

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.

## E

*Coming into effect of a contract*

(1) A contract of sale is concluded only at the moment the contracting parties have agreed upon all items upon which agreement was to be achieved according to the will of one party.

(2) A contract of sale is concluded also in case that various conditions are invalid, if it is to be supposed that the parties would have concluded the contract even without these conditions.

## F

*Conditions precedent and subsequent*

If a contract is entered into subject to a condition precedent or subsequent, it becomes effective or invalid upon fulfilment of the condition.

## G

*Approval by a third party or by the party represented*

(1) If a contract has been concluded subject to the approval of a third party, it will become effective at the moment this approval is given.

(2) This will apply also in case the contract was concluded by a representative with reservation as to be approved by the person represented.

5. In many legal orders there is a clause on *culpa in contrahendo* (fault at formation of contract). It is therefore considered appropriate to add a second paragraph to article 5 of the draft Convention, which could read as follows:

“(2) In case a party violates the duties of care customary in the preparation and formation of a contract of sale, the other party may claim compensation for the costs borne by it.”

6. The representatives of the German Democratic Republic at the eleventh UNCITRAL session will make additional verbal and written statements at the UNCITRAL session itself on matters of less principal importance than those set forth in paragraphs 3 and 4 of these observations.

7. Finally it is also suggested to conduct at the eleventh session of UNCITRAL an exchange of views on whether only *one* draft of the Convention should be submitted to the Diplomatic Conference of States, regulating both the formation and the contents of the contract on the international sale of goods or whether the above-mentioned separate draft conventions should be maintained.

#### V. COMMENTS BY THE INTERNATIONAL CHAMBER OF COMMERCE (A/CN.9/146/ADD.4)\*

1. This addendum sets out the observations of the International Chamber of Commerce (ICC) which were received on 22 May 1978.

##### A. *Comments on the draft convention as a whole*

2. ICC has taken a favourable position both to the

1964 Hague Convention relating to a Uniform Law on the International Sale of Goods and to the UNCITRAL draft Convention on the same subject-matter. Now, when an UNCITRAL draft Convention on the Formation of Contracts for the International Sale of Goods is under consideration, the general view of the Commission on International Commercial Practice of the ICC (hereafter referred to as the Commission) to the project will be very much the same. Unification of the law on the formation of contracts will be of practical value for the international trade and the greater the number of States adhering to any uniform rules the more useful they will become. The 1964 Hague Convention on Formation (ULF) represents by itself a remarkable piece of unification and is in the course of being ratified by a number of States in Europe, Asia and Africa. Contrary to ULIS, this Convention has never met with serious or widespread criticism. The Commission therefore regrets that the Working Group did not find it possible to follow the wording and the presentation of the subject-matter in ULF more closely.

3. The Commission reiterates its view expressed already in the ICC statement on the draft Convention on the International Sale of Goods (as prepared by the Special Working Group)<sup>1</sup> that the present efforts of unification must not without compelling reasons differ from what has already been achieved in 1964. It is also important that in the elaboration of the transitional provisions due consideration be given to the situation of States which have already ratified ULF 1964 and the difficulties for these States of replacing the earlier convention by a new one. If this is not the case, a considerable number of States may feel prevented from adhering to the new Convention or may postpone such adherence.

##### B. *Comments on the provisions of the draft Convention*

###### *Sphere of application*

4. The Commission refers to what was said in this respect in the said ICC statement on the draft Sales Convention. The provision that the Convention applies not only between parties from Contracting States but also when the rules of private international law lead to the application of the law of a Contracting State, may represent a useful compromise. The more clear-cut solution that the Convention applies only in the relationship between parties from different Contracting States should, however, be reconsidered.

###### *Place of business*

5. As said in the ICC statement, the Commission finds the provision relating to “place of business” inadequate. One and the same company may be said to have several “places of business” not only in different countries but also in one and the same country and the relevant place to send an answer to may be another than the place of business as defined for other purposes. The present provisions do not allow the identification of the relevant place of business satisfactorily.

<sup>1</sup> This statement is reproduced in document A/CN.9/125 (Yearbook . . . 1977, part two, I, D).

\* 23 May 1978.