) said that, while agreeing with the United States representative that oral information was not excluded provided a report was given later, he thought that it would be unwise to impose a requirement for a specific form in such cases. Normally, of course, a record would be provided—and the insurance companies would certainly demand that—but he saw no reason to exclude the occasional case where witnesses were called to testify, but no record was provided.

3. Discussions at the eleventh session of the Working Group on International Contract Practices had been based on a United States proposal that article 1(5) (now paragraph (e)) should read: "Notice" means a written or oral communication given pursuant to this Convention which is immediately preserved in a form or manner which provides a retrievable record of the information contained therein." He himself had suggested that the result of that proposal would be to exclude purely oral messages, and his view had been supported by others.

4. The CHAIRMAN suggested that, since the wording of paragraphs (e) and (f) was clearly not entirely satisfactory, it should be improved so as not to exclude oral information and so as to provide that proof could be furnished otherwise than in writing.

5. Mr. GRIFFITH (Observer for Australia), supported by Mr. SZASZ (Hungary), said that that purpose could be achieved by deleting paragraphs (e) and (f).

6. The CHAIRMAN said that the consequence of such an amendment might be a completely open situation, with reference back to national law. Would that be acceptable to the Commission?

7. Mr. VENKATARAMIAH (India) said that the proposed deletion would go counter to the aim of achieving some kind of uniformity. The wording might not be adequate, but it had been agreed upon in the Working Group. It would be better to see if the wording could be improved in order to meet the concern that had been expressed by some speakers.

8. Mr. LARSEN (United States of America) agreed with the representative of India. There might be room for improvement, but the basic need was to adapt the documents—in whatever form—to electronic data processing. That had been the trend in recent conventions on carriage, such as the Hamburg Rules, the Warsaw Convention and the Multimodal Convention. For example, in article 5 of the Warsaw Convention as amended by Montreal Protocol No. 4, the expression "any means which would preserve a record" was used.

9. The CHAIRMAN said that it might be necessary to expand the meaning of written documents, but for the time being the Indian suggestion represented the middle course. He suggested that the basic text should be sent to the drafting committee so that appropriate wording could be sought to make it clear that a request could be made by various means and need not be made in written form.

10. The Commission had now completed its consideration of article 1, except for a point in paragraph (a) which had been left open pending consideration of article 3, and paragraph (c) on which a written proposal from the Federal Republic of Germany was awaited.

11. Mr. ABASCAL (Mexico) drew attention to a number of terms which were not included in the definitions in article 1 but which needed clarification—perhaps in a commentary or in the report. He mentioned as examples: the “customer” referred to in article 4, who was presumably the person requesting a service; the “person entitled to take delivery of [goods]”, in articles 3 and 5, who could be the consignee, another carrier or his agent, or a person authorized to receive documents or records; the expressions “taken . . . in charge” and “delivery” in article 3, in connection with the responsibility of the operator.

12. The CHAIRMAN wondered whether the points could be covered in the report.

13. Mr. KATZ (International Trade Law Branch) said that any clarification requested by the Commission would be reflected in the report.

14. Ms. FAGHFOURI (United Nations Conference on Trade and Development) said that it would be useful to clarify the term “person entitled to take delivery of goods”, which under the Hamburg Rules was the consignee but in the present context could be the next carrier in the transport chain. The implications were different for different articles.

15. Mr. AZZIMAN (Morocco) said that his country had also suggested in its written comments (A/CN.9/319/Add.1) that the terms “customer” and “person entitled to take delivery” should be clarified.

16. The CHAIRMAN thought that it would be best to take up each case as it arose during the discussion.

17. Apart from the few items outstanding the Commission had concluded its consideration of article 1.

Article 2

18. The CHAIRMAN invited comments on paragraph (1).

19. Mr. ENDERLEIN (Observer for the German Democratic Republic) introduced the amendments proposed by his country in document A/CN.9/319/Add.3. His Government was proposing an amendment to subparagraph (a), the addition of a new subparagraph (b) and the retention of the existing subparagraph (b) as subparagraph (c).

20. Mr. SCHROCK (Federal Republic of Germany) said that his delegation had no objection to the proposals made by the German Democratic Republic.

21. He noted that both the present text and the proposed amendment referred to a “contracting State”, which in the Vienna Convention on the Law of Treaties meant a State which had consented to be bound by the Treaty whether or not it had entered into force. In the present context, he felt that the draft articles should be applied only in cases where a State had consented to be bound by the Treaty and where the Treaty was in force, and that the term “contracting State” should be replaced by “State Party”. (See document A/CN.9/XXII/CRP.5.)

22. Mr. HORNBY (Canada) said he saw no difficulty in the replacement of “contracting State” by “State Party” wherever necessary.

23. He was concerned, however, over the use of the place of business of the operator as the focal point for the scope of application. After consultations with industry, his delegation

was not convinced of the need for such a focal point and would prefer the earlier text which referred to the place where the services were performed (see document A/CN.9/WG.II/WP.60). That was customary in other instruments such as the Hague Rules, the Visby Rules and the Hamburg Rules and was generally more familiar.

24. Ms. van der HORST (Netherlands) supported the view expressed by the Canadian representative, but expressed opposition to subparagraph (b) in the Working Group’s text, with its reference to private international law.

25. Mr. BONELL (Italy) said that there had always been agreement that there was a need to select a connecting factor between the rules of the present draft Convention and the “centre of gravity” of the activity concerned. In many conventions and international instruments the connecting factor was the territory where services were performed. The present text took a different approach by selecting the place of business as the connecting factor. Fundamentally there had been no change of substance, since the emphasis still rested on the place where the transport-related activities were carried out. The present draft Convention dealt with what was essentially a static activity, i.e. the operation of a transport terminal (as opposed to carriage or movement of goods where the service could be performed in a number of places). There was also a positive reason in the present text for selecting place of business as the connecting factor. There could sometimes be occasions where a terminal straddled two States with different legal régimes. Moreover, different activities of the transport operator might take place in different States. One could even envisage a deliberate division of activities by the operator in order to avoid a particular legal régime. The present text should therefore be kept, but reference could also be made, as proposed by the German Democratic Republic, to the place where the service was performed.

26. He disagreed with the proposal to speak of “at least one” place of business in subparagraph (a). He preferred the existing formulation, which was consistent with other international instruments.

27. He could not agree with the representative of the Federal Republic of Germany concerning the formulation “State Party”. All other international instruments relating to the carriage or sale of goods spoke of contracting States.

28. Mr. INGRAM (United Kingdom) said he supported the view of the delegation of Canada. Paragraph (2), in particular, would cause considerable difficulty and uncertainty. If there were a problem in certain cases with transport terminals that straddled two States, he suggested that special exemptions could be formulated. He did not support the reformulation of article 2 proposed by the German Democratic Republic.

29. Mr. BERAUDO (France) said that there were two possible criteria for determining the scope of application of an international instrument, the physical location of the activities or the legal place of business. The latter solution was adopted, for example, in the United Nations Convention on Contracts for the International Sale of Goods. Where a transport terminal straddled two countries, it was possible that some of its activities would be in a State party to the Convention and others in a State which was not a party. The approach based on the legal place of business was the one used in private international law. Where there was more than one place of business the one with the closest links to the transport-related service would determine the scope of application. In his view, the use of the formula “at least one place of business” could lead to unexpected consequences. Terminal operators were highly specialized, often with a headquarters in one country and terminals in other countries.

Not all of those countries might be contracting States, and the scope of application of the proposed Convention could extend to non-ratifying States. He would therefore support the suggestion made by the representative of Italy.

30. Mr. SCHROCK (Federal Republic of Germany) said that the distinction between a contracting State and a State party was defined in the Vienna Convention on the Law of Treaties of 1969. In some cases, existing transport conventions had been redrafted to incorporate those definitions.

31. Mr. ILLESCAS (Spain) shared the concern of the delegation of France. The proposal of the representative of the German Democratic Republic opened up the possibility of the scope of application extending to activities in non-contracting States. He preferred the original text which was both rational and elegant in defining precisely the scope of application of the draft Convention. He found it difficult to accept that the application should extend to services in non-contracting States.

32. Mr. ENDERLEIN (Observer for the German Democratic Republic) said that, in his view, subparagraph (a) in the present text already extended the scope of the instrument to activities taking place in non-contracting States. In private international law, the connecting factor could be either the place of business or the place where the services were performed. In order to ensure that all cases were covered by the draft Convention, the phrase "provided services were performed in the contracting State" could be added.

33. Having heard the views of other delegations, he would withdraw his delegation's amendment to subparagraph (a).

34. Mr. BONELL (Italy) suggested that the Commission should choose between two formulations of article 2, paragraph (1). The first alternative would be to adopt the proposal of the German Democratic Republic, leaving subparagraph (a) as in the original text. The second alternative would be to amend subparagraph (a) by the deletion of the words "whose place of business is located".

35. Ms. van der HORST (Netherlands) said that the problem identified by the representatives of Italy and France would still exist when the place of business was not in a contracting State but the transport-related services were performed within a contracting State.

36. Mr. HORNBY (Canada) said that he would withdraw his proposal that paragraph (1)(a) should refer only to the place where services were performed. He could accept the idea that there should be three connecting factors, namely: place of business, place of performance of services and the rules of private international law. That would be an improvement on the present text.

37. Mr. DUCHEK (Observer for Austria) said that the present drafting of subparagraphs (a) and (b) should be retained. He had reservations about defining the scope of application on the basis of where the services were performed. That might work if it was clear that all the transport-related services were performed in a single State but situations could arise where, under a given contract, such services could take place in different States, one of which was a contracting party and the other not.

38. Mr. BONELL (Italy) said that, while he accepted the point that there might be a division of activities and legal regimes, he saw no risk of harmful uncertainty. Where the scope of application was determined by place of business or the location of services, there would be no split. Where the place of business was not in a contracting State but services were

performed in a contracting State, the position was still clear. Both the customer and the operator would realize that a contract was covered by the Convention because services were performed in a contracting State. It was true that the scope of the rules would be somewhat widened but he saw no difficulty with that.

39. Mr. ILLESCAS (Spain) said that, in practice, paragraph (2) concerning the possibility of more than one place of business raised doubts concerning the statement that the application of the Convention was independent of the place where the services were performed. Taken together, paragraphs (1)(a) and (2) seemed unduly to limit the application of the Convention.

40. The CHAIRMAN said that paragraph (2) was intended merely to explain what was meant by the concept of place of business. It neither restricted nor expanded the scope of application of the draft Convention.

41. Mr. EYZAGUIRRE (Chile) said that he could accept the formula in the draft Convention prepared by the Working Group regarding place of business as a criterion for the scope of application. He would have no problem if the definition was extended, but it was necessary to have a precise text for discussion.

42. Mr. BONELL (Italy) said that he was happy with the present text but had felt, after hearing the views of other members of the Commission, that a further factor, namely the place where the services were performed, could be added.

43. Mr. CHAFIK (Egypt) said that he was happy with the existing text. Regarding the proposed amendments, it was not clear to him exactly what was being proposed.

44. Mr. SAMI (Iraq) said that the question was not only whether a country was a contracting State or not. The draft Convention should regulate the responsibility of the operator, and, where possible, its scope should be enlarged to prevent the operator from circumventing its provisions. The proposal made by the Italian delegation achieved that purpose. As had been pointed out, some of the services might be rendered in a contracting State and others in a non-contracting State. Applying the Convention partially was preferable to not applying it at all. His delegation therefore supported the Italian proposal, which represented a compromise.

45. Mr. BONELL (Italy) said that either the text could be left as it stood or a new subparagraph (b) could be added reading: "When the transport-related services are performed in a contracting State, or"; the present subparagraph (b) would then become (c).

46. The CHAIRMAN asked whether any delegations were seriously opposed to the proposed new subparagraph.

47. Mr. NESTEROV (Union of Soviet Socialist Republics), supported by Mr. LARSEN (United States of America) said that, although his delegation preferred the text drafted in the Working Group, in order to help reach a consensus it could agree to the Italian proposal, which took into account the Working Group's views and those of the German Democratic Republic.

48. Mr. WANG Yangyang (China) said that his delegation would favour leaving the text as it stood in document A/CN.9/298, but would not object if a consensus existed on amending it.

49. Mr. TANASESCU (Observer for Romania) supported the Italian compromise.

50. The CHAIRMAN said he took it that the Commission accepted the proposal of the Italian delegation.

51. *It was so decided.*

52. The CHAIRMAN invited comments on paragraphs (2) and (3).

53. Mr. TANASESCU (Observer for Romania) thought that paragraphs (2) and (3) should be deleted, as proposed by the German Democratic Republic.

54. Mr. ENDERLEIN (Observer for the German Democratic Republic) said that the aim of his Government's proposal to add "any" before "Contracting State" in subparagraph (a) was to ensure the widest possible application of the draft Convention, but after listening to the arguments of other delegations and the rejection of the addition of "any" in paragraph (1) he withdrew the proposal to delete paragraph (2). He retained, however, some doubts as to the utility of paragraph (3). If paragraph (3) was not deleted, the reference should be to the place where the operator carried out his activities.

55. Mr. BONELL (Italy) said that paragraph (2) was almost indispensable, but that paragraph (3) should be deleted unless it could be shown to be useful. He noted that, whereas the Sales Convention did not make its application dependent on the place of business, the situations covered by the draft Convention were different.

56. Ms. PIAGGI de VANOSI (Argentina) agreed that paragraph (2) should be maintained and paragraph (3) deleted. Any reference should be to the place of business, not the habitual residence of the operator.

57. Mr. SAMI (Iraq) also agreed that paragraph (2) should be maintained and paragraph (3) deleted, but had doubts about the phrase "as a whole" in paragraph (2). In any case, the versions in the different languages needed to be aligned.

58. Mr. ABASCAL (Mexico) agreed that paragraph (3) should be deleted.

59. Mr. BERAUDO (France) said that the phrase "as a whole" in paragraph (2) would enable a court to determine where it considered the place of business to be. Paragraph (3) should be maintained, given that some operators did not have legally recognized places of business; the purpose of the paragraph was to extend the application of the Convention to the physical person of the operator in that case. Deletion of paragraph (3), when effectively identical provisions existed in other conventions,

could lead to possible and dangerous *a contrario* interpretations.

60. Mr. AZZIMAN (Morocco) agreed that paragraph (2) should be maintained, but had doubts about the usefulness of paragraph (3). If the latter paragraph were kept, the reference to the operator's habitual residence should be replaced by a reference to the place where he habitually carried out his activities. He agreed with the representative of Iraq that the phrase "as a whole" was unclear.

61. Mr. INGRAM (United Kingdom) said that the phrase "as a whole" was necessary, given that no reference to transport terminals was made in article 2. He cited the example of an operator running a cross-border transport terminal in which he handled goods at one end of the building and stored them at the other.

62. Ms. EISTERER (European Shippers' Councils) wondered whether the draft Convention could apply to an operator who had more than one place of business and whose place of business with the closest relationship to the transport-related services as a whole did not lie in a contracting State.

63. Mr. EYZAGUIRRE (Chile) agreed that paragraph (2) should be retained, but thought that the phrase "as a whole" was not clear enough. Paragraph (3) should be kept. While he could accept replacement of the reference to the operator's habitual residence by a reference to the place where the operator offered his services, he thought that the reference to the place of habitual residence should be maintained to avoid loopholes.

64. Mr. ILLESCAS (Spain) expressed the hope that any problems the courts might have in interpreting the amended paragraph (1) and paragraph (2) when taken together would be eased by examining the report of the session. Paragraph (3) should be maintained.

65. The CHAIRMAN said he took it that, despite the doubts expressed concerning paragraph (2), it could stand as drafted. Regarding paragraph (3), he noted that its purpose was to extend the application of the draft Convention to the physical person of the operator, with a reference to his habitual residence, and he thought that that could stand also.

66. *Paragraphs (2) and (3) were approved.*

The meeting rose at 5.10 p.m.

Summary record of the 406th meeting

Thursday, 18 May 1989, 9.30 a.m.

[A/CN.9/SR.406]

Chairman: Mr. RUZICKA (Czechoslovakia)

The meeting was called to order at 9.45 a.m.

Draft Convention on the Liability of Operators of Transport Terminals in International Trade (*continued*) (A/CN.9/298, A/CN.9/319 and Add.1-4, A/CN.9/321)

Article 3

1. Mr. SCHROCK (Federal Republic of Germany) said that his delegation was submitting a written proposal relating to the

expression "taken . . . in charge", an expression which was also used in article 1, paragraphs (a) and (c).

2. Mr. AZZIMAN (Morocco) said that the period of responsibility of operators of transport terminals was closely linked with that of the carrier. The line of demarcation between the two periods had accordingly to be very carefully drawn. The present wording did not achieve the necessary precision, the expressions

used to describe the beginning and end of the period of responsibility ("taken in charge" and "made available to the person entitled to take delivery") being equally vague. The formula proposed by the United States (A/CN.9/319, page 13) was also unsatisfactory, since it did not solve the problem of what made the rules governing carriage cease to apply and what determined the moment at which they began again to apply. The Commission should endeavour to move toward a legally defined act determining the change of responsibility, which could be located in time and space, similar to that referred to in the Hamburg Rules.

3. Ms. SKOVBY (Denmark) said that a problem might arise in regard to the period of responsibility where, for example, an operator had arranged to pick up goods outside his own establishment and failed to do so. If the case were held to be subject to the provisions of the Convention but outside the domestic legislation, the present text of article 3 would not be satisfactory, since the operator would not have "taken charge" of the goods and would accordingly not be liable. If, on the other hand, liability were to be decided on the basis of national law, the fact that most countries did not admit any limitation of liability could give rise to problems. It was essential to lay down clearcut principles governing the transfer of responsibility.

4. Mr. ABASCAL (Mexico) said that he too found the expression "taken them in charge" imprecise.

5. Mr. SWEENEY (United States of America) said that the United States proposal for amendment of article 3 (A/CN.9/319, page 13) was intended to rectify a situation in which, 11 years after signature, the Hamburg Rules were still not in force. The Hague Rules, which accordingly remained the legally valid instrument, were based on the "tackle to tackle" principle, whereby the terminal operator assumed responsibility only when goods crossed the side of the ship on the way in and at the time of the corresponding operation on the way out. An earlier United States statute, similar to a provision in force in France since 1966, provided for an extended period of liability before and after ocean-carriage liability. The wording which the United States proposed for article 3 was a paraphrase of the wording in that Statute.

6. According to the Hague Rules, what made the rules of carriage cease to apply was passage of the goods over the side of the carrier's vessel. Under the Hamburg Rules, which were not yet in force, the carrier's liability would be extended at the port for the period preceding acceptance of the goods by the terminal operator and the operator's liability would similarly be extended for the period preceding delivery. If the Hamburg Rules were to be the sole criterion, the situation would be adequately covered by the existing wording of article 3. Unfortunately, however, the Hague Rules were liable to remain in force for some time yet and the present wording was therefore unsatisfactory. It was a problem which arose solely in regard to maritime transport; there had never been any question of defining commencement or termination of liability by the passage of goods over the side of an aircraft or railway freight-car.

7. Ratification of the Hamburg Rules had been disappointingly slow and the minimum of 20 ratifications required for their entry into force had still not been achieved. Few Asian or African States had ratified. In spite of intensive efforts, progress towards ratification had been slow in the United States also, largely owing to opposition by the insurers. Shippers had begun to express organized support for ratification. On present estimates by the Secretariat the Hamburg Rules might possibly come into force by the end of 1990. In his view it was therefore essential that the convention on the liability of transport terminal

operators should have a life independent of previous liability conventions.

8. That was the background against which his Government had submitted its proposal for amendment of article 3, a proposal which should not be viewed as reducing its commitment to the Hamburg Rules. It was essential to have a text which defined clearly the points at which the transport terminal operators' liability began and ended.

9. Ms. PIAGGI de VANOSI (Argentina) said that she shared the views expressed by the representative of Morocco concerning the criteria governing the beginning and end of carriers' liability. It was not clear when the rules of carriage applied and did not apply. The present wording of article 3 might suit some domestic requirements, but not those of all countries.

10. Mr. TEPAVITCHAROV (Bulgaria) said that the point of transfer of responsibility had been defined only in very general terms in article 3. A more precise indication was required, as was given, for example, in the Hamburg Rules. Responsibility might be said to be transferred with the hand-over of documents or with the hand-over of the goods. Whenever the operator was ready to hand over the goods, it was reasonable that he should be relieved of responsibility for them.

11. Mr. BONELL (Italy) remarked on the difficulty of discussing the article in general terms when further written proposals for amendment were awaited.

12. The basic traditional task of the terminal operator had been one of safekeeping. That role was satisfactorily accommodated in most domestic law, but its performance was of course contingent on actual possession of the goods involved. When, at an earlier stage, the International Institute for the Unification of Private Law had been dealing with the subject, operations preceding or following carriage, such as loading and storage, had been referred to as additional tasks. The intention had been that the rules developed should cover those operations and to that end the period of responsibility had been expressly extended to include them.

13. Once the Commission had begun to deal with the question, it had become clear that a shift of emphasis was required, away from the safekeeping function that was the thinking underlying article 1, paragraph (1), of the present draft Convention. That formulation had its faults, many of which had been noted during the discussion, but nothing more satisfactory had yet been proposed. He fully sympathized with the desire of some for firm and precise definitions, but felt that in practice that was not feasible.

14. A possible solution appeared to be that suggested in the United States proposal for amendment of article 1, but that approach was unlikely, for technical reasons, to prove workable. It could not be assumed that there was in every case a continuum between the carriage of goods and the activities of the terminal operator. Many interruptions might occur, some before the commencement of the terminal operator's operations and others after their termination. Furthermore, there were inherent technical problems in implementing an instrument which referred to other instruments for its practical application.

15. Mr. BERAUDO (France) supported the views of the Italian representative, even though he might not have used the same reasoning to arrive at the same conclusion.

16. He pointed out that the word "garde" (charge) used in the French version of article 3 had a very precise meaning in French civil law. He favoured maintaining the present text of the article.

The United States amendment had a number of shortcomings: its use of formulas from other instruments designed for different purposes; its reference to other rules; the fact that it would not function where different modes of transport were successively used; and, the greatest stumbling-block of all, the attachment to an operator of liability in respect of goods he did not have in his possession.

17. Although the notion of "making available" did not appear in the Hamburg Rules, he thought that the present draft Convention should make reference to the persons entitled to take delivery when the activities of a terminal operator had ceased.

18. Mr. SEVON (Observer for Finland) drew attention to the fact that his country had submitted in document A/CN.9/319/Add.3 a specific proposal for amendment of article 3, namely the replacement of the words "made them available to" by "placed them at the disposal of". It was particularly concerned that terminal operators should not be expected to bear the risk, and the cost in terms of insurance premiums, for goods which customers failed to collect on time.

19. His delegation had initially had no difficulty with the notion of "taking in charge", but it had now rightly been pointed out that terminal operators did not always take in charge the goods for which they were responsible. Where goods were actually taken in charge, his delegation could accept the present wording of article 3 as adequate. It was not, in his view, intended to cover the notion of taking into possession, although how far that had been appreciated and how far that notion could be reflected in all the different language versions was problematical.

20. The United States proposal had major drawbacks in his delegation's view. One difficulty arose in the case where delivery of the goods to the transport terminal was the first leg of a transport operation; an even more frequent case was when goods were picked up from the transport terminal by the consignee. In neither of those cases did the United States proposal provide guidance. The wording used seemed in fact to imply that responsibility never began nor ceased, which was surely not the intention. For all these reasons his delegation preferred the present text of article 3 to that proposed by the United States.

21. Mr. RUSTAND (Observer for Sweden) pointed out that goods were often left in terminals initially without any instructions, instructions concerning them being given only later. That case, too, should be covered by the draft Convention. He shared the misgivings expressed by the observer for Finland and the representative of Italy concerning the United States proposal. The Commission should endeavour to agree on formulas susceptible of uniform interpretation in all countries.

22. Mr. ENDERLEIN (Observer for the German Democratic Republic) suggested that, as in the Hamburg Rules, a definition of "take in charge" should be included in article 1, to avoid different constructions being placed on that expression. His delegation supported the Finnish amendment as his Government had made the same proposal to replace the words "made them available to" by "placed them at the disposal of" in document A/CN.9/319/Add.3.

23. Referring to the United States amendment, he expressed dissatisfaction with a proposal which would extend the period of responsibility to include periods when the goods were not in the operator's possession. He could not agree with the United States contention that without such an extension of liability, there would be a time when the rules of law did not apply. If a claim for damages arose, the rules would still apply. Nor could he agree with a linkage of the period of responsibility to other

conventions or even national law; as the United States representative himself had argued, the present instrument would be independent of other instruments. Finally, it appeared to his delegation that, under the United States proposal, the application of national laws to different situations and different modes of transport would give rise to differing interpretations of the "period of responsibility", and that was inherently unsatisfactory.

24. Ms. VILUS (Yugoslavia) said that to establish the precise time at which the operator's responsibility began was difficult if not impossible. The present text of article 3 was not without shortcomings; in particular, the expressions "taken them in charge" and "handed them over or made them available" could be open to misinterpretation. But the formulation was short, comprehensive and elegant, and her delegation was in favour of maintaining it, amended as proposed by the observers for Finland and the German Democratic Republic. While appreciating the desire of the United States to improve the text, she feared that the wording which that country had proposed would give rise to even greater difficulties of interpretation. The exchange of views which had taken place had, in her opinion, made it sufficiently clear who was to be considered as the "person entitled to take delivery of the goods".

25. Mr. HORNBY (Canada) said that the expression "taken them in charge" did not present any difficulty for his country in either its English or its French version. The expression did not necessarily imply physical possession; in other words, it covered situations where, through negligence, physical possession had not been established. His delegation could accept the Finnish amendment but was generally satisfied with the text of article 3 as it stood. The United States proposal, which was intended to fill the gap between the Hague Rules régime and that of the draft instrument under consideration, did not appear to be necessary in view of the emerging understanding that the Working Group's text did so to a satisfactory degree.

26. Ms. PIAGGI de VANOSI (Argentina) noted that a majority of delegations appeared to favour the Working Group's text. She observed that in Spanish there was little difference between the expressions "made them available to" and "placed them at the disposal of". While she could accept the present text in principle, she wondered whether it might not be open to different interpretations in different countries. She wondered whether it might not be preferable to make the period of responsibility subject to the giving of notice?

27. Mr. EYZAGUIRRE (Chile) said that the text of article 3 was perfectly clear if read in conjunction with paragraphs (a) and (d) of article 1 and also with the relevant provisions of the Hamburg Rules. For the reasons mentioned by previous speakers, the alternative text proposed by the United States was less satisfactory and would become altogether inappropriate if, as was hoped, the Hamburg Rules received a sufficient number of ratifications and came into force at an early date. He was prepared to support the amendment proposed by the observer for Finland.

28. The CHAIRMAN also noted that a majority in the Commission appeared to favour the Working Group's text. However, it was evident that certain formulations in the draft article needed to be made more precise. Without wishing to curtail the discussion, he suggested that speakers might wish to focus on that objective.

29. Mr. JOKO-SMART (Sierra Leone) said that it had been his intention to support the United States proposal, but in view of the remarks just made by the Chairman, he would support the present text, amended as had been proposed by the delegations

of Finland and the German Democratic Republic. He urged all those delegations which had expressed themselves in favour of the Working Group's text to prevail upon their Governments to accede to the Hamburg Rules, thus bringing them into force at the earliest possible date. Failing that, the text of article 3 was bound to give rise to difficulties, especially in the case of land-locked countries where the Hague Rules were applied.

30. Mr. CHAFIK (Egypt) said that, for all its imperfections, he was in favour of maintaining the existing wording of article 3. The Finnish amendment, while no doubt appropriate in English, was not applicable to the French text. As for the United States proposal, it looked excellent on paper but would undoubtedly give rise to difficulties in practice.

31. Mr. WANG Yangyang (China) said that the wording of article 3 needed to be improved in order to avoid uncertainty, especially regarding the beginning and the end of the terminal operator's responsibility. However, he did not think the United States' proposal would solve that problem; indeed, it might lead to further misunderstanding since it did not indicate clearly to which rules it made reference. In some cases, for example, there might be no rules to cover the next segment of carriage after the goods had been handed over. In his view, the Commission should endeavour only to improve the wording of the existing text. He had no objection to the amendment proposed by Finland.

32. Ms. PERT (Observer for Australia) said that her country was basically satisfied with the present article 3 but supported the amendments proposed by the German Democratic Republic, to define "take in charge", and Finland, to replace "make available to" by "place at the disposal of". With regard to the United States proposal, she observed that the expression "applicable rules of law" covered both international and domestic legislation and might therefore have the unwanted effect of making the application of the Convention subject to domestic law. The same comment applied to the last phrase of article 1, paragraph (a).

33. Mr. TARKO (Observer for Austria) expressed his willingness to join the apparent majority favouring the present text, amended in accordance with the proposal by Finland. The text had given rise to much discussion and was necessarily a compromise. The expression "take in charge" was well known and any possibility of differing interpretations could be avoided by means of an explanatory report. He was unable to support the United States proposal.

34. Mr. ABASCAL (Mexico) said that, following the explanation given by the representative of Italy, he considered the present text of article 3, amended as proposed by Finland, to be the best solution. The expression "take in charge" needed to be defined, however. That could be done either in article 1 or in an explanatory report.

35. Mr. SZASZ (Hungary) said that while he was not satisfied with the formulation of article 3 he had no better wording to propose. The text had a number of shortcomings and might give rise to divergent interpretations in national courts. He supported the amendment proposed by Finland.

36. Mr. SAMI (Iraq) and Mr. POHUNEK (Czechoslovakia) also expressed support for adoption of the present wording of article 3, amended in accordance with the proposal of Finland.

37. Mr. RUSTAND (Observer for Sweden) said that, under article 3 as proposed by the Working Group, the responsibility of the operator ended when he had made the goods available to a person entitled to take delivery, which implied that the operator had no responsibility in case of delay in collecting the goods. He was not fully convinced that the text, amended as proposed by Finland and the German Democratic Republic would, from a legal standpoint, imply a requirement on the part of the operator to notify the customer and he would have preferred to see added at the end of the article a phrase such as "provided that the operator notifies the customer within a reasonable time". However, he would support the amendment proposed by Finland and the German Democratic Republic if the words "placed at the disposal of" were understood as requiring the operator to notify the customer.

38. Mr. MOORE (Nigeria) expressed his support for the present text amended as proposed by Finland. The United States proposal was based on fear that the present wording might leave a moment when no person was responsible for the goods. In his view, the present text left no such gap.

39. Mr. OCHIAI (Japan) said that he approved article 3 as it stood and had no objection to the amendment proposed by Finland.

40. Mr. NESTEROV (Union of Soviet Socialist Republics) expressed his support for the text of article 3 as prepared by the Working Group. It was not perfect but the outcome of compromises. Since most delegations appeared to support that wording as amended by the Finnish proposal, his delegation would join the consensus.

41. Mr. BONELL (Italy) said that it was difficult, indeed almost impossible, to define the period of responsibility with total clarity. The present text, even amended as proposed by Finland, still left some uncertainty. In view of the wide and substantial support for that wording, he hoped that any further proposals for amendment would not be pressed unless they had broad support.

The meeting rose at 12.35 p.m.

Summary record of the 407th meeting

Thursday, 18 May 1989, 2 p.m.

[A/CN.9/SR.407]

Chairman: Mr. RUZICKA (Czechoslovakia)

The meeting was called to order at 2.15 p.m.

Draft Convention on the Liability of Operators of Transport Terminals in International Trade (continued) (A/CN.9/298, A/CN.9/319 and Add.1-4, A/CN.9/321)

1. The CHAIRMAN suggested that an open-ended drafting group should be set up with a core membership comprising the representatives of the United States of America, the United Kingdom, Sierra Leone, Egypt, Spain, Mexico, the Union of Soviet Socialist Republics, France, Cameroon and China.

2. *It was so agreed.*

Article 3 (continued)

3. Mr. SCHROCK (Federal Republic of Germany), introducing his delegation's proposals in document A/CN.9/XXII/CRP.5, said that the proposal to refer to goods having been "handed over" to the operator rather than to his having "taken them in charge" was intended to replace a wording which had too many legal connotations with a more neutral one. He noted that in some countries the phrase "take in charge" was understood to mean custody, and the draft Convention was intended to cover not only warehousing contracts; he referred to the observations submitted by Morocco, contained in document A/CN.9/319/Add.1. He agreed that a possibility would be to include a definition of the phrase "take in charge" in article 1.

4. Mr. ABASCAL (Mexico) recalled the Finnish proposal (A/CN.9/319/Add.3) to use the phrase "placed them at the disposal of". On the basis of that proposal, article 3 might be reworded as follows: "The operator shall be responsible for the goods from the time they are placed at his disposal until the time he places them at the disposal of the person entitled to take delivery of them".

5. Mr. GRIFFITH (Observer for Australia) said he supported the proposals made by the Federal Republic of Germany, although he was of the opinion that amendments to the original draft should not be made lightly.

6. Mr. BONELL (Italy) said that he could not support the proposal by the Federal Republic of Germany; the expression "hand over" was as much a legal concept as the expression "take in charge". He could support the text as amended by Finland.

7. Mr. LARSEN (United States of America) said that there was a parallel between the arrival of the goods and their being handed over by the terminal operator to the next party. Perhaps a phrase echoing the phrase "handed them over or made them available to the person..." could be found to replace the phrase "taken them in charge" in article 3. Nevertheless, the proposal by the Federal Republic of Germany went some way towards meeting the United States' concerns in respect of the Hague Rules, and he supported it.

8. The CHAIRMAN said that none of the attempts made to replace the phrase "taken them in charge" in article 3 by more exact wording seemed to have been successful. International

conventions invariably contained such difficulties, arising out of the differing legal systems and practices of different States. However, the Finnish proposal seemed to have the support of the majority, and he suggested that article 3 should be transmitted to the drafting group with that amendment.

9. *It was so agreed.*

Article 1 (continued)

10. The CHAIRMAN reminded the Commission that it had postponed a decision on article 1(a) pending the outcome of the discussions on article 3 (see document A/CN.9/SR.403, paras 52 and 53). Since it had now been decided to retain the words "taken... in charge" in article 3, he asked whether there were still objections to the words "take in charge" remaining in article 1(a).

11. Mr. SCHROCK (Federal Republic of Germany) said that, although the Commission had been working on the assumption of a relationship between articles 1 and 3, the retention of the words "taken... in charge" in article 3 did not necessarily mean that the words "take in charge" were essential in article 1(a). It would be preferable not to start the Convention with problematic wording.

12. Mr. ILLESCAS (Spain) supported the proposal by the Federal Republic of Germany regarding article 1(a) (A/CN.9/XXII/CRP.5, p. 1), but suggested that the words "undertakes to perform or to procure" in the second and third lines of the proposed new version should be changed to read "performs or procures".

13. Mr. RUSTAND (Observer for Sweden) expressed his gratitude to the representative of the Federal Republic of Germany for his efforts to improve the text and meet the concern he himself had expressed earlier. However, if the expression "take in charge" was retained in article 3 it might as well remain in article 1(a).

14. Mr. EYZAGUIRRE (Chile) said that he, too, felt that, in view of the decision taken on article 3, the reference to taking goods in charge should also be retained in article 1(a), especially as the expression was used in article 1(c) also. In that connection, he said that the use of the words "handed over" in paragraph (c), as proposed by the Federal Republic of Germany (A/CN.9/XXII/CRP.5) was not satisfactory from his point of view.

15. Mr. AZZIMAN (Morocco), supported by Ms. SKOVBY (Denmark), said that, although it had been agreed to retain the expression "take in charge" in article 3, for want of better wording, he saw no need to retain it in article 1, where the context was entirely different. He therefore supported the proposal by the Federal Republic of Germany.

16. Mr. ABASCAL (Mexico) supported the proposal by the Federal Republic of Germany for the reasons given by other speakers.

17. The CHAIRMAN said that there appeared to be support for the proposal by the Federal Republic of Germany, but not necessarily majority support.

18. Mr. ENDERLEIN (Observer for the German Democratic Republic) recalled that he had already proposed the deletion of the words "take in charge goods involved in international carriage in order to" (see A/CN.9/SR.403, para. 34) and had been supported.

19. Mr. HORNBY (Canada) supported the proposal by the Federal Republic of Germany. He had already expressed support for the proposal to delete the reference to "taking in charge" in article 1, although he had no problem with the same expression in article 3.

20. Ms. PIAGGI de VANOSI (Argentina) also supported the deletion proposed.

21. Mr. BERAUDO (France) said that his country was in favour of keeping the notion of "taking in charge", which had a legal meaning and was widely known in jurisprudence and in doctrine.

22. Mr. CHAFIK (Egypt) supported the proposal by the Federal Republic of Germany, but suggested that the words "involved in international carriage" in square brackets in document A/CN.9/XXII/CRP.5 should be deleted.

23. Mr. DJIENA (Cameroon) said that the idea of "taking in charge" could be dropped, as it was not fundamental. With regard to the words "involved in international carriage", he noted the view taken by the Working Group as expressed in paragraph 12 of document A/CN.9/298, and thought the words in question should be retained. It was useful to emphasize that the rules applied only in respect of goods involved in international carriage.

24. Mr. NESTEROV (Union of Soviet Socialist Republics), supported by Mr. LARSEN (United States of America) and Mr. INGRAM (United Kingdom), thought that the text of article 1(a) as prepared by the Working Group should be retained, with the exception of the deletion already agreed by the Commission of the words "as a carrier or multimodal transport operator" (see A/CN.9/SR.404, paras. 17 and 18).

25. Mr. SAMI (Iraq) felt that article 1(a) should be retained as drafted by the Working Group.

26. The CHAIRMAN expressed doubts concerning the elimination of the reference to "taking in charge", since the same language occurred in other provisions of the draft Convention. He suggested that article 1(a) should be adopted and referred to the drafting group.

27. Mr. SCHROCK (Federal Republic of Germany), turning to paragraph (c), said that he wished to withdraw his delegation's proposal concerning that paragraph contained in A/CN.9/XXII/CRP.5.

28. Ms. van der HORST (Netherlands) suggested that the drafting group should insert the words "by the operator" after the words "the place of destination are identified".

29. Mr. GRIFFITH (Observer for Australia), referring to paragraph (b), asked for clarification as to whether it was generally agreed that empty containers should be treated as goods. His delegation would accept that empty containers should be treated as goods.

30. Mr. BONELL (Italy) explained that the Working Group had wished to make it clear that the definition of "goods" should include articles used to consolidate or package goods but not articles used purely to transport the goods. That approach followed the approach used in the Hamburg Rules. For his part he would prefer the text to remain as drafted by the Working Group. He would draw a distinction between empty containers which were simply merchandise in the sense that they had been manufactured and sold to a customer, and containers which were empty in the course of use, i.e. after being unloaded. The latter would seem to be means of transport and should not be included in the definition of "goods". It was important to decide what constituted "goods" and in what circumstances, if any, containers should be treated as "goods".

31. Mr. KATZ (International Trade Law Branch) recalled that there had been a discussion concerning the English text of article 1(b) and the possibility that the inclusion of the words "if the goods are consolidated or packaged therein" could be interpreted to mean that empty containers could in no circumstances constitute "goods". There had been a proposal to delete the words in question. However, it had been made clear that the purpose of the words was to clarify that "goods" were not deemed to include means of transport such as wagons, barges, etc. The proposal to delete the words "if the goods are consolidated or packaged therein" had therefore been withdrawn. There had, however, been widespread agreement that empty containers could in certain circumstances be regarded as "goods".

32. Mr. GRIFFITH (Observer for Australia) said that a decision was required on whether empty containers should be included or excluded from the definition of "goods".

33. Mr. DJIENA (Cameroon) said that an empty container (unless the subject of a purchase transaction between customer and manufacturer) was a means of transport. In his view, the wording proposed by the Working Group was a good one and perfectly clear.

34. Mr. SEVON (Observer for Finland) thought that the text of the English version of article 1(b) could be read to mean that containers could never be included in the definition of "goods" if they were empty. However, that was a matter for the drafting group.

35. Mr. BERAUDO (France) said that there was no problem with the French text of article 1(b). Addressing himself to the points raised by the representative of Italy, he expressed the view that the situation regarding the definition of "goods" in relation to containers was complex. A simple legal approach was required to avoid uncertainty; the definition of "goods" should therefore include all containers.

36. The CHAIRMAN thought that the provision should be submitted to the drafting group, which would be asked to find a better wording and to eliminate those areas that had given rise to doubts. Perhaps the French version should be taken as the basic text.

37. Mr. LARSEN (United States of America) said that the container industry had made the request not to include empty containers, which should be considered as means of transport, and he referred in that context to the United States comments on page 14 of document A/CN.9/319. It was his delegation's understanding that agreement had been reached on leaving the text as it stood, with the phrase "if the goods are consolidated or packaged therein", meaning that containers used as means of transport would be excluded. Perhaps a wording could be found to cover the case of containers shipped as goods, but that was another matter.

38. Mr. NESTEROV (Union of Soviet Socialist Republics) agreed that the text should be submitted to the drafting group.

39. The CHAIRMAN said that it was still not clear when empty containers would be regarded as a means of transport and when they would be considered goods. He invited concrete proposals from delegations in order to arrive at a clear distinction.

40. Mr. LARSEN (United States of America) said that the United States delegation believed that empty containers should not be considered as goods. It was not yet clear whether the drafting group was to be instructed to consider empty containers to be goods or not.

41. Mr. SEVON (Observer for Finland) said that the question was whether the English text conveyed the message that empty containers could under no circumstance be considered as goods. Agreement had been reached that used containers shipped from one place to another to await loading with new goods would not fall within the scope of the Convention. On the other hand, new containers were clearly goods.

42. Mr. ENDERLEIN (Observer for German Democratic Republic) said that, according to the comments of the United States of America on page 14 of document A/CN.9/319, the United States did not believe that the proposed Convention extended to container depots, a point of view that his delegation fully supported. However, he did not understand why empty containers should not be treated as goods if they were sold and shipped.

43. Mr. NESTEROV (Union of Soviet Socialist Republics) agreed with the United States that the proposed Convention should not extend to container depots where empty containers were stored. That must be reflected in the Convention.

44. Mr. DJIENA (Cameroon) thought that the drafting group should examine the matter and ensure that the various language versions were clear.

45. Mr. BONELL (Italy) said that most delegations seemed to be in favour of leaving the text as it stood, subject to minor drafting changes. As most delegations also agreed with the comments made by the United States in paragraph 2 on page 14 of document A/CN.9/319, the Commission might support that clarification and recommend its inclusion in the report. Wide support existed for excluding from the Convention empty containers in the course of their use, whereas everyone agreed that they were to be included when they were shipped as goods as such.

46. Mr. SWEENEY (United States of America) agreed with the previous speaker that the report should reflect the discussion. In particular, his delegation would like it to include the following sentence: "Storage areas for unloaded containers are not considered to be terminals". That should put the issue to rest but only if views were unanimous; if opinions differed he would prefer that the sentence not be in the report.

47. Mr. GRIFFITH (Observer for Australia) said that his delegation had raised the matter because it had not been sure what instructions were to be given to the drafting group. As to the United States proposal, it would be inappropriate to refer to

a terminal since that was a geographical term and was not defined in the draft Convention.

48. Mr. DJIENA (Cameroon) thought that the sentence proposed by the United States might be included in the report in a way which would not imply that the decision had been unanimous.

49. Mr. BERAUDO (France) said that his delegation could go along with including the United States proposal in the report if it was clearly understood that the storage areas for unloaded containers were set aside specifically for empty containers intended for subsequent use. It was not possible to impose upon an operator of a transport terminal the application of two different legal régimes, one for empty containers and one for full containers, in the same area. Perhaps the drafting group should prepare a legal provision for the Convention and also one or two sentences for the report. Another solution would be to take the wording in the Hamburg Rules; that would lead to a different result, but the wording would be clearer from a legal standpoint.

50. The CHAIRMAN said that it was important to decide not so much what must be put in the report as what must be included in the Convention. Perhaps the French version could be taken as the basic text and the other versions could be brought into line. A reference could be made in the report to exclusions and exceptions and to the reservations expressed by some delegations. But the Convention should make it clear that empty containers were not to be considered as goods.

51. Mr. BERAUDO (France) said that the French text meant that empty containers were goods and that containers included both those that were full and those that were empty.

52. Mr. DJIENA (Cameroon) did not interpret the French version in the same way as the previous speaker. It was his understanding of the text that empty containers were not included.

53. Mr. WANG (China) said that article 1(b) made it clear that containers used as a means of transport were not to be regarded as goods. The provision was acceptable to the Chinese delegation as it stood.

54. Mr. HORNBY (Canada) agreed with the delegation of Cameroon that the French version excluded empty containers. That was its very purpose. Clearly, a question of substance had arisen, and not just an editorial problem.

55. Mr. SEVON (Observer for Finland) said that a broad consensus had emerged on accepting the text as it stood. The only question was whether the English version could be improved through a new draft.

56. Mr. JOKO-SMART (Sierra Leone) said that the English text clearly stated that empty containers were not to be regarded as goods.

57. The CHAIRMAN said he noted that there was general agreement on submitting the provision to the drafting group with instructions to make it clear, if deemed necessary, that empty containers were not to be regarded as goods.

The meeting rose at 5.10 p.m.

Summary record of the 408th meeting

Friday, 19 May 1989, 9.30 a.m.

[A/CN.9/SR.408]

Chairman: Mr. RUZICKA (Czechoslovakia)

The meeting was called to order at 9.35 a.m.

Draft Convention on the Liability of Operators of Transport Terminals in International Trade (continued)
(A/CN.9/298, A/CN.9/319 and Add.1-4, A/CN.9/321; A/CN.9/XXII/CRP.5)

Article 2 (continued)

1. Mr. SCHROCK (Federal Republic of Germany), referring to his delegation's proposal for amendment of subparagraphs (a) and (b) of paragraph (1) (A/CN.9/XXII/CRP.5, page 2), said that it was designed to bring the language of the draft Convention into line with that used in the Vienna Convention on the Law of Treaties and in other more recent conventions.

2. Current practice was to use the term "contracting State" to designate States which had consented to be bound by a treaty, whether or not that treaty had entered into force. The term "State party", on the other hand, was used to refer to States bound by the treaty and for which the treaty was in force.

3. Mr. SEVON (Observer for Finland) suggested that the amendments proposed by the Federal Republic of Germany—which he supported—involved only a matter of drafting. He proposed that they be referred to the Drafting Group.

4. *It was so decided.*

Article 1 (continued)

5. Ms. van der HORST (Netherlands) recalled her suggestion, made at the previous meeting, that in paragraph (c) the words "by the operator" should be inserted after the words "the place of destination are identified".

6. The CHAIRMAN observed that the concern of the Netherlands delegation to bring out the key role of the operator appeared to have been met in the Russian version of the paragraph.

7. Mr. BERAUDO (France), supported by Mr. TANASESCU (Observer for Romania), Mr. FALVEY (United States of America) and Mr. POHUNEK (Czechoslovakia), said that he preferred the Working Group's text, which had the merit of objectivity. The Netherlands wording, by mentioning the operator, introduced a subjective factor. It had the further drawback that different criteria might be applied in different places.

8. Mr. VINCENT (Sierra Leone) expressed his support for the Netherlands proposal.

9. Mr. RAO (India) proposed the deletion of the words "identified as being" in paragraph (c), as they appeared to serve no purpose. If, however, the intention was that operators should be provided with a communication showing that the places of departure and destination were located in two different States, then the present wording was not adequate.

10. Mr. BONELL (Italy) said that it was important for the operator to be informed of the situation. Some means should be provided of bringing to his attention the international character

of a consignment. The Indian representative's point had been considered by the Working Group at some length.

11. Mr. KATZ (International Trade Law Branch) drew attention to the Working Group's discussion of paragraph (c), which was referred to in paragraphs 131 to 135 of document A/CN.9/287. One suggestion made had been that the Convention should not apply if the operator could prove that he did not know that the goods were involved in an international transport operation. Another suggestion had related to the means by which the operator should be enabled to determine whether or not they were involved in international carriage and to the various ways in which identification might be made, i.e. from accompanying documents or markings on the goods. There had been some discussion as to whether the operator's determination should be considered an objective or a subjective criterion.

12. Mr. RAO (India) said that, following the explanation just given, he was all the more convinced that the words "identified as being" were superfluous; they merely led to the question "who identifies, and to whom?". Accompanying documents and markings would show that two different States were involved even without the words to which he objected. However, he would not necessarily press this proposal.

13. Mr. CHAFIK (Egypt) said that he supported the Indian representative's proposal. A text which required clarification could not be regarded as acceptable and he felt the Drafting Group should be so informed.

14. Mr. MOORE (Nigeria) also saw merit in the Indian proposal. If the aim was to produce an objective rather than a subjective provision, then the deletion of the words to which the Indian delegate objected was desirable.

15. Mr. FALVEY (United States of America) disagreed. In his view, the words "when the goods are taken in charge by the operator" were linked to the words in the previous line "identified as being". Deletion of those words would introduce an undesirable element of subjectivity.

16. Mr. KATZ (International Trade Law Branch) said that there would be a subjective test if goods were considered to be involved in international carriage only if the operator knew of the identification; whereas an objective test would not look to what an operator knew or believed but only to what he could deduce from the facts. Whether or not the operator in fact made the identification would be irrelevant in an objective test, as the essential point was whether or not he had objective means of verifying the type of transport operation that was involved.

17. Mr. YUAN Zhennin (China) said that he was inclined to support the Indian representative's proposal. However, the point involved was not, in his view, a matter of substance and could be referred to the Drafting Group.

18. Mr. INGRAM (United Kingdom) endorsed the United States representative's remarks: the operator had to have means

of knowing that international carriage was involved. He therefore opposed the deletion of the words "identified as being".

19. Mr. POHUNEK (Czechoslovakia) suggested that the word "identified" might be replaced by the word "identifiable". That would meet the criterion of objectivity and at the same time avoid the question as to who it was that made the identification.

20. Ms. van der HORST (Netherlands) thought that the objective element would be preserved if the text read: "... can be identified by the operator as being located ...".

21. Mr. OCHIAI (Japan) considered the present text satisfactory and suggested that it be referred to the Drafting Group.

22. Mr. SCHROCK (Federal Republic of Germany) said that he had no objection to the substitution of the word "identifiable" for "identified", which was a purely drafting matter. However, he could not agree to the addition of the words proposed by the Netherlands representative.

23. The CHAIRMAN noted that a majority of speakers appeared to favour an objective criterion. He suggested that article 1, paragraph (c), as well as the other paragraphs of the article, should be referred to the Drafting Group, which might decide whether any drafting amendments were necessary.

24. *It was so decided.*

Article 4

25. The CHAIRMAN invited the Commission to consider paragraph (1) of article 4, proposals and comments relating to which were to be found in document A/CN.9/319 and its addenda and in document A/CN.9/XXII/CRP.5.

26. Mr. SCHROCK (Federal Republic of Germany), introducing his country's proposed amendment to paragraph (1) (A/CN.9/XXII/CRP.5, pages 2 and 3) said that the Working Group's text envisaged two types of documents, one produced by the customer and the other issued by the operator himself. One of the objects of his country's proposal was to bring subparagraphs (a) and (b), which dealt respectively with those two cases, into line with each other by including a reference to identification of the goods in subparagraph (b) and a reference to the date of receipt in subparagraph (a). As for the reservation clause whose addition to subparagraph (a) his country proposed, its object was to enable the operator to sign the document produced by the customer even if he had certain reservations concerning it. There would thus be less risk of the operator's falling within the scope of article 4, paragraph (2).

27. Mr. BONELL (Italy) said that paragraph (1) allowed the operator the choice between signing a document produced by the customer (but, in most cases, issued by the carrier) and issuing a signed document of his own. The differences between the requirements set out in subparagraphs (a) and (b), respectively, were not inconsistencies but reflected the different natures of the two solutions offered. If the operator had the slightest doubt as to the accuracy of the particulars contained in the document produced by the customer, he was perfectly free to opt for the solution in subparagraph (b) without any risk of incurring the legal effects set out in article 4, paragraph (2).

28. Mr. SWEENEY (United States of America), while agreeing with the substance of the Italian representative's remarks, said that, like the representative of the Federal Republic of Germany, he wished to increase the parallelism between subparagraphs (a) and (b). He therefore suggested that the words "in

so far as they can be ascertained by reasonable means of checking", which already appeared in subparagraph (b), should be inserted also in subparagraph (a). The words "and stating their condition and quantity" could, in his view, be omitted from that subparagraph, which would then read as follows: "Acknowledge his receipt of the goods by signing a document produced by the customer identifying the goods in so far as they can be ascertained by reasonable means of checking, or". The proposed change would make it quite clear that the opening of sealed containers was not required in either case, thus bringing the provision into line with an important principle adopted at the Hamburg Conference. Referring to the bracketed passages in the Federal Republic of Germany's proposal, he suggested that their discussion should be deferred pending the consideration of article 6, as a result of which that part of that proposal might become redundant.

29. Mr. YUAN Zhenmin (China) announced that his delegation had handed to the Secretariat a written proposal calling for more clarification of the meaning of the expressions "reasonable means of checking" in article 4, paragraph (1)(b) and "apparently good condition" in article 4, paragraph (2).

30. Mr. TEPAVITCHAROV (Bulgaria) said that he was in favour of introducing a reservation clause in subparagraph (a). That was the approach which had been adopted in the case of article 16, paragraph 1, of the Hamburg Rules. In the absence of such a clause, disputes were liable to arise in practice.

31. Mr. RUSTAND (Observer for Sweden) agreed with the representative of Italy that if the operator suspected the particulars in the document produced by the customer to be inaccurate he was at liberty to choose the alternative indicated in subparagraph (b). He wished for the present to reserve his delegation's position on the United States proposal to insert in subparagraph (a) a reference to reasonable means of checking.

32. Mr. TARKO (Observer for Austria) said that he understood the point of the Federal Republic of Germany's proposal for a reservation clause but agreed with previous speakers that such a clause was not strictly necessary. The Working Group's text was satisfactory in his view and the addition of further detail would make it unwieldy. With regard to the United States proposal, he would have no objection to adding the words "in so far as they can be ascertained by reasonable means of checking" to subparagraph (a), but he saw no reason why the words "and stating their condition and quantity" should be deleted from that subparagraph.

33. Mr. ENDERLEIN (Observer for the German Democratic Republic) said that he supported the Federal Republic of Germany's proposal to include the words "and the date thereof" between the word "goods" and the words "by signing" in subparagraph (a). He agreed with the United States representative that the words "and stating their condition and quantity" were inappropriate in the context of subparagraph (a). He suggested that the expression "produced by the customer" in that subparagraph might usefully be replaced by the words "presented by the customer".

34. Mr. DJIENA (Cameroon) said that the Federal Republic of Germany's proposal for amendment of paragraph (1) created a number of practical problems. The reference to the "number of packages or pieces" was too detailed and it was not stated whether, in the event of a "reservation" by the operator, the client could express his disagreement. Nor was the legal value of such a reservation clear. The carrier or client, too, might wish to make a reservation. It was important for the client not to be at the mercy of the operator, whose judgement might be subjective or mistaken. Despite its weaknesses, the text prepared by

the Working Group was simple, logical and easy to apply and it therefore had his delegation's support.

35. With regard to the United States proposal, he pointed out that the logic in paragraph (1)(a) differed from that in paragraph (1)(b). In the former case, the operator signed a document presented to him whereas in the latter he himself issued a document, so that reasonable means of checking were necessarily involved.

36. Mr. GRIFFITH (Observer for Australia) supported the proposal to include in subparagraph (a) a reference to the date of receipt but felt that the term "a dated document" might be preferable to the expression "and the date thereof". He also supported the United States proposal to add the words "in so far as they can be ascertained by reasonable means of checking" to paragraph (1)(a).

37. Mr. SCHROCK (Federal Republic of Germany) said that the words in square brackets in the text his country proposed for paragraph (1) might more usefully be discussed within the context of article 6. Some further improvement of article 4, paragraph (1) seemed necessary in order to make it clear that the choice between signing or producing a document lay with the operator. The word "shall" in the opening sentence of the paragraph might give rise to confusion. In response to the comment that the requirements laid down under his country's proposal might be too onerous for the operator, he suggested that the word "must" before the words "insert in the document" might be replaced by "can" or "may". He recognized that the text proposed was rather long and that a shorter text might be preferable. That proposed by the United States met some of his country's concerns, but he stressed the importance of including a reference to the date of receipt of the goods. He supported the replacement of the word "produced" in subparagraph (a) by the word "presented".

38. Mr. BERAUDO (France) said that the Hamburg Rules, on which the proposal of the Federal Republic of Germany was based, were of only limited assistance in connection with article 4 since the reference in those Rules to the bill of lading was applicable only to paragraph (1)(b), which dealt with the sole instance when the operator issued such a document. He was not in favour of the United States proposal since it would tend to reverse the burden of proof in paragraph (1)(a). In the Working Group's draft text, the burden of proof lay with the person issuing the document. If, in accordance with the United States proposal, a parallelism were established between subparagraphs (a) and (b), the result would be to make it incumbent on the transport terminal operator to establish the existence of inaccuracies in the customer's document, i.e. in a document not prepared by himself. According to the Working Group's text, the operator signed for reception of the goods but did not guarantee the accuracy of the document describing their condition or quantity because that document had been drawn up by a third party. If the operator were to be given, in paragraph (1)(a), the right or duty to check the conformity of the goods with the document describing them, the burden of proof would be reversed and the operator would then be obliged to establish the existence of errors or inaccuracies. In the case of paragraph (1)(b) the operator, as in the Hamburg Rules, issued the document; he was therefore responsible for its content, and hence for checking the condition and quantity of the goods to a "reasonable" extent. In the event of a dispute it was up to him to prove any inaccuracies. The text before the Commission was therefore logical and should be maintained since it was based on precise legal and practical considerations. However, he supported the proposal to add a reference to the date of receipt in paragraph (1)(a) and suggested that the words "and presented"

should be inserted after the word "produced", as it might be preferable to use both verbs.

39. Mr. OCHIAI (Japan) expressed agreement with the representative of Italy's remarks and accordingly supported the maintenance of the present text, with the two suggested amendments to paragraph (1)(a), namely the addition of the words "and the date thereof" and the replacement of the word "produced" by "presented".

40. Mr. RAO (India) said that he approved the text of subparagraph (a) as drafted by the Working Group, but not for the reasons given by the representative of France. On the question whether it was the operator or the customer who exercised the option offered in paragraph (1), he thought the English text made it clear that the choice lay with the operator. He found it difficult to accept the French representative's view that the burden of proof differed in subparagraphs (a) and (b). In his view, the burden of proof lay in both cases with the operator. He believed it would be wrong to omit a reference to the condition of the goods in subparagraph (a). It was implicit in that clause that the operator, in acknowledging receipt of the goods, would examine them and, if dissatisfied, issue a document himself in accordance with subparagraph (b). The Working Group's text was therefore satisfactory, although he agreed that the date of receipt should be mentioned in subparagraph (a) and also approved the addition to that paragraph of the words "in so far as they can be ascertained by reasonable means of checking".

41. Mr. SZASZ (Hungary) said that his delegation also preferred the term "presented" to "produced" in subparagraph (a) and the addition of a reference to the date of receipt. He could not agree with the French representative's interpretation concerning the burden of proof. Under most systems of law, the placing of a signature on a receipt for goods presupposed examination of the goods. There were no grounds whatsoever for reversal of the burden of proof and in consequence the United States proposal to insert in subparagraph (a) the words "in so far as they can be ascertained by reasonable means of checking" was appropriate. After careful consideration he was unable to support the proposal of the German Democratic Republic to delete the words "and stating their condition and quantity" in subparagraph (a).

42. Mr. ABASCAL (Mexico) said that, since it was clear that the operator had the option of either signing the receipt presented to him or preparing his own receipt document, there was no need for the amendment proposed by the United States. His delegation accordingly endorsed the text proposed by the Working Group.

43. Mr. EYZAGUIRRE (Chile) said that his delegation also preferred the verb "presented" to the verb "produced". While it was clear that the operator was offered an option, he supported the United States proposal to insert in subparagraph (a) the words "in so far as they can be ascertained by reasonable means of checking". He shared the view of the Indian and Hungarian delegations that any person who signed a receipt was responsible to a reasonable degree for the accuracy of its content.

44. Mr. POHUNEK (Czechoslovakia) said he could not agree that the present wording imposed an obligation on the operator to verify the accuracy of the description of the goods on the customer's document. His signature of the latter merely confirmed his receipt of the goods as described. To avoid ambiguity, he therefore proposed that the phrase "identifying the goods and stating their condition and quantity" in subparagraph (a) should be replaced by "in which the goods and their state and condition are identified".

45. Ms. van der HORST (Netherlands) suggested that the word "customer" in the introductory part of paragraph (1) should be replaced by the words "other party to the contract".

46. Mr. CHAFIK (Egypt) said that paragraph (1), as proposed by the Working Group, was precise, clear and elegant. There was no need for exact parallelism between subparagraphs (a) and (b). What was essential was agreement between the two parties as to who was to prepare the receipt document. His delegation had no objection to replacing the word "produced" by "presented" or to the insertion of a reference to the date of receipt. The phrase "without unreasonable delay" in the introductory part of the paragraph was liable to subjective interpretation and might well be replaced by the word "promptly".

47. Mr. INGRAM (United Kingdom) said he believed the Czechoslovak representative's interpretation of the meaning of subparagraph (a) was correct. The addition proposed by the United States delegation was therefore inappropriate. He preferred the present formula "without unreasonable delay" to the word "promptly".

48. Mr. HORNBY (Canada) said that the present text of paragraph (1) was satisfactory, although the addition of a reference to the date and the replacement of the word "produced" by "presented" represented an improvement.

49. Mr. MOORE (Nigeria) said that the operator must be given the option to choose, as in the text proposed by the Working Group, whether to sign the customer's receipt or to

prepare his own. He supported the proposed amendments relating to the word "produced" and a reference to the date of receipt.

50. Mr. ZUBEIDI (Libyan Arab Jamahiriya) said that the meaning of subparagraphs (a) and (b) was clear and the text should therefore be left unchanged. The United States proposal would be acceptable to his delegation if the phrase "in so far as they can be ascertained by reasonable means of checking" were replaced by the words "established by reasonable means".

51. Mr. LEBEDEV (Union of Soviet Socialist Republics), drawing attention to his Government's comments on article 4 (A/CN.9/319, page 12), said that the Commission had to decide on the meaning to be given to the signature of a receipt as referred to in paragraph (1)(a): whether signature merely confirmed receipt of the goods as described, or whether, once the operator had signed a receipt, he was not subsequently entitled to contest the condition and quantities shown thereon. The Czechoslovak delegation had made an intermediate proposal under which the signature related only to a document in which the condition of the goods was specified.

52. The Commission should recognize that the operator was entitled under paragraph (1)(b) to indicate merely the apparent condition of the goods. That was a practically meaningful provision which fitted in well with article 4, paragraph (2).

The meeting rose at 12.35 p.m.

Summary record of the 409th meeting

Friday, 19 May 1989, 2 p.m.

[A/CN.9/SR.409]

Chairman: Mr. RUZICKA (Czechoslovakia)

The meeting was called to order at 2.10 p.m.

Draft Convention on the Liability of Operators of Transport Terminals in International Trade (continued)
(A/CN.9/298, A/CN.9/319 and Add.1-4, A/CN.9/321; A/CN.9/XXII/CRP.2/Rev.1, A/CN.9/XXII/CRP.5)

Article 4 (continued)

1. Mr. JOKO-SMART (Sierra Leone) said that his delegation could support paragraph (1)(a) with the addition of the two minor amendments that had been suggested: the insertion of a reference to the date on which the receipt was issued, although in actual practice it was unusual to issue a receipt without a date; and the Netherlands proposal to replace the word "customer" by "other party". The word "customer" implied a continual relationship.

2. His delegation saw no need to replace the word "produced" by "presented". The term used in the Working Group's text was more suitable.

3. His delegation did not agree with the addition to paragraph (1)(a) beginning however, if the operator knows or has reasonable grounds to suspect . . . proposed by the Federal Republic of Germany (A/CN.9/XXII/CRP.5, p. 2). Such a reference was unsuitable in the present context: whereas article 16 of the Hamburg Rules, upon which the proposal drew, concerned bills

of lading which were negotiable and could be transferred from one party to another, article 4, paragraph (1)(a), of the draft under discussion referred only to the receipt, which was not a negotiable instrument.

4. Ms. SKOVBY (Denmark) said that her delegation did not agree with the Netherlands proposal to change the word "customer" to "other party". Such an amendment would create more problems than it would solve.

5. Mr. ILLESCAS (Spain) said that his delegation was in agreement with the principles underlying subparagraphs (a) and (b) of paragraph (1) and thought that the best approach would be to maintain the existing text. It might be an improvement to mention the date on which receipt was acknowledged or the signed document issued. That would be useful in the case of those legal systems under which a signature was regarded as implying liability. He agreed that, in the English version of subparagraph (a), the word "produced" should be replaced by "presented". In the introductory part of paragraph (1), he thought that the word "unreasonable" in the English version should be replaced by "unjustified".

6. Mr. RUSTAND (Observer for Sweden) supported the proposal to replace the word "produced" by the word "presented" in subparagraph (a). He was also in agreement with the proposal

made by the Federal Republic of Germany to insert in that subparagraph a reference to the date. He could not, however, support the United States proposal. He would not oppose the Netherlands proposal to replace the word "customer" by "other party", although he did not regard such an amendment as necessary.

7. The CHAIRMAN said that a majority of delegations appeared to agree that a reference to the date of the receipt of the document should be added to subparagraph (a). The question of whether to replace the word "customer" by "other party" could be left to the Drafting Group. Certain objections had been raised with regard to the word "reasonable": such terminology was found in a number of other conventions, and in practice its meaning was determined in accordance with the specific circumstances. That question could also be referred to the Drafting Group.

8. The most important problem concerned, in subparagraph (a), the consequences for the operator of signing the document, a matter about which disagreement persisted. Some delegations had insisted that the operator was liable if he signed a document produced by the customer stating that the goods were in good condition when that was not the case. Other delegations had argued that the operator was not liable. A possible solution would be to leave it to national legislation to determine the legal consequences, but it would be better to arrive at a common understanding on the matter.

9. Mr. SWEENEY (United States of America) said that the place to clarify the consequences of paragraph (1)(a) and (b) was in paragraph (2). The situation in regard to subparagraph (a) could be covered by stating in paragraph (2) that, if the operator chose to act in accordance with subparagraph (a), he was rebuttably presumed to have accepted the condition and quantity of the goods, unless those facts could not be ascertained by reasonable means of checking.

10. Mr. SAMI (Iraq) said that his delegation agreed with the suggestion made by the previous speaker, which should be satisfactory for most delegations.

11. Mr. YUAN Zhenmin (China) said that, in the view of his delegation, if an operator did not know the condition of the goods when he signed the document, he could not be held liable for their condition.

12. Mr. NESTEROV (Union of Soviet Socialist Republics) said that his delegation agreed with the proposal made by the United States at the previous meeting to bring subparagraph (a) into line with subparagraph (b) by adding a reference to "reasonable means of checking". His delegation could also agree to the insertion of a similar reference in paragraph (2).

13. The CHAIRMAN said he took it that article 4, paragraph (1), could be forwarded to the Drafting Group with the instruction to delete the phrase "and stating their condition and quantity" in paragraph (1)(a) taking into account that the operator only signed a receipt and had no obligation to check the condition and quantity of the goods.

14. *It was so agreed.*

15. The CHAIRMAN invited comments on paragraph (2).

16. Mr. DJIENA (Cameroon) said that the meaning of the word "apparently" was unclear in the context of the paragraph, and proposed that it should be deleted.

17. Mr. RAO (India) agreed, adding that under common law systems goods were presumed to be in good condition in the absence of any contrary indication.

18. Mr. SCHROCK (Federal Republic of Germany) drew attention to the proposal submitted by his country in document A/CN.9/XXII/CRP.5.

19. Mr. BERAUDO (France) said that his understanding of the system in article 4 was that, by signing the document referred to in paragraph (1)(a), the operator acknowledged receipt of the goods but made no undertaking in respect of their quality or nature: that was not his task, it was the customer's task. In paragraph (1)(b), the operator signed a document in which he himself stated the condition and quantity of the goods, with the proviso that any statement as to the condition of the goods was true in so far as it could be ascertained by reasonable means of checking. Paragraph (2) provided a legal solution in the event of no document being produced by either the customer or the operator, and had to be consistent with the provisions of subparagraphs (a) and (b) of paragraph (1). The word "apparently" reflected the concept of "reasonable means of checking" in paragraph (1)(b): the presumption under paragraph (2) in respect of the condition of the goods could not be any stronger than the statement concerning their condition issued by the operator under paragraph (1)(b). To delete the word "apparently" from paragraph (2) would in practice place the operator in an impossible position: he would have to check every piece of merchandise he received or risk excessive liability.

20. Mr. DJIENA (Cameroon) said that his interpretation of paragraph (1)(a) was that, when the operator signed a document produced by the customer identifying the goods and stating their condition and quantity, his signature was binding on him also in respect of the condition and quantity of the goods. Should the operator neither sign the document produced by the customer nor issue one of his own, his silence should be construed as acceptance of the statements made by the customer: an operator should not be permitted to profit from his oversight, whether accidental or deliberate, as to do so would be to grant excessive favour to one party.

21. Mr. BERGSTEN (Secretary of the Commission) agreed with the previous speaker that when an operator signed a document produced by the customer identifying the goods and stating their condition and quantity, he thereby made an undertaking in respect of that identification and statement as to the condition and quantity of the goods. Should the operator not sign such a document nor issue one of his own, the provisions of paragraph (2) would come into play. It was his understanding that, should any document issued under subparagraphs (a) or (b) of paragraph (1) not contain any statement as to the condition of the goods, the provisions of paragraph (2) would apply in that situation also. He accepted that the drafting of the article might not be perfect, and noted that the word "fails" in paragraph (2) might imply a failure by the operator to respond to a request by the customer to sign a document produced by the customer or to issue one himself; that should not be the intent of paragraph (2). He supported the comments of the representative of France regarding the word "apparently": the understanding throughout should be that any statement as to the condition of the goods should be based on their apparent, external appearance, not on what their actual condition might be.

22. Mr. DJIENA (Cameroon) thought, in spite of that explanation, that the drafting of subparagraphs (a) and (b) of paragraph (1) required further improvement and that the word "apparently" in paragraph (2) should still be deleted. He suggested that the Drafting Group should be entrusted with the task.

23. Mr. RAO (India) said that his understanding was that, as the text stood, the operator would be obliged to follow the provisions of either subparagraph (a) or subparagraph (b) of paragraph (1) in their entirety, and did not have the option of not stating the condition of the goods.

24. Mr. SEVON (Observer for Finland) said that he understood the intent of paragraph (2) to be that if the operator did not comply with the provisions of either paragraph (1)(a) or paragraph (1)(b), or complied only in so far as he acknowledged receipt of the goods, yet made no undertaking as to their condition, the provisions of paragraph (2) would apply. The substantive effect of the article should be that, in the absence of any statement to the contrary, the goods should be deemed to be in good condition, and it would be for the operator to prove that such was not the case. If there was agreement on the substance, the article could be referred to the Drafting Group.

25. Mr. ENDERLEIN (Observer for the German Democratic Republic) said it was his understanding that, under paragraph (1)(b), the operator would be expected to state the condition and quantity of the goods in so far as they could be ascertained by reasonable means of checking, and it was sometimes impossible to determine the condition of goods by any reasonable means. In such an event, the operator could not be considered at fault for not stating the condition of the goods. Paragraph (2) would then apply: the goods would be presumed to be in apparently good condition. A lacuna in the article was that there was no provision concerning proof of the condition of the goods in the event of a dispute.

26. Mr. SZASZ (Hungary) said that his understanding of the word "apparently" in paragraph (2) was that it paraphrased "in so far as they can be ascertained by reasonable means of checking" in paragraph (1). Any presumption as to the condition of the goods should be based on appearance alone. He could therefore accept the text of paragraph (2) as it stood.

27. Mr. BERAUDO (France) noted that the article had been drafted with reference to the Hamburg Rules. Article 16, paragraph 2, of those Rules stated that, if the apparent condition of the goods was not noted on the bill of lading, the carrier was deemed to have noted on the bill of lading that the goods were in apparent good condition. Paragraph 3(b) of the same article said that proof by the carrier that the goods were not as described in the bill of lading was not admissible if the bill of lading had been transferred to a third party who in good faith had acted in reliance on the description of the goods therein. An operator of a transport terminal was just such a third party. Therefore, if an operator of a transport terminal delivered defective goods to a consignee, the consignee must then take up the matter with the carrier. The operator of a transport terminal was only one link in the transport chain, and it was impossible for all the links in the chain to have equal liability: the liability of the operator of a transport terminal was reduced to the extent that carriers' liability was increased by the presumption under paragraph (2) that the operator received the goods in apparently good condition. Perhaps the Drafting Group should be requested to produce a number of versions of the article varying the balance of liability between operators and carriers.

28. Ms. SKOVBY (Denmark) agreed that paragraph (2) must be redrafted, and wondered if the word "act" should be replaced by the phrase "fulfil his obligations".

29. Mr. ZUBEIDI (Libyan Arab Jamahiriya) agreed with the representative of France that paragraph (2) must be consistent with paragraph (1). The Drafting Group should be requested to clarify the extent to which acknowledgement of receipt included a presumption as to the good condition of the goods.

30. Mr. AZZIMAN (Morocco) said that he did not see how the Commission could send paragraph (2) to the Drafting Group when no agreement had been reached on the vital question whether or not the operator of a transport terminal had to check the condition of goods he was taking in charge. If he had such

an obligation, he must if necessary be able to enter reservations concerning the contents of the relevant document when such a document had been established by the customer, in which case he would be under an obligation to check, failing which he would be presumed to have received the goods in good condition. The question arose whether he had to check the goods for "good condition" or "apparently good condition". It was essential to make the extent of the obligation clear.

31. The CHAIRMAN said that it could not be concluded from the text as it stood that the operator had an obligation to check the condition of the goods. However, since the operator took delivery of goods, took them in charge and later handed them to someone else, the question of responsibility arose and would have to be determined.

32. Mr. AZZIMAN (Morocco) said that, if an operator was under no obligation to check the goods, it was hard to see how he could be responsible for the presumption of their good condition. In his opinion such presumption could not be justified except by failure to fulfil an obligation to check, and the penalty under paragraph (2) was too severe.

33. The CHAIRMAN drew attention to the fact that paragraph (1) began: "The operator may".

34. Mr. SZASZ (Hungary) said that there was no great difference of interpretation regarding what had to be done. Under most laws it was necessary to exercise a minimum of care in inspecting the quantity and condition of goods received but later passed on or returned. He suggested that the Commission should submit paragraph (2) to the Drafting Group with a view to producing a text basically on the lines of the Working Group's draft, but making it clear that there was no obligation on the operator to make a thorough check, the obligation being to see if anything was apparently wrong with the goods, and that if the operator made no comments it would be deemed that nothing was apparently wrong.

35. Mr. SWEENEY (United States of America) agreed that paragraph (2) should be referred to the Drafting Group. In order to assist the Drafting Group he had prepared the following text which he hoped summed up the ideas put forward in the discussion:

"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 apparent good order and condition. If the operator has elected alternative (1)(a), he is rebuttably presumed to have accepted the condition and quantity of the goods unless such facts could not be ascertained by reasonable means of checking. If the operator has elected alternative (1)(b), he is rebuttably presumed to have received the goods in apparent good order and condition except as otherwise noted in the document."

36. Mr. BERAUDO (France) said that the United States amendment was not a matter of drafting but went back to the proposal made at the preceding meeting. It would have a serious impact on paragraph (1)(a), under which the person responsible for identifying the goods and stating their condition and quantity was the person who produced the document, not the operator who signed it.

37. The CHAIRMAN asked the representative of Cameroon if he maintained his request for the deletion of the word "apparently".

38. Mr. DJIENA (Cameroon) said that he had raised the point because he felt that it would clarify the text. He urged that the paragraph should be sent to the Drafting Group.

39. The CHAIRMAN said that a decision still had to be made on the proposal by the Federal Republic of Germany (A/CN.9/XXII/CRP.5).

40. Mr. BERAUDO (France) said that, as far as paragraph (2) was concerned, he would have no objection to its being sent to the Drafting Group, provided purely drafting changes were involved.

41. Mr. SCHROCK (Federal Republic of Germany) said that the amendment proposed by his delegation (A/CN.9/XXII/CRP.5, p. 3) was the consequence of the very broad scope of application of the draft Convention.

42. Article 4 might be called a warehousing provision. The original draft had dealt only with warehousing contracts and had contained such notions as safekeeping, care, custody and control. His delegation would have had no difficulty with article 4 or the legal implications of paragraph (2). However, the scope of the instrument had been expanded to include not only traditional warehouse activities but other transport-related services also. It would also be possible to cover direct trans-shipment—taking containers from one means of transport to another without safekeeping. His country felt—and the operators of its seaports had expressed concern—that it would not be appropriate to compel them indirectly, through the legal effect of paragraph (2), to issue or sign documents issued by a third person or a customer in all cases, especially in cases of direct trans-shipment.

43. If there were any shortcomings in the drafting of his proposal he was confident that the Drafting Group could remedy them.

44. Mr. SEVON (Observer for Finland), Mr. ENDERLEIN (Observer for the German Democratic Republic), Mr. SZASZ (Hungary) and Ms. FAGHFOURI (United Nations Conference on Trade and Development) expressed support for the amendment proposed by the Federal Republic of Germany.

45. The CHAIRMAN suggested that, since he had heard no opposition, the amendment to paragraph (2) submitted by the Federal Republic of Germany (A/CN.9/XXII/CRP.5, p. 3) should be sent to the Drafting Group.

46. *It was so agreed.*

47. The CHAIRMAN drew the Commission's attention to paragraph (3) of article 4, and said that, if he heard no comments, he would assume that the Commission wished to refer paragraph (3) to the Drafting Group.

48. *It was so agreed.*

49. The CHAIRMAN invited comments on paragraph (4).

50. Mr. ABASCAL (Mexico), referring to the comments of his Government contained in document A/CN.9/319/Add.1, noted that there were different definitions of signature in the Hamburg Rules, the United Nations Convention on International Multimodal Transport of Goods and the United Nations Convention on International Bills of Exchange and International Promissory Notes. He felt that the definition used in article 5(k) of the Convention on International Bills of Exchange should be used as a basis for the definition in article 4, paragraph (4), of the draft Convention under discussion. It was the most recent definition available, and it had the advantage that it allowed the possibility of other than handwritten signatures—a signature was defined as “a handwritten signature, its facsimile or an equivalent authentication effected by any other means”. He suggested

that that definition should be referred to the Drafting Group for use in paragraph (4).

51. Mr. ABYANEH (Islamic Republic of Iran) proposed that the following two additions should be made to paragraph (4): firstly, the method chosen by the operator for his own signature should be adopted by the customer; secondly, the customer might ask the operator to confirm his signature.

52. Mr. SAMI (Iraq) said that the question of the form of signature should be left to national law, because signatures could take many forms other than those included in the draft text for paragraph (4). An expression such as “in conformity with applicable law” could be added. Alternatively, wording could be used along the lines of that contained in article 14, paragraph 3 of the Hamburg Rules: “if not inconsistent with the law of the country where the bill of lading is issued”.

53. Ms. PIAGGI de VANOSSI (Argentina) said that she found the proposal of the representative of Mexico that the definition of signature should follow that contained in the Convention on International Bills of Exchange and International Promissory Notes a reasonable one.

54. Mr. BERAUDO (France) thought that the wording of the Hamburg Rules could be used, supplemented by a reference to “an equivalent authentication effected by any other means”.

55. Mr. LARSEN (United States of America) said that, as documents were increasingly in an electronic form, he preferred the text of paragraph (4) submitted by the Working Group. If that were not acceptable, his second preference would be article 14, paragraph 3, of the Hamburg Rules.

56. Mr. ABASCAL (Mexico) said that the definition of “signature” adopted in the Convention on International Bills of Exchange and International Promissory Notes had been intended to take into account the concern of those States which had reservations concerning the application of national law.

57. Mr. ENDERLEIN (Observer for the German Democratic Republic) said that it was his understanding that the Hamburg Rules, defining forms of signature which were permitted unless prohibited by national law, imposed certain limitations by this reference to national law. The proposal of the representative of Iraq, however, to include also additional forms permitted by national law would in fact extend the definition. He wondered, therefore, whether the reference to the Hamburg Rules would not lead to the opposite result. He would prefer the text to remain as it stood, but he could accept the Mexican proposal to adopt the definition contained in the Convention on International Bills of Exchange and International Promissory Notes.

58. The CHAIRMAN said he took it that the Commission wished to refer paragraph (4) to the Drafting Group on the basis that article 14, paragraph 3, of the Hamburg Rules and article 5(k) of the Convention on International Bills of Exchange and International Promissory Notes would be taken into account.

59. *It was so agreed.*

60. The CHAIRMAN invited comments on the additional paragraph proposed in document A/CN.9/XXII/CRP.2/Rev.1.

61. Mr. LARSEN (United States of America) said that clauses similar to the paragraph proposed in document A/CN.9/XXII/CRP.2/Rev.1 had been traditionally included in transport conventions such as the Hamburg Rules and the Warsaw Convention. They constituted a protection for the operator, because

where document details were incomplete the court could otherwise say that the contract was faulty and therefore order forfeiture. Indeed, in a very recent case in the United States Supreme Court involving the Warsaw Convention, the Court had noted the relevant clause and decided that there could be no forfeiture despite defects in the contract in question. As far as his delegation was concerned, the additional paragraph could refer either to the document mentioned in article 4 or to the contract for transport-related services.

62. Mr. SEVON (Observer for Finland) said that he saw no need for such a clause in relation to the law of his country, but he could support its inclusion if it would be a help to other delegations.

63. Mr. BERAUDO (France) said that the present draft Convention differed in nature from the Warsaw Convention. Under the latter Convention, the air waybill itself constituted the contract, so that if there were no air waybill there would be no contract. However, in article 4 of the draft Convention under discussion there were various terms indicating that the document was optional. Paragraph (1) began: "The operator may". There was therefore no need for the proposed new paragraph.

64. Mr. SZASZ (Hungary) said that there was no need under the law of his country for the proposed new paragraph, but he

could support it if it was useful to others. However, he saw difficulties. Presumably, the text would have to read "The absence of the document referred to in paragraph (1) or of one or more particulars shall not affect . . .", because if an incomplete document could give rise to an invalid contract, then the absence of such a document might also do so.

65. Mr. RUSTAND (Observer for Sweden) said he could agree that a paragraph of vital interest to one delegation, which was not harmful to others, should be included.

66. Mr. SCHROCK (Federal Republic of Germany) said that inclusion of the proposed new paragraph might lead to misunderstandings concerning the nature of the document referred to in paragraph (1). The Warsaw Convention was concerned with the air waybill as evidence of contract. Article 4, paragraph (1), of the present draft Convention was not concerned with the validity of a contract. It was simply background to the general legal effect of paragraph (2). He could not, therefore, support the inclusion of the proposed new paragraph in article 4.

67. Mr. LARSEN (United States of America) said his delegation withdrew the proposal in document A/CN.9/XXII/CRP.2/Rev.1.

The meeting rose at 5.10 p.m.

Summary record of the 410th meeting

Monday, 22 May 1989, 9.30 a.m.

[A/CN.9/SR.410]

Chairman: Mr. RUZICKA (Czechoslovakia)

The meeting was called to order at 9.55 a.m.

Draft Convention on the Liability of Operators of Transport Terminals in International Trade (*continued*) (A/CN.9/298, A/CN.9/319 and Add.1-4, A/CN.9/321; A/CN.9/XXII/CRP.4)

Article 5

1. Mr. KATZ (International Trade Law Branch) said that, in the drafting of article 5, it had been decided to adopt the principle of presumed fault or neglect, which also underlay article 5 of the Hamburg Rules and the corresponding provision of the Multimodal Convention. The decision to adopt that principle had been one of the earliest taken by the Working Group and had remained unchallenged throughout the work on the text. After some discussion, the Working Group had decided that the draft Convention should deal not only with the cases of loss or damage but also with the case of delay in delivering the goods, it having been felt that failure to cover that eventuality would leave a significant gap in the text. With regard to the phrase "loss resulting from loss of or damage to the goods" in paragraph (1), the Working Group had reached an understanding to the effect that the provision included consequential damages such as loss of profits, in legal systems where such damages were recoverable, within the limits of liability specified in article 6. The "other persons" referred to in the same paragraph were what in some legal systems were described as "independent contractors". After discussion, the Working Group had

decided that liability should arise even where the "other persons" or independent contractors were acting outside the scope of their employment, that principle being likewise incorporated in the Hamburg Rules. Paragraph (2), which corresponded to article 5, paragraph 7, of the Hamburg Rules, had generated very little discussion. With regard to paragraph (3), which corresponded to article 5, paragraph 2, of the Hamburg Rules, it had been decided to incorporate a "reasonable time" clause where there was no express agreement concerning the date of delivery. Lastly, with regard to paragraph (4), the Working Group had decided that, although the corresponding provision of the Hamburg Rules provided for a period of 60 days, a period of 30 days beyond which the goods might be treated as lost was sufficient in the context of terminal operations.

2. Mr. ABASCAL (Mexico), drawing attention to his Government's comments on article 5 appearing on pages 5 and 6 of document A/CN.9/319/Add.1, said that he would be satisfied if the report of the Commission recorded the statement that the phrase "loss resulting from loss of or damage to the goods" in paragraph (1) covered consequential loss of profits to the extent that such loss was recoverable.

3. Mr. SAMI (Iraq) agreed with the Mexican Government's comments and suggested that the beginning of paragraph (1) might be amended to read: "The operator is liable for damage resulting from loss of or damage to . . .".

4. Mr. POHUNEK (Czechoslovakia) said that to depart from the wording used in the Hamburg Rules (see article 5, paragraph 1, of the Rules) might imply an intention to convey a different meaning. He supported the Working Group's text as it stood.

5. Mr. EYZAGUIRRE (Chile) said that, under his country's laws, the term "loss" covered loss of profit. He understood the Working Group's text in that way.

6. The CHAIRMAN said that the discussion would be reflected in the Commission's report; on that understanding, he suggested that paragraph (1) of article 5 should be referred to the Drafting Group.

7. *It was so agreed.*

8. Ms. FAGHFOURI (United Nations Conference on Trade and Development), referring to paragraph (2), asked whether the fact that the Working Group had decided to use the term "failure" instead of the expression "fault or neglect" appearing in the Hamburg Rules (see article 5, paragraph 7) meant that it had intended to obtain a different result.

9. Mr. AZZIMAN (Morocco) associated himself with that query and drew attention to his Government's comments on paragraph (2) appearing on page 12 of document A/CN.9/319/Add.1.

10. Mr. BONELL (Italy) said that the Working Group had deliberately opted for the language of the Vienna Sales Convention rather than that of the Hamburg Rules. The expression "failure" was thought to be more general than "fault or neglect"; it could, for example, cover a failure to take measures without any actual fault being committed.

11. Mr. SWEENEY (United States of America) said that the language of the paragraph was parallel to that used in maritime law and placed the burden of apportionment squarely upon the operator of the transport terminal.

12. The CHAIRMAN said that he took it that there was no divergence of views; he suggested that paragraph (2) should be referred to the Drafting Group.

13. *It was so agreed.*

14. The CHAIRMAN drew attention to paragraph (3) and said that, in the absence of comments, he would take it that there was agreement that paragraph (3) should also be referred to the Drafting Group.

15. *It was so agreed.*

16. Mr. INGRAM (United Kingdom), referring to paragraph (4), introduced the proposal contained in document A/CN.9/XXII/CRP.4. If, as appeared to be the case, the presumption of loss was to be irrebuttable, the period of 30 days was surely unreasonably short and should be extended to the 90 days provided in the Multimodal Convention.

17. Mr. CHAFIK (Egypt) agreed that the period of 30 days proposed by the Working Group was too short, but thought that 90 days was too long. In his view, a period of between 45 and 60 days should be adopted.

18. Mr. BERAUDO (France), recalling that the issue had been thoroughly discussed in the Working Group, said that, in his view, 90 days or even 60 days was too long a waiting time for firms which might be held up for lack of essential goods. The 60-day period specified in the Hamburg Rules was acceptable in

a convention on maritime transport but excessive in a situation where the goods were known to be inside the transport terminal and in the operator's hands. To extend the period would be unfair to the customer, especially as the liability incurred by the operator was very slight while the harm suffered by the customer might be enormous. He urged the Commission not to reopen the discussion and to accept the Working Group's text.

19. Mr. JOKO-SMART (Sierra Leone) thought that it would be reasonable to extend the period to 60 days, thus bringing the provision into line with the corresponding one in the Hamburg Rules.

20. Mr. GOH (Singapore) said that he supported the United Kingdom proposal but could agree to a period of 60 days.

21. Ms. VILUS (Yugoslavia) expressed agreement with the explanation given by the representative of France and said that the present text was in the interest of both parties. In her view, a period of 60 days would be too long.

22. Mr. RAO (India) said that his delegation supported the present text. The United Kingdom proposal was based on the interpretation that paragraph (4) created an irrebuttable presumption of loss. However, that paragraph stated that the goods "may"—not "shall"—be treated as lost. The presumption of loss was therefore rebuttable if, for instance, the operator found himself unable to hand over the goods owing to circumstances beyond his control. Since the presumption was not irrebuttable, there was no reason to prolong the period and he supported the text prepared by the Working Group.

23. Mr. ZUBEIDI (Libyan Arab Jamahiriya) said that it was important for the text to cover cases in which the terminal operator was prevented from handing over the goods by circumstances beyond his control, such as war, an attack on the country or a natural disaster.

24. The CHAIRMAN thought that such circumstances were covered in paragraph (2).

25. Mr. SZASZ (Hungary) said that his delegation supported the provision for a 30-day period. Harmony with the Hamburg Rules did not necessarily imply the need for identical wording. Transportation by sea was an operation that was quite different from terminal operations and the text expressed that difference in an appropriate way. He wondered, however, who was entitled to treat the goods as lost—a court, for instance, or one of the parties? It might be simply a question of drafting.

26. Mr. ILLESCAS (Spain) said that his delegation supported the text as it stood. As he understood it, the 30 consecutive days started from the agreed date of handing over or the date on which a request for the goods had been received by the terminal operator. In practice, therefore, the operator had a much longer period of time at his disposal. To extend the period of 30 days would, in his view, encourage inefficiency since, under article 6, paragraph (2), the operator would, if the period was extended to 90 days, only have to pay two and a half times the charges payable for his services even in the case of a delay of 89 days. The Convention should encourage dispatch, and 30 days was a more appropriate period.

27. Mr. POHUNEK (Czechoslovakia) said that his country supported the present text. The arguments of the representative of France had been very convincing. As to whether the presumption of loss was rebuttable, he noted that article 5, paragraph 2, of the Hamburg Rules used similar wording and the Hamburg Conference had interpreted the presumption of loss as rebuttable.

28. Mr. TEPAVITCHAROV (Bulgaria) said that there were strong arguments for maintaining the present text. Indeed, in some cases 30 days might even be over-generous. In regard to the question raised by the representative of Hungary, the implication was that it was the interested party who could treat the goods as lost. In his view, there was no need for redrafting.

29. Ms. PIAGGI de VANOSI (Argentina) said that, for the reasons given by the representatives of France and Spain, the text should be left as it stood.

30. Mr. SAMI (Iraq) said that his delegation considered 30 days too long for goods that had already arrived at the terminal. However, it supported the present text. He agreed that there was a need to clarify whether the presumption of loss was rebuttable and who declared the goods to be lost.

31. Mr. RUSTAND (Observer for Sweden) supported the 30-day period, though he thought that even that period might be excessive in the case of air terminals, for which the Warsaw Convention stipulated 14 days. Since the only task of the terminal operator was to locate the goods the comparison with transportation by sea was not appropriate.

32. The term "make available to", used in paragraphs (3) and (4) of article 5, should perhaps be replaced by "place at the disposal of", in line with the amendment adopted in article 3 (see A/CN.9/SR.407, paras. 4-9).

33. Mr. BONELL (Italy) agreed that paragraphs (3) and (4) should be brought in line with article 3. A majority of members appeared to be in favour of a period of 30 days. As to the question of rebuttability, he considered that it was a matter for the interested party, as the representative of Bulgaria had said. The interested party could declare the goods lost after 30 days or give the operator more time. That was his business. Once, however, he had made a claim the presumption of loss became irrebuttable: it was too late for the operator to say the goods had been found. As for the important point made by the representative of the Libyan Arab Jamahiriya, the question of *force majeure* was covered in paragraph (1), where the operator was made responsible for loss, damage and delay unless he proved that he had taken all measures that could reasonably be required. In other words, in such a case the operator might avoid liability under paragraph (4), by appealing to paragraph (1).

34. As to who could make use of the right to treat the goods as lost, the text had originally referred to "a person entitled to make a claim for the loss of the goods" (see document A/CN.9/WG.II/WP.58) but that phrase had later been deleted, for reasons of form and not of substance. There was no doubt that it was only that person who could treat the goods as lost.

35. Mr. SEVON (Observer for Finland) said he supported the period of 30 days, which was quite long enough to find the goods in a terminal, and agreed that the draft should be aligned with article 3. He also felt that the Drafting Group should ensure that the present text did not leave the terminal operator free to treat the goods as lost.

36. The CHAIRMAN said that the great majority of members appeared to favour a period of 30 days. Drafting details would be handled by the Drafting Group. As to the question of rebuttability, the general view appeared to be that the presumption of loss was rebuttable. The Drafting Group would take account of all comments made to improve the wording. He took it that paragraph (4) could be passed on to the Drafting Group. He invited comments on article 5 as a whole.

37. Mr. SAMI (Iraq) noted that, according to the Secretariat, the text was based on the principle of presumed fault. However,

article 5 of the Hamburg Rules made an exception in the case of fire. He would like clarification as to whether, in the present text, the principle of presumed fault applied even in the case of fire.

38. Mr. KATZ (International Trade Law Branch) said that the Hamburg Conference had adopted a common understanding that liability would be based on the principle of presumed fault or neglect, except as otherwise provided in the Rules. Article 5, paragraph 4, of the Hamburg Rules made an exception for cases of fire, where it lay with the claimant to prove fault or neglect on the part of the carrier. The drafting of the Hamburg Rules, incorporating the exception with respect to fire, had been the outcome of an overall compromise concerning the "nautical fault" defence that appeared in the Hague Rules, the limits of liability and the exceeding of such limits. In the present draft Convention, however, no specific exception had been made for the case of fire. In his understanding, therefore, loss, damage or delay due to fire was in principle subject to the principle of presumed fault or neglect set forth in article 5(1).

39. Mr. ABASCAL (Mexico) asked whether the terms of reference of the Drafting Group on paragraph (4) would include the proposal that it should be made clearer that it was not the terminal operator who declared the goods lost.

40. The CHAIRMAN said that the matter would be dealt with by the Drafting Group.

41. Mr. EYZAGUIRRE (Chile) said that he would like clarification on the Commission's exact instructions to the Drafting Group in regard to paragraph (4). The present text specified the action to be taken after the lapse of 30 days, but was it not necessary also to consider the possibility of damage to the goods arising out of the delay?

42. Mr. CHAFIK (Egypt) expressed concern at the complications that could arise in court proceedings. Could a court regard goods as lost when they were physically present? Or if, for example, the 30-day period had been exceeded by 14 days, would the court have discretion to set aside the finding of presumed loss?

43. Mr. TARKO (Observer for Austria) said that one way of simplifying the issue would be to discard the concept of a presumption of loss in paragraph (4) and refer merely to an option, open to the person entitled to take delivery, to regard the goods as lost if they had not been delivered after a period of 30 consecutive days.

44. Mr. SZASZ (Hungary) supported that suggestion. His understanding was that the last line of paragraph (4) meant that the goods might be "treated as lost by the person entitled to take delivery". In regard to the point raised by the representative of Egypt, if the option were exercised by the person entitled to take delivery and the goods were treated as lost, it would be quite wrong to allow any court discretion to overturn the presumption of loss, since the entitled person might in the mean time have taken appropriate action based on the loss, affecting third, fourth and even fifth parties. It would be very odd and confusing if goods lost for several months could then be declared by a court not lost.

45. Mr. BERAUDO (France) was in favour of retaining the Working Group text, since it expressed an objective and neutral rule on the essential element in the situation, namely the loss, which would enable owners or carriers to apply to terminal operators or their insurers for compensation. A further advantage was its flexibility in that it would enable a terminal operator who subsequently located goods which had been mislaid to enter

into negotiations with the owner/carrier, in case the latter was prepared to accept the located goods, with or without financial compensation. Attempts to clarify the text might render it too rigid and less capable of responding to the variety of situations that might arise.

46. Mr. SEVON (Observer for Finland) thought that the solution suggested by the representative of France would be a radical departure from the existing rules. It would in his view be very unsatisfactory if, after the lapse of 30 days, the person entitled to receive goods were forced to receive them if found, after he had lost his commercial interest in them. Another consequence he foresaw from the French representative's remarks was that a terminal operator might on the thirty-first day, when he was in possession of valuable goods, tell a person who came to claim them that he had arrived too late, and proceed to sell them at a profit. It should by no means be assumed that losses during warehousing were adequately covered by insurance.

47. Mr. CHAFIK (Egypt) said that, as he saw it, the interested party could decide whether or not to declare a consignment lost, but a tribunal might overturn his decision if it wished.

48. Mr. BERAUDO (France) said he thought that erroneous deductions were being made from his remarks. Under any legal system in the world, an operator who, on the thirty-first day, appropriated goods entrusted to him, would be committing theft, and be subject to criminal law. An operator was under an obligation to deliver unclaimed goods to a warehouse, where normal lost-and-found procedures would apply. In the event of loss, the operator should instruct his staff to go on looking for the goods for 40 days or more.

49. To say that only the consignee was entitled to initiate a claim procedure was to distort the rules. Provided that the operator had compensated the entitled person, he must be able to regard himself as relieved of responsibility. The objective rule must apply.

50. Ms. PLAGGI de VANOSI (Argentina) said it did not seem to her right that only the person entitled to receive a consignment should be entitled to ask for it to be declared lost. There were other persons who ought to have the right to declare the goods lost.

51. Mr. LEBEDEV (Union of Soviet Socialist Republics) thought it was clear that it was the person entitled to take

delivery who had the right to declare goods lost. Article 12, paragraph (2), made the point clear. He felt sure the Drafting Group would arrive at a formula to reflect the Commission's thinking on the matter.

52. As to the point raised by the representative of Egypt regarding the function of the courts, his own thinking was that the right to consider goods to have been lost should be recognized and upheld by the courts, even in a situation where the goods were actually still at the transport terminal. The Working Group's text seemed to lend itself to that interpretation. Accordingly, he suggested that the Drafting Group should be asked to take serious account of the point that the provision that goods could be considered lost after a set period was part of the privileges of the person entitled to receive goods.

53. The CHAIRMAN said that all were agreed that the paragraph should be passed on to the Drafting Group. It would be for the Drafting Group to improve the text in order to make it clear that it was the right of the person entitled to receive goods to declare them lost after 30 days. It was outside the scope of the present Convention to rule on what action a court might take.

54. Mr. BONELL (Italy) said that, so far, there had been a common understanding that only persons entitled to take delivery of a consignment could ask for it to be declared lost. It might be necessary, for clarification, to indicate more precisely who such persons were. Article 12 must be borne in mind in that regard. Account should be taken of the fact that the person entitled to receive goods and the owner or person entitled to claim under article 5 might not be one and the same person. Perhaps the words "entitled to make a claim for a loss" could be used in article 5.

55. Mr. SAMI (Iraq) said that, even if the right to consider goods lost was recognized as the prerogative of the person asking for compensation, that still left unsettled the problem of operators' liability. An operator should not have a threat of action hanging over him. He might not be able to observe the 30-day rule, for example because of lengthy customs formalities, and should have some latitude.

56. If the text had to be retained, its wording should not be altered. Jurisprudence would help in the interpretation of the paragraph.

The meeting rose at 12.37 p.m.

Summary record (partial)* of the 411th meeting

Monday, 22 May 1989, 2 p.m.

[A/CN.9/SR.411]

Chairman: Mr. RUZICKA (Czechoslovakia)

The discussion covered in the summary record began at 2.35 p.m.

Draft Convention on the Liability of Operators of Transport Terminals in International Trade (*continued*) (A/CN.9/298, A/CN.9/319, Add.1-4; A/CN.9/XXII/CRP.3-6)

Article 5 (*continued*)

1. Mr. de GOTTRAU (International Road Transport Union) pointed out that article 20 of the Convention on the Contract for

the International Carriage of Goods by Road provided that, when not otherwise agreed by the parties, the time-limit after which goods could be treated as lost was 60 days.

2. The CHAIRMAN said that, in the absence of support for modification of the 30-day time-limit specified in article 5, paragraph (4), he would take it that the Commission did not wish to alter that time-limit.

3. *It was so agreed.*

*No summary record was prepared for the meeting before 2.35 p.m.

4. The CHAIRMAN drew attention to the fact that, under article 12, paragraph (2), of the draft Convention, only the person entitled to claim, and not the operator, might treat the goods as lost in accordance with article 5. That point should, in his view, be reflected in the Commission's drafting.

5. Another question which arose was that of the rights of courts or arbitral tribunals. The solution to that question was outside the framework of the draft Convention, however, and should therefore be left to national legislation.

6. The discussion on article 5 having been completed, he took it that the Commission wished to refer that article to the Drafting Group.

7. *It was so agreed.*

Article 6

8. Mr. KATZ (International Trade Law Branch) said that the discussion of article 6 in the Working Group on International Contract Practices had focused mainly on paragraph (1). There had been two schools of thought. One view had been that the limits of the operator's liability should match the limits applicable to the carrier bringing the goods to or taking them from the terminal, because that would assist the carrier in any recourse action against the operator. Another view held had been that there should be a single limit of liability, since multiple limits led to uncertainty. The operator might not know by what mode of transport the carriage had been effected and therefore not know the limits of his liability. A compromise had been found, based on the United Nations Convention on International Multimodal Transport of Goods. When the goods were involved in maritime transport, the limit of liability was lower. If they were not involved in maritime transport then a higher limit of liability applied.

9. Unlike in the Hamburg Rules, no alternative limit based on packages or shipping units was included. That had been decided for a number of reasons. Firstly, the definition of a package was uncertain and could give rise to litigation. Secondly, a limitation based on packages would require the inclusion of complex provisions relating to the information contained in the document issued under article 4, comparable to those in articles 5 and 6 of the Hamburg Rules. Provisions relating to packages, reservations and the legal effect of reservations were thought to complicate the text unnecessarily. Thirdly, such a form of limit would be of no great value in practice.

10. Arguments advanced in favour of an alternative limit based on packages or shipping units had been that such limits would assist recourse against the operator by a carrier who was himself subject to limits based on packages and that the intention in the Hamburg Rules to take account of different relative values in relation to the weight of the goods should also apply to terminals. The Working Group had recommended that in formulating their written comments, governments should consider the desirability of including alternative bases for limits of liability.

11. The provision in paragraph (2) of article 6 corresponded to that in the Hamburg Rules. It had been difficult to select an appropriate basis for the limitation of liability in the case of delay. The basis chosen had the virtue of simplicity. In connection with the final proviso of paragraph (2), he pointed out that a delay of certain goods could affect the consignment as a whole.

12. The Working Group had also discussed the question of a global limit for all claims against the operator, applicable, for

example, in the case of a catastrophic event, a protection already enjoyed by shipowners. No such limit had been included in the draft prepared by the Working Group, but governments had been invited to comment on the matter.

13. Mr. SCHROCK (Federal Republic of Germany), introducing his Government's proposal contained in document A/CN.9/XXII/CRP.6, pointed out that the words "and the number of packages or pieces", which appeared in square brackets in article 4, paragraph (1)(a), of his Government's proposal contained in document A/CN.9/XXII/CRP.5, were relevant to the present discussion.

14. It was not appropriate to base the limit of liability exclusively on the weight of goods lost or damaged. The text before the Commission was perhaps based on rules relating to land transport, whereas the present draft Convention related also to seaports, to stevedores, and also to air cargo terminals. A single limit of liability based on weight was acceptable for low-value bulk cargo. In such cases, the number of units of account specified would probably not constitute a limit of liability since the full loss would be covered. The situation was quite different, however, in the case of industrial or manufactured goods. That was a matter of concern to countries which exported or imported such items, because of the financial implications of the limit laid down. The limit of liability on a package containing a personal computer, for example, worth perhaps 1,000 special drawing rights, might result in recovery of between 10 and 20 per cent of the value in the case of loss, whereas in the case of calculation based on weight the result would be exclusion of liability. Similar calculations could be made in the case of motor vehicles.

15. He therefore recommended a two-tier approach, with alternative bases for calculating limits of liability. The practical problems should not be over-estimated. There was no need to incorporate all of articles 5, 6 and 7 of the Hamburg Rules. It would be sufficient to deal with packages and other shipping units in the context of article 4, as proposed in document A/CN.9/XXII/CRP.5. It would also be necessary, in his view, to add to article 6 a paragraph (2) along the lines proposed in document A/CN.9/XXII/CRP.6. That point could be dealt with by the Drafting Group.

16. Mr. LARSEN (United States of America) said that his delegation supported the proposal made by the Federal Republic of Germany in document A/CN.9/XXII/CRP.6 but only to the extent that it wished stevedores to be treated in the same way as maritime carriers as far as liability was concerned.

17. Ms. SKOVBY (Denmark) noted that the calculation of compensation has not been provided for in the draft Convention, as had been done in the case of the Hague/Visby Rules. She therefore took it that such calculation would be a matter for national legislation. She wished to know whether the lower limit of liability was to apply to carriage by sea even where such carriage was only one stage of a transport operation. Her delegation considered that there should be only a single limit. The alternative would only create more problems than it would solve. Denmark was unable to support the United States proposal relating to the treatment of stevedores, a term that was very difficult to define.

18. Mr. WANG Yangyang (China) said that his delegation doubted the wisdom of not specifying a limit of liability per package. It agreed with the proposal of the Federal Republic of Germany to include, at the end of the first sentence of article 6 (1), the words "whichever is the higher". A carrier sometimes suffered losses which could not be compensated by the operator, and it was therefore unreasonable not to have a

package limit. The limit could be decided later, or the 835 units referred to in the Hamburg Rules could be adopted.

19. Mr. KATZ (International Trade Law Branch), explaining the background of the Working Group's proposal that a lower limit should apply in the case of goods carried by sea or inland waterway, said that in January 1986 it had been suggested in the Working Group that if goods were delivered to or taken away from the operator by maritime transport, the limits applicable to maritime transport should apply (A/CN.9/275, paragraph 75). The Secretariat's note A/CN.9/WG.II/WP.58 had so provided in Alternative 2 of draft article 6, paragraph 1. When the Working Group had discussed that alternative provision at its tenth session, it had adopted the idea of a lower limit for maritime transport, but the text approved had not referred to "goods delivered to or taken away from the terminal" and was similar to the draft presently before the Commission. The drafting history thus offered support for the interpretation of the present text according to which the lower limit would apply if the goods were involved in carriage by sea or by inland waterways at any stage of the chain of transport.

20. Mr. de GOTTRAU (International Road Transport Union) said that the point under discussion raised an important question of principle. The International Road Transport Union and the International Union of Railways did not see why liability under article 6 should distinguish between transport by land, by sea or by inland waterways. Uniform rules on that matter were needed. He recalled that the two new Conventions—the United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978) and the United Nations Convention on International Multimodal Transport of Goods (Geneva, 1980)—were having a great deal of difficulty in entering into force. The International Road Transport Union was opposed to the package compensation provided for in the maritime conventions. There had been long experience of road carriers sustaining heavy losses, during maritime operations, by reason of the fact that a truck was treated as a mere package, compensated at a very low rate. He wondered why a land transport operator should have to refer to clauses concerning maritime carriage. Calculation of compensation on a differentiated basis should not be accepted in the present draft Convention. The value criterion applied to the goods should be the same for all modes of transport.

21. Mr. SEVON (Observer for Finland) said that his delegation had misgivings about distinguishing between cases in which maritime carriage was involved and those where it was not; they could, however, be dispelled in part if the Alternative 2 referred to by the representative of the International Trade Law Branch could be included in the text. Under the present article 6, if the first stage of a four-leg transport operation was by sea, even the last terminal operator involved could invoke the maritime liability limitation. That did not make sense. However, even if that Alternative 2 were adopted, it would still be necessary to decide whether the determining factor should be the person to whom the goods actually were handed over or the person to whom they should be handed over under the terms of the contract. In international transport it was not unusual for arrangements to be changed and for goods originally intended to travel by sea to be carried by another mode of transport.

22. His Government had proposed (A/CN.9/319/Add.3, page 3) the introduction of a per-package limitation, but had no strong views on the matter. It believed, however, that there was considerable merit in making article 6 as simple as possible, because every complication introduced would cause problems. His delegation could support the present text, but would like to see some improvements made if a different limit was to apply in the case of goods involved in maritime transport.

23. Mr. BONELL (Italy), speaking on a point of order, suggested that the Commission should consider first the written proposal made by the Federal Republic of Germany before turning to the question whether there should be different treatment for goods carried in maritime transport.

24. Mr. CHAFIK (Egypt) said that he could accept the distinction between different modes of transport but failed to understand why it had been made.

25. Ms. SKOVBY (Denmark) said that she could accept the kilogram-of-gross-weight basis as a lesser evil.

26. Ms. EISTERER (European Shippers' Councils) said that different limits of liability for different modes of transport would lead to confusion: in some circumstances it might not be known whether the goods would be conveyed by sea or through a tunnel, yet in both cases their value would be the same.

27. The CHAIRMAN pointed out that the idea of different limits of liability for different forms of transport had been arrived at as a compromise solution. He asked if that compromise could be accepted.

28. *It was so agreed.*

29. Mr. SCHROCK (Federal Republic of Germany) said that he could not support the kilogram-of-gross-weight basis for calculation of liability.

30. Mr. WANG Yangyang (China) drew attention to his Government's proposal (A/CN.9/XXII/CRP.3) that a limitation of liability "per item" should be included in article 6, paragraph (1). A limitation based on weight alone would result in carriers being unable to claim a reasonable amount from an operator in some circumstances. However, the Working Group had been unable to define an "item" adequately, and he noted that that question had not been resolved under the Hamburg Rules either. He did not, however, object to the present draft text.

31. Mr. BONELL (Italy) said that Italian transport operators had been divided on the issue: the maritime carriers would welcome a double system, while the air carriers preferred the weight basis alone. He was inclined to support the proposal of the Federal Republic of Germany in document A/CN.9/XXII/CRP.6.

32. Mr. LARSEN (United States of America) said that he could accept the proposal of the Federal Republic of Germany, with the reservation that its application should be limited to stevedores. If the proposal of the Federal Republic were not generally supported, he could accept the present text of article 6, paragraph (1).

33. Mr. BONELL (Italy) urged the previous speaker to withdraw his reservation: determination of a method of limiting the application of article 6 to one particular category would prove very difficult. No one category of person should be singled out for special treatment in the draft Convention.

34. Mr. BERAUDO (France) said that he could not support any departure from the kilogram-of-gross-weight basis of calculating liability. The understanding in the consultations in his country on the subject had been that the unit to be used was the kilogram.

35. Ms. VILUS (Yugoslavia) supported the Working Group's text for reasons similar to those given by the previous speaker. The kilogram-of-gross-weight basis was the more modern system.

36. Mr. RUSTAND (Observer for Sweden) drew attention to paragraphs 24 to 35 of the report of the Working Group in document A/CN.9/287. Paragraph 34 of that report stated eloquently why a liability limit based on the number of packages or shipping units was unworkable.

37. The CHAIRMAN said he took it that the majority in the Commission favoured the kilogram-of-gross-weight basis used in the Working Group's text.

38. *It was so agreed.*

39. Mr. SEVON (Observer for Finland) said that he had no objection to goods involved in maritime carriage being treated separately but he wished to know what that would imply. Was it intended that any carriage which included a maritime leg was to be regarded as involving maritime carriage, or was it intended that the carriage should be deemed to include a maritime leg only if that leg immediately preceded or followed the period when the goods were taken in charge by the operator of a transport terminal?

40. Mr. KATZ (International Trade Law Branch) said that the question certainly needed to be clarified in the light of the points made earlier by the representative of Denmark, and the observer for Finland and having regard to the decision to adopt a distinction in respect of liability between maritime and non-maritime transport.

41. Mr. BERAUDO (France) said that he appreciated the arguments put forward by the observer for Finland. It was true that applying very low limits of liability solely because there might be maritime carriage lower down or higher up the transport chain was a strange, not to say shocking, notion. In his opinion, the Drafting Group could without much difficulty modify the text to provide that lower limits of liability applied when the transport terminal was situated at the point of commencement or termination of maritime transport.

42. Mr. LARSEN (United States of America) said that the question at issue was the definition of a maritime leg. In the United Nations Convention on International Multimodal Transport of Goods, article 18, paragraph 3, stated:

"Notwithstanding the provisions of paragraphs 1 and 2 of this article, if the international multimodal transport does not, according to the contract, include carriage of goods by sea or by inland waterways, the liability of the multimodal transport 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."

That approach was essentially what the Working Group had had in mind in proposing the present draft. The problem was primarily one of drafting. The Multimodal Convention had been drafted on the assumption that whenever there was a maritime leg it would be the major leg, and further reference to it, therefore, was not appropriate.

43. The CHAIRMAN said that the United States proposal differed from that of France, which was more specific in referring to the maritime leg. He asked whether the Commission would agree to refer paragraph (1) to the Drafting Group together with those two proposals.

44. Mr. SZASZ (Hungary) said that there was a basic difference between the two proposals, one of which provided that the maritime leg was important only if it occurred immediately after departure of the goods from or before their arrival at the transport terminal, while the other provided that the maritime leg was important anywhere along the transport chain. The Commission

should decide between those two alternatives before referring paragraph (1) to the Drafting Group. Hungary supported the French proposal.

45. Mr. BONELL (Italy) also supported the French proposal. The text before the Commission was derived from the Multimodal Convention but had not been very carefully thought out. In the case of a multimodal contract the operator would know where he stood, but the Commission was at present dealing with only one part of the transport chain. The operator of a transport terminal might not be in a position to know whether the carriage had included or would include carriage by sea.

46. Mr. SEVON (Observer for Finland) strongly supported the French proposal, for the reasons given by the representatives of France and Italy. He would be very surprised if a Finnish transport terminal operator handling goods carried by railway through the Soviet Union to Japan—with a final maritime leg at the end of the carriage—could rely on maritime limitation. That would make little sense to the operator concerned—although he would appreciate the low limits.

47. Mr. POHUNEK (Czechoslovakia) said that he had originally supported the Working Group's draft but, in the light of the discussion, now supported the amendment proposed by France.

48. Mr. INGRAM (United Kingdom) supported the French proposal, subject to the modification suggested by the representative of Italy. Transport terminal operators in the United Kingdom had indicated that they did not necessarily know, when they received goods, what was the next destination of the goods. It followed that they would not necessarily know the ensuing mode of transport. It was reasonable therefore to provide that the corresponding limit should apply only if the operator knew.

49. Mr. BONELL (Italy) pointed out that a similar discussion had taken place in connection with article 1, paragraph (c), concerning identification of the location of the place of departure and place of destination. Since it was not the actual knowledge that was important but the possibility of the operator knowing on the basis of objective indications, he suggested that a similar formula should be used in the present instance.

50. Mr. TEPAVITCHAROV (Bulgaria) asked whether the text proposed by the French delegation might be circulated prior to reference of paragraph (1) to the Drafting Group.

51. The CHAIRMAN said that translation and circulation of the proposal would take considerable time. He appealed to the Bulgarian representative not to insist on his request, on the understanding that it would still be possible to comment on the text when it came back from the Drafting Group.

52. Mr. LEBEDEV (Union of Soviet Socialist Republics) agreed with the representative of Bulgaria. While he understood the issue in general terms, it was the actual text that was of interest. However, he accepted the Chairman's compromise proposal.

53. Mr. LARSEN (United States of America) said that, in order to speed up the Commission's work, his delegation would support the French proposal and agree to its being referred to the Drafting Group, on the understanding that the Commission would review the text when the Drafting Group reported back.

54. Mr. BERAUDO (France) said that his delegation's proposal involved simply amending the beginning of the second

sentence of paragraph (1) to read: "However, if the goods are involved in international carriage and on arrival or departure are carried by sea or by inland waterways, . . ."

55. Mr. KATZ (International Trade Law Branch) pointed out that there were still two proposals before the Commission which were not identical: the French proposal relating to goods being carried to or from the terminal and the Italian proposal to the effect that the existence of maritime carriage must be established by objective facts.

56. Mr. BERAUDO (France) said that the problem with the Italian proposal was one of proof. It was obvious whether the goods were in a port terminal or not, because the departure or arrival terminal for maritime transport was in a port, not in the

middle of the land. He questioned the need to overburden the text by such clarifications.

57. Mr. BONELL (Italy), while agreeing with the French representative in principle, said that there were exceptions. Goods were sometimes collected at inland terminals and then sent to ports for shipment. It was going too far to restrict the provision to seaport terminals. The question was one of substance.

58. The CHAIRMAN suggested that paragraph (1) of article 6, together with the French and Italian proposals for amendment, should be referred to the Drafting Group, on the understanding that substantive points might still be raised when the Drafting Group reported back.

59. *It was so agreed.*

The meeting rose at 5.10 p.m.

*Provisional translation.

Summary record of the 412th meeting

Tuesday, 23 May 1989, 9.30 a.m.

[A/CN.9/SR.412]

Chairman: Mr. RUZICKA (Czechoslovakia)

The meeting was called to order at 9.35 a.m.

Draft Convention on the Liability of Operators of Transport Terminals in International Trade (*continued*) (A/CN.9/298, A/CN.9/319 and Add.1-4; A/CN.9/XXII/CRP.3 and 6)

Article 6 (*continued*)

1. The CHAIRMAN drew attention to paragraphs (2) and (3), and suggested that if they raised no difficulties for members they should be referred to the Drafting Group.

2. *It was so agreed.*

3. The CHAIRMAN invited comments on paragraph (4).

4. Ms. VILUS (Yugoslavia) noted that the substance of paragraph (4) was repeated in article 13(2); she wondered whether paragraph (4) should be deleted or contain a reference to article 13(2).

5. Mr. KATZ (International Trade Law Branch) said that, to avoid any possibility of doubt, the Working Group had considered it desirable, notwithstanding the general provision contained in article 13(2), to specify in article 6(4) that the operator might agree to higher limits of liability.

6. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that his country's written comments in document A/CN.9/319 reflected a concern that it should be understood that, if the operator had agreed to higher limits of liability before the occurrence of loss, damage or delay, such an agreement was binding. It was an important point that should be referred to specifically.

7. Mr. KATZ (International Trade Law Branch) said that the matter had been discussed in the Working Group. The wording

in the present article differed from that of the Hamburg Rules (see article 6, paragraph 4, of the Rules) because a shipper might not be involved, but the Working Group had considered it useful to allow the operator to agree to higher limits of liability. In his understanding, it had been intended that any such agreement should be binding on the operator. The Commission would have to decide whether it was necessary to clarify the matter.

8. The CHAIRMAN asked the representative of the Soviet Union whether he thought an addition to the text was necessary or whether a reference in the Commission's report would be sufficient.

9. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that either solution would be acceptable; the important thing was for the Commission to take a single view so that the text would be universally interpreted in the same way.

10. Mr. POHUNEK (Czechoslovakia), referring to the point raised by the representative of Yugoslavia, said that the Working Group had taken account of the corresponding provisions in the Hamburg Rules (article 6, paragraph 4, and article 23, paragraph 2); he thought that the text should be approved as it stood.

11. Mr. BONELL (Italy) agreed. Article 13(2) of the draft under consideration was much broader in scope than article 6(4), which covered only the limits of liability referred to in article 6.

12. He supported the comments made by the representative of the Secretariat in answer to the point raised by the Soviet Union. The understanding of the Working Group had been that there must be an agreement in some form or other but, once that agreement had been entered into, it was binding on both parties. That understanding could be expressed in the report; it would be preferable to leave the text as it stood.

13. Mr. SCHROCK (Federal Republic of Germany) supported the views expressed by the representative of Italy.

14. The CHAIRMAN said he took it that the Commission was in favour of the text prepared by the Working Group and agreed that both article 6(4) and article 13(2) should be retained. It would also be mentioned in the report that any agreement on the part of the operator to increase his limits of liability would be binding. Paragraph (4) would be referred to the Drafting Group.

15. He invited comments on article 6 as a whole.

16. Mr. de GOTTRAU (International Road Transport Union) asked when the figures in article 6(1), at present in square brackets, would be decided on.

17. The CHAIRMAN said that that would depend on the Commission's decision as to the form to be taken by the document and the procedure to be followed for its adoption. It had been understood that the Commission would return to that question at the end of its discussion of the draft.

Article 7

18. Mr. KATZ (International Trade Law Branch) said that article 7 of the present text paralleled article 7 of the Hamburg Rules, with certain differences, especially in paragraph (2). Paragraph (1), relating to the defences and limits of liability, applied to actions founded "in contract, in tort or otherwise". The word "otherwise", also used in the Hamburg Rules, was included to cover actions that, in some legal systems, were not regarded as actions in contract or in tort. Paragraph (2), intended to bring servants, agents or independent contractors under the umbrella of the Convention, differed from the Hamburg Rules, which referred only to servants or agents, because, for example, stevedores were often considered not as servants or agents but as independent contractors. However, such servants, agents or independent contractors could benefit from the provisions only if they were acting within the scope of their employment or engagement by the operator. The term "employment" had been used to cover servants and agents while "engagement" had been felt to be more appropriate for the case of independent contractors. Article 7, paragraph 2, of the Hamburg Rules contained a corresponding requirement. After some discussion in the Working Group, it had eventually been decided that, despite the fact that in article 5 the operator was deemed responsible whether or not his servants, agents or other persons acted within the scope of their employment or engagement, the latter should benefit only if they acted "within the scope of their employment or engagement". As for paragraph (3), there had been little discussion since it was the same in essence as the corresponding paragraph 3 in the Hamburg Rules.

19. Mr. TEPAVITCHAROV (Bulgaria) noted that the English text of article 7 used the word "claims" in the title and "action" in the text, whereas the Russian version used the same word in both cases.

20. Mr. KATZ (International Trade Law Branch) said that the Drafting Group should perhaps look at the different language versions. The English words mentioned reproduced the terminology of the Hamburg Rules. The word "action" referred, as he understood it, to legal action in a court or arbitral tribunal. The question had not been discussed in the Working Group, which had been satisfied with the terminology used in the Hamburg Rules.

21. The CHAIRMAN thought that the distinction made between claims and actions should be reflected in the various

language versions, where possible. The broad term "claim" was rightly used in the title, whereas the word "action" in paragraphs (1) and (2) referred to the judicial proceedings in which a claim was asserted.

22. Mr. ABYANEH (Islamic Republic of Iran) said that the title in the French version of article 7 of the draft before the Commission was different from the title in the French version of article 7 of the Hamburg Rules, which was "*Recours judiciaires*".

23. Mr. BONELL (Italy) said that he had not realized that there was a difference between the two texts (in French), but he preferred the text in the present draft, as it was more general. The scope of article 7 should not be limited to legal or arbitration proceedings, especially since a dispute might well be settled out of court. It would in any case be wrong to over-emphasize the differences from the Hamburg Rules.

24. Mr. NESTEROV (Union of Soviet Socialist Republics) said that the English text was fully satisfactory, but the Russian text would require some amendment in the Drafting Group.

25. Mr. AZZIMAN (Morocco), supported by Mr. CHAFIK (Egypt), said that the purpose of article 7 was to restrict actions brought against the operator's servants, agents or sub-contractors to the limits of liability set out in article 6. That should be reflected in the title. He proposed as an alternative title "Application of limits to other liability claims".

26. The final phrase in paragraph (1), "or otherwise", was in his view insufficiently precise. He proposed that the last line should be replaced by the words "founded in contract or in tort or of some other nature".

27. Mr. BONELL (Italy) said that it would be preferable to deviate as little as possible from the Hamburg Rules. The article was intended to establish the scope of the conditions under which the liability limits applied in the case of claims against the terminal operator in his capacity as contractor.

28. To enable the Drafting Group to sort out the problems affecting the different language versions, it should be given as wide as possible a mandate, including the option of leaving the present version as it stood.

29. Mr. DJENA (Cameroon) said that the new title proposed by the representative of Morocco might create problems in that it moved further away from the text in the Hamburg Rules. The title could, in his view, be left to the Drafting Group to decide.

30. Mr. LARSEN (United States of America), supported by Mr. OCHIAI (Japan), expressed agreement with the Italian representative. The attention of any court would tend to be drawn to any differences from the Hamburg Rules, to which it might attribute undue significance. He favoured keeping the present title and the words "or otherwise".

31. Mr. CHAFIK (Egypt) said that the title did not adequately reflect the body of the article.

32. Mr. GAUTIER (France) thought that there were differences between the purpose of the text under discussion and that in the Hamburg Rules. It could be left to the Drafting Group to improve the language versions where appropriate.

33. Mr. TANASESCU (Observer for Romania) and Mr. DJENA (Cameroon) expressed the view that there were no problems in the English text. The Commission could leave it to the Drafting Group to bring the other language versions into line.

34. Mr. TEPAVITCHAROV (Bulgaria) said that it would be wrong to adhere slavishly to the Hamburg Rules when finalizing the texts in the individual languages. It was, moreover, most important that those concerned in the Drafting Group should understand exactly what was meant in the English text, for example by the term "defences" in paragraph (1).

35. Mr. INGRAM (United Kingdom) said that the content of the article dated back to the Warsaw Convention of 1929, and courts would therefore have little difficulty in understanding what was meant.

36. Mr. BONELL (Italy) said that the intention of the proposed title was to make it clear that the availability of the defences was extended to claims submitted on a non-contractual basis. The Commission could safely refer the whole matter to the Drafting Group.

37. The CHAIRMAN said he took it that the Commission agreed to refer paragraph (1) to the Drafting Group for amendment where necessary.

38. *It was so agreed.*

39. The CHAIRMAN drew attention to paragraph (2). If he heard no comments, he would take it as agreed that the paragraph should be referred to the Drafting Group.

40. *It was so agreed.*

41. The CHAIRMAN invited comments on paragraph (3).

42. Mr. ILLESCAS (Spain) said he had some difficulty with the expression "the aggregate of the amounts recoverable", or at least with the Spanish version of those words. He noted that the Spanish version of article 6, paragraph (3), referred to "*responsabilidad acumulada*". It might be desirable to use similar language in the present paragraph, at least in Spanish; he suggested inserting the word "*acumulable*" after the words "*cuantía total*".

43. He thought that confusion could arise from the use of the conjunction "and" between the words "operator" and "servant" combined with the use of the conjunction "or" between "agent" and "person". He proposed that "and" in the second line should be amended to read "or".

44. Mr. SAMI (Iraq) supported the views expressed by the representative of Spain, but said, with regard to his first point, that the French and Arabic texts were clear. He agreed that "and" should be replaced by "or".

45. Mr. EYZAGUIRRE (Chile), Ms. PIAGGI de VANOSI (Argentina) and Mr. MORA ROJAS (Costa Rica) supported the views expressed by the Spanish representative.

46. Mr. TARKO (Observer for Austria) said that the proposed change from "and" to "or" was more drastic than would at first appear. The present wording was in line with the Hamburg Rules. If "and" was changed to "or", there was a danger that the text would be construed as allowing the liability limit to be claimed twice.

47. Mr. BONELL (Italy) agreed. He had always understood the provision to mean that recovery could be made from two parties, but that the aggregate must not exceed liability limits. He strongly favoured retention of the present draft.

48. Mr. POHUNEK (Czechoslovakia) and Mr. LARSEN (United States of America) supported the remarks of the observer for Austria. The Spanish amendment would entail a

radical change, at least as far as the English version was concerned.

49. Mr. AZZIMAN (Morocco) said that the existing text seemed very clear, and he supported it. It was important to be sure what the intention of the paragraph was.

50. Mr. EYZAGUIRRE (Chile) said that, as he understood it, the addition of the word "*acumulable*" after "*cuantía total*" in Spanish, or "accumulable" or "accruable" before "amounts" in English, would avoid the dangers mentioned by the observer for Austria and the representative of Italy. It was the overall effect of the Spanish representative's proposal which had to be looked at.

51. Mr. CHAFIK (Egypt) said that he understood the text to mean that the aggregate should not exceed the limits of liability. He preferred to retain the present draft.

52. Mr. MOORE (Nigeria) supported the previous speaker's remarks. The term "aggregate" referred to a sum of the amounts recoverable from one or more persons.

53. Mr. MORA ROJAS (Costa Rica) noted that the Spanish version of the Hamburg Rules used the word "o" ("or") where the Spanish version of the text under consideration used the word "y" ("and").

54. Mr. ILLESCAS (Spain) said that he had raised the matter because, according to article 7, paragraph (2), which had been only cursorily considered, legal action could be taken by the customer of a terminal operator against a servant or agent of that operator or any other person employed by him to provide services. The introduction of the word "*acumulable*" in the Spanish version would help to make it clear that the servant or agent was entitled to avail himself of the defences and limits of liability.

55. Mr. SCHROCK (Federal Republic of Germany) said that he shared the concerns of the observer for Austria. He was not sure what the intended effect of the change of the word "and" to "or" was. Surely there was agreement that an operator should not be faced with claims which, combined, would exceed the limits laid down in article 6? The use of the word "or" to link servant and agent simply indicated that such a person could be either one or the other. The purpose was to make provision for a total liability that should not be exceeded.

56. Ms. LIVADA (Observer for Greece) said that she understood the provision to mean that the operator and his agents were wholly and severally liable. She considered that the word "and" was necessary.

57. Mr. SAMI (Iraq), supporting the views of the representative of Spain, said that separate actions might be brought against each and every agent of the operator but that the basis of each action might be different for each person. In the light of paragraph (2), three possible cases had to be covered. The first was action brought against an operator himself; the second, action brought against a servant of the operator separately from the operator; and the third, action brought against both jointly. The third of these cases would be a single action and, even if it involved more than one person, the limits of liability would still apply. Reference should not, in his view, be to aggregates of amounts recoverable but rather to amounts for each action as defined in accordance with article 6.

58. Mr. BONELL (Italy) said it would appear that the representatives of Spain and Iraq understood paragraph (2) to mean that the servant or agent could be sued jointly with the operator. This was only partially true. The function of paragraph (2) was

not to enable action to be taken, but simply to state that if action was taken then the limits of liability would apply. Anything else lay outside the scope of the present draft, and would be a question of tort. The rules concerning tort varied in different legal systems, but the philosophy of the whole article was that for one and the same event different actions might be brought, one contractual against an operator and one *a delicto* against his agent. The present clause was intended to ensure that recovery could not be made by means of different actions arising out of one and the same damaging event and leading to the recovery of twice the amount which would otherwise be obtained. The question was one of great substance.

59. Mr. ILLESCAS (Spain) agreed that the text was open to different interpretations, but he was concerned to learn that there were discrepancies between the Spanish and English versions of the Hamburg Rules. The Hamburg Rules were an international instrument, approved, signed following a diplomatic conference, and about to enter into force, and yet article 7, paragraph 3, contained an "o" ("or") in the Spanish text where there was an "and" in the English text.

60. While the Hamburg Rules were not a matter for the present Commission, the principle had to be addressed, and that was why he had proposed his amendments.

61. Mr. SEVON (Observer for Finland), supported by Mr. RUSTAND (Observer for Sweden), said that he would be opposed to the adoption of language other than that of the English version of the corresponding provision of the Hamburg Rules, since any departure from that language could be construed as implying a substantial difference of meaning. In his view, the text as it stood adequately reflected the idea that, if several actions were brought in respect of the same event, the limits of liability applied only once to the aggregate of the amounts recoverable under the Convention.

62. Mr. TEPAVITCHAROV (Bulgaria) said that he had no difficulty with the Working Group's text and did not believe that there was serious disagreement on substance.

63. The CHAIRMAN said that the English and Russian texts of paragraph (3) seemed satisfactory. He suggested that the Drafting Group should be requested to see whether the other language versions could be improved.

64. *It was so agreed.*

65. Mr. LEBEDEV (Union of Soviet Socialist Republics) drew attention to his Government's comment on article 7(3), set out on page 12 of document A/CN.9/319. Did the words "provided for in this Convention" appearing at the end of the paragraph cover the eventuality envisaged in paragraph (4) of article 6, where the limits of liability were not directly provided by the Convention but established by contractual agreement with the operator? If so, a reference to article 6(4) might be useful.

66. Mr. RUSTAND (Observer for Sweden) said that, in his view, the wording of article 7(3) covered the situation envisaged in article 6(4).

67. Mr. SEVON (Observer for Finland) said that he was not sure of the answer to the Soviet representative's question. So far as the operator himself was concerned, there was no problem. But if, as might well be the case, his servants or agents or other persons were responsible for the same event, it was by no means clear that the amount recoverable from them could also be

increased. His own view was that the limits of liability provided for in the Convention should apply except in the case of those who expressly agreed to higher limits.

68. Mr. POHUNEK (Czechoslovakia) said that, in his view, the wording of article 7(3) covered the situation envisaged in article 6(4). The Drafting Group should be requested to find a clearer formulation reflecting that interpretation.

69. Mr. BONELL (Italy) said that, while the operator's agreement to raise the limits of liability could conceivably be extended to his servants or agents, it was difficult to see how it could be extended to independent contractors. The formulation adopted by the Working Group was indeed somewhat ambiguous, but he, for one, did not find that unacceptable. A clearer rule could hardly be established at the present juncture, nor was it necessarily desirable. He recommended that the Commission should adopt the text as it stood and see how it operated in practice.

70. Mr. TANASESCU (Observer for Romania) endorsed the remarks of the observer for Finland. The text did not cover the case envisaged in article 6(4) and the Drafting Group should try to make that clear.

71. Mr. CHAFIK (Egypt) suggested that the text of article 7(3) should be adopted without change but that the different interpretations advanced concerning the point raised by the Soviet representative should be reflected in the report of the Commission.

72. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that he would agree to such a solution. Whereas the Hamburg Rules referred only to the operator's servants or agents, the draft Convention under discussion also referred to other persons of whose services the operator made use for the performance of transport-related services. That fact undoubtedly added to the problem's complexity.

73. Mr. HORNBY (Canada) agreed that the text should remain unchanged but requested that the report should indicate his delegation's interpretation of the provision, namely that the operator's servant, agent or another person referred to in article 7(2) could invoke the limits of liability established under article 6, but not as voluntarily increased by a contractual act of the operator.

74. Mr. LARSEN (United States of America) associated himself with that statement.

75. Mr. TEPAVITCHAROV (Bulgaria) said that he agreed with the solution proposed by the representative of Egypt but wished to place on record his delegation's view that the words "provided for in this Convention" covered the option offered in article 6(4).

76. In reply to a question from Ms. SKOVBY (Denmark), the CHAIRMAN said that, in agreeing to maintain the present language of article 7(3), the Commission had shown itself in favour of allowing a degree of flexibility in the matter raised by the Soviet representative. The different opinions expressed would be reflected in the report. He suggested that article 7 as a whole should be referred to the Drafting Group.

77. *It was so agreed.*

The meeting rose at 12.35 p.m.

Summary record of the 413th meeting

Tuesday, 23 May 1989, 2 p.m.

[A/CN.9/SR.413]

Chairman: Mr. RUZICKA (Czechoslovakia)

The meeting was called to order at 2.05 p.m.

Draft Convention on the Liability of Operators of Transport Terminals in International Trade (continued) (A/CN.9/298, A/CN.9/319 and Add.1-4, A/CN.9/321; A/CN.9/XXII/CRP.3-6)

Article 8

1. Mr. KATZ (International Trade Law Branch), introducing article 8, said that paragraph (1), which set forth the circumstances in which the operator would lose the benefit of the limits of liability specified in article 6, had been the subject of considerable discussion in the Working Group on International Contract Practices, centring mainly on whether the operator should lose such benefit as a result of his own conduct or as a result of the conduct of other persons, such as servants, agents or independent contractors. In support of the idea that the operator should be penalized only for his own intentional or reckless conduct, it had been pointed out in the Working Group that that principle was contained in article 8 of the Hamburg Rules, and also that it was desirable for limitations applying to the operator to be relatively unbreakable, since in that situation there would be economic advantages, such as more favourable insurance rates, which might well be passed along the chain of persons and commercial activities through which the goods were transferred.

2. Allowing the limit to be broken in the event of intentional or reckless conduct by other persons would greatly increase the operator's exposure and would be economically undesirable. There had also been support for the proposition that the operator should lose the benefit of the limit of liability, not only as a result of his own conduct but as a result of the conduct of others such as his servants, agents and independent contractors. The main arguments in that respect had been that an operator organized as a legal entity would, as such, not normally be acting directly, but rather through his agents and servants, and perhaps independent contractors, so that restricting the provisions concerning loss of right to limit liability to the operator would make the practical effects of the provisions almost non-existent.

3. The discussion in the Working Group had resulted in the compromise set forth in paragraph (1) to the effect that the operator would lose his limits of liability as a result of his own misconduct or that of his servants or agents, but not as a result of misconduct by an independent contractor engaged by him. The Working Group had recognized that the question involved important policy issues which governments should consider.

4. Paragraph (2), which concerned the operator's agents, servants and independent contractors, provided that they should lose the benefit of the limitation of liability applicable to them under article 7, paragraph (2), in the event of reckless or intentional misconduct.

5. Mr. INGRAM (United Kingdom) said that the reference in paragraph (1) to servants and agents had caused the utmost concern to all the commercial interests which had been consulted in the United Kingdom. The limits to an operator's liability laid down in article 6 of the draft Convention were related to the limits established in other transport conventions, but those other

conventions did not provide for loss of the carrier's right to limit liability because of the actions of his servants or agents. The provision in the present draft Convention that carriers and operators could limit their liability was there for good reason. It created certainty and enabled a carrier or operator who accumulated risks on a considerable number of goods to insure his liability. A transport terminal might well contain goods of very high value and if an operator was to be liable for the destruction of his terminal by a fire caused by the malicious or reckless act of a single employee, insurance might not be obtainable and the operator might have to risk operating uninsured. If insurance were available, it would be at a higher cost, which would have to be passed on to the shippers.

6. The inclusion in paragraph (1) of a reference to servants and agents—and even more so to other persons whose services the operator might use—would go a long way towards making the right to the limits under article 6 almost meaningless. It would have a dramatic and unfortunate effect on operators' costs and hence on the costs of international trade—and indeed on the chances of the draft Convention ever coming into force. Servants and agents had not been mentioned in the Hamburg Rules. The effect of the present Convention on operators of transport terminals and on stevedores would be considerable. Having previously been in a position where they could contract out of all liability, they would now be almost automatically subject to high limits of liability for the goods in their charge unless they could prove that they had taken all reasonable measures to protect the goods.

7. He therefore urged the Commission to delete the words "himself or his servants or agents" in paragraph (1), as his Government had proposed in document A/CN.9/XXII/CRP.4. His delegation would prefer not to have paragraph (2) in the draft Convention at all, although it was far less harmful than the present paragraph (1), because it would not prevent the risks from being insurable.

8. Ms. van der HORST (Netherlands) supported the United Kingdom proposal for the reasons indicated in her Government's comments (A/CN.9/319/Add.3, pages 7 and 8).

9. Mr. DJIENA (Cameroon) supported the existing text of paragraph (1), which was a compromise reached after prolonged discussion.

10. Mr. POHUNEK (Czechoslovakia) said that article 8 was one of the very few cases in which his delegation considered that the Hamburg Rules should not be followed. The wording adopted for the corresponding provision of those Rules had been part of a package deal agreed to in order to eliminate the defence of fault in navigation. In the Working Group Czechoslovakia had originally been in favour of referring also to an independent contractor in paragraph (1), but it had been satisfied with the compromise arrived at. He supported the existing text of the paragraph.

11. Ms. SKOVBY (Denmark) said that she opposed the United Kingdom amendment. It was difficult to make a

distinction between the operator and his servants, particularly in the case of a company.

12. Mr. SCHROCK (Federal Republic of Germany) said that he strongly supported the present wording of paragraph (1), but drew attention to the minor amendment proposed by his Government on page 2 of document A/CN.9/XXII/CRP.6. He understood that the compromise reached in the Working Group did not cover the question of acts or omissions of servants done outside the scope of their employment. He proposed that the present rule should be confined to acts or omissions within the scope of employment, following the principle of article 25 of the Warsaw Convention.

13. He suggested that the Commission should first decide whether to include a reference to servants and agents in paragraph (1). If it so decided, the question of the scope of employment would then arise.

14. Mr. ENDERLEIN (Observer for the German Democratic Republic) opposed the United Kingdom amendment for the reasons already given by other representatives. There was no point in limiting the provisions of article 8 to the operator, who was to a large extent a legal person.

15. Mr. SWEENEY (United States of America) associated himself with the remarks of the representative of Czechoslovakia. The Working Group had discussed the question of unbreakable limits of liability at some length and no compelling case for them had emerged. He would welcome compelling evidence in their favour. The operation of transport terminals being a land-based activity, the relevant protection should not differ from that for other land-based activities. In the absence of the evidence he had mentioned, he would prefer to see the whole of article 8 placed in square brackets. In that connection he drew attention to his Government's comments on the article (A/CN.9/319, pages 15 and 16).

16. Mr. WANG Yangyang (China) introduced the amendment suggested by his country (A/CN.9/XXII/CRP.3, paragraph 6) which was similar to the United Kingdom amendment. The idea underlying it was to make the provision compulsory or restrictive, rather than optional.

17. However, in view of the compromise which had been reached in the Working Group, his delegation would not press its amendment.

18. Mr. TARKO (Observer for Austria) associated himself with those who had favoured the maintenance of the existing text. The proposed deletion would leave only the operator and, if the operator were a legal entity, then article 8 would lose its meaning.

19. Referring to the observations of the United States representative, he said that he was in favour of breakable limits, which were provided for in other conventions.

20. Mr. MOORE (Nigeria) said that he did not understand the logic of the argument of the representative of the United Kingdom in wishing to delete the words "himself or his servants or agents" in paragraph (1). It was well established in common law systems that the operator, as principal, was liable for any loss, damage or delay and that included vicarious liability, i.e. for actions of servants or agents. He therefore supported the adoption of the paragraph as prepared by the Working Group, for it was both clear and precise.

21. Mr. JOKO-SMART (Sierra Leone) supported the arguments of the representative of Czechoslovakia. The compromise

which had led to the wording of articles 5, 6 and 8 of the Hamburg Rules could not apply in respect of operators of transport terminals. He could accept article 8 in its present form or amended as proposed by the representative of the Federal Republic of Germany. The concept of vicarious liability was well established in common law and he was not prepared to depart from it.

22. Mr. HORNBY (Canada) expressed sympathy for the arguments of the representative of the United Kingdom concerning the need for unbreakable limits of liability. Operators of transport terminals should not be held responsible for the tortious, delictual or quasi-delictual acts of their employees or agents which were outside the scope of their employment. That question should be considered in connection with the proposal of the representative of the Federal Republic of Germany, contained in document A/CN.9/XXII/CRP.6.

23. Mr. SAMI (Iraq) favoured maintenance of the Working Group's text with the addition of the wording proposed by the representative of the Federal Republic of Germany. It was not reasonable or equitable to impose upon an operator liability for the acts of agents or employees which were outside the normal functions of those persons.

24. Mr. ILLESCAS (Spain) said that the limits of liability should not be broken in relation to acts of agents or employees which were outside the scope of their employment. He drew attention to his Government's comments in document A/CN.9/319 (pages 8 and 9) and to its proposal that the phrase "... provided such occur during the fulfilment of his contractual obligations" should be added at the end of paragraph (1).

25. Mr. CHAFIK (Egypt) supported the proposal of the representative of the United Kingdom and particularly the latter's argument relating to insurance costs. Under the Hamburg Rules, the operator was responsible for the negligence of agents and employees but not for criminal acts.

26. Ms. FAGHFOURI (United Nations Conference on Trade and Development) supported the deletion of the words "himself, his servants or his agents" proposed by the United Kingdom. Should the Commission not approve that amendment, she could accept the wording proposed by the representative of the Federal Republic of Germany.

27. Mr. GOH (Singapore) supported the proposal of the representative of the United Kingdom.

28. Mr. BERAUDO (France) said that the draft Convention under consideration dealt with a situation quite different from that covered by the Hamburg Rules. The latter related to maritime carriage of goods where the owners were invariably legal persons and not physical persons. The operator of a transport terminal, on the other hand, might be a physical or a legal person. It was necessary to draw a distinction between the latter, who would operate a sophisticated modern terminal and in whose case the limits of liability could never be broken, and the physical person, the operator of a single crane for example, who would always be wholly liable. The need to take account of that distinction had resulted in the Working Group's draft, which was unsatisfactory from a legal standpoint. He pointed out that article 5 referred to the liability of the operator in relation to three categories, his servants, agents or other persons. Article 8, on the other hand, considered only two categories, servants or agents. He would have welcomed the inclusion of a reference to other persons, i.e. independent contractors, in article 8. At the very least, the compromise text proposed by the Working Group should be maintained.

29. Mr. VENKATRAMIAH (India) expressed agreement with the representative of France and supported adoption of the text prepared by the Working Group.

30. The CHAIRMAN noted that the proposal of the representative of the United Kingdom appeared unacceptable to the majority of the members of the Commission and that there had been little support for the proposal of China. He suggested that further discussion might focus on the proposal of the Federal Republic of Germany in document A/CN.9/XXII/CRP.6.

31. Mr. BERAUDO (France) said that at first sight that proposal seemed acceptable. It was just that the operator should not be liable for acts committed by his agents or employees outside the scope of their employment, and thus beyond his control. Experience in the French courts suggested, however, that it was extremely difficult in practice to determine whether a particular act fell within or outside the scope of employment. The result was a proliferation of litigation on that point. France's *Conseil d'Etat* had in fact rejected such a rule. In his view, the circumstances in which limits of liability could be broken should be strictly circumscribed. That objective was achieved in the draft prepared by the Working Group. He was therefore unable to support the amendment proposed by the Federal Republic of Germany.

32. Mr. SEVON (Observer for Finland) expressed support for the proposal of the Federal Republic of Germany. He was surprised that the representative of France foresaw excessive litigation resulting from adoption of the proposal. The experience generally in relation to legislation by UNCITRAL had been that it did not give rise to much litigation.

33. He suggested that the drafting of the proposal should be improved in order to avoid the use of a double negative.

34. Mr. ENDERLEIN (Observer for the German Democratic Republic) said that he was unable to support the proposal of the Federal Republic of Germany, which he felt would make the provision in paragraph (1) meaningless. It was a general principle of law that if the possibility of loss, delay or damage existed somebody must be at risk. That person was usually the party most able to exert influence, in the present context the operator. In other words, the agents and servants were under the influence of the operator.

35. Mr. DJIENA (Cameroon) said that the additional phrase proposed by the Federal Republic of Germany constituted an unnecessary repetition. It was already implicit in articles 1 and 2 that the draft Convention related to the exercise of the functions of the operator. He saw no need for further clarification in article 8. He agreed with the representative of France that where an operator employed agents or servants it was difficult to distinguish between acts or omissions inside or outside the scope of employment.

36. Mr. FALVEY (United States of America) agreed with the comments of the representative of the German Democratic Republic. It was impossible to prove whether an intentional act was within the scope of employment or not. The operator had a responsibility to supervise his agents or employees.

37. Ms. PIAGGI de VANOSSI (Argentina) said it was her understanding that the operator should not be liable for acts or omissions of agents or employees done outside the scope of their employment. However, a number of delegations had suggested that there would be difficulty in distinguishing whether such acts or omissions were inside or outside the scope of employment, and therefore took the view that there should be no breach of the limit of liability. In her view it was dangerous to make the

operator responsible for acts which were outside the scope of employment; the courts in her country had frequently been able to distinguish acts outside the scope of employment.

38. Mr. SCHROCK (Federal Republic of Germany) acknowledged that the drafting of his country's proposal might be improved. He believed, however, that the proposal had merit in substance. The distinction between acts inside and outside the scope of employment was a familiar concept in the law of his country, and had not given rise to problems in the courts.

39. Mr. INGRAM (United Kingdom) said that there was general agreement on the need for a right to limit liability. The purpose of allowing limits to be broken was to deter the operator from being reckless. A provision that would make the operator liable without limit for the acts of his servants, even when they were acting totally outside the scope of their employment, would not achieve that result, and it would therefore appear to be contrary to the original purpose of having a right to limit liability at all. His delegation therefore supported the proposal of the Federal Republic of Germany, but agreed with the observer for Finland that the Drafting Group might be asked to improve its wording. The expression "scope of employment" reflected a well-known concept and was used also in article 7 of the draft Convention. It should therefore not give rise to any problems. It was clear that reckless or even intentional acts within the scope of the employee's employment were quite conceivable. His delegation considered that the amendment proposed by the Federal Republic of Germany contributed to the purpose of the article, which was to allow limits to be broken so as to provide an incentive for the operator to behave well.

40. Mr. HORNBY (Canada) said that his delegation supported the proposal of the Federal Republic of Germany and would like to see it referred to the Drafting Group for the necessary changes. The draft Convention would impose a liability régime in many jurisdictions, including that of Canada, where one did not yet exist. The key to making the instrument attractive was to offer certainty by placing limits on liability. In article 8 as presently drafted, those limits were easily broken whenever an employee acted outside the scope of his employment. It was therefore important to make the limits difficult to break, and that was the purpose of the amendment proposed by the Federal Republic of Germany. The notion of "scope of employment" was a widely accepted concept in Canada with a long case history. It would not cause any difficulties for Canadian courts.

41. Mr. RUSTAND (Observer for Sweden) said that his delegation supported the amendment proposed by the Federal Republic of Germany, but agreed with the observer for Finland on the need to improve its wording. The operator should lose the benefit of limits only if the reckless act of a servant was committed within the scope of employment. He agreed, in that connection, with the remarks of the United Kingdom representative.

42. Mr. POHUNEK (Czechoslovakia) said that the present discussion was virtually a repetition of the points previously made in the Working Group. A summary of those views could be found in paragraphs 55-57 of the Working Group's report, contained in document A/CN.9/298. The Working Group, having heard arguments for and against, finally decided against adding to the paragraph wording similar to that proposed by the Federal Republic of Germany. His delegation believed that the compromise wording approved by the Working Group should be maintained.

43. Mr. AZZIMAN (Morocco) said that his delegation could not support the proposal of the Federal Republic of Germany and agreed with the objections to it expressed by the observer

for the German Democratic Republic. The problem was one of substance, not of form. In Morocco, as in many other countries, the intentional act referred to in article 8, paragraph (1), was by definition outside the scope of employment. The addition of proposed wording at the end of that paragraph would deprive it of meaning.

44. Ms. LIVADA (Observer for Greece) said that her delegation was also unable to support the amendment of the Federal Republic of Germany, for the reasons already given by the delegations of France, the German Democratic Republic and others. Her delegation also had reservations in respect of the terms "intent" and "recklessness". In Greek law, liability could derive only from intent or negligence. Intent could be either intent in its pure form or what was loosely referred to as incidental intent, i.e. where a person assumed that the act would probably have a harmful result. Her delegation wondered whether the former was the meaning in the present wording, or whether, on the contrary, the term should be interpreted as meaning that the person responsible for the act did not accept the probability of a harmful result and believed that it could be avoided, but still produced the harmful result out of recklessness. The present text appeared to confuse "incidental intent" and "recklessness". If the Commission's intention was to limit liability to damage only, there should be no reference to negligence. If, on the other hand, the Commission wished to extend liability to negligence, which her delegation did not believe to be the case, it should say so expressly.

45. Mr. ZUBEIDI (Libyan Arab Jamahiriya), supporting the amendment proposed by the Federal Republic of Germany, said that it was unfair to make an operator liable for acts committed by his servants. He considered that if the operator had no part in the act, he could not be treated as fully liable.

46. Mr. CHAFIK (Egypt) supported the amendment of the Federal Republic of Germany and agreed that its wording might be improved. His delegation did not agree that drawing a distinction between "within the scope of employment" and "outside the scope of employment" presented a difficulty. Considerable jurisprudence existed on that question.

47. Mr. OCHIAI (Japan) said that there appeared to be a contradiction between article 5, paragraph (1), and article 8, paragraph (1). But it was the understanding of his delegation that under the former provision the operator was liable even if his servant or agent acted outside the scope of his employment, whereas article 8, paragraph (1), established when the operator's liability might be limited. In other words, article 5 and article 8 dealt with completely different matters.

48. Ms. van der HORST (Netherlands) supported the amendment proposed by the Federal Republic of Germany and agreed that it should be referred to the Drafting Group for rewording.

49. Ms. PERT (Observer for Australia) supported the amendment proposed by the Federal Republic of Germany and agreed with the representative of Canada that the Convention would be enhanced by ensuring some degree of certainty. The operator's limited liability should not be removed in the case of fraudulent or criminal acts by his servants or agents.

50. Ms. PIAGGI de VANOSSI (Argentina) said that her delegation also supported the proposal of the Federal Republic of Germany, which was consistent with Argentine case law. She failed to see the inconsistency between articles 5 and 8 mentioned by the Japanese representative.

51. Mr. EYZAGUIRRE (Chile) said that, in proposing its amendment, the Federal Republic of Germany was making an

important point. Nevertheless his delegation preferred the Working Group's text, which was a compromise solution. The operator of a transport terminal must be liable for loss, damage or delay caused by his servants or agents within their scope of employment. Article 8, paragraph (1), was in line with Chilean legislation and he believed it should remain unchanged.

52. Mr. OCHIAI (Japan), replying to the point raised by the representative of Argentina, said that, as he understood it, the Working Group had concluded that the operator was also liable for loss, damage or delay brought about by his servants or agents outside their scope of employment under article 5, paragraph (1).

53. Mr. KATZ (International Trade Law Branch) said that the prevailing view at the tenth session of the Working Group had been that the operator should be liable for loss, damage or delay caused by persons engaged by him, even if they acted outside the scope of employment. That conclusion was reflected in paragraph 18 of the report on that session (A/CN.9/287). At the ninth session of the Working Group the same view had prevailed. That was reflected in paragraph 65 of document A/CN.9/275.

54. Mr. DJIENA (Cameroon) said that the problem was not one of language, but of substance. As the representative of Morocco had rightly pointed out, an intentional act was by definition outside the scope of employment. His delegation agreed, however, with the representative of France that it was very difficult to distinguish between a personal act and an act committed within the scope of employment.

55. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that he supported the original draft of article 8, paragraph (1). To introduce further limitations would increase the possibility of disputes. He pointed out that under some legal systems it was not easy to determine what was the scope of the employment of a servant or agent: theft or misappropriation might take place out of working hours or off the premises of the employer. He therefore urged the Commission to maintain the present wording.

56. Mr. TANASESCU (Observer for Romania) said that he understood the intent of the paragraph to be to avoid application of the liability limitation provisions of the draft Convention in the case where a servant or agent committed an intentional, criminal act. Such an act would take place outside the scope of his employment on the basis that wrongdoing could form no part of the employment.

57. Mr. BERAUDO (France) pointed out that the amendment under discussion would prevent the customer from claiming in excess of the liability limits even when the act or omission took place outside the scope of the agent's or servant's employment. That would have the effect of denying the customer compensation for his loss. The burden of bringing a claim against a servant or agent should properly fall on the operator, and he therefore urged rejection of the amendment.

58. Mr. JOKO-SMART (Sierra Leone) said that he supported the text without the proposed addition. The courts in his country would in any case interpret the paragraph in the manner suggested by the proposed amendment.

59. The CHAIRMAN said that in the absence of objection he would take it that article 8, paragraph (1), was approved without change.

60. *It was so agreed.*

61. The CHAIRMAN invited comment on article 8, paragraph (2).

62. Mr. FALVEY (United States of America) noted that independent contractors fell within the scope of paragraph (2) of article 8, but not of paragraph (1). That distinction should be maintained and made explicit.

63. Mr. SEVON (Observer for Finland) agreed with the previous speaker.

64. Mr. GRIFFITH (Observer for Australia) said that the point just mentioned had been dealt with in paragraph 54 of document A/CN.9/287. He saw no need for any redrafting.

65. Mr. AZZIMAN (Morocco) expressed some concern that the word "mandataires" (agents) in the French version of paragraph (1) of article 8 could be interpreted as including independent contractors. It should be made clear that that was not the case.

66. The CHAIRMAN said that it would be made clear in the report on the session that independent contractors fell within the scope of paragraph (2) of article 8, but not of paragraph (1).

67. Mr. AZZIMAN (Morocco) drew attention to the fact that, whereas the title of article 8 was "Loss of right to limit liability", the text of the article referred to entitlement to the benefit of the limit of liability. Article 8 of the Hamburg Rules, on which the text under discussion was based, also contained a similar discrepancy between the title and the text. The choice of the word "right" had been unfortunate: there should be no implication that the operator normally had the right to limit his liability as he chose. A more objective and impersonal formula was desirable and he suggested as a possible title "Non-application of liability limits".

68. Mr. TANASESCU (Observer for Romania) agreed with the previous speaker. The expression "limitation of liability" was preferable to "limit of liability".

69. The CHAIRMAN said that in the absence of objection he would take it that the Commission wished to refer article 8 to the Drafting Group, which would take account of the last two points mentioned.

70. *It was so agreed.*

The meeting rose at 5 p.m.

Summary record of the 414th meeting

Wednesday, 24 May 1989, 9.30 a.m.

[A/CN.9/SR.414]

Chairman: Mr. RUZICKA (Czechoslovakia)

The meeting was called to order at 9.35 a.m.

Draft Convention on the Liability of Operators of Transport Terminals in International Trade (*continued*) (A/CN.9/298, A/CN.9/319 and Add.1-4, A/CN.9/321)

Article 9

1. Mr. KATZ (International Trade Law Branch) said that the Working Group on International Contract Practices had decided very early on that the subject of dangerous goods was of such importance as to necessitate special provisions in the text. The proposed text differed substantially from the Hamburg Rules in that article 9 did not specifically indicate who should mark or label the goods and imposed no such obligation on the shipper as that in the Hamburg Rules (see article 13 of the Rules), since in many cases the terminal operator would not be in direct contact with the shipper. The article did, however, state that if the goods were not appropriately marked or labelled, the operator would be entitled to take certain protective measures—which might provide a further inducement to shippers to label dangerous goods properly.

2. The words "in accordance with any applicable law..." in the introductory part of the article related not only to the wide variety of international regulations issued by IMO, IAEA and other organizations, but also to local rules, e.g. those issued by port authorities. The phrase "when the goods pose an imminent danger..." in subparagraph (a) meant that the right to destroy, render innocuous or otherwise dispose of goods was limited to emergency situations. The intention in subparagraph (b) had been to leave the question of who was to be responsible for reimbursement of the terminal operator's costs to be decided by

national law. After considering the further question of the reimbursement of costs incurred by the terminal operator other than those specified under subparagraph (a), e.g. in respect of damage to his own property or claims made against him by third parties, the Working Group decided to leave those matters to be resolved by national law and to restrict the Convention to costs incurred directly in connection with protective measures.

3. Ms. SKOVBY (Denmark) said that the question of who should be responsible for reimbursement of the operator's costs was important. In her view, the Convention should specify the person responsible or indicate that the matter was to be decided in accordance with national legislation. She also felt that the link between article 9 and the question of liability dealt with in article 5 should be emphasized.

4. Ms. van der HORST (Netherlands) supported the views of the representative of Denmark. Her Government had already submitted a proposed amendment for subparagraph (b), contained in document A/CN.9/319/Add.3, for consideration by the Commission.

5. Mr. SAMI (Iraq) noted that the introductory part of the article referred to dangerous goods received by the operator without any label or marking to indicate the nature of the goods. Other transport conventions assumed that the nature of the goods would be indicated on the bill of lading. For example, article 15, paragraph 1(a), of the Hamburg Rules indicated that the bill of lading must include particulars regarding the nature of the goods. He suggested that the paragraph should be re-examined to bring it in line with current practice.

6. Ms. VILUS (Yugoslavia), referring to subparagraph (a), said it must be emphasized that goods should not be destroyed before all other possible measures had been taken. She also suggested that the introductory part of the article should be amended to cover a situation where the operator "should have known" that the goods were dangerous.

7. Mr. KATZ (International Trade Law Branch) said, with regard to the second point, that article 9 had been based on the corresponding article in the Hamburg Rules, where there was no such reference.

8. Mr. TEPAVITCHAROV (Bulgaria) said that the phrase "in accordance with any applicable law or regulation . . ." in the introductory part of the article was not easy to interpret. As far as international regulations were concerned, they included a wide range of recommendations and guidelines as well as the provisions of various conventions. It would therefore be wise to restrict the field to "the applicable law". Regarding the phrase "does not otherwise know", he said that it raised problems concerning subjective opinion versus objectively verifiable knowledge. He also had doubts regarding the utility of the word "including" in the first line of subparagraph (a).

9. Mr. de GOTTRAU (International Road Transport Union) suggested that the introductory part of article 9 should be amended to read:

"If dangerous goods are handed over . . . in accordance with any law or international regulation relating to dangerous goods applicable in the country in which the transport terminal is located, and if, at the time . . ."

10. Mr. BERAUDO (France), supporting that amendment, said that important international regulations such as those relating to road, rail and maritime transport and the carriage of goods on inland waterways would be covered. It was obviously pertinent to refer to the question of applicability in the country where the transport terminal was located. The carriage of goods of a dangerous nature was likely to involve more than one and possibly more than two States and it was only reasonable that all the regulations in force in those States should be complied with. The French text would read: "*... conformément à toute loi ou réglementation internationale applicable dans le pays où est situé le terminal de transport . . .*".

11. Mr. DJIENA (Cameroon), referring to the comment of the representative of Iraq, agreed that the language should be clarified. He found it hard to imagine how a consignment could be transported with no waybill or other document or with only vague markings, and it would clearly be a very serious matter should that happen. The destruction of goods went well beyond the normal functions of an operator and should be an act of last resort, undertaken only in dire emergency. What would the consequences be if an operator were to destroy goods on the basis of information which later turned out to be ill-founded? It was important that the customer should be notified. It was also conceivable that an operator might not record his expenses accurately. His delegation would welcome more clarification, especially in the context of subparagraph (b).

12. Mr. DAVIES (United States of America) said that, in his delegations' view, the laws and regulations referred to must not be limited to international laws and regulations. He agreed with the point made earlier by the representative of Denmark; liability for costs should rest with the person who had failed to label goods and mark documents in an appropriate manner, and laws applicable in the place where the mistake caused danger should protect the terminal operator.

13. Mr. MOORE (Nigeria) said that he could accept the draft as it stood, but hoped that subparagraph (b) could be expanded.

14. Mr. CHAFIK (Egypt) said that he was happy with the text as it stood. He took it that "any applicable law or regulation" covered both international and national laws and regulations. Further additions might have the effect of limiting the scope of the paragraph.

15. Mr. BONELL (Italy) said that the arguments put forward by previous speakers had brought to light weaknesses in what he had previously considered a good text. In some ways the text seemed over-ambitious, and in others unduly restrictive. Thus the opening words "If dangerous goods are handed over . . ." left the identity of the person handing over unexplained. It was also difficult to be sure which international guidelines were to be regarded as "regulations", and therefore binding on the undefined person doing the handing over. With regard to the action an operator might take in the circumstances described in article 9, it might be best to leave the matter to the existing international and national instruments dealing with the carriage of dangerous goods.

16. At the same time, the provisions of the draft text seemed unduly limited in that they contained nothing to ensure that the person elsewhere in the draft referred to as the "customer" informed the operator of the nature of the cargo to be dispatched. As for liability for costs, the text had been deliberately drafted to avoid prejudicing the question of who was responsible for any consequences of the transport of dangerous goods.

17. Under the present draft, the onus would be on the operator to prove that he had taken appropriate steps to discover the nature of an unmarked cargo, and to deal with such goods accordingly while they were on his premises, without his necessarily having been told what precautions he should take. While he was prepared to follow the majority view, he rather wondered whether the entire article was not in need of a thorough overhaul. He noted that, under article 4, the customer was entitled to ask for the issuance of a document by the operator. Surely it was a primary duty of such a customer to inform the operator of any special circumstances, and to envisage possible consequences.

18. Subparagraphs (a) and (b) of the present text, which were really of secondary importance, seemed in the absence of any qualification to place too heavy a burden on the operator. He would like to hear other views on those problems.

19. The CHAIRMAN said that the representative of Italy had obviously raised very serious questions. His understanding of the Working Group's position had been that the provisions should accord the operator certain rights. If the Commission wished to deal with questions relating to liability, substantial changes would be needed. As it was, the operator would have to look for the person responsible for a dangerous cargo and warn him that it fell into the dangerous goods category. Thereafter he would rely on the basic principles of law.

20. Mr. TARKO (Observer for Austria) said that, after the intervention of the representative of Italy, the problem was no longer so straightforward. To discuss the points raised, the Commission would need to have a new textual proposal before it.

21. When an operator received goods from another country, information as to whether they were dangerous goods could only be obtained from the shipper of the goods. In that regard, the present reference to "any applicable law or regulation" seemed satisfactory since regulations in force in the country from which the goods were dispatched and in the country of destination might be relevant.

22. The words "the operator does not otherwise know" would apply in cases when even the shipper originally had no knowledge of the character of a cargo but discovered later that it was dangerous; at that stage he would notify the operator orally and say "the goods are not marked as dangerous but I now know that they are so".

23. He agreed with the view that the operator had a right to destroy goods in cases of emergency only. He also agreed with the Netherlands amendment to subparagraph (b).

24. Ms. LIVADA (Observer for Greece) suggested that the word "legitimate" should be inserted between "other" and "means" in the third line of subparagraph (b). That would make it clear that illegal disposal, dumping and so forth were not condoned.

25. Mr. DAVIES (United States of America) said that the establishment of liability should depend on proving fault or error. His delegation supported the amendment proposed by the Netherlands (A/CN.9/319/Add.3, p. 8), but suggested that the words following "nature of the goods" should be changed to "under such applicable law or regulation".

26. Mr. ENDERLEIN (Observer for the German Democratic Republic) said that his delegation had no difficulty over the words "applicable law", but found the introductory part of the article unsatisfactory in that it appeared to imply that the operator was only entitled to take measures if he did not know in advance that the goods were dangerous and if they were not labelled as such, and that only in that case would he be entitled to reimbursement. It appeared to his delegation that, even if the goods were labelled as they should be and the customer on handing over the goods notified the operator of their dangerous character, should an emergency arise he would still be bound to take appropriate action and should be reimbursed.

27. Mr. JOKO-SMART (Sierra Leone) thought that there was some confusion over whether what the Commission was presently concerned with was the right of the operator to take action or the liability of the person presenting dangerous goods to the operator.

28. The Hamburg Rules made no mention of the type of law applicable, but were very clear on the need for proper labelling. He proposed that the beginning of the article should be amended to read: "If dangerous goods are handed over to an operator without being marked or labelled as dangerous, and if ...".

29. Ms. SKOVBY (Denmark) emphasized the close relationship between article 9 and article 5. In view of that relationship, it might be advisable to place the two articles closer together in the draft. She endorsed the proposal made by the representative of France, except that the national or international law or regulation referred to should be that applicable where the transport-related services were performed rather than where the transport terminal was located.

30. Mr. HORNBY (Canada) supported the French proposal concerning the introductory part of the article and the Netherlands proposal concerning subparagraph (b). The Drafting Group should be requested to elaborate the text of that subparagraph so as to make it clear who was responsible for reimbursing the operator for his costs. Regarding the points raised by the representative of Italy, he wondered whether establishing a closer link between article 9 and article 5, as the representative of Denmark had suggested, might not achieve the desired effect without any structural change in article 9.

31. Mr. OCHIAI (Japan), referring to the Italian representative's statement, stressed the extreme difficulty of arriving at a satisfactory definition of the term "customer".

32. Mr. LEBEDEV (Union of Soviet Socialist Republics) drew attention to his Government's comments on article 9 appearing in paragraphs 4 and 5 on page 12 of document A/CN.9/319. The Soviet Union's suggestions concerning the article were: first, to include a reference, in line with the Hamburg Rules, to the customer's obligation to inform the operator when handing over dangerous goods; second, to extend the operator's exemption from payment of compensation beyond compensation for "damage to or destruction of" dangerous goods; third, to indicate the customer's liability to third parties whose goods might also be located in the terminal and damaged by the dangerous goods.

33. Mr. EYZAGUIRRE (Chile) supported the French proposal with the clarification given by the representative of Denmark that it should refer to international or national laws or regulations applicable in the country where the transport-related services were performed. He also endorsed the Netherlands proposal on subparagraph (b). In his view, the article as a whole should be maintained in substance, the Drafting Group being requested to fill in any gaps still remaining with regard to the scope of the article.

34. Ms. FAGHFOURI (United Nations Conference on Trade and Development) suggested that the Drafting Group might also be requested to ensure that the draft took into account the question of the reimbursement of costs incurred by the operator other than those specified in subparagraph (a), as mentioned by the representative of the Secretariat in his introductory remarks.

35. Mr. RAO (India) noted the points made by the Italian representative and said that, as a matter of principle, the text of the draft Convention should, in the absence of cogent reasons to the contrary, be aligned as closely as possible with that of the Hamburg Rules. Several representatives had drawn attention to the need for the Commission to reconsider its approach to article 9. In his view, by adopting the criterion concerning applicable law, the Working Group had moved away from the Hamburg Rules which, as was pointed out in the Soviet Government's comments, imposed a positive obligation on the customer to inform the operator of the dangerous nature of goods when handing them over. Moreover, as had been pointed out, the Working Group's text made no reference to the customer's liability to third parties, a point which was also covered by the Hamburg Rules.

36. Mr. SAMI (Iraq) said that, while he agreed with the Danish representative's point concerning the close relationship between articles 9 and 5, a relationship also existed between article 9 and article 4 inasmuch as article 4(2) seemed to constitute an exception to article 9. A reference to international, national or local laws should be inserted in the introductory part of article 9. With regard to the Italian representative's comments, he agreed with the representative of Japan that it would be difficult to define the "customer".

37. The CHAIRMAN said that a majority of the Commission's members appeared to be against the Italian representative's suggestion for restructuring the article and to favour the adoption of the Working Group's draft as a basis for discussion. Some speakers had referred to the need to relate article 9 to article 5 and, perhaps article 4, the definitive draft of which had not yet, of course, emerged from the Drafting Group. Perhaps the obligation of the person handing over dangerous goods to mark them accordingly or to inform the operator of their

dangerous nature should be clearly spelt out in the introductory part of the article.

38. Mr. BONELL (Italy) said that the problem would be to define the person who was under an obligation to inform the transport terminal operator that the goods were dangerous. He agreed that, as his proposal had not elicited sufficient support, further discussion should be based on the Working Group's text. In that case, an amendment to the opening sentence of draft article 9 might contribute to a solution: he proposed that the words "in accordance with any applicable law or regulation relating to" should be deleted and replaced by the word "as".

39. The CHAIRMAN noted that the Italian representative's proposal was similar to that of the representative of Sierra Leone.

40. Mr. BERAUDO (France) said he could not support the Italian representative's proposal. The Commission could not redo the work done over many years by other organizations or bodies concerned with the transportation of dangerous goods. That work provided an established code with which the person handing over goods to the operator must conform; it was not enough simply to label the goods as dangerous. The present text must refer, as other conventions did, to existing regulations: it should refer explicitly to the international or national regulations applicable in the State where the transport-related services were performed. That was the only amendment necessary. Many sea, road, air or rail terminals employed immigrant workers ignorant of the host country's language but they knew the meaning, for example, of the various flame symbols in the local context.

41. Ms. SKOVBY (Denmark) expressed agreement with the previous speaker; she wondered how the representative of Italy would define dangerous goods.

42. Mr. DAVIES (United States of America) agreed that a reference to the application of local law should be included; the definition of what was dangerous was liable to change and the operator was the person at risk.

43. The CHAIRMAN said that there appeared to be little support for the proposal to delete the reference to applicable laws and regulations. The Commission appeared to wish the operator to be informed as to the nature of the goods and the danger they presented. Many delegations felt that the person responsible for informing the operator should be mentioned, but it was difficult to know whether that person should be the owner

of the goods, the person handing them over or the person taking delivery of them. He asked the Commission to decide whether or not the article should indicate that some person must inform the operator of the dangerous nature of goods.

44. Mr. DJENA (Cameroon) said that it was not easy to give a precise answer, owing to the linkage with other parts of the draft.

45. Mr. TANASESCU (Observer for Romania) said that the terminal operator was not dealing with an unknown person. The draft Convention covered a contractual relationship between the operator and the customer. If it was agreed in principle that the Convention should contain the obligation to provide correct and adequate information, that obligation, with all the legal consequences that might ensue, should be placed on the customer.

46. Mr. INGRAM (United Kingdom) said that there should in principle be an obligation to mark or label goods as dangerous; however, the practical purpose of the article was to state the consequences if that was not done. Subparagraphs (a) and (b) stated two such consequences; it was possible that there could be others. Since the text was primarily concerned with consequences, it did not need to define the customer which, he agreed, would be an impossible task.

47. Mr. BONELL (Italy) said it seemed that the Commission did not wish to define the person responsible for informing the operator that the goods were dangerous. The purpose of his latest proposal had been to ensure that the obligation to inform the operator was not dependent on any applicable law or regulation. The suggested deletion would not give people a free hand to do what they liked: if the goods were dangerous, the fact must be indicated in some way. Other speakers had made similar points. As the text stood, a terminal might be located in a place where there existed no rules requiring the labelling of dangerous goods, with the result that such goods could be handed over to the operator with no indication of their dangerous nature. The purpose of his proposal had been to avoid such a situation.

48. The CHAIRMAN noted that no one objected to using the text submitted by the Working Group as a basis, and that there appeared to be little support for an addition to the text specifying the person who should warn the operator that the goods were dangerous.

The meeting rose at 12.35 p.m.

Summary record of the 415th meeting

Wednesday, 24 May 1989, 2 p.m.

[A/CN.9/SR.415]

Chairman: Mr. RUZICKA (Czechoslovakia)

The meeting was called to order at 2.05 p.m.

Draft Convention on the Liability of Operators of Transport Terminals in International Trade (continued)
(A/CN.9/298, A/CN.9/319 and Add.1-4, A/CN.9/321; A/CN.9/XXII/CRP.6)

Article 9 (continued)

1. The CHAIRMAN said that, at the previous meeting, a number of questions had been raised concerning article 9 and a

number of amendments had been proposed or suggested. He had listed all those points and suggested that the Commission might wish now to take them up in sequence.

2. He first recalled the proposal that the text of article 9 should be moved closer in the draft Convention to article 5.

3. Mr. ABASCAL (Mexico) said that he did not oppose the proposal, provided the text itself remained unchanged.

4. Mr. RUSTAND (Observer for Sweden), Mr. SAMI (Iraq), Mr. ZUBEIDI (Libyan Arab Jamahiriya) and Mr. TEPAVITCHAROV (Bulgaria) supported the Danish suggestion.
5. Mr. NESTEROV (Union of Soviet Socialist Republics) and Mr. OCHIAI (Japan) expressed opposition to it.
6. Mr. DJIENA (Cameroon) said that it was too early to decide on the position of the articles in the draft Convention.
7. Mr. LARSEN (United States of America), supported by Mr. HORNBY (Canada), proposed that the matter should be left for decision by the Drafting Group.
8. *It was so agreed.*
9. The CHAIRMAN asked whether there was support for the idea that the introductory paragraph of the article should indicate who had responsibility for marking goods as dangerous.
10. Mr. ABASCAL (Mexico) said that the text should not be altered. The draft Convention was not an instrument concerning the movement of dangerous goods, a topic on which the Commission was in any case not competent. When and how goods were marked should be defined by the applicable laws or regulations.
11. Ms. EISTERER (European Shippers' Councils) agreed. She said there would be a risk of conflict between the draft Convention and the applicable national or international laws or regulations if the introductory paragraph were so amplified.
12. Mr. CHAFIK (Egypt) concurred with the previous speaker.
13. Mr. TEPAVITCHAROV (Bulgaria) also opposed any such addition to the article. The Commission should simply decide what the consequences of goods being unmarked should be.
14. Mr. TARKO (Observer for Austria), Mr. WANG Yangyang (China) and Mr. ELLESCAS (Spain) also opposed the addition referred to.
15. *The addition to the introductory paragraph referred to by the Chairman was not approved.*
16. The CHAIRMAN asked whether the introductory paragraph of the article should indicate who was to inform the operator that goods were dangerous.
17. Ms. EISTERER (European Shippers' Councils), supported by Mr. RUSTAND (Observer for Sweden), said that the draft Convention should not deal with that question, which was covered by the rules for the carriage of dangerous goods.
18. *The indication in the introductory paragraph referred to by the Chairman was not approved.*
19. The CHAIRMAN asked whether the reference to "any applicable law or regulation" in the introductory paragraph should be deleted and, if not, whether a reference to international law should be added.
20. Mr. CHAFIK (Egypt) and Mr. TARKO (Observer for Austria) opposed the deletion.
21. Mr. RUSTAND (Observer for Sweden) also opposed the deletion and said that a reference to international law would be superfluous since the existing text referred to "any applicable law or regulation".
22. Mr. TANASESCU (Observer for Romania), Mr. SCHROCK (Federal Republic of Germany), Mr. ABASCAL (Mexico), Ms. EISTERER (European Shippers' Councils) and Mr. ZUBEIDI (Libyan Arab Jamahiriya) also opposed the deletion and the addition.
23. The CHAIRMAN said he took it that neither the deletion nor the addition he had mentioned were approved.
24. *It was so agreed.*
25. Mr. HASSAN (Sudan) said that the word "entitled" at the end of the introductory paragraph was unsuitable: entitlements were to rights and benefits rather than duties and obligations.
26. The CHAIRMAN said that the Drafting Group would examine that point.
27. He asked whether the phrase "of the country in which the transport terminal is situated" or the phrase "of the place where the transport-related services are performed" should be inserted in the introductory paragraph after the words "any applicable law or regulation".
28. Mr. RUSTAND (observer for Sweden) preferred the second alternative.
29. Mr. LARSEN (United States of America) said that neither phrase should be added to the text. The marking of dangerous goods might take place outside the country in which the terminal was situated and away from the place where the transport-related services were performed.
30. Mr. CHAFIK (Egypt) had no objection to either of the proposed additions, but thought that, on balance, the text should be left unchanged.
31. Mr. POHUNEK (Czechoslovakia) agreed with the previous speaker.
32. Ms. PIAGGI de VANOSI (Argentina) said that she supported the existing text, but would not oppose either of the suggested additions.
33. Mr. TARKO (Observer for Austria) said that the present text should be left unchanged.
34. Mr. PELICHET (Hague Conference on Private International Law) said that some addition was necessary: a conflict-of-law rule was needed in article 9.
35. Mr. HORNBY (Canada) supported the second of the proposed additions.
36. Mr. SCHROCK (Federal Republic of Germany) concurred with the previous speaker, on the understanding that a conflict-of-law rule was necessary.
37. Mr. BERAUDO (France) said that it would be illogical not to have a conflict rule: the laws of several different countries could not be applied simultaneously, and it must therefore be stated which set of applicable laws or regulations should apply. Of the alternative proposals, he preferred the second.
38. Mr. NESTEROV (Union of Soviet Socialist Republics) and Mr. AZZIMAN (Morocco) supported the remarks of the representative of France.
39. Mr. SAMI (Iraq) agreed that a conflict rule was necessary. He wondered, however, whether the second addition

mentioned would in fact make matters clearer: if the transport-related services were carried out at terminals in three countries, would the applicable laws or regulations be those of the first, the second or the third country in the transport chain?

40. Mr. BERAUDO (France) said that the phrase to be inserted should read: "the regulations applicable at the place where the transport-related services are performed".

41. Ms. SKOVBY (Denmark) supported the French representative's proposal.

42. Mr. SAMI (Iraq) said that the problem still remained: if there were several places where transport-related services were performed, which would be the applicable regulations?

43. Mr. TEPAVITCHAROV (Bulgaria) said that at the preceding meeting the representative of France had spoken of "the country" where the transport terminals were situated, whereas he now spoke of "the place". He could accept the French amendment if it referred to "the country".

44. Mr. ILLESCAS (Spain) suggested that it would be preferable to say "the rules and regulations applicable at the place where the goods are handed over to the operator". That might be different from the place where the operator had his terminal or the place where all the transport-related services were performed.

45. Mr. SAMI (Iraq) supported that suggestion.

46. *The suggestion of the representative of Spain was adopted.*

47. The CHAIRMAN said that the next point to be considered was the proposal to replace the words "does not otherwise know", in the introductory paragraph, by a phrase such as "did not know or could not have known".

48. Mr. SAMI (Iraq) supported that proposal because it embodied the idea that the operator could know, before receiving the goods, that they were dangerous.

49. Mr. LARSEN (United States of America) said that he could not support the change proposed since, in a situation where the goods were not marked as dangerous, it would have to be proved that the transport terminal operator knew that they were dangerous. He was satisfied with the text as it stood.

50. Mr. BERAUDO (France), Mr. CHAFIK (Egypt) and Mr. GOH (Singapore) supported the views of the United States representative.

51. Mr. SAMI (Iraq) recalled his delegation's earlier suggestion that there was a close link between articles 9 and 4 and that paragraph (2) of article 4 should be regarded as an exception to article 9, in that an operator who had failed to acknowledge receipt of goods in the required way should not be able to claim ignorance of their dangerous nature by invoking article 9. He proposed that a phrase such as "Except as provided in article 4, paragraph (2)," should be inserted at the beginning of article 9.

52. Mr. TARKO (Observer for Austria), supported by Ms. PERT (Observer for Australia), expressed doubts concerning that proposal. The two articles in question dealt with different subjects: article 9 was concerned with rules on dangerous goods, whereas article 4 dealt with documents which certified the quantity and condition of goods received, but made no reference to dangerous goods. He would prefer to leave the beginning of the paragraph unchanged.

53. Mr. ABYANEH (Islamic Republic of Iran), disagreeing with the observer for Austria, maintained that there was a link between articles 4 and 9. It was clear from paragraph (1) of article 4 that a document had to be produced which indicated the nature of the goods.

54. Mr. SAMI (Iraq) said that he had understood the words "stating their condition and quantity" in paragraph (1)(b) of article 4 to mean that everything concerning the goods, including their nature, had to be indicated in the relevant document. If, however, the word "condition" did not cover the nature of the goods, he would agree with the observer for Austria.

55. The CHAIRMAN said that if the word "condition" was understood not to include the nature of the goods, then no problem arose. He suggested that the Commission should await the result of the Drafting Group's consideration of article 4.

56. Mr. SAMI (Iraq) supported the Chairman's suggestion.

57. Mr. DAVIES (United States of America) said that he shared the views of the observer for Austria and opposed the amendment proposed by the representative of Iraq. The existing text dealt effectively with the rare situation of dangerous goods masquerading as safe goods. The operator of a terminal might well issue a receipt for a container accurately labelled as containing a certain named chemical, but one which the operator did not know to be dangerous.

58. Mr. ZUBEIDI (Libyan Arab Jamahiriya) supported the Iraqi amendment. However, he wondered whether the observer for Austria and the representative of the United States of America saw any difference in meaning between "condition" in article 4 and "dangerous nature" in article 9. If there was a difference, the amendment proposed by the representative of Iraq was unnecessary.

59. Mr. AZZIMAN (Morocco) said that the question at issue was a matter of interpretation. He had understood the word "condition" to refer to whether or not the goods were damaged or had been affected by transport, but to have nothing to do with whether they were dangerous. If the representative of Iraq could accept the idea that goods could be in excellent condition but also dangerous, there would be no problem. He saw no need to include a reference to article 4 in article 9.

60. Mr. CHAFIK (Egypt) agreed entirely with the representative of Morocco. The whole problem centred on the meaning of "condition". For the delegation of Iraq, the word appeared to have a variety of meanings, including the nature of the goods and whether they were dangerous or not. On that basis, article 9 would be a derogation from article 4.

61. Mr. SCHROCK (Federal Republic of Germany) agreed with the representative of Morocco. He had always understood that the word "condition" in article 4 was related to the basis of liability under article 5. To introduce the notion of dangerous goods in article 4 would mean a change of substance.

62. Mr. OCHIAI (Japan) also supported the views of the representative of Morocco.

63. Mr. SAMI (Iraq) suggested that the Commission should state in its report that it understood the word "condition" in article 4 to refer to whether the goods were damaged or not, and not to the nature of the goods.

64. The CHAIRMAN said he took it that there was no objection to the inclusion of such a statement in the report.

65. *It was so agreed.*

66. The CHAIRMAN invited the Commission to consider the proposal which had been made that article 9 include a requirement that the operator should give notice of intention to destroy the goods.

67. Mr. DAVIES (United States of America) opposed the introduction of such a requirement. It was quite clear from the English version of the article that destruction should take place only when there was imminent danger. In that event there would be no time to inform the shipper or customer.

68. Mr. RUSTAND (Observer for Sweden) agreed with the previous speaker. It was clear that the question of destruction arose only in the event of imminent danger, when it would be impracticable to notify a third party. He therefore could not support the inclusion of such a requirement.

69. Mr. TANASESCU (Observer for Romania) suggested that the article might include a requirement of simultaneous notification of any emergency measures taken, such as destruction of the goods. The shipper or owner of the goods might otherwise have no knowledge of their destruction.

70. Mr. DJIENA (Cameroon) supported the proposal to include a requirement to notify but agreed with the representative of Romania that there might be cases where there was insufficient time for advance notification. It was also necessary to guard against the possibility, particularly in the case of valuable goods, that the operator might be misinformed as to their dangerous nature. Notification would permit the avoidance of any misunderstanding concerning the goods.

71. Mr. CHAFIK (Egypt) agreed with the United States representative that destruction would take place only in an emergency. A notification requirement was therefore superfluous.

72. Mr. TARKO (Observer for Austria) agreed with the previous speaker. In his view there was no point in giving notification at the time of destruction of the goods.

73. Ms. SKOVBY (Denmark) agreed with the observer for Austria. She pointed out that, if a notification requirement were included in article 9, the draft Convention would then also have to deal with the question of failure to notify.

74. Ms. PIAGGI de VANNOSSI (Argentina) also opposed the inclusion of a notification requirement. If the danger was imminent there would be no time to notify.

75. Mr. ILLESCAS (Spain) said he could agree to the inclusion of a notification requirement if he thought it would facilitate the adoption of the draft Convention. However, since only dangerous goods, in the case of imminent danger, were liable to destruction, he felt that the present text should be maintained.

76. The CHAIRMAN noted that the majority of the members of the Commission appeared to oppose the inclusion in article 9 of a requirement that notification be given of the destruction of the goods. He invited the Commission to consider the proposal which had been made that the word "legitimate" should be inserted in the third line of subparagraph (a) between the words "other" and "means".

77. Ms. PERT (Observer for Australia) supported in principle the addition of the word "legitimate", but felt that it might be superfluous if the Commission understood that the means adopted must be in accordance with the applicable law. In that case the point might be dealt with in the report of the

Commission. In any event it should be made clear that all actions taken under subparagraph (a) must be lawful, including destroying the goods and rendering them innocuous.

78. Mr. HORNBY (Canada) also supported the insertion of the word "legitimate" in principle, but he suggested that the proposal should be referred to the Drafting Group.

79. Mr. TEPAVITCHAROV (Bulgaria) said that he too assumed that any disposal of dangerous goods would necessarily be by legitimate means. If that was not clear from the text then he would support the insertion of the word "legitimate".

80. Ms. SKOVBY (Denmark) also supported the addition of the word "legitimate".

81. The CHAIRMAN said that the question of the insertion in subparagraph (a) of the word "legitimate" would be referred to the Drafting Group.

82. He drew attention to the the proposal of the Government of the Netherlands on page 8 of document A/CN.9/319/Add.3.

83. Ms. van der HORST (Netherlands) said that the reason for the proposed amplification of subparagraph (b) was to underline in respect of dangerous goods the obligation to comply with notification provisions of the applicable law. A person failing to fulfil such obligations should be liable to the operator for all costs of taking the measures referred to in subparagraph (a).

84. Ms. EISTERER (European Shippers' Councils) supported the Netherlands proposal because the draft Convention did not specify who should notify a third party, the matter being left to applicable law.

85. Mr. DAVIES (United States of America) agreed that it was important that the person from whom the damages were recoverable should be identified. The proposal of the Netherlands was a practical one which he supported. However, he recommended the replacement in it of the words "any international convention or national legislation" by the words "any applicable law".

86. Ms. SKOVBY (Denmark) supported the remarks of the United States representative.

87. Mr. HORNBY (Canada) supported the Netherlands amendment as modified by the proposal of the representative of the United States.

88. Mr. NESTEROV (Union of Soviet Socialist Republics) associated himself with the remarks of the previous speaker.

89. The CHAIRMAN said that, in the absence of objection, he would take it that the proposal of the Government of the Netherlands for amendment of subparagraph (b), amended as proposed by the representative of the United States of America, should be referred to the Drafting Group.

90. *It was so agreed.*

91. The CHAIRMAN said that the next question for consideration by the Commission was a proposal by the Union of Soviet Socialist Republics which would extend or rather seek not to limit the compensation which might be claimed by the operator in case of damage or destruction of dangerous goods.

92. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that the comments of his Government (A/CN.9/319, page 12), in relation to article 9, subparagraph (b), were intended to reflect

its understanding that the liability of the person now described in the additional wording which had been proposed by the representative of the Netherlands did not exclude liability *vis-à-vis* third parties. His delegation had no specific drafting proposal to make but would like to see that point reflected in the report.

93. Ms. FAGHFOURI (United Nations Conference on Trade and Development) took a similar position. The Working Group was correct in its view that the recovery of compensation should be the subject of national law so as not to preclude the possibility of liability for damage to other goods.

94. The CHAIRMAN said that in the absence of further comment, he would take it that the Commission wished to refer article 9 to the Drafting Group.

95. *It was so agreed.*

Article 10

96. Mr. KATZ (International Trade Law Branch) said that article 10 provided for two types of right of security in goods, the right of the operator to retain the goods and his right to sell the goods. Paragraph (1) permitted the operator to retain the goods in respect of which charges had been incurred (a particular lien), but the second sentence of the paragraph provided for the possibility of a general lien by permitting contractual arrangements that were valid under applicable law. The reason for that was that some national laws restricted the possibility of concluding such arrangements, particularly laws dealing with unfair contract terms.

97. Paragraph (2) provided that there was no right of retention of goods if an appropriate sum had been deposited. Such a deposit could be lodged with an official institution. That was a unilateral choice by the customer but the deposit had to be made in the State where the operator had his place of business. The Working Group had explained that the operator was normally paid in that State and the deposit should therefore be made there also.

98. The right to sell described in paragraph (3) was subject to applicable law because in certain States there was no right of sale and in others there were legal rules concerning the entity entitled to carry out the sale, which might, for example, be a court. The applicable law now referred to in the case of the right to sell goods was the law of the place where the operator had his place of business, for reasons of consistency with similar rules elsewhere in the draft Convention designed to deal with the problem, *inter alia*, of terminals which straddled two States.

99. The second sentence of paragraph (3) was designed to provide specific protection for third-party owners of containers such as lessors.

100. The question in paragraph (4) of the persons to whom notice should be given had been considered at length by the Working Group, which had finally decided on the three categories mentioned, in order to enable them to protect their interests.

101. The last sentence was designed to accommodate a wide variety of provisions contained in different national laws. That approach was felt preferable to attempting to itemize how the rights of sale should be exercised.

102. The CHAIRMAN invited the Commission to consider article 10, paragraph (1).

103. Mr. SCHROCK (Federal Republic of Germany) drew the attention of the Commission to his Government's comments in

document A/CN.9/319/Add.1 and to the proposal made by his delegation in document A/CN.9/XXII/CRP.6. The right of retention over the goods should be restricted to those claims of the operator which were due. That would not affect the validity under any applicable law of any contractual arrangements extending the operator's security in the goods. The second sentence of article 10, paragraph (4), contained a reference to "sums due" and his delegation would like to see a similar reference in paragraph (1).

104. Mr. OCHIAI (Japan) and Mr. TARKO (Observer for Austria) supported the proposal of the Federal Republic of Germany.

105. *The amendment proposed by the Federal Republic of Germany was adopted.*

106. Mr. RUSTAND (Observer for Sweden) drew the attention of the Commission to the proposal of the Government of Finland in document A/CN.9/319/Add.3, which his delegation thought had considerable merit. The point it made was that the operator's right of retention over the goods for costs and claims relating to the transport-related services performed by him was restricted to the period of his responsibility for the goods. However, if, under article 3 of the draft Convention, the period of responsibility had expired, it was necessary to determine what would happen if the goods were not collected in the agreed period of time. There would obviously be storage fees which the operator would wish to collect, but those fees might have become due after the expiration of the period of liability. In such a case, the operator should be entitled to exercise his right of retention and even to sell the goods.

107. Ms. SKOVBY (Denmark), supporting the proposal of Finland, said that an operator often had goods in his possession after his period of responsibility had expired. He therefore should have the right of retention, although perhaps not the right to sell the goods.

108. The CHAIRMAN said he took it that the Commission approved the proposal of the Government of Finland.

109. *It was so decided.*

110. Mr. PELICHET (Hague Conference on Private International Law) said that, as he understood the phrase "under any applicable law" in the last sentence of article 10, paragraph (1), the parties had the right to choose any law they wished to govern an arrangement to extend the operator's security. That provision would cause difficulties in those countries whose legal systems did not allow such a choice. The draft Convention should not grant the parties total independence in that regard. He therefore proposed the deletion of the phrase "under any applicable law".

111. Mr. SAMI (Iraq) agreed with the previous speaker that article 10, paragraph (1), might be interpreted as he had indicated. One solution might be to adopt the proposal made by the Government of the German Democratic Republic in document A/CN.9/319/Add.3 under which the applicable law referred to in paragraphs (1), (3) and (4) of article 10 would be the law of the place where the goods were situated. The goods could then not be sold if they were in a country where the law did not allow their sale, even if the law of the country where the operator had his place of business did.

112. Mr. AZZIMAN (Morocco) said that he fully agreed with the remarks of the representative of the Hague Conference on Private International Law. The reference to "any applicable law" would only complicate existing national legislation on security. He believed that the word "any" should not have been used and

that the phrase in question should read "under the applicable law".

113. Mr. LARSEN (United States of America) agreed with the previous speaker that the phrase should read "under the applicable law". He also supported the remarks of the representative of Iraq concerning the proposal of the German Democratic Republic.

114. Mr. POHUNEK (Czechoslovakia) said that the understanding in the Working Group had been that nothing in the Convention should affect the validity of contractual arrangements to the extent that they were allowed under any applicable law extending the operator's security in the goods. In other words, the parties were not free to choose any applicable law as the basis for their contractual arrangements; rather, their arrangements were valid only if concluded within the limits of applicable law. He agreed with the United States and Morocco that the phrase to be used was "under the applicable law".

115. Mr. TANASESCU (Observer for Romania) said that it was his delegation's understanding that the article allowed for other rights that took precedence over the right of retention. Such rights could only be agreed upon by the parties through contractual arrangements. There was therefore no need, in his

view, to include the words "under any applicable law". For that reason he also supported the remarks of the representative of the Hague Conference on Private International Law.

116. Mr. ILLESCAS (Spain) agreed with the suggestion of the representative of Morocco. He pointed out that the Spanish version of the phrase in question corresponded to the wording now proposed. He therefore suggested that the other language versions should simply be brought into line with the Spanish version.

117. Mr. HORNBY (Canada) preferred the suggestion made by the representative of the Hague Conference on Private International Law to delete, as superfluous, the phrase "under any applicable law". Even if the word "any" were replaced by "the", his delegation was not sure what the applicable law was. As to the suggestion of the German Democratic Republic to refer to the law of the State where the goods were located, that was a matter which might be dealt with under article 10, paragraphs (3) and (4).

118. Mr. NESTEROV (Union of Soviet Socialist Republics) agreed with the proposal not to use the word "any" in the phrase under discussion.

The meeting rose at 5.10 p.m.

Summary record of the 416th meeting

Thursday, 25 May 1989, 9.30 a.m.

[A/CN.9/SR.416]

Chairman: Mr. RUZICKA (Czechoslovakia)

The meeting was called to order at 9.35 a.m.

Draft Convention on the Liability of Operators of Transport Terminals in International Trade (continued) (A/CN.9/298, A/CN.9/319/Add.1-4; A/CN.9/XXII/CRP.6)

Article 10 (continued)

1. The CHAIRMAN invited the Commission to consider the proposal of the German Democratic Republic (A/CN.9/319/Add.3, page 5) that in paragraphs (1), (3) and (4) of article 10 the applicable law should be the law of the place where the goods are located.

2. Mr. POHUNEK (Czechoslovakia) supported that proposal in principle. The Drafting Group might perhaps be asked to consider that where applicable law was mentioned in article 10 the intention was to refer to applicable rules of the country where the goods were located.

3. Mr. BERAUDO (France) was unable to support the proposal. In his delegation's view it had the drawback of introducing into the present text the rule of conflict of law, which was out of date in a great many States. It was true that the traditional situation was for the *lex fori* to obtain in international law, but that rule was being increasingly replaced, especially in respect of movable goods, by the principle that the parties to the contract giving rise to the security should choose the régime which they wished to apply.

4. Mr. LARSEN (United States of America) shared the view of the representative of Czechoslovakia that the significant place

was the place where the goods were retained. That was where dues were payable.

5. Mr. INGRAM (United Kingdom) agreed with the representative of the Hague Conference on Private International Law that the phrase "under any applicable law" only caused confusion and should be deleted.

6. Mr. BONELL (Italy) said that he supported the remarks of the representative of France.

7. Mr. EYZAGUIRRE (Chile) favoured retention of the existing wording. The Spanish version, which referred to "*la legislación...*", was entirely satisfactory. He also agreed with the representative of France.

8. Mr. TEPAVITCHAROV (Bulgaria) supported the proposal of the German Democratic Republic.

9. Mr. HORNBY (Canada), supported by Mr. RUSTAND (Observer for Sweden), said he believed the views expressed by the representative of the Hague Conference on Private International Law was correct. There was no need for the phrase "under any applicable law" in article 10, paragraph (1). However, the proposal of the German Democratic Republic did have merit in regard to paragraphs (3) and (4).

10. Mr. TARKO (Observer for Austria) said that account should be taken of the differences in national laws. He would

prefer to see no major change made in the wording of paragraph (1).

11. Mr. SCHROCK (Federal Republic of Germany) agreed with the remarks of the representative of Canada. The phrase "under any applicable law" should be deleted. Contractual arrangements would not be affected by the present draft Convention and would have to be governed by law.

12. Mr. MOORE (Nigeria) saw no need to modify paragraph (1).

13. Mr. CHAFIK (Egypt) favoured replacement of the word "any" by "the".

14. Mr. POHUNEK (Czechoslovakia) and Ms. SKOVBY (Denmark) expressed agreement with the representative of Egypt.

15. Mr. WANG Yangyang (China) supported the views of the representative of the Hague Conference on Private International Law and the remarks of the representatives of Canada and the Federal Republic of Germany. It was inappropriate to refer to "any applicable law", since the draft Convention did not deal with the question of contractual arrangements between carriers and terminal operators.

16. Mr. DJENA (Cameroon) opposed the use of the word "any".

17. Mr. NESTEROV (Union of Soviet Socialist Republics) supported the remarks of the representative of Czechoslovakia.

18. Mr. TANASESCU (Observer for Romania) said that, if the Commission decided to replace the words "any applicable law" by "the applicable law", it should bear in mind that the same change might be made in article 9.

19. Ms. EISTERER (European Shippers' Councils) said that, in the context of article 10, she was not concerned about conflict of laws, but rather about conflict of interests. She wondered whether the Commission had adequately considered the magnitude of the sums involved and how small a portion of the value of the overall freight was represented by the costs to the terminal operator. A consignment of cheap merchandise in a container might have a value of \$US 20,000. The overall freight for the consignment in maritime transport might be \$US 1,000 or \$US 2,000, while the terminal charges might amount to only about \$US 100. It was a matter of concern to her that for this very small sum the operator of the terminal would be accorded the right to retain or even sell goods which belonged, not to his debtor, but to a third party with whom he was not even in contact. While the interests of the owner of the container were clearly protected under paragraph (3) of the article, no protection appeared to be given to the interests of the third party who owned the cargo. As a representative of the shippers of goods, she was worried to note how the proposed rules were weighted in favour of the terminal operators.

20. The CHAIRMAN observed that the right of retention of goods was known in all legislations.

21. Mr. BONELL (Italy) objected to the suggestion that the Commission was under the influence of any one lobby. He pointed out that both in the Working Group on International Contract Practices and in the Commission all parties had had the opportunity to participate from the outset in the consideration of the draft Convention.

22. The CHAIRMAN said that, in the absence of objection, he would take it that the Commission approved article 10, paragraph (1), with the deletion of the word "any" before the words "applicable law".

23. *It was so decided.*

24. The CHAIRMAN invited the Commission to consider article 10, paragraph (2).

25. *Article 10, paragraph (2), was approved.*

26. The CHAIRMAN invited the Commission to consider article 10, paragraph (3).

27. Mr. SCHROCK (Federal Republic of Germany) drew attention to his delegation's proposal for amendment of paragraph (3) (A/CN.9/XXII/CRP.6, page 2), and also to paragraph 64 of document A/CN.9/298, which gave the background to the proposal. He pointed out that the Government of Finland had submitted an almost identical proposal (A/CN.9/319/Add.3, page 4).

28. Mr. WOOLLEY (Institute of International Container Lessors) said that, as background to the discussion of article 10, paragraph (3), he believed it might be useful to give the Commission some information concerning the container leasing industry. There were at present in existence some 5 million containers whose total resale value was between \$US10 billion and \$US15 billion. Approximately one half of them were owned by leasing companies which leased the containers to shipping lines, typically for periods of from two months to five years. When they were under lease, the leasing company had no control over their movement or location.

29. The draft Convention being concerned with liability in respect of goods in transit, two points seemed to him worth mentioning. First, the container leasing companies were in the habit of keeping their containers in depots throughout the world. Those depots were not terminals nor did they belong to terminal operators; they were simply places where containers could be stored and repaired and delivered to shipping lines. Secondly, problems could sometimes arise when a shipping line abandoned a container and ceased to pay storage charges on it, for example in the case of bankruptcy. Legislation covering that situation appeared to vary widely from country to country. Some countries, especially in Europe, recognized the right of retention but not that of sale. In the United States of America, a warehousing company would normally have a lien on the shipping line, but there was no clear lien on the leasing company. Such law as there was was based on a pledge for value by the depositing shipping line.

30. The Institute of International Container Lessors wished to express its support for article 10, paragraph (3) of the draft Convention.

31. Mr. BONELL (Italy) supported the proposals of the Federal Republic of Germany and Finland relating to pallets or similar articles of packaging and said that the point at issue was essentially one of drafting.

32. With regard to the question of precise identification of the claims referred to in article 10, he had great sympathy with the views expressed by Finland and the Federal Republic of Germany in their comments. While amendment of paragraph (3) might necessitate reconsideration of paragraph (1), he thought it still would be desirable.

33. Mr. BERAUDO (France) supported the amendment proposed by the Federal Republic of Germany.

34. The CHAIRMAN said that, in the absence of objection, he would take it that the Commission wished to instruct the Drafting Group to incorporate in the second sentence of article 10, paragraph (3), the words "pallets or similar articles of packaging for transport" as proposed by the Federal Republic of Germany.

35. *It was so agreed.*

36. Mr. CHAFIK (Egypt), referring to the first sentence of paragraph (3), said that to grant the operator the right to sell all the goods over which he had exercised the right of retention appeared excessive, especially in the light of the remarks by the representative of the European Shippers' Councils. The text should indicate that only that part of the goods which was sufficient to cover the operator's claim could be sold. As for the reference at the end of the first sentence to the law of the State where the operator had his place of business, it was at variance with many national legislations, including that of Egypt, under which the applicable law would be that of the State where the goods were offered for sale. He therefore proposed that the first sentence should end with the words "... permitted by the applicable law".

37. Mr. RUSTAND (Observer for Sweden) said that the first point raised by the representative of Egypt seemed adequately covered by the second sentence of paragraph (4).

38. Ms. SKOVBY (Denmark) said that she agreed with the Egyptian representative's comments but considered them to be matters of drafting rather than of substance. She wondered whether the word "claim" in the first sentence of paragraph (3) should be understood to cover the "costs and claims" referred to in paragraph (1).

39. Mr. ABASCAL (Mexico) drew attention to his Government's comments on article 10, paragraph (3) (A/CN.9/319/Add.1, page 8). Like the Egyptian representative, he thought that reference to the law of the State where the operator had his place of business might give rise to conflicts; however, in preference to the amendment proposed by Egypt, he suggested the adoption of the present text with the addition of the words "and provided that the sale does not violate the law where the goods are located".

40. Mr. FALVEY (United States of America) said that the second point raised by the representative of Egypt was an important one. He endorsed the proposal to replace the reference to the law of the State where the operator had his place of business by a more general reference to "the applicable law". As for the other suggestions made during the discussion, they were of a drafting nature and could be referred to the Drafting Group.

41. Mr. BONELL (Italy) said he believed that the notice procedure envisaged in paragraph (4) dealt with the problem referred to by the representative of the European Shippers' Councils. In his view, the text of paragraph (3) was satisfactory as it stood. The second proposal made by the Egyptian representative and supported by the representative of the United States of America was helpful and he also wished to support it.

42. Mr. SAMI (Iraq) agreed with the Egyptian representative's first point, namely, that the operator's right to sell the goods over which he had exercised the right of retention should be limited to goods to the amount necessary to meet his claim. It had to be borne in mind that the owner of the goods might prefer to recover the goods themselves rather than the proceeds from their sale. Regarding the Egyptian representative's second proposal, he would prefer a reference to the law of the State where the goods were located.

43. Mr. BERAUDO (France), recalling the discussion concerning the phrase "where the operator has his place of business" which had taken place both in the Working Group and in the Commission itself in connection with article 2, said that in the case of transport terminals which straddled the frontiers of two or more States it was not possible to refer to the law of the State where the goods were located. He was in favour of adopting the Working Group's text without change.

44. Mr. ENDERLEIN (Observer for the German Democratic Republic) said that, in the light of the discussion which had taken place, he wondered whether paragraph (3) was needed at all. To state that the operator could sell the goods if the applicable law so permitted, and could not if it did not, added nothing to the draft Convention. Given the definition in article 1 of "transport-related services", it was clear that the right of retention related only to warehousing and not to any other transport-related service. Short of including a provision concerning the terms of payment in contractual relations, the Commission could not add anything substantially new to the situation as it already existed.

45. He agreed with the representative of Iraq that the owner of the goods might wish to recover the actual goods rather than a part of the proceeds from their sale; in any event, the amount paid for the goods was bound to be below their real value. If the Commission decided to adopt the article in its present form, the title of the draft Convention should perhaps be reconsidered in view of the very strong emphasis the instrument placed on the operator's rights as distinct from his liability.

46. Mr. ILLESCAS (Spain) wondered whether the point that the operator's right of retention was relative rather than absolute might not be met simply by deleting the word "the" between the words "over" and "goods" in the first sentence of paragraph (1). No change would then be necessary in paragraph (3). With regard to the question of the applicable law, he recalled the proposal he had made in connection with article 9, namely that the applicable law should be that of the State where the operator handed over the goods to the person entitled to receive them. The arguments advanced on that occasion were also relevant in the present context.

47. Mr. TANASESCU (Observer for Romania) agreed with the observer for the German Democratic Republic that the Commission might reconsider the necessity of including paragraph (3) in article 10. If the paragraph were maintained, he would be in favour of it referring to the law of the State where the goods were located. The importance of ensuring the operator's effective right to sell the goods seemed to him to outweigh the arguments advanced by the representatives of France and Italy.

48. Mr. DJENA (Cameroon) said that paragraph (3) should be maintained, if only to provide a logical transition from paragraph (2) to paragraph (4). He supported the Egyptian representative's observation that the goods which the operator was entitled to sell should be proportional to the amount due to him. Regarding the Egyptian representative's proposal concerning the applicable law, he would prefer a reference in paragraph (3) to the law of the State where the goods were located.

49. Ms. FAGHFOURI (United Nations Conference on Trade and Development) endorsed the comments of the observer for the German Democratic Republic. Article 10 was, in her view, applicable only to warehousing situations.

50. Mr. EVANS (International Institute for the Unification of Private Law) said that his organization had sought to establish a uniform rule on the question of the applicable law but the

Working Group had fallen back on national law. He was inclined to agree with the observer for the German Democratic Republic. The expression employed in an earlier draft in connection with the right to sell had been "all or part of the goods". On the question of applicable law, he agreed with the representative of Italy, bearing in mind the changes introduced in article 2.

51. Mr. POHUNEK (Czechoslovakia) said that he was in favour of maintaining article 10, paragraph (3), in the draft Convention, not only for the reason mentioned by the representative of Cameroon, but also in the interests of completeness of the draft text as a whole. He agreed with the Egyptian representative that a limit should be placed on the operator's right to sell the goods retained by him, and suggested that the Commission might also wish to introduce a reference to proportionality. The first sentence of paragraph (3) could, for example, read as follows: "... the operator is entitled to sell all or part of the goods, in proportion to the claims due, over which he has exercised the right of retention ...". With regard to the possibility of conflicting national laws, he said that he had no strong preference as between the text in its present form and the proposed reference to the State where the goods were located. He opposed, however, the use of the phrase "the applicable law", which was too vague.

52. Mr. CHAFIK (Egypt) said that he would be entirely satisfied with the words "the goods or part of the goods".

53. The CHAIRMAN asked whether the Commission approved the proposal of the observer for the German Democratic Republic that article 10, paragraph (3), in its entirety, be deleted.

54. Ms. EISTERER (European Shippers' Councils) supported that proposal.

55. Mr. EYZAGUIRRE (Chile) said that his delegation was opposed to the deletion of paragraph (3) because that provision was a consequence of the right of retention established in paragraph (1).

56. Mr. SCHROCK (Federal Republic of Germany) expressed his support for the deletion of paragraph (3).

57. The CHAIRMAN, observing that there appeared to be no further support for the proposal, took it that the majority of members wished paragraph (3) to be maintained. He then asked the Commission, with reference to the Egyptian proposal, if the operator should have the right to sell all or part of the goods proportionately to his claim.

58. Mr. ABYANEH (Islamic Republic of Iran) expressed his support for the Egyptian proposal.

59. Mr. RAO (India) also supported the Egyptian proposal but proposed, in addition, that the words in paragraph (3) "permitted by the law of the State where the operator has his place of business" should be replaced by the words "necessary to satisfy his claim". His amendment would avoid reference to the applicable law and would take account of the right of the operator to sell goods to the extent necessary to cover his claim.

60. Mr. EYZAGUIRRE (Chile) said that a careful reading of paragraph (1), which established the right of retention, showed that it applied only to the amount of the costs and claims. The terminal operator did not have the right to sell all the goods. He was not sure of the purpose of the Egyptian proposal since,

according to paragraph (3), there could be no sale of goods in order to obtain an amount in excess of the value of the goods over which the operator had exercised his right of retention. He therefore regretted that he could not support the proposal of Egypt.

61. Mr. BONELL (Italy) said that, for the reasons given by the previous speaker as well as for other reasons, he too could not support the Egyptian proposal. Paragraph (3) did not establish the right of sale but limited it by reference to the applicable law. To introduce the concept of proportionality might create unnecessary confusion since it might not exist in the applicable law. The Indian representative, on the other hand, had suggested a quite different approach, namely to avoid all reference to national laws and to state positively the right of sale. The representative of the International Institute for the Unification of Private Law had taken a similar approach. If that approach were adopted, it would be possible to introduce the concept of proportionality, because it would be the Convention that established the right. If, therefore, the Indian proposal—which he supported—were endorsed by the Commission, he would be able to support the proposal of Egypt. Otherwise, he would feel obliged to oppose it.

62. The CHAIRMAN asked whether the Commission wished to delete in paragraph (3) the reference to the applicable law.

63. Mr. SCHROCK (Federal Republic of Germany) regretted that he was unable to support the approach suggested by India. His Government's consultations with the *Länder* and with commercial interests in the Federal Republic had been based on the understanding that the basic principles applied in his country would be maintained. He was prepared to support the development of rules designed to promote uniformity, but the deletion proposed by the Indian delegation represented a basic change that was unacceptable to him.

64. Mr. DJIENA (Cameroon) associated himself with the remarks of the previous speaker.

65. Mr. PELICHET (Hague Conference on Private International Law) said that he strongly supported the Indian proposal, which was a reasonable one whose adoption would provide justification for including article 10 in the Convention. The Indian proposal had the great merit of promoting uniformity and would perform the positive function of serving as a guide for countries preparing legislation to implement the Convention.

66. Mr. POHUNEK (Czechoslovakia) supported the Indian proposal, for the reasons expressed by the representative of the Hague Conference on Private International Law. He endorsed the view that it was the task of the Commission to promote uniformity.

67. Mr. BERAUDO (France) also supported the proposal of the representative of India but observed that the discussion in the Working Group had shown that many countries were not ready for uniformity. France was able to accept the wording proposed because it was consistent with French law.

68. Mr. AZZIMAN (Morocco) supported the proposal by India and took the same position as the representative of Italy concerning the proposal of the Egyptian representative.

69. The CHAIRMAN asked whether there was objection to the idea of a proportionate sale of goods to meet the claims of the operator.

70. Mr. OCHIAI (Japan) said that he could support the insertion of the words "all or part of" before the words "the goods" in the first sentence of paragraph (3). Care was needed, however, in introducing the concept of proportionality, since the goods could not always be divided up in a reasonable manner and, secondly, it was difficult to evaluate the proportion of the goods required to meet the claim before a sale. He was therefore not in favour of using the word "proportionately" in the paragraph.

71. The CHAIRMAN observed that the problem of non-dividable goods was dealt with in paragraph (4). Whether the word "proportionately" could be used was clearly a question of drafting.

72. Mr. ZUBEIDI (Libyan Arab Jamahiriya) said that the operator should have the right to retain enough of the goods to cover his claim. There were, however, certain cases where the nature or form of the goods made it impossible to divide them. Furthermore, the rules of certain countries might prohibit the auctioning of the goods, which might be against the owners' interests. He considered it preferable to maintain the existing text.

73. Mr. ABASCAL (Mexico) said that, while he appreciated the value of the Indian proposal as a means of promoting uniformity, it would create serious ratification difficulties for his country, since it was alien to Mexican law. He therefore had to oppose the proposal.

74. Ms. PIAGGI de VANOSI (Argentina) said that the provision in the second sentence of paragraph (4) made it clear that the balance in excess of the amount of the claim under paragraph (1) had to be returned to the owner of the goods. In consequence, the limitations arising out of paragraphs (1) and (3) did not prevent sale of the goods in their entirety. This interpretation was confirmed by examination of paragraph (4) under which the operator was required to return to the owner the balance of the proceeds of the sale.

75. Mr. EYZAGUIRRE (Chile) said that the right of retention established in paragraph (1), which had already been approved by the Commission, made necessary a quantitative assessment of the costs and claims to be met from the proceeds of the sale of the retained goods. In determining those costs and claims, the right of sale for which provision was made in paragraph (3) had again to be limited to the results of that quantitative assessment. A problem also arose regarding the proportional sale of indivisible articles. The sale had in any case been made subject in paragraph (4) to prior notification of intention to sell being given to the owner, who should be given the opportunity to settle the claim himself.

76. His delegation would like to see the phrase relating to the applicable law retained in the text of paragraph (3).

77. Ms. LIVADA (Observer for Greece) said that her delegation considered deletion of paragraph (3) too radical a solution. If, on the other hand, it was retained, the principle of proportionality could not be introduced. It would in the best case only provide a theoretical solution and in the worst case create confusion.

78. Mr. HASSAN (Observer for Sudan) said that the Indian proposal to delete the reference to applicable law was open to objection on practical grounds, since it would stand in the way of a number of countries acceding to or ratifying the Convention. He was, however, able to support the proposal of the representative of Egypt, which provided a basis for compromise

between those who wished to allow the operator to retain and sell all the goods in his care and those who wished to deny him both those rights. Paragraphs (1) and (3), taken together, allowed the terminal operator discretion to sell goods in proportion to the costs incurred, provided that was not contrary to the national law.

79. Ms. SKOVBY (Denmark) requested that the exact wording of the Indian proposal should be read out.

80. Mr. INGRAM (United Kingdom) said that it was his understanding that the Indian delegation had proposed that the words "permitted by the law of the State where the operator has his place of business" in paragraph (3) should be replaced by the words "necessary to satisfy his claims". His delegation supported that amendment.

81. Ms. PERT (Observer for Australia) also supported the Indian proposal.

82. Mr. SCHROCK (Federal Republic of Germany) said that adoption of the Indian proposal would necessitate a redrafting of the entire article; otherwise the terminal operator would have a lien on the goods in his care. He suggested that the words "The operator has a right of retention . . ." in paragraph (1) should be replaced by the words "The operator is entitled to retain the goods . . .".

83. Mr. FALVEY (United States of America) supported the Indian proposal, which would grant the operator a uniform right of sale. His support was, however, conditional on the other rules in paragraphs (2), (3) and (4) of article 10 remaining in force, since they afforded necessary protection to the owner of the goods. In his view the procedure for the notification and execution of the sale should be governed by the provisions of the applicable national law, to be determined on the basis of the law which rendered the draft Convention applicable to the transaction in accordance with article 2.

84. Mr. HORNBY (Canada) said that, in the light of what had been said by the representative of the United States, he could support the Indian proposal.

85. Mr. BONELL (Italy) said that he, too, supported the Indian proposal.

86. Mr. SAMI (Iraq) said that his delegation favoured adoption of the proposal of the representative of Egypt, to the effect that the terminal operator should be given the right to sell goods, in whole or in part, sufficient to satisfy his claims. The representative of India had emphasized the importance of the goods sold being proportional to the operator's claim and it appeared that the majority of delegations were in favour of the proportionality principle, provided the goods were sold in accordance with the national legislation of the country in which the goods were located.

87. Mr. DJIENA (Cameroon) said that there were in essence two questions for decision by the Commission, namely the adoption of the proportionality principle—which appeared to be favoured by a large majority of participating delegations—and the determination of the national law which should govern the sale of retained goods. The applicable law could in that case be either the law of the State in which the goods were located or the law of the State where the operator's business was registered.

Summary record of the 417th meeting

Thursday, 25 May 1989, 2 p.m.

[A/CN.9/SR.417]

Chairman: Mr. RUZICKA (Czechoslovakia)

The meeting was called to order at 2.10 p.m.

Draft Convention on the Liability of Operators of Transport Terminals in International Trade (*continued*) (A/CN.9/298, A/CN.9/319 and Add.1-4, A/CN.9/321; A/CN.9/XXII/CRP.6)

Article 10 (*continued*)

1. The CHAIRMAN invited members to continue the discussion of paragraph (3). He noted that some delegations were in favour of the interpretation that the applicable law should be the law of the State where the goods were located, whereas others had argued that it should be that of the State where the operator had his place of business.
2. Mr. TARKO (Observer for Austria) suggested as a compromise that the operator should be allowed to sell the goods only when they were owned by the debtor. In that case, there should be no reference to applicable law. If the goods were not owned by the debtor, the matter could be left to the applicable law. That would at least cover cases where the customer was also the owner of the goods. It would, however, be unfair for the owner of the goods to lose them because a third party had not fulfilled his obligations.
3. Ms. PERT (Observer for Australia) said that the suggestion made by the previous speaker might be too complicated. It would be better to choose one of the alternatives referred to by the Chairman.
4. Mr. ABASCAL (Mexico) said that the operator should only be entitled to sell the goods if the applicable law of the State where the goods were located entitled him to do so. The other alternative was unacceptable to his delegation, because it would run counter to the Mexican Constitution. Many countries took the same approach to conflicts of national law with regard to goods.
5. Mr. POHUNEK (Czechoslovakia) said that the applicable law should be that of the State where the goods were located.
6. Mr. NESTEROV (Union of Soviet Socialist Republics) said that the text prepared by the Working Group already represented a compromise. The comments made by the delegation of Egypt should also be taken into consideration.
7. Mr. RAO (India) said that his delegation supported the proposal of the German Democratic Republic, which was that the applicable law should be that of the place where the goods were located (see document A/CN.9/319/Add.3).
8. Mr. MOORE (Nigeria) said that his delegation supported the existing text. The law of the State where the operator had his place of business should be applicable.
9. Mr. HORNBY (Canada), Ms. van der HORST (Netherlands), Mr. SAMI (Iraq) and Mr. TEPAVITCHAROV (Bulgaria) supported the proposal of the German Democratic Republic.
10. Mr. ZHANG Yuqing (China) agreed with the observer for Austria that the operator should only be allowed to sell the

debtor's goods, and not those of others. In the opinion of his delegation, the applicable law should be that of the country where the goods were.

11. Mr. SWEENEY (United States of America) said that his delegation shared the concerns of the delegation of Mexico. The easiest solution might be to use the law of the place where the goods were located, as proposed by the German Democratic Republic. If that would leave the text still unacceptable for Mexico, his delegation suggested inserting the following phrase at the end of the first sentence of article 10 (3): "unless forbidden by the law of the place where the goods are".
12. Mr. ABASCAL (Mexico) said that his delegation preferred the proposal of the German Democratic Republic.
13. Mr. SCHROCK (Federal Republic of Germany) said that his delegation could also support the proposal of the German Democratic Republic. It was, however, regrettable that the interesting suggestion of the observer for Austria had been made so late in the discussion.
14. Mr. EYZAGUIRRE (Chile) said that his delegation preferred the text prepared by the Working Group, but would not object to the proposal of the German Democratic Republic, especially in the light of the comments made by the delegations of Mexico and the United States of America.
15. Mr. DJENA (Cameroon), Mr. INGRAM (United Kingdom), Ms. PIAGGI de VANOSI (Argentina), Mr. TANASESCU (Observer for Romania) and Mr. CHAFIK (Egypt) supported the proposal of the German Democratic Republic.
16. Mr. NESTEROV (Union of Soviet Socialist Republics) said that in view of the widespread support expressed, his delegation could also support the proposal of the German Democratic Republic.
17. The CHAIRMAN said he took it that the proposal of the German Democratic Republic to refer to the law of the place where the goods were located could be adopted.
18. *It was so decided.*
19. Mr. BOUR (Central Commission for the Navigation of the Rhine) suggested that the Drafting Group should examine the phrase "except in respect of" in the second sentence in paragraph (3). The notion of proportionality was not made sufficiently clear thereby.
20. The CHAIRMAN said he took it that paragraph (3) could be forwarded to the Drafting Group with the replacement of the phrase "where the operator has his place of business" by "where the goods are located", the inclusion of the notion of proportionality and the inclusion of the phrase "pallets or similar articles of packaging or transport".
21. *It was so agreed.*

22. The CHAIRMAN invited comments on article 10, paragraph (4).
23. Mr. DJIENA (Cameroon) said that, in order to protect owners' rights, not only should the operator be required to make reasonable efforts to give notice of any intended sale, but a period of notice should be stipulated. As the paragraph stood, it was sufficient for the operator to make reasonable efforts, and he could then sell the goods immediately without allowing a reasonable length of time for any owner to come forward. Such an outcome was not in the spirit of the article. Recalling that in many parts of the world communications were bad, he would favour the notion of a reasonable period of notice rather than a fixed number of days.
24. Mr. BONELL (Italy) opposed introducing the notion of a reasonable period of notice, as it was vague and would lead to controversy. The provisions of the article were intended as a last resort, and much time would already have elapsed before it could be invoked.
25. Mr. ENDERLEIN (Observer for the German Democratic Republic) supported the introduction of the notion of a reasonable period of notice: the owner of the goods might wish to recover them by paying the operator himself. The operator should not be allowed to sell the goods immediately he had made reasonable efforts to give notice of their intended sale. The period of notice should be described as reasonable; he recalled that the Sales Convention employed such a notion.
26. Mr. TEPAVITCHAROV (Bulgaria) said that if the effort to give notice were unsuccessful, it would be pointless to impose any further delay. If the notion of a period of notice were introduced, the notion of reasonable effort to give notice should be deleted.
27. Mr. SAMI (Iraq) agreed that the operator must be obliged to make reasonable efforts for a reasonable period of time to give notice of any sale, as the owner of the goods might wish to make payment himself. He therefore supported the suggestion made by the representative of Cameroon.
28. Mr. POHUNEK (Czechoslovakia) said he felt sympathetic towards the suggestion by the representative of Cameroon. Operators should indeed be obliged to wait for a reasonable time to enable owners of goods to respond before any sale took place. He recalled, however, that the purpose of the phrase "to make reasonable effort" had been to address the situation where it was not known who was the owner of the goods; if the paragraph was amended, it would be important to see how the provisions of the paragraph would operate in that circumstance.
29. Mr. TANASESCU (Observer for Romania) thought the change suggested by the representative of Cameroon was unnecessary. Any notice of intended sale which was given would be preliminary to a formal judicial procedure to enable the goods to be sold in accordance with national law.
30. Mr. EYZAGUIRRE (Chile) said that the existing text balanced the rights of operators and owners adequately; the operator was obliged to make reasonable efforts to give notice of any intended sale to the owner of the goods, the person from whom the operator had received them and the person entitled to take delivery of them. Furthermore, if the goods were perishable, the operator might be left with nothing worth selling by the end of any mandatory period of notice and so would be unable to recover his costs. The notion of a reasonable period of notice was vague and had been adopted in other Conventions only as a compromise; it should not be used where no compromise was necessary.
31. Mr. HORNBY (Canada) supported the text as it stood. His delegation had, during the drafting of that text, wished to make explicit the implicit notion that any sale, indeed, any period of notice, would be governed by the provisions of national law. The provisions of the article should be regarded as minimum requirements in respect of notice and accountability.
32. Ms. PIAGGI de VANOSI (Argentina) supported the text as it stood for the reasons advanced by the observer for Romania and the representative of Canada.
33. Mr. SWEENEY (United States of America) said that he supported the views just expressed. The paragraph addressed primarily the question of notice of intended sale, and did so appropriately. However, the reference in the last sentence to the law of the State where the operator had his place of business should be changed to refer to the law of the State where the goods were located.
34. Mr. BERAUDO (France) supported the view that no period of notice should be stipulated.
35. Mr. VINCENT (Sierra Leone) said that he did not find the first sentence of the paragraph completely clear, and supported the introduction of the notion of a reasonable period of notice.
36. Mr. AZZIMAN (Morocco) supported the text as it stood. The notion of a reasonable period of notice was implicit in the phrase "make reasonable efforts to give notice", and no court would fail to so interpret it.
37. Mr. RUSTAND (Observer for Sweden) appreciated the concern expressed by the representative of Cameroon, but said that the matter was adequately covered by the last sentence of the paragraph.
38. Mr. RAO (India) said he did not oppose the suggestion by the representative of Cameroon, but thought that the matter should be addressed by national law.
39. Ms. VILUS (Yugoslavia) supported the existing text, but thought that the phrase "in other respects" in the last sentence should be strengthened to "in all other respects".
40. Mr. ABYANEH (Islamic Republic of Iran) supported the existing text, subject to the phrase "where the operator has his place of business" in the last sentence being replaced by "where the goods are located", in line with paragraph (3).
41. The CHAIRMAN said he took it that the Drafting Group should be asked to take into account the suggestion by the representative of Yugoslavia in considering the phrase "in other respects". He took it that the paragraph could be forwarded to the Drafting Group with the phrase "where the operator has his place of business" changed to read "where the goods are located".
42. *It was so agreed.*
- Article 11*
43. The CHAIRMAN invited the Commission to consider paragraph (1).
44. Mr. HORNBY (Canada) said he supported the paragraph in principle but would be grateful if the suggestion made by his Government (see document A/CN.9/319, page 6) that the words "from the operator" should be inserted after the words "delivery of them" in the fourth line could be referred to the Drafting Group.

45. *It was so agreed.*

46. Ms. van der HORST (Netherlands) proposed that the words "in writing" should be inserted after the word "operator" in the second line, so that it was specified that notice of loss or damage should be given to the operator in writing.

47. The CHAIRMAN drew attention to the definition of "notice" in article 1(e).

48. Ms. van der HORST (Netherlands) said that the definition provided only that notice should be given in a form which provided a record. It did not specify that notice should be in writing, which was essential for the purposes of article 11.

49. The CHAIRMAN suggested that the matter should be referred to the Drafting Group for consideration.

50. Ms. SKOVBY (Denmark) said that the point was one of substance, not drafting. She preferred the present text.

51. Mr. POHUNEK (Czechoslovakia), Mr. BONELL (Italy) and Mr. TARKO (Observer for Austria) endorsed that view.

52. The CHAIRMAN said that he took it the Commission wished to retain the text unchanged.

53. *It was so agreed.*

54. Mr. EYZAGUIRRE (Chile) said that he would like it to be noted in the report that his delegation would have preferred notice to be given in writing, in line with article 19 of the Hamburg Rules, with "writing" including telegram or telex, in line with article 1 of the Hamburg Rules.

55. Mr. SAMI (Iraq) said that the period of one day for giving notice of loss or damage was not long enough. He suggested that it should be increased to three days, or a week.

56. Mr. SCHROCK (Federal Republic of Germany) welcomed the suggestion made by the representative of Iraq. His own Government had suggested that the time-limit be extended to three working days (see document A/CN.9/319/Add.1, page 5).

57. Mr. RUSTAND (Observer for Sweden) said that the matter had been discussed at length in the Working Group, where he had favoured a period of three days. He had nothing against a longer period and would join in any consensus, but hoped that the discussion need not be re-opened.

58. The CHAIRMAN asked whether the Commission would be in favour of extending the period to three working days.

59. *After an informal show of hands, it was so agreed.*

60. Mr. ABYANEH (Islamic Republic of Iran) asked whether the word "loss" in the first line meant loss of part or all of the goods.

61. The CHAIRMAN said that it was difficult to give a precise answer. It would depend on the circumstances or the nature of the goods. For example, damage could be such that an entire consignment would be considered as destroyed, since what remained was useless.

62. Mr. SWEENEY (United States of America), referring to the reference to article 4 in the penultimate line of the paragraph, suggested that the Drafting Group should be requested to ensure that the wording of article 4 and article 11 was consistent.

63. Mr. BERAUDO (France) suggested that it might save time if the Commission decided to delete the words "signed or" in the fifth line, since it had been decided that the document signed by the operator under paragraph (1)(a) of article 4 was merely a receipt.

64. Mr. SWEENEY (United States of America) asked whether the Commission could be informed of the Drafting Group's recommendation on article 4.

65. Mr. KATZ (International Trade Law Branch) said that the Drafting Group had recommended that the words "and stating their condition and quantity" should be deleted from paragraph 1(a) of article 4 and that the subparagraph should read "Acknowledge his receipt of the goods by signing and dating a document presented by the customer that identifies the goods, or". The notion of signature appeared also in paragraph (1)(b) and paragraph (4) of article 4.

66. Mr. BERAUDO (France) said that the words "the handing over by the operator of the goods as described in the document signed or issued by the operator pursuant to article 4" in paragraph (1) of article 11 implied that the operator was attesting to the state or condition of the goods. With the deletion of the words "and stating their condition and quantity" in paragraph (1)(a) of article 4, however, the document to be signed by the operator in that case would be only a receipt. The word "signed" would thus no longer have the same implication and should be deleted.

67. Mr. INGRAM (United Kingdom) said he considered that the alignment of paragraph 11 with paragraph 4 with regard to the "goods as described in the document signed or issued by the operator . . ." was a drafting matter.

68. Mr. RAO (India) said he was not against the aligning of article 11 with article 4. However, according to his recollection, the Commission had not agreed to the deletion in paragraph (1)(a) of article 4 of the words "and stating their condition and quantity". In deleting those words, he believed the Drafting Group had exceeded its authority.

69. Mr. KATZ (International Trade Law Branch) said that the Drafting Group had prepared the text based on the understanding that the Commission had, in fact, decided to delete the words "and stating their condition and quantity" from article 4, paragraph (1)(a).

70. Mr. RUSTAND (Observer for Sweden) said that, when it had completed its work, the Drafting Group would report back to the plenary. That would be the proper time for the Commission to review whether or not the Drafting Group had fulfilled its mandate.

71. Mr. RAO (India) said that, in that case, he would reserve his comments on the deletion of the reference to "condition and quantity" in article 4, paragraph (1)(a), until later.

72. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer article 11, paragraph (1), to the Drafting Group.

73. *It was so agreed.*

74. The CHAIRMAN invited comments on paragraph (2) of article 11.

75. Mr. SAMI (Iraq) said that paragraph (2) contained an apparent contradiction. In the case where loss or damage of goods was not apparent, the notice had to be presented within

seven days, i.e. presumably within seven days of receipt of the goods by the person entitled to receive them, yet there was also a second time-limit of 45 consecutive days after the goods were handed over to the person entitled to take delivery of them. The text was contradictory or ambiguous and would not be applied in a uniform manner. He therefore proposed that it should be deleted in its entirety and replaced by paragraph 2 of article 19 of the Hamburg Rules which were quite clear and precise, except that the time-limit of 15 days prescribed in the Hamburg Rules should be increased to 30 days in the present draft Convention.

76. Mr. HORNBY (Canada) proposed that the words "to the operator" should be added after the word "notice" in the second line of paragraph (2). That was the proposal of his Government contained in document A/CN.9/319.

77. Mr. CHAFIK (Egypt) said he agreed that the time-limit of seven days was too short; however, regarding the question of the date when the time-limit began to run, there was a difference between the English and French texts. The English text referred to the "final destination", i.e. the place, whereas the French text referred to the "*destinataire*", i.e. the person. He thought that the English text should be aligned with the French, since it was the person receiving the goods who would have to give notice and the time-limit could only run from the time when that person was in a position to know whether or not the goods were damaged.

78. Mr. ENDERLEIN (Observer for the German Democratic Republic) said he did not agree with the proposal of the representative of Iraq to take over the relevant clause in the Hamburg Rules, since there was a distinction. In the Hamburg Rules it was assumed that when the goods arrived they were *de facto* in the hands of the buyer. In the case of a terminal operator, there could, for example, be a long sea voyage between the goods leaving the terminal and being delivered to the customer. There was therefore a need to find a different solution. If necessary, he could support the proposal of the United States of America for

an extension of the time-limit to 90 days (A/CN.9/319), but he would prefer the deletion of the last part of paragraph (2), after the words "reached their final destination". The time-limit would then begin to run only after the goods reached their final destination; otherwise there would be no limit.

79. Mr. BERAUDO (France) agreed with the point made by the representative of Egypt concerning the difference between the English and French versions. He preferred that the text should refer to a legally defined person; he noted that the Hamburg Rules referred to a person, using the word "consignee" in the English version (see article 19, paragraph 2, of the Rules).

80. The CHAIRMAN wondered whether the Commission would wish to use the text of the Hamburg Rules as a basis for paragraph (2) of the present draft.

81. Mr. CHAFIK (Egypt) said that, if the word "destination" in the English text was changed to align it with the French text, there would be no problem and no need to use the text of the Hamburg Rules.

82. Mr. INGRAM (United Kingdom) said he agreed that the time-limit of 45 days was too short.

83. Mr. ILLESCAS (Spain) noted that the Spanish version of the text used the word "*destinatario*", which also referred to a person. As paragraph (2) concerned damage which was not apparent, it was clear that the person receiving the goods must be in a position to examine them before he could give notice. He also agreed that 45 days was too short a period.

84. Mr. SAMI (Iraq) said he could accept the change of the wording in the English text to align it with the French word "*destinataire*", referring to a person. However, he still questioned the need for two different time-limits.

The meeting rose at 5 p.m.

Summary record of the 418th meeting

Friday, 26 May 1989, 9.30 a.m.

[A/CN.9/SR.418]

The meeting was called to order at 9.40 a.m.

Draft Convention on the Liability of Operators of Transport Terminals in International Trade (continued) (A/CN.9/298, A/CN.9/319 and Add.1-5, A/CN.9/321)

Article 11 (continued)

1. Mr. RUSTAND (Observer for Sweden), referring to the discussion at the previous meeting concerning the use of the term "final destination" in paragraph (2), drew attention to the statement in paragraph 69 of the Working Group's report (A/CN.9/298) that the term was intended to refer to the final recipient of the goods.

2. Mr. POHUNEK (Czechoslovakia) said that he understood the Commission to have agreed that on that point the English text should be aligned with the French text. On the question of whether it was necessary to stipulate two separate time-limits in paragraph (2), he fully endorsed the arguments in favour of two

time-limits put forward by various speakers at the previous meeting. He pointed out that the second time-limit was also necessary in order to protect the operator in cases where the goods failed to reach their final recipient after leaving the operator's terminal. With regard to the proposal to extend the second time-limit, he said that he was prepared to accept the preference of the majority up to a maximum of 90 days.

3. Mr. SWEENEY (United States of America) said that he supported the text with the replacement of the word "destination" by the word "consignee". He also agreed that the period of 45 consecutive days was too short and should be doubled.

4. Ms. SKOVBY (Denmark) agreed that two time-limits were necessary in the interest of fairness to both the operator and the customer. However, she did not think that the second period of 45 days mentioned in paragraph (2) should be extended.

5. Mr. BONELL (Italy), agreed that a period of 45 days might be too short, but thought that 90 days would be too long. He proposed that, in the interest of consistency with the Hamburg Rules, the period should be 60 consecutive days. He also proposed that the first time-limit should be increased from 7 to 15 consecutive days, not only in the interest of consistency with the Hamburg Rules but also in view of the decision taken at the previous meeting to extend the period of notice specified in paragraph (1) from one to three working days.

6. Mr. NESTEROV (Union of Soviet Socialist Republics) said that he would prefer the second time-limit to be extended from 45 to 90 consecutive days.

7. Mr. POHUNEK (Czechoslovakia) supported the Italian representative's proposal to extend the first time-limit from 7 to 15 consecutive days.

8. Mr. DJIENA (Cameroon) said that without more detailed knowledge of the reasons for the Working Group's decision to recommend the time-limits appearing in paragraph (2), he was reluctant to agree to any change. However, in the interest of consistency with the Hamburg Rules, he would be prepared to accept the Italian representative's proposals.

9. Mr. RAO (India), Mr. HASCHER (France), Mr. ABYANEH (Islamic Republic of Iran) and Mr. ZHANG Yuqing (China) also supported the Italian representative's proposals.

10. The CHAIRMAN said that, in view of the substantial support received by the Italian proposals, he took it that the Commission wished to replace the figure "7" in the second line of paragraph (2) by the figure "15" and the figure "45" in the fourth line by the figure "60".

11. *It was so agreed.*

12. Mr. OCHIAI (Japan), reverting to the issue of an appropriate English term corresponding to the French term "*destinataire final*", said that the term "consignee", while perfectly acceptable in the context of carriage of goods, would be highly ambiguous in that of a Convention concerned with transport terminals.

13. After further discussion in which Mr. TEPAVITCHAROV (Bulgaria), Mr. KATZ (International Trade Law Branch) and the CHAIRMAN took part, Mr. DJIENA (Cameroon) proposed that the words "final destination" in the English text should be replaced by the words "final recipient".

14. *It was so agreed.*

15. The CHAIRMAN suggested that paragraph (2), as amended, should be referred to the Drafting Group.

16. *It was so agreed.*

17. The CHAIRMAN said that, in the absence of comment, he would take it that the Commission wished paragraphs (3), (4) and (5) also to be referred to the Drafting Group.

18. *It was so agreed.*

19. The CHAIRMAN recalled that at the previous meeting the representative of India had raised the question of the relationship between article 11 and paragraph (1)(a) of article 4 and, in that connection, had asked the Chair to indicate what had been the Commission's decision on that paragraph. As he recollected, the Commission had agreed, first, that paragraph (1)(a) of article 4 should not include a reference to the condition and quantity of

the goods; second, that the operator was under no obligation, under the paragraph, to check the condition and quantity of the goods; and, third, that where the operator did sign a document stating the condition and quantity of the goods, the consequences of his doing so should not be regulated by the Convention but left to national law. The matter being one of substance as well as of drafting, he proposed that the Commission should set up a small working party composed of the delegations of France, India, Mexico, Morocco, the Union of Soviet Socialist Republics and the United States of America to prepare an appropriate text, if possible before the entire text of the draft Convention had been referred to the Drafting Group.

20. *It was so agreed.*

21. The CHAIRMAN suggested that article 11, as amended, should be referred to the Drafting Group.

22. *It was so agreed.*

Article 12

23. The CHAIRMAN invited the Commission to consider paragraph (1) of article 12.

24. Mr. ABYANEH (Islamic Republic of Iran) said that, as the prescription period might vary from country to country, the phrase "within a period of two years" should be amended to "in conformity with the law applicable where the goods are located".

25. The CHAIRMAN observed that such an amendment would be detrimental to the principle of the unification of law.

26. Mr. DJIENA (Cameroon) said that he understood the position taken by the representative of the Islamic Republic of Iran but thought it preferable, for the reason given by the Chairman but also in order to avoid other problems that might arise, for example, from the fact that a claimant wishing to take legal action might reside in a country other than that in which the goods were located, to stick to the text as prepared by the Working Group.

27. The CHAIRMAN noted that there appeared to be no support for the proposal of the Islamic Republic of Iran.

28. Mr. ABYANEH (Islamic Republic of Iran) said that he respected the views of other members of the Commission but stressed that in his country's legislation there existed no period of prescription. He requested that the proposal he had made be reflected in the record.

29. The CHAIRMAN said that that would be done. He took it that the Commission wished to refer paragraph (1) to the Drafting Group.

30. *It was so decided.*

31. The CHAIRMAN invited the Commission to consider paragraph (2).

32. Mr. TEPAVITCHAROV (Bulgaria) said that the reference at the end of paragraph (2) to article 5 should be to article 5, paragraph (4).

33. The CHAIRMAN said that that point would be dealt with by the Drafting Group.

34. Mr. ENDERLEIN (Observer for the German Democratic Republic) said that paragraph (2) referred to two different persons, the person entitled to take delivery—in the second

line—and the person entitled to make a claim—in the fourth line. He believed that the point, which was perhaps a drafting matter, should be clarified.

35. Mr. KATZ (International Trade Law Branch) said that the question referred to had not given rise to much discussion in the Working Group. In his interpretation, the person entitled to take delivery might be the carrier whereas the person entitled to make a claim might be the shipper or the owner of the goods and therefore not necessarily the same person.

36. Mr. ENDERLEIN (Observer for the German Democratic Republic) recognized that the person entitled to make a claim might be different from the person entitled to take delivery of the goods. However, paragraph (2) defined the commencement of the limitation period. If the goods were lost, the operator would notify the carrier, who would in turn notify the consignee. In effect, therefore, as far as the commencement of the limitation period was concerned, it would be the same person. He therefore proposed that the words "entitled to take delivery" should be employed in both cases.

37. Mr. BONELL (Italy) said that the Working Group on International Contract Practices had departed from the model provided by article 20, paragraph 2, of the Hamburg Rules, where no specific person was mentioned, because the situation in regard to terminal operations was more complex. The person taking delivery of the goods was not necessarily the person who might wish to make a claim. Since the present draft Convention stipulated that, if the goods were lost, notification had to be given, it was necessary to state who must receive that notification. It was not enough to refer to the person entitled to take delivery of the goods; it was the person ultimately interested in the goods who had to be informed. In fairness to that person, therefore, the limitation period should not commence at the time when the goods should have been, but were not in fact, delivered.

38. Mr. ENDERLEIN (Observer for the German Democratic Republic) drew attention to the words "that person", in the penultimate line of paragraph (2), which referred back to "the person entitled to make a claim". However, it was apparent from article 5, paragraph (4), that the person who could treat the goods as lost was the person entitled to take delivery of them. It seemed to him that in all cases it was the person entitled to take delivery who was concerned and he therefore reiterated his earlier proposal.

39. Mr. DJIENA (Cameroon) said that the expression used, "the person entitled to make a claim", was intentionally broad so as to cover a number of different possibilities. He had no objection in principle to changing that expression but any alternative used should be equally broad.

40. Mr. OCHIAI (Japan), preferred to see the present wording maintained. He pointed out that it was not specified in article 5, paragraph (4), who could treat the goods as lost.

41. Ms. SKOVBY (Denmark) supported the previous speaker's remarks.

42. Ms. FAGHFOURI (United Nations Conference on Trade and Development), expressing her support for the proposal by the observer for the German Democratic Republic, said that the person entitled to take delivery of the goods might be different from the person entitled to make a claim. It might be difficult for the terminal operator to identify and find the person entitled to make a claim in order to notify him.

43. Mr. ZUBEIDI (Libyan Arab Jamahiriya) said that, although the point under discussion might possibly be a matter of

substance, it should in his view be referred to the Drafting Group.

44. Mr. SCHROCK (Federal Republic of Germany) doubted whether it was simply a matter of drafting. While he had some sympathy for the explanation given by the representative of Italy, he felt that the observer for the German Democratic Republic was right and that it might be appropriate to clarify the last part of the sentence, perhaps by making paragraph (2) end with the words "on the day the goods may be treated as lost in accordance with article 5, paragraph (4)". Some modification of the paragraph was in any event necessary.

45. Mr. BONELL (Italy) said that, while the proposal of the representative of the Federal Republic of Germany involved a change of substance, it helped to clarify and simplify the text. He suggested deleting the words following "total loss of the goods", in paragraph (2) and replacing them by the words "on the day the goods may be treated as lost in accordance with article 5".

46. Mr. ENDERLEIN (Observer for the German Democratic Republic) said that although the Italian proposal would shorten the paragraph he was opposed to it. The Working Group had chosen two starting points for the limitation period, the period of 30 days after which the goods could be treated as lost or the date on which notification was given of the loss of the goods, which could be earlier. In other words, the limitation period commenced with the notice given by the operator that the goods were lost or, at the latest, after 30 days. In order to avoid the situation where an operator might give notice after, say, 40 days and this would then be taken as the starting point, it was necessary for the paragraph to specify an unambiguous day for the commencement of the limitation period.

47. The CHAIRMAN suggested that the Drafting Group should be asked to consider all the possibilities and take account of all the comments made concerning paragraph (2).

48. Mr. TANASESCU (Observer for Romania) supported the Chairman's suggestion and also the last remarks of the observer for the German Democratic Republic. In his view, the other proposals which had been made had the merit of simplifying the text but were detrimental to its content. He suggested, however, that the Drafting Group might consider deleting, in the second line of paragraph (2), the words "to a person entitled to take delivery of them", since the limitation period should commence even when the goods had been handed over to a person not entitled to take delivery of them. He thought that suggestion might also resolve the difficulty mentioned by the observer for the German Democratic Republic.

49. Mr. SCHROCK (Federal Republic of Germany) said that, if the notification was to be considered the starting point of the limitation period, it should perhaps be specified whether the period commenced with the receipt or with the dispatch of the notification.

50. Mr. DUCHEK (Observer for Austria) said that he had been convinced by the argument of the observer for the German Democratic Republic that something was wrong with paragraph (2). In his view, a solution might be, in the case of total loss of the goods, to have the limitation period commence when the operator notified the person entitled to take delivery. Should no notification be given, the limitation period should start on the day on which the goods could be treated as lost in accordance with article 5, paragraph (4). That would be a simple and practical solution which would make article 12, paragraph (2) consistent with article 5, paragraph (4). He hoped that suggestion might be taken into consideration by the Drafting Group.

51. The CHAIRMAN observed that the proposal of the observer for Austria related to only one of the cases that could arise.

52. Mr. INGRAM (United Kingdom) said that his delegation favoured retention of the reference to two different persons in paragraph (2). The problem mentioned by the observer for the German Democratic Republic might perhaps be solved by the insertion of the words "whichever is the earlier" at the end of paragraph (2).

53. Mr. OCHIAI (Japan) supported the amendment suggested by the United Kingdom representative. He pointed out that, if the Romanian proposal were adopted, the rights of the person entitled to take delivery would become time-barred as a result of delivery having been made to a non-entitled person.

54. Mr. BONELL (Italy) said that two alternative courses of action were open to the Commission: either to maintain the existing text, amended as suggested by the United Kingdom representative, or to adopt the proposal of the observer for the German Democratic Republic.

55. Mr. KATZ (International Trade Law Branch), in reply to a question from Mr. ZUBEIDI (Libyan Arab Jamahiriya), said that the notification referred to in article 12(2) served to signify the starting point of the limitation period.

56. Mr. CRUZ (Chile) said that the text of article 12(2) should be reworded so as to reflect a proper balance between the interests of the terminal operator and those of the person or persons suffering loss.

57. The CHAIRMAN suggested that the Commission should first decide on the substantive question of whether to leave the text of paragraph (2) unchanged or to adopt the amendment proposed by the observer for the German Democratic Republic. It could then consider the proposal of the representative of the United Kingdom to add at the end of the paragraph the words "whichever is the earlier".

58. Mr. BOUCETTA (Morocco) said that, although he favoured maintenance of the existing text, he would like to see the words "or on the day on which the goods were made available" inserted in the paragraph after the words "to a person entitled to take delivery of them", in order to cover the case where the person responsible failed to collect the goods from the terminal operator.

59. The CHAIRMAN noted that the majority of delegations appeared to favour the maintenance of the existing text. He invited the Commission to consider the United Kingdom amendment, which called for the addition of the words "whichever is the earlier" at the end of paragraph (2).

60. Ms. SKOVBY (Denmark) supported the United Kingdom amendment.

61. Mr. ENDERLEIN (Observer for the German Democratic Republic) suggested that the slight lack of logic in the text might be overcome by deleting the words "if no such notice was given".

62. Mr. RAO (India) said that the United Kingdom proposal compounded a contradiction in the wording of the paragraph, since the two dates referred to were not expressed in strictly equivalent terms.

63. Mr. HASCHER (France) said that the United Kingdom amendment, instead of clarifying the text, created a possible

source of confusion. Moreover, it would modify the scope of the existing provision.

64. Mr. INGRAM (United Kingdom) said that the object of his delegation's amendment was to achieve a greater degree of certainty regarding the date of commencement of the limitation period.

65. The CHAIRMAN said that, in the absence of objection, he would take it that the Commission wished to refer the amendment proposed by the United Kingdom to the Drafting Group.

66. *It was so agreed.*

67. Mr. CHAFIK (Egypt) requested clarification of the method of determining the limitation period in the event of partial handing over of a consignment, say on 15 May, with the remainder of the consignment being handed over on 30 May.

68. Mr. KATZ (International Trade Law Branch) said that the question raised by the representative of Egypt, which might well be mentioned in the Commission's report, had not been discussed in the Working Group on International Contract Practices. The point was one which the Commission might consider.

69. Mr. LARSEN (United States of America) suggested that, since the existence and nature of the problem were clear, the Drafting Group might be asked to find language that would solve it.

70. The CHAIRMAN observed that any reference of the point to the Drafting Group should be accompanied by an instruction. Did the Commission favour only one limitation period or two in the circumstance referred to by the Egyptian representative?

71. Mr. CHAFIK (Egypt) said that it was not a question of more than one limitation period, on the length of which there was no disagreement, but merely of the date on which the limitation period in respect of a subsequent portion of the consignment should commence.

72. Mr. RUSTAND (Observer for Sweden) considered that the date on which the limitation period in respect of a second portion of the consignment commenced should be the date on which that second portion was handed over. That would obviate the possibility of a carrier handing over only a small portion of a consignment on an agreed date in order to bring forward the limitation period.

73. He proposed the deletion in paragraph (2) of the words "or part thereof".

74. Mr. POHUNEK (Czechoslovakia) fully concurred in the opening remarks of the observer for Sweden, but did not support the proposal to delete "or part thereof".

75. Mr. HASCHER (France) said that the limitation period in respect of the second portion of the consignment would logically run from the date on which that portion was handed over. He saw no need to alter the text.

76. Mr. SCHROCK (Federal Republic of Germany) supported the remarks of the observer for Sweden as far as the first two lines of paragraph (2) were concerned. He pointed out, however, that the paragraph then went on to refer to "cases of total loss of the goods", a phrase which might give rise to confusion if a consignment was handed over in stages and only a part of the consignment was lost or handed over in poor condition. The solution might be to delete the word "total" in that phrase.

77. Mr. OCHIAI (Japan) opposed the deletion of the words "or part thereof", a formula which had been used in the Hamburg Rules.

78. The CHAIRMAN said that, if it was agreed that the limitation period for each portion of a consignment should have a separate date of commencement, that could be stated in the Commission's report.

79. Mr. CHAFIK (Egypt) withdrew his proposal, in order not to prolong the discussion.

80. Paragraph (2) was approved.

81. The CHAIRMAN invited the Commission to consider paragraphs (3) and (4).

82. Paragraphs (3) and (4) were approved.

83. The CHAIRMAN invited the Commission to consider paragraph (5).

84. Mr. HORNBY (Canada) considered that the wording of paragraph (5) should be altered, as it placed the operator in a position of uncertainty. It appeared to leave open the possibility of an action being brought even after several years, provided the 90-day rule was observed. He suggested the adoption of a formula such as that to be found in article 20, paragraph 5, of the Hamburg Rules, which provided that an action might be instituted within the time allowed by the law of the State where proceedings were instituted. The exact wording to be adopted could be decided by the Drafting Group.

85. Mr. INGRAM (United Kingdom) asked for an explanation of the phrase "within a reasonable period of time". That seemed to him a very vague formula to use in a legal provision.

86. Mr. KATZ (International Trade Law Branch), replying to the points raised by the representatives of Canada and of the United Kingdom, said that the Working Group had not been unaware that it was departing from the provisions of the Hamburg Rules, but it had been wary of including in article 12 any reference to national law, because of the wide variations from one country and another. For that reason it had preferred a firm 90-day rule. Concern had been expressed in the Working Group, however, at the fact that the clause relating to the commencement of the 90-day period could work unfairly against the operator. The Working Group had accordingly decided, in order to afford the latter some protection, to add at the end of paragraph (5) the phrase "if, . . . , notice of the filing of such a claim has been given to the operator".

87. Regarding the phrase "within a reasonable period of time", the Working Group had felt that, while imprecise, the phrase was susceptible of meaning in national law.

88. Mr. ENDERLEIN (Observer for the German Democratic Republic) said that he would prefer a reference in paragraph (5) to a specific period. He thought that a four-week period would be appropriate.

89. He drew attention to his Government's comments on paragraph (5) in document A/CN.9/319/Add.3 and recalled that during the discussion of the paragraph in the Working Group, two different views had been expressed: one in favour of permitting recourse action even where a person had settled a claim without litigation and the other opposed to such permission. He did not know why the latter view had prevailed.

90. He proposed that either recourse action should be allowed even if no court action had been brought, or the phrase "or has settled the claim upon which such action was based" should be deleted.

The meeting rose at 12.34 p.m.

Summary record of the 419th meeting

Friday, 26 May 1989, 2 p.m.

[A/CN.9/SR.419]

Chairman: Mr. RUZICKA (Czechoslovakia)

The meeting was called to order at 2.05 p.m.

Draft Convention on the Liability of Operators of Transport Terminals in International Trade (continued)
(A/CN.9/298, A/CN.9/319 and Add.1-5, A/CN.9/321; A/CN.9/XXII/CRP.6)

Article 12 (continued)

1. Ms. VILUS (Yugoslavia) agreed that the expression "within a reasonable period of time" left the terminal operator exposed for too long a period. A specific time-limit should be stated in the text, otherwise there would be unfair uncertainty for the operator.

2. Mr. HORNBY (Canada) said that his preference would be for changing article 12(5) to bring it in line with the Hamburg Rules, which relied on the application of national law. Failing that, he believed the reference to a "reasonable period" should

be changed to a specific period such as 90 days. He could also accept any other means of reducing the uncertainty for the terminal operator in relation to possible recourse actions against him.

3. Mr. BOUR (Central Commission for the Navigation of the Rhine) said that it was unusual for legal provisions relating to recourse to speak of a "reasonable period". On the other hand, in order to protect the rights of carriers, it would be necessary to have a sufficiently long time-limit, such as 90 days. Indeed, simple deletion of a reference to a time-limit would be better.

4. Mr. ZHANG Yuqing (China) said that he supported the change proposed by the German Democratic Republic in article 12(5). He was concerned that the present wording might actually encourage recourse action through arbitration tribunals or courts rather than settlement without legal action. It seemed that a

carrier or other person who had already received the costs claimed might still institute recourse action. He would like his view to be reflected in the report.

5. Mr. DJENA (Cameroon) said that he would prefer the present text to be kept; specifying time-limits would create more problems than it resolved.

6. The CHAIRMAN noted that there was support for the Working Group's text as far as the use of the phrase "reasonable period" was concerned. He invited consideration of the proposal of the German Democratic Republic contained in document A/CN.9/319/Add.3.

7. Ms. PERT (Observer for Australia) said she supported the proposal of the German Democratic Republic. It was not logical to refer only to the settlement of claims already begun under judicial procedures. It was appropriate to include voluntary settlements.

8. Mr. POHUNEK (Czechoslovakia) said that he could not support the proposal of the German Democratic Republic. The draft of the Working Group in general followed the Hamburg Rules. There were similar provisions in the Hague/Visby Rules concerning the extension of time for recourse action.

9. Mr. ENDERLEIN (Observer for the German Democratic Republic) said he disagreed with the representative of Czechoslovakia. Under article 20 of the Hamburg Rules, the carrier would have recourse even if there was no litigation.

10. The CHAIRMAN said that it was his understanding that there was only limited support for the proposal of the German Democratic Republic. He assumed that the Commission wished to retain the existing draft text of paragraph (5) and refer it to the Drafting Group.

11. *It was so agreed.*

Article 13

12. *The Commission decided to retain the substance of the article unchanged and refer it to the Drafting Group.*

Article 14

13. *The Commission decided to retain the substance of the article unchanged and refer it to the Drafting Group.*

Article 15

14. Ms. PERT (Observer for Australia) suggested that article 15 could be simplified by the deletion of the words from "which is binding on a State . . ." to the end of the sentence. The phrase "rights or duties" in the first line of the article already made the sense clear.

15. Mr. KATZ (International Trade Law Branch) said that it had been observed in the Working Group that the provisions of some international transport conventions were made applicable in some States not by virtue of the State becoming a party to the convention concerned, but by the introduction of equivalent provisions in national legislation. That had been the reason for the inclusion of the words whose deletion had just been proposed.

16. Mr. ENDERLEIN (Observer for the German Democratic Republic) wondered whether article 15 should not be included in the final clauses, as in the case of certain other conventions such

as the Convention on Contracts for the International Sale of Goods.

17. Mr. LARSEN (United States of America) said that he saw no need for the provision contained in article 15; however, if it were to be retained, he would support the deletion proposed by the observer for Australia. It was undesirable that an international convention should be dependent on national legislation.

18. Ms. van der HORST (Netherlands) said she would prefer the text to be retained as drafted by the Working Group.

19. Mr. HORNBY (Canada) said it was his understanding that the words whose deletion was proposed had been added to assist States which were not parties to international conventions for the carriage of goods. If those countries saw no need for such a reference, it should be deleted.

20. Mr. MOURA-RAMOS (Observer for Portugal) said he supported the deletion proposed by the observer for Australia.

21. Mr. ILLESCAS (Spain) said that the text prepared by the Working Group of article 15 would be most useful in practice. The latter part would promote the maintenance of international law no matter in what form it was applicable to individual States, i.e. whether a State was party to the Convention or used the Convention as a model law in developing national legislation. He therefore supported the retention of article 15 as drafted by the Working Group.

22. Mr. POHUNEK (Czechoslovakia) supported the argument of the representative of Spain, and drew attention to paragraphs 111 and 112 of the Working Group's report (A/CN.9/298).

23. Mr. TEPAVITCHAROV (Bulgaria) asked whether the words "such State" in the fourth line referred to a State party to the present draft Convention or other conventions for the carriage of goods.

24. Mr. KATZ (International Trade Law Branch) said that it had been the intention that the present draft Convention should not modify rights under other international conventions which were binding on the parties. The words "such State" referred to a State party to the present draft Convention.

25. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer the Working Group's text to the Drafting Group.

26. *It was so agreed.*

Article 16

27. Mr. KATZ (International Trade Law Branch) said that article 16 reproduced the provision for a unit of account for use in conventions which had been adopted by UNCITRAL at its fifteenth session in 1982, and the use of which had been recommended by the General Assembly (resolution 37/107).

28. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer the Working Group's text to the Drafting Group.

29. *It was so agreed.*

Article 17

30. Mr. KATZ (International Trade Law Branch) said that, when drafting the provision on units of account, UNCITRAL

had also prepared provisions on procedures for revision of limits of liability, to reflect the need to keep pace with changes in the value of limits due to inflation or other causes.

31. The provisions contained in the present draft article 17 represented a refinement of the provisions adopted by UNCITRAL in 1982, reflecting similar provisions adopted in the Protocol of 1984 amending the International Convention on Civil Liability for Oil Pollution Damage, which themselves were based on the 1982 UNCITRAL provisions.

32. An earlier draft had provided that the revision of limits of liability should be undertaken within UNCITRAL. However, there was doubt as to whether such a procedure was constitutional under United Nations rules. Legal advice had indicated it would be preferable if such revision were not undertaken by UNCITRAL itself. A separate committee for the purpose of revision of limits of liability should be constituted, though for practical reasons it could meet at the same time as a regular session of the Commission.

33. The Secretariat had been requested to prepare a list of international transport conventions to be included in paragraph (1)(b) of article 17; such a list was contained in annex 2 of document A/CN.9/298.

34. The CHAIRMAN invited comments on article 17(1).

35. Mr. SCHROCK (Federal Republic of Germany) drew attention to his delegation's proposal in document A/CN.9/XXII/CRP.6 that the term "contracting States" in paragraph (1)(a) should be replaced by the term "States Parties". Paragraph (1)(a) should relate only to States parties as that term was understood in the Vienna Convention on the Law of Treaties, i.e. States that were already bound by the Convention. On the other hand, all contracting States, including those States where the Convention was not yet binding, should be allowed to take part in the procedure for revising the limits of liability. A distinction should be made between those States that should have the right to make the request under paragraph (1)(a) and those that should be allowed to participate. If necessary, his delegation could go along with the term "contracting States" in paragraph (1)(a), but it thought the language should be clear.

36. Mr. ENDERLEIN (Observer for the German Democratic Republic) said that it was important to be consistent. If the term "States Parties" was chosen, it should be used throughout, and the same applied to the term "contracting States". His delegation thought that that question had already been settled at an earlier point in the discussions.

37. The CHAIRMAN said that some States that had signed the Convention might not have ratified it, and the question arose whether such States should also be allowed to request the convening of a meeting.

38. Mr. DJENA (Cameroon) recalled that, during the consideration of article 2, the difference between the terms "States Parties" and "contracting States" under the Vienna Convention had been discussed; he thought that it had been decided to use the latter term.

39. Mr. KATZ (International Trade Law Branch) said that the Drafting Group had considered whether to use "contracting State" or "State Party" in article 2; bearing in mind other UNCITRAL conventions and the desirability of consistency, it had decided to use "contracting State". The delegation of the Federal Republic of Germany had raised the question which States should be entitled to request a revision conference and which States should be invited to participate. Perhaps the

Commission should take a position on that question and then refer the matter to the Drafting Group.

40. Mr. TANASESCU (Observer for Romania) said that the term "contracting State" should be interpreted in the light of the Vienna Convention. Otherwise, States that were not parties to the Convention would be able to take part in its revision. The Convention to be adopted must be consistent with the general notions of international law.

41. Mr. TEPAVITCHAROV (Bulgaria) said that the term "contracting States" should be replaced by "States Parties" in paragraph (1)(a), because only those States that had ratified the Convention should be allowed to request the convening of a revision conference. On the other hand, the term "contracting State" used in the introductory part of paragraph (1) should be retained, because all States that had signed the Convention should be invited to attend the meeting.

42. Mr. RAO (India) said that the proposal made by the Federal Republic of Germany was sensible. It was important to fall in line with the Vienna Convention on the Law of Treaties and United Nations usage in other forums.

43. Mr. ENDERLEIN (Observer for the German Democratic Republic) thought that the term "States Parties" should be used throughout the Convention. States that had not ratified the Convention should not be allowed to participate in its revision.

44. Mr. TARKO (Observer for Austria) agreed with the previous speaker. The term "States Parties" should be used throughout the Convention in order to avoid ambiguities.

45. Mr. SCHROCK (Federal Republic of Germany) agreed that there should be consistency of terminology. However, the term "contracting State" should be retained in paragraph (1), because those States for which the Convention was not yet binding should nevertheless be allowed to participate in a revision meeting. That distinction had already been made in 1988 in the Strasbourg Convention on the Limitation of Liability in Inland Navigation.

46. The CHAIRMAN noted that a proposal had been made to use the term "States Parties" throughout the text of the draft Convention.

47. Mr. SCHROCK (Federal Republic of Germany) said that his delegation could go along with that proposal, but would prefer to retain the term "contracting State" in article 17(1).

48. Mr. DJENA (Cameroon) said that the Vienna Convention did not bind the Commission. For example, in the preamble to the Hamburg Rules the term "States Parties" was used, whereas in article 2 of the Rules the words "Contracting State" were employed. It was important to determine the obligations of the contracting States and of States parties under the Convention now being drafted. A State that had signed the Convention was not bound in the same way as a State that had completed the formalities required to become a State party. His delegation agreed that it would be odd if States that had not yet ratified the Convention could decide on its revision on an equal footing with those that had. The term "States Parties" should be used.

49. Mr. TARKO (Observer for Austria) said that, as his delegation understood the proposal of the Federal Republic of Germany, articles 1-16 and article 17(1)(a) should refer to States parties, i.e. those parties that had ratified the Convention and were legally bound by it. In the introductory part of article 17(1), States that had commenced the ratification procedure and foresaw becoming States parties within a matter of months should not be excluded.

50. Mr. DJIENA (Cameroon) said that his delegation did not see what the status of States that were in the process of becoming States parties, but had not yet completed that process would be at such meetings.

51. Mr. SCHROCK (Federal Republic of Germany), referring to article 2, paragraph 1(f), of the Vienna Convention on the Law of Treaties, said that a contracting State was defined in that instrument as a State which had consented to be bound by a treaty, whether or not the treaty had entered into force. A period of time elapsed between the presenting of the instrument of ratification and the moment when the treaty came into force and became binding for a State. Only those States that had consented to be bound by the Convention should be invited, regardless of whether it had entered into force for them. Those States that had only signed would be outside the framework of the provision.

52. Mr. DJIENA (Cameroon) said that, in that case, he could agree to the proposal to use the term "States Parties" in articles 1-16, the term "contracting State" in the introductory part of article 17(1) and the term "States Parties" in article 17(1).

53. Mr. CHAFIK (Egypt) said that a reference should be made in the report to the fact that the term "States Parties" was used as understood in the Vienna Convention.

54. Mr. BERAUDO (France) said that his delegation agreed with the text as drafted by the Working Group. He wondered what the consequences would be of using the term "States Parties" throughout the text.

55. The CHAIRMAN suggested that, in order to bring the language in the draft Convention in line with article 2 of the Vienna Convention on the Law of Treaties, the words "contracting States" should be replaced by the words "States Parties" wherever they occurred in articles 1-16. In article 17, paragraph (1), the words "contracting State" should stand in the introductory part, but the words "contracting States" in subparagraph (a) should be replaced by "States Parties".

56. Mr. PFUND (United States of America) said that the terminology used in earlier UNCTRAL Conventions would thereby be replaced by that used in the Vienna Convention on the Law of Treaties.

57. Mr. HISCHER (France) said that his acceptance of the change was subject to reservations.

58. The CHAIRMAN asked whether the Commission wished to use the terminology set forth in the Vienna Convention on the Law of Treaties.

59. *After an informal show of hands, it was so agreed.*

60. The CHAIRMAN invited comments on paragraph 1(b).

61. Mr. LARSEN (United States of America) said that the list of conventions should not be exhaustive, and proposed the following wording: "When an amendment of a limit of liability in respect of loss, damage or delay of goods set forth in one of the transport-related Conventions hereinafter named is adopted. The Conventions include but are not limited to:".

62. Mr. BOUR (Central Commission for the Navigation of the Rhine) said that the Strasbourg Convention on the Limitation of Liability in Inland Navigation should be added to the list. He asked if it was indeed intended that the depositary should convene a meeting of a committee each time any transport-related convention was changed.

63. Mr. KATZ (International Trade Law Branch) said that it was indeed so intended.

64. Mr. CHAFIK (Egypt) proposed that subparagraph (b) should be deleted.

65. Mr. AZZIMAN (Morocco) said that the committee should not be automatically required to meet if a transport-related convention was changed. With that reservation, he could support the proposal made by the United States of America.

66. Mr. ENDERLEIN (Observer for the German Democratic Republic) agreed with the representative of the United States of America that the list of conventions should be open-ended. He agreed also that the automatic linkage of meetings of a revision committee to changes in any transport-related convention would be excessive: given the number of conventions and the average frequency with which they were changed, the committee would have to meet about once a year; he suggested that it should not meet more frequently than every three or four years.

67. Mr. MOURA-RAMOS (Observer for Portugal) said that any meeting of the committee should be called at the request of a State, not by the depositary. Under subparagraph (b), there should be a provision that at least one State party should request that a meeting should be convened.

68. Mr. INGRAM (United Kingdom) supported the proposal by the representative of Egypt, but said that he could also support the limitations suggested by the observers for the German Democratic Republic and Portugal.

69. Mr. AZZIMAN (Morocco) said that the provisions of subparagraph (b) should be limited by stipulating that the draft Convention must be significantly affected by any change in a transport-related convention.

70. Mr. MOURA-RAMOS (Observer for Portugal) said that it should not be for the depositary to decide whether any effect on the draft Convention warranted convening a meeting of the revision committee: that decision should be made by a State.

71. The CHAIRMAN asked whether the Commission wished subparagraph (b) to be deleted.

72. *After an informal show of hands, it was so agreed.*

73. Mr. ENDERLEIN (Observer for the German Democratic Republic) drew attention to the proposal by the German Democratic Republic in document A/CN.9/319/Add.3, page 6, for an additional subparagraph (c) in article 17, paragraph (1).

74. *The Commission accepted the proposal.*

75. Ms. van der HORST (Netherlands) suggested that it might be more appropriate to place the new subparagraph (c) in paragraph (5).

76. Mr. ZUBEIDI (Libyan Arab Jamahiriya) said that, in any case, the deletion of subparagraph (b) entailed the deletion of the word "or" at the end of subparagraph (a).

77. The CHAIRMAN suggested that paragraph (1) should be sent to the Drafting Group, which should take into account those points and the changes that had been agreed on.

78. *It was so agreed.*

79. The CHAIRMAN invited the Commission to consider paragraph (2).

80. *The Commission decided to retain the substance of the paragraph unchanged.*

81. The CHAIRMAN invited comments on paragraph (3).

82. Mr. ENDERLEIN (Observer for the German Democratic Republic) drew attention to his Government's proposal in document A/CN.9/319/Add.3, that the paragraph should be deleted as superfluous, or else reworded.

83. Mr. GRIFFITH (Observer for Australia) said that he was in favour of deleting the paragraph.

84. Mr. SCHROCK (Federal Republic of Germany) said that he could not support the deletion of the paragraph. Failure to list the criteria might give rise to constitutional problems in his country.

85. Mr. MOURA-RAMOS (Observer for Portugal) supported the proposal by the German Democratic Republic. It did not make sense to subject the decisions of a committee composed of all contracting States to criteria fixed in advance.

86. Mr. AZZIMAN (Morocco) said that he was in favour of maintaining paragraph (3) but in the amended form suggested by the German Democratic Republic, which made it clear that the criteria listed were only indicative.

87. He considered that paragraph (3)(a) should be retained, despite the deletion of paragraph (1)(b).

88. Mr. RUSTAND (Observer for Sweden) said that he shared the concern voiced by the representative of the Federal Republic of Germany. He could support the alternative wording proposed by the German Democratic Republic.

89. Mr. LARSEN (United States of America) said that he was in favour of retaining the introductory part of paragraph (3), possibly in the revised version proposed by the German Democratic Republic. He was also in favour of retaining subparagraph (a) since it was perhaps the best place for including the notion of changes in other transport-related conventions, but suggested that it should be amended to read: "The amount by which the limits of liability in transport-related conventions have been amended". The reference should not be to conventions "of a global nature"; for example, an important regional convention such as the Convention concerning International

Carriage by Rail (COTIF) should not be excluded from consideration.

90. The CHAIRMAN said that there appeared to be little support for the deletion of paragraph (3). He took it that the Commission would wish the amendment proposed by the German Democratic Republic to the introductory part of the paragraph to be referred to the Drafting Group.

91. *It was so agreed.*

92. The CHAIRMAN invited the Commission to consider subparagraph (a). If there were no objections he would take it that the Commission approved the text with the drafting change proposed by the United States of America.

93. *It was so agreed.*

94. *The Commission approved subparagraphs (b), (c), (d), (e) and (f) of paragraph (3).*

95. *It was agreed to refer paragraph (3) to the Drafting Group with the drafting changes suggested.*

96. The CHAIRMAN invited comments on paragraph (4).

97. Mr. RUSTAND (Observer for Sweden) drew attention to the proposal by the Government of Finland (A/CN.9/319/Add.3, page 4) to add the words "on the condition that at least one half of the members shall be present at the time of voting" at the end of the paragraph.

98. Mr. DJENA (Cameroon) said that he would find it difficult to accept an amendment to the paragraph. The practice in the United Nations system was for decisions to be taken by a two-thirds majority of members present and voting.

99. The CHAIRMAN asked whether, on the understanding that if a meeting were convened it should adopt its own rules of procedure, the Commission wished to keep the text as it stood.

100. *It was so agreed.*

101. *It was agreed to refer paragraph (4) to the Drafting Group.*

The meeting rose at 5.05 p.m.

Summary record of the 420th meeting

Monday, 29 May 1989, 9.30 a.m.

[A/CN.9/SR.420]

Chairman: Mr. RUZICKA (Czechoslovakia)

The meeting was called to order at 9.40 a.m.

Draft Convention on the Liability of Operators of Transport Terminals in International Trade (*continued*) (A/CN.9/298, A/CN.9/319 and Add.1-5, A/CN.9/321)

Article 17 (*continued*)

1. The CHAIRMAN invited the Commission to consider article 17, paragraph (5).

2. Mr. ENDERLEIN (Observer for the German Democratic Republic) said that the provision in paragraph (5) should come earlier in the article, possibly after paragraph (1) or paragraph (2).

3. The CHAIRMAN said that the point raised was a drafting matter which could be dealt with by the Drafting Group. In the absence of further comments, he took it that the Commission wished to refer paragraph (5) to the Drafting Group.

4. *It was so decided.*

5. The CHAIRMAN invited the Commission to consider paragraph (6).

6. Mr. ENDERLEIN (Observer for the German Democratic Republic) referred to his country's proposal relating to paragraph (6) in document A/CN.9/319/Add.3. The total period of three years that might have to elapse before an amendment of the limits of liability came into force was excessive. A further need to amend the limits might well arise during that three-year period. He pointed out that a number of other Conventions stipulated shorter periods.

7. Mr. OCHIAI (Japan) strongly supported the references to 18-month periods in the text under discussion. Those periods had been accepted by the Working Group on International Contract Practices as a reasonable compromise and they had also been approved at the International Maritime Organization's 1984 Diplomatic Conference. He pointed out, furthermore, that in the case of Japan an 18-month period was absolutely necessary, since any change in the limits of liability had, according to Japanese constitutional law, to be approved by the Diet. If the period were set at 12 months, his country might not be able to accept the draft Convention as a whole.

8. The CHAIRMAN, observing that there appeared to be no support for the proposal of the German Democratic Republic, took it that the Commission approved the text as it stood and wished to refer it to the Drafting Group.

9. *It was so decided.*

10. The CHAIRMAN invited the Commission to consider paragraphs (7), (8) and (9).

11. *Paragraphs (7), (8) and (9) of article 17 were approved.*

Final clauses

12. The CHAIRMAN invited the Commission to consider the draft final clauses for the draft Convention, which had been prepared by the Secretariat (A/CN.9/321).

13. Mr. SEKOLEC (International Trade Law Branch) said that the draft final clauses had been modelled closely on the final clauses of the Hamburg Rules and those of the 1980 United Nations Convention on Contracts for the International Sale of Goods.

Article A

14. *Article A was approved.*

Article B

15. The CHAIRMAN invited the Commission to consider paragraph (1).

16. Mr. SEKOLEC (International Trade Law Branch) said that the alternative wordings in square brackets in paragraph (1) of article B corresponded to the two alternative procedures for adoption of the draft Convention, the first through the United Nations General Assembly and the second through a diplomatic conference.

17. Mr. KATZ (International Trade Law Branch), referring to the choice of procedure, said that the final text approved by the Commission would be transmitted by it to the United Nations

General Assembly with a recommendation as to the manner in which it might be adopted. Under the first alternative, the final text would be referred to the Sixth Committee of the General Assembly, which would then transmit it to a plenary meeting of the General Assembly for adoption and opening for signature. The second alternative was for the Commission to transmit the draft Convention to the United Nations General Assembly with a recommendation that it convene a diplomatic conference to finalize the text and open it for signature.

18. The United Nations Office of Legal Affairs believed it would be advantageous, for financial reasons, to adopt the procedure of adoption by the General Assembly if the text to be transmitted was in a sufficiently final form as to need no further substantive discussion on any outstanding issues. However, if at the end of the present session, the Commission felt that there still remained substantive problems requiring further discussion, the procedure of adoption by a diplomatic conference might be more appropriate. As for the financial implications of a recommendation that a diplomatic conference be convened, it had been estimated that a three-week conference in Vienna in 1991 would cost just under \$1.4 million. On the other hand, most of the costs involved in the General Assembly procedure would be absorbed in the general overheads of the United Nations General Assembly.

19. The CHAIRMAN, replying to a request for clarification by Mr. BONELL (Italy), suggested that the Commission should endeavour to agree on recommending one of the two alternatives. However, he did not exclude that it might wish to defer its choice until later.

20. Mr. SAMI (Iraq) said that the choice of the procedure to be adopted was a very important matter. The draft Convention under consideration was particularly significant because it supplemented and added to other conventions. In the past, the Commission had agreed to recommend the adoption of certain draft conventions by the General Assembly, largely for financial reasons, even when many countries would have preferred the convening of a diplomatic conference. He hoped that such decisions would not set a precedent for all of UNCITRAL's work since, in the present case, the procedure of adoption by the General Assembly would not contribute to the promotion of uniformity of legal systems throughout the world. The holding of a diplomatic conference, on the other hand, would encourage wide acceptance of the Convention by States. From that standpoint it might even be dangerous to maintain that there was sufficiently full agreement for the text to be adopted by the General Assembly. He therefore considered that the Commission should recommend the convening of a diplomatic conference at which States Members of the United Nations, international organizations and transport interests would be able to finalize, adopt and open the Convention for signature. The cost of holding such a Conference could be covered by the adoption of a resolution by the General Assembly.

21. Mr. GRIFFITH (Observer for Australia) said that the Commission's choice of adoption procedure should be deferred until the Drafting Group had submitted its report.

22. Mr. BONELL (Italy) said that it was reasonable to assume that the text of the draft Convention to be considered in final reading would reflect the discussion that had taken place in the Commission; it was therefore not necessary to await that text. He felt that the Commission should at least give its preliminary views on the procedure to be adopted. For its part, his country strongly recommended that a diplomatic conference be convened. Although the draft text represented an impressive achievement in the important field of international transportation, it did not entirely satisfy all concerned. It would be

premature to submit it to the General Assembly for automatic approval, as the discussion in the Commission had shown the existence of certain issues which called for more reflection or even, possibly, a new round of negotiations. Economic interests were at stake and a compromise still had to be found between certain conflicting positions. A common understanding could be properly achieved only through negotiation at a diplomatic conference. He recognized the importance of the financial implications, but thought that, although a diplomatic conference might well cost \$1.4 million, the cost of the procedure of adoption by the General Assembly would not be negligible, as the Sixth Committee would need to take a substantive final look at the draft text. There would still be a considerable difference in cost but he felt that, after the years of hard work on the topic, it would be worth some sacrifice to obtain a satisfactory result.

23. Mr. SCHROCK (Federal Republic of Germany) referred to the statement his delegation had made at the 403rd meeting, and said that his country preferred the model law approach but would accept the convention approach.

24. His delegation wished to associate itself with the views just expressed by the representative of Italy. Further substantial discussion of the draft articles was necessary and a diplomatic conference was therefore the right forum for the adoption of the proposed Convention.

25. Mr. EYZAGUIRRE (Chile) said that, despite the financial implications mentioned, he favoured the convening of a diplomatic conference. He drew attention to the fact that in the case of the draft Convention on International Bills of Exchange and International Promissory Notes, considered by the Sixth Committee of the General Assembly, it had been necessary to appoint an expert group and even that body had been unable to consider all the aspects of that text in order to make it readily acceptable to States. The General Assembly approach had therefore incurred additional costs in that case and the holding of a diplomatic conference would have been preferable.

26. Mr. DJIENA (Cameroon) recalled the proposal which had been made to concentrate UNCITRAL activities at United Nations Headquarters, a potentially dangerous trend, in his view. He pointed out that the financial aspects of any recommendations made by the General Assembly's Sixth Committee would have to be examined by the Fifth Committee, which might counter them.

27. His delegation therefore favoured a diplomatic conference, which would permit the holding of further necessary negotiations.

28. Ms. FERNANDEZ (Argentina) also supported the holding of a diplomatic conference to permit further discussion of the draft Convention. However, having regard to the financial implications of that procedure, she wondered whether there might be a compromise solution, involving the combination of a diplomatic conference with a session of the Commission.

29. Mr. KATZ (International Trade Law Branch) said that a diplomatic conference might be arranged to coincide in time with a session of the Commission, but it would have to be held as a separate event, because it would be open to all States, not only those which were members of the Commission, and because a diplomatic conference had special procedures relating to credentials and voting.

30. The figure of just under \$1.4 million which he had mentioned included the cost of document reproduction, interpretation and meeting servicing and the preparation of summary

records. The costs incurred for those items would be additional to any costs normally incurred by the Commission at its session.

31. Mr. NESTEROV (Union of Soviet Socialist Republics) endorsed the views expressed by the representatives of Iraq and Italy and confirmed his delegation's support for the convening of a diplomatic conference.

32. Mr. CHAFIK (Egypt) said that his delegation's first preference was for a diplomatic conference, although it would not object to reference of the draft Convention to the Sixth Committee of the General Assembly.

33. In addition to the cost figure mentioned by the representative of the International Trade Law Branch, it was necessary to bear in mind also the cost to Governments of participation in a Conference. His own rough calculation indicated that participation by 100 States would involve an additional cost of some \$2 million for the Governments concerned.

34. Mr. POHUNEK (Czechoslovakia) expressed his delegation's support for the convening of a diplomatic conference, primarily to give the States which had not yet participated in the discussion an opportunity to play an active role.

35. In view of the very substantial financial implications, not only for the United Nations, but also for participating States, he wondered whether the Commission's report to the General Assembly should perhaps recommend reference of the draft Convention to the Sixth Committee, mention its recognition of budgetary considerations and leave to the General Assembly the final decision on the course to be followed.

36. Mr. CHAFIK (Egypt) supported the compromise solution suggested by the representative of Czechoslovakia.

37. Mr. ZUBEIDI (Libyan Arab Jamahiriya) said that his delegation favoured the holding of a diplomatic conference.

38. Mr. BERGSTEN (Secretary of the Commission) did not think it was appropriate to recommend alternative courses of action to the Sixth Committee. In making its recommendation, the Commission had to make certain assumptions concerning the condition of the text it submitted. The General Assembly could not consider adopting the text unless the Commission was confident regarding its suitability for adoption. Moreover, the General Assembly could not be expected to review matters of substance. It could only adopt the draft Convention or pass it on to another body, such as a diplomatic conference, for it to be put into final form. A danger inherent in a diplomatic conference was the possibility of last-minute negotiations with participants which had not previously been involved in the discussion and were unaware of its background. If the Commission were to recommend the convening of a diplomatic conference and the General Assembly considered that approach too expensive, or if the Commission were not satisfied that it was submitting a complete and final draft, then it was likely that the draft would be returned to the Commission for the preparation of a final version.

39. Ms. VERDON (Canada), supported by Mr. HASCHER (France), proposed that further discussion of the question should be postponed until the final clauses had been considered.

40. Mr. BONELL (Italy) thought, on the contrary, that the question should be resolved during the discussion of the final clauses. He had the impression that a majority of the members of the Commission favoured the convening of a diplomatic conference.

41. Mr. JOKO-SMART (Sierra Leone) endorsed the views expressed by the representative of Italy. His delegation had heard no convincing reason for postponing a decision on the question. He indicated his delegation's preference for the convening of a diplomatic conference.

42. The CHAIRMAN noted that a majority in the Commission appeared to favour recommending the convening of a diplomatic conference. He therefore took it that the Commission wished to adopt the second alternative wording in paragraph (1) of article B.

43. *It was so decided.*

44. *Article B, paragraph (1), as amended, was approved.*

45. The CHAIRMAN invited the Commission to consider paragraphs (2) to (4) of article B.

46. *Paragraphs (2) to (4) were approved.*

47. *Article B, as a whole, as amended, was approved.*

Article C

48. The CHAIRMAN invited the Commission to consider paragraphs (1) to (4) of article C.

49. *Paragraphs (1) to (4) of article C were approved.*

50. *Article C, as a whole, was approved.*

Article D

51. The CHAIRMAN drew attention to the footnotes relating to article D.

52. Mr. ABYANEH (Islamic Republic of Iran) said that, as his delegation had already announced, it wished to enter a reservation in respect of article 12, concerning the limitation period. Since his country had no limitation period rule it would be unable to become a party to a convention to which no reservation might be made.

53. Ms. van der HORST (Netherlands) drew attention to her Government's comments on the draft Convention contained in document A/CN.9/319/Add.3. Having regard to the great variety of national views and circumstance, the Netherlands considered that the draft Convention should include an article providing "Any State may declare at the time of signature, ratification, acceptance, approval or accession that it restricts the application of the rules of this Convention to certain types of terminal operators."

54. Mr. CHAFIK (Egypt) said that he appreciated the concern of the delegation of the Islamic Republic of Iran and would certainly not object to a reservation such as the one mentioned.

55. The CHAIRMAN asked whether it was the view of the Commission that article 12 could be the subject of a reservation. He recalled that a number of delegations had indicated their desire to leave open the possibility of entering a reservation at a later stage.

56. Mr. LARSEN (United States of America) said that he could not support that approach. Any possibility of entering reservations would run counter to the establishment of a viable instrument. In particular, it would be detrimental to the present

draft Convention to allow a State to restrict its application to certain types of terminal, such as maritime terminals.

57. Mr. BONELL (Italy) endorsed that view. Unfortunately for delegations favouring latitude in the application of the Convention rules, with whose difficulties he sympathized, but fortunately for the draft Convention itself, the majority of countries took a very serious view of reservations to international conventions, as involving considerable risks.

58. While he recognized the force of the argument that a price sometimes had to be paid to secure the agreement of certain States, he hoped that the final clauses of the present draft Convention would exclude all reservations whatsoever. If some account had to be taken of differences of position, that could be done later, within the framework of a diplomatic conference.

59. Mr. INGRAM (United Kingdom), supported by Mr. GOH (Singapore), said that one of the chief problems that arose in the United Kingdom, especially where commercial interests were concerned, was the great variety of those interests, which made it impossible to cover every eventuality. He hoped, therefore, that some reservation clause might be included in the draft Convention.

60. Mr. POHUNEK (Czechoslovakia) drew attention to article 29 of the Hamburg Rules, which expressly excluded the possibility of reservations. For the reasons stated by the representatives of the United States and Italy, he believed that reservations should also not be permitted in the present instance. A final decision on the matter could be taken at the proposed diplomatic conference.

61. Mr. SCHROCK (Federal Republic of Germany) concurred, adding that the diplomatic conference might arrive at results which would make any reservations unnecessary.

62. Ms. PIAGGI de VANOSSI (Argentina), Ms. VILUS (Yugoslavia), Mr. ABASCAL (Mexico) and Mr. JOKO-SMART (Sierra Leone) also agreed with the views expressed by the representatives of the United States of America and Italy.

63. Mr. SAMI (Iraq) said that he was strongly in favour of including an article on reservations in the draft Convention. The possibility of entering reservations, whether for political or for other reasons, would encourage a much greater number of States to become parties to the Convention.

64. Following a suggestion by Mr. CHAFIK (Egypt), the CHAIRMAN inquired whether it was the Commission's wish to leave article D as it appeared in document A/CN.9/321, with a note to the effect that the blank space in paragraph (1) would be filled in later in the light of the results of the diplomatic conference.

65. Mr. ABASCAL (Mexico), supported by Mr. AZZIMAN (Morocco) and Mr. DJIENA (Cameroon), objected to that approach and expressed a strong preference for including in the draft Convention a "no reservations" provision along the lines of article 29 of the Hamburg Rules.

66. Mr. BONELL (Italy), supported by Mr. EYZAGUIRRE (Chile), Mr. LARSEN (United States of America) and Mr. MOORE (Nigeria) endorsed that view but emphasized that the Commission's report should reflect the views expressed by some delegations in favour of permitting reservations to the Convention and should indicate that it had been agreed to defer the final decision on the matter until the future diplomatic conference.

67. Mr. DJIENA (Cameroon) remarked that the Commission's decision to recommend the holding of a diplomatic conference did not mean that the General Assembly would necessarily accept that recommendation. Instead, the draft Convention might well be referred back to the Commission. He did not think it necessary to state that the final decision had been deferred to a diplomatic conference.

68. Mr. ABYANEH (Islamic Republic of Iran) said that the absence of a reservations clause in the Hamburg Rules was one of the reasons why those Rules had not yet come into force after 11 years of existence. The internal laws of many States made it impossible for them to accept an international convention unless it contained such a clause. He urged the Commission to reconsider what appeared to be its position.

69. Mr. SAMI (Iraq) also favoured leaving the matter open pending the holding of the proposed diplomatic conference.

70. The CHAIRMAN, after calling for an informal show of hands, said that 20 delegations appeared to be in favour of including a provision along the lines of article 29 of the Hamburg Rules to the effect that reservations to the Convention were not permitted, while nine delegations were opposed. He accordingly suggested that the Drafting Group should be requested to draft such a provision for inclusion in the final clauses.

71. *It was so decided.*

Article E

72. *Article E was approved.*

The meeting rose at 12.25 p.m.

Summary record (partial)* of the 421st meeting

Monday, 29 May 1989, 2 p.m.

[A/CN.9/421]

Chairman: Mr. RUZICKA (Czechoslovakia)

The meeting was called to order at 2.10 p.m.

Draft Convention on the Liability of Operators of Transport Terminals in International Trade (*continued*) (A/CN.9/298, A/CN.9/319 and Add.1-5, A/CN.9/321)

1. Mr. BALLEEN (Andean Federation of International Transport Users' Councils), speaking on behalf of his Federation, which comprised the Councils of Bolivia, Colombia, Ecuador, Peru and Venezuela, commended the Secretariat for its efforts to promote the progressive harmonization and unification of international trade law and to remove obstacles to international trade.

2. In the case of intermodal transport, there was a clear lack of legal regulations covering the interval when goods were transferred from one means of transport to another, which was when the wastage, losses, damage, thefts and delays occurred which hampered the development of national production and trade.

3. With reference to the draft Convention under consideration, he stressed the need for an instrument that would harmonize and unify regulations covering the various activities involved in international transport, so that exporters and importers could obtain cargo insurance on more favourable terms and so that insurers could more readily identify those responsible for carriage and for the operation of terminals, in the event of claims on behalf of the owner of cargo. In that connection, he mentioned a case in Ecuador where, although cargo had been insured against damage to a value of \$US 19 million, only five per cent of that amount had been recovered—less than \$US 1 million—since the carriers had proved in court that most of the damage had occurred when the goods were not under their control.

4. He commended the Working Group on International Contract Practices for its work of preparation of the draft Convention and the Commission for having agreed upon an instrument not subject to reservations. He also asked the Commission to

help, together with the Commission of the Cartagena Agreement, in promoting implementation of the various trade law conventions in the Andean countries.

Final clauses (continued)

Article F

5. The CHAIRMAN invited the Commission to consider paragraph (1).

6. Mr. INGRAM (United Kingdom), supported by Mr. SCHROCK (Federal Republic of Germany) and Mr. OCHIAI (Japan), said that an ordinal number considerably higher than the one which appeared in square brackets in the third line of paragraph (1) should be agreed upon. The Commission was engaged in drafting a convention designed to fill certain gaps in the chain of international carriage of goods and, in particular, was supplementing the Hamburg Rules. Since the draft Convention was intended to be global, he considered that the number of ratifications required should be in line with that specified in the Hamburg Rules or perhaps in the Multimodal Convention.

7. Mr. EYZAGUIRRE (Chile) supported the number proposed by the Working Group. A larger number would not be helpful since very few of the last conventions adopted had come into force in the past 15 years and, in the case of the Hamburg Rules, only 14 of the 20 ratifications required for its entry into force had been deposited. He would like to know what alternative number the United Kingdom representative had had in mind.

8. Mr. HASCHER (France) also considered five ratifications a somewhat unrealistic number. It was not in keeping with the main purpose of the Convention which was the unification of law governing liability of operators of transport terminals, which could not be achieved until many more countries had adopted the provisions of the Convention. Moreover, he did not see how

*No summary record was prepared for the meeting after 3.40 p.m.

it would be possible to convene the diplomatic conference called for at the preceding meeting, attended by more than 100 States, on the basis of a draft convention which required only five ratifications for its entry into force. He proposed that the number should be increased to 15.

9. Mr. YUAN Zhenmin (China) asked if the Secretariat could explain why such a low number as five had been proposed, when 20 ratifications had been required for the entry into force of the Hamburg Rules.

10. Mr. KATZ (International Trade Law Branch) explained that the word "five" in square brackets was merely a suggestion, made in the belief that the present draft Convention, although factually linked with the Hamburg Rules would nevertheless be an independent instrument not necessarily having juridical links with the Hamburg Rules. The number in square brackets was simply an indication that the Commission would have to deal with the question of the number of ratifications needed for the Convention's entry into force.

11. Mr. BERGSTEN (Secretary of the Commission) said that in the Secretariat's view there was merit in not requiring a large number of ratifications. One of the most successful international trade law conventions, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which more than 80 States were now parties, had come into force 90 days after the third ratification. None of the trade law conventions so far had achieved 20 ratifications. States tended to be reluctant to take the initiative of ratifying when they realized that they would have to await a large number of other ratifications before their own action would have any significance for them. Consequently, if the Commission wished the Convention to be a significant factor in international trade law it would be better to specify a smaller number than a larger number in paragraph (1). Whatever the number agreed upon, however, it was unlikely that the States which became parties to the proposed Convention would be the same as those which were parties to the Hamburg Rules. While the present draft text was certainly associated with the Hamburg Rules from the standpoint of drafting and legal meaning, it could not be tied to those Rules as far as its entry into force was concerned.

12. Mr. ENDERLEIN (Observer for the German Democratic Republic) agreed with the Secretary of the Commission that it was easier for some countries to accede to a convention that was in force than to one that was not yet in force. It was essential to facilitate rather than delay entry into force and he therefore supported a requirement for five or even fewer ratifications. In that connection he mentioned two conventions adopted in 1988 which required only three ratifications for their entry into force. He noted from the discussion that countries which favoured a model law tended to favour specifying a large number of ratifications. It was up to the countries which favoured harmonization and unification of law, and really desired a convention that would enter into force soon, to secure agreement on a low ratification requirement.

13. Mr. SAMI (Iraq) agreed with the remarks of the Secretary of the Commission. No one wished the proposed Convention to have the same fate as the Hamburg Rules which, 10 years after their adoption had still not come into force. In order to accommodate those delegations which considered five ratifications too low a number, he was prepared to accept 10, but that should be the ceiling.

14. Mr. GOH (Singapore) supported the previous speaker. In his opinion, five was too low a number and he was in favour of 10.

15. Mr. BONELL (Italy) said that the point under discussion had nothing to do with substantive law, procedural law or anything that might be thought to affect existing laws. The Commission was simply considering when it wished the proposed Convention to enter into force: sooner, later or never. He could well imagine that some delegations had little sympathy for the draft Convention and were not disposed to recommend acceptance of the instrument by their country: they were satisfied with the existing situation. He fully respected the position of those delegations. However, he felt that they should not press what was seemingly only a technical matter, as if it were but a number game, when everyone knew that the decision to be taken was vital for the fate of the draft Convention. His delegation supported the maintenance of the word "fifth" in the third line of paragraph (1).

16. Mr. ABYANEH (Islamic Republic of Iran) said he doubted that 10 or 20 of the 36 countries represented in the Commission were ready to become parties to the Convention. The Convention was international, not regional, and should therefore be such as to attract as many countries as possible. In his view the number of ratifications required should be increased to 10 or 15.

17. Mr. ABASCAL (Mexico) supported the number "five" for the reasons already given during the discussion. Ten ratifications was too high a requirement and would delay the entry into force of a satisfactory Convention. He shared the view that there was no essential link between the draft Convention and the Hamburg Rules.

18. Ms. PERT (Observer for Australia) supported the remarks of the Italian representative. It was important for those who favoured the draft Convention for the instrument to come into force sooner rather than later. She was therefore in favour of a requirement not exceeding five ratifications.

19. Mr. LARSEN (United States of America) said that his delegation was in favour of the Convention's entry into force sooner rather than later and would support replacement of the word "fifth" by the word "tenth" in paragraph (1).

20. Mr. YUAN Zhenmin (China) agreed with the representative of Iraq and supported a requirement for 10 ratifications. He considered five ratifications too low a number but would not object to it if it was supported by the majority.

21. Mr. SCHROCK (Federal Republic of Germany) associated himself with the position expressed by the representative of Iraq. Ten ratifications was a realistic compromise.

22. Mr. POHUNEK (Czechoslovakia) supported a requirement for five ratifications. It was important for the Convention to come into force as soon as possible, particularly in the light of the Commission's proposal that a diplomatic conference be convened.

23. Ms. VERDON (Canada) associated herself with those representatives who were in favour of maintaining the number "fifth" in paragraph (1). That was a compromise in the light of the precedent set by the two Ottawa Conventions which had called for three ratifications.

24. Mr. ZUBEIDI (Libyan Arab Jamahiriya) said that his delegation wished the draft Convention to enter into force as soon as possible. Having regard to the fact that the Hamburg Rules were still not in force after 10 years, he considered that the number of ratifications required should be five.

25. Mr. NESTEROV (Union of Soviet Socialist Republics) said that he agreed entirely with the convincing arguments of the

Secretary. His delegation was in favour of using the word "fifth" in paragraph (1).

26. Ms. PIAGGI de VANOSI (Argentina) said that the proposal that the draft Convention should come into force after five States had ratified it was a practical one.

27. Mr. TARKO (Observer for Austria) said he agreed with the proposal that five ratifications should be required. The number required should certainly not be higher than 10.

28. Mr. BALLE (Andean Federation of International Transport Users' Councils) said that he shared the view that the present draft Convention was independent of the Hamburg Rules. It was important that the instrument should come into force as soon as possible in order to assist those, both importers and exporters, who were involved in international trade. He therefore supported the proposal that the draft Convention should come into force after the fifth instrument of ratification had been deposited.

29. The CHAIRMAN said he concluded from the discussion that the majority of the Commission were in favour of the Convention entering into force on the first day of the month following the expiration of one year from the date of deposit of the fifth instrument of ratification, acceptance, approval or accession. In the absence of objection, he would take it that the Commission wished to refer article F, paragraph (1) to the Drafting Group on that understanding.

30. *It was so decided.*

31. The CHAIRMAN invited the Commission to consider paragraph (2).

32. *Paragraph (2) was approved.*

33. The CHAIRMAN invited the Commission to consider paragraph (3).

34. Mr. CHAFIK (Egypt) asked whether the term "State Party" should not be used instead of "Contracting State" in paragraph (3).

35. The CHAIRMAN said that that question would be dealt with in the Drafting Group.

36. Mr. AZZIMAN (Morocco) suggested that, for greater clarity, the word "international" should be inserted before the words "transport-related services" in paragraph (3).

37. The CHAIRMAN observed that articles 1 and 2 made it quite clear that the goods in relation to which services were performed were those involved in international carriage.

38. *Paragraph (3) was approved.*

39. *Article F, as a whole, was approved.*

Article G

40. The CHAIRMAN invited the Commission to consider paragraph (1).

41. Mr. ABYANEH (Islamic Republic of Iran) requested clarification of two points. Firstly, when could a request for a conference to revise or amend the Convention be made, before the Convention had entered into force or subsequently? Secondly, could such a conference be convened during the period after

the deposit of the fifth instrument of ratification but prior to the actual entry into force of the Convention?

42. Mr. KATZ (International Trade Law Branch) said that the intention underlying article G was that the Convention should be in force before a conference could be requested. A similar consideration applied to the second question of the representative of the Islamic Republic of Iran, since the Convention came into force only after the prescribed period had elapsed following the deposit of the fifth instrument of ratification.

43. Mr. DJIENA (Cameroon) welcomed the explanation given by the representative of the International Trade Law Branch.

44. Ms. FERNANDEZ (Argentina) asked whether the principle approved in connection with article 17, namely that only States parties could request the convening of a meeting of a committee to consider increasing or decreasing liability limit amounts but that the committee should be composed of representatives of contracting States, applied with respect to the Conference referred to in article G. In her view it should so apply.

45. Mr. EYZAGUIRRE (Chile) considered that the words "Contracting States" in the first line of paragraph (1) should be replaced by the words "States Parties".

46. Mr. HASCHER (France) said that the use in the first line of the words "States Parties" would solve the timing problem, since there could be States parties only to a Convention already in force.

47. Mr. LARSEN (United States of America) said that he agreed with the representative of Argentina that article G should be consistent with article 17, which had already been approved.

48. Mr. MOURA-RAMOS (Observer for Portugal) supported the remarks of the United States representative.

49. Mr. DJIENA (Cameroon) agreed with the representative of France that the use of the words "States Parties" in the first line clarified the situation. However, he did not regard revision of the limits of liability in the same light as revision of the Convention itself. Article G did not have to follow the principles adopted for article 17.

50. Mr. PELLICHET (Hague Conference on Private International Law) said that the Vienna Convention on the Law of Treaties envisaged the participation of contracting States in the revision or amendment of a convention. It would therefore be permissible and appropriate to use the words "States Parties" in the first line of paragraph (1) and "Contracting States" in the third line, following the principle already approved in the case of article 17.

51. Mr. TARKO (Observer for Austria) agreed that, as with article 17, only States parties could convene a conference to revise or amend the Convention but contracting States had the right to participate in such a conference.

52. Mr. TEPAVITCHAROV (Bulgaria) agreed that article G should follow the principles approved in the case of article 17. However there was a possible alternative, the deletion of the words "of the Contracting States" in the third line of paragraph (1). Then, the Convention being in force, the States parties requesting the conference could decide what States should participate in it.

53. Mr. AZZIMAN (Morocco), Mr. ABASCAL (Mexico) and Mr. CHAFIK (Egypt) took the view expressed by the representative of Argentina.

54. Mr. SCHROCK (Federal Republic of Germany) also supported the proposal of the representative of Argentina to align article G with article 17. He had no strong feelings concerning the proposal of the representative of Bulgaria to delete the words "of the Contracting States" in the third line of paragraph (1), but he knew of no precedent for the wording which would result.

55. Mr. DJENA (Cameroon) said he had no objection to aligning article G with article 17. He wished only to insist on acceptance of the definitions of "State Party" and "Contracting State" contained in the Vienna Convention on the Law of Treaties.

56. Mr. CHAFIK (Egypt) said he understood it had been agreed that the need for conformity with the Vienna Convention on the Law of Treaties would be reflected in the report of the Commission.

57. The CHAIRMAN said it was his understanding that the majority of the Commission wished to align paragraph (1) of article G with article 17 as far as the right to convene a conference to revise or amend the Convention and the right to participate in such a conference were concerned. In the absence of objection he took it that the Commission wished to refer paragraph (1) to the Drafting Group on that understanding.

58. *It was so agreed.*

59. The CHAIRMAN invited the Commission to consider paragraph (2).

60. *Paragraph (2) was approved.*

61. *Article G, as amended, was approved.*

Article H

62. The CHAIRMAN, referring to the note in square brackets under article H, recalled that the question of the appropriate place in the draft Convention for the existing text of article 17 had been considered during the discussion of that article. He proposed that the question of the location of that text should be referred to the Drafting Group.

63. *It was so decided.*

Article I

64. Mr. SCHROCK (Federal Republic of Germany) said he wondered whether the words "Contracting State" in

paragraph (1) should be replaced by "State Party" and whether that point was one of substance.

65. The CHAIRMAN said that, in his view, that was a drafting point. Only a State party to the Convention would be in a position to denounce it.

66. *Article I was approved.*

Article 6 (continued)

67. The CHAIRMAN invited the Commission, having regard to its decision that the draft Convention should be referred to a diplomatic conference, to consider whether the square brackets enclosing the figures in paragraph (1) of article 6 should be deleted.

68. Mr. CHAFIK (Egypt), supported by Mr. LARSEN (United States of America), Mr. NESTEROV (Union of Soviet Socialist Republics) and Mr. ABYANEH (Islamic Republic of Iran), said that the numbers of units of account specified in the paragraph should be left in square brackets. It was preferable that the actual amounts of the limits of liability should be discussed by the largest possible number of States, as would be the case at the proposed diplomatic conference. There was no need to consider the numbers in question at present.

69. The CHAIRMAN said he took it that the Commission wished to maintain the square brackets in paragraph (1) of article 6.

70. *It was so decided.*

Title of the draft Convention

71. Mr. ENDERLEIN (Observer for the German Democratic Republic) recalled that the suggestion had been made that the word "trade" in the title of the draft Convention should perhaps be replaced by the words "carriage of goods". He felt that the Drafting Group should consider that question.

72. The CHAIRMAN said that the Drafting Group had received instructions to consider the question. It was his understanding, however, that there had been no specific proposal to alter the title of the draft Convention.

73. He declared the Commission's consideration of the draft Convention in first reading concluded.

The discussion covered in the summary record ended at 3.40 p.m.

Summary record of the 424th* meeting

Wednesday, 31 May 1989, 9.30 a.m.

[A/CN.9/SR.424]

Chairman: Mr. RUZICKA (Czechoslovakia)

The meeting was called to order at 9.35 a.m.

Draft Convention on the Liability of Operators of Transport Terminals in International Trade (continued)
(A/CN.9/298; A/CN.9/XXII/CRP.7, A/CN.9/XXII/CRP.7/Rev.1 and A/CN.9/XXII/CRP.7/Add.1)

Report of the Drafting Group

1. Mr. KATZ (International Trade Law Branch), introducing the report of the Drafting Group, said that the part of the report relating to articles 1 to 10 of the draft Convention appeared, in the English version, in document A/CN.9/XXII/CRP.7. In the Arabic, Chinese, French, Russian and Spanish versions that part of the report appeared in document A/CN.9/XXII/CRP.7/Rev.1. The part of the report relating to articles 11 to 25 appeared, in all six language versions, in document A/CN.9/XXII/CRP.7/Add.1.

2. The Drafting Group, in carrying out its mandate, had reviewed the text of the draft Convention in the light of the Commission's instructions and the report now submitted was the result of that work.

3. The CHAIRMAN invited the Commission to consider the report of the Drafting Group.

Title

4. Mr. YUAN Zhenmin (China) recalled his Government's suggestion (A/CN.9/XXII/CRP.3, page 1) for amendment of the title of the draft Convention, and the observations made in that connection by the representative of the United States of America and the observer for the German Democratic Republic.

5. His delegation took the view that international trade, a concept which also embraced payments and insurance, was too broad in scope to be referred to in the title of the present draft Convention. He pointed out that universal liability would attach to a terminal operator whether the goods he took in charge were involved in trade or not. Consignments which had nothing to do with trade included such items as donations, exhibits, aid programme supplies and relief cargoes in national disasters. An operator should not be faced with a decision as to whether or not a cargo should be designated "trade".

6. China would not press at present its suggestion that the word "trade" should be replaced by the words "transportation of goods" but would revert to the matter later. He requested that his delegation's position be reflected in the Commission's report.

7. The CHAIRMAN said that that would be done.

8. *The title was adopted.*

Article 1

9. Mr. KATZ (International Trade Law Branch) said that the proposal of the Netherlands to insert in paragraph (d) a reference to "physical handling of goods" had been considered by the Drafting Group, which had concluded that the itemized formulation in that paragraph sufficiently reflected the notion of physical transport-related services, as intended by the Commission, and that no addition was needed.

10. *Article 1 was adopted*

Article 2

11. Mr. SCHROCK (Federal Republic of Germany) noted an apparent discrepancy between the English and French versions of paragraph (1)(a). The French version included a reference to "territory" which did not appear in the English version.

12. Mr. OCHIAI (Japan), supported by Mr. BONELL (Italy), requested that an indication be given of the modifications of the text in document A/CN.9/298 that had been introduced by the Drafting Group.

13. Mr. KATZ (International Trade Law Branch) said that the words "contracting State" in subparagraph (a) had been replaced by "State Party" in accordance with the Commission's decision. Subparagraph (b) was a new subparagraph and the original subparagraph (b) had become subparagraph (c).

14. Mr. GOH (Singapore) asked whether the Drafting Group had considered the possibility of including in the draft Convention a definition of "State Party".

15. The CHAIRMAN recalled that the Commission had discussed that question but had taken no decision to include such a definition in the text.

16. *Article 2 was adopted.*

Article 3

17. Mr. KATZ (International Trade Law Branch) said that the words "made them available" had been replaced by "placed them at the disposal of", a change requested by the Commission.

18. *Article 3 was adopted.*

Article 4

19. Mr. KATZ (International Trade Law Branch) recalled that there had been certain differences of opinion in the Commission regarding the approach to be adopted in the formulation of article 4, paragraph (1). The Chairman had convened a working party to consider the question and the working party had arrived at a solution consisting in the adoption by the Commission of

*No summary records were prepared for the 422nd and 423rd meetings.

the text as prepared by the Drafting Group together with the following understanding:

"The understanding of the Commission was that, if the document referred to in paragraph (1)(a) contained additional information, such as the condition and quantity of the goods, the legal effect of the operator's signature of such a document would be settled by the applicable provisions of national law. In addition, the legal effect of the issuance of a document referred to in paragraph (1)(b) would be settled by the applicable provisions of national law."

20. The major difference of opinion had centred on the effect of the operator's signature referred to in paragraph (1)(a). One view taken had been that such signature should be regarded as nothing more than a receipt. Others, however, had felt that the signature carried with it some legal consequences, such that, if the document indicated the condition or quantity of the goods, the operator, by signing the document, would be accepting those indications.

21. The Commission had given no ruling as to the implications for the operator of his signing the document, nor as to the type of legal consequences that would flow from such signature, beyond indicating that the consequences would be determined by national law. That had seemed a reasonable approach.

22. He pointed out that although paragraph (1) as submitted by the Drafting Group meant that signature of the document by the operator carried no implication as to the condition or quantity of the goods, the document itself could include such indications, as in the case of a bill of lading, on which a carrier might enter particulars of the condition or quantity of the goods.

23. Mr. BONELL (Italy) commended the Drafting Group and the working party for their efforts but said that his delegation was unable fully to support either the substance or the form of the provision now submitted. He wished it to be placed on record that his delegation still had some difficulty with the text of article 4, paragraph (1). The provision in question was one which might well be discussed further within the framework of a diplomatic conference.

24. Mr. TARKO (Observer for Austria) said that the wording submitted by the Drafting Group reflected the outcome of the discussion in the Commission. Nevertheless, paragraph (1)(a) and paragraph (2) did not, in his delegation's view, constitute an appropriate solution to the problem. In its anxiety not to overburden the operator, he thought that the Commission had perhaps gone too far in the opposite direction. He wondered what the consequence would be, for example, if an operator omitted to sign the document referred to.

25. The CHAIRMAN said that the statements of the representative of Italy and the observer for Austria would be reflected in the Commission's report.

26. Mr. BERGSTEN (Secretary of the Commission) said that there clearly was not time for the Commission to reconsider questions of substance. However, it could certainly still consider drafting points where they seemed to give rise to legal problems.

27. Mr. LARSEN (United States of America) said that the Drafting Group had devoted much effort to achieving agreement on the text of article 4, which had presented particular difficulties. He appealed to all delegations to accept the Drafting Group's text.

28. Mr. CHAFIK (Egypt) said that, although he had been a member of the Drafting Group, he could not agree to the wording proposed for paragraph (1)(a) of article 4. He wished to

associate himself with the remarks of the representative of Italy and the observer for Austria.

29. Ms. KLEIS (Denmark) also associated herself with those remarks. The text proposed by the Drafting Group was not satisfactory in the opinion of her delegation.

30. Mr. TARKO (Observer for Austria) suggested that the problem under discussion might perhaps be solved by reintroducing in subparagraph (1)(a) the words "and stating their condition and quantity", which had been deleted, and adding, in square brackets, after those words, the phrase "in so far as they can be ascertained by reasonable checking".

31. Ms. SASEGBON (Nigeria) said that the simplest solution might be to eliminate subparagraph (1)(a).

32. Mr. ENDERLEIN (Observer for the German Democratic Republic) said that he was strongly opposed to further discussion of points of substance. The only issue at present before the Commission was the approval of the report of the Drafting Group. The text as it now stood was perhaps not perfect, but he regarded it as satisfactory. Any dissenting views would be reflected in the summary records of the session and in the Commission's report.

33. Mr. POHUNEK (Czechoslovakia) agreed with the previous speaker. He did not favour submitting to the General Assembly a draft article containing phrases in square brackets.

34. Mr. AZZIMAN (Morocco) and Mr. YUAN Zhenmin (China) also supported the remarks of the observer for the German Democratic Republic.

35. Mr. BONELL (Italy) said that he had not wished to imply any criticism of the work done by the Drafting Group. He desired only that the Commission's report should reflect the fact that some delegations were not entirely satisfied with the proposed solution.

36. The CHAIRMAN suggested that the Commission might wish to adopt paragraph (1) of article 4 on that understanding.

37. *It was so decided.*

38. *Paragraphs (2) and (3) were adopted.*

39. Mr. KATZ (International Trade Law Branch) said that the Drafting Group had made the following changes in the text of paragraph (4) contained in the Working Group's report: first, the words "referred to in" had been substituted in the first line for the word "under"; second, the comma between the words "printed" and "in facsimile" in the second line had been deleted; and, third, the words "if not inconsistent with the law of the country where the document is signed" had been added at the end of the paragraph, thus bringing it into line with the text of the corresponding provision of the Hamburg Rules. The Drafting Group had, in accordance with the Commission's instructions, considered whether the language of the paragraph should be based on that of the Hamburg Rules or on that of the United Nations Convention on International Bills of Exchange and International Promissory Notes and had reached the conclusion that, in the present context, the former solution would be more appropriate.

40. Mr. ABASCAL (Mexico) said that, as a member of the Drafting Group, he had accepted that conclusion. Upon reflection, however, he still wondered whether adoption of the language of the 1978 Hamburg Rules would not in fact be a backward step. The Convention on International Bills of Exchange

and International Promissory Notes was a more recent instrument and represented an advance in both international and domestic trade practice. He requested that the text of article 5(k) of that Convention be read out to the Commission so that it might choose between the two options.

41. Mr. KATZ (International Trade Law Branch) said that the text which had been referred to read as follows: "Signature means a handwritten signature, its facsimile or an equivalent authentication effected by any other means".

42. Mr. BONELL (Italy) said that, like the representative of Mexico, he had some difficulty with the text proposed by the Drafting Group and felt that, subject to drafting considerations, the alternative solution might be more appropriate. He would be satisfied if that comment of his delegation was reflected in the record of the meeting.

43. Mr. EYZAGUIRRE (Chile) pointed out that in the Spanish version of paragraph (4) the words "*al que*" in the first line should be replaced by "*a que*".

44. *Paragraph (4) was adopted.*

45. *Article 4, as a whole, was adopted.*

Article 5

46. Mr. KATZ (International Trade Law Branch) said that the Drafting Group had not modified paragraphs (1) and (2).

47. *Paragraphs (1) and (2) were adopted.*

48. Mr. KATZ (International Trade Law Branch) said that, in paragraph (3), the Commission had requested the Drafting Group to replace the words "make them available to" by "place them at the disposal of". The Drafting Group had also deleted, in the English version, the comma after the words "take delivery of them".

49. Mr. GOH (Singapore) suggested that, in the English version, the word "to" should be inserted after the word "over" in the second line.

50. The CHAIRMAN said he took it that there was no objection to that drafting change.

51. *It was so agreed.*

52. *Paragraph (3), as amended in the English version only, was adopted.*

53. Mr. KATZ (International Trade Law Branch) said that several changes had been made in paragraph (4): the words "make them available to" had been replaced by "place them at the disposal of" and, for consistency and to avoid unintended interpretations, the word "expressly", used in paragraph (3), had been added before the words "agreed upon" in the English version of paragraph (4). At the end of the paragraph, to meet the Commission's wish that the person by whom the goods could be treated as lost should be specified, the Drafting Group had altered the wording to "a person entitled to make a claim for the loss of the goods may treat them as lost".

54. Mr. GOH (Singapore) said that the word "to" should be inserted after "goods" in the first line of the English version.

55. The CHAIRMAN said he took it that there was no objection to that drafting change.

56. *It was so agreed.*

57. *Paragraph (4), as amended in the English version only, was adopted.*

58. *Article 5, as amended in the English version only, was adopted.*

Article 6

59. Mr. KATZ (International Trade Law Branch), referring to paragraph (1), said that the Commission, deeming it necessary to clarify the conditions under which the carriage of goods by sea or by inland waterways would give rise to the lower limits of liability, had adopted the principle that, for that to occur, such carriage should take place either immediately before or immediately after the goods were in the hands of the terminal operator. That decision had been implemented by the use in subparagraph (1)(b) of the phrase "however, if the goods . . . for such carriage". In order to make clear that a possible intervening event between the carriage of the goods to the terminal and their being taken in charge by the operator (for example, the loading or unloading of a ship by independent stevedores) should not prevent application of the lower limits of liability, the Drafting Group had considered it appropriate to add the final sentence of subparagraph (b). In making those changes, the Drafting Group had also decided to restructure paragraph (1) in the interest of greater clarity.

60. Mr. BONELL (Italy) expressed his satisfaction with the new structure of paragraph (1) but felt—although he did not wish to press the point—that some change in substance had been introduced. The new text appeared to reflect only partially the views of the Commission. His delegation, for example, had suggested that any change should focus on the possibility of providing objective criteria to help the operator recognize when there had been or would be carriage by sea or inland waterways. In his opinion, the text of the paragraph was now unduly complicated.

61. *Paragraph (1) was adopted.*

62. Mr. KATZ (International Trade Law Branch) said that the Drafting Group had made no changes in paragraphs (2) to (4) of article 6.

63. *Paragraphs (2) to (4) were adopted.*

64. *Article 6, as a whole, was adopted.*

Article 7

65. Mr. KATZ (International Trade Law Branch) said that the Drafting Group had not modified the English language version of article 7. However, in regard to the heading of the article, it had sought to ensure that the other language versions corresponded with the English text. The Drafting Group had also been asked to ensure that the word "otherwise" used in the English version of paragraph (1) was accurately reflected in the other language versions. That had been done.

66. Mr. BONELL (Italy) recognized that there had been difficulty in aligning the various language versions of article 7, particularly in the case of the article's heading. He failed to understand the reason for the different wording adopted for the heading in the French version.

67. Mr. KATZ (International Trade Law Branch) said that the question had been discussed at some length among French-speaking delegations and the language services.

68. Mr. MORAN (Spain) said that the basic text considered had been the English version. He suggested that any question concerning the drafting of the other language versions should be addressed to the corresponding members of the Drafting Group.

69. The CHAIRMAN observed that the text had to be adopted in all language versions. Any discrepancies must be corrected. If it proved impossible to resolve certain problems of that nature, the Commission would have to take note of the situation and state in its report that the different language versions needed to be aligned.

70. Mr. HASCHER (France) said that the present wording of the heading of article 7 corresponded exactly to the wishes of the French-speaking delegations and to the content of article 7. He understood that the representatives of both Cameroon and Morocco took the same view.

71. Mr. BONELL (Italy) said that there was a clear difference in substance between the English and French headings of the article. The new French heading might be the one preferred by the French-speaking delegations but the decision of the Commission had been to align the other language versions on the English version. The former French heading should therefore be reinstated.

72. Mr. PELICHET (Hague Conference on Private International Law) agreed with the representative of Italy. The term "*recours en responsabilité*" did not correspond to the English heading. A French formula would have to be found that corresponded more closely to the English heading and the substance of article 7.

73. Mr. AZZIMAN (Morocco) said that the difficulty was in adapting the heading to the contents of the article. The English heading's reference to non-contractual claims appeared to be in contradiction with paragraphs (1) and (2), which did not rule out the possibility of an action founded in contract. The heading used in the French version of document A/CN.9/XXII/CRP.7/Rev.1 was general in character and was the result of an effort to achieve as close a correspondence as possible between the heading of the article and its contents.

74. Mr. HASCHER (France) expressing his agreement with the representative of Morocco. He maintained that the heading of article 7 submitted by the Drafting Group reflected the views of the Commission.

75. The CHAIRMAN noted that there appeared to be no objection to the English version of the heading.

76. Mr. BONELL (Italy) acknowledged that certain delegations had expressed reservations regarding the appropriateness of the heading. However, he considered that the French-speaking delegations were not entitled to choose a title of their own. He urged that the majority view be accepted and requested observance of the normal procedures for dealing with international texts in several languages.

77. Mr. AZZIMAN (Morocco) pointed out that the corresponding article in the Hamburg Rules also had a different heading in the French version, namely "*Recours judiciaires*". The problem was to decide how to designate the same reality: whether to opt for a formal linguistic correspondence or to base the alignment on the actual content of the article in question.

78. Mr. OCHIAI (Japan) said that, on the basis of the Commission's decision, as reflected in the draft report of the session (A/CN.9/XXII/CRP.1/Add.8, paragraph 3), he supported the views expressed by the representative of Italy.

79. Mr. CHAFIK (Egypt) suggested that paragraph (1) of article 7 should be given the following wording to harmonize it with the heading of the article:

"The defences and limits of liability provided for in this Convention apply in any action founded in contract or in tort against the operator in respect of loss or of damage to the goods, as well as delay in handing over the goods".

80. The CHAIRMAN suggested that further discussion of the heading of article 7 should be postponed. He invited comments on paragraphs (1) to (3) of article 7.

81. *Paragraphs (1) to (3) were adopted.*

82. *Article 7, excluding its heading, was adopted.*

Article 8

83. Mr. KATZ (International Trade Law Branch) said that the only change made had been the replacement of the word "limit" by "limitation" in paragraphs (1) and (2) in order to align the wording with that of the Hamburg Rules.

84. Mr. TANASESCU (Observer for Romania) suggested that the heading of the article should perhaps be "Loss of right to limited liability".

85. Mr. AZZIMAN (Morocco) said that, in his delegation's view, it might perhaps be inadvisable to refer in the heading to a right to limit liability, because the limits of liability in question were the result of an objective provision and not of the discretion of the operator. It was true that the limits could be exceeded by agreement between the parties or in the case of a deliberate mistake, but in both instances that was outside the will of the operator.

86. When the Commission had discussed article 8, his delegation had proposed a more objective heading that made no reference to a non-existent right of the operator to limit liability. That proposal had been supported by a number of delegations and had been referred to the Drafting Group.

87. Mr. BONELL (Italy) associated himself with the views expressed by the representative of Morocco.

88. *Paragraphs (1) and (2) were adopted.*

89. *Article 8, as a whole, was adopted.*

Article 9

90. Mr. KATZ (International Trade Law Branch) said that, pursuant to a decision of the Commission, the words "applicable in the country where the goods are handed over" had been included in the introductory paragraph of the article.

91. In paragraph (a), the word "lawful" had been inserted before the word "means" to indicate that only legitimate means could be employed to destroy the goods, render them innocuous or dispose of them.

92. The beginning of paragraph (b) had been slightly re-drafted to read "To receive reimbursement for all costs incurred by him in taking the measures . . ." To reflect the Commission's decision to specify who was the person obligated under the paragraph to reimburse the operator, the phrase "from the person who failed to meet any obligation under such applicable law or regulation to inform him of the dangerous character of the goods" had been added at the end of the paragraph.

93. Mr. BONELL (Italy) said that he failed to understand the reference in paragraph (b) to "such applicable law". Furthermore, paragraph (b) was the first provision to mention an obligation to inform and, what was more, only to the extent prescribed by the applicable law. That was a considerable innovation and it had not been his impression that the Commission as a whole had wished to go so far.

94. Ms. PERT (Observer for Australia), referring to paragraph (a), suggested that the word "lawful" should be deleted where it appeared at present and that the paragraph should begin with the words "To take any lawful precautions . . .".

95. Mr. LARSEN (United States of America) thought that the wording suggested by the observer for Australia might imply that disposal could be carried out by unlawful means. As a compromise, he suggested that the word "lawful" should be maintained in the third line of paragraph (a) and also inserted before the word "precautions" at the beginning of the paragraph.

96. Mr. GRIFFITH (Observer for Australia) saw no need to use the word "lawful" twice in the paragraph.

97. Mr. TARKO (Observer for Austria) supported the amendment suggested by the observer for Australia.

98. Mr. HASCHER (France) proposed that the word "endommagement" used in the French version of paragraph (a) should be replaced by "détérioration".

99. Mr. LARSEN (United States of America) said that he could accept the amendment suggested by the observer for Australia.

100. Mr. EYZAGUIRRE (Chile) felt that the use of the word "lawful" to qualify "precautions" in paragraph (a) would create confusion for readers of the Spanish version.

101. Mr. AZZIMAN (Morocco) thought that there was an element of ambiguity in referring, in the context of "lawful precautions", to the illicit act of destroying goods belonging to others. He recalled that, during the initial discussion of the paragraph, the representative of the Union of Soviet Socialist Republics had proposed that it should refer to destruction or disposal of the goods in a manner that was not harmful to the environment. The suggested use of the expression "lawful precautions" at the beginning of the paragraph failed to convey that idea.

The meeting rose at 12.40 p.m.

Summary record (partial)* of the 425th meeting

Wednesday, 31 May 1989, 2 p.m.

[A/CN.9/SR.425]

Chairman: Mr. RUZICKA (Czechoslovakia)

The meeting was called to order at 2.10 p.m.

Draft Convention on the Liability of Operators of Transport Terminals in International Trade (continued)
(A/CN.9/298, A/CN.9/319 and Add.1-5, A/CN.9/321; A/CN.9/XXII/CRP.7, A/CN.9/XXII/CRP.7/Rev.1 and A/CN.9/XXII/CRP.7/Add.1)

Article 9 (continued)

1. Ms. PERT (Observer for Australia) recognized the difficulty of finding a suitable alternative wording for paragraph (a) at the present stage. She nevertheless proposed that the word "lawful" should not be used in the paragraph at all and that it should be made clear in the Commission's report that any means of destruction or disposal of goods must be in accordance with relevant law on the destruction or disposal of dangerous goods.

2. Mr. JOKO-SMART (Sierra Leone) said that he could not support the deletion of the word "lawful", which had been used to ensure that the operator would not be in a position to dispose of the goods for his own benefit or to keep the goods and report that he had destroyed them.

3. Mr. MORAN (Spain) agreed with the previous speaker that the word "lawful" should be retained in paragraph (a).

4. *Article 9 was adopted.*

Article 7 (continued)

5. Mr. HASCHER (France) proposed that the heading of article 7 in the French version should read: "*Application aux actions non-contractuelles*".

6. Mr. CHAFIK (Egypt) recalled that the delegation of Morocco had pointed to a discrepancy between the heading of article 7 and the contents of paragraph (1). Whereas the heading referred to non-contractual claims, the text of paragraph (1) referred to actions founded in contract, in tort or otherwise. The French representative's proposal relating to the French version did not help to resolve that discrepancy.

7. Ms. JAMETTI (Observer for Switzerland) supported the proposal of the French representative, although she agreed with the representative of Egypt that the problem of discrepancy remained.

8. Mr. BOUCETTA (Morocco) said that his delegation would support the proposal of the representative of France. However, it would like a reference to be made in the Commission's report to the Moroccan delegation's comments on the discrepancy between the heading of article 7 and paragraph (1) of that article.

9. Mr. GRIFFITH (Observer for Australia) said that his delegation would have difficulty in accepting a discrepancy between the English and French versions of the heading of article 7. The

*No summary record was prepared for the meeting after 4.30 p.m.

different language versions should in his view be identical. The heading in the French version of document A/CN.9/XXII/CRP.7/Rev.1 should perhaps be retained and the Commission's report should recommend that the issue should be discussed at the proposed diplomatic conference.

10. The CHAIRMAN said that if the French-speaking delegations considered that there was a discrepancy between the English and French versions of the heading, then a change should be made.

11. *The proposal of the representative of France that the French version of the heading of article 7 should read "Application aux actions non-contractuelles" was adopted.*

12. *The heading of article 7, as amended in the French version only, was adopted.*

Article 10

13. Mr. KATZ (International Trade Law Branch) said that the Drafting Group had made the following changes in article 10: in paragraph (1), the words "relating to" in the first sentence had been replaced by "which are due in connection with"; in the second sentence, the words "any applicable law" had been replaced by "the applicable law". Paragraph (2) remained unchanged. In paragraph (3), the last part of the first sentence, following the words "the operator is entitled", had been amended to read "to the extent permitted by the law of the State where the goods are located, to sell all or part of the goods over which he has exercised the right of retention provided for in this article". In the second sentence, the words "pallets or similar articles of transport or packaging" had been inserted twice, and the last part of the sentence, beginning with the word "except" had been amended to read "except in respect of claims by the operator for the cost of repairs or improvements to the containers, pallets or similar articles of transport or packaging". In paragraph (4), the word "all" had been inserted in the last sentence before the words "other respects", and the words "operator has his place of business" at the end of that sentence had been replaced by "goods are located".

14. Mr. OCHIAI (Japan) said that, in the opinion of his delegation, paragraph (1) of article 10 had not been modified to take into account a proposal of the delegation of Finland which the Commission had accepted. He referred in that connection to paragraph 2 of document A/CN.9/XXII/CRP.1/Add.11.

15. Mr. BONELL (Italy) agreed with the previous speaker concerning the proposal of Finland. He proposed the deletion, as meaningless, of the phrase "during the period of his responsibility for them", which appeared in paragraph (1).

16. Mr. EYZAGUIRRE (Chile), referring to the expression "costs and claims" used in the English version of the first sentence of paragraph (1), asked why, in the Spanish version, the words "*el importe y los gastos*" had been replaced by "*el costo y otros créditos*", which in the view of his delegation did not mean the same thing. The term "*costo*" was broader in scope. Some claims involved remunerations, which could not be included under costs. It was preferable to use the term "*gastos*" as the expression "*otros créditos*" simply introduced confusion.

17. Mr. KATZ (International Trade Law Branch) said that the problem of rendering the English expression "costs and claims" in the other language versions had been discussed in the Drafting Group. It was his recollection that there had been agreement on the Spanish expression used in the Drafting Group's report.

18. Mr. ABASCAL (Mexico) agreed with the delegation of Chile that the Spanish expression previously used had been

clearer. Unfortunately, however, it had not corresponded exactly with the expression used in the English version. Following consultations on the exact meaning of the words "costs" and "claims", a new Spanish formula had been adopted for purposes of alignment with the English version.

19. Mr. BALLE (Andean Federation of International Transport Users' Councils) agreed with the Chilean representative's remarks. He considered it preferable to revert to the expression originally used in the Spanish version.

20. Mr. OCHIAI (Japan) supported the Italian representative's proposal that the words "during the period of his responsibility for them" should be deleted.

21. Mr. SCHROCK (Federal Republic of Germany) said that his delegation also recalled that the Commission had decided to approve the proposal of the Government of Finland which appeared in document A/CN.9/319/Add.3. He supported the deletion proposed by the Italian representative.

22. Mr. GRIFFITH (Observer for Australia) said that his delegation also supported the Italian representative's proposal.

23. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that one part of the Finnish proposal in document A/CN.9/319/Add.3 had been incorporated in paragraph (1) by the Drafting Group, namely, the words "in respect of the goods". However, the Drafting Group had not taken up the Finnish proposal to include in article 10 a new subparagraph allowing the operator to sell unclaimed goods after a fixed period. He did not think it wise to delete the phrase "during the period of his responsibility for them", as proposed by the Italian delegation, as to do so would break the linkage with article 3. He proposed that paragraph (1) should be left unchanged, but that the Commission's report should note that the problem of rights of retention over unclaimed goods remained unsolved.

24. Mr. SCHROCK (Federal Republic of Germany) pointed out that paragraph (1) of article 10 concerned the right of retention of goods, whereas the third paragraph of the comments by the Government of Finland in document A/CN.9/319/Add.3 contained the proposal that operators' rights to sell goods should be extended to unclaimed goods. A right of retention was not the same as a right to sell.

25. Mr. OCHIAI (Japan) drew attention to the proposal, whose acceptance by the Commission was referred to in paragraph 2 of document A/CN.9/XXII/CRP.1/Add.11, that the operator's right of retention over the goods should be extended to cover unclaimed goods. That point was not reflected in the text of article 10 at present before the Commission.

26. Mr. ABASCAL (Mexico) said that, following discussion among the Spanish-speaking delegations, those delegations had agreed that the Spanish version of article 10 in the text before the Commission could be regarded as aligned with the English and French versions.

27. Mr. EYZAGUIRRE (Chile) said that he could accept the text under discussion provided the Commission's report reflected his delegation's understanding that in the Spanish version the word "*costo*" also covered the concept expressed by the phrase "*los derechos de crédito por los honorarios correspondientes a los servicios prestados*" (claims for fees corresponding to services performed).

28. Mr. BALLE (Andean Federation of International Transport Users' Councils) agreed with the previous speaker's interpretation.

29. The CHAIRMAN said he took it that the Commission wished to leave article 10 unchanged and to refer to the problem of unclaimed goods in its report.

30. *It was so agreed.*

31. *Article 10 was adopted.*

Article 11

32. Mr. OCHIAI (Japan) expressed surprise at the use of the words "final recipient" in paragraph 2. He considered the original term "final destination" preferable.

33. The CHAIRMAN explained that the Drafting Group had aligned the English version on the French version in that instance.

34. Mr. OCHIAI (Japan) proposed that the word "must" in paragraph (4) should be replaced by the word "shall".

35. *It was so decided.*

36. *Article 11, as amended, was adopted.*

Article 12

37. The CHAIRMAN, replying to a question from Mr. ABYANEH (Islamic Republic of Iran), confirmed that the observations which the delegation of the Islamic Republic of Iran had made at the 418th meeting in relation to article 12 would be reflected in the Commission's report.

38. *Article 12 was adopted.*

Articles 13, 14 and 15

39. *Articles 13, 14 and 15 were adopted.*

Article 16

40. Mr. HASCHER (France) proposed that, in the French version of paragraph (2) the word "*propres*" before "*opérations et transactions*" should be deleted.

41. *It was so decided.*

42. Article 16, as amended in the French version only, was adopted.

Articles 17 and 18

43. *Articles 17 and 18 were adopted.*

Article 19

44. Mr. ABYANEH (Islamic Republic of Iran) asked why the article made reference to "Contracting States". It was his understanding that all references to "Contracting States" were to be replaced by references to "States Parties", except in paragraph (1) of article 23.

45. Mr. KATZ (International Trade Law Branch) explained that specific instructions had been given to the Drafting Group only in respect of the former articles 1 to 17. In the case of the remaining articles the Drafting Group had been instructed by the Commission to decide upon the appropriate terminology in the light of article 2 of the Vienna Convention on the Law of Treaties.

46. Mr. PELICHET (Hague Conference on Private International Law) said that, in his view, the use of the term "Contracting State" in article 19 was inappropriate. He proposed that "Contracting State" should be replaced by "State Party" in paragraphs (1) and (4).

47. Ms. VERDON (Canada), Mr. MOURA-RAMOS (Observer for Portugal), Mr. ABYANEH (Islamic Republic of Iran) and Mr. HASCHER (France) supported that proposal.

48. *The proposal of the representative of the Hague Conference on Private International Law was adopted.*

49. *Article 19, as amended, was adopted.*

Article 20

50. Mr. KATZ (International Trade Law Branch) recalled that the Commission had decided that no reservations to the proposed Convention should be permitted, in line with the Hamburg Rules.

51. Mr. ABYANEH (Islamic Republic of Iran) said that his delegation had reservations concerning article 20, which it feared would discourage some countries from acceding to the Convention. In his view, the whole article should be placed within square brackets. A decision on the matter could then be taken by the proposed diplomatic conference.

52. Ms. van der HORST (Netherlands) agreed with the previous speaker.

53. Mr. CHAFIK (Egypt) said that, if it was in the interest of a State to derogate from a provision of the draft Convention, it was pointless to try to prevent it from doing so. The matter should be left to the diplomatic conference, and he therefore supported the Iranian proposal.

54. Mr. JOKO-SMART (Sierra Leone) said that the point at issue was not whether delegations had reservations concerning article 20, but rather whether the text before the Commission reflected its instructions to the Drafting Group.

55. The CHAIRMAN ruled that the text of article 20 before the Commission reflected the decision taken by the Commission when it had considered the draft final clauses in first reading. If the Commission so desired, the text of article 20 could be placed in square brackets for the attention of the proposed diplomatic conference.

56. Mr. MOURA-RAMOS (Observer for Portugal) said that if certain States considered it necessary for them to enter reservations, the diplomatic conference would have to decide what reservations were permissible.

57. The CHAIRMAN pointed out that the principle of inadmissibility of reservations had been accepted. In reply to a question from Mr. CHAFIK (Egypt), he said that the doubts expressed by some delegations during the Commission's earlier consideration of the draft article would be reflected in the report on the session.

58. *Article 20 was adopted.*

Articles 21 to 23

59. *Articles 21 to 23 were adopted.*

Article 24

60. Mr. KATZ (International Trade Law Branch) pointed out that article 24 corresponded to the article 17 previously considered by the Commission in first reading.

61. Mr. BOUCETTA (Morocco) noted that in paragraph (3) the French version contained no word corresponding to the word "next" which preceded "session" in the English version. It was in any event not clear which session was intended.

62. Mr. KATZ (International Trade Law Branch) explained that the intention was to refer to the next feasible session of the Commission following the Committee meeting referred to in paragraph (1).

63. The CHAIRMAN suggested that the word "*prochaine*" should be inserted in the French text before the word "*session*".

64. *It was so agreed.*

65. Mr. HASCHER (France) said that he regretted the deletion of the earlier wording which provided that the meeting should be convened automatically in the event of adoption of an amendment to a limit of liability; the article now provided for the convening of a meeting at the request of at least one quarter of the States Parties. In order that the Working Group's efforts should not be lost, he suggested that it should be mentioned in the Commission's report that the international conventions referred to in paragraph (4)(a) were essentially those listed in annex II of document A/CN.9/298. He pointed out that in the French version of paragraph (4)(a) the words "*aux transports*" should be in the singular.

66. Mr. MOURA-RAMOS (Observer for Portugal), referring to paragraph (8), asked what would be the position of a

Contracting State which did not accept an amendment. He suggested that the word "Party" in the first line of the paragraph should be deleted.

67. Mr. HASCHER (France) observed that the point just raised was dealt with in paragraph (9) of the article.

68. Mr. ENDERLEIN (Observer for the German Democratic Republic) said that the deletion of the word "Party" would bring paragraph (8) into conflict with paragraph (7). He agreed with the representative of France. It was clear that a State which was not yet a party to the Convention could not denounce it.

69. Mr. LARSEN (United States of America) suggested that the words "has entered into force" in the third line of paragraph (8) should be replaced by the words "enters into force".

70. The CHAIRMAN said that the drafting point made by the United States representative would be taken into account.

71. *Article 24, as amended, was adopted.*

Article 25

72. *Article 25 was adopted.*

Closing paragraphs

73. *The closing paragraphs were adopted.*

74. The CHAIRMAN said that the Commission had concluded its work on the draft Convention.

The part of the meeting covered by the summary record ended at 4.30 p.m.

III. BIBLIOGRAPHY OF RECENT WRITINGS RELATED TO THE WORK OF UNCITRAL: NOTE BY THE SECRETARIAT (A/CN.9/339)

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IV. CHECK-LIST OF UNCITRAL DOCUMENTS

<i>Document symbol</i>	<i>Title or description</i>	<i>Location in present volume</i>
A. List of documents before the Commission at its twenty-second session		
1. General series		
A/CN.9/314	Provisional agenda	not reproduced
A/CN.9/315	Report of the Working Group on the New International Economic Order on the work of its tenth session	Part two, II, A
A/CN.9/316	Report of the Working Group on International Contract Practices on the work of its twelfth session	Part two, IV, A
A/CN.9/317	Report of the Working Group on International Payments on the work of its seventeenth session	Part two, I, A
A/CN.9/318	Report of the Working Group on International Payments on the work of its eighteenth session	Part two, I, C
A/CN.9/319 and Add.1-5	Liability of operators of transport terminals: compilation of comments by Governments and international organizations on the draft Convention on the Liability of Operators of Transport Terminals in International Trade: report of the Secretary-General	Part two, III, A
A/CN.9/320	Limits of liability and units of account in international transport conventions: report of the Secretary-General	Part two, III, B
A/CN.9/321	Liability of operators of transport terminals: draft final clauses for the draft Convention on the Liability of Operators of Transport Terminals in International Trade: report of the Secretary-General	Part two, III, C
A/CN.9/322	International countertrade: draft outline of the possible content and structure of a legal guide on drawing up international countertrade contracts: report of the Secretary-General	Part two, V
A/CN.9/323	Training and assistance: note by the Secretariat	Part two, VIII
A/CN.9/324	Current activities of international organizations related to the harmonization and unification of international trade law: report of the Secretary-General	Part two, VI,
A/CN.9/325	Status of Conventions: note by the Secretariat	Part two, VII
A/CN.9/326	Bibliography of recent writings related to the work of UNCITRAL: note by the Secretariat	Reproduced in 1988 <i>Yearbook</i> , part three, III

2. Restricted series

A/CN.9/XXII/CRP.1 and Add.1-22	Draft report of the United Nations Commission on International Trade Law on the work of its twenty-second session	Not reproduced
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<i>Document symbol</i>	<i>Title or description</i>	<i>Location in present volume</i>
A/CN.9/XXII/CRP.2/Rev.1	Proposal of the United States of America	Not reproduced
A/CN.9/XXII/CRP.3	Comments and suggestions of the Chinese Government on the draft Convention on Liability of Operators of Transport Terminals	Not reproduced
A/CN.9/XXII/CRP.4	Proposal by the United Kingdom of Great Britain and Northern Ireland	Not reproduced
A/CN.9/XXII/CRP.5	Proposal by the Federal Republic of Germany	Not reproduced
A/CN.9/XXII/CRP.6	Proposals by the Federal Republic of Germany	Not reproduced
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3. Information series

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B. List of documents before the Working Group on International Payments at its seventeenth session

1. Working papers

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A/CN.9/WG.IV/WP.37	Draft model rules on electronic funds transfers: report of the Secretary-General	Part two, I, B

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C. List of documents before the Working Group on International Payments at its eighteenth session

1. Working papers

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A/CN.9/WG.IV/WP.39	Draft model rules on electronic funds transfers: report of the Secretary-General	Part two, I, D

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D. List of documents before the Working Group on the New International Economic Order at its tenth session

1. Working papers

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A/CN.9/WG.V/WP.22	Procurement: report of the Secretary-General	Part two, II, B

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E. List of documents before the Working Group on International Contract Practices at its twelfth session

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A/CN.9/WG.II/WP.63	Stand-by letters of credit and guarantees: tentative considerations on the preparation of a uniform law: note by the Secretariat	Part two, IV, B, 2

2. Restricted series

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V. CROSS-REFERENCES: UNCITRAL DOCUMENTS REFERRED TO IN THE PRESENT VOLUME AND REPRODUCED IN THIS VOLUME OR AN EARLIER VOLUME OF THE *YEARBOOK*

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1. *General series*

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