

**REPORT**  
**OF THE**  
**UNITED NATIONS COMMISSION**  
**ON**  
**INTERNATIONAL TRADE LAW**  
**on the work of its eleventh session**

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**30 May - 16 June 1978**

**GENERAL ASSEMBLY**

OFFICIAL RECORDS: THIRTY - THIRD SESSION

SUPPLEMENT No. 17 (A/33/17)



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**NOTE**

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

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## INTRODUCTION

1. The present report of the United Nations Commission on International Trade Law covers the Commission's eleventh session, held at New York from 30 May to 16 June 1978.
2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the General Assembly and is also submitted for comments to the United Nations Conference on Trade and Development.

## CHAPTER I

### ORGANIZATION OF THE SESSION

#### A. Opening

3. The United Nations Commission on International Trade Law (UNCITRAL) commenced its eleventh session on 30 May 1978. The session was opened on behalf of the Secretary-General by Mr. Erik Suy, the Legal Counsel.

#### B. Membership and attendance

4. General Assembly resolution 2205 (XXI) established the Commission with a membership of 29 States, elected by the Assembly. By resolution 3108 (XXVIII), the General Assembly increased the membership of the Commission from 29 to 36 States. The present members of the Commission, elected on 12 December 1973 and 15 December 1976, are the following States: 1/

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1/ Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years, except that, in connexion with the initial election, the terms of 14 members, selected by the President of the Assembly, by drawing lots, expired at the end of three years (31 December 1970); the terms of the 15 other members expired at the end of six years (31 December 1973). Accordingly, the General Assembly, at its twenty-fifth session, elected 14 members to serve for a full term of six years, ending on 31 December 1976, and, at its twenty-eighth session, elected 15 members to serve for a full term of six years, ending on 31 December 1979. The General Assembly, at its twenty-eighth session, also selected seven additional members. Of these additional members, the term of three members, selected by the President of the Assembly by drawing lots, would expire at the end of three years (31 December 1976) and the term of four members would expire at the end of six years (31 December 1979). To fill the vacancies on the Commission which would occur on 31 December 1976, the General Assembly, at its thirty-first session, on 15 December 1976, elected (or re-elected) 17 members to the Commission. Pursuant to resolution 31/99 of 15 December 1976, the new members took office on the first day of the regular annual session of the Commission immediately following their election (23 May 1977) and their term will expire on the last day prior to the opening of the seventh regular annual session of the Commission following their election (in 1983). In addition, the term of office of those members whose term would expire on 31 December 1979 was by the same resolution extended till the last day prior to the beginning of the regular annual session of the Commission in 1980.

Argentina,\* Australia,\*\* Austria,\*\* Barbados,\* Belgium,\* Brazil,\* Bulgaria,\* Burundi,\*\* Chile,\*\* Colombia,\*\* Cyprus,\* Czechoslovakia,\* Egypt,\*\* Finland,\*\* France,\*\* Gabon,\* German Democratic Republic,\*\* Germany, Federal Republic of,\* Ghana,\*\* Greece,\* Hungary,\* India,\* Indonesia,\*\* Japan,\*\* Kenya,\* Mexico,\* Nigeria,\*\* Philippines,\* Sierra Leone,\* Singapore,\*\* Syrian Arab Republic,\* Union of Soviet Socialist Republics,\*\* United Kingdom of Great Britain and Northern Ireland,\*\* United Republic of Tanzania,\*\* United States of America\* and Zaire.\*

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

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

5. With the exception of Burundi, Gabon, Sierra Leone and the Syrian Arab Republic, all members of the Commission were represented at the session.

6. The session was also attended by observers from the following States Members of the United Nations: Bhutan, Burma, Canada, Cuba, Iraq, Ireland, Netherlands, Niger, Peru, Poland, Romania, Senegal, Spain, Sweden, Trinidad and Tobago, Turkey, Uganda, Venezuela and Yugoslavia.

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

(a) Specialized agencies

International Monetary Fund (IMF).

(b) Intergovernmental organizations

Commission of the European Communities; Council for Mutual Economic Assistance; Hague Conference on Private International Law; International Institute for the Unification of Private Law.

(c) International non-governmental organizations

International Chamber of Commerce; International Union of Marine Insurance.

C. Election of officers

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

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2/ The election took place at the 187th and 188th meetings, on 30 May 1978, and at the 189th meeting, on 31 May 1978. In accordance with a decision taken by the Commission at its first session, the Commission has three Vice-Chairmen, so that, together with the Chairman and Rapporteur, each of the five groups of States listed in General Assembly resolution 2205 (XXI), sect. II, para. 1, will be represented on the bureau of the Commission (see Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/7216), para. 14 (Yearbook of the United Nations Commission on International Trade Law, Volume 1: 1968-1970 (United Nations publication, Sales No. E.71.V.1), part two, I, para. 14)).

Chairman: Mr. S. K. Date-Bah (Ghana)  
Vice-Chairmen: Mr. N. Gueiros (Brazil)  
Mr. L. Kopač (Czechoslovakia)  
Mr. L. Sevón (Finland)  
Rapporteur: Mr. R. K. Dixit (India)

D. Agenda

9. The agenda of the session as adopted by the Commission at its 187th meeting, on 30 May 1978, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda; tentative schedule of meetings.
4. International sale of goods.
5. International payments.
6. Programme of work of the Commission.
7. Training and assistance in the field of international trade law.
8. Future work.
9. Other business.
10. Date and place of the twelfth session.
11. Adoption of the report of the Commission.

E. Decisions of the Commission

10. The decisions taken by the Commission in the course of its eleventh session were all reached by consensus, except for the decision referred to in paragraph 101, which was taken by a formal vote.

F. Adoption of the report

11. The Commission adopted the present report at its 209th meeting, on 16 June 1978.

## CHAPTER II

### INTERNATIONAL SALE OF GOODS

#### A. Formation and validity of contracts for the international sale of goods

12. The Commission, at its second session, established a Working Group on the International Sale of Goods and requested it, inter alia, to ascertain which modifications of the Hague Convention of 1964 relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) might render it capable of wider acceptance by countries of different legal, social and economic systems and to elaborate a new text reflecting such modifications. 3/

13. At its seventh session, the Commission considered the request of the International Institute for the Unification of Private Law (UNIDROIT) that it include in its programme of work the consideration of the "draft of a law for the unification of certain rules relating to the validity of contracts of international sale of goods" (the UNIDROIT draft). 4/ The Commission requested the Working Group "to consider the establishment of uniform rules governing the validity of contracts for the international sale of goods, on the basis of the above UNIDROIT draft, in connexion with its work on uniform rules governing the formation of contracts for the international sale of goods". 5/ At its ninth session, the Commission noted the views of the Working Group that it consider whether some or all of the rules on validity could appropriately be combined with rules on formation 6/ and gave the Working Group discretion as to whether to include some rules on validity among the provisions it was preparing on the

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3/ Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18 (A/7618), para. 38, subpara. 3 (a) of the resolution contained therein (Yearbook of the United Nations Commission on International Trade Law, Volume I: 1968-1970 (United Nations publication, Sales No. E.71.V.1), part two, chap. II, para. 38, subpara. 3 (a)). The 1964 Hague Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods and the annexed Uniform Law (ULF) appears in the Register of Texts of Conventions and Other Instruments Concerning International Trade Law, vol. 1 (United Nations publication, Sales No. E.71.V.3), chap. I, sect. I.

4/ Ibid., Twenty-ninth Session, Supplement No. 17 (A/9617), para. 89 (Yearbook of the United Nations Commission on International Trade Law, Volume I: 1968-1970 (United Nations publication, Sales No. E.71.V.1), part two, chap. III, para. 89):

5/ Ibid., para. 93, subpara. 2 of the decision contained therein.

6/ Ibid., Thirty-first Session, Supplement No. 17 (A/31/17), para. 24 (Yearbook of the United Nations Commission on International Trade Law, Volume VII: 1976 (United Nations publication, Sales No. E.77.V.1), part one, chap. II, A, para. 24).

formation of contracts for the international sale of goods. <sup>7/</sup> The Working Group completed its work on the preparation of such provisions at its ninth session, held at Geneva from 19 to 30 September 1977. <sup>8/</sup>

14. At the present session the Commission had before it the following documents:

- (a) A/CN.9/142 and Add.1: Report of the Working Group on the International Sale of Goods on the work of its ninth session. The addendum reproduced the text of a draft Convention on the Formation of Contracts for the International Sale of Goods as approved by the Working Group.
- (b) A/CN.9/143: Text of the draft of a law for the unification of certain rules relating to validity of contracts of international sale of goods, prepared by the International Institute for the Unification of Private Law (UNIDROIT). This document was circulated by the Secretary-General at the request of the Working Group on the International Sale of Goods made at its ninth session.
- (c) A/CN.9/144: Commentary on the draft Convention on the Formation of Contracts for the International Sale of Goods. This commentary was prepared and circulated by the Secretary-General in response to a request made by the Working Group on the International Sale of Goods at its ninth session.
- (d) A/CN.9/145: Incorporation of the provisions of the draft Convention on the Formation of Contracts for the International Sale of Goods into the draft Convention on the International Sale of Goods: analysis of drafting problems. This document was prepared by the Secretariat upon a request made by the Working Group on the International Sale of Goods at its ninth session.
- (e) A/CN.9/146 and Add.1 to 4: Analytical compilation of comments by Governments and international organizations on the draft Convention on the Formation of Contracts for the International Sale of Goods and on the UNIDROIT draft law for the unification of certain rules relating to validity of contracts of international sale of goods.

1. Relationship of the draft Convention on the Formation of Contracts for the International Sale of Goods to the draft Convention on the International Sale of Goods <sup>9/</sup>

15. The Commission considered the question, which it had deferred at its tenth session, whether the rules on formation of contracts for the international sale of

<sup>7/</sup> Ibid., para. 27.

<sup>8/</sup> Report of the Working Group on the International Sale of Goods on the work of its ninth session (Geneva, 19-30 September 1977), A/CN.9/142 and Add.1. The text of the provisions prepared by the Working Group is set out in the annex to the report (A/CN.9/142/Add.1).

<sup>9/</sup> The Commission considered this subject at its 197th meeting, on 6 June 1978; for the summary record of this meeting, see A/CN.9/SR.197.

goods should be the subject-matter of a convention separate from the Convention on the International Sale of Goods.

16. A single consolidated text dealing with formation of contracts and containing substantive rules governing the obligations of the buyer and seller was supported on the basis that an integrated text would be more appropriate than two Conventions because of the close relationship between the subject-matters of each draft Convention. Furthermore, the existence of two separate Conventions would inevitably lead to discrepancies between them as was illustrated by differences that already existed between the present draft texts and also by the differences that existed between the Convention on the Limitation Period in the International Sale of Goods and the present draft texts. A single text would also tend to encourage ratification of both the rules on formation and sales which would assist the harmonization and unification of international trade law.

17. Furthermore, although the existence of two separate Conventions would enable States to ratify either the rules on formation or the rules on sale or both, the same result could be achieved by permitting separate ratification of those chapters in an integrated text which contains the rules on formation and sales. The benefits of a single text were generally considered to outweigh the problems that some States might encounter in implementing into their national law partial ratification of an entire text.

18. After discussion, the Commission decided to integrate the draft Convention on the Formation of Contracts with the draft Convention on the International Sale of Goods into a single text to be entitled "Draft Convention on Contracts for the International Sale of Goods".

2. Duration of conference of plenipotentiaries to consider integrated text 10/

19. The Commission was of the view that it would be difficult to finalize within four weeks an integrated Convention which contained approximately 80 substantive articles. There was a substantial body of opinion, based on experience in dealing with texts prepared by the Commission, that the adoption of a text of this length and complexity would require about six weeks. However, in deference to the view of several representatives that it would be difficult and costly for their countries to send delegations to a Conference of six weeks' duration, the Commission decided to recommend to the General Assembly that a conference of plenipotentiaries be convened for five weeks with the possibility of extending the Conference for a further week if such extension appeared necessary.

3. Establishment of a Drafting Group

20. The Commission, at its 201st meeting on 8 June 1978, established a Drafting Group composed of the representatives of Chile, Egypt, France, Hungary, India, Japan, Mexico, Nigeria, the Union of Soviet Socialist Republics and the United Kingdom of Great Britain and Northern Ireland.

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<sup>10/</sup> The Commission considered this subject at its 197th meeting, on 6 June 1978; for the summary record of this meeting, see A/CN.9/SR.197.

21. The Drafting Group was requested to integrate the draft Convention on Formation and the draft Convention on the International Sale of Goods into a single Convention. In doing so, the Drafting Group was requested to redraft the articles on sphere of application and general provisions as would be necessary for an integrated Convention. The Drafting Group was also requested to insert the rules on formation of contracts and the rules on sales in separate Parts of the Convention so that it would be possible to prepare a final clause which would permit a State to ratify or accept the Convention either in respect of formation of contracts alone, in respect of sales alone or in respect of both.

22. In addition, the Drafting Group was requested to redraft articles of the draft Convention in accordance with the decisions taken by the Commission, to consider drafting suggestions made during the course of the Commission's discussions and, generally, to examine the text from the point of view of consistency of the terminology used and to ensure consistency between different language versions.

4. Consideration of the report of the Drafting Group 11/

23. After considering the report of the Drafting Group, the Commission decided that article 7 of the draft Convention on Formation, which the Drafting Group had placed in the general provisions of the integrated draft Convention, should instead be included in part II of the draft Convention relating to the formation of the contract. The Commission also made a few drafting changes to various provisions. With these changes, the Commission adopted the text of the draft Convention on Contracts for the International Sale of Goods.

5. Relationship of draft Convention with Prescription Convention 12/

24. It was noted that the sphere of application provisions of the draft Convention differed in several respects from the equivalent provisions in the Convention on the Limitation Period in the International Sale of Goods. The Commission noted that, at the United Nations Conference on Prescription (Limitation) in the International Sale of Goods at which that Convention had been concluded, the possibility had been envisaged that, at such time as a revision of the Uniform Law on the International Sale of Goods was completed by the Commission, a protocol would be prepared to harmonize the sphere of application and general provisions of the two conventions. 13/

25. The Commission decided to recommend to the General Assembly that the conference of plenipotentiaries to be convened to conclude the Convention on Contracts for the International Sale of Goods be authorized to consider the

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11/ The Commission considered this subject at its 207th and 208th meetings on 14 June 1978; summary records of these meetings are contained in A/CN.9/SR.207 and 208.

12/ The Commission considered this subject at its 208th meeting, on 14 June 1978; for the summary record of this meeting, see A/CN.9/SR.208.

13/ See generally the note by the Secretariat on the relationship of the draft Convention on the International Sale of Goods and the draft Convention on the Formation of Contracts for the International Sale of Goods to the Convention on the Limitation Period in the International Sale of Goods (A/CN.9/XI/CRP.2).

desirability of adopting such a protocol. The Commission also requested the Secretary-General to prepare the draft of such a protocol for submission to the conference of plenipotentiaries.

6. Summary of deliberations of the Commission on the draft Convention on the Formation of Contracts for the International Sale of Goods

26. A summary of the Commission's deliberations is set forth in annex I below.

Decision of the Commission

27. At its 209th meeting on 16 June 1978, the Commission adopted unanimously the following decision:

The United Nations Commission on International Trade Law

1. Approves the text of the draft Convention on Contracts for the International Sale of Goods, as set forth below;

2. Requests the Secretary-General:

(a) To prepare, under his own authority, a commentary on the provisions of the draft Convention;

(b) To prepare draft provisions concerning implementation, reservations and other final clauses and, in particular, a provision which would allow a Contracting State to ratify or accept the Convention in respect of parts I and II or in respect of parts I and III or in respect of parts I, II and III;

(c) To circulate the draft Convention, together with the commentary and draft provisions concerning implementation, reservations and other final clauses, to Governments and interested international organizations for comments and proposals;

(d) To place before the conference of plenipotentiaries to be convened by the General Assembly the comments and proposals received from Governments and international organizations;

(e) To prepare an analytical compilation of such comments and proposals and to submit it to the conference of plenipotentiaries;

3. Recommends that the General Assembly should convene an international conference of plenipotentiaries, as early as practicable, to conclude, on the basis of the draft Convention approved by the Commission, a Convention on Contracts for the International Sale of Goods;

4. Further recommends that the General Assembly should authorize the conference of plenipotentiaries to consider the desirability of preparing a Protocol to the Convention on the Limitation Period in the International Sale of Goods, which would harmonize its provisions in respect of sphere of application with those in the Convention on Contracts for the International Sale of Goods as it may be adopted by the Conference.

B. Text of the draft Convention on Contracts for the International Sale of Goods

28. The draft Convention on Contracts for the International Sale of Goods reads as follows:

DRAFT CONVENTION ON CONTRACTS FOR THE  
INTERNATIONAL SALE OF GOODS

PART I. SPHERE OF APPLICATION AND GENERAL PROVISIONS

Chapter I. Sphere of application

Article 1

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(a) when the States are Contracting States; or

(b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration.

Article 2

This Convention does not apply to sales:

(a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;

(b) by auction;

(c) on execution or otherwise by authority of law;

(d) of stocks, shares, investment securities, negotiable instruments or money;

(e) of ships, vessels or aircraft;

(f) of electricity.

### Article 3

(1) This Convention does not apply to contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services.

(2) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

### Article 4

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided therein, this Convention is not concerned with:

- (a) the validity of the contract or of any of its provisions or of any usage;
- (b) the effect which the contract may have on the property in the goods sold.

### Article 5

The parties may exclude the application of this Convention or, subject to article 11, derogate from or vary the effect of any of its provisions.

## Chapter II. General provisions

### Article 6

In the interpretation and application of the provisions of this Convention, regard is to be had to its international character and to the need to promote uniformity and the observance of good faith in international trade.

### Article 7

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had in the same circumstances, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

## Article 8

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

## Article 9

For the purposes of this Convention:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

## Article 10

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means, including witnesses.

## Article 11

Any provision of article 10, article 27 or Part II of this Convention that allows a contract of sale or its modification or abrogation or any offer, acceptance, or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this article.

## PART II. FORMATION OF THE CONTRACT

### Article 12

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

### Article 13

- (1) An offer becomes effective when it reaches the offeree.
- (2) An offer may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer. It may be withdrawn even if it is irrevocable.

### Article 14

- (1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.
- (2) However, an offer cannot be revoked:
  - (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
  - (b) if it was reasonable for the offeree to rely upon the offer as being irrevocable and the offeree has acted in reliance on the offer.

### Article 15

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

### Article 16

- (1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence shall not in itself amount to acceptance.
- (2) Subject to paragraph (3) of this article, acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.
- (3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed provided that the act is performed within the period of time laid down in paragraph (2) of this article.

### Article 17

- (1) A reply to an offer which purports to be an acceptance containing additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance unless the offeror objects to the discrepancy without undue delay. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, inter alia, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially, unless the offeree by virtue of the offer or the particular circumstances of the case has reason to believe they are acceptable to the offeror.

#### Article 18

(1) A period of time for acceptance fixed by an offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by an offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

(2) If the notice of acceptance cannot be delivered at the address of the offeror due to an official holiday or a non-business day falling on the last day of the period for acceptance at the place of business of the offeror, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

#### Article 19

(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror so informs the offeree orally or dispatches a notice to that effect.

(2) If the letter or document containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror informs the offeree orally that he considers his offer as having lapsed or dispatches a notice to that effect.

#### Article 20

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

#### Article 21

A contract is concluded at the moment when an acceptance of an offer is effective in accordance with the provisions of this Convention.

## Article 22

For the purposes of Part II of this Convention an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him, his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

### PART III. SALES OF GOODS

#### Chapter I. General provisions

##### Article 23

A breach committed by one of the parties is fundamental if it results in substantial detriment to the other party unless the party in breach did not foresee and had no reason to foresee such a result.

##### Article 24

A declaration of avoidance of the contract is effective only if made by notice to the other party.

##### Article 25

Unless otherwise expressly provided in Part III of this Convention, if any notice, request or other communication is given by a party in accordance with Part III and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

##### Article 26

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court could do so under its own law in respect of similar contracts of sale not governed by this Convention.

##### Article 27

(1) A contract may be modified or abrogated by the mere agreement of the parties.

(2) A written contract which contains a provision requiring any modification or abrogation to be in writing may not be otherwise modified or abrogated. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

Chapter II. Obligations of the seller

Article 28

The seller must deliver the goods, hand over any documents relating thereto and transfer the property in the goods, as required by the contract and this Convention.

Section I. Delivery of the goods and handing over of documents

Article 29

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

(a) if the contract of sale involves carriage of the goods - in handing the goods over to the first carrier for transmission to the buyer;

(b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place - in placing the goods at the buyer's disposal at that place;

(c) in other cases - in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

Article 30

(1) If the seller is bound to hand the goods over to a carrier and if the goods are not clearly marked with an address or are not otherwise identified to the contract, the seller must send the buyer a notice of the consignment which specifies the goods.

(2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for the carriage to the place fixed by means of transportation which are appropriate in the circumstances and according to the usual terms for such transportation.

(3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must provide the buyer, at his request, with all available information necessary to enable him to effect such insurance.

Article 31

The seller must deliver the goods:

(a) if a date is fixed by or determinable from the contract, on that date; or

(b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or

(c) in any other case, within a reasonable time after the conclusion of the contract.

#### Article 32

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract.

### Section II. Conformity of the goods and third party claims

#### Article 33

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. Except where otherwise agreed, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods.

(2) The seller is not liable under subparagraphs (a) to (d) of paragraph (1) of this article for any non-conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such non-conformity.

#### Article 34

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in paragraph (1) of this article and which is due to a breach of any of his obligations, including a breach of any express guarantee that the goods will remain fit for their ordinary purpose or for some particular purpose, or that they will retain specified qualities or characteristics for a specific period.

### Article 35

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. The buyer retains any right to claim damages as provided for in this Convention.

### Article 36

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

(3) If the goods are redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redispach, examination may be deferred until after the goods have arrived at the new destination.

### Article 37

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless such time-limit is inconsistent with a contractual period of guarantee.

### Article 38

The seller is not entitled to rely on the provisions of articles 36 and 37 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

### Article 39

(1) The seller must deliver goods which are free from any right or claim of a third party, other than one based on industrial or intellectual property, unless the buyer agreed to take the goods subject to that right or claim.

(2) The buyer does not have the right to rely on the provisions of this article if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he became aware or ought to have become aware of the right of claim.

#### Article 40

(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial or intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that that right or claim is based on industrial or intellectual property:

(a) under the law of the State where the goods will be resold or otherwise used if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or

(b) in any other case under the law of the State where the buyer has his place of business.

(2) The obligation of the seller under paragraph (1) of this article does not extend to cases where:

(a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or

(b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

(3) The buyer does not have the right to rely on the provisions of this article if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he became aware or ought to have become aware of the right or claim.

### Section III. Remedies for breach of contract by the seller

#### Article 41

(1) If the seller fails to perform any of his obligations under the contract and this Convention, the buyer may:

(a) exercise the rights provided in articles 42 to 48;

(b) claim damages as provided in articles 70 to 73.

(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

#### Article 42

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with such requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach and a request for substitute goods is made either in conjunction with notice given under article 37 or within a reasonable time thereafter.

#### Article 43

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in the performance.

#### Article 44

(1) Unless the buyer has declared the contract avoided in accordance with article 45, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. The buyer retains any right to claim damages as provided for in this Convention.

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under paragraph (2) of this article, that the buyer make known his decision.

(4) A request or notice by the seller under paragraphs (2) and (3) of this article is not effective unless received by the buyer.

#### Article 45

(1) The buyer may declare the contract avoided:

(a) if the failure by the seller to perform any of his obligations under the contract and this Convention amounts to a fundamental breach of contract; or

(b) if the seller has not delivered the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 43 or has declared that he will not deliver within the period so fixed.

(2) However, in cases where the seller has made delivery, the buyer loses his right to declare the contract avoided unless he has done so within a reasonable time:

(a) in respect of late delivery, after he has become aware that delivery has been made; or

(b) in respect of any breach other than late delivery, after he knew or ought to have known of such breach, or after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 43, or after the seller has declared that he will not perform his obligations within such an additional period.

#### Article 46

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may declare the price to be reduced in the same proportion as the value that the goods actually delivered would have had at the time of the conclusion of the contract bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 44 or if he is not allowed by the buyer to remedy that failure in accordance with that article, the buyer's declaration of reduction of the price is of no effect.

#### Article 47

(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, the provisions of articles 42 to 46 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

#### Article 48

(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

### Chapter III. Obligations of the buyer

#### Article 49

The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

#### Section I. Payment of the price

#### Article 50

The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any relevant laws and regulations to enable payment to be made.

#### Article 51

If a contract has been validly concluded but does not state the price or expressly or impliedly make provision for the determination of the price of the goods, the buyer must pay the price generally charged by the seller at the time of the conclusion of the contract. If no such price is ascertainable, the buyer must pay the price generally prevailing at the aforesaid time for such goods sold under comparable circumstances.

#### Article 52

If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.

#### Article 53

(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:

(a) at the seller's place of business; or

(b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

(2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in the place of business of the seller subsequent to the conclusion of the contract.

#### Article 54

(1) The buyer must pay the price when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

#### Article 55

The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or other formality on the part of the seller.

### Section II. Taking delivery

#### Article 56

The buyer's obligation to take delivery consists:

(a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and

(b) in taking over the goods.

### Section III. Remedies for breach of contract by the buyer

#### Article 57

(1) If the buyer fails to perform any of his obligations under the contract and this Convention, the seller may:

(a) exercise the rights provided in articles 58 to 61;

(b) claim damages as provided in articles 70 to 73.

(2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

#### Article 58

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with such requirement.

### Article 59

(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.

(2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in the performance.

### Article 60

(1) The seller may declare the contract avoided:

(a) if the failure by the buyer to perform any of his obligations under the contract and this Convention amounts to a fundamental breach of contract; or

(b) if the buyer has not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 59, performed his obligation to pay the price or taken delivery of the goods, or if he has declared that he will not do so within the period so fixed.

(2) However, in cases where the buyer has paid the price, the seller loses his right to declare the contract avoided if he has not done so:

(a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or

(b) in respect of any breach other than late performance, within a reasonable time after he knew or ought to have known of such breach, or within a reasonable time after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 59, or the declaration by the buyer that he will not perform his obligations within such an additional period.

### Article 61

(1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with any requirement of the buyer that may be known to him.

(2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If the buyer fails to do so after receipt of such a communication, the specification made by the seller is binding.

Chapter IV. Provisions common to the obligations  
of the seller and of the buyer

Section I. Anticipatory breach and instalment contracts

Article 62

(1) A party may suspend the performance of his obligations if it is reasonable to do so because, after the conclusion of the contract, a serious deterioration in the ability to perform or in the creditworthiness of the other party or his conduct in preparing to perform or in actually performing the contract gives good grounds to conclude that the other party will not perform a substantial part of his obligations.

(2) If the seller has already dispatched the goods before the grounds described in paragraph (1) of this article become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. This paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice to the other party thereof and must continue with performance if the other party provides adequate assurance of his performance.

Article 63

If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach, the other party may declare the contract avoided.

Article 64

(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

(2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

(3) A buyer, avoiding the contract in respect of any delivery, may, at the same time, declare the contract avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

## Section II. Exemptions

### Article 65

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if he is exempt under paragraph (1) of this article and if the person whom he has engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect only for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

## Section III. Effects of avoidance

### Article 66

(1) Avoidance of the contract releases both parties from their obligations thereunder, subject to any damages which may be due. Avoidance does not affect any provisions of the contract for the settlement of disputes or any other provisions of the contract governing the respective rights and obligations of the parties consequent upon the avoidance of the contract.

(2) If one party has performed the contract either wholly or in part, he may claim from the other party restitution of whatever he has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

### Article 67

(1) The buyer loses his right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) Paragraph (1) of this article does not apply:

(a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which he received them is not due to an act or omission of the buyer; or

(b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 36; or

(c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered the lack of conformity or ought to have discovered it.

#### Article 68

The buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 67 retains all other remedies.

#### Article 69

(1) If the seller is bound to refund the price, he must also pay interest thereon from the date on which the price was paid.

(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:

(a) if he must make restitution of the goods or part of them; or

(b) if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

### Section IV. Damages

#### Article 70

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which he then knew or ought to have known, as a possible consequence of the breach of contract.

#### Article 71

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction and any further damages recoverable under the provisions of article 70.

## Article 72

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 71, recover the difference between the price fixed by the contract and the current price at the time he first had the right to declare the contract avoided and any further damages recoverable under the provisions of article 70.

(2) For the purposes of paragraph (1) of this article, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at another place which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

## Article 73

The party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount which should have been mitigated.

## Section V. Preservation of the goods

### Article 74

If the buyer is in delay in taking delivery of the goods and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He may retain them until he has been reimbursed his reasonable expenses by the buyer.

### Article 75

(1) If the goods have been received by the buyer and he intends to reject them, he must take such steps as are reasonable in the circumstances to preserve them. He may retain them until he has been reimbursed his reasonable expenses by the seller.

(2) If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that he can do so without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination.

### Article 76

The party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

### Article 77

(1) The party who is bound to preserve the goods in accordance with articles 74 or 75 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the cost of preservation, provided that notice of the intention to sell has been given to the other party.

(2) If the goods are subject to loss or rapid deterioration or their preservation would involve unreasonable expense, the party who is bound to preserve the goods in accordance with articles 74 or 75 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.

(3) The party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

## Chapter V. Passing of risk

### Article 78

Loss or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

### Article 79

(1) If the contract of sale involves carriage of the goods and the seller is not required to hand them over at a particular destination, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer. If the seller is required to hand the goods over to a carrier at a particular place other than the destination, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of risk.

(2) Nevertheless, if the goods are not clearly marked with an address or otherwise identified to the contract, the risk does not pass to the buyer until the seller sends the buyer a notice of the consignment which specifies the goods.

### Article 80

The risk in respect of goods sold in transit is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents controlling their disposition. However, if at the time of the conclusion of the contract the seller knew or ought to have known that the goods had been lost or damaged and he has not disclosed such fact to the buyer, such loss or damage is at the risk of the seller.

### Article 81

(1) In cases not covered by articles 79 and 80 the risk passes to the buyer when the goods are taken over by him or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(2) If, however, the buyer is required to take over the goods at a place other than any place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

(3) If the contract relates to a sale of goods not then identified, the goods are deemed not to be placed at the disposal of the buyer until they have been clearly identified to the contract.

### Article 82

If the seller has committed a fundamental breach of contract, the provisions of articles 79, 80 and 81 do not impair the remedies available to the buyer on account of such breach.

### Article (X)

A Contracting State whose legislation requires a contract of sale to be concluded in or evidenced by writing may at the time of signature, ratification or accession make a declaration in accordance with article 11 that any provision of article 10, article 27, or Part II of this Convention, which allows a contract of sale or its modification or abrogation or any offer, acceptance, or other indication of intention to be made in any form other than in writing shall not apply where any party has his place of business in a Contracting State which has made such a declaration.

## CHAPTER III

### INTERNATIONAL PAYMENTS

#### Negotiable instruments

29. The Commission had before it two reports of the Working Group on International Negotiable Instruments: the report on the work of the Working Group's fifth session, held in New York from 18 to 29 July 1977 (A/CN.9/141), and the report on the work of its sixth session (A/CN.9/147), held at Geneva from 3 to 13 January 1978. These reports set forth the progress so far made by the Working Group in its work on the preparation of a draft convention on international bills of exchange and international promissory notes. The proposed convention would establish uniform rules applicable to an international negotiable instrument (bill of exchange or promissory note) for optional use in international payments.

#### Report of the Working Group (fifth session)

30. As indicated in its report, the Working Group at its fifth session began consideration of the revised text of the draft uniform law on international bills of exchange and international promissory notes, prepared by the Secretariat on the basis of the deliberations and decisions of the Working Group at its four previous sessions relative to the draft uniform law first prepared by the Secretary-General in response to a decision of the Commission 14/ and referred by the Commission to the Working Group. 15/ The report indicates that the Working Group at this session completed consideration of articles 1 to 23 and commenced consideration of article 24.

31. The report on the work of its fifth session sets forth the deliberations and conclusions of the Working Group with respect to the provision of the draft uniform law regarding sphere of application of the rules, formal requirements of an international negotiable instrument, completion of an incomplete instrument, interpretation, transfer of an instrument and the rights of a holder.

32. The report also contains a recommendation by the Working Group to the Commission that the uniform provisions governing international bills of exchange and international promissory notes should be set forth in the form of a convention rather than in the form of a uniform law and should then be retitled, "Draft Convention on International Bills of Exchange and International Promissory Notes".

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14/ Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17 (A/8417), para. 35 (Yearbook of the United Nations Commission on International Trade Law, Volume II: 1971 (United Nations publication, Sales No. E.72.V.4), part one, II, A, para. 35). The text of the draft uniform law, with commentary, appears in A/CN.9/WG.IV/WP.2.

15/ Ibid., Twenty-seventh Session, Supplement No. 17 (A/8717), para. 61 (Yearbook of the United Nations Commission on International Trade Law, Volume III: 1972 (United Nations publication, Sales No. E.73.V.6), part one, II, A, para. 61).

## Report of the Working Group (sixth session)

33. As indicated in its report, the Working Group at its sixth session continued its consideration of the revised text of the draft uniform law prepared by the Secretariat and considered articles 5 and 6 and articles 24 to 53. The report sets forth the deliberations and conclusions of the Working Group with respect to the provisions of the draft uniform law regarding the definition of a "protected holder", the rights of a holder and a protected holder, the liability of the parties, presentment for acceptance and presentment for payment.

34. The report also sets forth a decision by the Working Group to establish a drafting group composed of representatives of the four working languages of the Commission (English, French, Russian and Spanish) to review the text of the draft Convention on International Bills of Exchange and International Promissory Notes as finally adopted by the Working Group to assure harmony between the various language versions.

## Consideration of the reports by the Commission 16/

35. The Commission, in accordance with its general policy of considering the substance of the work carried out by its working groups only upon completion of that work, took note of the reports of the Working Group on International Negotiable Instruments.

## Decision of the Commission

36. The Commission adopted the following decision:

### The United Nations Commission on International Trade Law

1. Takes note with appreciation of the reports of the Working Group on International Negotiable Instruments on the work of its fifth and sixth sessions;
2. Requests the Working Group to continue its work under the terms of reference set forth by the United Nations Commission on International Trade Law in the decision adopted in respect of negotiable instruments at its fifth session and to complete that work expeditiously;
3. Requests the Secretary-General to carry out, in accordance with the directives of the Working Group on International Negotiable Instruments, further work in connexion with the draft uniform law on international bills of exchange and with the inquiries regarding the use of cheques for settling international payments, in consultation with the Commission's Study Group on International Payments, composed of experts provided by interested international organizations and banking and trade institutions, and for these purposes to convene meetings as required.

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<sup>16/</sup> The Commission considered this item at its 203rd meeting on 12 June 1978; a summary record of this meeting is contained in A/CN.9/SR.203.

## CHAPTER IV

### PROGRAMME OF WORK OF THE COMMISSION

37. At its ninth session, the Commission noted that it had completed, or would soon complete, work on many of the priority items included in its programme of work and that it was therefore desirable to review in the near future its long-term work programme. In this connexion, the Secretariat was instructed by the Commission to submit to its eleventh session a report on the long-term work programme of the Commission and, where appropriate, to consult with international organizations and trade institutions as to its contents. 17/

38. At its thirty-first session, the General Assembly welcomed the decision of the Commission to review its long-term work programme, and requested the Secretary-General to ask Governments to submit their views and suggestions on such a programme (General Assembly resolution 31/99 of 15 December 1976).

39. At the present session, the Commission had before it the following documents:

(a) Report of the Secretary-General on the programme of work of the Commission. This contained an account of the extent to which the first programme of work of the Commission had been completed, an analysis of proposals by Governments and international organizations on the future work programme of the Commission, and a discussion of issues relating to the establishment of a new programme of work (A/CN.9/149).

(b) Note by the Secretariat on liquidated damages and penalty clauses (A/CN.9/149/Add.1).

(c) Note by the Secretariat on international barter or exchange (A/CN.9/149/Add.2).

(d) Note by the Secretariat on some legal aspects of electronic funds transfer (A/CN.9/149/Add.3).

(e) Note by the Secretariat setting forth a proposal by France relating to the determination of a unit of account for inclusion in the programme of work of the Commission (A/CN.9/156).

(f) Note by the Secretariat on co-ordination of work between the Commission and other international organizations (A/CN.9/154).

(g) Note by the Secretariat setting forth the proposals of the Asian-African Legal Consultative Committee on the programme of work of the Commission (A/CN.9/155).

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17/ Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17), paras. 65-66 (Yearbook of the United Nations Commission on International Trade Law, Volume VII: 1976 (United Nations publication, Sales No. E.77.V.1), part one, II, A, paras. 65-66).

40. The Commission considered the following issues: 18/

- (a) The possible contents of a new work programme;
- (b) The allocation of subjects to working groups of the Commission;
- (c) The co-ordination of the work of organizations engaged in the unification of international trade law.

A. The possible contents of a new work programme

41. In its deliberations on this issue, the Commission used as a basis the following "List of subject-matters for possible inclusion in the future work programme" set forth in document A/CN.9/149 and Corr.1:

List of subject-matters for possible inclusion in the  
future work programme 19/

I. Issues relating to international trade law

- (a) Preparation of a code of international trade law (FP, NP).
- (b) Preparation of uniform conflict of law rules (NP).
- (c) Work directed to the unification of international contracts
  - (i) Contracts of warehousing (NP);
  - (ii) Contracts of barter (NP);
  - (iii) Contracts for the supply of labour, or contracts where the party who orders the goods supplies a substantial part of the materials (NP);
  - (iv) General conditions on the erection and technical servicing of machines and industrial plant (NP);
  - (v) Contracts of leasing (NP);
  - (vi) Standard contract terms (FP, NP);

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18/ The Commission considered this item at its 203rd and 204th meetings, on 12 June 1978, at its 205th and 206th meetings, on 13 June 1978 and at its 208th meeting, on 14 June 1978; for the summary records of these meetings, see A/CN.9/SR.203, 204, 205, 206 and 208.

19/ In the list that follows, the letters "(FP)" indicate that the topic was formerly proposed for inclusion in the programme of work of the Commission, either at its first session or at a subsequent time. The letters "(NP)" indicate that the topic is a new proposal made for the purposes of deciding on a new programme of work. It will be noted that, in several instances, former proposals have been repeated. The list does not include priority topics in respect of which work has not yet been completed.

- (vii) Consequences of frustration (FP);
- (viii) Force majeure clauses (FP, NP);
- (ix) Penalty clauses (NP);
- (x) Certain contractual issues of general application (e.g. set-off, suretyship assignment, transfer of property rights, formation of contracts in general, representation and full powers, frustration, damages, application of usages) (NP);
- (xi) Contracts for quality control (NP);
- (xii) Public tenders (NP).
  - (d) Preparation of uniform rules relating to international payments
    - (i) Electronic funds transfers (NP);
    - (ii) "Standby" letters of credit (NP);
  - (iii) Clauses protecting parties against fluctuations in the value of currency (NP);
  - (iv) Collection of commercial paper (NP).
  - (e) International commercial arbitration
    - (i) Study of means to make the UNCITRAL Arbitration Rules more effective (NP);
    - (ii) Formulation of provisions for situations which cannot be dealt with by bilateral agreements (NP);
    - (iii) Proposal relating to article V (1) (e) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NP).
  - (f) Transport 20/ and transport insurance
    - (i) Drafting a convention on multimodal transport (NP);
    - (ii) Consideration of the law of charter parties (NP);
    - (iii) Consideration of legal issues relating to transport by container (NP);
    - (iv) Consideration of the law of transport insurance (NP);
    - (v) Preparation of uniform rules relating to contracts for the forwarding of goods (NP).
  - (g) Agency
    - Legal issues arising out of agency contracts concluded for commercial purposes (FP, NP).

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20/ It was proposed at the first session of the Commission that "transportation" be placed on the work programme of the Commission.

(h) Insurance (FP, NP).

(i) Products liability (FP, NP).

(j) Company law

The establishment and operation of commercial companies (NP).

(k) Intellectual property (FP). 21/

(l) Legalization of documents (FP). 22/

II. Issues arising from a possible reordering of international economic relations

(a) Legal implications of the new international economic order (NP).

(b) Multinational enterprises (FP, NP).

(c) Transfer of technology (NP).

(d) Elimination of discrimination in laws affecting international trade (FP, NP).

42. In the course of the deliberations, it was suggested that the following topics be added to this list:

(a) "Hardship" clauses;

(b) Restrictive business practices;

(c) Factoring contracts;

(d) A convention on the recognition and enforcement of judgements in commercial matters;

(e) A convention regulating the use of microfilms in arbitration proceedings;

(f) Letters of intent;

(g) The legal effect of initialling a commercial contract;

(h) Conciliation of international trade disputes, and its relationship to arbitration;

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21/ The Convention establishing the World Intellectual Property Organization (WIPO), Stockholm, 1967, states that the objectives of that organization are, inter alia, to promote the protection of intellectual property throughout the world through co-operation among States, and, where appropriate, in collaboration with any other international organization. WIPO became a specialized agency of the United Nations in December 1974.

22/ The Convention abolishing the requirement of legalization for foreign public documents, The Hague, 5 October 1961, has been concluded under the auspices of the Hague Conference on Private International Law.

(i) Validity of contracts of international sale of goods.

43. There was wide agreement that the success of the first work programme had been in large measure due to the fact that work had been directed to specific identified topics. The new work programme should also be composed of topics of this character. Furthermore, the topics selected should be of global significance. Topics, the unification of which had merely limited interest, should be left for consideration by other bodies. It was also noted that, in accordance with General Assembly resolution 2205 (XXI) of 17 December 1966, establishing the mandate of the Commission, an attempt should be made to identify topics of special interest to developing countries.

44. In the course of the deliberations, several topics were mentioned for possible inclusion in the work programme, as set forth in the following paragraphs.

1. Preparation of a Code of International Trade Law

45. In support of the inclusion of this topic, it was noted that the current method of unifying special areas of trade law might eventually produce lack of harmony between the various instruments both because the instruments might contain conflicting rules, and because the same problems might be resolved differently in different instruments. Further, there would remain some areas where divergent national laws would apply. The prevailing view, however, was that it was inadvisable for the Commission to undertake such a project at the present time. Such a project would take many years to complete, and there was a risk that the rules codified would be obsolete at the time of completion.

2. Preparation of uniform conflict of law rules

46. The view was expressed that, concurrently with its work on the unification of substantive rules of law, the Commission could, where appropriate, also direct its attention to the preparation of uniform conflict of law rules to resolve conflict of law issues arising out of international trade transactions. In this connexion, it was noted that the Commission could examine the 1955 Hague Convention on the Law Applicable to International Sales of Goods, which was a topic on the existing work programme of the Commission. The observer for the Hague Conference on Private International Law stated that the Conference had on its work programme the drafting of a Protocol to the 1955 Hague Convention. The general view within the Commission was that it could consider the appropriateness of undertaking work on uniform conflict of law rules.

3. Topics relating to international trade contracts

47. Wide support was expressed for the inclusion in the new programme of work of the following topics relating to international trade contracts: "hardship" clauses, force majeure clauses, liquidated damages and penalty clauses and clauses protecting parties against fluctuations in the value of currency. It was noted that the formulation of model clauses in these areas would facilitate international trade. It was also suggested that an investigatory study be made by the Secretariat on contract practices in international trade, which would focus on typical clauses used in international contracts, and on the use of unfair clauses in trade between developed and developing countries.

48. There was general agreement that the subject of international barter or exchange might be of special interest to developing countries. There was wide support for the inclusion of this item in the programme of work.

#### 4. Topics relating to international payments

49. Considerable support was expressed for the proposal (A/CN.9/156) to commence work on determining a universal unit of value which could serve as a point of reference in international conventions. Support was also expressed for commencing work, in collaboration with the International Chamber of Commerce, on uniform rules relating to standby letters of credit. In regard to the subject of legal problems of electronic funds transfers, there was support for its inclusion in the work programme, but with the subject given a lower priority than the other two subjects mentioned above in this paragraph.

#### 5. Topics relating to international transport

50. There was some support for including in the new work programme the following items: preparation of a draft Convention on multimodal transport, preparation of uniform rules on contracts for the forwarding of goods and legal issues relating to charter-parties, transport by container and transport insurance.

51. In relation to the preparation of a draft Convention on multimodal transport, the view was expressed that all previous efforts by international bodies at unifying the law on multimodal transport had met with little success. No body dealing with a single mode of transport, such as the International Civil Aviation Organization (ICAO) dealing with air transport, and the Inter-Governmental Maritime Consultative Organization (IMCO) dealing with sea transport, was competent to deal with the issue. A draft Convention on the Combined Transport of Goods (TCM Convention), approved in 1969 by the International Maritime Committee (CMI), had not been submitted to a diplomatic conference. A subsequent draft prepared by UNIDROIT had also not been submitted to a diplomatic conference. A joint meeting of IMCO and the Economic Commission for Europe (ECE) had also produced a draft TCM Convention, but this had also not commanded sufficient support. The International Chamber of Commerce (ICC) had prepared Uniform Rules for a Combined Transport Document (ICC Brochure No. 298), but these rules had been criticized. An Intergovernmental Preparatory Group, established by the Trade and Development Board in 1973, was currently considering the formulation of a draft Convention, but had made little progress in drafting a legal text. In the light of the successful elaboration by the Commission of the draft Convention on the Carriage of Goods by Sea, which had formed the basis for the United Nations Convention on the Carriage of Goods by Sea, 1978, it was proposed that the Commission should offer to collaborate with the UNCTAD Intergovernmental Preparatory Group in formulating a draft Convention on multimodal transport.

52. Doubts were expressed as to whether it was proper at the present time to include in the work programme of the Commission the items on multimodal transport, charter-parties, container transport and marine insurance, as these were currently under consideration by subsidiary organs of the Trade and Development Board. To commence work without further consultation with these organs might create duplication of work.

## 6. International commercial arbitration

53. A suggestion was made that the Commission include in its work programme the conciliation of disputes arising out of international trade transactions, and the relation of such conciliation procedures to arbitration. It was noted that conciliation had been adopted as a method of dispute settlement in some recent interregional trade agreements. This was also known in the Asian-African region. There was wide support for this suggestion.

## 7. Product liability

54. In relation to this topic, attention was drawn to the decision of the Commission at its tenth session (1977) not to pursue work on this subject, but that the matter should be reviewed in the context of the future work programme of the Commission if one or more member States of the Commission should take an initiative to that effect. There was support for the inclusion of this topic in the new work programme on the basis that such work would be of particular interest to the developing countries.

## 8. Legal implications of the new international economic order

55. There was wide support for inclusion by the Commission in its work programme of the legal issues of the new international economic order. It was noted that the General Assembly, by its resolutions 3494 (XXX) of 15 December 1975, 31/99 of 15 December 1976 and 32/145 of 16 December 1977, had called upon the Commission to take account in its work of the relevant provisions of the resolutions of the sixth and seventh special sessions of the Assembly that laid down the foundations of the new international economic order, bearing in mind the need for United Nations organs to participate in the implementation of these resolutions. It was stated that the implementation of the new international economic order was of greatest importance to the economic development of the developing countries, and this had prompted the resolution of the Asian-African Legal Consultative Committee, calling upon the Commission to examine this topic (A/CN.9/155). At the time of the establishment of the Commission, the principles of the new international economic order had not been formulated and, accordingly, no mention was made in the mandate of the Assembly to the Commission contained in Assembly resolution 2205 (XXI) of 17 December 1966. The above-mentioned Assembly resolutions 3494 (XXX), 31/99 and 32/145, adopted after the formulation of these principles, should be construed as extending the original mandate of the Commission.

56. In opposition it was stated that the present topic was not clearly defined. Further, it was possible that the new international economic order was still in the course of evolution, and it would be inappropriate to study its legal implications at the present stage. The focus of the Commission's work hitherto had been on subjects with little political content, thus enabling the Commission to accomplish its tasks in a spirit of harmony. The suggested topic, however, might lead to polemical debate and impede the smooth functioning of the Commission.

57. In reply, it was stated that the course of action proposed was for the Secretariat to prepare preliminary studies identifying specific legal issues

which the Commission might consider. These issues would then be submitted to a special committee composed of government representatives, who could further clarify the issues if necessary. Furthermore, the work of the special committee itself would be reviewed by the Commission. There was therefore no reason to fear that the work of the Commission would not proceed with its usual effectiveness.

58. The view was also expressed that General Assembly resolutions 3494 (XXX), 31/99 and 32/145 obliged the Commission not to consider the legal implications of the new international economic order in general, but to take that order into account in selecting items for its programme of work, and in the way in which issues relating to selected items were resolved.

## 9. Other subjects

59. In the course of the deliberations, the following were suggested as other subjects which might be examined by the Commission: multinational enterprises, the transfer of technology, restrictive business practices, the elimination of discrimination in trade, the principle of mutual and equitable benefit in trade and the duty to co-operation in trade relations.

### B. Allocation of subjects to working groups of the Commission

60. It was noted that, owing to financial constraints, the Commission could only establish three working groups. The former Working Group on International Legislation on Shipping had been dissolved, and a new working group could be established in its place. The Working Group on the International Sale of Goods had completed its mandate and could be given a new mandate. Since the Working Group on International Negotiable Instruments had yet to complete its work, it was not imperative to allocate any new items to it at the present stage.

61. It was noted that many suggested topics relating to international contracts could be entrusted to the existing Working Group on the International Sale of Goods, with a corresponding modification in its title. Further, topics relating to international payments might be entrusted to the Working Group on International Negotiable Instruments. There was wide support for entrusting to a third working group the work on the legal implications of the new international economic order. There was general agreement that the work on arbitration could proceed, as in the past, without recourse to a working group.

### C. Co-ordination of the work of organizations engaged in the unification of international trade law

62. There was general agreement on the need for effective co-ordination of the work of organizations engaged in the unification of international trade law. It was recalled that General Assembly resolution 2205 (XXI) of 17 December 1966 establishing the Commission imposed on it a duty to co-ordinate such work, not only in regard to the work of the Commission in relation to the work of other organizations, but in relation to the work of other organizations inter se. Such co-ordination was of special importance in relation to the new programme of work for, whereas other organizations had not been dealing with the priority items selected for the first work programme of the Commission, several organizations

were already dealing with certain aspects of items which might be included in the new work programme.

63. The view was expressed that the Commission, a body having a universal character, had a special position in the field of unification, and that therefore the need to co-ordinate work did not prevent the Commission from commencing work on an item already undertaken by a body having a less representative character.

64. It was noted that there was a need to co-ordinate the work of the Commission not only with organizations outside the United Nations family, but also with organizations within it. Consultation already existed between the secretariats of the Commission and of certain organizations for the purpose of co-ordinating work programmes, and it was agreed that such links should be maintained and strengthened.

65. In the discussion of means to improve co-ordination, it was observed that the Commission worked within certain limitations, as it had no power to oblige another organization to take up an item of work, or cease to deal with an item. The most effective check on duplication of work could be exercised by States members of international organizations themselves, for they could allocate particular subjects to the organizations most fitted to deal with them. The following suggestions as to machinery for more effective co-ordination were made:

(a) Recognizing that co-ordination was primarily the work of the secretariat of the Commission, it was suggested that initiatives should be taken to approach the secretariats of other organizations whose programmes of work appeared to overlap with that of the Commission. Such an initiative might take the form of a special intersecretariat meeting to eliminate duplication of work and promote collaboration.

(b) A co-ordinating committee might be created of members of the Commission entrusted with the duty of furthering co-ordination by the best available means.

(c) A steering committee might be created of members of bodies engaged in the unification of international trade law to co-ordinate work.

D. Recommendations of the ad hoc working group and decisions of the Commission

1. Creation of an ad hoc working group to consider the programme of work

66. At the conclusion of its deliberations on a programme of work, the Commission established an ad hoc working group composed of the representatives of Chile, Colombia, Egypt, France, the German Democratic Republic, Germany, Federal Republic of, Hungary, India, Japan, Kenya, Mexico, Nigeria, Singapore, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America. The Working Group elected as its Chairman Professor J. Barrera Graf (Mexico). The Commission requested the Working Group:

(a) To consider the items proposed for inclusion in the new work programme, and to make its recommendations thereon;

(b) To make recommendations as to working methods which might be adopted by the Commission.

## 2. Recommendations of the ad hoc Working Group

67. The ad hoc Working Group made the following recommendations to the Commission:

### New work programme of the Commission

(a) The Commission should take note of all items in the "List of subject-matters for possible inclusion in the future work programme" (see para. 41 above), and the items listed at paragraph 42 above, as possible subjects for inclusion in its work programme.

(b) As a general rule, the Commission should not refer subject-matters to a Working Group until after preparatory studies had been made by the Secretariat and the consideration of these studies by the Commission had indicated not only that the subject-matter was a suitable one in the context of the unification and harmonization of a law, but that the preparatory work was sufficiently advanced for a working group to commence work in a profitable manner.

(c) Priority should be accorded to the following:

(i) Topics relating to international trade contracts

- a. International barter or exchange;
- b. Study of international contract practices, with special reference to "hardship" clauses, force majeure clauses, liquidated damages and penalty clauses, and clauses protecting parties against currency fluctuations;
- c. The 1955 Hague Convention on the Law Applicable to International Sales, to be considered by the Commission only after the Hague Conference on Private International Law had completed its revision of that Convention.

(ii) Topics on international payments

- a. Stand-by letters of credit, to be studied in conjunction with the International Chamber of Commerce;
- b. Electronic funds transfer, to be given, however, a lower priority than item (a).

(iii) Determination of a universal unit of account for international conventions

(iv) International commercial arbitration

Conciliation of international trade disputes and its relation to arbitration and to the UNCITRAL Arbitration Rules.

- (v) Product liability
- (vi) The legal implications of the new international economic order
- (vii) Transportation

The preparation of studies setting forth the work so far accomplished by international organizations in the fields of multimodal transport, charter-parties, marine insurance, transport by container and the forwarding of goods.

(d) In respect of all the above topics, the Secretariat should, in the first instance, undertake preliminary studies, where necessary in consultation with interested international organizations. The Secretariat could exercise its discretion in determining the order in which such studies were prepared, but take into account any priorities indicated by the Commission.

(e) The Commission should decide on the scope of further work on these subjects, and their possible allocation to Working Groups, after having examined the studies prepared by the Secretariat.

68. The Commission considered and adopted these recommendations.

#### Decision of the Commission

69. At its 208th meeting, on 14 June 1978, the Commission adopted the following decision:

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

Noting the desirability of establishing a new programme of work,

Having considered the views of Governments and international organizations submitted to it as to the possible contents of a new programme of work,

1. Takes note of all items in the list of subject-matters for possible inclusion in the future work programme set forth in paragraph 41 above, and the items set forth in paragraph 42 above as possible subjects for inclusion in its work programme;
2. Decides that priority be given to the consideration of the items set forth in paragraph 67 above;
3. Requests the Secretary-General to co-ordinate the programme of work of the Commission with that of other organizations working in the same areas and, to the extent considered appropriate, to collaborate with such other organizations;
4. Further requests the Secretary-General to submit to the Commission at its twelfth session studies on priority items selected from the programme of work.

### 3. New international economic order

70. A proposal for a decision in respect of the action to be taken by the Commission in respect of the new international economic order was submitted by the representatives of Egypt, Ghana, India, Kenya, Nigeria, the Philippines, Singapore and the United Republic of Tanzania, and the observer for Yugoslavia. After certain amendments had been made, and after discussion, during which some delegations took the view that it was premature to establish a working group at this session, the Commission, at its 208th plenary meeting on 14 June 1978, adopted the decision set forth in paragraph 71 below.

#### Decision of the Commission

71. At its 208th meeting, on 14 June 1978, the Commission adopted the following decision:

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

Having regard to General Assembly resolution 2205 (XXI) of 17 December 1966 establishing the United Nations Commission on International Trade Law for the purpose of promoting the progressive harmonization and unification of the law of international trade,

Noting that the General Assembly, in that resolution, requested the Commission to bear in mind the interests of all peoples, and particularly those of developing countries, in the extensive development of international trade,

Taking note of General Assembly resolutions 3494 (XXX) of 15 December 1975, 31/99 of 15 December 1976 and 32/145 of 16 December 1977, in which it called on the Commission to take account of the relevant provisions of the resolutions of the sixth and seventh special sessions of the Assembly that laid down the foundations of the new international economic order, bearing in mind the need for United Nations organs to participate in the implementation of those resolutions,

Taking note of the resolution on the future programme of work of the Commission, adopted by the Asian-African Legal Consultative Committee at its nineteenth session, held at Doha, Qatar, in January 1978, 23/

1. Expresses the view that, in order to implement the mandate given to it by the General Assembly in the above resolutions, it is necessary for the United Nations Commission on International Trade Law to determine the legal implications of the new international economic order;

2. Requests the Secretary-General:

(a) To place before the United Nations Commission on International Trade Law, at its twelfth session in 1979, a report setting forth subject-matters that are relevant in the context of the development of a new international economic order and that would be suitable for consideration by the Commission, accompanied, where appropriate, with background reports and recommendations as to the action that could be taken by the Commission;

(b) To consult, where appropriate, with other international organizations and bodies, within and outside the United Nations system, on their programme of work to the extent that such programmes relate to legal work carried out by them in the field of international trade law and is especially relevant to the new international economic order, and to formulate, for the Commission's consideration, recommendations as to the degree of co-ordination that would be required for a rational programme of work in the area at issue;

(c) To invite Governments to submit their views and proposals as to subject-matters that are relevant in the context of the development of a new international economic order and that would be suitable for consideration by the Commission;

(d) To carry out the preparatory work, where appropriate with the assistance of an ad hoc study group composed of representatives of interested organizations and individual experts;

3. Decides to establish a Working Group on the New International Economic Order to examine the report of the Secretary-General in order to make recommendations as to specific topics which could appropriately form part of the programme of work of the Commission, but to defer the designation of States members of the Working Group until its twelfth session, pending the submission of the report of the Secretary-General mentioned in paragraph 2 (a) above;

4. Requests the Secretary of the Commission, in accordance with his normal practice of informing interested intergovernmental organizations of the progress of the work of the Commission and of collaborating with such organizations, to inform the Asian-African Legal Consultative Committee of the action taken by the Commission and to maintain close collaboration with that organization.

## CHAPTER V

### TRAINING AND ASSISTANCE IN THE FIELD OF INTERNATIONAL TRADE LAW 24/

72. The Commission had before it a note by the Secretary-General (A/CN.9/152) setting forth the actions taken by the Secretariat to implement the Commission's decisions on training and assistance in the field of international trade law adopted at its tenth session, 25/ as well as the actions of the Sixth Committee and the General Assembly relating thereto.

#### A. Second UNCITRAL symposium

73. At its tenth session, consequent upon the cancellation for lack of funds of the UNCITRAL symposium on international trade law planned in connexion with that session, the Commission recommended to the General Assembly that the Assembly "should consider the possibility of providing for the funding of the Commission's symposia on international trade law, in whole or in part, out of the regular budget of the United Nations". 26/ The Commission was informed by the Secretariat of the action taken by the Sixth Committee and by the Assembly at its thirty-second session with respect to the Commission's recommendation.

74. It was reported that, in response to the Commission's recommendation, the General Assembly, on the recommendation of the Sixth Committee, had, at its thirty-second session, adopted resolution 32/145 of 16 December 1977, by which it requested the Secretary-General "to study the problem of how adequate financial resources can be provided for the symposia on international trade law which are organized biennially by the United Nations Commission on International Trade Law taking into account the availability of voluntary contributions and the relevant recommendation of the Commission adopted at its 185th meeting on 17 June 1977, 27/ and to report to the General Assembly at its thirty-third session".

75. The Commission took note of the General Assembly's action and reiterated its belief that the UNCITRAL symposia on international trade law constitute a very valuable and important aspect of the Commission's work which it would be desirable to continue if funds could be found for the purpose.

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24/ The Commission considered this item at its 203rd meeting on 12 June 1978; a summary of this meeting is contained in A/CN.9/SR.203.

25/ Official Records of the General Assembly, Thirty-second Session, Supplement No. 17 (A/32/17), para. 45.

26/ Ibid.

27/ Official Records of the General Assembly, Thirty-second Session, Supplement No. 17 (A/32/17), chap. VI.

76. The question was raised whether it would be useful for the Commission to renew at the present session its recommendation regarding the financing of the UNCITRAL symposia. It was, however, agreed that, since the matter was already before the General Assembly for a decision, no further action by the Commission was necessary or desirable pending such decision. The suggestion was also made that a programme, such as a seminar, for the training of young lawyers from developing countries in the field of international trade law might be a more useful and less costly alternative to the symposia.

77. The Commission also considered the question of rescheduling the second symposium assuming that funds became available in the future. There was considerable support for holding the symposium as soon as practicable thereafter, in view especially of the fact that it had originally been scheduled for the Commission's tenth session in 1977. After considering a number of proposals for a specific date, the Commission concluded that there were at present still too many indeterminate factors to enable it to decide the time when the symposium might most practicably be organized. It was noted that quite apart from the uncertainty as to funds, there were the following other factors to consider: the minimum period of six-to-nine months that would be required, after funds became available, for the administrative aspects of organizing the symposium; the continued preference expressed by representatives for holding the symposium contemporaneously with a session of the Commission; and the probability of a conference of plenipotentiaries in 1980 to consider the draft Convention on Contracts for the International Sale of Goods.

78. The Commission, therefore, decided to leave it to the Secretariat to propose a suitable date to the Commission for the holding of the second symposium on international trade law as soon as the prospects for the symposium became clearer.

79. The representative of the Federal Republic of Germany, in his intervention, stressed the importance which his Government attached to the Commission's training and assistance programme, and particularly to the UNCITRAL symposia, and announced that Government's readiness to make a voluntary contribution towards organizing the second UNCITRAL symposium, provided that other States would make similar contributions.

B. Fellowships and internship arrangements for training in international trade law

80. The Commission took note with appreciation of the information contained in the note by the Secretary-General (A/CN.9/152) that the Government of Belgium had informed the Secretary-General that it would again award, in 1978, two fellowships for academic and practical training in international trade law which it had offered for the past few years to candidates from developing countries.

## CHAPTER VI

### FUTURE WORK AND OTHER BUSINESS 28/

#### A. Date and place of the Commission's twelfth session

81. The representative of Austria, on behalf of his Government, invited the Commission to hold its twelfth session at Vienna. He noted that consequent upon the decision taken by the General Assembly under resolution 31/19<sup>4</sup> of 22 December 1976, the International Trade Law Branch, which functioned as the secretariat of the Commission, would be transferred to Vienna, and that this transfer was scheduled to take place in the summer of 1979. The Austrian authorities had extended this invitation in the belief that holding the Commission's session at Vienna would ease the transfer of the Branch to that city and that its officials could use the occasion to investigate the housing situation and familiarize themselves with the facts of life in Austria.

82. The Commission noted that, under General Assembly resolution 31/140 of 17 December 1976, United Nations bodies may hold sessions away from their established headquarters when a Government issuing an invitation for a session to be held within its territory has agreed to defray the actual additional costs directly or indirectly involved. During the discussion of this item, the representative of Austria on the Commission confirmed that his Government would defray such costs as might be directly or indirectly attributable to shifting the twelfth session from Geneva to Vienna.

83. The Commission expressed its appreciation to the Government of Austria for the invitation and decided to hold its twelfth session, of two weeks' duration, at Vienna - the dates to be determined by the Secretary of the Commission after consultation with the Austrian authorities.

#### B. Seventh session of the Working Group on International Negotiable Instruments

84. The Commission decided that the seventh session of the Working Group on International Negotiable Instruments would be held at United Nations Headquarters in New York from 3 to 12 January 1979.

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

85. The Commission took note of General Assembly resolution 32/145 of

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<sup>28/</sup> The Commission considered these items at its 203rd meeting on 12 June 1978, at its 207th and 208th meetings on 14 June 1978 and at its 209th meeting on 16 June 1978; for the summary records of these meetings, see A/CN.9/SR.203, 207, 208 and 209.

16 December 1977 on the report of the United Nations Commission on International Trade Law on the work of its tenth session.

D. United Nations Conference on the Carriage of Goods by Sea

86. The Commission took note of General Assembly decision 32/438 of 16 December 1977 on the United Nations Conference on the Carriage of Goods by Sea and of a note by the Secretary-General concerning that Conference (A/CN.9/150). The above Conference was held at Hamburg, Federal Republic of Germany, from 6 to 31 March 1978. The Commission noted with appreciation that the Conference, at which 78 States were represented, had adopted the United Nations Convention on the Carriage of Goods by Sea, 1978. It expressed its hope that the Convention, which has already been signed by 15 States, would receive the widest possible acceptance.

E. Co-operation with the Commission on Transnational Corporations

87. The Commission took note of a letter from the Chairman of the Commission on Transnational Corporations, in response to the offer by the Commission, made at its eighth session, to undertake work of a legal nature on subjects that might be referred to it by the Commission on Transnational Corporations (A/CN.9/148).

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

88. The Commission took note of a report of the Secretary-General on the current activities of international organizations related to the harmonization and unification of international trade law (A/CN.9/151).

G. Possible transfer of the International Trade Law Branch from New York to Vienna

89. At its tenth session, the Commission noted that the General Assembly, by resolution 31/194 of 22 December 1976, had authorized the Secretary-General to put into effect, among other things, the proposal contained in paragraph 41 of his report on the utilization of office accommodation and conference facilities at the Donaupark Centre in Vienna (A/C.5/31/34), which mentions the International Trade Law Branch as one of the units to be considered for possible transfer from New York to Vienna in 1979. <sup>29/</sup> In view of the fact that the International Trade Law Branch functions as the secretariat of the Commission, the Commission, at the tenth session, held an exchange of views on the effect of the proposed transfer on its work and on the question of where the Commission would hold its sessions

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<sup>29/</sup> Official Records of the General Assembly, Thirty-second Session, Supplement No. 17 (A/32/17), para. 59.

in the event of a transfer of its secretariat to Vienna and decided to revert to the question of venue at the present session. 30/

1. Venue of the Commission's sessions

90. The discussions on the venue of the Commission's sessions showed that there was considerable support for the continuation of the existing pattern of sessions, which had been authorized by the General Assembly when it established the Commission and under which the Commission met alternately at United Nations Headquarters in New York and at the United Nations Office at Geneva (see Assembly resolution 2205 (XXI) of 17 December 1966, sect. II, para. 6). The Commission noted that this pattern of sessions had been reaffirmed by the Assembly in resolution 2609 (XXIV) of 16 December 1969 and by resolution 31/140 of 17 December 1976. There was agreement that the rotation between New York and Europe should continue and that the European session might be held at Geneva or Vienna once the Commission's secretariat was established in the latter city. Accordingly, the Commission decided to recommend to the Assembly that, in respect of the Commission, the above meeting pattern, under which sessions of the Commission may be held alternately at Headquarters in New York and at Geneva or Vienna, should be maintained.

2. Impact of proposed transfer of the secretariat on the Commission's work

91. In the opinion of some representatives, it was not for the Commission to reconsider a decision of the General Assembly and these representatives were therefore of the view that the Commission should take note of Assembly resolution 31/194 without discussion. Most representatives were, however, of the opinion that it was not only within the competence of the Commission, but also the Commission's duty to ensure that the transfer would harm as little as possible the continuity and quality of its work.

92. In this connexion, the Commission expressed its conviction that, since the preparatory work carried out by its secretariat was an essential element of its own work, the International Trade Law Branch should be provided with such research facilities as would enable it to perform its task. In this respect, it was stated that the library facilities at present available in Vienna were as yet inadequate and that it was important that a proper legal reference library should be available upon the arrival of the Branch in Vienna.

93. The Commission noted that its secretariat had made arrangements for the preparation of a list of books to be included in a reference type of library and that such list would presently be available. The representative of Austria informed the Commission that his Government recognized the need for adequate research facilities for the International Trade Law Branch and was prepared to examine the list drawn up by the secretariat with a view to considering to what extent it could contribute to the establishment of a legal reference library for the Commission's secretariat in Vienna.

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30/ Ibid., para. 68.

94. The view was expressed that the establishment of a reference library would probably take time and involve considerable expenditure. The view was also expressed that there might well be disadvantages in the reduced access to large trading interests and institutes in New York, which are frequently consulted by the Commission, and in separating the International Trade Law Branch from the Office of Legal Affairs in New York. Because of the uncertainty of the time needed for establishing a reference library and the availability of funds therefor, the Commission, after deliberation, agreed that it would be in the interest of its work that the International Trade Law Branch should not be transferred to Vienna until the time when adequate research facilities were made available.

95. The view was also expressed that it would be desirable for the General Assembly to reconsider its decision regarding the transfer of the Commission's secretariat to Vienna in the light of the issues raised by the Commission.

96. The question was also raised of the financial implications for the United Nations of the establishment of a legal reference library in Vienna and of holding sessions of the Commission and its working groups in that city. The Commission was informed that no precise indications, beyond those set forth in the report of the Secretary-General on the utilization of office accommodation and conference facilities at the Donaupark Centre in Vienna (A/C.5/31/34), could be given at this stage.

#### Decision of the Commission

97. Following a proposal submitted orally to the Commission, the Commission decided to recommend to the General Assembly that it should defer the transfer of the Commission's secretariat to Vienna for a period of three years, in order to allow time for the establishment of the necessary research facilities for its secretariat, the position to be reviewed in the light of the circumstances then prevailing.

98. After this decision was taken, the Legal Counsel of the United Nations made the following statement:

"Resolution 31/19<sup>4</sup> of the General Assembly, which authorized the Secretary-General to implement his proposals regarding the transfer of units from New York and Geneva to Vienna, remains in effect. This decision is binding upon the Secretary-General and the Secretary-General will implement that decision keeping in mind only the interests of the Organization.

"The Commission, in that it is a subsidiary organ of the General Assembly, has no authority to call in question this decision on the transfer. The implementation of that decision is within the power of the Secretary-General, but the Commission could, if need be, address itself to the Secretary-General and ask him that, in the timing of the transfer, account should be taken of the research facilities available and required in Vienna.

"I have no doubt that, when planning the transfer of the International Trade Law Branch to Vienna, the Secretary-General and no doubt also the Austrian Government will be aware of the need for a substantial effort so as to create the conditions which would permit the Branch to accomplish the task conferred upon it. The Commission should have confidence in the Secretary-General and the Austrian Government that they will take decisions which are in the best interest of the Organization."

99. Following the statement by the Legal Counsel, two representatives proposed that the decision of the Commission set out in paragraph 97 above should be amended so that the recommendation contained therein would be addressed to the Secretary-General rather than to the General Assembly and so that the recommendation would not contain any period of time during which the transfer should not take place, but merely request the Secretary-General, in fixing the time of the transfer of the Secretariat, to take into consideration the time needed for the necessary research facilities to be established at Vienna. It was stated in this connexion that, since the Secretary-General had been entrusted by the General Assembly to implement the proposed transfer of certain Secretariat units, it was to him that the Commission should address the request that, in planning the transfer of the Commission's secretariat, account should be taken of the research facilities it needs.

100. Under another view, however, the Commission was not calling the decisions of the General Assembly into question, but merely requesting the Assembly to reconsider the matter in the light of certain facts that were perhaps not known to it at the time the decision was taken. It was proper that the Commission, as a subsidiary body of the Assembly, should make its recommendations to its parent body. It was also stated that the Commission should not reopen discussion on a matter on which it had already taken a decision.

101. A formal vote was taken on whether to reopen the decision set out at paragraph 97 above.

102. By a vote of 10 to 5, with 9 abstentions, the Commission decided not to reopen the matter and to maintain its decision set forth in paragraph 97 above.

103. In view of this decision, two representatives expressed reservations concerning the decision of the Commission to make a recommendation to the General Assembly.

ANNEX I

Summary of deliberations of the Commission on the draft  
Convention on the Formation of Contracts for the  
International Sale of Goods

ARTICLE 1 a/

1. The text of article 1 of the draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"(1) This Convention applies to the formation of contracts of sale of goods between parties whose places of business are in different States:

"(a) when the States are Contracting States; or

"(b) when the rules of private international law lead to the application of the law of a Contracting State.

"(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the offer, any reply to the offer, or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

"(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the proposed contract is to be taken into consideration.

"(4) This Convention does not apply to the formation of contracts of sale:

"(a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;

"(b) by auction;

"(c) on execution or otherwise by authority of law;

"(d) of stocks, shares, investment securities, negotiable instruments or money;

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a/ The Commission considered article 1 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 187th meeting, on 30 May 1978, and at its 202nd meeting, on 8 June 1978; for the summary records of these meetings, see A/CN.9/SR.187 and 202.

"(e) of ships, vessels or aircraft;

"(f) of electricity.

"(5) This Convention does not apply to the formation of contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services.

"(6) The formation of contracts for the supply of goods to be manufactured or produced is to be considered as the formation of contracts of sale of goods unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

"(7) For the purposes of this Convention:

"(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the proposed contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

"(b) if a party does not have a place of business, reference is to be made to his habitual residence."

Subparagraph (1) (b)

2. The Commission considered a proposal to renumber subparagraph (1) (b) as subparagraph (1) (b) (1) and to add the following provisions:

"(2) In cases in which the only question is whether this Convention applies to an offer, it so applies where the rules of private international law lead to the application to the offer of the law of a Contracting State.

"(3) In cases in which the only question is whether this Convention applies to an acceptance, it so applies where the rules of private international law lead to the application to the acceptance of the law of a Contracting State.

"(4) In cases in which the rules of private international law lead to the application of the law of a Contracting State to one or some only of the events which together constitute the formation of a contract under this Convention, the law of the Contracting State applies to all of those events."

3. This proposal was designed to deal with the problem that the rules of private international law of some legal systems apply the law of different States to different elements of the formation process, such as the offer, the acceptance and the required form.

4. This proposal was withdrawn, however, in view of the fact that a number of representatives considered that the subject of private international law was too complex to be governed by a few provisions in an article on the sphere of application of the draft Convention. If the problems which this proposal were intended to govern were to arise in a concrete case, the court or arbitral tribunal

would have to solve them in the context of that case. It was also noted that, subsequent to the submission of the proposal, the Commission had decided to integrate the draft Convention on the Formation of Contracts for the International Sale of Goods and the draft Convention on the International Sale of Goods (CISG), which meant that retention of the proposal would have required considerable amendment to its wording. Finally, it was observed that the existing text of article 1, paragraph (1) (b), was a carefully worked out compromise solution between the advocates of the universal application of the draft Convention, as was the case under the 1964 Hague Conventions, and the advocates of restricting the application of the draft Convention to those cases in which both parties had their place of business in a Contracting State. It was thought that this compromise should not now be reopened.

#### Subparagraph (4) (e)

5. The Commission did not proceed with a suggestion that subparagraph (4) (e) clearly indicates whether the formation of contracts of sale of hovercraft are excluded from the scope of application of the draft Convention.

#### Decision

6. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 1 of this draft Convention was combined with articles 1, 2, 3 and 5 of the draft CISG and became articles 1, 2, 3 and 9 of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of articles 1, 2, 3 and 9:

#### "Article 1

"(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

"(a) when the States are Contracting States; or

"(b) when the rules of private international law lead to the application of the law of a Contracting State.

"(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

"(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration."

#### "Article 2

"This Convention does not apply to sales:

"(a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;

- "(b) by auction;
- "(c) on execution or otherwise by authority of law;
- "(d) of stocks, shares, investment securities, negotiable instruments or money;
- "(e) of ships, vessels or aircraft;
- "(f) of electricity."

"Article 3

"(1) This Convention does not apply to contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services.

"(2) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production."

"Article 9

"For the purposes of this Convention:

"(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

"(b) if a party does not have a place of business, reference is to be made to his habitual residence."

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ARTICLE 2 b/

7. The text of article 2 of the draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"(1) The parties may agree to exclude the application of this Convention.

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b/ The Commission considered article 2 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 187th meeting, on 30 May 1978, at its 191st meeting, on 1 June 1978 and at its 199th meeting, on 7 June 1978; summary records of these meetings are contained in A/CN.9/SR.187, 191 and 199.

"(2) Unless the Convention provides otherwise, the parties may agree to derogate from or vary the effect of any of its provisions as may appear from the negotiations, the offer or the reply, the practices which the parties have established between themselves or from usages.

"(3) Unless the parties have previously agreed otherwise, a term of the offer stipulating that silence shall amount to acceptance is not effective."

#### Paragraphs (1) and (2)

#### Unilateral variation or exclusion of Convention

8. There was strong support for the view that an offeror should be able to indicate in his offer that the formation of the contract would not be governed by the Convention, or to indicate the manner in which an acceptance must be made for a contract to be formed even though that might constitute a derogation from this Convention. If such unilateral exclusion or derogation from the Convention were not acceptable, then, as a minimum, an offeror should be able to stipulate that an acceptance must be in writing.

9. On the other hand, it was noted that while a unilateral exclusion of or derogation from the Convention appeared to be acceptable in the case of the offeror, it was less suitable to the case where the offeree in his acceptance attempted to exclude the application of the Convention or otherwise attempted to derogate from it.

#### Establishment of a Working Group on article 2

10. The Commission established a Working Group on article 2 composed of the representatives of Brazil, Egypt, Finland, India, the Union of Soviet Socialist Republics and the United Kingdom of Great Britain and Northern Ireland. The Commission requested the Working Group to formulate a text based upon the views expressed in the Commission.

11. The Working Group on article 2 proposed that paragraphs (1) and (2) of article 2 be deleted and that the following text be substituted:

"(1) The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions."

12. It was pointed out that this text was identical to article 4 of the draft CISG. This formulation avoided the difficulty of the text adopted by the Working Group on the International Sale of Goods which required an agreement to exclude or vary the Convention prior to the conclusion of the principal contract. Under the proposal of the Working Group, any requirement as to the formation of the contract contained in the offer would be treated as a normal condition in the offer. Therefore, the effect of a reply which departed from this condition would be determined by the rules contained in article 13 on replies which do not conform to the offer.

13. The proposal of the Working Group on article 2 was generally acceptable. The Commission accepted an amendment to prevent the derogation from or variation of the effect of a provision where the Convention provided otherwise.

Paragraph (3)

14. The Commission considered this paragraph in conjunction with article 12 (1), which provided that "Silence by itself shall not constitute acceptance".

15. The Commission decided to delete paragraph (3) and to retain article 12, paragraph (1), as the sole provision which governed acceptance by silence (see paras. 147 to 149 below).

Decision

16. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 2 of this draft Convention was combined with article 4 of the draft CISG and became article 5 of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of article 5:

"Article 5

"The parties may exclude the application of this Convention or, subject to article 11, derogate from or vary the effect of any of its provisions."

ARTICLE 3 c/

17. The text of article 3 of the draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"(1) A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means, including witnesses.

"(2) Paragraph (1) of this article does not apply to a contract of sale where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this paragraph."

Paragraph (1)

Contracts of sale evidenced by writing

18. The Commission considered a proposal that article 3, paragraph (1), should not refer to contracts "evidenced by" writing, but should provide only that contracts of sale need not be concluded in writing. This proposal was supported on several grounds. One ground was that the draft Convention should not deal with matters of evidence (this view would also have entailed the deletion of the second sentence of

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c/ The Commission considered article 3 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 188th meeting on 30 May 1978 and at its 195th meeting on 5 June 1978; summary records of these meetings are contained in A/CN.9/SR.188 and 195.

paragraph (1), see para. 20 below). Another view was that article 3 related only to the formation of contracts with the consequence that it was sufficient to state that contracts of sale do not have to be concluded in writing, since the question of their content would be dealt with by the draft CISG. However, it was pointed out that in many common law countries a provision providing only that contracts need not be concluded in writing would not overcome national legislation which recognized contracts concluded orally but only enforced such contracts above a certain value if they were evidenced by writing.

19. In view of the difficulties that would arise for these legal systems by the deletion of the phrase that contracts need not be evidenced by writing, the Commission decided to retain this expression even though it might appear superfluous to a number of legal systems.

#### Mode of proving formation of contracts

20. The Commission did not retain a proposal to delete the second sentence of article 3, paragraph (1). Although there was support for the view that matters of evidence should not be dealt with by the draft Convention either because such matters were best left to national law or because the question of proof related only to the content of contracts, which was dealt with by the draft CISG, most representatives favoured the retention of the second sentence because it was important to indicate the manner in which the existence of an oral contract could be proved. It was also noted that, if article 3, paragraph (1) differed from article 11, paragraph (1), of the draft CISG, the courts of a number of legal systems would assume that a different rule was intended rather than interpreting the deletion of the second sentence as reflecting the fact that the Convention dealt only with matters of formation and not proof of the contents of a contract, which would always be established by evidence.

21. One representative expressed a reservation to the rule that the formation of a contract of sale could be established by means of witnesses.

22. The Commission considered, but did not accept, the following suggestions:

(a) That the draft Convention contain a definition of goods so that the scope of application of article 3, paragraph (1), and the scope of the draft Convention would be clearly defined;

(b) That the words "contract of sale" be eliminated from article 3, paragraph (1) and replaced by an expression which made it clear that the article governed only the form of the offer, acceptance and any negotiations, that is, the communications which led to the formation of a contract of sale.

#### Paragraph (2)

23. The Commission considered a proposal that paragraph (2) should read as follows:

"(2) Paragraph (1) of this article as well as any other provision of this Convention which allows a contract of sale or its modification or rescission or any offer, acceptance, or other indication of intention to be made in any other form than in writing does not apply where any party has his place of business

in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this paragraph."

24. It was pointed out that the proposal used specific language to define the precise scope of application of the provision in order to avoid the necessity of repeating the former text as a separate paragraph of articles 3, paragraph (2), 7, paragraph (2), 12, paragraph (4) and 18, paragraph (3).

25. This proposal was referred to the Drafting Group, which was asked to consider whether this provision should be a separate article of the Convention and, if so, to formulate an appropriate text. The Drafting Group was also asked to consider whether the proposal made it clear that a declaration under article (X) excluded the application of the second sentence of article 3 (1) as well as the first sentence so that in a case where a contract had been concluded in writing but the writing had been lost, national law would govern the question of proving the fact that a contract had been formed.

26. One representative stated that the régime established by this paragraph as finally adopted by the Commission (which subsequently became article 11) did not achieve an acceptable solution to an admittedly difficult problem and reserved the right of his delegation to dissent from the provisions of article 11 at any subsequent diplomatic conference. Another representative reserved the position of his delegation on article 11.

#### Decision

27. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 3 of this draft Convention was combined with article 11 of the draft CISG and became articles 10 and 11 of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of articles 10 and 11:

#### "Article 10

"A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means including witnesses."

#### "Article 11

"Any provision of article 10, article 27 or Part II of this Convention that allows a contract of sale or its modification or abrogation or any offer, acceptance, or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this article."

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ARTICLE 4 d/

28. The text of article 4 of the Draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"(1) Communications, statements and declarations by and conduct of a party are to be interpreted according to his intent where the other party knew or ought to have known what that intent was.

"(2) If the preceding paragraph is not applicable, communications, statements and declarations by and conduct of a party are to be interpreted according to the understanding that a reasonable person would have had in the same circumstances.

"(3) In determining the intent of a party or the understanding a reasonable person would have had in the same circumstances, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."

Article as a whole

Existence of a provision on interpretation

29. The existence of a provision which provided rules for determining a party's intent where this did not appear with sufficient clarity from his communications or conduct was generally supported as assisting in the unification and harmonization of the law relating to the formation of contracts for the international sale of goods. However, it was also argued that the restriction of the provision on interpretation to matters of formation made its retention of doubtful value.

The matters to be interpreted

30. There was considerable support for the view that the expression "communications, statements and declarations by and conduct" could be simplified. However, there was also support for the retention of the present text since it clearly indicated which matters were to be the subject of interpretation and demonstrated that the provision was restricted to the formation process.

31. There was considerable discussion on whether the rules of interpretation should be limited to the communications of each party individually or whether they should be extended to the communications of both parties taken as a whole. It was stated that the use of the phrase "communications ... of a party" indicated that this article was aimed at the interpretation of unilateral acts such as an

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d/ The Commission considered article 4 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 188th meeting on 30 May 1978, at its 189th meeting on 31 May 1978, at its 191st and 192nd meetings on 1 June 1978; summary records of these meetings are contained in A/CN.9/SR.188, 189, 191 and 192.

offer or an acceptance for the purpose of determining whether a contract had been formed. Prior to the formation of a contract there was no common intent of both parties which called for interpretation. On the other hand, it was suggested that it would be artificial to isolate the transaction into component parts because the totality of the transaction had to be examined if the true intent of each party was to be ascertained. It was pointed out that, in any event, if there was an actual common intent, this intent would prevail. After considerable deliberation the Commission decided to retain in principle the existing formulation.

#### Tests for determining intent

32. There was support for the view that the primary rule of interpretation should be the objective test formulated in article 4, paragraph (2). This result could be achieved by reversing the order of paragraphs (1) and (2). An objective approach was stated to be more certain and, as it would come into operation only in cases of doubt, it would usually favour the weaker party. It was also noted that although a party's subjective intent should in principle govern the interpretation to be given to his communications and conduct, that party's intention should either appear clearly from his communications and conduct, or he should have the burden of proving that the other party knew or ought to have known of his intent.

33. It was suggested that the present structure of article 4 could be altered by limiting the primary rule in paragraph (1) to cases where the other party knew of the intent. Where this knowledge did not exist the interpretation of the party's communications and conduct would be in accordance with the rules in paragraphs (2) and (3).

34. Under another view, the present structure of article 4 should be maintained. In establishing the existence of a contract the primary concern must be the subjective intent of the parties. It was only if a subjective rule was not applicable that recourse should be had to objective criteria of interpretation which, in effect, resulted in the negation of the real intent of a party and its replacement by the intent of a hypothetical reasonable party. It was suggested that the subjective nature of the rules on interpretation could be lessened if paragraph (1) was reformulated to state that communications, statements and declarations by and conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was rather than referring to what the other party knew or ought to have known. However, another view was that the original wording was preferable as it related a party's knowledge to that of a reasonable person.

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

#### Understanding of a reasonable person

35. It was stated that in some of the legal systems which were not familiar with the juridical concept of a reasonable person, it would be difficult to comprehend what a reasonable person would have understood if he had been in the same circumstances as the party to the formation process whose statements or other conduct were being interpreted. It was suggested that it might be possible to

formulate this text in more precise terms, for instance by referring to the intent that a person placed in the same circumstances as the parties would normally have had. On the other hand, it was noted that article 4, paragraph (3), gave guidance as to the type of considerations which should be taken into account in determining the understanding of a reasonable person in the same circumstances.

### Paragraph (3)

#### Subsequent conduct

36. It was suggested that conduct of the parties subsequent to a specific communication or conduct of a party should not be a relevant factor in the interpretation of that communication or conduct. The object of the draft Convention was to establish when a contract of sale was formed. Any extension of the rules on interpretation to matters that occurred after this formation process would raise doubts as to the scope of the Convention. Under another view, subsequent conduct of a party could be an excellent guide to his real intention at the time that the communications in question were made. The Commission decided to retain subsequent conduct of the parties as an element in determining the intent of a party or the understanding that a reasonable person would have had in the same circumstances.

#### Establishment of Working Group on article 4

37. The Commission established a Working Group on article 4 composed of the representatives of Australia, Brazil, Finland, Hungary, Nigeria and Yugoslavia. The Commission requested the Working Group to formulate a text of article 4 taking into account the views expressed.

38. The Working Group on article 4 submitted the following proposal:

"(1) For the purposes of this Convention communications and statements by and conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

"(2) If the preceding paragraph is not applicable, communications and statements by and conduct of a party are to be interpreted according to the understanding that a reasonable person would have had in the same circumstances.

"(3) In determining the intent of a party or the understanding a reasonable person would have had in the same circumstances, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."

39. It was pointed out that in paragraph (1) the expression "could not have been unaware what that intent was" replaced the expression "ought to have known what that

intent was". This reflected the concern expressed in the Commission that the previous version of paragraph (1) contained too subjective a test. The term "declarations" had been deleted from paragraphs (1) and (2) but the Working Group retained the term "communications" to reflect the view of some members of the Working Group that the term "statements" might be understood in business circles as only referring to unilateral acts and not to such matters as business correspondence that had passed between the parties. The Working Group retained the concept of the understanding of a reasonable person in the same circumstances since it was considered that the problems caused by its retention were not serious enough to warrant attempting the difficult task of formulating an acceptable alternative.

40. The proposal of the Working Group on article 4 was generally acceptable. However, the expression "communications and statements by and conduct of party" was replaced by the expression "statements made by and other conduct of a party" since this formulation was considered simpler while at the same time it made it clear that all conduct, including communications and declarations, were encompassed by the provision.

#### Decision

41. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 4 of this draft Convention became article 7 of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of article 7:

#### "Article 7

"(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

"(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person would have had in the same circumstances.

"(3) In determining the intent of a party or the understanding a reasonable person would have had in the same circumstances, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."

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#### ARTICLE 5 e/

42. The text of article 5 of the Draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

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e/ The Commission considered article 5 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 190th meeting on 31 May 1978, at its 191st meeting on 1 June 1978 and at its 201st meeting on 8 June 1978; summary records of these meetings are contained in A/CN.9/SR.190, 191 and 201.

"In the course of the formation of the contract the parties must observe the principles of fair dealing and act in good faith."

43. Article 5 was the subject of lengthy discussion which revealed a difference of opinion as to whether the draft Convention should contain a provision on fair dealing and good faith.

#### Arguments against inclusion of a provision on fair dealing and good faith

44. There was considerable support for the deletion of article 5. This support was based on a number of grounds. It was stated that the provision merely contained a moral exhortation, which should not be included in the draft Convention. If such a moral principle were elevated to the status of a legal obligation, it became imperative to determine how it would be applied to particular transactions. Although there could be no disagreement with the principle stated in article 5, the development of a coherent body of case law was unlikely to take place, since national courts would be influenced by their own legal and social traditions in applying the article to individual cases. The resultant uncertainty was said to be detrimental to international trade. Another view against the inclusion of article 5 in the draft Convention was that the requirement of acting in good faith was implicit in all laws regulating business activity and it was consequently unnecessary to include the requirement in any specific text.

45. The retention of article 5 was also criticized on the basis that the draft Convention did not specify the consequences of a failure to observe the principles which were made binding on the parties. This failure meant that the consequences of a violation would be left to national law with the result that no uniformity of sanctions would be achieved. An illustration of this type of problem was said to be the UNIDROIT draft text on validity, which considered it necessary to regulate in great detail the consequences of fraud and threats which were clear violations of good faith. It was even more difficult to envisage uniformity in dealing with the consequences of less obvious violations of the principle of good faith. It followed that, if the draft Convention were to contain a provision on good faith, it should also contain detailed provisions spelling out the consequences of failure of a party to comply with the requisite standard, but the place for such detailed rules was in a Convention on validity of contracts rather than in a Convention on formation. It thus also followed that the proper place for a provision on good faith and fair dealing was in a Convention which dealt with the validity of contracts.

#### Arguments for inclusion of a provision on fair dealing and good faith

46. There was also considerable support for the retention of article 5. It was stated that, since principles of good faith were universally recognized, there seemed

little harm in including them in the draft Convention. This was particularly the case when it was recalled that many national codes contained provisions similar to article 5 which had played an important role in the development of rules regulating commercial activity. It was considered that the extension of this provision into an instrument regulating an aspect of international trade was a valuable extension of a widely recognized norm of conduct. Furthermore, deletion of the provision would open the Commission to the criticism that it opposed such principles when it was clear that this type of rule was needed in international trade, particularly in relation to trade with developing countries. It was also pointed out that the concept of good faith was well recognized in public international law and was referred to in the Charter of the United Nations.

47. Although it was generally agreed that it would be useful to set out the consequences of a violation of article 5, it was stated that it was not necessary to specify the consequences of a violation of the article, as this could be determined by the courts in a flexible manner having regard to the particular facts of each case. The development of a body of case law would reduce initial uncertainty as to the effects and scope of the provision. In any case, even without sanctions the existence of the provision would draw the attention of the parties and the court to the fact that high standards of behaviour were expected in international trade transactions.

48. Adoption of the provision was also considered to be a modest implementation of some of the principles of the new international economic order and could have the practical effect of lessening undesirable or discriminatory trade practices, particularly if a similar provision were inserted into the draft CISG.

#### The concept of the "principles of fair dealing"

49. The requirement in article 5 that the parties "must observe the principles of fair dealing" was criticized by a number of representatives who otherwise supported the retention of the article. It was stated that the expression "fair dealing" could be taken to refer to the current standards of international business practices which, from the point of view of many developing countries, could hardly be considered as "fair". The risk of elevating these current standards of business practice into norms of conduct recognized and upheld by an international convention led to the conclusion that the concept of "fair dealing" should be deleted. It was tentatively suggested that the expression "loyauté commerciale" in the French language version was perhaps less open to criticism.

50. It was proposed that the replacement of the expression "fair dealing" by "international co-operation" would overcome many of these difficulties. The use of the expression "international co-operation" would make it clear that present international business standards were not necessarily the appropriate criteria by which a particular international transaction was to be judged. Furthermore, "international co-operation" was a well-known public international law concept which could usefully be introduced into a private law convention dealing with international trade which affected the interests of States and was thus susceptible to the use of public law concepts. The introduction of a requirement that the parties must observe the principles of "international co-operation" also made it clear that national law conceptions of good faith were not automatically appropriate to

international trade transactions, but had to be evaluated by a court to ascertain whether they were appropriate to the particular transaction having regard to the fact that international co-operation was to be encouraged.

51. It was also pointed out that the principle of "international co-operation" was used in international trade conditions governing trade between certain socialist countries and the basis of the principle was simply that a commercial contract was not an adversary relationship, but that the parties were under an obligation to co-operate to overcome difficulties. Article 59 of the draft CISG, which dealt with mitigation of damages, was said to be a particular application of this general principle.

52. The use of the expression "international co-operation" as a standard by which to measure acts of the parties in the formation of international contracts of sale goods, however, was opposed by many representatives. It was pointed out that this expression did not specify the scope and effect of the obligation that was being imposed on the parties to a commercial contract. The view was also expressed that, although it might be feasible for a court, by using expert testimony, to ascertain whether a particular transaction complied with principles of fair dealing, it was difficult to apprehend how a transaction could be objectively evaluated to ascertain whether it complied with the standards of "international co-operation".

#### Possible compromise solutions

53. In view of the serious differences of opinion as to the inclusion of article 5 in the draft Convention, there was general agreement that strenuous efforts should be made to seek a compromise solution. The alternative of either deleting or retaining article 5 by a slender majority was considered unacceptable to most representatives.

54. A number of possible compromise solutions were canvassed. The proponents of these compromise solutions noted that in all cases the absence of sanctions did not raise the problems encountered in relation to the formulation contained in article 5. It was suggested that the substance of article 5 could be contained in a preamble to the Convention, but this was met with the objection that this would make it devoid of effect. Another suggestion was that the requirement of the observance of good faith could be incorporated into the rules of interpretation of the statements and conduct of the parties. Against this suggestion was the view that article 5 was not concerned with the intent of the parties, but sought to lay down a standard of behaviour to which the parties must conform. A more widely supported compromise suggestion was that the principle of the observance of good faith could be incorporated into an article on the interpretation and application of the provisions of the Convention. This suggestion was criticized on the basis that it was not really appropriate to direct the requirement of good faith to the courts rather than to the parties.

#### Establishment of a Working Group on article 5

55. The Commission established a Working Group on article 5, composed of the representatives of Finland, Hungary, Mexico, Singapore, Uganda and the United

Kingdom of Great Britain and Northern Ireland, and requested the Working Group to formulate a compromise proposal taking into account all the views expressed during the course of the discussion on article 5.

56. The Working Group proposed that the following new article, based on article 13 of the draft CISG, should be adopted:

"In the interpretation and application of the provisions of this Convention, regard is to be had to its international character and to the need to promote uniformity and to observe good faith in international trade."

57. In explanation of this proposal it was stated that the Working Group had attempted to find an acceptable compromise on a question which had sharply divided the Commission. The first part of the proposal reproduced article 13 of the draft CISG and sought to require courts and arbitral tribunals to promote uniformity of interpretation of the Convention. The second part of the proposal was intended to direct the attention of the courts in resolving disputes to the fact that the acts and omissions of the parties must be interpreted in the light of the principle that they observe good faith in international trade. The provision was intended to apply to both the rules on formation and the rules on sales.

58. Although several representatives still preferred the original version of article 5, while other representatives still favoured deletion of all reference to the need to observe the principles of good faith, the proposal was generally supported as containing a realistic compromise solution. It was stated, however, that the proposal did not make it clear that the need to observe good faith in international trade was also directed to the parties to an international sales transaction. It was also stated that the proposed wording did not make it clear that the need to promote uniformity referred to the need to promote uniformity of interpretation of the Convention and not uniformity in international trade in general.

59. Under one view, the Convention should not contain a provision on interpretation because, according to the constitutions of some countries, it was not possible for a legal text to instruct the courts on the manner in which it should be interpreted. It was also stated that the requirement to promote uniformity should be imposed on States and not upon courts and arbitral tribunals, since this requirement was contained in a public international law convention. However, the generally accepted view was that the provision was properly directed to courts and arbitral tribunals, since it was these bodies which would resolve disputes between the parties to an international trade transaction.

#### Decision

60. As a result of the decision to integrate the draft Convention on Formation with the draft CISG, (para. 18 of the Commission's report), article 5 of this draft Convention was merged with article 13 of the draft CISG and became article 6 of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of article 6:

"Article 6

"In the interpretation and application of the provisions of this Convention, regard is to be had to its international character and to the need to promote uniformity and the observance of good faith in international trade."

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ARTICLE 6 f/

61. The text of article 6 of the Draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"For the purposes of this Convention, usage means any practice or method of dealing of which the parties knew or ought to have known and which in international trade is widely known to and regularly observed by parties to contracts of the type involved in the particular trade concerned."

62. The Commission adopted this provision and referred the question of its location to the Drafting Group.

Decision

63. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 6 of this draft Convention was merged with article 7 of the draft CISG and became article 8 of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of article 8:

"Article 8

"(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

"(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."

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f/ The Commission considered article 6 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 192nd meeting on 1 June 1978; a summary record of this meeting is contained in A/CN.9/SR.192.

ARTICLE 7 g/

64. The text of article 7 of the draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"(1) For the purposes of this Convention, an offer, declaration of acceptance or any other indication of intention 'reaches' the addressee when it is made orally to him or delivered by any other means to him, his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

"(2) Paragraph (1) of this article does not apply to an offer, declaration of acceptance or any other indication of intention if any of them is made in any other form than in writing where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this paragraph."

Paragraph (1)

Place of business or mailing address

65. The Commission considered a suggestion to delete the words "or, if he does not have a place of business or mailing address, to his habitual residence". This suggestion was based on the fact that article 1, paragraph (7) (b), provides that, "if a party does not have a place of business, reference is to be made to his habitual residence". However, it was generally considered preferable to retain the existing language of paragraph (1) since article 1, paragraph (7) (b), did not refer to "mailing address". The Commission, accordingly, did not retain the suggestion.

66. The Commission did not retain proposals that (i) the expression "place of business" should be replaced by the expression "principal place of business" and that (ii) the term "mailing address" should be deleted as unnecessary.

Habitual residence

67. It was pointed out that in private international law the term "habitual residence" had developed a fairly settled meaning of residence in a particular country or province within a country. It was accordingly suggested that possible confusion would be avoided by the use of terms such as "normal residence" or "usual residence" instead of "habitual residence".

68. The Commission did not retain this suggestion, since the term "habitual residence" had already been adopted in the draft CISG. An observer reserved the position of his delegation in respect of this decision.

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g/ The Commission considered article 7 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 196th meeting on 7 June 1978; a summary record of this meeting is contained in A/CN.9/SR.196.

69. The Commission also considered, but did not retain, the following proposals:

(a) That the term "habitual residence" should be deleted, since it was difficult to envisage the case of a businessman engaged in the international sale of goods who had neither a business address nor a mailing address;

(b) That the Convention should permit the sending of a communication to the "habitual residence" of the addressee only if the sender did not know the place of business or mailing address of the addressee.

#### Oral communications

70. The Commission did not retain a suggestion that, before an oral communication could have been considered to have reached the addressee, it would have had to have been understood by him.

#### Paragraph (2)

71. As a consequence of its decision in relation to article 3, paragraph (2) (see paras. 23 to 27 above), the Commission deleted this paragraph.

#### Decision

72. The Commission retained the substance of article 7, paragraph (1), and deleted article 7, paragraph (2). As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 7 of this draft Convention became article 22 of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of article 22:

#### "Article 22

"For the purposes of Part II of this Convention, an offer, declaration of acceptance or any other indication of intention 'reaches' the addressee when it is made orally to him or delivered by any other means to him, his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence."

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#### ARTICLE 8 h/

73. The text of article 8 of the draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

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h/ The Commission considered article 8 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 192nd meeting on 1 June 1978, at its 193rd meeting on 2 June 1978, at its 196th meeting on 5 June 1978 and at its 201st meeting on 8 June 1978; summary records of these meetings are contained in A/CN.9/SR.192, 193, 196 and 201.

"(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.

"(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

"(3) A proposal is sufficiently definite if it indicates the kind of goods and fixes or makes provision for determining the quantity and the price. Nevertheless, if a proposal indicates the intention to conclude the contract even without making provision for the determination of the price, it is considered as proposing that the price be that generally charged by the seller at the time of the conclusion of the contract or, if no such price is ascertainable, the price generally prevailing at the aforesaid time for such goods sold under comparable circumstances."

#### Paragraph (1)

##### Definition of offer

74. The substance of the rule contained in paragraph (1) was generally considered to be satisfactory.

#### Paragraph (2)

##### Proposals to the public

75. It was suggested that proposals addressed to the public should be treated in the same way as proposals addressed to specific persons. Consequently, if any proposal indicated an intention to be bound and if it were sufficiently definite, it should be treated as an offer. This result could be achieved by deleting article 8, paragraph (2), and deleting the word "specific" in article 8, paragraph (1).

76. On the other hand, it was stated that proposals to the public were sufficiently different in character from proposals to specific persons to justify the assumption that they constituted mere invitations to make offers unless the contrary were clearly indicated by the person making the proposal. There was also support for the view that proposals to the public relating to the international sale of goods should always be considered as invitations to make offers.

77. Another view suggested that the question of public offers should be left to national law or regulated in detail in a separate instrument.

78. After extensive deliberation, the Commission decided to retain article 8, paragraph (2), and the word "specific" in article 8, paragraph (1).

### Paragraph (3)

#### Definition of sufficiently definite

79. The substance of the rule contained in the first sentence of paragraph (3) was considered to be generally acceptable. It was suggested, however, that the expression "kind of goods" should be made more precise by deleting the words "kind of" in order to indicate that an offer must specify the type and nature of the goods and not merely their generic description.

80. It was stated that there was a possible inconsistency between the rule in the first sentence, requiring that the offer should fix or make provision for the determination of the price, and the rule in the second sentence, which implied a price if the offer, although indicating the intention of the offeror to be bound to a contract in case of acceptance, did not itself fix or make provision for the determination of the price. It was suggested that this possible inconsistency could be overcome by redrafting the first sentence in the negative so that it would provide that a proposal would not be sufficiently definite unless it indicated the kind of goods and made provision for determining the quantity and the price. This redrafting should make it clear that a particular transaction might require additional elements for a contract to be concluded and should retain the rule that no contract of sale can be formed without those three elements. The redrafting should also make it clear that, under the second sentence, an agreement in respect of one of these three elements, namely, the price, could be implied only in certain specifically defined cases.

#### Possible additional elements to definition of sufficiently definite

81. The Commission did not retain a suggestion that, if a proposal were to be considered sufficiently definite, it must indicate the time of payment and delivery as well as the kind of goods and fixing or making provision for determining the quantity and the price.

#### Proposals not fixing or making provision for determination of price

82. There was considerable support for the view that a proposal could not be considered an offer and thus lead to the formation of a contract by acceptance, if it did not either fix the price or make provision for its determination. The price was an essential ingredient of a contract and consequently it was unsatisfactory to impose a price on the parties when there had been no express or implicit agreement by the parties on this price.

83. Under another view it was very important to recognize the realities of international trade where contracts were formed without the price, or the manner of its determination, being indicated in the offer. It was said that such contracts were entered into in respect of commodity transactions or where orders were placed for spare parts when the cost of the spare parts was insignificant compared to the value of lost production that would be caused by failure to repair defective machinery promptly.

84. It was also pointed out that the second sentence of paragraph (3) would operate only when the person making the proposal had intended to be bound to a contract, even though no provision for the price or its determination had been included in the offer.

### Criteria used for determination of price

85. There was considerable criticism of the mechanism by which article 8, paragraph (3), established price. This criticism was largely directed against selecting the price generally charged by the seller. It was considered that such a selection did not take into account the interests of the buyer, since he might have been entitled to special discounts. In addition, since price was the subject of agreement between the parties, an implied price in the absence of agreement should be no more than a reasonable price.

86. Criticism was also directed against the use of the concept of a generally prevailing price for goods sold under comparable circumstances, since this again emphasized the interests of the seller. It was stated in this connexion that such a concept would be difficult to apply, since discriminatory pricing was prevalent in many branches of international trade, particularly in relation to trade affecting developing countries.

### Relationship of provision to article 37 of the draft CISG i/

87. Under one view, the existence of the second sentence of article 8, paragraph (3), should be accepted by those delegations who did not express reservations to article 37 of the draft CISG, which envisaged the formation of contracts which did not fix a price or make provision for its determination. It was pointed out, however, that article 37 of the draft CISG was expressly dependent upon the valid conclusion of a contract and that, consequently, acceptance of article 37 merely indicated willingness to let the matter be determined by national law and not a willingness to accept a binding provision in an international convention that a contract for the international sale of goods may be validly concluded without fixing a price or making provision for its determination.

### Compromise proposals

88. In view of the differences of opinion as to the rule contained in the second sentence of article 8, paragraph (3), it was generally agreed that it was essential to formulate a compromise solution rather than to retain or delete the second sentence, which would, in either case, be unacceptable to many representatives.

89. Although it was noted that some contracts for the international sale of goods were formed without reference to a price or without making provision for the

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i/ Article 37 of the draft CISG provides:

"If a contract has been validly concluded but does not state the price or expressly or impliedly make provision for the determination of the price of the goods, the buyer must pay the price generally charged by the seller at the time of the conclusion of the contract. If no such price is ascertainable, the buyer must pay the price generally prevailing at the aforesaid time for such goods sold under comparable circumstances."

As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 37 of the draft CISG became article 51 of the draft Convention on Contracts for the International Sale of Goods.

determination of a price, it was observed that, in these cases, the fixation of the price or the manner of its determination was common knowledge in the trade concerned, followed from prior dealings of the parties or resulted from implicit reference to published price lists. The discussion showed that the basic difficulty with the rule contained in the second sentence of article 8, paragraph (3), was that it appeared to some to apply in the absence of these or similar considerations. Consequently, there was considerable support for a compromise suggestion that the rule implying a price in the second sentence of article 8, paragraph (3), be limited to cases where the price or the manner of its determination was implicit in the proposal because of prior dealings between the parties or because of common knowledge in the trade concerned.

#### Establishment of a Working Group on article 8

90. The Commission established a Working Group, composed of the representatives of Australia, Brazil, Finland, France, Hungary, Kenya, Singapore, the Union of Soviet Socialist Republics and the United Kingdom of Great Britain and Northern Ireland and requested it to present a text of article 8, paragraph (3), that would take account of the deliberations of the Commission.

91. The Working Group proposed that article 8, paragraph (3), be deleted and that a new second sentence be added to article 8, paragraph (1), which would then read as follows:

"(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price."

92. The Commission adopted the above proposal. A representative indicated that he supported the proposal as a compromise solution only and was, in principle, opposed to the rule that a proposal was sufficiently definite if it implicitly fixed or implicitly made provision for determining the price.

#### Decision

93. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 8 of this draft Convention became article 12 of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of article 12:

#### "Article 12

"(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

"(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal."

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Proposed article on the formation of contracts other  
than by offer and acceptance j/

94. The Commission considered a proposal that article 8 of the draft Convention on the Formation of Contracts for the International Sale of Goods should contain an additional paragraph as follows:

"A contract is concluded when the parties thereto have manifested their mutual agreement to its provisions."

95. In support of the proposal, it was stated that the new paragraph sought to deal with the formation of contracts which were not concluded by the normal exchange of offer and acceptance, but resulted from, for example, lengthy negotiations and the signing of a single document, which contained the agreement. The provision was also seen as stating an important declaration of principle applicable to all contracts.

96. The proposal was opposed on the ground that the provision could not apply to the formation of all contracts, since it was inconsistent with other rules in the draft Convention, for example, article 17 on the time of conclusion of the contract. It was also difficult to reconcile the proposal with provisions such as article 13, paragraph (2), which permitted the formation of a contract even though there was not a complete manifestation of mutual agreement. Furthermore, there was implicit in the proposal the suggestion that the contract was complete when consent had been expressed rather than when it reached the other party in accordance with article 12.

97. There was support, however, for a modified restricted proposal which, in its final form, provided for the insertion of the following separate article in the draft Convention:

"A contract of sale of goods may be formed by the parties' manifestation of mutual assent to its provisions even though it is not possible to identify an offer and acceptance."

98. The support for this proposal, which clearly indicated that it did not deal with the formation of contracts by the exchange of offer and acceptance, was based on the view that, although many legal systems would view the provision as unnecessary, the fact that it would assist the courts of some other legal systems justified its introduction into the draft Convention. It was crucial, however, to distinguish carefully the provision from the other articles in the draft Convention which dealt with the formation of contracts by offer and acceptance so that the general principle stated in the proposal would not conflict with the detailed rules contained in the draft Convention.

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j/ The Commission considered the question of the formation of contracts other than by offer and acceptance at its 192nd meeting on 1 June 1978, at its 193rd meeting on 2 June 1978, at its 195th meeting on 5 June 1978 and at its 200th meeting on 7 June 1978; for the summary records of these meetings, see A/CN.9/SR.192, 193, 195 and 200.

### Establishment of Working Group

99. The Commission established a Working Group, composed of the representatives of Chile, Greece, Ireland, Japan, Poland, Uganda and the United Kingdom of Great Britain and Northern Ireland and requested it to prepare the text of a separate article dealing with the formation of contracts where it was not possible to identify an offer and an acceptance. The Working Group was also requested to suggest an appropriate location for such a provision.

100. The Working Group initially proposed the following text:

"A contract of sale is deemed to be formed if there is the mutual assent of the parties to form it, even though it is not possible to establish an offer and an acceptance."

101. As members of the Working Group were divided on the adequacy of this formulation, however, the Working Group decided to withdraw the initial proposal and adopt as the proposal of the Working Group the following proposal of a member of the Working Group which, in its final form, provided as follows:

"Formation of a contract of sale is not precluded by the fact that the mutual assent of the parties cannot be established by reference to an exchange of offer and acceptance."

102. This variant of the initial proposal sought to overcome the difficulty inherent in a positive statement that a contract is deemed to be formed if there is mutual assent, even though there is no offer or acceptance.

103. There was considerable opposition to this modified proposal, to the initial proposal and to a number of other variants proposed during the discussion, largely because of the difficulties inherent in some legal systems to accept as a statement of principle that a contract of sale of goods can be formed without the existence of an offer or an acceptance. Although these legal systems admitted that on occasion it would be difficult or impossible to identify which communications constituted the offer and acceptance, it was nevertheless essential that an offer and acceptance existed for a contract of sale to be formed. The proposals were also criticized because of the difficulty of reconciling them with articles 12 and 17. It was further stated that a provision in the draft Convention based on the proposals before the Commission was unnecessary since, for many legal systems, the principle contained in the proposals was self-evident.

104. The proposals were withdrawn because of the extreme difficulty of formulating an acceptable text.

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Proposed article on identical cross offers k/

105. The Commission considered a proposal that the following provision be inserted as an additional paragraph of article 8 of the draft Convention:

"Identical cross offers shall be treated as a manifestation of a mutual agreement binding on an offeror unless he promptly notifies the other offeror that he does not hold himself bound."

106. This proposal was designed to deal with a problem which had been left unresolved by the 1964 Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF).

107. The generally prevailing view was that a provision on identical cross offers was unnecessary since such offers would occur only rarely in international trade. Furthermore, the insertion of the proposal into the draft Convention would raise a number of difficulties which would require considerable redrafting of other provisions of the Convention. In particular, consideration would have to be given to the application of the rule in article 17 as to the time of formation of the contract and to the rule in article 12, paragraph (1) that silence shall not in itself amount to acceptance. It might also be necessary to define "identical cross offers". It was further pointed out that the assumption implicit in the proposal that all cross offers were revocable ran counter to the interests of international trade. Under another view the proposed article was unnecessary since the draft Convention already provided an adequate solution, i.e. that offers must be accepted for a contract to be formed.

108. In view of these considerations, the proposal was withdrawn.

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ARTICLE 9 1/

109. The text of article 9 of the draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"The offer becomes effective when it reaches the offeree. It is withdrawn if the withdrawal reaches the offeree before or at the same time as the offer even if it is irrevocable."

Withdrawal of communications in general

110. The Commission did not retain a suggestion that the draft Convention contain a provision dealing with the withdrawal of communications in general.

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k/ The Commission considered the question of identical cross offers at its 194th meeting on 2 June 1978 and its 195th meeting on 5 June 1978; for the summary records of these meetings, see A/CN.9/SR.194 and 195.

1/ The Commission considered article 9 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 196th meeting on 5 June 1978 and its 201st meeting on 8 June 1978; for the summary records of these meetings, see A/CN.9/SR.196 and 201.

### Distinction between "withdrawal" and "revocation"

111. It was generally considered useful to maintain the distinction between the ability of an offeror to withdraw an offer before or at the same time that it became effective and the ability of an offeror to revoke an offer which had taken effect. The purpose of this distinction was to make it clear that an irrevocable offer could be withdrawn before or at the same time as it took effect. After an irrevocable offer took effect it could no longer be revoked. The question of revocation of a revocable offer which had taken effect was dealt with by article 10 (1). While this distinction was accepted, there was considerable support for the view that the language of article 9 should be modified to distinguish clearly between "withdrawal" and "revocation".

### Establishment of a Working Group

112. The Commission established a Working Group composed of the representatives of Finland, Ghana, Hungary, Japan, Kenya, Mexico, the Philippines, the Union of Soviet Socialist Republics and the United States of America to consider articles 9 and 10. The Commission requested the Working Group to clarify the text of article 9 in order to distinguish between the withdrawal of an offer and its revocation.

113. The Working Group proposed the following text of article 9:

"The offer becomes effective when it reaches the offeree. It may be withdrawn before becoming effective if the withdrawal reaches the offeree before or at the same time as the offer even if the offer is irrevocable."

114. In explanation of this text, it was noted that its objective was to distinguish clearly between withdrawal of an offer and the revocation of an offer. This was achieved by providing that the offer may be withdrawn "before becoming effective".

115. While there was considerable support for this provision, opinions were divided on the question whether the words "before becoming effective" were necessary. The Commission, after deliberation, adopted the substance of article 9 and referred the text to the Drafting Group.

### Decision

116. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 9 of this draft Convention became article 13 of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of article 13:

#### "Article 13

"(1) An offer becomes effective when it reaches the offeree.

"(2) An offer may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer. It may be withdrawn even if it is irrevocable."

\* \* \*

ARTICLE 10 m/

117. The text of article 10 of the draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"(1) The offer is revoked if the revocation reaches the offeree before he has dispatched his acceptance.

"(2) However, an offer cannot be revoked:

"(a) if the offer indicates that it is firm or irrevocable; or

"(b) if the offer states a fixed period of time for acceptance; or

"(c) if it was reasonable for the offeree to rely upon the offer being held open and the offeree has acted in reliance on the offer."

Paragraph (1)

118. The scope of paragraph (1) was criticized on the ground that the provisions did not take account of oral acceptance or acceptance by other conduct which becomes effective when brought to the knowledge of the offeror or acceptance by an act which, by virtue of article 12, paragraph (3), becomes effective when performed. It was suggested that this problem could be overcome by providing that the offer may be revoked as long as it has not been accepted or notice of acceptance has not been dispatched to the offeror.

119. Another difficulty with article 10, paragraph (1), was said to be that the terminal point for revocation of an offer was the dispatch of an acceptance which event was anterior to the formation of the contract. It was considered that the right to revoke an offer should, in principle, exist until a contract had been formed.

Subparagraph (2) (a)

120. The use of the expression "firm or irrevocable" was criticized on the basis that the word "firm", although understood by some legal systems as being synonymous with irrevocable, could be understood in other legal systems as merely referring to a proposal that was intended by the offeror to bind him and was sufficiently definite to constitute an offer. The result would be that all offers could be considered as irrevocable, which would contradict the general principle of revocability of offers contained in article 10, paragraph (1).

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m/ The Commission considered article 10 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 196th meeting on 5 June 1978, at its 197th and 198th meetings on 6 June 1978 and at its 202nd meeting on 8 June 1978; for the summary records of these meetings, see A/CN.9/SR.196, 197, 198 and 202.

#### Subparagraph (2) (b)

121. Under one view, the rule that an offer may not be revoked if it states a fixed period of time for acceptance constituted a trap for offerors in those countries whose legal systems differentiate between fixing a time on the expiration of which the offer would lapse and fixing a time until which an offer may not be revoked. The existence of article 10, paragraph (2) (b) was said to be particularly inappropriate to govern the formation of contracts between merchants from common law systems, since the draft Convention automatically made an offer irrevocable if it stated a fixed period of time for acceptance, even though the intention of the offeror in making the statement was merely to indicate the point of time at which the offer lapsed. It was stated that this difficulty could not be completely overcome by the rules on interpretation or the rule contained in article 10, paragraph (2) (c). Accordingly, it was proposed that article 10, paragraph (2) (b) should be deleted.

122. However, under another view, the entire structure of article 10 must be viewed as a compromise between legal systems which considered offers to be generally irrevocable and legal systems which considered offers to be generally revocable. This compromise solution should be retained since a further departure from the rule that offers were irrevocable would cause great difficulty to merchants who were used to such a rule. Furthermore, article 10, paragraph (2) (b) implemented the desirable policy goal in international trade transactions of protecting an offeree from an arbitrary revocation of an offer. This was particularly important, since it was clear that article 5 on fair dealing and good faith would not be retained in its original form. It was also observed that the present wording of article 10, paragraph (2) (b), was clear so that it should not cause any lasting difficulty to merchants familiar with a different rule.

123. In view of this divergence of opinion, the Commission considered it desirable to attempt to formulate some further compromise solution and referred the matter to the Working Group on articles 9 and 10 (see para. 112 above).

#### Subparagraph (2) (c)

124. The Commission decided not to adopt a proposal to delete this provision since article 10, paragraph (2) (c), was generally considered as providing protection to an offeree who had to carry out investigations or make inquiries before deciding whether to accept an offer.

125. It was suggested that the provision should make it clear that it would apply also where an offeree, in reliance on the offer, had failed to act, for example, by failing to take advantage of an alternate source of supply.

126. There was some support for the view that article 10, paragraph (2) (c), should apply only if the offeror knew that the offeree had relied on the offer or if this reliance derived from an act of the offeror.

#### Working Group on articles 9 and 10

127. The Working Group on articles 9 and 10 (see para. 112 above) was requested to formulate a text of article 10 based on the deliberations in the Commission.

128. The Working Group proposed the following text of article 10:

"(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched his acceptance.

"(2) However, an offer cannot be revoked:

"(a) if the offer indicates that it is irrevocable; or

"(b) if the offer states a fixed period of time for acceptance, unless the offer clearly states it is intended to refer only to the termination of the offer or the termination is evident because of the operation of article 2, paragraph (2); or

"(c) if it was reasonable for the offeree to rely upon the offer as being irrevocable and the offeree has acted in reliance on the offer."

#### Paragraph (1)

129. In explanation of the Working Group proposal, it was stated that article 10, paragraph (1), in conjunction with the proposed wording of article 9, clarified the distinction between a withdrawal of an offer and its revocation. It was also intended to deal with oral acceptances and acceptances by an act under article 12, paragraphs (1) and (3). The proposal was said to achieve this purpose by providing that the offeror may revoke his offer if the revocation reaches the offeree before he has dispatched his acceptance, but that this right would not apply if the contract had already been concluded.

130. It was considered that the proposal did not meet the problem that, in the case where an acceptance was not effective until it reached the offeror, the right to revoke the offer was lost prior to the formation of the contract.

131. The Commission decided to adopt the substance of paragraph (1) as proposed by the Working Group on articles 9 and 10.

#### Subparagraphs (2) (a) and (2) (b)

132. In explanation of the proposals of the Working Group, it was stated that the draft text sought to reach a compromise between the view that, if the offer stated a fixed time for acceptance, it was always to be considered as irrevocable and the view that fixing a period of time for acceptance merely indicated the period during which the offer could be accepted. The Working Group sought to achieve this compromise by providing that the offer cannot be revoked if it states a fixed period of time for acceptance unless it clearly states that this fixed period of time for acceptance is intended to refer only to the time at which the offer terminates or that this result is achieved by virtue of the operation of article 2, paragraph (2) of the draft Convention.

133. However, under one view this attempted compromise was still unsatisfactory, since the primary rule remained that the consequence of stating a fixed period of time in an offer was the conversion of the offer into an irrevocable offer. The

exception of a clear contrary statement of intent was very unlikely in practice, as was the likelihood of a court determining that the operation of the primary rule would be avoided through the application of article 2, paragraph (2).

134. In view of these objections to the text proposed by the Working Group, a further compromise text derived from article 5, paragraph (2), of ULF was considered by the Commission. This text combined article 10, paragraph (2), subparagraphs (a) and (b) into a single provision as follows:

"(2) However, an offer cannot be revoked:

"(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or"

135. In support of this proposal, it was stated that the principal test to determine that an offer could not be revoked was whether the offer indicated that it was irrevocable. Whether the offer was irrevocable could be determined by the fact that it stated a fixed time for acceptance or otherwise. However, the mere fact of stating a time for acceptance would not automatically lead to the result that the offer was irrevocable if, under the circumstances of the case, such a result was not intended. In particular, it was said, where a merchant from one common law country made an offer to a merchant from another common law country, the fixing of a time for acceptance without more would not indicate that the offer was irrevocable.

136. However, there was considerable support for the view that the interpretation placed on the words of the text by its proposers was unjustified. It was considered that this text clearly adopted the rule that, if the offer stated a fixed time for acceptance, it automatically was irrevocable.

137. The Commission decided to accept the wording of the compromise proposal to combine article 10, paragraph (2), subparagraphs (a) and (b).

#### Paragraph (2) (c)

138. There was a difference of opinion as to whether the text proposed by the Working Group encompassed cases where the offeree failed to act because he relied on the offer. The Commission adopted the text proposed by the Working Group.

#### Decision

139. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 10 of this draft Convention became article 14 of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of article 14:

#### "Article 14

"(1) Until a contract is concluded, an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

"(2) However, an offer cannot be revoked:

"(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

"(b) if it were reasonable for the offeree to rely upon the offer as being irrevocable and the offeree has acted in reliance on the offer."

#### ARTICLE 11 n/

140. The text of article 11 of the draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror."

141. The Commission adopted the substance of article 11. The Commission did not accept a suggestion that the draft Convention should deal with the question whether an offer is terminated on the death or bankruptcy of the offeror, since it was impractical to attempt to deal with these complex problems, and especially those raised by bankruptcy.

#### Decision

142. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 11 of this draft Convention became article 15 of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of article 15:

#### "Article 15

"An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror."

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#### Other matters relating to offers

#### Lapse of offers

143. Under one view, it would be desirable to have a separate provision in the draft Convention which indicated at what moment of time an offer would lapse. The following proposal was placed before the Commission:

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n/ The Commission considered article 11 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 198th meeting on 6 June 1978; for the summary record of this meeting, see A/CN.9/SR.198.

"An offer lapses when

"(a) the period fixed by it expires; or

"(b) if no period is fixed, upon expiry of a reasonable time, due account being taken in this regard of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror."

144. Under another view, this matter was already regulated by article 12, paragraphs (2) and (3). The proposal was withdrawn when it became evident that there was not sufficient support for the restructuring of other provisions, which would have been necessary if the proposal had been adopted.

#### Revocation of public offers

145. A proposal, namely, that public offers be considered as revoked when the offeror had taken reasonable steps to bring the revocation to the attention of those to whom it was addressed, was withdrawn in view of the fact that, under article 8 (2), there would be few occasions in which a public offer would constitute an offer capable of acceptance.

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#### ARTICLE 12 o/

146. The text of article 12 of the draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"(1) A declaration or other conduct by the offeree indicating assent to an offer is an acceptance. Silence shall not in itself amount to acceptance.

"(2) Subject to paragraph 3 of this article, acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. It is not effective if the indication of assent does not reach the offeror within the time he has fixed or if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

"(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed provided that the act is performed within the period of time laid down by the second and third sentences of paragraph (2) of this article.

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o/ The Commission considered article 12 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 199th meeting on 7 June 1978; for the summary record of this meeting, see A/CN.9/SR.199.

"(4) This article does not apply to the acceptance of an offer in so far as the acceptance is allowed otherwise than in writing where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this paragraph."

#### Paragraph (1)

147. The Commission had previously decided to consider the text of article 2, paragraph (3), in conjunction with article 12, paragraph (1) (see para. 15 above).

148. The Commission deleted article 2, paragraph (3), since it was generally agreed that silence in itself should not constitute acceptance; but silence could constitute acceptance if this had been previously agreed upon between the parties or resulted from prior dealings between them or from usage.

149. One representative indicated that, in his view, the only occasion when silence should be permitted to constitute acceptance was when this had been previously agreed upon between the parties.

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

150. The Commission adopted the substance of these provisions.

#### Paragraph (4)

151. The Commission deleted this provision as a consequence of its reformulation of article 3, paragraph (2) (see para. 27 above).

#### Decision

152. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 12 of this draft Convention became article 16 of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of article 16:

"Article 16

"(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence shall not in itself amount to acceptance.

"(2) Subject to paragraph 3 of this article, acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

"(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed provided that the act is performed within the period of time laid down in paragraph 2 of this article."

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ARTICLE 13 p/

153. The text of article 13 of the draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"(1) A reply to an offer containing additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

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p/ The Commission considered article 13 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 199th meeting on 7 June 1978 and at its 202nd meeting on 8 June 1978; for the summary records of these meetings, see A/CN.9/SR.199 and 202.

"(2) However, a reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance unless the offeror objects to the discrepancy without delay. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance."

#### Paragraph (1)

154. The Commission adopted a proposal that the wording of paragraph (1) be clarified to ensure that a reply which merely made inquiries or suggested the possibility of additional or different terms did not constitute a counter-offer since paragraph (1) was designed to apply to a reply which purported to be an acceptance of the offer.

155. The Commission did not accept a proposal that a reply to an offer containing additions, limitations or other modifications does not reject the offer, but only constitutes a counter-offer. It was generally agreed that it was important to state expressly that a counter-offer rejects the offer so that, under article 11, the offer would be terminated. Under such a rule the original offeree could not accept the original offer at a later point in time if his counter-offer was rejected.

#### Paragraph (2)

##### Deletion of paragraph (2)

156. Under one view, it was preferable to delete paragraph (2), since the formation of a contract of sale necessarily implied that the parties had agreed, that is, that the acceptance matched the offer. In addition, article 13, paragraph (2), would cause great uncertainty in international trade and would lead to divergent judicial interpretations in ascertaining whether an addition materially altered the terms of the offer.

157. However, under another view, article 13, paragraph (2), was considered to be a very useful provision having regard to the fact that, in the international sale of goods, offers and acceptances were frequently communicated by means of filling in the particular details of a transaction in printed forms, which would normally contain differences among the printed terms. In such a case, the parties might assume that a contract has been formed but, at a later date, one of the parties might, after a careful scrutiny of the printed terms, be able to avoid the obligations that he had undertaken to perform by demonstrating that no contract had been formed. In addition, it was stated that an offeror, assuming the conclusion of a contract, might accept goods and this might be construed as the acceptance which forms the contract thus preventing him from claiming damages for late delivery. Article 13, paragraph (2) would avoid these undesirable results while giving the offeror the opportunity to object to the reply, which contained non-material alterations to the offer.

158. After considerable deliberation, the Commission decided to retain the principle contained in article 13, paragraph (2).

### Scope of application of rule in article 13, paragraph (2)

159. Under one view, article 13, paragraph (2) should be limited to mere differences in wording, grammatical changes, typographical errors or insignificant matters, such as the specification of details which were implicit in the offer.

160. There was also considerable support for the view that article 13, paragraph (2), should have a broader scope of application than to mere matters of wording and the like, since these matters would, even under the test in article 13, paragraph (1), probably not convert a purported acceptance into a counter-offer. It was stated that as long as the reply did not depart from the substance of the offer, the offeror was sufficiently protected by being given the right to prevent the formation of the contract because of the discrepancy. If a merchant chose not to examine carefully a reply purporting to be an acceptance, the draft Convention should not seek to protect him from his omission to do so.

161. It was suggested by some representatives who opposed the retention of article 13, paragraph (2), that, as a minimum, an attempt should be made to define what would constitute a material alteration of an offer. This would give more certainty to the provision and would make its retention more acceptable.

162. Under another view, the present formulation of article 13, paragraph (2), was preferable as it enabled the determination of what constituted a material alteration to be made having regard to the particular circumstances of each case.

### Establishment of a Working Group on article 13

163. The Commission established a Working Group composed of the representatives of Czechoslovakia, Germany, Federal Republic of, Indonesia, Spain and the United Republic of Tanzania. The Working Group was requested to attempt to reformulate article 13, paragraph (2), to clarify what would constitute a material alteration of an offer.

164. The Working Group proposed that article 13, paragraph (2), be deleted or, if it were retained, that the following provision be added as article 13, paragraph (3):

"(3) Additional or different terms relating to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially, unless the offeree, by virtue of the offer or the particular circumstances of the case, has reason to believe they are acceptable to the offeror."

165. In explanation of this proposal it was stated that the Working Group's first preference was the deletion of article 13, paragraph (2), because it contradicted the basic principle of article 13, paragraph (1), that an acceptance must agree with the terms of an offer. It was also extremely difficult to define satisfactorily what constituted a material alteration of the offer.

166. After deliberation, the Commission decided to maintain its previous decision to retain article 13, paragraph (2) (see para. 158 above).

167. Given that article 13, paragraph (2) was retained, it was generally agreed that the additional paragraph proposed by the Working Group constituted a considerable improvement over the text of the previous article 13, paragraph (2). It was considered that the text proposed by the Working Group should be clarified to indicate that the list of matters, which were defined as constituting a material alteration of an offer, was not exhaustive.

168. One representative stated that the words "unless the offeree by virtue of the offer or the particular circumstances of the case has reason to believe they are acceptable to the offeror" should be deleted, since it was inconceivable that an alteration to any of the matters set out in article 13, paragraph (3) could ever be described as non-material.

169. One representative expressed reservations in respect of the drafting of article 13, paragraph (3). Another representative expressed a reservation as to article 13, paragraph (3).

#### Requirement of objection "without delay"

170. The Commission adopted a proposal that the words "without delay" be replaced by words such as "without undue delay" to permit the offeror some time for reflection. A representative indicated that, in his view, it was essential to retain the requirement to object without delay, since this accorded with modern commercial practice.

#### Decision

171. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 13 of this draft Convention became article 17 of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of article 17:

#### "Article 17

"(1) A reply to an offer which purports to be an acceptance containing additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

"(2) However, a reply to an offer which purports to be an acceptance, but which contains additional or different terms which do not materially alter the terms of the offer, constitutes an acceptance unless the offeror objects to the discrepancy without undue delay. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

"(3) Additional or different terms relating, inter alia, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially, unless the offeree by virtue of the offer or the particular circumstances of the case has reason to believe they are acceptable to the offeror."

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## ARTICLE 14 g/

172. The text of article 14 of the draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"(1) A period of time for acceptance fixed by an offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by an offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

"(2) If the notice of acceptance cannot be delivered at the address of the offeror due to an official holiday or a non-business day falling on the last day of the period for acceptance at the place of business of the offeror, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period."

### Paragraph (1)

173. The Commission considered a suggestion that the words "or from the date shown on the letter" be deleted. This suggestion was based on the view that the offeror might insert a date on the letter which did not reflect the date on which the letter was sent. However, the generally accepted view was that a provision along these lines was unnecessary, since it was generally in the interest of the offeror to give the offeree an adequate opportunity to accept.

174. The Commission did not retain a suggestion that article 14, paragraph (1) be simplified by providing that the period of time fixed for acceptance begins to run on receipt of the offer.

### Paragraph (2)

175. The Commission did not retain a proposal that official holidays or non-business days occurring during the running of the period of time be excluded when calculating the period.

### Decision

176. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 14 of this draft Convention became article 18 of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of article 18:

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g/ The Commission considered article 14 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 200th meeting on 7 June 1978; for the summary record of this meeting, see A/CN.9/SR.200.

"Article 18

"(1) A period of time for acceptance fixed by an offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown from the date shown on the envelope. A period of time for acceptance fixed by an offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

"(2) If the notice of acceptance cannot be delivered at the address of the offeror due to an official holiday or a non-business day falling on the last day of the period for acceptance at the place of business of the offeror, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period."

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ARTICLE 15 r/

177. The text of article 15 of the draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror so informs the offeree orally or dispatches a notice to that effect.

"(2) If the letter or document containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror informs the offeree orally that he considers his offer as having lapsed or dispatches a notice to that effect."

178. The Commission adopted article 15 in principle.

Decision

179. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 15 of this draft Convention became article 19 of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of article 19:

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r/ The Commission considered article 15 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 200th meeting on 7 June 1978; for the summary record of this meeting, see A/CN.9/SR.200.

"Article 19

"(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror so informs the offeree orally or dispatches a notice to that effect.

"(2) If the letter or document containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror informs the offeree orally that he considers his offer as having lapsed or dispatches a notice to that effect."

\* \* \*

ARTICLE 16 s/

180. The text of article 16 of the draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"An acceptance is withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective."

181. The Commission adopted article 16 in principle.

Decision

182. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 16 of this draft Convention became article 20 of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of article 20:

"Article 20

"An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective."

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s/ The Commission considered article 16 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 200th meeting on 7 June 1978; for the summary record of this meeting, see A/CN.9/SR.200.

ARTICLE 17 t/

183. The text of article 17 of the draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"A contract of sale is concluded at the moment that an acceptance of an offer is effective in accordance with the provisions of this Convention."

184. The Commission did not accept a suggestion that article 17 provide that the contract of sale be concluded on the date agreed upon by the parties, since the parties were always free to agree on a different rule from that provided by article 17.

185. The Commission adopted article 17 in principle.

Decision

186. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 17 of this draft Convention became article 21 of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of article 21:

"Article 21

"A contract is concluded at the moment when an acceptance of an offer is effective in accordance with the provisions of this Convention."

\* \* \*

ARTICLE 18 u/

187. The text of article 18 of the draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods, is as follows:

"(1) The contract may be modified or rescinded by the mere agreement of the parties.

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t/ The Commission considered article 17 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 200th meeting on 7 June 1978; for the summary record of this meeting, see A/CN.9/SR.200.

u/ The Commission considered article 18 of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 200th meeting on 7 June 1978 and at its 201st meeting on 8 June 1978; for the summary records of these meetings, see A/CN.9/SR.200 and 201.

"(2) A written contract which contains a provision requiring any modification or rescission to be in writing may not be otherwise modified or rescinded. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

"(3) This article does not apply to the modification or rescission of a contract in so far as it is allowed otherwise than in writing where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this paragraph."

#### Paragraph (1)

188. A suggestion to delete the word "mere" was withdrawn when it was pointed out that the expression "mere agreement" had been used by the Working Group on the International Sale of Goods to make it clear that the common law doctrine of consideration was not applicable to the modification or rescission of a contract.

#### Paragraph (2)

189. There was support for the view that the first sentence of article 18, paragraph (2), should be retained but that the second sentence should be deleted. It was stated in support of this view that the draft Convention should give effect to a written agreement between the parties that their contract could not be modified or rescinded except in writing. To accomplish this result it would be necessary to delete the provision that a party could be precluded by his conduct from asserting such a provision.

190. There was also support for deleting all of article 18, paragraph (2). In support of this view it was stated that the first sentence of article 18, paragraph (2), contradicted the principle of article 3 that no particular form was necessary to constitute an agreement. It was also stated that the provisions of article 18, paragraph (2), would be difficult to interpret and that it would be better to leave the matter to national law.

191. There was also considerable support for the retention of article 18, paragraph (2) as adopted by the Working Group on the International Sale of Goods since it provided a uniform solution to a very important problem in international trade, that is, the effect of clauses in written contracts which provided that any modification or rescission to the contract must be in writing. It was said that article 18, paragraph (2) provided a just and flexible solution to this common problem.

192. After considerable deliberation the Commission decided to retain the substance of article 18, paragraph (2).

#### Paragraph (3)

193. The Commission deleted this provision as a consequence of its reformulation of article 3, paragraph (2) (see para. 27 above).

## Decision

194. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article 18 of this draft Convention became article 27 of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of article 27:

### "Article 27

"(1) The contract may be modified or abrogated by the mere agreement of the parties.

"(2) A written contract which contains a provision requiring any modification or abrogation to be in writing may not be otherwise modified or abrogated. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct."

### ARTICLE (X) v/

195. The text of article (X) of the draft Convention on the Formation of Contracts for the International Sale of Goods, as adopted by the Working Group on the International Sale of Goods is as follows:

"A Contracting State whose legislation requires a contract of sale to be concluded in or evidenced by writing may at the time of signature, ratification or accession make a declaration to the effect that the provisions of this Convention, in so far as they allow the conclusion, modification or rescission of the contract, offer, acceptance or any other indication of intention to be made otherwise than in writing shall not apply if one of the parties has his place of business in the declarant State."

## Decision

196. As a result of the decision to integrate the draft Convention on Formation with the draft CISG (para. 18 of the Commission's report above), article (X) of this draft Convention became article (X) of the draft Convention on Contracts for the International Sale of Goods. The Commission adopted the following text of article (X):

### "Article (X)

"A Contracting State whose legislation requires a contract of sale to be concluded in or evidenced by writing may at the time of signature, ratification or accession make a declaration in accordance with article 11 that any provision of article 10, article 27 or Part II of this Convention which

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v/ The Commission considered article (X) of the draft Convention on the Formation of Contracts for the International Sale of Goods at its 208th meeting on 16 June 1978; for the summary record of this meeting, see A/CN.9/SR.208.

allows a contract of sale or its modification or abrogation or any offer, acceptance, or other indication of intention to be made in any form other than in writing shall not apply where any party has his place of business in a Contracting State which has made such a declaration."

#### Final clauses

197. A representative stated that the draft final clauses to be prepared by the Secretary-General should contain the following provision:

"This Convention shall not prevail over conventions already entered into or which may be entered into, and which contain provisions concerning the matters covered by this Convention, provided that the seller and buyer have their places of business in States parties to such a convention."

ANNEX II

List of documents before the Commission

A. General series

- A/CN.9/141 . . . . . International payments: draft Convention on International Bills of Exchange and International Promissory Notes: report of the Working Group on International Negotiable Instruments on the work of its fifth session (New York, 18-29 July 1977)
- A/CN.9/142 and Add.1 . . . . . Report of the Working Group on the International Sale of Goods on the work of its ninth session (Geneva, 19-30 September 1977)
- A/CN.9/143 . . . . . International sale of goods: draft Convention on the Formation of Contracts for the International Sale of Goods: note by the Secretary-General
- A/CN.9/144 . . . . . Commentary on the draft Convention on the Formation of Contracts for the International Sale of Goods: report by the Secretary-General
- A/CN.9/145 . . . . . International sale of goods: incorporation of the provisions of the draft Convention on the Formation of Contracts for the International Sale of Goods into the draft Convention on the International Sale of Goods: report of the Secretary-General
- A/CN.9/146 and Add.1 to 4 . . . . . International sale of goods: analytical compilation of comments by Governments and international organizations on the draft Convention on the Formation of Contracts for the International Sale of Goods as adopted by the Working Group on the International Sale of Goods and on the draft of a law for the unification of certain rules relating to validity of contracts for the international sale of goods prepared by the International Institute for the Unification of Private Law: report of the Secretary-General
- A/CN.9/147 . . . . . International payments: draft Convention on International Bills of Exchange and International Promissory Notes: report of the Working Group on International Negotiable Instruments on the work of its sixth session (Geneva, 3-13 January 1978)

- A/CN.9/148 . . . . . Multinational enterprises: note by the Secretary-General
- A/CN.9/149 and Add.1 to 3  
and Corr. 1-2 . . . . . Programme of work of the Commission: report of the Secretary-General
- A/CN.9/150 . . . . . United Nations Conference on the Carriage of Goods by Sea: note by the Secretary-General
- A/CN.9/151 . . . . . Current activities of international organizations related to the harmonization and unification of international trade law: report of the Secretary-General
- A/CN.9/152 . . . . . Training and assistance in the field of international trade law: note by the Secretary-General
- A/CN.9/153 . . . . . Provisional agenda, annotations thereto, and tentative schedule of meetings: note by the Secretary-General
- A/CN.9/154 . . . . . Co-ordination of work between the Commission and other international organizations: note by the Secretary-General
- A/CN.9/155 . . . . . Programme of work of the Commission: recommendations of the Asian-African Legal Consultative Committee: note by the Secretary-General
- A/CN.9/156 . . . . . Programme of work of the Commission: proposal by France: note by the Secretary-General

B. Restricted series

- A/CN.9/XI/CRP.1 . . . . . International sale of goods: draft Convention on the Formation of Contracts for the International Sale of Goods: note by the Secretariat: documentation relevant to the draft Convention on the Formation of Contracts for the International Sale of Goods
- A/CN.9/XI/CRP.2 . . . . . Relationship of Convention on the International Sale of Goods and Convention on the Formation of Contracts for the International Sale of Goods to Convention on the Limitation Period in the International Sale of Goods: note by the Secretariat
- A/CN.9/XI/CRP.3 . . . . . Proposal of Australia: article 1

A/CN.9/XI/CRP.4 . . . . .	Proposal by the Working Group composed of the representatives of Brazil, Egypt, Finland, India, the Union of Soviet Socialist Republics and the United Kingdom of Great Britain and Northern Ireland: article 2
A/CN.9/XI/CRP.5 . . . . .	Proposal of the Union of Soviet Socialist Republics: article 3
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A/CN.9/XI/CRP.8 . . . . .	Proposal of the United Kingdom of Great Britain and Northern Ireland: article 8
A/CN.9/XI/CRP.9 . . . . .	Proposal of the Working Group composed of the representatives of Finland, Hungary, Mexico, Singapore, Uganda and the United Kingdom of Great Britain and Northern Ireland
A/CN.9/XI/CRP.10 . . . . .	Proposal of the Working Group composed of the representatives of Australia, Brazil, Finland, France, Hungary, Kenya, Singapore, the Union of Soviet Socialist Republics and the United Kingdom of Great Britain and Northern Ireland: article 8
A/CN.9/XI/CRP.11 . . . . .	Proposal of the Working Group composed of the representatives of Chile, Greece, Ireland, Japan, Poland, Uganda and the United Kingdom of Great Britain and Northern Ireland: new article
A/CN.9/XI/CRP.12 . . . . .	Proposal of the United States of America
A/CN.9/XI/CRP.13 . . . . .	Proposal of the United Kingdom of Great Britain and Northern Ireland
A/CN.9/XI/CRP.14 . . . . .	Proposal of Australia: new article; article 15
A/CN.9/XI/CRP.15 . . . . .	Proposal of the Working Group composed of the representatives of Czechoslovakia, Germany, Federal Republic of, Indonesia, Spain and the United Republic of Tanzania
A/CN.9/XI/CRP.16 . . . . .	Proposal of the Working Group composed of the representatives of Finland, Ghana, Hungary, Japan, Kenya, the Philippines, the Union of Soviet Socialist Republics and the United States of America: articles 9 and 10

- A/CN.9/XI/CRP.17 . . . . . Report of the Drafting Group: draft Convention on Contracts for the International Sale of Goods
- A/CN.9/XI/CRP.18 . . . . . Draft report of the United Nations Commission on International Trade Law on the work of its eleventh session
- A/CN.9/XI/CRP.18/Add.1 to 12 . . Draft report of the Commission: chapter II
- A/CN.9/XI/CRP.18/Add.13 . . . . . Draft report of the Commission: chapter III: international payments: negotiable instruments
- A/CN.9/XI/CRP.18/Add.14 . . . . . Draft report of the Commission: chapter VI
- A/CN.9/XI/CRP.18/Add.15 . . . . . Draft report of the Commission: chapter V: training and assistance in the field of international trade law
- A/CN.9/XI/CRP.18/Add.16 and 17 . . Draft report of the Commission: chapter IV
- A/CN.9/XI/CRP.19 . . . . . Draft decision submitted by Egypt, Ghana, India, Kenya, Nigeria, the Philippines, Singapore, the United Republic of Tanzania and Yugoslavia

C. Information series

- A/CN.9/INF.11 and Corr.1 and 2 . . List of participants: members of the Commission

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