

the parties, in spite of this, are intent on concluding a contract”.

### Article 15

#### Paragraph (1)

41. See the comments of Norway on article (X) at paragraph 46 below.

### Article 17

42/43. Yugoslavia is of the opinion that this article should be deleted.

### Article 18

#### Article as a whole

44. Yugoslavia is of the opinion that this article should be deleted because it is irrelevant to the formation of contracts. These provisions could give rise to confusion, particularly because the title to the draft Convention does not indicate that it relates to problems other than those concerning the formation of contracts (see also para. 6 above).

45. See the comments of Norway on article (X) at paragraph 46 below.

### Article (X)

46. Norway states that article (X) is supplemented by a separate paragraph in articles 3 (2), 7 (2), 12 (4) and 18 (3). This system seems to be unnecessarily complicated. These separate paragraphs do not add anything which cannot be achieved by the formulation of article (X). Further, the system of the draft Convention with separate paragraphs in the affected articles does not seem to be quite consistent. Thus there is no separate reservation for writing in connexion with the information given orally after article 15 (1).

#### C. Comments on the UNIDROIT draft

47. Madagascar notes that since, on the one hand, the provisions concerning defects in the contract, particularly those relating to mistake and consent, are of a general and conventional nature and, on the other, they seem to be in keeping with legal practice in this field, it has no comments to make on them.

48. The Malagasy Government does, however, express some reservations with respect to article 4, paragraph 2, of the draft law, which permits the use of oral evidence for the purpose of applying article 3, concerning substantive procedures for the establishment of the contract; this method by itself is very unreliable, especially now that modern technology, particularly telegraphic communication, provides the parties with much more reliable procedures for international sales. It is hard to see, once it is agreed, as it must be, that in many cases contracts for the international sale of goods can be concluded by modern means such as telegraphic communication, how oral evidence can be accepted in this connexion. If there is no other way of establishing the facts—although this will very seldom be the case—then oral evidence will no doubt have to be used, but the question is whether it is really necessary to spell it out, thus opening the way to practices that are

far too unreliable, particularly if it is borne in mind that, by definition, any contract for the international sale of goods involves a number of important details (nature and quality of goods, terms of payment, place and date of delivery, etc.) on which, in case of dispute, it is likely to prove difficult to rule in favour of one party or the other. Accordingly, although it appears likely that this type of evidence will in practice be very seldom used, it would seem wiser not to refer to it at all in the draft law.

### III. COMMENTS BY FRANCE (A/CN.9/146/ADD.2)\*

1. This addendum contains the observations of France which were received by the Secretariat on 9 May 1978.

#### I. General observations

2. There seems to be no reason for maintaining two separate instruments governing respectively the formation of contracts of sale and the effects of such contracts, since the sphere of application as laid down in article 1 is exactly the same.

3. Accordingly, the French Government is of the view that the draft Convention on the Formation of Contracts should be integrated into the draft Convention on the International Sale of Goods (CISG) adopted by UNCITRAL at its tenth session.

4. The French delegation looks forward with interest to the document on this question which the Secretariat will be submitting at the request of the Working Group.

5. It is regrettable that no provisions relating to the validity of contracts have been included in the draft Convention, since this would have been the only point on which the new draft Conventions went beyond the two Hague Conventions of 1964.

6. Articles 4 and 5 are innovations not found in earlier instruments. The French Government is favourably disposed towards them. The rules relating to good faith and interpretation should apply to both the content and the performance of a contract. Accordingly, they should also be included in CISG.

7. The article headings should be deleted. They add nothing to the text and are sometimes ambiguous (arts. 1, 2, 7 and (X)) or incorrect (art. 16: “*révocation*” instead of “*retrait*”; art. 17: “*date*” instead of “*moment*”).\*\* Moreover, there are no article headings in the draft CISG adopted at Vienna in 1977. The chapter titles provide sufficient guidance to the reader.

#### II. Specific observations

##### Title of the draft Convention

8. The title should be amended to read: “*Projet de convention sur la formation du contrat de vente internationale de marchandise*”.\*\*

##### Article 8

###### Paragraph (2)

9. It would be desirable to reverse the rule, so that

\* 9 May 1978.

\*\* These observations do not appear to apply to the English text.

an offer to the public at large would bind the offeror in the same way as an offer made to a specific person. This would provide a clear rule and would avoid the difficulties which will arise in interpreting the phrase "unless the contrary is clearly indicated by the person making the proposal".

#### *Paragraph (3)*

10. There is a contradiction between the first and the second sentences. The first sentence lays down the principle that, in order for a contract to be formed, the price must be fixed or capable of being determined. The second sentence implies the opposite. The French Government is firmly opposed to any solution which would allow a contract to be considered concluded when the price is neither fixed nor capable of being determined. It therefore requests the deletion of the second sentence. Article 37 of CISG is all that is needed in order to determine the price when it is uncertain. The rule laid down in that article is valid as regards payment of the price, but it should not be extended, as is proposed, to apply to the formation of contracts.

#### *Article 18*

11. This article does not relate to the formation of contracts but to their modification and rescission. It should therefore be transferred to CISG.

12. The second sentence of paragraph (2) is unclear. It will give rise to errors in interpretation. It should therefore be deleted, especially since the principle of good faith, as stated in article 5, suffices to ensure the desired result.

#### IV. COMMENTS BY THE GERMAN DEMOCRATIC REPUBLIC (A/CN.9/146/Add.3)\*

1. This addendum contains the observations of the German Democratic Republic which were received by the Secretariat on 10 May 1978.

2. The German Democratic Republic considers it desirable to examine at the eleventh session of UNCITRAL the following matters in connexion with the discussion on the draft Convention on the Formation of Contracts for the International Sale of Goods.

3. In their current state the draft Convention on the International Sale of Goods (CISG) and the present draft Convention on the Formation of Contracts for the International Sale of Goods do not yet cover the problems of the validity of contracts for the international sale of goods. In order to arrive at a regulation which will be as complete as possible, provisions on the various aspects of the validity of declarations (offer, acceptance) and of contracts should be included in the present draft Convention. The German Democratic Republic has in mind here rescission on account of error, incorrect transmission and fraud, but also violation of legal prohibitions, approval of contracts, voidness of individual terms of contract and contracts subject to conditions precedent and subsequent.

4. As a basis for an exchange of views the German Democratic Republic takes leave to submit the following amendments which could be included in the draft Convention at various points:

#### A

##### *Violation of legal prohibitions and impossibility of performance*

A declaration is void if it violates a statutory prohibition or has as its object an impossible performance.

#### B

##### *Grounds for rescission*

(1) The declarant has the right to rescind his declaration if, despite the observance of customary commercial care, he was in error as to the contents of the declaration on making it.

(2) The declarant also has the right to rescind his declaration if, despite the observance of customary commercial care, he was in ignorance of the facts, including the essential characteristics of persons or things, and, with knowledge of the facts, would not have made such a declaration.

(3) The declarant also has the right to rescind his declaration if it was incorrectly transmitted.

(4) The declarant has moreover the right to rescind his declaration if he has been induced by fraud or threats, by or on behalf of the addressee of the declaration, to make a declaration.

#### C

##### *Exercise of rescission*

(1) The rescission is effective only if the party entitled to rescind declares it immediately after he has gained knowledge of the grounds of rescission or, in the case of a threat, immediately after its removal. Rescission is excluded if the party entitled to rescind, after discovery of the error, confirms his original declaration.

(2) The opposing party has the right to object to the rescission within a period of one month. If the opposing party fails to object within this period, the rescission is deemed to have been effected. If the opposing party objects, the party entitled to rescind may only enforce his right of rescission within three months of receipt of the objection by the competent court or arbitral tribunal.

(3) The right of rescission in accordance with (1) expires not later than two years after submission of the declaration.

#### D

##### *Legal consequences of rescission*

(1) A successfully rescinded declaration is void from the outset.

(2) In the case of paragraph B (4) the rescinding party is entitled to demand compensation from the opposing party.

(3) In all other cases of rescission the opposing party has the right to demand reimbursement of expenditure from the rescinding party unless he knew, or should have known, the grounds for rescission.

\* 10 May 1978.