I. INTERNATIONAL SALE OF GOODS

A. Report of the Working Group on the International Sale of Goods on the work of its eighth session (New York, 4–14 January 1977) (A/CN.9/128)*

CONTENTS

INTRODUCTION

1. The Working Group on the International Sale of Goods was established by the United Nations Commission on International Trade Law at its second session held in 1969. The Commission at its 44th meeting, on 26 March 1969, requested the Working Group 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 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.[1] At its third session the Commission decided that the Working Group should commence its work on formation of contracts when it had completed its work on the revision of the Uniform Law on the International Sale of Goods.[2]

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

3. The Working Group held its eighth session at the Headquarters of the United Nations in New York from 4 to 14 January 1977. All members of the Working Group were represented.

4. The session was also attended by observers from the following members of the Commission: Argentina, Australia, Bulgaria, Chile, Cyprus, Gabon, Germany, Federal Republic of, and Poland. Observers from Canada, Finland, and the German Democratic Republic also attended the session.[3] In addition, the session was attended by observers from the following international organizations: East African Community, Hague Conference on Private International Law, the International Institute for the Unification of Private Law (UNIDROIT) and the Inter-American Juridical Committee.

5. The Working Group elected the following officers:
Chairman ..... Mr. Jorge Barrera-Graf (Mexico)
Rapporteur ..... Mr. Gyula Eörsi (Hungary)

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

(*a*) Provisional agenda and annotations (A/CN.9/WG.2/L.3);

(*b*) Report of the Secretary-General: formation and validity of contracts for the international sale of goods (A/CN.9/WG.2/WP.26 and Add.1).[4] The Secretariat prepared for the consideration of the Working Group a draft of a convention on the formation of contracts for the international sale of goods (A/CN.9/WG.2/WP.26, annex I).[5] The Secretariat also prepared a critical analysis of the UNIDROIT draft law on the validity of contracts of international sale of goods (A/CN.9/WG.2/WP.26/Add.1);[6]

(*c*) Convention relating to a uniform law on the formation of contracts for the international sale of goods, with annexes (extract from the *Register of Texts and Conventions and other Instruments concerning International Trade Law, Vol. I* (United Nations publication, Sales No. E. 71.V.3));

(*d*) Analysis of replies and comments by Governments on the Hague Convention of 1964 on the Formation of Contracts for the International Sale of Goods (A/CN.9/31, paras. 144 to 156; UNCITRAL Yearbook, vol. I: 1968-1970, part three, I);

(*e*) Draft of a law for the unification of certain rules relating to validity of contracts of international sale of goods, followed by an explanatory report (UNIDROIT, ETUDE XVI/B, Document 22, U.D.P. 1972, French and English only).

7. The Working Group adopted the following agenda:

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* 3 February 1977.

[1] Report of the Commission on the work of its second session (1969), A/7618 (Yearbook..., 1968–1970, part two, II, A).

[2] Report of the Commission on the work of its third session (1970), A/8017 (Yearbook..., 1968–1970, part two, III, A).

[3] Finland and the German Democratic Republic were elected to the Commission by the General Assembly at its thirty-first session. Their terms commence on the first day of the Commission's tenth session.

[4] Reproduced as annex II to the present report. Annex I contains the text of the draft convention on the formation of contracts for the international sale of goods, as approved or deferred for further consideration by the Working Group on the International Sale of Goods at its eighth session. References to those annexes hereinafter replace references to documents A/CN.9/WG.2/WP.26 and Add.1.

[5] Annex II to the present report, appendix I.

[6] *Ibid.*, appendix II.

(1) Opening of the session
(2) Election of officers
(3) Adoption of the agenda
(4) Formation and validity of contracts for the international sale of goods
(5) Other business
(6) Date of the next session
(7) Adoption of the report of the session.

8. In the discussion of the adoption of agenda item 4, the Working Group noted the view of the Commission at its ninth session that "the Working Group should restrict its work to the preparation of rules on the formation of contracts for the international sale of goods so as to complete its task in the shortest possible time, but that the Working Group had discretion as to whether to include some rules in respect of the validity of such contracts".[7]

9. Accordingly, the Working Group decided to consider firstly the 1964 Hague Uniform Law on the Formation of Contracts for the International Sale of Goods[8] together with the proposed alternative provisions contained in the report of the Secretary-General (annex II, appendix I). However, during its consideration of this item any representative or observer could refer to such questions of validity which appeared to be related to the draft provisions on formation.

10. Secondly, the Working Group would consider the general question of validity of contracts and, in particular, the UNIDROIT draft of a law for the unification of certain rules relating to validity of contracts of international sale of goods and the critical analysis of these provisions prepared by the Secretariat (annex II, appendix II).

I. Formation of contracts for the international sale of goods

Article 1

11. The text of article 1 in Annex I of the 1964 Convention for use by those States which have not adopted the Uniform Law of the International Sale of Goods is as follows:

"1. The present Law shall apply to the formation of contracts of sale of goods entered into by parties whose places of business are in the territories of different States, in each of the following cases:

"(*a*) Where the offer or the reply relates to goods which are in the course of carriage or will be carried from the territory of one State to the territory of another;

"(*b*) Where the acts constituting the offer and the acceptance are effected in the territories of different States;

"(*c*) Where delivery of the goods is to be made in the territory of a State other than that within whose territory the acts constituting the offer and the acceptance are effected.

"2. Where a party does not have a place of business, reference shall be made to his habitual residence.

"3. The application of the present Law shall not depend on the nationality of the parties.

"4. Offer and acceptance shall be considered to be effected in the territory of the same State only if the letters, telegrams or other documentary communications which contain them are sent and received in the territory of that State.

"5. For the purpose of determining whether the parties have their places of business or habitual residences in 'different States', any two or more States shall not be considered to be 'different States' if a valid declaration to that effect made under Article II of the Convention dated the 1st day of July 1964 relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods is in force in respect of them.

"6. The present Law shall not apply to the formation of contracts of sale:

"(*a*) Of stocks, shares, investment securities, negotiable instruments or money;

"(*b*) Of any ship, vessel or aircraft, which is or will be subject to registration;

"(*c*) Of electricity;

"(*d*) By authority of law or on execution or distress.

"7. Contracts for the supply of goods to be manufactured or produced shall be considered to be sales within the meaning of the present Law, unless the party who orders the goods undertakes to supply an essential and substantial part of the materials necessary for such manufacture or production.

"8. The present Law shall apply regardless of the commercial or civil character of the parties or of the contracts to be concluded.

"9. Rules of private international law shall be excluded for the purpose of the application of the present Law, subject to any provision to the contrary in the said Law."

12. The text of article I in Annex II of the 1964 Convention for use by those States which have adopted the Uniform Law on the International Sale of Goods is as follows:

"The present Law shall apply to the formation of contracts of sale of goods which, if they were concluded, would be governed by the Uniform Law on the International Sale of Goods."

Discussion and decision

13. The Working Group was of the view that it was desirable to prepare an article on the scope of application of the draft Convention based upon the provisions in the draft Convention on the International Sale of Goods (CISG) even though the provisions on formation and validity may eventually be incorporated into that draft Convention.

14. The Working Group accordingly requested the Secretariat to prepare draft provisions on the scope of application of the Convention using the approach em-

[7] Report of the Commission on its ninth session (1976), A/31/17, para. 27 (Yearbook..., 1976, part one, II, A).

[8] The Uniform Law is hereafter referred to as ULF. The English and French language versions of ULF are the official texts as adopted by the 1964 Hague Conference. The Russian and Spanish language versions are unofficial translations reproduced from *Register of Texts of Conventions and other Instruments concerning International Trade Law*, vol. I (United Nations publication, Sales No. 71.V.3), chap. I, sect. 1.

ployed in the ULF and the appropriate provisions of the CISG. The Secretariat prepared two draft provisions. Alternative No. 1 was for use by those States which adopt the CISG. Alternative No. 2 was for use by those States which do not adopt the CISG. The text of these provisions is as follows:

[*Alternative No. 1*]

"This Convention applies to the formation of contracts of sale of goods which, if they were concluded, would be governed by the Convention on the International Sale of Goods."

[*Alternative No. 2*]

"(1) This Convention applies to the formation of contracts of sale of goods entered into by 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) 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, did not know and had no reason to know 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.

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

"(5) 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.

"(6) 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;

"(*c*) 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."

15. The Working Group decided that these draft provisions should be placed in square brackets to indicate that they would have to be reconsidered in the light of any changes which the Commission might make to the scope of application of the draft CISG.

16. A suggestion was made that article 1, paragraphs (2) and (6) (*a*) of alternative No. 2, be limited to events prior to the conclusion of the contract. This suggestion was objected to on the grounds that such a limitation was not contained in the draft CISG and that there was no reason to have one rule in respect of the scope of application of the CISG and another in respect of the scope of application of the present Convention.

17. It was noted that the draft of alternative No. 1 could lead to the situation that if the parties to a transaction were from States both of which had adopted CISG but only one of which had adopted the present Convention, the courts of the State which had adopted the present Convention would be required to apply it to the transaction whereas the courts of the other States would not.

Article 2

18. The text of article 2 of ULF is as follows:

"1. The provisions of the following articles shall apply except to the extent that it appears from the preliminary negotiations, the offer, the reply, the practices which the parties have established between themselves or usage, that other rules apply.

"2. However, a term of the offer stipulating that silence shall amount to acceptance is invalid."

19. The alternative text proposed by the Secretariat (annex II, appendix I) is as follows:

"The provisions of the following articles apply except to the extent that the preliminary negotiations, the offer, the reply, any practices that the parties have established between themselves or usage lead to the application of more stringent legal rules or more stringent agreed principles to determine whether a contract has been concluded."

Discussion and decision

20. The Working Group decided that article 2 should clearly state that the parties could exclude the uniform law as a whole, so that the applicable national law would govern. As to the extent to which particular rules could be excluded or modified by the parties, it was decided that the general principle should be that of autonomy of the will of the parties. However, it was recognized that in the subsequent discussion of the substantive provisions the Working Group might decide that the parties could not derogate from or vary certain of those provisions, especially if it was later decided to incorporate provisions on validity into the text.

21. It was decided that article 2 (2) of UFL should be retained, although there was some sentiment for including it in article 6.

22. Several representatives and an observer stated that the concept that an article could only be modified or excluded by more stringent legal rules or more stringent agreed principles, as suggested in the alternative text proposed by the Secretariat, could cause consider-

able difficulty since it was not always easy to determine whether a legal rule or agreed principle was "more stringent" than the rules contained in ULF or the alternative text proposed by the Secretariat.

23. A Drafting Party consisting of the representatives of Brazil, Czechoslovakia and the United States and the observer for UNIDROIT, was set up to draft a new text.

24. The text proposed by the Drafting Group was as follows:

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

"(2) Unless the Convention provides otherwise, the parties may derogate from or vary the effect of any of its provisions as may appear from the preliminary negotiations, the offer, the reply, the practices which the parties have established between themselves or usages widely known and regularly observed in international trade."

25. It was decided to add the words "agree to" before the word "exclude" in paragraph (1) and before "derogate" in paragraph (2). These words were placed in square brackets because some representatives believed that it was difficult to speak of the agreement of the parties prior to the conclusion of the contract.

26. The view was expressed that the most likely manner in which the parties would act to exclude the application of this Convention was by the choice of a specific national law to govern the contract. It was also suggested that the parties should not be able to exclude the application of this Convention unless they stated the law which would be applicable. One representative was opposed to paragraph (1) because, in his view, the parties should not be permitted to exclude the application of the Convention.

27. In respect of article 2 (2) of the proposal, the Working Group deleted the words following the word "usages" since "usages" were defined in article 13.

28. Several representatives suggested that the expression "the practices the parties have established between themselves or usages" should be deleted as it was unlikely that such practices or usages exist.

29. The decision to retain article 2 (2) of ULF was reaffirmed and it was placed as paragraph (3) of this article pending a general reordering of the text.

Article 3

30. The text of article 3 of ULF is as follows:

"An offer or an acceptance need not be evidenced by writing and shall not be subject to any other requirement as to form. In particular, they may be proved by means of witnesses."

31. The alternative text proposed by the Secretariat (annex II, appendix I) is as follows:

"Neither the formation or validity of a contract nor the right of a party to prove its formation or any of its provisions depends upon the existence of a writing or any other requirement as to form. The formation of the contract, or any of its provisions, may be proved by means of witnesses or other appropriate means."

Discussion and decision

32. There was support for the view that consideration of matters concerning form of contracts should be postponed until the Commission finalized article 11 of the draft CISG which had been left in square brackets because the Working Group had been unable to reach agreement on such questions of form.

33. It was noted that the use of the expression "need not be evidenced by writing" in the English language version of article 3 of ULF suggested that the article regulated only matters of evidence and of the proper form of the offer and the acceptance but that it did not overcome a national rule of law that a contract for the international sale of goods must be in writing either to be validly formed or to be enforceable before the courts of that country. It was further noted, however, that the French language versions of article 3 of ULF and article 11 of the draft CISG used the phrase "aucune forme n'est prescrite pour . . . " which suggested that the article went to questions of validity and enforceability. It was suggested that the fact that the different language versions of the text were not identical be brought to the attention of the Commission at its tenth session for its consideration during the discussion of article 11 of the draft CISG.

34. It was also noted that it might be possible to reach a compromise in relation to the problem of form of contracts by retaining the substance of article 3 of ULF with a proviso that it did not overcome contrary provisions in the municipal laws of the place of business of either party.

35. In view of the fact that the Commission would consider article 11 of the draft CISG at its tenth session in May, the Working Group decided to place both versions of article 3 in square brackets and to record in the report the compromise solution suggested above, which relates to all articles that deal with the question of the form of any declarations or expressions of intention of the parties.

Article 3A

36. The text of article 3A as proposed by the Secretariat (annex II, appendix I) is as follows:

"(1) An agreement by the parties made in good faith to modify or rescind the contract is effective. However, a written contract which excludes any modification or rescission unless in writing cannot be otherwise modified or rescinded.

"(2) Action by one party on which the other party reasonably relies to his detriment may constitute a waiver of a provision in a contract which requires any modification or rescission to be in writing. A party who has waived a provision relating to an unperformed portion of the contract may retract the waiver. However, a waiver cannot be retracted if the retraction would result in unreasonable inconvenience or unreasonable expense to the other party because of his reliance on the waiver."

The provision in general

37. The view was expressed that article 3A, since it did not strictly relate to the formation of contracts, did not belong in the draft Convention on formation. It was also suggested that it would be appropriate for the Working Group to transmit the proposal to the Commission for its possible inclusion in the draft Convention on the In-

ternational Sale of Goods. The Working Group, after deliberation, was of the view that the issues raised by its provisions were of such importance that the article should be retained in the draft Convention on formation.

First sentence of article 3A paragraph (1)

38. It was noted that this provision performed a useful function, particularly in common law jurisdictions which retained the doctrine of consideration. The introduction of this provision would enable the parties to modify or rescind a contract even though consideration was lacking, e.g., where the obligations of only one of the parties was affected.

39. The view was expressed, however, that the requirement that the modification be "in good faith" would not be interpreted the same in all countries. There was some support for the view that the words "in good faith" could be replaced by other expressions such as "freely" or "in conformity with fair dealing". There was also support for the view that the first sentence be recast in terms making inapplicable any rule of municipal law requiring consideration for modification or rescission of contracts. This would make it clear that questions of "good faith" were not involved. Another suggestion was to delete the provision and replace it with an article which made the provisions on formation applicable to modification and rescission of contracts. Yet another view was to delete the words "in good faith" and deal with the problem of improper pressures in a separate provision on questions of validity.

Second sentence of article 3A, paragraph (1) and article 3A, paragraph (2)

40. There was considerable support for the retention of the second sentence of article 3A, paragraph (1). However, the reasons for this support varied.

41. On the one hand, some support was dependent upon also retaining article 3A (2). The combined effect of these provisions would enable a written contract which excluded any modification or rescission unless in writing to be modified or rescinded without a writing if the conditions in article 3A (2) were met.

42. On the other hand, there was some support for the retention of the second sentence of article 3A (1) because it gave supremacy to the written terms of a contract. A representative sharing this opinion proposed the deletion of article 3A (2). He reserved his position should that article be retained since it raised the same type of problems as were posed by article 3.

43. In relation to article 3A (2), it was suggested that the general approach should be consistent with that taken in relation to article 3 and accordingly article 3A (2) if retained, should be placed in square brackets. In addition, a number of representatives considered article 3A (2) complex and unclear and suggested that, if it were retained, it should be simplified.

Action by the Working Group

44. The Working Group established a drafting party, consisting of the representatives of Austria, Czechoslovakia, the United Kingdom of Great Britain and Northern Ireland and the observer for UNIDROIT to draft provisions based on these considerations.

45. The Drafting Party proposed the following text:

"(1) The contract may be modified or rescinded merely by agreement of the parties [made in conformity with fair dealing].

"(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 action from asserting such a provision to the extent that the other party has relied to his detriment on that action."

Discussion and decision

46. Although some representatives favoured the retention of the words in square brackets in paragraph (1) until the Working Group decided whether the draft Convention would contain a separate provision on good faith and fair dealing, the Working Group decided to delete them.

47. The Working Group placed the second sentence of paragraph (2) in square brackets to indicate that, while a number of representatives opposed the provision, other representatives considered that it should be reconsidered at a later stage since it dealt with a practical problem in international trade.

Article 4

48. The text of article 4 of ULF in annex I of the 1964 Convention for use by the States which have not adopted the Uniform Law on the International Sale of Goods is as follows:

"1. The communication which one person addresses to one or more specific persons with the object of concluding a contract of sale shall not constitute an offer unless it is sufficiently definite to permit the conclusion of the contract by acceptance and indicates the intention of the offeror to be bound.

"2. This communication may be interpreted by reference to and supplemented by the preliminary negotiations, any practices which the parties have established between themselves, usage and any applicable legal rules for contracts of sale."

49. The text of article 4 of ULF in annex II of the 1964 Convention for use by those States which have adopted the Uniform Law on the International Sale of Goods is as follows:

"1. The communication which one person addresses to one or more specific persons with the object of concluding a contract of sale shall not constitute an offer unless it is sufficiently definite to permit the conclusion of the contract by acceptance and indicates the intention of the offeror to be bound.

"2. This communication may be interpreted by reference to and supplemented by the preliminary negotiations, any practices which the parties have established between themselves, usage and the provisions of the Uniform Law on the International Sale of Goods."

50. The alternative text proposed by the Secretariat (annex II, appendix I) is as follows:

"(1) A communication directed to one or more specific persons [or to the public] with the object of concluding a contract of sale constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound.

"(2) This communication may be interpreted by

reference to and supplemented by the preliminary negotiations, any practices which the parties have established between themselves, usage and any applicable legal rules for contracts of sale.

"(3) An offer is sufficiently definite if it expressly or impliedly indicates at least the kind and quantity of the goods and that a price is to be paid.

"(4) Subject to the contrary intention of the parties, an offer is sufficiently definite even though it does not state the price or expressly or impliedly make provision for the determination of the price of the goods. In such cases, 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.

"(5) An offer is sufficiently definite if it measures the quantity by the amount of goods available to the seller or by the requirements of the buyer. In such cases, the amount of goods available to the seller or the requirements of the buyer means the actual amount available or the actual amount required in good faith. However, the buyer is not entitled to demand nor compelled to accept a quantity unreasonably disproportionate to any stated estimate, or in the absence of a stated estimate, a quantity unreasonably disproportionate to any normal or otherwise comparable amount previously available or required."

Discussion

51. The Working Group decided to conduct its discussions on the basis of the alternative text.

Article 4 paragraph (1)

52. The discussion focused on two questions: (1) whether it was common for "offers to the public" for international sales of goods to be sufficiently definite and to indicate the requisite intention on the part of the offeror to conclude a contract of sale so as to qualify as offers in the legal sense and (2) whether "offers to the public" which met the test of definiteness and intent should be considered to be offers in the legal sense or whether an offer in a legal sense must be made to one or more specific persons.

53. The general view of the Working Group was that few "offers to the public" met the test of definiteness or indicated an intent to conclude a contract of sale. However, the Working Group was informed that a recent UNIDROIT survey found that public offers were becoming more important in international trade.

54. One view expressed in the Working Group was that the reference to public offers should be retained in article 4 (1). Another view was that the references to public offers should be deleted. Some representatives expressed the opinion that offers to "one or more specific persons" could approach the situation generally described as a public offer if the offer was made to a large number of specific persons. The suggestion was also made to delete any reference to the number of possible addressees of the offer.

Article 4 paragraph (2)

55. After discussion the Working Group decided to delete article 4 (2) and to combine it with other provisions on interpretation in the ULF as well as with articles 3, 4 and 5 of the draft uniform law on validity of contracts in a new general provision on interpretation.

Article 4 paragraphs (3) and (4)

56. The Working Group considered these two paragraphs together.

57. Under one view a communication was too indefinite to be an offer if it did not itself fix the price or provide for the means of determining the price. Under this view article 36 of the draft CISG, from which the second and third sentences of article 4 (4) were taken, was for use by those countries under whose law a contract could be concluded without fixing the price or providing a means of determining the price. It could not be used as a justification for the introduction of such a test into a text of uniform law on the formation of contracts.

58. Under another view article 4 (3) and (4) gave a means by which the price could always be determined. Therefore, a communication which would otherwise be an offer should not be held to be too indefinite to be an offer because it failed to fix the price or give the means by which the price could be determined.

59. One representative proposed a compromise solution which, after several amendments, was expressed as follows:

"(3) An offer is sufficiently definite if it expressly or impliedly indicates at least the kind and quantity of the goods and states the price or expressly or impliedly makes provision for the determination of the price or indicates the intention to conclude the contract even without fixing the price or making provision for determination of the price in the contract.

"(4) If the proposal indicates the intention to conclude the contract even without fixing the price or making provision for the determination of the price in the contract, it is a proposal for sale of goods at the price 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 under comparable circumstances."

60. The Working Group accepted the principle of this proposal and referred it to the Drafting Group for it to consider a number of drafting points made during the discussion.

61. However, three representatives expressed reservations to this decision on the grounds that it transformed certain invitations to deal into offers by implying a price which the "offeror" had not himself indicated. One of these representatives also expressed a reservation as to the decision that the implied price was the price generally prevailing at the time of the conclusion of the contract.

Article 4 paragraph (5)

62. Most representatives favoured deletion of this provision. It was pointed out that the second and third sentences of article 4 (5) dealt with matters of performance rather than with the formation of contracts. Some representatives were of the view that the provision left the determination of the quantity of goods too indefinite for the communication to be an offer. One representative noted that it only considered certain matters that were not specific in the offer and omitted to deal with a number of other matters, such as delivery dates and

quality of the goods, which might also be decided upon after the making of the offer.

63. Under another view the provision offered a practical solution for a common form of contract. It was suggested that, if article 4 (5) was deleted, some provision should be made in article 4 (3) to indicate the possibility for the parties to provide for the means of determining the quantity of goods to be delivered.

64. The Work Group decided to delete article 4 (5) but requested the Drafting Group to take into account the suggestion made above.

Decision of the Working Group as to article 4

65. It was decided that the parties were not to be permitted to derogate from or vary the provisions of this article.

66. The Working Group created a Drafting Group consisting of the representatives of Austria, France, the United Kingdom and the USSR and requested it to present a redraft of the entire article in the light of the decisions of the Working Group and the discussions which had been held.

67. The Drafting Group proposed the following text:

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

"(2) An offer is sufficiently definite if expressly or impliedly it indicates the kind of the goods and fixes or makes provision for determining the quantity and the price. Nevertheless, if the offer indicates the intention to conclude the contract even without making provision for the determination of the price, it is considered as a proposal 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."

Discussion and decision

68. The Working Group decided to add the words "addressed to one or more specific persons" after the word "contract" in paragraph (1) in order to exclude specifically public offers from the ambit of the Convention. However, since there was opposition to a specific exclusion of public offers, these words were placed in square brackets for reconsideration at the next session of the Working Group.

69. The Working Group also decided to place the second sentence of paragraph (2) in square brackets to indicate the opposition of some representatives to the inclusion of a provision which would enable a proposal to be considered as an offer even though it does not indicate a price nor make provision for its determination.

Article 5

70. The text of article 5 of ULF is as follows:

"1. The offer shall not bind the offeror until it has been communicated to the offeree; it shall lapse if its withdrawal is communicated to the offeree before or at the same time as the offer.

"2. After an offer has been communicated to the offeree it can be revoked unless the revocation is not made in good faith or in conformity with fair dealing or unless the offer states a fixed time for acceptance or otherwise indicates that it is firm or irrevocable.

"3. An indication that the offer is firm or irrevocable may be express or implied from the circumstances, the preliminary negotiations, any practices which the parties have established between themselves or usage.

"4. A revocation of an offer shall only have effect if it has been communicated to the offeree before he has despatched his acceptance or has done any act treated as acceptance under paragraph 2 of article 6."

71. The alternative text proposed by the Secretariat (annex II, appendix I) is as follows:

"(1) The offer can be accepted only after it has been communicated to the offeree. It cannot be accepted if its withdrawal is communicated to the offeree before or at the same time as the offer.

"(2) After an offer has been communicated to the offeree it can be revoked if the revocation is communicated to the offeree before he has despatched his acceptance or has done any act treated as acceptance under article 6 (2). However, an offer cannot be revoked:

"(*a*) During any time fixed in the offer for acceptance; or

"(*b*) For a reasonable time if the offer otherwise indicates that it is firm or irrevocable; or

"(*c*) For a reasonable time if it was reasonable for the offeree to rely upon the offer being held open and the offeree has altered his position to his detriment in reliance on the offer.

"(3) An indication that the offer is firm or irrevocable may be express or may be implied from the circumstances, the preliminary negotiations, any practices which the parties have established between themselves or usage."

The provisions in general

72. The Working Group agreed to use the alternative text as the basis for discussion although there was support for the view that, in relation to paragraph (1), the approach of ULF was preferable.

Article 5 paragraph (1)

73. Those representatives who expressed the view that the approach taken in the drafting of article 5 (1) of ULF was preferable to that of the alternative text poined out that the ULF text clearly dealt with the effect of an offer, the subject-matter of article 5, whereas the alternative text appeared to deal with the time at which an acceptance could take place.

74. On the other hand it was pointed out that the alternative draft described the practical effect of an offer after its communication to the offeree. It also avoided the ambiguity which arose in article 5 (1) of ULF from the provision that "the offer shall not bind the offeror until it has been communicated". The use of the word "bind" suggested that the offer was irrevocable, which would conflict with the general principle of revocability of offers contained in article 5 (2) of ULF.

75. The Working Group decided to redraft article 5 (1) to conform to ULF but in a way that avoided such ambiguities.

76. In order to make it clear that the offeror could withdraw his offer if the withdrawal was communicated to the offeree before or at the same time as the offer even if the offer was irrevocable, the Working Group decided to add to the end of the second sentence of article 5 (1) the words "even if it is irrevocable". However, because some representatives did not believe the words were necessary, they were placed in square brackets. Another representative pointed out that the words in square brackets were necessary to avoid confusion with article 5 (2).

Article 5 paragraph (2)

77. After discussion it was decided that the basic compromise of the ULF should be retained; offers were in general revocable but they became irrevocable in a number of specific situations. It was thought that any fundamental change in this compromise might render a replacement text less acceptable.

78. The view was expressed that article 5 (2) (*a*) should be redrafted to distinguish between those offers which were intended to be irrevocable for a period of time and those offers which merely indicated the period of time before they lapsed. On the other hand the view was expressed that one of the main exceptions to the principle of revocability was precisely those occasions in which the offer fixed a time for acceptance. The Working Group decided to leave open this question until its next session by placing the word "acceptance" in square brackets immediately followed by the word "irrevocability" in square brackets.

79. There was general support for deleting from the beginning of subparagraphs (*a*), (*b*) and (*c*) any reference to the period of time during which an offer was irrevocable on the grounds that the offer normally remained irrevocable until it lapsed. It was agreed that there should not be two provisions on the period of time during which the offer could be accepted, one in article 5 (2) and the other in article 8.

80. The Working Group accepted subparagraph (*c*) on the understanding that this was a useful example of the general requirement that parties act in good faith. A number of representatives stated that they agreed to the retention of this subparagraph on the understanding that the draft Convention would contain a general provision dealing with the requirement to act in good faith.

81. In the discussion in respect of article 6 (2), the Working Group decided that the words "shipped the goods or paid the price" should be added to the first sentence of article 5 (2) following the words "before he has despatched his acceptance" but that they should be placed in square brackets for reconsideration at its next session. If these words were retained an offer otherwise revocable would become irrevocable once the offeree had shipped the goods or paid the price. In conjunction with this decision the second sentence of article 5 (2) became article 5 (3). A more complete discussion of this action is found in paragraphs 91 to 98 and 116 to 119.

82. One representative reserved his position in relation to article 5 (2) (*b*). Another representative stated that article 5 (2) (*b*) was acceptable provided the report noted that the provision would have the effect in some legal systems of transforming an offer which merely stated that it would expire after a certain period into an irrevocable offer.

83. A representative reserved his position in respect of article 5 (2) (*c*) on the basis that such a provision was vague and contained no safeguards to protect an innocent offeror.

Article 5 paragraph (3)

84. The Working Group deleted paragraph (3) of the alternative text on the ground that the question of interpretation should be dealt with in a separate provision.

Decision of the Working Group

85. The text of article 5 as adopted by the Working Group is as follows:

"(1) The offer becomes effective when it has been communicated to the offeree. It can be withdrawn if the withdrawal is communicated to the offeree before or at the same time as the offer [even if it is irrevocable].

"(2) The offer can be revoked if the revocation is communicated to the offeree before he has despatched his acceptance [, shipped the goods or paid the price].

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

"(*a*) If the offer expressly or impliedly indicates that it is firm or irrevocable; or

"(*b*) If the offer states a fixed period of time for [acceptance] [irrevocability]; or

"(*c*) If it was reasonable for the offeree to rely upon the offer being held open and the offeree has altered his position to his detriment in reliance on the offer."

Article 6

86. The text of article 6 of ULF is as follows:

"1. Acceptance of an offer consists of a declaration communicated by any means whatsoever to the offeror.

"2. Acceptance may also consist of the despatch of the goods or of the price of any other act which may be considered to be equivalent to the declaration referred to in paragraph 1 of this Article either by virtue of the offer or as a result of practices which the parties have established between themselves or usage."

87. The alternative text proposed by the Secretariat (annex II, appendix I) is as follows:

"(1) An offer is accepted by a declaration to that effect communicated by any means whatsoever to the offeror.

"(2) The offer is also accepted if the offeree:

"(*a*) Without delay ships either conforming or non-conforming goods unless the offeree notifies the offeror that the shipment of non-conforming goods is offered only for his accommodation; or

"(*b*) Pays the price in accordance with the terms of the offer; or

"(*c*) Commences any other act which indicates that the offer has been accepted; or

"(*d*) Remains silent beyond the point of time when, because of the circumstances of the case, the practices the parties have established between themselves or usage, the offeree should have notified the offeror that he did not intend to accept.

"(3) Where the offer is accepted by the shipment of the goods, payment of the price or the commencement of performance, an offeror who is not notified of the acceptance within a reasonable time may recover any damages caused thereby.

"(4) (*a*) A contract is concluded at the moment the offer is accepted.

"(*b*) A contract of sale may be found to be concluded even though the moment that it was concluded is undetermined."

The provisions in general

88. The Working Group agreed to proceed on the basis of the alternative text although a number of representatives expressed a preference for article 6 of ULF.

Article 6 paragraph (1)

89. The view was expressed that the rule of article 6 (1) coupled with the provision in article 12 on "communication", which results in the offer being accepted on the receipt of the acceptance, should be reversed so that the offer was accepted on despatch. It was decided, however, to retain the receipt theory as it had been adopted in ULF, although article 6 (1) itself was deleted for the reasons set out in paragraphs 91 to 98 and paragraphs 116 to 119.

90. It was pointed out that the words "by any means whatsoever" were very broad and could cause difficulty if the offeror had prescribed a particular mode of acceptance. It was also noted that in any case this question was dealt with in article 12 (1).

Article 6 paragraphs (2) (a), (b), (c) *and (3)*

91. It was noted that article 6 (2) dealt with the practical problem of cases where the offeree acted in response to an offer without first declaring his intention to accept. It was observed that even in the absence of this provision, such acts in response to an offer could constitute acceptance through the operation of usages and practices established by the parties.

92. However, there was considerable opposition to the notion that an offer could be accepted even though at the moment of acceptance no notice had been given to the offeror. Article 6 (3), which would give the offeror a right to damages for any losses caused to him by the offeree's failure to notify him of the acceptance by shipment or other act described in article 6, paragraph (2) (*a*) to (*c*), was considered an inadequate solution since it would place the burden of litigation on an innocent offeror. Accordingly, it was considered that an acceptance should not be considered to be effective until the offeror had received an indication of the offeree's assent to the offer.

93. On the other hand the view was expressed that an offeror should not be able to revoke his offer once the goods were shipped or the price had been paid. Such a result was achieved by a rule that the offer was accepted by the shipment of the goods or payment of the price, as provided in article 6 (2).

94. In relation to article 6 (2) (*a*), under one view shipment of non-conforming goods should not constitute acceptance. However, under another view this was an appropriate result if the goods were despatched with the intention to conform to the offer.

95. It was agreed that the words "without delay" should be deleted so as to eliminate a conflict with the provisions of article 8 on the time during which an offer can be accepted.

96. There was opposition to article 6 (2) (*c*) on the basis that the provision was vague and could apply where such a result would be unreasonable.

97. In the light of this discussion the Working Group decided to delete article 6, paragraphs (2) (*a*), (*b*), (*c*) and (3) and to add to the first sentence of article 5 (2) the words "shipped the goods or paid the price". These words were placed in square brackets for reconsideration by the Working Group at its next session. Under this new text the offer would become irrevocable once the goods were shipped or the price was paid but the acceptance of the offer would depend on notification to the offeror.

98. In order to redraft the provisions on acceptance to conform to this new arrangement, the Working Group created a Drafting Group consisting of the representatives of Hungary, the Philippines and the United States to present a new text. As a result of their proposal, which is discussed in more detail in paragraphs 116 to 119 in relation to article 8, article 6 (1), (2) (*a*), (*b*), (*c*) and (3) were deleted.

Article 6 paragraph (2) (d)

99. There was general agreement to delete article 6 (2) (*d*) on the basis that a contract should be concluded only on notification to the offeror, as discussed above. However, a representative and an observer stated that the same result as in article 6 (2) (*d*) would result through the operation of usages or established practices.

Article 6 paragraph (4)

100. The Working Group agreed that, since a number of provisions in the text and in the draft Convention on the International Sale of Goods have rules which are based on the time the contract was concluded, it was desirable to have a provision which specified that time. It was also agreed that, in order to conform to the new text of article 8, the time of the conclusion of the contract should be the moment at which the acceptance became effective.

101. The Working Group considered and rejected a proposal that the provision also expressly determine the place at which the contract was concluded. It was noted by some that such a provision was unnecessary since the time that the contract was concluded would also determine the place at which the contract was concluded. Others observed that it was undesirable to link automatically the time of conclusion of the contract with the place at which the contract was concluded since there may be little real connexion between the two, particularly in the case of oral contracts or contracts concluded at a place other than the place of business of either party, such as at a trade fair. The consequence of fixing the place of conclusion of the contract may have, it was thought, unfortunate results in regard to conflicts of law and judicial jurisdiction. It was also pointed out that such a provision was unneeded since neither the draft CISG nor this draft text on formation of contracts contained any provisions dependent upon the place at which the contract was concluded.

102. The Working Group deleted article 6 (4) (*b*) of the alternative text since it was considered that such a provision was unnecessary.

103. The text of article 6 as adopted by the Working Group 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."

The Working Group noted that this text was no longer in the proper sequence and that at a later time it should be moved to a different location.

Article 7

104. The text of article 7 of ULF is as follows:

"1. An acceptance containing additions, limitations or other modifications shall be a rejection of the offer and shall constitute 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 shall constitute an acceptance unless the offeror promptly objects to the discrepancy; if he does not so object, the terms of the contract shall be the terms of the offer with the modifications contained in the acceptance."

105. The alternative text proposed by the Secretariat (annex II, appendix I) 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.

"(2) (*a*) 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.

"(*b*) If the offer and a reply which purports to be an acceptance are on printed forms and the non-printed terms of the reply do not materially alter the terms of the offer, the reply constitutes an acceptance of the offer even though the printed terms of the reply materially alter the printed terms of the offer unless the offeror objects to any discrepancy without delay. If he does not so object the terms of the contract are the non-printed terms of the offer with the modifications in the non-printed terms contained in the acceptance plus the printed terms on which both forms agree.

"(3) If a confirmation of a prior contract of sale is sent within a reasonable time after the conclusion of the contract, any additional or different terms in the confirmation [which are not printed] become part of the contract unless they materially alter it, or notification of objection to them is given without delay after receipt of the confirmation. [Printed terms in the confirmation form become part of the contract if they are expressly or impliedly accepted by the other party.]"

Discussion and decision

106. There was general agreement to proceed on the basis of the alternative text.

Article 7 paragraph (1)

107. The Working Group decided to retain this provision which stated the generally accepted rule that a purported acceptance which adds to, limits or otherwise modifies an offer is a rejection of that offer and constitutes a counter-offer.

Article 7 paragraph (2)

108. It was pointed out that paragraph (2) (*a*) contained a practical rule which permitted the formation of a contract even though there were minor discrepancies between the offer and the acceptance.

109. However, several representatives expressed reservations in respect of this provision because it contradicted the basic principle expressed in paragraph (1). It was pointed out that while this rule may be appropriate for national law it was unsuited to international trade where opinions on what would constitute a material alteration would differ widely. Accordingly, the Working Group decided to place article 7 (2) (*a*) in square brackets for further consideration at its next session.

110. As to the provisions set forth in article 7 (2) (*b*), the view was expressed that these provisions dealt with a practical problem and provided an acceptable solution thereto. However, the Working Group, after deliberation, concluded that, if an acceptance contained any material alterations to an offer, it should constitute a rejection of that offer, whether those material alterations were in the printed or in the non-printed terms of the acceptance. Accordingly, the Working Group agreed to delete this provision.

Article 7 paragraph (3)

111. It was pointed out that paragraph (3) was a useful provision as it dealt with the widespread practice of sending a confirmation notice after the conclusion of a contract by telephone, telex or the like. In such confirmation forms it was common to refer to general conditions of sale which contained provisions which had not been discussed by the parties. It was observed that such general conditions were also found in invoices.

112. On the other hand, there was opposition to this proposal for the same reasons as were expressed in relation to paragraph (2) (*b*). The Working Group accordingly decided to place this provision in square brackets and to reconsider it at a later stage.

113. Therefore, the text of article 7 as approved by the Working Group is that contained in paragraphs (1), (2) (*a*) and (3) of the alternative text with paragraph (2) (*a*) and (3) in square brackets.

Article 8

114. The text of article 8 of ULF is as follows:

"1. A declaration of acceptance of an offer shall have effect only if it is communicated to the offeror within the time he has fixed or, if no such 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, and usage. In the case of an oral offer, the acceptance shall be immediate, if the circumstances do not show that the offeree shall have time for reflection.

"2. If a time for acceptance is fixed by an offeror in a letter or in a telegram, it shall be presumed to begin to run from the day the letter was dated or the

hour of the day the telegram was handed in for despatch.

"3. If an acceptance consists of an act referred to in paragraph 2 of Article 6, the act shall have effect only if it is done within the period laid down in paragraph 1 of the present Article."

115. The alternative text proposed by the Secretariat (annex II, appendix I) is as follows:

"(1) Subject to article 9, an offer is accepted only if the declaration of acceptance is communicated to the offeror or any act referred to in article 6(2) is performed within the time the offeror 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. In the case of an oral offer, the acceptance must be immediate unless the circumstances show that the offeree is to have time for reflection.

"(2) A period of time for acceptance fixed by an offeror in a telegram or a letter begins to run from the hour of the day the telegram is handed in for despatch 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 in a telephone conversation, telex communication or other means of instantaneous communication, begins to run from the hour of the day that the offer is communicated to the offeree.

"(3) If the last day of such period is an official holiday or a non-business day at the residence or 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 8 paragraph (1)

116. As a result of the decisions in respect of articles 5 and 6, the Drafting Group consisting of the representatives of Hungary, the Philippines and the United States recommended that article 8(1) be redrafted into three new paragraphs as follows:

"(1) A declaration or other conduct by the offeree indicating assent to an offer is an acceptance.

"(1 *bis*) Acceptance of an offer is not effective unless notice of acceptance is communicated to the offeror within the time the offeror 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. In the case of an oral offer, the acceptance must be immediate unless the circumstances show that the offeree is to have time for reflection.

"(1 *ter*) If an offer is irrevocable because of an act referred to in paragraph 2 of article 5, the acceptance is not effective unless it is given immediately after that act and within the period laid down in paragraph 1 *bis* of the present article."

117. An objection was raised to this proposal that it artificially separated the definition of an acceptance in Article 8(1) from the time the acceptance was effective in article 8(1 *bis*) and 8(1 *ter*). It was suggested that only a declaration should constitute an acceptance. It was also suggested that article 8(1) and 8(1 *ter*) were in contradiction with one another because article 8(1) referred to conduct in general whereas article 8(1 *ter*) referred only to shipment of the goods and payment of the price. Furthermore, it was suggested, the words "or other conduct" created unnecessary complications and should either be deleted or modified. As a result, the Working Group decided to place the words "or other conduct" in article 8(1) and all of article 8(1 *ter*) in square brackets for further consideration at its next session.

118. In article 8(1 *bis*) the words "notice of acceptance" were replaced by "indication of assent" to make it clear that the offeror could be notified of the acceptance by a third party, such as a bank through whom the payment had been made. The words "due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror" were placed in square brackets because it was thought that they were not necessary to explain what is meant by a reasonable time. Other editorial changes were made prior to final adoption.

119. It was explained that article 8(1 *ter*) was included in the recommendation of the Drafting Group because it was thought that in case of a revocable offer which was made irrevocable by shipment of the goods or payment of the price, the offeror should be notified of this action promptly so that he would not be left for any appreciable period of time in the position that his offer was irrevocable although he did not know this fact. It was suggested that this problem did not arise in cases of payment, since notification to the offeror would be given by the bank through which payment was made.

Article 8 paragraph (2)

120. The Working Group decided to adopt the alternative text.

121. It was pointed out that it was useful to provide that time for acceptance commences to run from the date shown on the letter as this was easily provable and generally corresponded to the intention of the offeror. In addition, both parties are aware of the date shown on the letter whereas normally only the offeree would be aware of the date of a postmark on the letter containing the offer. However, several representatives reserved their position in respect of this paragraph on the basis that time for acceptance should commence to run from the date of receipt of the offer.

Article 8 paragraph (3)

122. The Working Group adopted the general approach of the alternative text and referred it to a Drafting Party consisting of the representatives of Czechoslovakia and the United States to redraft the paragraph to make it clear that only official holidays which would prevent an acceptance becoming effective should be included. Two representatives reserved their position in respect to the rule contained in this paragraph.

Decision

123. The text of article 8 as adopted by the Working Group is as follows:

"(1) A declaration [or other conduct] by the offeree indicating assent to an offer is an acceptance.

"(1 *bis*) Acceptance of an offer becomes effective at the moment the indication of assent is commu-

nicated to the offeror. It is not effective if the indication of assent is not communicated within the time the offeror 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]. In the case of an oral offer, the acceptance must be immediate unless the circumstances show that the offeree is to have time for reflection.

"[1 *ter*) If an offer is irrevocable because of shipment of the goods or payment of the price as referred to in paragraph 2 of article 5, the acceptance is effective at the moment notice of that acceptance is communicated to the offeror. It is not effective unless the notice is given promptly after that act and within the period laid down in paragraph 1 *bis* of the present article.]

"(2) A period of time for acceptance fixed by an offeror in a telegram or a letter begins to run from the hour of the day the telegram is handed in for despatch 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 in a telephone conversation, telex communication or other means of instantaneous communication, begins to run from the hour of the day that the offer is communicated to the offeree.

"(3) 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 such period 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 9

124. The text of article 9 of ULF is as follows:

"1. If the acceptance is late, the offeror may nevertheless consider it to have arrived in due time on condition that he promptly so informs the acceptor orally or by despatch of a notice.

"2. If however the acceptance is communicated late, it shall be considered to have been communicated in due time, if the letter or document which contains the acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have been communicated in due time; this provision shall not however apply if the offeror has promptly informed the acceptor orally or by despatch of a notice that he considers his offer as having lapsed."

125. The alternative text proposed by the Secretariat (annex II, appendix I) is as follows:

"If a reply to an offer which purports to be an acceptance or any act referred to in article 6 (2) is communicated or performed late but the reply or the performance was made in good faith, the offer is deemed to be accepted in due time unless without delay after the offeror learns of the acceptance he informs the offeree that the offer had lapsed."

Discussion and decision

126. The Working Group decided to proceed on the basis of ULF although there was support for the alternative text which, it was stated, provided a unified solution to a practical problem. On the other hand, it was noted that the alternative text depended upon the concept of "good faith", the application of which in relation to a late acceptance was unclear and could be the source of difficulty. Furthermore, it was stated, if an acceptance was sent in such time that it would normally arrive late, the offeror should not be bound to a contract unless he expressed his assent.

127. There was general agreement for the retention of article 9 (1) which reflected the traditional rule that a late acceptance constituted a counter-offer. It was noted that article 9 (1) differed slightly from the traditional approach in that the offeror's assent was effective on the despatch of a notice.

128. There was some difference of opinion in relation to article 9 (2). Under one view it should be deleted because determining whether a communication should have arrived in due time was difficult. In addition, deletion of the paragraph would consistently place the risk of transmission on the acceptor.

129. However, under another view article 9 (2) should be retained because it provided equal protection to both parties. One representative was opposed to taking any decision on the question until the Working Group had determined the time at which the contract was concluded.

130. Under yet another view the second part of article 9 (2) should be deleted.

131. The Working Group decided to place article 9 (2) in square brackets for further consideration at its next session.

Article 10

132. The text of article 10 of ULF is as follows:

"An acceptance cannot be revoked except by a revocation which is communicated to the offeror before or at the same time as the acceptance."

133. The alternative text proposed by the Secretariat (annex II, appendix I) is as follows:

"An acceptance cannot be revoked except by a declaration which is communicated to the offeror before or at the same time the declaration of acceptance is communicated to the offeror or, in the case of an acceptance by an act referred to in article 6 (2), before or at the same time as the offeror is informed of the acceptance."

Discussion and decision

134. In view of the deletion of article 6 (2) the Working Group decided to adopt article 10 of ULF rather than the alternative text. However, the Working Group added the words "becomes effective" at the end of article 10 to bring the text into line with article 8 (2) as it was redrafted by the Working Group.

135. Two representatives expressed their reservations in respect of article 10. In their view, once a contract was concluded by an acceptance, it was not open to one of the parties to abrogate the contract unilaterally.

Article 11

136. The text of article 11 of ULF is as follows:

"The formation of the contract is not affected by the death of one of the parties or by his becoming incapable of contracting before acceptance unless the contrary results from the intention of the parties, usage or the nature of the transaction."

137. The alternative texts proposed by the Secretariat (annex II, appendix I) are as follows:

Proposed alternative text 1

"(1) (Same as article 11 of ULF.)

"(2) If bankruptcy or similar proceedings are opened in respect of either party after the making of the offer, a revocable offer cannot be accepted. However, an irrevocable offer can be accepted during the period the offer is irrevocable."

Proposed alternative text 2

"If either party dies or becomes physically or mentally incapable of contracting or if bankruptcy or similar proceedings are opened in respect of either party after the making of the offer, a revocable offer cannot be accepted. However, an irrevocable offer can be accepted during the period the offer is irrevocable."

Discussion and decision

138. The Working Group decided to proceed on the basis of article 11 of ULF because it was considered that it would be inappropriate to attempt to unify widely differing national bankruptcy rules in the context of the present draft Convention.

139. It was generally considered that, although article 11 was not overly important in the context of international trade, its retention was useful since it resolved a problem that was dealt with unsatisfactorily in a number of legal systems.

140. However, several representatives proposed the deletion of article 11 and another proposed that the provision read as follows:

"The offer becomes ineffective upon the death or incapacity of the offeror and before the offer is accepted. However, an irrevocable offer can be accepted during the period the offer is irrevocable."

The Working Group did not retain this proposal.

141. The Working Group agreed that the wording of article 11 be slightly amended to read ". . . or by his becoming physically or mentally incapable of contracting . . .". This made it clear that the provision applied only to physical persons and did not deal with bankruptcy or similar proceedings. Two representatives and an observer considered that a reference to death and mental incapacity would have been sufficient to make this point clear.

142. The Working Group also added the words "becomes effective" after "acceptance" in order to make the provision conform to article 8.

143. The text of article 11 as adopted by the Working Group is as follows:

"The formation of the contract is not affected by the death of one of the parties or by his becoming physically or mentally incapable of contracting before the acceptance becomes effective unless the contrary results from the intention of the parties, usage or the nature of the transaction."

Article 11A

144. The text of article 11A as proposed by the Secretariat (annex II, appendix I) is as follows:

Alternative 1

"(1) A revocable offer may be assigned by the offeree unless within a reasonable time after the offeror learns of the assignment he notifies either the offeree or the assignee that he objects to it.

"(2) An irrevocable offer may be assigned by the offeree to the extent that, if the contract was concluded, his rights and obligations under the contract could be assigned under the applicable law.

"(3) The contract concluded by acceptance of the offer by the assignee arises only between the offeror and the assignee. However, the offeree is responsible for any failure to perform by the assignee if within a reasonable time after the offeror learns of the assignment he informs the offeree of his intention to hold him so responsible."

Alternative 2

"(1) An offer may be assigned by the offeree unless within a reasonable time after the offeror learns of the assignment he notifies either the offeree or the assignee that he objects to it.

"(2) The contract concluded by acceptance of the offer by the assignee arises only between the offeror and the assignee. However, the offeree is responsible for any failure to perform by the assignee if within a reasonable time after the offeror learns of the assignment he informs the offeree of his intention to hold him so responsible."

Alternative 3

"(1) An offer may be assigned by either the offeror or the offeree unless within a reasonable time after the other party learns of the assignment that party notifies the assignor or the assignee that he objects to it.

"(2) The contract concluded by acceptance of the offer arises only between the offeror and the assignee of the offeree or between the offeree and the assignee of the offeror, as the case may be. However, the assignor is responsible for any failure to perform by the assignee if within a reasonable time after the other party learns of the assignment he informs the assignor of his intention to hold him so responsible."

Discussion and decision

145. The Working Group deleted this provision. The Working Group considered that offers should not be automatically assignable because the offeror should have control over who could accept his offer.

146. Some representatives pointed out that in their legal systems the reorganization of an offeree would not affect the identity of that offeree who could accordingly accept offers addressed to it under its prior name. Other representatives noted that even in the case of mere reorganization it was useful to require that the change be notified to the offeror who could then indicate whether he was prepared to deal with the reorganized entity.

Article 12

147. The text of article 12 of ULF is as follows:

"1. For the purposes of the present Law, the expression 'to be communicated' means to be delivered at the address of the person to whom the communication is directed.

"2. Communications provided for by the present Law shall be made by the means usual in the circumstances."

148. The alternative text proposed by the Secretariat (annex II, appendix I) is as follows:

"For the purposes of this Convention an offer, declaration of acceptance or any other notice is 'communicated' when it is told orally to the party concerned or when it is physically delivered to the addressee or when it is [physically, mechanically or electronically] delivered to his place of business, mailing address or habitual residence."

Discussion and decision

149. The Working Group decided to proceed on the basis of the Secretariat draft.

150. The Working Group accepted a proposal that the words in square brackets be deleted and be replaced by a general expression which would enable the provision to apply to any means of communication that might be developed in the future. The Working Group also accepted a proposal for the simplification of the text and for its location near the start of the draft Convention.

151. The text of article 12 as adopted by the Working Group is as follows:

"For the purposes of this Convention an offer, declaration of acceptance or any other indication of intention is 'communicated' to the addressee when it is made orally or delivered by any other means to him, his place of business, mailing address or habitual residence."

Article 13

152. The text of article 13 of ULF is as follows:

"1. Usage means any practice or method of dealing, which reasonable persons in the same situation as the parties usually consider to be applicable to the formation of their contract.

"2. Where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning usually given to them in the trade concerned."

153. The alternative text proposed by the Secretariat (annex II, appendix I) is as follows:

"Usage means any practice or method of dealing of which the parties knew or had reason to know 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."

Discussion and decision

154. The Working Group adopted the alternative text, which is based on article 8 in the draft CISG. One representative expressed a reservation in respect of the use of the expression "of which the parties knew or had reason to know".

Article 14

155. During the discussion on article 4 the Working Group decided to eliminate article 4 (2) on the interpretation of an offer and requested the Secretariat to prepare a draft text on interpretation based upon articles 4 (2) and 5 (2) of ULF and articles 3, 4 and 5 of the draft Law for the Unification of Certain Rules relating to Validity of Contracts of International Sale of Goods. The draft text prepared in accordance with those instructions is as follows:

"(1) [Communications by and acts of] the parties are to be interpreted according to their actual common intent where such an intent can be established.

"(2) If the actual common intent of the parties cannot be established, [communications by and acts of] the parties are to be interpreted according to the intent of one of the parties, where such an intent can be established and the other party knew or ought to have known what that intent was.

"(3) If neither of the preceding paragraphs is applicable, [communications by and acts of the parties] are to be interpreted according to the intent that reasonable persons would have had in the same circumstances.

"(4) The intent of the parties or the intent a reasonable person would have had in the same circumstances or the duration of any time-limit or the application of article 11 [may] [is to] be determined in the light of the circumstances of the case including the [preliminary] negotiations, any practices which the parties have established between themselves, any conduct of the parties subsequent to the conclusion of the contract, usages [of which the parties knew or had reason to know and which in international trade are widely known to, and regularly observed by parties to contracts of the type involved in the particular trade concerned] and any applicable legal rules for contracts of sale.

"(5) Such circumstances are to be considered, even though they have not been embodied in writing or in any special form. In particular, they may be proved by witnesses."

Discussion and decision

156. The Working Group agreed that a provision on interpretation was important and should be included in the draft text. However, in view of the lack of time to discuss fully all the important issues raised by this text, and because other important matters of interpretation had not been included in this text, the Working Group decided to place the provision in square brackets and to record the principal points of view expressed during the discussion.

157. Several representatives expressed reservations to the draft provisions because they appeared to govern interpretation of a contract once concluded as well as with questions of interpretation in the formation of contracts. Other representatives considered that it was artificial to limit the draft provisions to the formation of contracts and that, on the contrary, both this draft and CISG should contain rules on interpretation, which rules should be identical.

158. It was suggested that the practical effect of these provisions would be easier to understand if the

Secretariat were to prepare a commentary on this article that included practical examples for the next session of the Working Group.

Article 14 paragraph (1)

159. The use of the expression "actual common intent" was objected to as it might be taken to encompass the use of a subjective test in order to determine whether a contract had been formed. It was also suggested that this expression was not suitable for the interpretation of unilateral acts such as offer.

160. The Working Group decided to include in square brackets the expression "statements and declarations" after the word "communications" in paragraphs (1), (2) and (3) to indicate that "communications" also included informal statements of intention.

Article 14 paragraph (2)

161. Under one view the intention of one party should not be able to control the interpretation of a contract. However, under another view, if one party knew the intention of the other party, he should be bound by that intention unless he openly objected to it.

162. It was suggested that under this provision silence might constitute acceptance should one party have that intention and the other party knew of it. An objection was raised to this provision, if such an interpretation was correct.

163. The suggestion was made that the words "or ought to have known what that intent was" rendered the provision objective rather than subjective and that such questions would be better treated in paragraph (3).

Article 14 paragraph (3)

164. The use of the words "reasonable persons" was objected to and it was noted that they did not appear in CISG.

Article 14 paragraph (4)

165. It was suggested that the words in square brackets after "usages" be deleted as "usage" was defined in article 13. However, it was observed that the definition of usages should be fully defined in the provision on interpretation since it was in this provision that "usages" had their greatest operative effect.

166. The Working Group agreed to delete as unnecessary the expression "and any applicable legal rules for contracts of sale" in paragraph (4).

167. The use of the words "any conduct of the parties subsequent to the conclusion of the contract" was objected to on the grounds that acts after the conclusion of the contract should not be relevant to questions of interpretation as to whether a contract was concluded.

Article 14 paragraph (5)

168. The Working Group decided to delete paragraph (5) because it was felt not to be necessary.

II. Future Work

169. The Working Group, in view of the progress made at its present session, was agreed that it was likely to complete its mandate with respect to the matters of formation and validity of contracts, in the course of one further session. In order to enable the Commission to consider the draft Convention on Formation and Validity of Contracts at its eleventh session in 1978, together with comments from Governments and interested organizations on the draft Convention, the Working Group decided to recommend to the Commission that the Group should hold its ninth session in Geneva from 19–30 September 1977. However, in case the Working Group would not be able to complete its work at that session, the Working Group decided to request the Commission to schedule a further tenth session in New York in January 1978, even though it noted that it may be difficult for some representatives to attend so many meetings. Such an arrangement would make it possible for the Commission, should it so desire, to recommend to the General Assembly to convene in 1980 a conference of plenipotentiaries at which both the draft Convention on the International Sale of Goods and the draft Convention in respect of the Formation and Validity of Contracts would be considered.

170. One representative doubted whether the Working Group could complete its mandate with regard to matters of formation and validity of contracts in two further sessions if it gave a careful consideration to the full range of questions relating to validity of contracts. He further noted that such a result would have financial implications and may delay completion of work on the Convention on the International Sale of Goods contrary to the prevailing approach shown during the course of discussions in the Sixth Committee when it considered the report of the Commission on the work of its ninth session.[9]

171. The Working Group noted that the Commission at its ninth session had decided to take up at its tenth session the question whether the rules on formation and validity of contracts should be set forth in the Convention containing the rules on the International Sale of Goods or whether they should form the subject of a separate convention, and whether, if it were decided that there should be two separate conventions, they should be considered at the same conference of plenipotentiaries. It was observed that the discussion which the Commission intended to have on these matters would make clear the following issues: whether one conference should be convened to consider (i) only the draft Convention on the International Sale of Goods, or (ii) both the draft Convention on the International Sale of Goods and the draft Convention on the Formation of Contracts, or (iii) the draft Convention on the International Sale of Goods and separate draft Conventions on Formation of Contracts and Validity of Contracts; or whether two or more conferences of plenipotentiaries should be convened to consider these conventions separately. In this connexion the Working Group requested the Secretariat to prepare a statement of financial implications for each of these alternatives and to submit it to the tenth session of the Commission.

172. The Working Group also decided to recommend to the Commission that upon the completion of its mandate, the Secretary-General be requested (i) to circulate the draft Convention to Governments and interested international organizations for comments and to prepare a critical analysis of those comments to be submitted to the Commission at its eleventh session; (ii) to

[9] Sixth Committee report, A/31/390, para. 15 (reproduced in this volume, part one, I, B).

circulate 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) to Governments and interested international organizations for their comments as to whether any matters in that text which had not been included in the draft Convention prepared by the Working Group should be included.

173. The Working Group decided that at its next session it should determine which rules on validity of contracts of international sale of goods should be included in the draft Convention and to complete, if possible, its work in respect of the revision of the Uniform Law on the Formation of Contracts for the International Sale of Goods and its work on validity of such contracts.

174. In preparation of that session the Secretariat was requested to analyse the UNIDROIT text and to suggest, with draft texts as necessary, what matters covered by that text as well as what other matters of validity of contract should be included in the draft Convention. The Working Group invited any representatives or observers to submit their views to the Secretariat on the matter. The Secretariat was also requested to review the text of ULF as approved by the Working Group at this session and to suggest to the Working Group the modifications which might be made in the text in the various language versions to render the style of drafting consistent, to suggest a reorganization of the provisions in a more logical order and to prepare titles for the individual articles. The Working Group also requested the Secretariat to prepare a commentary on the text as it had been approved by the Working Group at this session similar to the commentary which had been prepared on the draft Convention on the International Sale of Goods.

B. Draft Convention on the formation of contracts for the international sale of goods as approved or deferred for further consideration by the Working Group on the International Sale of Goods at its eighth session[1] (A/CN.9/128, annex I)*

[*Article one (alternative No. 1)*

This Convention applies to the formation of contracts of sale of goods which, if they were concluded, would be governed by the Convention on the International Sale of Goods.]

[*Article one (alternative No. 2)*

(1) This Convention applies to the formation of contracts of sale of goods entered into by 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) 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, did not know and had no reason to know 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.

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

(5) 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.

(6) 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;

(*c*) 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.]

Article 2

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

(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 preliminary negotiations, the offer, the reply, the practices which the parties have established between themselves or usages.

(3) However, a term of the offer stipulating that silence shall amount to acceptance is invalid.

[*Article 3 (alternative No. 1)*

An offer or an acceptance need not be evidenced by writing and shall not be subject to any other requirement as to form. In particular, they may be proved by means of witnesses.]

* 3 February 1977.

[1] Those matters which are still unresolved by the Working Group are in square brackets.

[*Article 3 (alternative No. 2)*

Neither the formation or validity of a contract nor the right of a party to prove its formation or any of its provisions depends upon the existence of a writing or any other requirement as to form. The formation of the contract, or any of its provisions, may be proved by means of witnesses or other appropriate means.]

Article 3A

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

(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 action from asserting such a provision to the extent that the other party has relied to his detriment on that action.]

Article 4

(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) An offer is sufficiently definite if expressly or impliedly it indicates the kind of goods and fixes or makes provision for determining the quantity and the price. [Nevertheless, if the offer indicates the intention to conclude the contract even without making provision for the determination of the price, it is considered as a proposal 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.]

Article 5

(1) The offer becomes effective when it has been communicated to the offeree. It can be withdrawn if the withdrawal is communicated to the offeree before or at the same time as the offer [even if it is irrevocable].

(2) The offer can be revoked if the revocation is communicated to the offeree before he has dispatched his acceptance [, shipped the goods or paid the price].

(3) However, an offer cannot be revoked:

(*a*) if the offer expressly or impliedly indicates that it is firm or irrevocable; or

(*b*) if the offer states a fixed period of time for [acceptance] [irrevocability]; or

(*c*) if it was reasonable for the offeree to rely upon the offer being held open and the offeree has altered his position to his detriment in reliance on the offer.

Article 6

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.

Article 7

(1) A reply to an offer 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 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) If a confirmation of a prior contract of sale is sent within a reasonable time after the conclusion of the contract, any additional or different terms in the confirmation [which are not printed] become part of the contract unless they materially alter it, or notification of objection to them is given without delay after receipt of the confirmation. [Printed terms in the confirmation form become part of the contract if they are expressly or impliedly accepted by the other party.]]

Article 8

(1) A declaration [or other conduct] by the offeree indicating assent to an offer is an acceptance.

(1 *bis*) Acceptance of an offer becomes effective at the moment the indication of assent is communicated to the offeror. It is not effective if the indication of assent is not communicated within the time the offeror 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]. In the case of an oral offer, the acceptance must be immediate unless the circumstances show that the offeree is to have time for reflection.

[(1 *ter*) If an offer is irrevocable because of shipment of the goods or payment of the price as referred to in paragraph 2 of article 5, the acceptance is effective at the moment notice of that acceptance is communicated to the offeror. It is not effective unless the notice is given promptly after that act and within the period laid down in paragraph 1 *bis* of the present article.]

(2) A period of time for acceptance fixed by an offeror in a telegram or a letter begins to run from the hour of the day the telegram is handed in for despatch 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 in a telephone conversation, telex communication or other means of instantaneous communication, begins to run from the hour of the day that the offer is communicated to the offeree.

(3) 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 such period 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 9

(1) If the acceptance is late, the offeror may nevertheless consider it to have arrived in due time on condition that he promptly so informs the acceptor orally or by despatch of a notice.

[(2) If however the acceptance is communicated

late, it shall be considered to have been communicated in due time, if the letter or document which contains the acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have been communicated in due time; this provision shall not however apply if the offeror has promptly informed the acceptor orally or by despatch of a notice that he considers his offer as having lapsed.]

Article 10

An acceptance cannot be revoked except by a revocation which is communicated to the offeror before or at the same time as the acceptance becomes effective.

Article 11

The formation of the contract is not affected by the death of one of the parties or by his becoming physically or mentally incapable of contracting before the acceptance becomes effective unless the contrary results from the intention of the parties, usage or the nature of the transaction.

Article 12

For the purposes of this Convention an offer, declaration of acceptance or any other indication of intention is "communicated" to the addressee when it is made orally or delivered by any other means to him, his place of business, mailing address or habitual residence.

Article 13

Usage means any practice or method of dealing of which the parties knew or had reason to know 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 14

(1) [Communications, statements and declarations by and acts of] the parties are to be interpreted according to their actual common intent where such an intent can be established.

(2) If the actual common intent of the parties cannot be established, [communications, statements and declarations by and acts of] the parties are to be interpreted according to the intent of one of the parties, where such an intent can be established and the other party knew or ought to have known what that intent was.

(3) If neither of the preceding paragraphs is applicable, [communications, statements and declarations by and acts of the parties] are to be interpreted according to the intent that reasonable persons would have had in the same circumstances.

(4) The intent of the parties or the intent a reasonable person would have had in the same circumstances or the duration of any time-limit or the application of article 11 [may] [is to] be determined in the light of the circumstances of the case including the [preliminary] negotiations, any practices which the parties have established between themselves, any conduct of the parties subsequent to the conclusion of the contract, usages [of which the parties knew or had reason to know and which in international trade are widely known to, and regularly observed by parties to contracts of the type involved in the particular trade concerned].

C. Report of the Secretary-General: formation and validity of contracts for the international sale of goods (A/CN.9/128, annex II)*

CONTENTS

INTRODUCTION

1. At its seventh session (Geneva, 5 to 16 January 1976) the Working Group on the International Sale of Goods requested the Secretariat to prepare, in consultation with UNIDROIT, one or more studies that would:

"(*a*) Submit to a critical analysis the 1964 Hague Uniform Law on the Formation of Contracts for the International Sale of Goods and the UNIDROIT draft law on the validity of contracts of international sale of goods, and

"(*b*) Examine the feasibility and desirability of dealing with both subject-matters in a single instrument" (A/CN.9/116, para. 114; yearbook . . . , 1976, part two, I, 1).

2. This report is issued pursuant to that request. An-

* 3 February 1977.

nex I to the report contains the 1964 Hague Uniform Law on the Formation of Contracts for the International Sale of Goods together with a critical analysis and proposed alternative provisions. Annex II to the report contains the UNIDROIT draft law on the validity of contracts of international sale of goods with a critical analysis.

History of the 1964 Uniform Law on Formation[1]

3. In 1930 the International Institute for the Unification of Private Law (UNIDROIT) appointed a Committee to prepare a draft uniform law of sale. During the deliberations of this Committee problems were encountered in defining the time at which a contract was concluded. Such a definition was attempted because a number of provisions were related to the time and place that the contract was concluded. These problems remained unresolved and accordingly in 1934 UNIDROIT appointed a separate Committee to consider the question of the unification of rules for the formation of contracts. In 1936 that Committee submitted a draft of a uniform law on the formation of international contracts by correspondence. Because of the significant differences which exist between the theories in respect of the formation of contracts in different countries, it was thought that there would be little chance of drafting a satisfactory international convention on the matter. Therefore, the Institute took no further action at that time.

4. At the Diplomatic Conference convened at The Hague in 1951 to examine the draft of a uniform law on the international sale of goods (ULIS), it was felt that new provisions specifying the time at which a contract was concluded should be drafted because of the large number of provisions in the draft law on sales which referred to the time of the conclusion of the contract. It was left to the Special Commission created by the Conference to determine whether the rules on formation of contracts should be included in the main text of the law of sales or whether they should be in a separate text. The Special Commission decided in favour of preparing a separate text.

5. As a result of these actions UNIDROIT appointed a Study Group which prepared a draft of a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF). This draft law was considered and a final text was adopted at the Diplomatic Conference convened at The Hague in 1964 which considered and adopted ULIS.

6. ULF has been signed by the following States: Greece (3 August 1964); the Kingdom of the Netherlands (12 August 1964); San Marino (24 August 1964); Italy (23 December 1964); Vatican City (2 March 1965); United Kingdom of Great Britain and Northern Ireland (8 June 1965); Belgium (6 October 1965); Federal Republic of Germany (11 October 1965); Luxembourg (7 December 1965); Israel (28 December 1965); France (31 December 1965) and Hungary (31 December 1965). The following States have ratified the Convention: United Kingdom of Great Britain and Northern Ireland (31 August 1967); San Marino (24 May 1968); Belgium (1 December 1970); Italy (22 February 1972); the Kingdom of the Netherlands (for the Kingdom in Europe) (22 February 1972) and the Federal Republic of Germany (also for West Berlin) (16 October 1973). In addition the Gambia acceded to the Convention on 5 March 1974.

7. In conformity with article VIII, paragraph 1, the Convention entered into force on 23 August 1972 for Belgium, Italy, San Marino, the Kingdom of the Netherlands (for the Kingdom in Europe) and the United Kingdom of Great Britain and Northern Ireland. In conformity with article VIII, paragraph 2, the Convention entered into force on 17 April 1974 for the Federal Republic of Germany and on 6 September 1974 for the Gambia.

History of the UNIDROIT draft of a law for the unification of certain rules relating to the validity of contracts of international sale of goods

8. In 1960 UNIDROIT requested the *Max-Planck Institut für auslandisches und internationales Privatrecht* to prepare a comparative study of the pertinent rules on the validity of contracts of sale. After submission of this study in 1963[2] the Max-Planck Institute was asked to prepare a preliminary text of a Uniform Law. A Committee of UNIDROIT considered this text in four sessions held between 1967 and 1971 during which time it formulated the draft of a Law for the Unification of Certain Rules Relating to the Validity of Contracts of International Sale of Goods (LUV). This draft law was approved by the Governing Council of UNIDROIT on 31 May 1972.

Formation and validity of contracts in the Commission

Formation

9. In its report on the work of its second session (1969) the Commission decided that the Working Group on the International Sale of Goods should consider "which modifications of [ULF] might render [it] capable of wider acceptance by countries of different legal, social and economic systems, or whether it will be necessary to elaborate a new text for the same purpose" (A/7618, para. 38, Yearbook . . . , 1968-1970, part two, II, A). In its report on the work of its third session (1970) the Commission decided that the Working Group should give priority to the systematic consideration of ULIS (A/8017, para. 72; Yearbook . . . , 1968-1970, part two, III, A) and should, therefore, postpone its work on the ULF.

Validity

10. In its report on the work of its sixth session (1973) the Commission noted the receipt of a letter from the President of UNIDROIT which transmitted the text of a "draft of a law for the unification of certain rules relating to the validity of contracts of international sale of goods" and which invited the Commission to include the consideration of this draft as an item on its agenda. The Commission decided to consider at its

[1] The drafting history is more fully described in vol. I of the records of the 1964 Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2 to 25 April 1964, pp. 3-10.

[2] The conditions of substantive validity of contracts of sale, UNIDROIT Year Book 1966, pp. 175-410 (French only).

seventh session what further steps should be taken on the subject (A/9017, para. 148; Yearbook . . . , 1973, part one, II, A).

Formation and validity

11. In its report on the work of its seventh session (1974) the Commission decided to request the Working Group "after having completed its work on the uniform law on the international sale of goods, to consider the establishment of uniform rules governing the validity of contracts for the international sale of goods, on the basis of the . . . UNIDROIT draft, in connexion with its work on uniform rules governing the formation of contracts for the international sale of goods" (A/9617, para. 93; Yearbook . . . , 1974, part one, II, A).

12. In its report on the work of its sixth session (1975) the Working Group decided "to hold at its [seventh] session a preliminary discussion on the formation and validity of . . . contracts [of sale for the international sale of goods] so as to give the Secretariat, if appropriate, directions as to the studies which the Working Group may wish it to undertake in that field" (A/CN.9/100, para. 118; Yearbook . . . , 1975, part two, I, 1).

13. In its report on the work of its seventh session (1976) the Working Group, after deliberation, was of the unanimous view that, at its next session, it should begin work on uniform rules governing the formation of contracts and should make an attempt to formulate such rules on a broader basis than the international sale of goods. If, in the course of its work, it should prove that the principles underlying contracts of sale and other types of contract could not be treated in the same text, the Group would direct its work towards contracts of sale only. The Working Group was further of the view that it should consider whether some or all of the rules on validity could appropriately be combined with rules on formation. The Working Group decided to place these conclusions before the ninth session of the Commission (A/CN.9/116, para. 13; Yearbook . . . , 1976, part two, I, 1).

14. In its report on the work of its ninth session (1976) the Commission decided to instruct the Working Group on the International Sale of Goods to confine its work on the formation and validity of contracts to contracts of the international sale of goods" (A/31/17, para. 28; Yearbook . . . , 1976, part one, II, A).

15. Accordingly the studies prepared by the Secretariat in response to the directions of the Working Group (para. 1 above) deal only with the formation and validity of contracts for the international sale of goods.

Coverage of the proposed convention

16. The subject of the formation and validity of contracts, even if limited to contracts for the international sale of goods, is one which is vast and deeply imbedded in legal theory on the nature of contractual obligations. Fortunately, it is not necessary to codify every aspect of the subject in a text of uniform law since there is more agreement on the practical result in various situations than there is on the theory by which that solution is attained or justified. Therefore, it may be enough to prepare a text which offers solutions to practical problems caused by such differences in the law in various legal systems.

17. For this reason, it is suggested that the draft convention on formation of contracts to be prepared by the Working Group might follow the plan of ULF in regard to its coverage. Such a draft convention would be largely limited to offer and acceptance. These matters are ones in which the differences between the various legal systems are such that practical problems are caused in international trade. Nevertheless, they are subjects in which it appears possible to formulate a generally acceptable text.

18. It is also suggested that the draft convention to be prepared not include any provisions in respect of validity of contracts based on the LUV. The LUV contains 16 articles which cover such matters as interpretation of the acts of the parties, mistake, fraud, duress, impossibility of performance at the time of contracting and avoidance of the contract and other remedies. However, all available evidence suggests that these problems of validity are relatively rare events in respect of contracts for the international sale of goods.

19. As noted in the report of the Max-Planck Institute accompanying the draft text on validity prepared by UNIDROIT, that Institute had contacted a number of commercial institutions, in particular the International Chamber of Commerce, to inquire as to the practical utility and necessity of a unification of the rules on this subject:

> "The virtually unanimous view held by those institutions was that the question of whether an international contract is valid or not arises only in a limited number of cases. Thus it was found that of all published arbitration awards handed down by Dutch arbitration tribunals between 1945 and 1964 only 20 awards discussed problems relating to the substantive validity of a contract. Of the 500 arbitration proceedings conducted under the auspices of the Hamburg Chamber of Commerce only one award hinged on a problem of mistake. There is little doubt that merchants engaged in international sales transactions are much more concerned with problems arising from the non-performance of a contract than with issues relating to its substantive validity."[3]

20. Although the commercial institutions consulted by the Max-Planck Institute were all based in Western Europe and the results reflect, therefore, Western European experience, the Secretariat has no evidence that the experience in other parts of the world is different in respect of the matters covered by LUV. Nor does the Secretariat have any evidence that differences in the laws in respect of these aspects of validity of contracts lead to significant problems in international trade.

21. It is likely that the reason that the problems of validity covered by LUV rarely arise in contracts for the international sale of goods is that such contracts are concluded between merchants who are, at least as compared to the average person, relatively sophisticated in matters of contracting. The problems of mistake, fraud and duress — which are the heart of the LUV — are

[3] Report of the *Max-Planck Institut für auslandisches und internationales Privatrecht*, UNIDROIT Étude XVI/B, Doc. 22, p. 15. (This report will be referred to as the Max-Planck report.) The text of this report was approved by the Governing Council of UNIDROIT on 31 May 1972.

less likely to occur between merchants than they are in transactions between merchants and consumers or between two non-merchants.

22. Moreover, it would seem that when such events do occur, they can usually be handled as well under non-uniform national law as under any proposed text of uniform law. It would seem that the common examples of mistake, fraud or duress which would justify a party to avoid the contract under the LUV would justify that party to avoid the contract under any applicable legal system. To the extent that this is the case, adoption of a uniform law will not increase the uniformity of result for the parties.

23. More importantly, it does not appear that the LUV increases the degree of unification in those areas where there are divergencies in the law between legal systems, and it does not appear that any text could achieve this result.

24. The difficulty arises out of two characteristics of the law governing the validity of contracts. The first such characteristic is that the event which activates the legal rules in a text on the validity of contracts is usually not an objective physical event, but an event which must be characterized by the adjudicator. For example, a rule on offer and acceptance can state that the offer has been accepted when the acceptance arrives at the address of the offeror. Such a rule gives rise to relatively few problems of interpretation. However, article 11 of the LUV provides that the threat which justifies avoidance of the contract must have been "unjustifiable, imminent and serious". Each of these three words admits of extensive interpretation before it can be determined whether the contract can be avoided.

25. The second characteristic of some aspects of the law governing the validity of contracts is that it is an important vehicle by which the political, social and economic philosophy of the particular society is made effective in respect of contracts. This is most obviously the case in respect of rules invalidating a contract because of a violation of a statutory prohibition or of public policy. Statutory prohibitions and public policy vary to such an extent from country to country that it is impossible to achieve the goal of unification, namely the development of a uniform body of case law. Consequently, the UNIDROIT committee decided to omit such a rule from the draft LUV.[4]

26. Similarly, the rules on duress, or similar rules on usury, unconscionable contracts, good faith in performance and the like also serve as a vehicle by which the political, social and economic philosophy of the society is made effective in respect of contracts. It is by the extensive or the restrictive interpretation of such rules that many legal systems have effected the balance between a philosophy of sanctity of contract with the security of transactions which that affords and a philosophy of protecting the weaker party to a transaction at the cost of rendering contracts less secure.

27. For these reasons it is suggested that the draft convention to be prepared not include any provisions in respect of validity of contracts based on the LUV. It may be, however, that the consideration which is currently being given in other bodies of the United Nations system to such issues as the new international economic order and transnational corporations may eventually result in a general consensus on principles which may affect the validity of international contracts. If so, and if such principles should bear on the validity of contracts for the international sale of goods, the Commission may wish to consider these matters. In the absence of a general consensus, the consideration of these matters would appear to be so complex that it would not be feasible for the Working Group to complete its work on the formation of contracts for the international sale of goods "in the shortest possible time", as requested by the Commission during its ninth session (A/31/17, para. 27; Yearbook . . . , 1976, part one, II, A).

[4] Max-Planck report, p. 17.

APPENDIX I

1964 Hague Uniform Law on the Formation of Contracts for the International Sale of Goods:* critical analysis and proposed alternative provisions

ARTICLE 1

Text of ULF in annex I of the 1964 Convention

(1) The present Law shall apply to the formation of contracts of sale of goods entered into by parties whose places of business are in the territories of different States, in each of the following cases:

(*a*) Where the offer or the reply relates to goods which are in the course of carriage or will be carried from the territory of one State to the territory of another;

(*b*) Where the acts constituting the offer and the acceptance are effected in the territories of different States;

(*c*) Where delivery of the goods is to be made in the territory of a State other than that within whose territory the acts constituting the offer and the acceptance are effected.

(2) Where a party does not have a place of business, reference shall be made to his habitual residence.

(3) The application of the present Law shall not depend on the nationality of the parties.

(4) Offer and acceptance shall be considered to be effected in the territory of the same State only if the letters, telegrams or other documentary communications which contain them are sent and received in the territory of that State.

(5) For the purpose of determining whether the parties have their places of business or habitual residences in "different States", any two or more States shall not be considered to be "different States" if a valid declaration to that effect made under Article II of the Convention dated the 1st day of July 1964 relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods is in force in respect of them.

(6) The present Law shall not apply to the formation of contracts of sale:

(*a*) Of stocks, shares, investment securities, negotiable instruments or money;

(*b*) Of any ship, vessel or aircraft, which is or will be subject to registration;

(*c*) Of electricity;

(*d*) By authority of law or on execution or distress.

(7) Contracts for the supply of goods to be manufactured or produced shall be considered to be sales within the meaning of the present Law, unless the party who orders the goods

* The Uniform Law is hereafter referred to as ULF. The English and French language versions of ULF are the official texts as adopted by the 1964 Hague Conference. The Russian and Spanish language versions are unofficial translations reproduced from *Register of Texts of Conventions and other Instruments Concerning International Trade Law*, vol. I (United Nations publication, Sales No. 71.V.3), chap. I, sect. 1.

undertakes to supply an essential and substantial part of the materials necessary for such manufacture or production.

(8) The present Law shall apply regardless of the commercial or civil character of the parties or of the contracts to be concluded.

(9) Rules of private international law shall be excluded for the purpose of the application of the present Law, subject to any provision to the contrary in the said Law.

Text of ULF in annex II of the 1964 Convention

The present Law shall apply to the formation of contracts of sale of goods which, if they were concluded, would be governed by the Uniform Law on the International Sale of Goods.

COMMENTARY

1. The text of article 1 in annex II of the 1964 Convention is for use by those contracting States which are also contracting States to the 1964 Hague Convention relating to a Uniform Law on the International Sale of Goods (ULIS). The text of article 1 in annex I of the 1964 Convention is for use by those contracting States which are not contracting States in regard to ULIS.

2. If a separate Convention on the Formation of Contracts for the International Sale of Goods is prepared by the Working Group, a new draft of article 1 will need to be prepared based on the provisions in the draft convention on the international sale of goods (CISG).

ARTICLE 2

Text of ULF

(1) The provisions of the following articles shall apply except to the extent that it appears from the preliminary negotiations, the offer, the reply, the practices which the parties have established between themselves or usage, that other rules apply.

(2) However, a term of the offer stipulating that silence shall amount to acceptance is invalid.

Proposed alternative text

The provisions of the following articles apply except to the extent that the preliminary negotiations, the offer, the reply, any practices that the parties have established between themselves or usage lead to the application of more stringent legal rules or more stringent agreed principles to determine whether a contract has been concluded.

COMMENTARY

1. Article 2 states the extent to which the parties may vary or derogate from the provisions of this Convention.

2. Article 2 (1) states a general principle of party autonomy. This article is consistent with the general principle of party autonomy found in article 3 of ULIS and article 5 of the draft CISG. However, article 2 (2) limits party autonomy in one respect, i.e., that the offeror may not unilaterally declare in the offer that a contract will be concluded if the offeree remains silent.

3. The proposed alternative text suggests a different approach to the subject of party autonomy in respect of the formation of the contract. The ULF provides the minimum criteria which must be met for a contract to be concluded. However, even if these minimum criteria are met, there is no contract if the parties have agreed that additional criteria must also be met. For example, even though it is not necessary for the parties to agree on such matters as the delivery date or the date of payment of the price for the offer to be sufficiently definite, if one of the parties insists on prior agreement on these points, no contract will be concluded until such agreement is reached.

4. However, under the proposed alternative text the parties may not agree that a contract will be concluded even though all of the necessary elements have not been agreed upon, e.g. if the communication sent with the intent of making an offer is not sufficiently definite in respect of the quantity to be an offer under article 4. An agreement between the parties that the seller would sell "all that the buyer orders" would constitute only an invitation to deal; it could not be considered to be a current contract of sale.

5. It is possible to imagine agreements which a legal system might permit which would cause future contracts to come into existence at an earlier time than the general rules of law would allow. For example, article 6 provides that an acceptance by correspondence is effective only on delivery of the acceptance at the address of the offeror, and, therefore, presumably, the contract is concluded at that time. If the parties were to agree that the contract was concluded on despatch of the acceptance, the State may have no particular reason to refuse to give effect to that agreement. However it is difficult to see why the parties would make such an agreement.

6. If the principle of the proposed alternative text is accepted, there is no need to have a provision, similar to that in article 2 (2) limiting the power of the offeree to stipulate in the offer that silence amounts to acceptance.

ARTICLE 3

Text of ULF

An offer or an acceptance need not be evidenced by writing and shall not be subject to any other requirement as to form. In particular, they may be proved by means of witnesses.

Proposed alternative text

Neither the formation or validity of a contract nor the right of a party to prove its formation or any of its provisions depends upon the existence of a writing or any other requirement as to form. The formation of the contract, or any of its provisions, may be proved by means of witnesses or other appropriate means.

COMMENTARY

1. The substance of article 3 is the same as that in article 15 of ULIS and article 11 of the draft CISG. It should be noted that the Working Group left article 11 of the draft CISG in square brackets to indicate that it was a matter which it considered should be decided by the Commission. It can be assumed that if article 11 is retained in the draft CISG by the Commission, it would be retained in a draft convention on formation. On the other hand, if article 11 is deleted from the draft CISG, the action of the Working Group in respect of article 3 of ULF would depend on whether article 11 was deleted from the draft CISG because the Commission decided that it did not belong in the Convention on the International Sale of Goods or whether it was deleted because the Commission decided that the rule was wrong.

2. It was pointed out in the commentary to article 11 of the draft CISG that even though the provision could be considered to relate to a matter of formation or validity, the fact that many contracts for the international sale of goods are concluded by modern means of communication which do not always involve a written contract led to the decision to include it in the present convention.[a] Nevertheless, any administrative or criminal sanctions for breach of the rules of any State requiring that such contracts be in writing, whether for purposes of administrative control of the buyer or seller, for purposes of enforcing exchange control laws, or otherwise, would still be enforceable against a party which concluded the non-written contract even though the contract itself would be enforceable between the parties.

3. It should be added that a party could make it clear in the preliminary negotiations that no communication is to be regarded as an offer or an acceptance unless it is in writing. The same result might occur because of the practices which the parties have established between themselves or usage. In such

[a] A/CN.9/116, annex II (Yearbook..., 1976, part two, I, 3).

cases the requirement of a writing would exist as an incident of the principle of party autonomy as found in article 2.

4. The use of the expression "need not be evidenced by writing" suggests that article 3 regulates only matters of evidence and of the proper form of the offer and the acceptance but that it does not overcome a national rule of law that a contract for the international sale of goods must be in writing either to be validly formed or to be enforceable before the courts of that country. However, the French language versions of article 3 of ULF and article 11 of the draft CISG use the phrase "aucune forme n'est prescrite pour . . . " which suggests that the article goes to questions of validity and enforceability. If article 3 is to be retained in its present form, it may be desirable to unify the translations in the different languages and to draw the attention of the Commission to this problem in relation to article 11 of the draft CISG.

5. The provision that an offer or an acceptance is not subject to "any other requirement as to form" refers to requirements such as the placing of seals on a document, its witnessing or authentication by a notary or the use of special forms.

6. The provision which enables the existence and contents of the offer and the acceptance to be proved by witnesses, is intended to apply to those countries in which the requirement that there be a writing goes to the proof of the existence of the contract rather than to the proper form of the offer and acceptance. It has, however, been suggested that article 3 could be interpreted in such a manner so as not to achieve the desired result in these countries.[b]

7. Although article 3 could be interpreted to mean only that the existence of the offer and acceptance may be proved by means of witnesses, logically it must be understood to mean also that the terms of the offer and acceptance may be proved by means of witnesses. Such a provision has been added to the proposed alternative text.

8. The proposed alternative text seeks to eliminate the difficulties mentioned above. It introduces no new policies beyond those already in article 3. If the Working Group finds the alternative text preferable to article 3 of ULF, it might wish to suggest that article 11 of the draft CISG be modified accordingly. It may be noted that the last four words, "or other appropriate means", have been added to make it clear that not only witnesses but any other appropriate proof, such as the conduct of the parties, may be used to prove the existence of the contract and its terms.

9. A new article 3A has been added in respect of the related problem of the oral modification or rescission of a written contract.

Proposed article 3A

(1) An agreement by the parties made in good faith to modify or rescind the contract is effective. However, a written contract which excludes any modification or rescission unless in writing cannot be otherwise modified or rescinded.

(2) Action by one party on which the other party reasonably relies to his detriment may constitute a waiver of a provision in a contract which requires any modification or rescission to be in writing. A party who has waived a provision relating to an unperformed portion of the contract may retract the waiver. However, a waiver cannot be retracted if the retraction would result in unreasonable inconvenience or unreasonable expense to the other party because of his reliance on the waiver.

[b] The basis of this suggestion is that some common law systems do not require that the offer and the acceptance be in writing but instead require that a memorandum of the agreement be in writing. Accordingly, article 3 of ULF would not displace this requirement but would merely confirm the pre-existing rule that the offer and the acceptance need not be in writing (Unification of the Law Governing International Sales of Goods, editor John Honnold, Paris, Librairie Dalloz (1966), p. 372).

COMMENTARY

1. Proposed article 3A describes the means by which a contract can be modified or rescinded.

Modification and rescission of contracts, paragraph (1)

2. There is an important difference between the civil law and the common law in respect of the modification of existing contracts. In the civil law an agreement between the parties to modify the contract is effective if there is sufficient *cause* even if the modification relates to the obligations of only one of the parties. In the common law a modification of the obligations of only one of the parties is in principle not effective because consideration is lacking.

3. Article 3A (1) states that an agreement to modify or rescind the contract made by the parties in good faith is effective. The modifications envisaged by this provision are the technical modifications in specifications, delivery dates, or the like which frequently arise in the course of performance of commercial contracts. Even though such modifications of the contract may increase the costs of one party or decrease the value of the contract to the other, the parties may agree that there will be no change in the price. Article 3A (1) states that such agreements are effective thereby overcoming the common law rule that consideration is required.

4. However, article 3A (1) also states that the agreement must be "in good faith". These words are intended to give a tribunal the basis on which to refuse to enforce an agreement to modify the contract if that agreement was the result of improper pressures by one of the parties.

5. Although article 3 provides that the contract need not be in writing, it was noted in the commentary that the parties could reintroduce such a requirement. A similar problem is the extent to which a contract which specifically excludes modification or rescission unless in writing can be modified or rescinded orally.

6. In some legal systems a contract can be modified orally in spite of a provision to the contrary in the contract itself. It is possible that such a result would follow from article 3 of ULF which provides that a contract governed by this convention need not be evidenced by writing. However, the second sentence of article 3A (1) provides that a written contract which excludes any modification or rescission unless in writing cannot be otherwise modified or rescinded.

Waiver, paragraph (2)

7. Article 3A (2) recognizes that actions by one party on which the other party reasonably relies to his detriment might be such as to constitute a waiver of the requirement that any modification or rescission of the contract be in writing. In this respect article 3A (2) is similar to article 30 of the UNCITRAL Arbitration Rules which provides for a waiver of the requirement in article 1 (1) of those Rules that any modification of the rules be in writing.

8. Nevertheless, article 3A (2) goes on to provide that the party who has waived the requirement of a writing in respect of the modification of an unperformed portion of the contract can reinstate the original term in the contract to the extent that it would not cause the other party unreasonable inconvenience or unreasonable expense because of his reliance on the waiver.

Article 4

Text of ULF in annex I of the 1964 Convention

(1) The communication which one person addresses to one or more specific persons with the object of concluding a contract of sale shall not constitute an offer unless it is sufficiently definite to permit the conclusion of the contract by acceptance and indicates the intention of the offeror to be bound.

(2) This communication may be interpreted by reference to and supplemented by the preliminary negotiations, any practices which the parties have established between themselves, usage and any applicable legal rules for contracts of sale.

Text of ULF in annex II of the 1964 Convention

(1) The communication which one person addresses to one or more specific persons with the object of concluding a contract of sale shall not constitute an offer unless it is sufficiently definite to permit the conclusion of the contract by acceptance and indicates the intention of the offeror to be bound.

(2) This communication may be interpreted by reference to and supplemented by the preliminary negotiations, any practices which the parties have established between themselves, usage and the provisions of the Uniform Law on the International Sale of Goods.

Proposed alternative text

(1) A communication directed to one or more specific persons [or to the public] with the object of concluding a contract of sale constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound.

(2) This communication may be interpreted by reference to and supplemented by the preliminary negotiations, any practices which the parties have established between themselves, usage and any applicable legal rules for contracts of sale.

(3) An offer is sufficiently definite if it expressly or impliedly indicates at least the kind and quantity of the goods and that a price is to be paid.

(4) Subject to the contrary intention of the parties, an offer is sufficiently definite even though it does not state the price or expressly or impliedly make provision for the determination of the price of the goods. In such cases, 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.

(5) An offer is sufficiently definite if it measures the quantity by the amount of goods available to the seller or by the requirements of the buyer. In such cases, the amount of goods available to the seller or the requirements of the buyer means the actual amount available or the actual amount required in good faith. However, the buyer is not entitled to demand nor compelled to accept a quantity unreasonably disproportionate to any stated estimate, or in the absence of a stated estimate, a quantity unreasonably disproportionate to any normal or otherwise comparable amount previously available or required.

COMMENTARY

1. The text of article 4 in annex II of the 1964 Convention is for use by those contracting States which are also contracting States to the 1964 Convention relating to ULIS. The text of article 4 in annex I of the 1964 Convention is for use by those contracting States which are not contracting States in regard to ULIS.

Communication by more than one person, paragraph (1)

2. Article 4 (1) specifies that the offer must be that of "one person". The drafting history does not make it clear why this requirement exists. However, it does not appear to have been a deliberate decision that two parties who jointly owned goods or two persons who wished to purchase goods together could not make such an offer. The proposed alternative text does not specify the number of persons who might jointly send the offer.

Communication to one or more specific persons, paragraph 1

3. Article 4 (1) provides that the offer must be addressed "to one or more specific persons". The words "or to the public" found in square brackets in the proposed alternative text would be an addition to the words used in ULF.

4. It was this requirement that the offer be addressed to specific persons which received the most attention in the 1964 Conference. In some countries a "public offer", i.e., a communication addressed to the general public, can be an offer in the legal sense if it meets the other criteria of an offer. Among the more frequent examples given are the display of goods in a shop window, with a price attached and the display of goods in an automatic vending machine. While these examples are of interest to demonstrate the theory of contract formation in various countries, they are of no importance in international trade.

5. However, the same problem arises in respect of advertisements in publications of general circulation such as newspapers and magazines, advertisements sent in the mail, and catalogues of goods available for sale. Such advertisements and communications are widely used as a means of stimulating sales of goods in international trade.

6. It would appear that a distinction should be made between those advertisements and catalogues which are sent in the mail directly to the addressee from those advertisements which are distributed to the general public. Those which are sent in the mail directly to the addressee are sent "to one or more specific persons", whereas those distributed to the general public are not. Nevertheless, in most cases an advertisement is not "sent with the object of concluding a contract" but as an invitation to deal, even if the advertisement is sent to a restricted list of addressees.

Sufficiently definite, paragraph 1

7. Article 4 (1) provides that in order to constitute an offer the communication must be "sufficiently definite to permit the conclusion of the contract by acceptance". Therefore, the offer must directly or indirectly contain all of the essential elements of the contract. However, neither article 4 nor any other provision in the ULF specifies what are those essential elements. The following paragraphs describe how the proposed alternative text of articles 4 (1), (3), (4) and (5) would set forth the essential elements of a contract of sale.

8. Article 4 (1) specifies only that the offer must be "sufficiently definite" rather than that it must be "sufficiently definite to permit the conclusion of the contract by acceptance". Paragraphs (3), (4) and (5) define some of the most important characteristics of an offer which is sufficiently definite.

9. Article 4 (3) states that the offer must contain at least three items to be sufficiently definite: (i) an indication of the kind of goods, (ii) an indication of the quantity of the goods, and (iii) an indication that a price is to be paid. If these three items are expressly or impliedly present in the communication, the communication is an offer and a contract will be concluded by the offeree's acceptance.

10. Article 4 (4) completes article 4 (3) in respect of the price. While article 4 (3) provides that the offer must indicate that a price is to be paid, article 4 (4) provides that the offer need not state the price or expressly or impliedly make provision for its determination. The provision goes on to repeat the language of article 36 of the draft CISG which provides the means of determining the price in such cases.

11. Article 4 (5) provides that offers in which the quantity is measured by the amount of goods available to the seller or the requirements of the buyer are sufficiently definite. Otherwise, the fact that the seller has some control over the amount he has available and the buyer has some control over his requirements has been held in some legal systems to mean that the quantity was at the discretion of that party and was therefore not sufficiently definite. It is desirable, however, that there be some limit on the permissible fluctuation of the amount the other party is obligated to buy or sell as the case may be. Therefore, if an estimate has been made of the amount the seller will have available or the requirements of the buyer or if there is prior experience with the amount the seller has had available or with the buyer's requirements, the other party is not obligated to accept, or to furnish, an amount unreasonably disproportionate to that estimate or to the prior experience.

Interpretation of the offer, paragraph 2

12. It should be noted that the version of article 4 (2) in annex II of the 1964 Convention may not be sufficient since there are many aspects of the law of contracts in general and sales in particular which are not covered by ULIS or by the draft CISG but which are relevant for the interpretation of the

offer. It may, therefore, be advisable to use only the version of article 4 (2) in annex I of the 1964 Convention.

ARTICLE 5

Text of ULF

(1) The offer shall not bind the offeror until it has been communicated to the offeree; it shall lapse if its withdrawal is communicated to the offeree before or at the same time as the offer.

(2) After an offer has been communicated to the offeree it can be revoked unless the revocation is not made in good faith or in conformity with fair dealing or unless the offer states a fixed time for acceptance or otherwise indicates that it is firm or irrevocable.

(3) An indication that the offer is firm or irrevocable may be express or implied from the circumstances, the preliminary negotiations, any practices which the parties have established between themselves or usage.

(4) A revocation of an offer shall only have effect if it has been communicated to the offeree before he has despatched his acceptance or has done any act treated as acceptance under paragraph 2 of article 6.

Proposed alternative text

(1) The offer can be accepted only after it has been communicated to the offeree. It cannot be accepted if its withdrawal is communicated to the offeree before or at the same time as the offer.

(2) After an offer has been communicated to the offeree it can be revoked if the revocation is communicated to the offeree before he has despatched his acceptance or has done any act treated as acceptance under article 6 (2). However, an offer cannot be revoked:

(*a*) During any time fixed in the offer for acceptance; or

(*b*) For a reasonable time if the offer otherwise indicates that it is firm or irrevocable; or

(*c*) For a reasonable time if it was reasonable for the offeree to rely upon the offer being held open and the offeree has altered his position to his detriment in reliance on the offer.

(3) An indication that the offer is firm or irrevocable may be express or may be implied from the circumstances, the preliminary negotiations, any practices which the parties have established between themselves or usage.

COMMENTARY

1. Article 5 states the time at which an offer becomes effective and the extent to which it is revocable. The proposed alternative text presents the same rules as does ULF but in a form which may make them more easily understood.

2. Article 5 (1) states the time after which the offer "binds" the offeror and the conditions under which its withdrawal causes the offer to "lapse". The proposed text of article 5 (1) states the time after which the offer can be accepted and the conditions under which its withdrawal makes it no longer subject to acceptance.

3. Article 5 (2) states a basic rule of the revocability of an offer while article 5 (4) states the events which terminate the offeror's power to revoke the offer. In the proposed text articles 5 (2) and 5 (4) of ULF are combined in article 5 (2).

4. Article 5 (2) provides that an offer which "states a fixed time for acceptance or otherwise indicates that it is firm or irrevocable" cannot be revoked. It would seem that what is meant is that the offer cannot be revoked during that fixed time or for a reasonable time, as the case may be. The proposed alternative text of article 5 (2) states the rule in this manner.

5. Although article 5 (2) (c) of the proposed alternative text is new, the rule it announces is thought to be that already in ULF. In article 5 (2) of ULF the offer cannot be revoked if the "revocation is not made in good faith or in conformity with fair dealing". The legislative history is not clear as to the factual situations which were thought to be subsumed in this provision.

6. It would appear, however, that the major, if not the only, factual situation which would generally be understood to fall within the language of article 5 (2) of ULF is that it was reasonable for the offeree to rely upon the offer being held open and the offeree has altered his position to his detriment in reliance on the offer. In such a case the offer would seem to be irrevocable for a reasonable period of time.

7. A major example of this rule would be where the offeree would have to engage in some extensive investigation to determine whether he should accept the offer. Even if the offer does not indicate that the offer is irrevocable, it should be irrevocable for the period of time necessary for the offeree to make his determination.

Effective date of the offer, paragraph 1

8. The offer can be accepted once it is "communicated" to the offeree. Article 12 (1) provides that the offer is communicated when it is delivered at the address of the person to whom the communication is directed.

9. The proposed alternative text of article 12 expands the definition of "communicated" by including within it, *inter alia*, an oral statement. Consequently, if an offeror sent his offer by mail but prior to its arrival he notified the offeree by telephone of the offer, the offer would be "communicated" by the telephone call.

Revocation, paragraphs 2 and 4

10. According to article 5 (2) an offer is in principle revocable. Article 5 (4) goes on to require that the revocation be communicated to the offeree before he has despatched his acceptance or has done any act treated as acceptance under article 6 (2). It should be noted that, contrary to the rule in most, if not all, legal systems, under these provisions the offeror loses the power to revoke an offer prior to the time the offer has been accepted since the offer can no longer be revoked once an acceptance has been sent even though it has not yet been received. However, under articles 6 (1) and 12 (1) an offer to conclude a contract by correspondence is accepted only when the acceptance has arrived. Presumably the contract is concluded at this time. This congruence of rules does not appear to have been the result of a deliberate decision. Instead, it appears to be the result of an incomplete integration of the two separate but related rules as to the period during which an offer can be revoked and the moment at which an offer has been accepted. Nevertheless, this incomplete integration appears to do little harm and may contribute to an effective compromise between the theory of despatch and the theory of reception.

11. The provision in article 5 (2) that an offer which states a fixed time for acceptance cannot be revoked during that fixed time should be read in conjunction with article 8 (1). The conjunction of the two provisions leads to the result that if an offer is stated to be open for a fixed period of time, such as 10 days, the offer cannot be revoked during that period. At the end of the period the offer can be revoked. Even if the offer is not revoked, according to article 8 (1) it could no longer be accepted, unless the conditions of article 9 are met.

ARTICLE 6

Text of ULF

(1) Acceptance of an offer consists of a declaration communicated by any means whatsoever to the offeror.

(2) Acceptance may also consist of the despatch of the goods or of the price of any other act which may be considered to be equivalent to the declaration referred to in paragraph 1 of this article either by virtue of the offer or as a result of practices which the parties have established between themselves or usage.

Proposed alternative text

(1) An offer is accepted by a declaration to that effect communicated by any means whatsoever to the offeror.

(2) The offer is also accepted if the offeree:

(*a*) Without delay ships either conforming or non-conforming goods unless the offeree notifies the offeror that the shipment of non-conforming goods is offered only for his accommodation; or

(*b*) Pays the price in accordance with the terms of the offer; or

(*c*) Commences any other act which indicates that the offer has been accepted; or

(*d*) Remains silent beyond the point of time when, because of the circumstances of the case, the practices the parties have established between themselves or usage, the offeree should have notified the offeror that he did not intend to accept.

(3) Where the offer is accepted by the shipment of the goods, payment of the price or the commencement of performance, an offeror who is not notified of the acceptance within a reasonable time may recover any damages caused thereby.

(4) (*a*) A contract is concluded at the moment the offer is accepted.

(*b*) A contract of sale may be found to be concluded even though the moment that it was concluded is undetermined.

COMMENTARY

Acceptance by declaration, paragraph 1

1. Article 6 (1) does not say what the declaration of acceptance must contain, but it is evident that it must accept the offer proposed by the offeror. In the past all legal systems have required that, at least in theory, the acceptance be equivalent to a simple "agreed". However, practical realities led the drafters of ULF to provide in article 7 (2) that in certain circumstances a reply to an offer which purports to be an acceptance is an acceptance even though it contains terms which are additional to or different from those in the offer. Such a rule has been carried forward to the current text. The extent to which this rule allows a deviation from the simple "agreed" is considered in the discussion of article 7.

Communication of the acceptance, despatch or receipt

2. Some legal systems consider the acceptance of an offer to have taken place on despatch of the notice of acceptance while other legal systems consider it to have taken place only on receipt by the offeror.

3. There are two main practical consequences which can arise from the differences in these two rules. If an acceptance is not effective until its receipt, the sender-offeree bears the risk of loss, delay or error in transmission whereas if the acceptance is effective upon despatch, the recipient-offeror bears the risk of loss, delay or error in transmission. Secondly, if the legal system in question provides that an offer is revocable, the offeror has a longer period during which to revoke the offer under the receipt theory than under the despatch theory.

4. It seems to be the case that those legal systems which follow the receipt theory of the effectiveness of an acceptance tend to uphold the irrevocability of the offer for a sufficient period of time for the offeree to accept whereas those legal systems which follow the despatch theory tend to recognize the revocability of the offer until its acceptance.[c]

5. ULF takes a middle position between the receipt and the despatch theories. According to article 6 (1) the offer is accepted once the declaration of acceptance has been "communicated" to the offeror. Since article 12 (1) provides that "to be communicated" means to be delivered at the address of the person to whom the communication is directed, ULF formally adopts the receipt theory.

6. However, most of the normal consequences which flow from the adoption of the receipt theory do not prevail.

7. First, according to article 9 an acceptance which arrives late is, or may be, deemed to have been communicated in due time. However, the sender-offeree still bears the risk of non-arrival of the acceptance and of any error in transmission. Secondly, even though the acceptance is not effective until receipt, the effect of article 5 (4) is that once the acceptance has been despatched the offer is irrevocable.

Means of communicating acceptance, paragraph 1

8. The provision in article 6 (1) that the declaration of acceptance may be communicated "by any means" to the offeror is intended to overcome the rule in some common law jurisdictions that the requirement that the acceptance be the same as the offer includes the requirement that the means of communicating the acceptance also be the same as the means by which the offer was communicated. The normal consequence of using a means of communication different from that used for the offer was that the acceptance was effective only on receipt rather than on despatch, thereby reversing the normal common law result. Under ULF it is not necessary to concern oneself with this consequence since the general rule is that the acceptance is effective only upon receipt. However, in some common law jurisdictions an acceptance communicated by a means other than that used for the offer would not be effective at all as an acceptance if the court is of the view that the offeror had impliedly prescribed the manner of acceptance. This result would be obviated by the words "by any means" and for this reason these words are useful, even though they may not be necessary in many legal systems.

9. It should be noted that article 2 authorizes the offeror, as an incidence of party autonomy, to require the offeree to use a particular means of communication for his acceptance. A particular means of acceptance may also be required as a result of "the practices which the parties have established between themselves or usage". In particular an offeror may require that the offer must be accepted in writing. Such a requirement by the offeror would prevail over the provisions of article 6 (1) that the offer can be accepted "by any means".

10. A further consequence of article 2 would be that the offeror could require that the offer be accepted by air mail and refuse to recognize an acceptance by telegram. The telegraphic acceptance would constitute a counter-offer which in turn would have to be accepted.

Acceptance by an act, paragraph 2

11. Although article 6 (1) recognizes that a declaration of acceptance normally takes the form of a verbal or written communication, it sometimes happens that the offeree does not reply to an offer to buy or sell goods but simply ships the goods, pays the price, or performs some other act which indicates that the offer has been accepted. Article 6 (2) provides that such an act is not a counter-offer but is an acceptance of the offer.

12. A problem which is unresolved in article 6 (2) is whether the shipment of non-conforming goods constitutes an acceptance of the offer. In article 5 (2) of the 1958 draft of ULF the despatch of the goods had to be "according to the conditions of the offer". Although the words of the 1958 draft suggest that there could be no deviation from the terms of the offer for the despatch of the goods to constitute an acceptance, including no deviation in respect of the quality of the goods shipped, it is less clear that this was the intention of the drafters.[d] However, if the despatch of the goods did not consti-

[c] Formation of Contracts: A study of the Common Core of Legal Systems (Schlesinger, ed., Oceana Publications, 1968), p. 115.

[d] At one stage of the discussion the representative of the Federal Republic of Germany pointed out that the words "to the conditions of the offer" do not mean delivery of goods without any defect but shipment made with intent to conform to the contract. (Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague,

tute an acceptance, it was a counter-offer which would normally be accepted, if at all, by the buyer-offeror's acceptance of or payment for the goods.

13. At the 1964 Hague Conference the words "according to the conditions of the offer" were deleted. However, neither the records of the Conference nor the text as it was adopted makes it clear whether the deletion was intended to or had the effect of making the despatch of non-conforming goods an act of acceptance or whether there is still an implicit requirement that the goods be conforming.

14. The proposed text of article 6 (2) (*a*) provides that a shipment of non-conforming goods constitutes an acceptance of the offer. The terms of the contract which is concluded by the shipment of the non-conforming goods are those found in the offer. Therefore, the shipment of the non-conforming goods constitutes a breach of the contract as well as the act of formation and the buyer-offeror has available any remedy contained in the applicable law of sales. Under the draft CISG, those remedies include damages, reduction of the price, and, if the breach was fundamental, the right to the replacement of the non-conforming goods or the avoidance of the contract.

15. It should, of course, be noted that a seller-offeree who did not have available exactly what was ordered might deliberately ship non-conforming goods in the belief that the offeror would find them acceptable. This might happen in particular if the seller has discontinued manufacturing the specific catalogue item ordered and replaced it with a new catalogue item. In such a case, where the seller notifies the buyer-offeror that non-conforming goods are shipped only for his accommodation, the proposed article 6 (2) (*a*) provides that the shipment constitutes a counter-offer.

Acceptance by silence

16. Article 2 (2) states that "a term of the offer stipulating that silence shall amount to acceptance is invalid". However, that provision does not state that under no situations might the silence of the offeree constitute an acceptance. Proposed article 6 (2) (*d*) describes circumstances in which the silence of the offeree would constitute acceptance of the offer.

17. The general rule of proposed article 6 (2) (*d*) is that the offer is accepted if the offeree remains silent where, because of the circumstances of the case, the practices the parties have established between themselves or usage, it is reasonable that the offeree should notify the offeror if he does not intend to accept. For example, if the offeree were to reply to an offer that he no longer carried the specific item ordered but that he would ship the item carried as a replacement unless he heard to the contrary within 10 days, normal business practice would lead the original offeror to reply if he did not wish the replacement item. In such a case the silence of the original offeror would constitute an acceptance of the counter-offer.

Notification of the acceptance

18. ULF has no requirement that the offeree notify the offeror that he has shipped the goods, paid the price or performed any other act which constitutes an acceptance. As a result it is at least possible that the offeror might be bound for a considerable period of time to a contract when, from the silence of the offeree, he legitimately believed the offer to have lapsed.

19. As a practical matter, this situation is unlikely to happen often. If a buyer-offeree accepts by paying the price, the seller-offeror will most likely know of that event promptly. If a seller-offeree accepts the offer by shipping the goods by air, truck, or other means of rapid transport, the goods will often arrive within the period of time in which the buyer-offeror would have anticipated a reply. In such cases the act of acceptance naturally brings notice of the acceptance to the offeror.

20. The difficulty arises only if the act of acceptance is such that it does not by itself bring notice of the acceptance to the offeror in a reasonable period of time. Such acts might include the shipment of goods by sea or the commencement of manufacturing the goods. In such cases it would be normal business practice to send some documentation to the offeror indicating the actions taken or contemplated by the offeree. If the documentation arrived prior to the performance of the act in question, the documentation would serve as the declaration of acceptance. If it arrived after the performance of the act in question, it would serve as the notice of the acceptance.

21. Proposed article 6 (3) takes the position that failure to follow this normal business practice does not vitiate the effectiveness of the acceptance, but that the offeree must reimburse the offeror any damages caused by the failure to notify the offeror.

Conclusion of the contract

22. As ULF was finally adopted, it specified by the combination of articles 6 (1) and 12 (1) that acceptance by correspondence took place at the moment the declaration arrived at the address of the offeror. Presumably, the contract was concluded at that moment. However, such a result had to be drawn either as a natural consequence of the provisions of ULF or by the application of national law. It was not stated specifically in the text of ULF itself.

23. Proposed article 6 (4) (*a*) of the current text states that the contract is concluded at the moment the offer is accepted. This provision covers all forms of acceptances and not merely acceptances by correspondence.

24. It might be noted that the proposed article 6 (4) (*a*) is drafted, as are all texts in respect of offer and acceptance, on the assumption that there is a specific communication which can be recognized as an offer and a reply which can be recognized as an acceptance. In the vast majority of the cases this assumption is in accord with the facts. However, in a certain number of cases the parties may engage in an extensive correspondence in which various elements of the eventual contract are settled. If a controversy later develops, it may be difficult to isolate any single communication which can be said to be the offer and a reply which can be said to be the acceptance. Nevertheless, it may be clear that the parties have at some stage of their correspondence come to such agreement that a contract should be held to have been concluded even though the moment that it was concluded is undetermined.

25. Proposed article 6 (4) (*b*) formulates such a rule. It should be read in conjunction with article 4 on the definition of an offer and article 7 on acceptances which have additional or different terms.

Article 7

Text of ULF

(1) An acceptance containing additions, limitations or other modifications shall be a rejection of the offer and shall constitute 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 shall constitute an acceptance unless the offeror promptly objects to the discrepancy; if he does not so object, the terms of the contract shall be the terms of the offer with the modifications contained in the acceptance.

2-25 April 1964, *Records and Documents of the Conference, Vol. I*, p. 221.) These words were deleted on the suggestion of the representative of the International Chamber of Commerce with the concurrence of the representative of the United States (vol. I, p. 221). However, the United States representative had earlier said that despatch of non-conforming goods was acceptance and enabled the injured party to resort to his remedies under ULIS (vol. I, p. 213). But it is doubtful whether all the other delegates who supported the deletion of this phrase shared the view of the United States representative that despatch of non-conforming goods constitutes acceptance (vol. I, pp. 213-214; vol. II, pp. 478-480).

Proposed alternative text

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

(2) (*a*) 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.

(*b*) If the offer and a reply which purports to be an acceptance are on printed forms and the non-printed terms of the reply do not materially alter the terms of the offer, the reply constitutes an acceptance of the offer even though the printed terms of the reply materially alter the printed terms of the offer unless the offeror objects to any discrepancy without delay. If he does not so object the terms of the contract are the non-printed terms of the offer with the modifications in the non-printed terms contained in the acceptance plus the printed terms on which both forms agree.

(3) If a confirmation of a prior contract of sale is sent within a reasonable time after the conclusion of the contract, any additional or different terms in the confirmation [which are not printed] become part of the contract unless they materially alter it, or notification of objection to them is given without delay after receipt of the confirmation. [Printed terms in the confirmation form become part of the contract if they are expressly or impliedly accepted by the other party.]

COMMENTARY

The general rule, paragraph 1

1. Article 7 (1) states the traditional rule that a purported acceptance which adds to, limits or otherwise modifies the offer to which it is directed is a rejection of the offer and constitutes a counter-offer.

2. This provision reflects traditional theory that contractual obligations arise out of expressions of mutual agreement. Accordingly, an acceptance must comply exactly with the offer. Should the purported acceptance not agree completely with the offer, there is no acceptance but the making of a counter-offer which requires acceptance by the other party for the formation of the contract.

3. Although the explanation for the rule expressed in article 7 (1) appears to lie in a widely held view of the nature of a contract, the rule also reflects the reality of the common factual situation in which the offeree is in general agreement with the terms of the offer but wishes to negotiate in regard to certain aspects of it. If the intent to engage in further negotiations is evident, it would be an unfortunate rule which would recognize a contract as being already in existence contrary to the will of the parties.

4. There are, however, other common factual situations in which the traditional rule, as expressed in article 7 (1), does not give desirable results. Article 7 (2) and proposed article 7 (3) create exceptions to article 7 (1) in regard to several of those situations.

Non-material alterations, paragraph 2

5. Article 7 (2) contains rules dealing with the situation where a reply to an offer is expressed and intended as an acceptance but contains new proposals or proposals which deviate in minor ways from the offer. For example, an offer stating that the offeror has 50 tractors for sale at a certain price is accepted by a telegram which adds "ship immediately" or "ship draft against bill of lading inspection allowed".

6. It should be noted that in most cases in which a reply purports to be an acceptance, any additional or different terms in the reply will not be material and, therefore, under article 7 (2) a contract will be concluded on the basis of the terms in the offer as modified by the terms in the acceptance. If the offeror objects to the terms in the acceptance, further negotiations will be necessary before a contract is concluded.

7. If the reply contains a material alteration, the reply would not constitute an acceptance but would constitute a counter-offer. Naturally, if the offeror then performed by shipping the goods, paying the price or otherwise commencing performance, the offeror would have accepted the counter-offer by virtue of article 6 (2). Therefore, a contract would be concluded and the terms of the contract would be those of the counter-offer.

8. It would be an unusual case in which an offeror who did not agree with the additional or different terms would not respond to the reply, whether or not the additional or different terms in the reply materially altered the terms in the offer. The offeror was the party who originally desired the conclusion of a contract and it would be expected that he would continue negotiations with the offeree looking towards the conclusion of a contract.

9. Therefore, the question as to whether a contract was concluded on the basis of the reply containing additional or different terms will almost always arise in a case in which the offeror decides, after the reply has been received but before performance has begun, that he no longer wishes to be bound by the contract. This will often be the result of a change in price for the goods. In this class of cases article 7 (2) says that the offeror is bound to the contract, subject only to the proviso that the additional or different terms in the reply did not materially alter the terms of the offer.

10. However, the rule in article 7 (2) does not give the same desirable result when both the offer and the acceptance are on printed forms. In such a case, the employees of both parties will rarely, if ever, read and compare the printed terms. All that is of importance to them are the terms which have been filled in on the forms. If those terms are identical, as they usually are, or contain only such additions as "ship immediately" or "ship draft against bill of lading inspection allowed", everyone will usually act as though a contract has been concluded even though there are gross discrepancies between the printed terms.

11. Proposed article 7 (2) (*b*) states that a contract has been concluded if the non-printed terms, i.e. the terms unique to the individual contract, are not materially different. If a contract has been concluded, the rule as to the terms of the contract distinguishes between the printed terms and the non-printed terms. As to the non-printed terms, the rule is the same as in article 7 (2), which is reproduced as proposed article 7 (2) (*a*), i.e. the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

12. However, the only printed terms which would become terms of the contract are those on which both forms agree. If one form has terms not contained in the other form or if the two forms have inconsistent terms, those terms would not be part of the contract. In their place the governing rule will be that supplied by usage, any practices that the parties have established between themselves or by the applicable substantive law.

13. The formulation of proposed article 7 (2) is more detailed than that which is usually contained in a uniform law. However, it was considered that the subject-matter of proposed article 7 (2) required this degree of detail to achieve an appropriate result.

Confirmation of the conclusion of a contract

14. Typically, after the conclusion of an oral contract or after the conclusion of a contract by telegram or telex, one or both of the parties will send to the other a confirmation of the contract. The purpose of the confirmation is not only to produce a paper record of the transaction, but also to inform the other party of the terms of the contract as those terms were understood by the party sending the confirmation. Proposed article 7 (3) recognizes an obligation on the part of the party receiving the confirmation to verify whether those terms are consistent with his understanding of the contract and to object

if they are not. If he does not object, the terms in the confirmation become the terms of the contract unless it can be shown that they constitute a material alteration of the contract.

15. If the words in brackets were adopted, the rule as stated above would be modified so that it would accord, in essence, with the rule in proposed article 7 (2) (*b*). The terms of the contract would be the non-printed terms which did not materially alter the contract and to which the other party did not object plus the printed terms which were expressly accepted by the other party or which could in some manner be found to have been impliedly accepted by him. Such implied acceptance might be evidenced by showing a past practice of contracting on those terms or by showing actions in respect of this contract in a manner consistent with those terms. In any case, it would be the burden of the party who had sent the form to show that the other party had in some manner accepted the printed terms.

Article 8

Text of ULF

(1) A declaration of acceptance of an offer shall have effect only if it is communicated to the offeror within the time he has fixed or, if no such 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, and usage. In the case of an oral offer, the acceptance shall be immediate, if the circumstances do not show that the offeree shall have time for reflection.

(2) If a time for acceptance is fixed by an offeror in a letter or in a telegram, it shall be presumed to begin to run from the day the letter was dated or the hour of the day the telegram was handed in for despatch.

(3) If an acceptance consists of an act referred to in paragraph 2 of article 6, the act shall have effect only if it is done within the period laid down in paragraph 1 of the present article.

Proposed alternative text

(1) Subject to article 9, an offer is accepted only if the declaration of acceptance is communicated to the offeror or any act referred to in article 6 (2) is performed within the time the offeror 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. In the case of an oral offer, the acceptance must be immediate unless the circumstances show that the offeree is to have time for reflection.

(2) A period of time for acceptance fixed by an offeror in a telegram or a letter begins to run from the hour of the day the telegram is handed in for despatch 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 in a telephone conversation, telex communication or other means of instantaneous communication, begins to run from the hour of the day that the offer is communicated to the offeree.

(3) If the last day of such period is an official holiday or a non-business day at the residence or 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.

COMMENTARY

Time for acceptance, paragraphs 1 and 3

1. Article 8 (1) states the traditional rule that an offer can be accepted only if the offeree acts within the time fixed by the offeror or, if no such time is fixed, within a reasonable time. However, since this rule is affected by article 9, a specific reference to article 9 has been added in the proposed article 8 (1).

2. The provision in article 8 (1), that in the case of an oral offer, the acceptance must be immediate, serves in practice as a rebuttable presumption as to the duration of a reasonable period of time. Article 8 (1) goes on to state that the presumption is rebutted if the circumstances show that the offeree is to have time for reflection.

3. Article 8 (1) specifies that in measuring what is a reasonable time, due account must be "taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror and usage". It should be noted that all of the text following the word "including" is by way of example of what is meant by the circumstances of the transaction. Other elements also may be taken into consideration, such as prior negotiations or the practices which the parties have established between themselves. In proposed article 8 (1) the words "and usage" have been deleted. It would also be possible to place the full stop after the word "transaction" or even after the words "reasonable time".

4. Article 8 (3) provides that the same rule as stated in article 8 (1) applies to an acceptance by an act referred to in article 6 (2). The proposed alternative text achieves the same result by incorporating article 8 (3) in the proposed article 8 (1).

Commencement of period of time to accept, paragraph 2

5. Article 8 (2) provides a mechanism for the calculation of the commencement of the period of time during which an offer can be accepted.

6. In the case of a letter, the time runs from "the day the letter was dated". It is not clear whether this means from the date shown on the letter or the date shown on the postmark. Proposed article 8 (2) provides that the time runs "from the date shown on the letter" unless no such date is shown, in which case it runs "from the date shown on the envelope". This order of preference is suggested for two reasons: first, the offeree may discard the envelope but he will have available the letter as the basis for calculating the end of the period during which the offer can be accepted and second, the offeror will have a copy of the letter with its date but will generally have no record of the date on the envelope. Therefore, if the date on the envelope controls, the offeror cannot know when the period terminates during which the offer can be accepted.

7. In the case of a telegram, the period begins to run from the hour of the day "the telegram is handed in for despatch". Such a rule works best if the telegram shows the time it is handed in for despatch or telephoned in for despatch in those countries where this is possible. If this is not a universal practice, a different time at which the period begins to run may be desirable.

End of the period for acceptance

8. Proposed article 8 (3) is based on article 2 (2) of the UNCITRAL Arbitration Rules.

Article 9

Text of ULF

(1) If the acceptance is late, the offeror may nevertheless consider it to have arrived in due time on condition that he promptly so informs the acceptor orally or by despatch of a notice.

(2) If however the acceptance is communicated late, it shall be considered to have been communicated in due time, if the letter or document which contains the acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have been communicated in due time; this provision shall not however apply if the offeror has promptly informed the acceptor orally or by despatch of a notice that he considers his offer as having lapsed.

Proposed alternative text

If a reply to an offer which purports to be an acceptance or any act referred to in article 6 (2) is communicated or performed late but the reply or the performance was made in good

faith, the offer is deemed to be accepted in due time unless without delay after the offeror learns of the acceptance he informs the offeree that the offer had lapsed.

COMMENTARY

1. Article 9 deals with acceptances that arrive after the expiration of the time for acceptance.

Power of offeror to consider acceptance as having arrived in due time, paragraph 1

2. If the acceptance is late, the offer has lapsed and no contract is formed by the arrival of the acceptance. However, it will often be the case that the offeror will still be interested in entering into a contract on the terms of his original offer. It appears that all legal systems are in agreement that this is possible; they differ only on the theory and to some degree on how this result may be achieved.

3. Some legal systems consider a late acceptance as a counter-offer. Considering a late acceptance as a counter-offer means that the original offeror must accept the counter-offer by one of the means by which any offer can be accepted and until he does so, no contract has been concluded.

4. Article 9 (1) takes a different approach. The late acceptance is considered to be a potentially effective acceptance. However, for it to become fully effective, the offeror must validate it by informing the offeree promptly that he considers it to have arrived in due time even though it was late.

5. It should be noted that both the system of article 9 (1) and a system which considers the late acceptance to be a counter-offer require an affirmative action by the original offeror for the contract to come into existence. If no communication is sent to the offeree, no contract exists. Except to the extent that article 9 (2) applies, this is true even if both the offeror and the offeree believe a contract exists.

Acceptances which are late because of a delay in transmission, paragraph 2

6. Since the acceptance is effective only when it has arrived, it would be expected that the risks of lost or delayed transmission would be on the acceptor. However, article 9 (2) provides that "if the letter or document which contains the acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have been communicated in due time", the acceptance which arrives late is considered to have arrived in due time. This shifts the risk of delayed transmission to the offeror but the risk of a lost transmission remains on the acceptor.

7. Article 9 (2) goes on to state that this provision does not apply if the offeror has promptly informed the offeror that he considers the offer as having lapsed.

8. It should be noted that the combination of the rules in articles 9 (1) and 9 (2) requires the offeror to notify the offeree whether or not he considers the late acceptance as having arrived in due time unless either (i) the offeror wishes the contract to come into effect and it is clear that the acceptance was sent in such circumstances that if its transmission had been normal it would have arrived in due time or (ii) the offeror does not wish the contract to come into effect and it is clear that the acceptance was not sent in such circumstances that if its transmission had been normal it would have arrived in due time. To the extent that the offeror is uncertain whether under normal circumstances the acceptance would have arrived in time by the means of communication chosen, he must send a notice of his decision in order to be sure of his rights.

9. The proposed article 9 adopts the principle of article 9 (2) and applies it to all late acceptances. In a commercial context it would normally be the case that the reply by the offeree which purports to be an acceptance was sent in good faith, whether or not a close analysis of the time it normally takes for a communication to go from the offeree to the offeror would show that the acceptance should have arrived in time. Therefore, the proposed article 9 would make it a general requirement for the offeror to inform the acceptor if he intends to treat a late acceptance as not having arrived in due time. However, if it is found that the offeree did not act in good faith, an offeror who failed to reply to the purported acceptance would not be held to have concluded a contract by reason of that failure.

ARTICLE 10

Text of ULF

An acceptance cannot be revoked except by a revocation which is communicated to the offeror before or at the same time as the acceptance.

Proposed alternative text

An acceptance cannot be revoked except by a declaration which is communicated to the offeror before or at the same time the declaration of acceptance is communicated to the offeror or, in the case of an acceptance by an act referred to in article (6) (2), before or at the same time as the offeror is informed of the acceptance.

COMMENTARY

1. In the case of an acceptance by correspondence, article 10 provides that the declaration of revocation of the acceptance must be communicated to the offeror before or at the same time as the acceptance is communicated to the offeror. However, article 10 gives no rule in case of an acceptance by means of an act referred to in article 6 (2).

2. The proposed alternative text provides that in the case of an acceptance by means of an act referred to in article 6 (2), the revocation of the acceptance must be communicated to the offeror before or at the same time as the offeror is informed of the act which constitutes acceptance. In this proposed text the emphasis is placed on the knowledge of the offeror at the time he learns of the revocation rather than on the question as to whether a contract has been concluded.

ARTICLE 11

Text of ULF

The formation of the contract is not affected by the death of one of the parties or by his becoming incapable of contracting before acceptance unless the contrary results from the intention of the parties, usage or the nature of the transaction.

Proposed alternative text 1

(1) (Same as article 11 of ULF.)

(2) If bankruptcy or similar proceedings are opened in respect of either party after the making of the offer, a revocable offer cannot be accepted. However, an irrevocable offer can be accepted during the period the offer is irrevocable.

Proposed alternative text 2

If either party dies or becomes physically or mentally incapable of contracting or if bankruptcy or similar proceedings are opened in respect of either party after the making of the offer, a revocable offer cannot be accepted. However, an irrevocable offer can be accepted during the period the offer is irrevocable.

COMMENTARY

1. Article 11 is limited to a statement that the formation of the contract is not affected by the death or physical or mental incapacity of a party.

2. Article 11 (2) of proposed alternative text 1 provides that a revocable offer cannot be accepted after the opening of bankruptcy or similar proceedings, but that such an event does not affect an irrevocable offer. This approach treats the irrevocable offer as a form of property or vested right, a position which appears to be generally adopted in most legal systems.

3. Proposed alternative text 2 provides a unitary rule for the death or physical or mental incapacity of a party and for

his bankruptcy. The rule is modelled on article 11 (2) of alternative 1. Therefore, the death or physical or mental incapacity of either party occurring after the making of a revocable offer as well as the opening of bankruptcy or similar proceedings would preclude the acceptance of the offer. However, none of these events would preclude the acceptance of an irrevocable offer.

PROPOSED ARTICLE 11A

Alternative 1

(1) A revocable offer may be assigned by the offeree unless within a reasonable time after the offeror learns of the assignment he notifies either the offeree or the assignee that he objects to it.

(2) An irrevocable offer may be assigned by the offeree to the extent that, if the contract was concluded, his rights and obligations under the contract could be assigned under the applicable law.

(3) The contract concluded by acceptance of the offer by the assignee arises only between the offeror and the assignee. However, the offeree is responsible for any failure to perform by the assignee if within a reasonable time after the offeror learns of the assignment he informs the offeree of his intention to hold him so responsible.

Alternative 2

(1) An offer may be assigned by the offeree unless within a reasonable time after the offeror learns of the assignment he notifies either the offeree or the assignee that he objects to it.

(2) The contract concluded by acceptance of the offer by the assignee arises only between the offeror and the assignee. However, the offeree is responsible for any failure to perform by the assignee if within a reasonable time after the offeror learns of the assignment he informs the offeree of his intention to hold him so responsible.

Alternative 3

(1) An offer may be assigned by either the offeror or the offeree unless within a reasonable time after the other party learns of the assignment that party notifies the assignor or the assignee that he objects to it.

(2) The contract concluded by acceptance of the offer arises only between the offeror and the assignee of the offeree or between the offeree and the assignee of the offeror, as the case may be. However, the assignor is responsible for any failure to perform by the assignee if within a reasonable time after the other party learns of the assignment he informs the assignor of his intention to hold him so responsible.

COMMENTARY

1. Classical theory prohibits the assignment of an offer, although many legal systems allow the assignment of irrevocable offers. To allow the assignment of an offer would permit the assignee to conclude a contract with the offeror even though the offer was not made to him. Nevertheless, in practice it is occasionally important that an assignment of an offer be allowed. One such case arises when the offeree is reorganized and a successor company accepts the offer. It is normally to the advantage of both parties that the contract is concluded by the acceptance of the offer by the assignee. The extent to which an offer can be assigned should also be considered in the light of the extent to which either party could assign his rights or delegate his duties under the contract once it was concluded.

2. Alternatives 1 and 2 provide for assignment of the offer only by the offeree. Alternative 3 allows the offeror also to assign, a provision which would be primarily applicable to an offeror who has been reorganized after the offer was made.

3. Alternative 1 distinguishes between revocable and irrevocable offers. A revocable offer can be assigned by the offeree unless the offeror objects. An irrevocable offer can be assigned by the offeree without the consent of the offeror to the extent that, if the contract was concluded, the offeree's rights and obligations could be assigned under the applicable law. Although it is undesirable to refer to national law in order to determine the extent of the right to assign the offer, some limitation must be introduced. The limitation proposed has the merit of already existing. If the Working Group accepts the principle of alternative 1, it might consider whether the limitation of the right to assign an irrevocable offer should be specifically established by article 11A (2) rather than leaving the matter to be determined by national law.

4. Alternative 2 makes no distinction between revocable and irrevocable offers. The offeree may assign the offer subject to the offeror's right to object.

5. Alternative 3 follows the pattern of alternative 2 except that the offer can be assigned by either the offeror or the offeree, subject to the other party's right to object. Of course, it would be possible to model a fourth alternative on alternative 1.

6. The last paragraph in all three alternatives specifies the parties to the contract which results if the offer which has been assigned is accepted. In all three alternatives the assignor, whether he be offeror or offeree, is not a party to the contract. However, he may be held responsible for the failure of the assignee to perform if the other party takes the necessary steps to assure himself of this guarantee.

ARTICLE 12

Text of ULF

1. For the purposes of the present Law, the expression "to be communicated" means to be delivered at the address of the person to whom the communication is directed.

2. Communications provided for by the present Law shall be made by the means usual in the circumstances.

Proposed alternative text

For the purposes of this Convention an offer, declaration of acceptance or any other notice is "communicated" when it is told orally to the party concerned or when it is physically delivered to the addressee or when it is [physically, mechanically or electronically] delivered to his place of business, mailing address or habitual residence.

COMMENTARY

1. Article 12 (1) sets forth the principle that communications are effective on receipt.

2. The proposed alternative text expands on article 12 (1) of ULF in that provision is made for oral communications and for the physical delivery of a communication to the addressee. In addition, following the example of the UNCITRAL Arbitration Rules, the various permissible addresses of the addressee to which the communication may be sent are set forth.

3. The words in brackets in article 12 seek to make provision not only for traditional postal and telegraphic deliveries but also for modern means of communication such as telex machines or computer terminals. It should be noted that these words would be additions to the text as it is set out in the UNCITRAL Arbitration Rules.

4. Article 12 (2) of ULF, also found in almost identical terms in article 10 (1) of the draft CISG, which provides that "communications provided for by the present law shall be made by the means usual in the circumstances" was not included in the proposed article 12 because it was in conflict with article 6 (1) that an acceptance may be communicated "by any means".

ARTICLE 13

Text of ULF

1. Usage means any practice or method of dealing, which reasonable persons in the same situation as the parties usually consider to be applicable to the formation of their contract.

2. Where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning usually given to them in the trade concerned.

Proposed alternative text

Usage means any practice or method of dealing of which the parties knew or had reason to know 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.

COMMENTARY

The proposed alternative text has been drafted to conform as closely as possible to the text of article 8 of the draft CISG. In particular, this has meant the deletion of article 13 (2) of ULF.

APPENDIX II

UNIDROIT draft of a law for the unification of certain rules relating to validity of contracts of international sale of goods:[a] critical analysis

ARTICLE 1

(1) The present law applies to contracts of sale of goods entered into by parties whose places of business are in the territories of different States, in each of the following cases:

(*a*) Where the contract involves the sale of goods which are at the time of the conclusion of the contract in the course of carriage or will be carried from the territory of one State to the territory of another;

(*b*) Where the acts constituting the offer and the acceptance have been defected in the territories of different States;

(*c*) Where delivery of the goods is to be made in the territory of a State other than that within whose territory the acts constituting the offer and the acceptance have been effected.

(2) Where a party to the contract does not have a place of business, reference shall be made to his habitual residence.

(3) The application of the present law shall not depend on the nationality of the parties.

(4) In the case of contracts by correspondence, offer and acceptance shall be considered to have been effected in the territory of the same State only if the letters, telegrams or other documentary communications which contain them have been sent and received in the territory of that State.

(5) For the purpose of determining whether the parties have their places of business or habitual residences in "different States", any two or more States shall not be considered to be "different States" if a valid declaration to that effect made under Article ... of the Convention dated ..... relating to a Law for the unification of certain rules relating to validity of contracts of international sale of goods is in force in respect of them.

(6) The present Law shall not apply to contracts of sale:

(*a*) Of stocks, shares, investment securities, negotiable instruments or money;

(*b*) Of any ship, vessel or aircraft, which is or will be subject to registration;

(*c*) Of electricity;

(*d*) By authority of law or on execution or distress.

(7) Contracts for the supply of goods to be manufactured or produced shall be considered to be sales within the meaning of the present law, unless the party who orders the goods undertakes to supply an essential and substantial part of the materials necessary for such manufacture of production.

(8) The present law shall apply regardless of the commercial or civil character of the parties or of the contracts to be concluded.

(9) Rules of private international law shall be excluded for the purpose of the application of the present law, subject to any provision to the contrary in the said law.

COMMENTARY

1. This article states the general rules for determining whether the draft law is applicable to a contract of sale of goods.

2. If the Working Group decides to prepare a draft convention on validity of contracts for the international sale of goods, presumably article 1 would be redrafted to conform to the sphere of application of the Convention on the International Sale of Goods (CISG).

ARTICLE 2

(1) The present law shall not apply to the extent that the parties have agreed, expressly or impliedly, that it is inapplicable.

(2) However, in the case of fraud and in the case of threat, the present law may not be excluded or departed from to the detriment of the aggrieved party.

COMMENTARY

1. Article 2 (1) reiterates the principle of party autonomy in respect of the international sale of goods which is also found in article 2 (1) of the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF), article 3 of the Uniform Law on the International Sale of Goods (ULIS) and article 5 of the draft CISG. However, article 2 (2) provides that the law cannot be excluded or departed from to the detriment of the aggrieved party in the case of fraud or in the case of threat (duress). There is no bar to the inclusion of higher standards in respect of these matters in the contract.

2. It is submitted that article 2 gives a broader role to the principle of party autonomy than is warranted. Most of the rules in respect of validity of contracts are rules from which the parties should not be able to derogate. This applies in particular to such provisions in the LUV as the power of the court to determine the "actual common intent" of the parties in the case of a simulated contract,[b] the determination of whether a usage is valid,[c] or the criteria for the determination whether a contract can be avoided for mistake.[d]

3. Certain rules in respect of the validity of contracts should be subject to the will of the parties. In such a case the substantive rule should reflect the extent to which the parties may affect the operation of the rule. The LUV already adopts that principle of drafting in such provisions as article 6 (*b*) which provides that a party may avoid a contract for mistake only if, *inter alia*, "the mistake does not relate to a matter in regard to which, in all the relevant circumstances, the risk of mistake was expressly or impliedly assumed by the party claiming avoidance".

ARTICLE 3

(1) Statements by and acts of the parties shall be interpreted according to their actual common intent, where such an intent can be established.

(2) If the actual common intent of the parties cannot be established, statements by and acts of the parties shall be in-

[a] The draft Law is hereafter referred to as LUV in the commentaries. The English and French language versions are the texts approved by the Governing Council of UNIDROIT on 31 May 1972 and set out in the following bilingual publication of UNIDROIT: ETUDE XVI/B, Doc.22, U.D.P. 1972. The Russian and Spanish versions have been prepared by the United Nations Secretariat.

[b] Article 3 (1).

[c] Article 4 (3).

[d] Articles 6 to 9.

terpreted according to the intent of one of the parties, where such an intent can be established and the other knew or ought to have known what that intent was.

(3) If neither of the preceding paragraphs is applicable, the statements by and the acts of the parties shall be interpreted according to the intent that reasonable persons would have had in the same situation as the parties.

COMMENTARY

1. Article 3 sets out rules for the interpretation of the statements and acts of the parties to a contract of sale of goods to which the uniform law applies. The rules in article 3 are supplemented and expanded by those contained in article 4.

2. The report of the Max-Planck Institut für ausländisches und internationales Privatrecht (hereafter referred to as the Max-Planck report) states that the rules of interpretation are necessary (i) to establish whether there is a contract in order to ascertain whether it may be avoided for fraud, threat or mistake, (ii) to establish which facts entitle a party to avoid a contract and (iii) to ascertain the importance of the mistake.[e]

3. Although the report goes on to state that "the import of the rules on interpretation is limited to the present draft",[f] it would appear that the text of neither article 3 nor article 4 so limits their application. Articles 3 and 4 contain rules of interpretation to be used for all purposes for which the contract must be interpreted. Moreover, it would be inappropriate to have more than one set of rules of interpretation to be applied to a single contract. But this may occur if article 3 is retained as its rules differ from the more limited rules of interpretation contained in the draft CISG.

4. The rules of interpretation set forth in article 3 are, in general, appropriate so far as they go. However, it should be noted that, according to article 3 (3), unless there can be determined the actual common intent of the parties or the actual intent of one party which the other knew or of which he ought to have known, the statements and acts of the parties are to be interpreted "according to the intent that reasonable persons would have had in the same situation". Since in most difficult questions of interpretation there will be neither a common intention of the parties nor an intention of one party of which the other party knew or ought to have known, it follows that the test in article 3 (3) will be the primary tool of interpretation used by a tribunal to resolve such questions.

5. It may be suggested that a major difficulty with article 3 (3) is that the two parties to the contract are in different situations and consequently two "reasonable persons", one in the situation of the buyer and the other in the situation of the seller, might well have the same disagreement over the interpretation of the contract as the parties themselves. While this is also true of two parties within a given country, the problem is accentuated in international transactions. Different ways of doing business, different legal and economic systems and even the possibility of two different texts of the contract (if the contract is in two languages and the translation is inadequate) may render any objective interpretation of the contract impossible. In such a situation, article 3 gives no aid to a tribunal as to how to resolve the difficulty.

ARTICLE 4

(1) In applying the preceding Article due consideration shall be given to all relevant circumstances, including any negotiations between the parties, any practices which they have established between themselves, any usages which reasonable persons in the same situation as the parties usually consider to be applicable, the meaning usually given in any trade concerned to any expressions, provisions or contractual forms which are commonly used, and any conduct of the parties subsequent to the conclusion of the contract.

(2) Such circumstances shall be considered, even though they have not been embodied in writing or in any other special form; in particular, they may be proved by witnesses.

(3) The validity of any usage shall be governed by the applicable law.

COMMENTARY

1. Article 4 (1) is similar to article 4 (2) of ULF. If a text on validity of contracts were to be adopted, it should be redrafted to conform to that adopted for the formation of contracts.

2. The Max-Planck report notes that a member of the committee that prepared the draft uniform law on validity considered that it might cause problems in some common law jurisdictions to provide that a contract could be interpreted by a tribunal in the light of "any conduct of the parties subsequent to the conclusion of the contract". However, as that report notes, the rule in the uniform law, if adopted by a given country, would supersede any contrary rule in municipal law.[g] Furthermore, at least one common law country has adopted a rule by statute that the conduct of the parties in performing their obligations under the contract is relevant in determining the meaning of the contract.[h]

3. Article 4 (2) would seem to be a self-evident provision since several of the sources mentioned in article 4 (1) by their very nature would often not be in writing.

4. Article 4 (3) is a reiteration of what the law would be without the provision. The only other alternative would be to set forth the criteria for the validity of a usage.

5. It should be noted that under article 2 the parties appear to have the power to determine their own tests for the validity of a usage.

ARTICLE 5

There is no contract if, under the provisions of the preceding articles, an agreement between the parties cannot be established.

COMMENTARY

1. Article 5 completes the set of three articles on interpretation by providing that no contract exists if no agreement between the parties can be established from the statements and acts of the parties as properly interpreted according to articles 3 and 4. It should be noted that the consequence which follows from the finding of a mistake under articles 6 to 9, fraud under article 10 or improper threat under article 11 is the right of the mistaken, defrauded or threatened party to avoid the contract.

2. If a provision such as that in article 5 is thought to be desirable, it may perhaps better be placed with the provisions on formation of the contract rather than with the provisions on validity of contracts.

ARTICLE 6

A party may only avoid a contract for mistake if the following conditions are fulfilled at the time of the conclusion of the contract:

(*a*) The mistake is, in accordance with the above principles of interpretation, of such importance that the contract would not have been concluded on the same terms if the truth had been known; and

(*b*) The mistake does not relate to a matter in regard to which, in all the relevant circumstances, the risk of mistake

[e] ETUDE XVI/B, Doc.22, U.D.P. 1972, pp. 21 and 23. All page references given below in foot-notes pertain to the English language version of the Max-Planck report reproduced in that publication.

[f] P. 23.

[g] P. 25.

[h] Sect. 2-208 (1), Uniform Commercial Code, United States.

was expressly or impliedly assumed by the party claiming avoidance; and

(c) The other party has made the same mistake, or has caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error.

COMMENTARY

1. Article 6 is the first of four articles dealing with mistake and is the basic article in which the major policy decisions taken by UNIDROIT in respect of mistake are to be found.

2. Article 6 presents a number of problems, some of which may be inherent in a text on the unification of the law on mistake.

3. The first test that a mistake must satisfy to enable avoidance of the contract is that it be of such importance that the contract would not have been concluded on the same terms if the truth had been known. A problem with this formulation is that whenever there is a mistake, at least some of the terms of the contract would probably have been altered in at least a minor respect if the party that had made the mistake had been aware of that mistake. Such a result is clearly not intended.[1]

4. A similar problem was faced by the Working Group in defining the concept of "fundamental breach" in the draft CISG. In article 10 of ULIS a breach is regarded as fundamental "wherever the party in breach, knew, or ought to have known at the time of the conclusion of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects". This definition has been changed in article 9 of the draft CISG so that a breach is fundamental "if it results in substantial detriment to the other party and the party in breach foresaw or had reason to foresee such a result".

5. Article 6 (b) requires a determination whether the party claiming avoidance of the contract for mistake had expressly or impliedly assumed the risk of the mistake. While it is certainly correct that a party who has assumed the risk that a mistake may exist should not be able to avoid the contract for that mistake, the text gives no assistance in determining under what circumstances it should be held that a party assumed the risk of mistake.

6. Article 6 (c) sets forth a further requirement for the avoidance of the contract. The party not claiming avoidance must either (i) have made the same mistake, or (ii) have caused the mistake, or (iii) have known or ought to have known of the mistake and not have told the party claiming avoidance even though it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error.

7. It is doubtful if a uniform body of interpretation could be developed as to the circumstances under which one party may be held to have caused the other party to be mistaken. It is also doubtful whether a uniform body of interpretation could be developed as to whether the other party should have known of the mistake or whether reasonable commercial standards of fair dealing would require him to notify the mistaken party of the error.

8. Articles 6 and 14 (3) provide that the remedy available to a mistaken party is to avoid the contract and, to the extent permitted by the applicable law, to claim damages. In addition, article 15 recognizes that if the co-contractant of the mistaken party declares himself willing to perform the contract as it was understood by the mistaken party, the contract shall be considered to have been concluded as the latter understood it. However, if there is no acquiescence on the part of the other party, no possibility of reforming the contract is possible.

9. It may be observed that article 14 (4) provides that if the mistake was at least in part the fault of the mistaken party, the other party may obtain damages from the mistaken party who avoided the contract.

[1] It should also be noted that article 10 allows a party to avoid the contract for fraud only if the mistake caused by the fraud was sufficiently important as to induce him to conclude the contract.

ARTICLE 7

(1) A mistake of law shall be treated in the same way as a mistake of fact.

(2) A mistake in the expression or transmission of a statement of intention shall be considered as the mistake of him from whom the statement emanated.

COMMENTARY

1. Although many legal systems do not consider a mistake of law to have the same legal effect as a mistake of fact, it is reasonable to do so in respect of a contract of international sale of goods. The legal rules governing such contracts are voluminous and complex and at least in part will be rules of a foreign legal system. It would be unreasonable to assume knowledge by the parties of the existence and effect of all such laws.

2. The rule in article 7 (2) that a mistake in the expression or transmission of a statement of intention shall be considered as the mistake of him from whom the statement emanated appears to place the consequences of the mistake on the party who chose the means of communication. However, the result is the opposite since it is only the party who is mistaken, i.e., the party who sends the message, who can avoid the contract under article 6 (2). The practical consequence is that if an offeror-seller offered to sell goods at 8 per unit but the message was transmitted to the offeree-buyer as 7 per unit and he accepted at that price, the offeror-seller could avoid the contract. However, if the message was transmitted at 9 per unit and the offeree-seller accepted at that price, the offeror-seller would have no reason to avoid the contract and the offeree-buyer could not do so.

3. There is a difficulty in determining on what occasions the receiver of a message may have impliedly assumed the risk of mistake as provided in article 6 (b). The Max-Planck report suggests that this will occur in "some cases" without specifying what those cases might be.[1]

ARTICLE 8

A mistake shall not be taken into consideration when it relates to a fact arising after the contract has been concluded.

COMMENTARY

1. Article 8 serves as a rule delimiting the scope of application of the LUV in relation to mistake. The LUV does not apply to a mistake in respect of an event which occurs after the conclusion of the contract. The LUV does apply to a mistake in respect of an event which occurs before the conclusion of the contract, unless the mistake is one which falls under article 9 or 16.

2. The effect of articles 9 and 16 is that if the mistake goes to the non-conformity of the goods or the rights of third parties in the goods or if the mistake relates to the impossibility of performing the assumed contractual obligation, LUV does not permit avoidance of the contract. Presumably such cases would be governed by the substantive law of sales.

ARTICLE 9

The buyer shall not be entitled to avoid the contract on the ground of mistake if the circumstances on which he relies afford him a remedy based on the non-conformity of the goods with the contract or on the existence of rights of third parties in the goods.

[1] P. 35.

COMMENTARY

1. Article 9 does not permit avoidance of the contract for mistake when the buyer has a remedy based on the non-conformity of the goods or on the existence of rights of third parties. The Max-Planck report indicates that article 9 also prohibits avoidance of the contract in "those cases in which the buyer might have relied on a remedy under [the draft CISG] if, in the circumstances, those remedies had not been barred (for example, because the lack of conformity is immaterial or the buyer has not given prompt notice...)".[k] It would seem that this interpretation of article 9 leads to the conclusion that the LUV is never applicable to a mistake as to the quality of the goods or as to the rights of third parties. In all such cases the substantive law of sales would have to apply.

2. The scope of application of article 9 would have to be carefully defined if article 7 (2) of the draft CISG, which was left in square brackets by the Working Group, is retained.[l]

ARTICLE 10

(1) A party who was induced to conclude a contract by a mistake which was intentionally caused by the other party may avoid the contract for fraud. The same shall apply where fraud is imputable to a third party for whom the other party is responsible.

(2) Where fraud is imputable to a third party for whose acts the other contracting party is not responsible, the contract may be avoided for fraud if the other contracting party knew or ought to have known of the fraud.

COMMENTARY

1. Article 10 deals with avoidance of the contract for fraud.

2. According to the Max-Planck report, in contrast to a "simple" mistake under article 6, the mistake which was fraudulently caused need not have been "essential" to authorize the defrauded party to avoid the contract.[m] However, it may be noted that in article 6 (*a*) the "simple" mistake need only be "of such importance that the contract would not have been concluded on the same terms if the truth had been known" whereas under article 10 the fraudulently caused mistake must have induced the other party to conclude the contract. It is evident that the mistake must be more serious to induce the conclusion of the contract than to cause it to be concluded on different terms than it would have been if the truth had been known.

3. It is intended that "mere puff in advertising or negotiations in itself does not suffice" to constitute fraud.[n] The text of article 10 does not furnish the basis on which to distinguish between those advertising claims which are "mere puff" and those which constitute fraud.

ARTICLE 11

A party may avoid the contract when he has been led to conclude the contract by an unjustifiable, imminent and serious threat.

COMMENTARY

1. Article 11 does not attempt to describe what kind of threats would be "unjustifiable". As stated in the Max-Planck report, "in deciding when a threat is justifiable and when it is not, due consideration must be given to the entire contractual context and to the purposes that the person uttering the threat thereby sought to achieve".[o]

2. Nevertheless, it would seem necessary to determine what forms and what degree of pressure are acceptable in order to determine what kinds of threats are unjustifiable. It can be expected that there would be a wide range of views on the forms and degree of pressure which are acceptable as a means of inducing the conclusion of a contract.

3. In all legal systems a threat of physical harm is unjustifiable, and this is, indeed, the classical example of duress. There is probably also agreement that it is justifiable to threaten civil action to enforce an obligation which the claimant believes in good faith to be due. However, there would probably be no agreement at what point, if any, the threat of civil action or of attachment of goods or of similar proceedings in connexion with a civil action would become unjustified harassment. Other typical threats which might be viewed as justifiable in some legal systems, but as unjustifiable in others, would include a refusal by a bailee to surrender goods on the owner's demand unless paid a sum which is not due but which the bailee believes in good faith to be due, and the threat to start a criminal prosecution for the purpose of collecting a private claim.

4. Although the examples given may be peripheral problems in the context of international trade, the question as to whether a contract was concluded by reason of economic duress has a potentially greater significance.[p] Many legal systems have rejected the concept of economic duress. Nevertheless, many of those same legal systems have reached results similar to those which would result from an acceptance of a concept of economic duress. However, such concepts are closely linked to the particular notions of public policy that prevail in each individual legal system. It is thus difficult to anticipate agreement on the nature of the economic threats that would be considered to be "unjustifiable" under article 11.

ARTICLE 12

(1) Avoidance of a contract must be by express notice to the other party.

(2) In the case of mistake or fraud, the notice must be given promptly, with due regard to the circumstances, after the party relying on it knew of it.

(3) In the case of threat, the notice must be given promptly, with due regard to the circumstances, after the threat has ceased.

COMMENTARY

1. The requirement that a contract can be avoided only by express notice to the other party is in accord with article 10 (2) of the draft CISG. The requirement that the notice be given within a restricted time-limit is in accord with articles 30 (2) and 45 (2) of the draft CISG, but the exact wording of the time-limit is somewhat different.

2. It might be remarked that a remedy system which seeks to provide relief in the case of fraud should not require as an absolute prerequisite to that relief that avoidance must be by express notice which is received by the other party for, on occasion, a fraudulent party may be difficult to locate.

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[k] Pp. 37-39.

[l] Article 7 (2) provides that CISG does not govern the rights and obligations which might arise between buyer and seller because of the existence in any person of rights or claims which relate to intellectual or industrial property or the like.

[m] P. 39.

[n] *Ibid.*

[o] P. 41.

[p] It is doubtful whether the drafters of article 11 intended that economic duress be included. The Max-Planck report points out that a provision was discussed by the UNIDROIT committee which prepared the draft LUV which would have permitted "the avoidance of a contract if there is an obvious inequality between the contractual performances required of the parties and if one party has been led to enter into the contract by an abusive exploitation of his personal or economic situation" (pp. 17-19). The majority of the committee rejected this rule because of the uncertainty it would introduce into international trade since uniformity in its application would be unlikely.

ARTICLE 13

(1) In case of mistake, any notice of avoidance shall only be effective if it reaches the other party promptly.

(2) In any event, the notice shall only be effective if it reaches the other party within two years after the conclusion of the contract in the case of mistake or within five years after the conclusion of the contract in the other cases.

COMMENTARY

1. Article 13 adopts a reception theory in respect of notices in contrast with article 10 (3) of the draft CISG which gives effect to a notice which has been sent by appropriate means within the required time even if that notice fails to arrive or fails to arrive within the required time or even if the contents of the notice have been inaccurately transmitted.

2. The point of time at which the period of five years commences during which, at a maximum, the notice of avoidance must be received by the other party in case of fraud differs from the point of time at which the four year period of limitation begins under the Convention on the Limitation Period in the International Sale of Goods. Article 10 (3) of that Convention recognizes the special character of fraud by providing that a claim based on fraud accrues on the date on which the fraud was or reasonably could have been discovered. However, article 13 (2) of LUV provides that a notice of avoidance of the contract for fraud must be given within five years from the conclusion of the contract.

ARTICLE 14

(1) Notice of avoidance shall take effect retroactively, subject to any rights of third parties.

(2) The parties may recover whatever they have supplied or paid in accordance with the provisions of the applicable law.

(3) Where a party avoids a contract for mistake, fraud or threat, he may claim damages according to the applicable law.

(4) If the mistake was at least in part the fault of the mistaken party, the other party may obtain damages from the party who has avoided the contract. In determining damages, the court shall give due consideration to all relevant circumstances, including the conduct of each party leading to the mistake.

COMMENTARY

1. Article 14 deals with the effects of avoidance. It reaches results which are similar to, but slightly different from, those reached under articles 51 to 54 of the draft CISG.

2. Article 14 (1) provides that the avoidance of the contract is retroactive, i.e. that the contract is regarded as never having existed. The natural consequences of this rule would seem to be that there should be mutual restitution of any goods or money handed over to the other party. Article 51 (2) of the draft CISG specifically provides such a requirement in respect of an avoidance of a contract under that text. However, article 14 (2) of LUV provides for restitution only "in accordance with the provisions of the applicable law".

3. Article 14 (1) notes that even though a contract which is avoided is treated as though it never existed, the rights of third parties may not be affected. Although there is no provision exactly comparable in the draft CISG, article 52 (2) (c) of the draft CISG recognizes that a buyer may not be able to make restitution of goods delivered to him because they have been sold in the normal course of business, thereby recognizing the right of the third-party purchaser to retain them.

4. The Max-Planck report points out that avoidance nullifies the entire contract. However, the report also takes the view that in the case of a complex contract having several objects or parties, only some of which are effected by the mistake, fraud or threat, the contract "may be considered severable so that avoidance of one contract need not affect the other".[q] Although such a result is reasonable and can be attained in similar circumstances under the draft CISG,[r] it does not follow from the text of the LUV.

5. Article 14 (3) recognizes that the grounds which justify the avoidance of a contract for mistake, fraud or threat may also justify a claim for damages. However, article 14 (3) does not decide either the circumstances under which damages may be claimed or the amount of such damages but refers both matters to the applicable law.

6. Since LUV allows a party to avoid the contract for mistake even though the mistake was at least in part his own fault, article 14 (4) provides that in such a circumstance the party who has avoided the contract may be obligated to pay damages to the other party. The amount of the damages is to be determined by considering all the circumstances, "including the conduct of each party leading to the mistake". Therefore, the amount of damages is to be determined not only by the amount of loss suffered, but by the comparative fault of the parties.

ARTICLE 15

(1) If the co-contractant of the mistaken party declares himself willing to perform the contract as it was understood by the mistaken party, the contract shall be considered to have been concluded as the latter understood it. He must make such a declaration promptly after having been informed of the manner in which the mistaken party had understood the contract.

(2) If such a declaration is made, the mistaken party shall thereupon lose his right to avoid the contract and any other remedy. Any declaration already made by him with a view to avoiding the contract on the ground of mistake shall be ineffective.

COMMENTARY

1. Article 15 applies only in cases of mistake and not to cases of fraud or threat. It allows the co-contractant of the mistaken party to preserve the contract by agreeing to perform the contract as it was understood by the mistaken party. This not only allows a reformation of the contract but also precludes the mistaken party from using the mistake as a spurious means of avoiding the contract.

2. It may be noted that in fact the mistaken party has a similar option, i.e. he can agree to perform the contract as it was concluded and not exercise his right to avoid the contract. However, the mistaken party has no right to have the contract reformed to that which it would have been had there been no mistake.

3. Article 15 (2) provides that if a declaration is made under article 15 (1), the mistaken party not only loses his right to avoid the contract but also loses any other remedy he may have. In addition, any declaration of avoidance by the mistaken party is ineffective.

4. This drastic provision not only precludes avoidance of the contract but also takes away from the mistaken party any right to damages that he may have had under national law. It should be noted that this result is achieved even in those cases in which the mistaken party is left with a loss which is not eliminated by his co-contractant's declaration that he is willing to abide by the contract as it was understood by the mistaken party.

ARTICLE 16

(1) The fact that the performance of the assumed obligation was impossible at the time of the conclusion of the contract shall not affect the validity of the contract, nor shall it permit its avoidance for mistake.

(2) The same rule shall apply in the case of a sale of goods that do not belong to the seller.

[q] P. 45.

[r] Articles 32 and 48 (1).

COMMENTARY

1. Article 16 serves to delimit the scope of LUV and does not serve as a substantive provision. As a result of article 16 the consequences arising out of the non-performance of an obligation which was impossible at the time of the conclusion of the contract or the sale of goods that do not belong to the seller is to be governed by the substantive law of sales and not by the LUV.

2. The Max-Planck report points out that, "following judicial practice and advanced modern doctrines":

> "There appears to be no reason to make the validity of the contract depend upon the accidental fact that the object sold has perished before or after the conclusion of the contract. The impossibility of delivery of the perished goods should leave the door open to determine the rights and obligations of the parties according to the flexible rules on non-performance."[s]

[s] P. 49.

3. The approach taken by article 16 assumes that the doctrines of non-performance in the applicable substantive law of sales would apply to an impossibility of performance existing at the time of the conclusion of the contract. However, the Max-Planck report notes that "most legal systems declare a contract of sale to be void if the specific object sold had already perished at the time of the conclusion of the contract".[t] Similarly article 50 of the draft CISG proceeds on the basis that the impediment to performance which exempts the non-performing party from liability in damages for his non-performance must have occurred after the conclusion of the contract.[u] Therefore, the adoption of article 16 in its current form would leave a gap in the law in many countries between the LUV and the substantive law of sales.

[t] *Ibid.*

[u] A/CN.9/116, annex II, para. 3 of commentary on article 50 (Yearbook . . . , 1976, part two, I, 3).

D. Comments by Governments and international organizations on the draft convention on the international sale of goods (A/CN.9/125 and A/CN.9/125/Add. 1 to 3)*

CONTENTS

Introduction

1. At its second session (3-31 March 1969) the United Nations Commission on International Trade Law established a Working Group on the International Sale of Goods to ascertain, *inter alia,* which modifications of the text of the Uniform Law on the International Sale of Goods (ULIS), annexed to the 1964 Hague Convention, might render such text capable of wider acceptance by countries of different legal, social and economic systems and to elaborate, if necessary, a new text reflecting such modifications.[1]

[1] *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 . . . , 1968-1970, part two, II, A).

* 22 March 1977.